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İÇİNDEKİLER

CRIME OF FINANCING OF TERRORISM UNDER TURKISH CRIMINAL LAW

Türk Ceza Hukukunda Terörizmin Finansmanı Suçu

Assoc. Prof. Dr. Vesile SONAY EVİK*

Abstract

In order to combat terrorism and terrorist organizations in an efficient way, cutting off the resources funding terrorism is important as much as criminalization of such acts. Turkey signed International Convention for the Suppression of the Financing of Terrorism adopted in 1999 by United Nations and regulated financing of terrorism, as such, as a type of crime distinct from assistance to terrorist organization, through amendment of Anti-Terror Law in 2006 for the first time with the aim of combatting terrorism and its financing in an efficient way. Law regarding Suppression of the Financing of Terrorism dated 2013 and numbered 6415, as a special code, regulated financing of terrorism as an independent crime as well as regulating administrative measures to seize the proceeds derived from financing of terrorism. Crime of financing of terrorism assures legal values such as indivisible integrity of the state with its territory and nation, constitutional and democratic order, public peace and tranquility, fundamental rights and liberties. The acts criminalized with the relevant type of crime are providing to or gathering for terrorist organization, money or any kind of movable or immovable properties, rights or receivables, which can be represented by money, with the knowledge of the organization's purpose and characteristics but without being a member of terrorist organization. In this article, legal element, material element, moral element, illegality element, factors affecting crime, special forms of crime appearance, provisions of punishment and procedure will be analyzed.

Keywords: Crime of financing of terrorism, assistance to terrorist organization, terrorism, combat terrorism, anti terror law.

Özet

Terörizmle, terör örgütleriyle etkili bir şekilde mücadele etmek için bu tür faaliyetleri cezai yaptırım altına almak kadar, kaynaklarını kurutmak da önemlidir. 1999 tarihli Birleşmiş Milletler Terörün Finansmanının Önlenmesi Sözleşmesini imzalayan Türkiye, terör ve terörizmin finansmanıyla etkili olarak mücadele edilmesi için ilk kez 2006 yılında Terörle Mücadele Kanunu'nda yaptığı değişiklikle Terörizmin finansmanı suçunu, terör örgütlerine yardım fiilinden bağımsız bir suç tipi olarak düzenlemiştir. 2013 tarihli 6415 Sayılı Terörizmin Finansmanının Önlenmesi Hakkında Kanunla, terörün finansmanını, özel bir yasada bağımsız bir suç olarak düzenlendiği gibi terörün finansmanında kullanılan gelirlere el konulması şeklindeki idari tedbirleri de düzenlemiştir. Terörizmin finansmanı suçu, devletin ülkesi ve milletiyle bölünmez bütünlüğü, anayasal ve demokratik düzeni, toplum barışı, huzuru, kişilerin temel hak ve hürriyetleri gibi pek çok hukuksal değeri korumaktadır. İlgili suç tipiyle cezalandırılan hareketler, terör örgütüne üye olmaksızın örgütün amaçlarını, niteliğini bilerek örgüte veya teröristlere para veya para ile temsil edilebilen her türlü taşınır veya taşınmaz mal, hak ve alacak sağlamak veya toplamaktır. Bu çalışmada terörizmin finansmanı suçunun kanuni unsuru, maddi unsurlar, manevi unsur, hukuka aykırılık unsuru, suçu etkileyen nedenler, suçun özel görünüş şekilleri, yaptırım ve usul hükümleri hakkında değerlendirmede bulunmak suretiyle açıklamalara yer verilecektir.

Anahtar Kelimeler: Terörizmin finansmanı suçu, terör örgütüne yardım, terörizm, terörizmle mücadele, terörle mücadele hukuku.

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Introduction

Even though there is not one agreed definition, terrorism is generally defined[1] to express systematic and organized use of violence in the pursuit of subverting or destroying political structure. The conventions regarding suppression of terrorism prepared within the United Nations put emphasis on the importance of cutting off its resources with international cooperation as much as criminalizing such acts for fighting with terrorism in an efficient way[2]. The UN International Convention for the Suppression of the Financing of Terrorism dated 1999 was prepared for the purpose of prevention of financing of terrorism and establishing measures through prosecuting and punishing offenders. The Convention briefly sets forth that each contracting state shall criminalize financing of terrorism under its domestic law, identify and seize (or freeze) any funds allocated to or used by terrorist purposes, adopt measures to prevent funds flow from financial institutions to terrorist organization upon its identification, cooperate with other states for the investigation and prosecution of suspects involved in the crime of financing of terrorism. The main characteristic of the Convention is regulation of crime of financing of terrorism as a different crime and adoption of provision with respect to the seizure of proceeds used, or to be used or derived from terrorism financing[3].

Turkey had signed the Convention on September 27, 2001 and performed its international obligation through adopting the most comprehensive Law regarding Suppression of the Financing of Terrorism dated February 7, 2013 and numbered 6415[4]. This special law made crime of financing of terrorism punishable and sets forth the procedure and principals of administrative measures for the freezing of assets of persons and institutions financing terrorism[5].

In this article, legal values protected by the crime of financing of terrorism, legal element of the crime, material elements, moral element, illegality

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1 Öktem Emre, Terrorism, *Terörizm,* İnsancıl *Hukuk ve* İnsan *Hakları*, İstanbul, 2007, 13; Zafer Hamide, *Ceza Hukukunda Terörizm*, Beta, İstanbul, 1998, 81, 276; Bıçak Vahit, Suç Muhakemesi Hukuku, Seçkin, Ankara, 2013, 43, Altun Hasan Mutlu, Terör, Seçkin, Ankara, 2011, 164-166.

2 www.masak.gov.tr/tr/content/uluslararasi-mucadele-tf/80

3 www.masak.gov.tr/tr/content/uluslararasi-mucadele-tf/80

4 The Convention has been signed by Turkey on September 27, 2001, its ratification had been approved by the Law dated January 10, 2002 and numbered 4738, the Council of Ministry ratified with its Ordonnance dated March 1, 2002, numbered 2002/3801 and published in the Official Gazette dated April 1, 2002 and numbered 24713.

5 Değirmenci Olgun, "*Türk Hukukunda Terörizmin Finansmanı Suçu*", 7. *Suç ve Ceza Film Festivali, Hukuk Devletinin Terör ve Darbelere Karşı Korunması*, İstanbul Üniversitesi, 3-9 Kasım, 2017, 101.

element, factors affecting crime, special forms of crime appearance, provisions of punishment and procedure will be analyzed.

I. Protected Legal Values

The crime of financing of terrorism is regulated for the purpose of prevention of terrorism, cutting off resources of terrorist organizations. In this respect, legal values protected by crime of financing of terrorism shall be in close connection with crimes of terrorism[6]. Considering the definition of terrorism adopted by Article 1 of the Anti-Terror Law numbered 3713, we can conclude that the prevention of activities conducted in the pursuit of subversion of constitutional order by means of threat, intimidation, suppression, damaging indivisible integrity of the state with its territory and nation, weakening internal and external security of the state, endangering public peace and tranquility, general health and elimination of fundamental rights and liberties of the persons is aimed with the crime of terrorism. Two important aspects of terrorism are generally stated. The first one is use of violence and the second one is its being against political, economic, social (societal), democratic order. The ultimate goal of terrorist acts is in general subverting state order or international order[7]. Terrorists damage, in particular, national and international order and peace by means of eliminating the values such as right to life, physical integrity, property and liberty that shall be protected by state. Such values damaged or endangered by terrorist activities are also applicable to the crime of financing of terrorism. There exist plenty of protected legal values including indivisible integrity of the state with its territory and nation, constitutional and democratic order, public peace and tranquility and fundamental rights and liberties of the persons. It is noteworthy to state that such values are not specific to Republic of Turkey or persons in its territory. Indeed, pursuant to Article 4/5 of the Law regarding Suppression of the Financing of Terrorism, in the event that crime of financing of terrorism is committed against a foreign state or international institution, such act can be investigated with the request of Minister of Justice. Hence, we can state that all national and international social order and public peace are protected in general[8].

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6 Kocasakal Ümit, "*"Terör ve* İnsan *Hakları", Terör ve* İnsan *Hakları Sempozyum Notlar,* İstanbul Barosu, İstanbul, 2006, 12; Yenidünya Caner-Değirmenci Olgun,*"Mukayeseli Hukuk ve Türk Hukukunda Terörün Finansmanı Suçu)*, Ord. Prof. Dr. Sulhi Dönmezer Armağanı, C. II, İstanbul, 2008, 1285.

7 Zafer, 90.

8 Çetin Soner Hamza,*"Terörizmin Finansmanı Suçu"*, Ceza Hukuku Dergisi, Seçkin, Ankara, Ağustos 2016, 138.

II. Elements of the Crime

A. Legal Element

Within the Article 4 of the Law regarding Suppression of the Financing of Terrorism dated February 7, 2013 and numbered 6415, crime of financing of terrorism is defined and punished as specified hereinafter:

ARTICLE 4 – (1) Any person who provides or gathers funds for a terrorist or terrorist organizations with the intention that they are used or by knowing and willing that they are to be used, in full or in part, in conduct of the acts regulated as crime within the scope of Article 3, even without need of being linked to a specific act, shall be punished by imprisonment for a term of five to ten years, unless the act of the offender constitutes another crime requiring a more severe punishment.

(2) It is not required that the funds have actually been used to commit a crime in order to impose a punishment pursuant to the provision of paragraph one.

(3) In the event that the crimes within the scope of this Article are committed through undue influence of the public service, punishment to be imposed shall be increased by half.

(4) In the event that the crime is committed within the framework of a legal person's activity, security measures peculiar to legal persons shall be applied.

(5) In the event that the crime is committed against a foreign state or an international organization, investigation or prosecution shall be initiated upon the request of Minister of Justice.

(6) Provisions of Law numbered 3713 regarding investigation, prosecution and enforcement shall also apply to this offence.

Article 3 of the Law regarding Suppression of the Financing of Terrorism prohibited providing or gathering funds for the purposes of committing the following acts:

a) Acts intended to homicide or serious bodily injury for the purpose of intimidating or suppressing a society or compelling a government or an international organization to do or to abstain from doing any act,

b) Acts set forth as terror crimes within the scope of the Anti-Terror Law numbered 3713 dated April 12, 1991,

c) Acts that are forbidden and regulated as crime in;

1) Convention for the Suppression of Unlawful Seizure of Aircraft,

2) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,

3) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,

4) International Convention against the Taking of Hostages,

5) Convention on the Physical Protection of Nuclear Material,

6) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,

7) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation,

8) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf,

9) International Convention for the Suppression of Terrorist Bombings

to which Turkey is a party.

As seen, in Article 3 of the relevant law, the prohibited acts of providing and gathering funds are classified under three groups[9]. First ones are intentional homicide and injury for the terrorist purposes considering the generally accepted definitions of the terrorism, second ones are the crimes of terrorism set forth in Article 3 of the Anti-Terror Law, and third ones are the acts prohibited by the international conventions to which Turkey is a party. In this respect, financing of terrorism is defined as providing or gathering funds for the support of such prohibited acts.

B. Material Elements

1-Offender

Crime of financing of terrorism is not a specific crime. Anyone may commit such crime. However, offender shall not be a terrorist organization's founder, director or member[10]. Any person providing or gathering funds who does not have a hierarchical connection with the organization may be the offender of the crime. In the event that the person gathers or provides funds as a member of terrorist organization cannot commit this crime. In our view, lawmaker

[9] Değirmenci, 102.

[10] See for the same view, Yenidünya-Değirmenci, 1285; Şen Ersan, *"Terör* Örgütünün *Finansmanı"*, www.haber7.com/yazarlar/prof-dr-ersan-sen/2092425-teror-orgutunun-finansmani.

preference to use the wording "unless the act of the offender constitutes another crime requiring a more severe punishment" indicates this approach. In Court of Cassations' decisions, any person providing or gathering money or any movable, immovable, any kind of material or immaterial property, right, receivable or any document that represents those whose value may be represented by money, for the purpose of those to be used in the activities of the organization without being a member of an armed terrorist organization will be punished pursuant to Article 4 of the Law numbered 6415[11]. The offender does not have be a citizen. A foreign state's citizen or a stateless is also qualified to commit this crime. However, the offender can only be a real person[12]. In the event that this crime is committed within the framework of activities of a legal person, this legal person may be subject to security measures (Article 4/4 of the Law regarding Suppression of the Financing of Terrorism).

The person who uses another person in commission of this crime will also be responsible as an indirect offender as stipulated under Article 37/2 of the Turkish Criminal Code[13].

2-Victim

Victims of the crime are all individuals who are part of state, national and international society to whom protected legal values belong. All the individuals whose certain values such as life, physical integrity, property are damaged constitute the victims of the crime [14].

3-Material Subject

The material subject of the crime is funds that is provided or gathered for financing of terrorism. The dictionary meaning of the funds expresses capital, savings, money or other resources, which are set apart for a whatsoever purpose[15]. The legal definition of the funds in the context of the relevant crime is made under Article 2/c of the Law regarding Suppression of the Financing of Terrorism. Pursuant to this, funds means money or any kind of movable, immovable, material or immaterial property, right, receivable or any document that represents those which may be represented by money. Any money or any value in kind or cash, which may be represented by money that cover

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11 Court of Cassation, 9th Criminal Chamber, Application Number: 2014/5464, Decision Number: 2014/12447.

12 Çetin, 140; Değirmenci, 101.

13 Bıçak Vahit, Türkçe-İngilizce Türk Ceza Kanunu Turkish Penal Code, Seçkin, Ankara, 2007, 120.

14 Yenidünya-Değirmenci, 1285.

15 www.tdk.gov.tr

expenses necessary for the running and structure of terrorist organization and its terrorist activities are considered as funds. Article 1 of the UN International Convention for the Suppression of the Financing of Terrorism, that Turkey had signed, expresses what to be understood from funds. Pursuant to this, funds includes assets of every kind, whether tangible or intangible, movable or immovable, and documents or legal instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, bank credits, travelers checks, money orders, shares, securities, bonds, letters of credit and it is stated that funds are not limited to those[16]. Funds means a sum of money or any values in kind or cash that cover all types of expenses regarding performing of terror activities[17]. Despite the fact that money or any movable or immovable asset that may be represented by money constitutes the material subject of the crime, other resources that cannot be qualified as financial support will not be considered within the scope of funds. The amount, kind or usage area of the provided or allocated funds are of no importance in respect of occurrence of the crime of financing of terrorism. Any kind of financial value may lead to the commission of this crime in the event that such value may potentially finance terrorist organization, terrorists and terrorist activities[18]. Instrument, tools, any kind of equipment, labor[19], supplied for terrorist purposes shall not be qualified as funds[20]. Furthermore, values obtained as a result of physical labor shall also not be considered as funds in this respect[21]. The Court of Cassation had concluded in its decision dated March 25, 2013 that providing food and equipment for living to terrorist organization is not considered as providing funds, but qualified as assistance to terrorist organization[22]. However, the Court of Cassation has changed its

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16 The Convention has been signed by Turkey on September 27, 2001, its ratification had been approved by the Law dated January 10, 2002 and numbered 4738, the Council of Ministry ratified with its Ordonnance dated March 1, 2002, numbered 2002/3801 and published in the Official Gazette dated April 1, 2002 and numbered 24713.

17 Yenidünya-Değirmenci, 1286.; Akın Engin, Terör ve Terörün Finansmanı Suçu, Adalet, Ankara, 2009, 397.

18 Gödekli Mehmet, *Terörizmin Finansmanı Suçu*, Seçkin, Ankara, 2017 s.306; Şen Ersan, *"Terörizmin Finansmanı Suçu"*, www.hukukihaber.net/terorizmin-finansmani-sucu-makale,5529.html

19 See the decision concluding that providing staff to terrorist organization constitutes assistance to armed terrorist organization Court of Cassation, 9th Criminal Chamber, Application Number: 2013/15389, Decision Number: 2014/10370.

20 Değirmenci, 103.

21 Çetin, 141.

22 Court of Cassation, 9th Criminal Chamber, Application Number: 2012/700, Decision Number: 2013/4535. See for the decision Özdemir Didar, *"Yargıtay Kararları Işığında Terörizmin Finansmanı Suçu"*, 7. *Suç ve Ceza Film Festivali, Hukuk Devletinin Terör ve Darbelere Karşı Korunması*), İstanbul Üniversitesi, November 3-9, 2017, 17.

jurisprudence in its later decisions. As of its decision dated October 10, 2013 until now, the Court Cassation qualifies supply of food and living equipment, instrument and tools which may be represented by money as providing funds[23]. For example, the Court Cassation qualifies, additional to the money, providing any food and other living equipment, cloth, knife, razor, botted gas, tent cover, laptop, camera that may be represented by money as funds[24].

4-Conduct-Result-Causation

With respect to the forms and characteristics of the conduct, the crime of financing of terrorism is regulated as an executory conduct crime (commission by act), optional conduct crime and depicted conduct crime[25]. The conducts that form the material element of the crime are providing or gathering funds for terrorists or terrorist organizations. The acts of providing or gathering funds require active behavior. We are of the opinion that this crime can only be committed by acts due to the fact that providing or gathering funds cannot be possibly committed by omission[26]. However, according to another scholarly view, commission by omission of this crime is also possible. A police officer's being silent about the funds that is to be used for the commission of terror crime despite his knowledge due to bribery can be indicated as an example[27]. In our view, committing a crime by omission is not possible if the crime describes the conduct thoroughly. In case of omission, police officer should be held responsible for participation to the crime by means of assistance to the person who has provided finance and also for bribery[28]. This is an

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23 Court of Cassation, 9th Criminal Chamber, Application Number: 2013/9852, Decision Number: 2013/2486; Court of Cassation, 9th Criminal Chamber, Date: 11.10.2013, Application Number: 2012/6766, Decision Number: 2013/12505; Court of Cassation, 9th Criminal Chamber, 22.12.2014, Application Number: 2014/5464, Decision Number: 2014/12447; Court of Cassation, 16th Criminal Chamber, Date: 24.4.2015, Application Number: 2015/1066, Decision Number: 2015/1243; Court of Cassation, 16th Criminal Chamber, Date: 10.11.2016, Application Number: 2015/6515, Decision Number: 2016/5787. See for the decisions Özdemir, 17-18; Court of Cassation, 9th Criminal Chamber, Application Number: 2013/16229, Decision Number: 2014/9723; Court of Cassation, 9th Criminal Chamber, Application Number: 2013/15837, Decision Number: 2014/3254; Court of Cassation, 9th Criminal Chamber, Application Number: 2013/9917, Decision Number: 2014/342 K. See for these decisions https://emsal.yargitay.gov.tr

24 Özdemir, 18.

25 Çetin, 142; Değirmenci, 143-144.

26 Değirmenci, 103.

27 Yenidünya-Değirmenci, 1288; Değirmenci, 104.

28 In the event that public officers conducting an activity for bribe, that should not be done, constitutes another crime, public officer should also be punished for this crime. Artuk Mehmet Emin-Gökcen Ahmet- Yenidünya Caner, *Ceza Hukuku* Özel *Hükümler*, Adalet, Ankara, 2015,1093-1094; Tezcan Durmuş-Erdem Mustafa Ruhan-Önok Murat, *Teorik ve Pratik Ceza* Özel *Hukuku*, Seçkin, Ankara, 2017, 1127.

optional conduct crime since the conducts that form the material element are providing or gathering funds. Any of those conducts would constitute crime of financing of terrorism. We think that crime of financing of terrorism describes the conduct in such a way that it cannot be committed in whatsoever way, but only through providing or gathering funds, as defined by law.

The material element is providing and gathering funds, which is the material subject of the crime, in other words, money or any kind of movable, immovable, material or immaterial property, right, receivable or any document that represents those whose value may be represented by money. Financing terrorism by means of providing funds is also a kind of assistance, however supply of instruments, tools or equipment, which do not qualify as funds, is not considered as providing funds[29]. We are of the opinion that providing or gathering instruments, tools, any kind of equipment, labor for the terrorist purposes should be considered as "knowingly and willingly assisting an organization without being part of the hierarchic structure of the organization" based on the Article 220/7 of the Turkish Criminal Code which is referred to within the Article 314/3 of the Turkish Criminal Code[30]. However, as stated above, the Court of Cassation qualifies providing anything that may be represented by money, such as food, living equipment, and any kind of instruments, tools or equipment as providing funds[31]. In the event of providing weapons to organization, Article 315 of the Turkish Criminal Code should apply in priority due to its being a special norm[32]. Likewise, acts of physical labor or services in favor of terrorist organization should be punished pursuant to Article 220/7 of the Turkish Criminal Code.

However, a person's providing or gathering money or any kind of property, right or receivable, which may be represented by money, provided in return of labor performed, should be punished according to Article 4 of the Law regarding Suppression of the Financing of Terrorism[33].

The dictionary meaning of providing is making preparations for and supplying necessary events or conditions[34]. Preparation of funds that are to be used in terrorism financing includes all kind of activities for its supply. For instance, an offender's donation of money or asset and release of his right to eceivable are within this scope[35]. Funds may be provided through both legal

29 Yenidünya-Değirmenci, 1286.
30 See for the same view Yenidünya Caner-İçer Zafer, *Suç* İşlemek *Amacıyla* Örgüt *Kurma*, Digesta, İstanbul, 2014, 56.
31 Özdemir, 17-18.
32 See for the same view Değirmenci, 103.
33 Çetin, 142.
34 www.tdk.gov.tr
35 Çetin, 143.

ways and illegal ways[36]. For example, money gained by a drug trafficker by means of trafficking is money gained through illegal ways and money gained by a businessperson by means of its commercial activities is money gained through legal ways.

The dictionary meaning of gathering is bringing together, arranging[37]. Act of gathering is relevant in the case that third parties supply funds, which are to be used in terrorist activities' financing. The act of gathering means bringing together the values qualified as funds through collecting those from others. In this respect, convincing a person or an institution to donate such values for the mentioned purposes and acquiring those from them and thereafter transferring such values to the relevant places may be indicated as an example[38]. Pursuant to a view, the act of gathering funds should be understood as an act that also includes transport and transfer of the funds[39]. In our opinion, such acts should be considered as participation to crime (through assistance). Gathering means bringing together, arranging. Hence, assigning a different meaning to an act means making an analogy. While interpreting types of crime in criminal law, analogy should not be made and strict interpretation should be the principle.

With regard to the act of gathering, knowledge of third parties about the fact that collected funds is to be used in terrorist activities or third parties' acting under duress or threat is insignificant. If the third parties who have provided funds in the name of donation or assist to legal organization are not aware of the fact that such collected money will be used in terrorist activities, they will not be punished within the scope of crime of financing of terrorism, however the persons who have gathered assistance and donation by this way will be held responsible. Nevertheless, the persons who have made payments knowingly to be used in terrorist activities without being subject to duress or threat will be held responsible for the crime of providing funds; furthermore, the persons gathered funds would be held responsible for the gathering funds unless being a member of an organization[40].

The acts of providing or gathering funds should be conducted in favor of terrorist organization or terrorist. Lawmaker did not only criminalize providing or gathering financing for terrorist organization, but also accepted providing financial support or gathering funds for terrorist within the scope of the crime. Should the lawmaker specify it within the crime? Under Article 220/7

36 Yenidünya-Değirmenci, 1288.
37 www.tdk.gov.tr
38 Çetin, 143.
39 Çetin, 143.
40 Değirmenci, 104.

of the Turkish Criminal Code, only assistance to an organization is punished, assistance to a member of organization is not punished. Since a person, assisting a member of organization should know being of indirect assistance to an organization, this person would not remain unpunished. Likewise, a person assisting a member of organization (terrorist) with the knowledge of terrorist's qualification should know that he is indirectly assisting a terrorist organization. Thus, in our opinion, even in the event that the relevant provision did not include the wording of "providing or gathering funds for terrorist", it would have not been possible for such person remain unpunished.

We are of the opinion that crime of financing of terrorism is crime of abstract danger and conduct crime with respect to result. Under relevant provision, occurrence of damage and as well as emergence of a concrete danger are not required for the formation of the crime. It is accepted that providing or gathering funds for terrorist organizations or terrorist would endanger indivisible integrity of the state with its territory and nation, constitutional and democratic order, public peace and tranquility, fundamental rights and liberties of the persons. In our view, the result which is danger of damage will occur simultaneously with the conduct- acts of providing or gathering funds. Indeed, lawmaker has regulated under Article 4/2 of the Law regarding Suppression of the Financing of Terrorism that providing or gathering funds are sufficient to form the crime of financing of terrorism and there is not any further need to the use of funds in crime for the punishment. According to another view, crime of financing of terrorism is a pure conduct crime and any result other than providing or gathering funds is not required[41].

C-Moral Element

Crime of financing of terrorism can only be committed with intention. Commission of this crime with negligence is not regulated by law. It is stated that, knowing and willing the fact that such funds are to be used in terrorist activities are required. According to a view, the wording "knowing and willing" of the relevant provision indicates that this crime can only be committed with direct intention. It is not possible to commit this crime with eventual intention[42]. For the formation of the crime, the offender has to know that the person or organization for whom the offender is providing or gathering funds is a terrorist or terrorist organization and it is required that the offender willingly provides or gathers funds. Despite the fact that the offender may not be aware of the specific activity, it is necessary that the

41 Yenidünya-Değirmenci, 1289; Çetin, 144.

42 Yıldırım Zeki, *Türk Hukukunda Terörizmin Finansmanı Suçu ve Malvarlıklarını Dondurma*, Seçkin, Ankara, 2013, 98; Yenidünya-Değirmenci, 1289; Değirmenci, 104.

offender knows that such funds will be used in terrorist activities and such funds are to be the source of the commission of crimes and that the offender acts in accordance with this will[43]. Pursuant to another view that we support, considering the wording "with the intention that they are used or by knowing and willing that they are to be used, in full or in part", this crime can only be committed with special intention, and commission of this crime with eventual intention is not possible[44]. In fact, Court of Cassation has certain decisions where it concluded that providing financial support to organization members which is to be determined through identifying sources and purposes of the money transfers constitutes the crime[45]. In the event that a person is forced to provide or gather funds under duress or threat, such person will not be held criminally responsible due to the lack of fault. If a person is used as means of crime who is mistaken or deprived of fault capacity, or benefits a reason for justification, such person will be not acting in fault and thus such person will not be held criminally responsible. In this scenario, the one who is using this person can be held responsible as an indirect offender[46] (Article 37/2 of Turkish Criminal Code). Furthermore, it is also possible to hold such a person responsible as a direct offender or -if there is more than one person- as a joint offender without resorting to the institution of indirect offender, since not just providing funds, but also the act of gathering funds is regulated as an alternative conduct.

D-Illegality Element

The crime of financing of terrorism does not have any significance with respect to the illegality element. We are of the view that acts such as supply of food or medicines will have a social appropriateness, and thus the illegality element will be not met in this case. However, the Court of Cassation is of the opinion that anything, which may be represented by money, should be considered within the scope of funds and thus crime of financing of terrorism is constituted[47].

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43 Yenidünya-İçer, 56.

44 Şen Ersan, *"Terörizmin Finansmanı Suçu"* www.hukukihaber.net/terorizmin-finansmani-sucu-makale,5529.html

45 Court of Cassation, 16th Criminal Chamber, Date: 10.5.2017, Application Number: 2015/5503, Decision Number: 2017/3893

46 See for the indirect offender, Özgenç İzzet, Legal Merits of Participation to Crime and the Institution of Offender (*Suça* İştirakin *Hukuki Esası ve Faillik*, İstanbul, 1996, 201 ff; Aydın Devrim, *Türk Ceza Hukukunda Suça* İştirak, Yetkin, Ankara, 2009, 149 ff.

47 Özdemir, 18.

E-Factors Affecting Crime

The event of undue influence of the public service in the commission of the crime is regulated as a matter of aggravation. In such case, the offender needs to be a public officer and to commit this crime through undue influence of the public service. The term of public officer is defined under Article 6/c of the Turkish Criminal Code[48]. Pursuant to this, public officer expresses a person chosen through selection or appointment or through other ways, to carry out public service for a temporary or permanent period. A link between public services carried out by the public officer and the committed crime is not required for the aggravation. Public officer's undue influence of his capacity or public service is sufficient in this respect[49].

III. Special Forms of Crime Appearance

A. Attempt

We have stated above that crime of financing of terrorism is a conduct crime. Since by conduct of the acts, the danger of damage will simultaneously occur, attempt may only happen in the event that the executory acts are not completed. If the offender has started direct execution of the crime with suitable acts, yet executory acts are unfinished due to the events not attributable to the offender, attempt to the crime is possible. Since it is possible to divide the acts of providing or gathering funds into parts due to their characteristics[50], in the event such executory acts are not completed, attempt to the crime would be possible. For instance, if relevant actions for a bank wire begin, but the bank sends a notice to Financial Crimes Investigation Board (MASAK) due to the suspicious act, as a result the act could not be completed; or in case relevant actions for an immovable property transfer has begun, but before land registry, the perpetrator has been caught.

With regard to gathering funds, the attempt will occur in the case that the relevant acts for gathering funds have commenced but the act of gathering is not completed due to the events not attributable to the offender. For instance, a person can be caught before completing relevant actions for transfer of money or values such as immovable property from a third party.

The crime of financing of terrorism is completed when the funds are provided or gathered. For the commission of this crime, there is no further need of usage of such funds in a perpetration of a crime. Furthermore,

48 Bıçak, Türkçe-İngilizce Türk Ceza Kanunu Turkish Penal Code, 45.

49 See for the opposite view Çetin, 146. According to the author, a link between the authority of the public officer and the committed crime is required.

50 Çetin, 149.

the crime is completed when a value, which can be considered as funds, is provided or gathered. For instance, if a bank wire is made only for one time or a share certificate is taken from a third party for one time, the crime is completed.

The crime can be committed at once. Presence of continuity of the acts of providing or gathering is not required. Providing funds can be conducted for an only time or can also be conducted for several times, which may lead its qualification as being continuous. Particularly, since the act of gathering funds means bringing together, arranging, such act can be continuous due its characteristic[51]. In this case, the crime finishes at the time of the interruption.

In the event that the material subject of the crime is not suitable due to inability to consider it as funds, the crime will be non-committable. For instance, in the case that the offender gives to a terrorist or a terrorist organization stones that the offender believes to be precious, the offender will not be punished since the material subject of the crime is not suitable due to the fact that the stones are not valuable[52].

B. Complicity

There is no special conditions of complicity in respect of this crime. Anyone can be the offender, abettor or accessory.

C. Joinder of Offences

Crime of financing of terrorism is the specially regulated norm of the crime of assisting terrorist organizations[53]. Hence, assistance which may be qualified as providing or gathering funds will not be punished within the scope of assistance to terrorist organization, but rather crime of financing of terrorism due to its being special norm. However, providing or gathering values, which cannot be qualified as funds, should be considered within the framework of assistance[54].

Under article regarding crime of financing of terrorism, it is regulated that the offender would be punished pursuant to this article "unless the act of

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51 Çetin, 144-145.

52 Çetin, 150.

53 Court of Cassation, 16th Criminal Chamber, Date: 26.10.2016, Application Number: 2016/2365, Decision Number: 2016/5345.

54 Court of Cassation, 16th Criminal Chamber, Date: 24.4.2017, Application Number: 2015/3, Decision Number: 2017/3. Excluding the hierarchal structure of the organization, all kind of assistance such as providing accommodation, transferring, intelligence, facilities to avoid organization member's being examined or caught will be considered within the scope of Article 314/2 of Turkish Criminal Code by reference of Articles 314/3 and 220/7.

the offender constitutes another crime requiring a more severe punishment". Thereby, lawmaker admitted that this norm will be applied in the event that other norms (which require more severe punishment) are not applied. This wording in the relevant article clearly indicates that this article is a secondary norm. In this respect, norm regulating a more severe punishment is a primary (principal) norm whereas such norm will be applied by priority vis-à-vis the secondary norm (secondary norm will be latterly applied)[55].

Pursuant to a scholarly view, provision regarding crime of financing is not a special norm vis-à-vis crime of assistance. There is not a general norm-special norm relation between them. Due to the wording of "unless the act of the offender constitutes another crime requiring a more severe punishment", for the acts of providing or gathering funds, the provisions regarding assistance to terrorist organization should be applied [56] (by reference made in Article 314 of the Turkish Criminal Code, to the Article 220/7 of the Turkish Criminal Code; and Articles 3, 5, 8/A and 8/B of Law numbered 3713). According to this view, provisions regarding crime of financing of terrorism will not be applied, if the act of assistance to terrorist organization is realized, since it is more severely punished via another norm. Thus, a more severe punishment should be regulated for the crime of financing of the terrorism than the punishment within the provision regarding assistance to terrorist organization[57].

The responsibility will also arise from other crimes that are committed in order to provide or gather funds for terrorism. For instance, in the event that crimes of drug trafficking, tobacco trafficking, petrol trafficking, plunder, larceny are committed in order to provide funds, and in the event that certain acts are concluded in order to conceal the funds gained through illegal ways, the principles of joinder of punishments will be applied and responsibility for crime of financing of terrorism and for other committed crimes will arise[58].

With respect to financing of terrorism, the acts of providing or gathering funds can be successively conducted in several times. However, depending on whether the act is legally sole or more than one, the principles regarding successive crime will be applied. In the event that the offender provides or gathers several assets of the same or different kind whose value may be calculated with money, at the same time, the act will be considered as legally sole, the principles regarding successive crime will not be applied. There is no

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55 İçel Kayıhan, *Suçların* İçtimaı, İstanbul, 1972, 209-210.

56 Şen Ersan, "*"Terör* Örgütünün *Finansmanı"*, www.haber7.com/yazarlar/prof-dr-ersan-sen/2092425-teror-orgutunun-finansmani.

57 Şen Ersan, *"Terör* Örgütünün *Finansmanı"*, www.hukukihaber.net/terorizmin-finansmani-sucu-makale,5529.html.

58 Yenidünya-Değirmenci, 1290.

doubt on that. However, it is problematic, when the acts that are committed in short intervals. We are of the view that, the acts conducted in different times with short intervals within the context of the same decision of commission of crime, such acts can be considered within the scope of successive crime. In the event that crime is committed in several times within the context of the same decision of commission of crime without any interruption of the acts, the principals regarding successive crime should be applied.

On the other hand, in the event of interruption such as commencement of prosecution, the crime committed would be a new crime and thus principles regarding joinder of punishments should apply[59]. Indeed, the Court of Cassation concludes that with the commencement of prosecution, the unity of decision of commission of crime ends and the acts conducted thereafter should be qualified as independent from the former ones[60].

IV. Sanction and Procedural Provisions

Imprisonment for a term of five to ten years has been regulated as the sanction of the crime. The punishment will be imposed unless the act constitutes another crime requiring a more severe punishment. Judge will determine the punishment between lower and upper limits in accordance with the importance and value of the funds provided or gathered. In the event that the crime is committed by means of undue influence of public service, which constitutes the qualified form of the crime, the punishment shall be increased by half. In such event, the judge will not have a judicial discretion. In the case that the crime is committed within the framework of a legal person's activity, security measures peculiar to legal persons such as seizure, cancellation of license will be applied pursuant to Article 60 of the Turkish Criminal Code[61]. The judge may determine not to apply the security measures, if the execution of the security measures will create a more severe outcome than the perpetrated act.

With regard to the crime of financing of terrorism, no effective remorse provisions have been regulated. However,as lawmaker regulated effective remorse provisions for suppression of the terrorism, the necessity of efficient remorse provisions for the crime of financing of terrorism is self-evident, as the crime is regulated with the same purpose[62].

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59 See for a similar view, Çetin, 156-157.

60 Court of Cassation General Assembly of Criminal Chamber, 17.03.2015, 2-37/47 from İçel Kayıhan, İçel *Ceza Hukuku,* Beta, İstanbul, 2017, 611-612.

61 Bıçak, Türkçe-İngilizce Türk Ceza Kanunu Turkish Penal Code, 160-161.

62 See for the same view Çetin, 151.

In the event that the crime is committed against a foreign state or an international organization, commencement of investigation and prosecution has been left to the request of Minister of Justice. Article 4/6 of Law regarding Suppression of the Financing of Terrorism regulates that Anti-Terror Law numbered 3713 shall apply with respect to investigation, prosecution and enforcement for this crime. Nevertheless, the general provisions regarding investigation and prosecution will apply to this crime, as relevant special provisions of Anti-Terror Law have been abolished[63].

Conclusion

The main characteristic of the UN International Convention for the Suppression of the Financing of Terrorism is regulating the financing of terrorism as a distinct crime and containing provisions regarding seizure of the proceeds used or to be used for the financing of terrorism whether they are gained through illegal ways or legal ways or derived from financing of terrorism. Law regarding Suppression of the Financing of Terrorism numbered 6415, criminalized financing of terrorism and regulated the administrative measures regarding seizure of proceeds used in the terrorism financing in accordance with the Convention. As it is analyzed above, the material subject of the relevant crime, the funds, causes problems in practice. It is due to the definition of the funds given by the law as movables or immovable, which may be represented by money. In our opinion, movables which can be represented by money indicate the movables such as gold and diamond, as they are quantifiable monetarily. Each thing that can be bought by money should not be considered directly within this scope. Court of Cassation concludes in its recent decisions that providing any living equipment, instrument or equipment constitutes financing activity. However, financing means providing required money or credit for the purpose of running or developing an activity. Providing or gathering foods, living equipment, instruments and equipment should rather be considered as assistance to terrorist organization. Hence, it is required to re-regulate the definition of funds differently in order to avoid such broad interpretations. Furthermore, the lack of regulation with respect to efficient remorse is an important deficiency.

[63] The relevant provisions have been abolished with the Laws numbered 3842, 5532, 6352, 6526.

BIBLIOGRAPHY

Akın Engin, Terör ve Terörün Finansmanı Suçu, Adalet, Ankara, 2009.

Altun Hasan Mutlu, Terör, Seçkin, Ankara, 2011.

Artuk Mehmet Emin-Gökcen Ahmet- Yenidünya Caner, Ceza Hukuku Özel Hükümler, Adalet, Ankara, 2015.

Aydın Devrim, Türk Ceza Hukukunda Suça İştirak, Yetkin, Ankara, 2009.

Bıçak Vahit, Türkçe-İngilizce Türk Ceza Kanunu-Turkish Penal Code, Seçkin, Ankara, 2007.

Bıçak Vahit, Suç Muhakemesi Hukuku, Seçkin, Ankara, 2013.

Çetin Soner Hamza, "Terörizmin Finansmanı Suçu" Ceza Hukuku Dergisi, Seçkin, Ankara, Ağustos 2016.

Değirmenci Olgun, Türk Hukukunda "Terörizmin Finansmanı Suçu", 7. Suç ve Ceza Film Festivali, Hukuk Devletinin Terör ve Darbelere Karşı Korunması, İstanbul Üniversitesi, 3-9 Kasım 2017.

Gödekli Mehmet, Terörizmin Finansmanı Suçu, Seçkin, Ankara, 2017.

İçel Kayıhan, Suçların İçtimaı, İstanbul, 1972.

İçel Kayıhan, İçel Ceza Hukuku, Beta, İstanbul, 2017.

Kocasakal Ümit, "Terör ve İnsan Hakları",Terör ve İnsan Hakları Sempozyum Notları, İstanbul Barosu, İstanbul, 2006.

Öktem Emre, Terörizm, İnsancıl Hukuk ve İnsan Hakları, İstanbul, 2007.

Özdemir Didar, "Yargıtay Kararları Işığında Terörizmin Finansmanı Suçu", 7. Uluslararası Suç ve Ceza Film Festivali, Hukuk Devletinin Terör ve Darbelere Karşı Korunması, İstanbul Üniversitesi, 3-9 Kasım 2017.

Özgenç İzzet, Suça İştirakin Hukuki Esası ve Faillik, İstanbul, 1996.

Şen Ersan, "Terörizmin Finansmanı Suçu", www.hukukihaber.net/terorizmin-finansmani-sucu-makale,5529.html

Şen Ersan, "Terör Örgütünün Finansmanı", www.haber7.com/yazarlar/prof-dr-ersan-sen/2092425-teror-orgutunun-finansmani

Tezcan Durmuş-Erdem Mustafa Ruhan-Önok **Murat**, Teorik ve Pratik Ceza Özel Hukuku, Seçkin, Ankara, 2017.

Yenidünya Caner-Değirmenci Olgun, "Mukayeseli Hukuk ve Türk Hukukunda Terörün Finansmanı Suçu", Ord. Prof. Dr. Sulhi Dönmezer Armağanı", C. II, İstanbul, 2008.

Yenidünya Caner-İçer Zafer, Suç İşlemek Amacıyla Örgüt Kurma, Digesta, İstanbul, 2014.

Yıldırım Zeki, Türk Hukukunda Terörizmin Finansmanı Suçu ve Malvarlıklarını Dondurma, Seçkin, Ankara, 2013.

Zafer Hamide, Ceza Hukukunda Terörizm, Beta, İstanbul, 1998.

www.masak.gov.tr/tr/content/uluslararasi-mucadele-tf/80

www.masak.gov.tr/tr/content/uluslararasi-mucadele-tf/80

www.tdk.gov.tr

www.emsal.yargitay.gov.tr

ENFORCEMENT AND IMPLEMENTATION OF THE PROVISIONS CONCERNING SURETYSHIP AND STANDARD BUSINESS TERMS IN THE NEW TURKISH CODE OF OBLIGATIONS NUMBERED 6098

6098 Sayılı Türk Borçlar Kanunu'nun Kefalete ve Genel İşlem Şartlarına İlişkin Düzenlemelerinin Yürürlüğü ve Uygulama Şekli

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Abstract

According to article 2 of The Code numbered 6101 relating to the Mode of Enforcement and Implementation of The Turkish Code of Obligations, provisions of Turkish Code of Obligations regarding public order and morality should be applied to all transactions without giving importance to when they are performed; and to ongoing lawsuits according to article 7, that is to say these provisions should be applied retroactively. Turkish Law of Obligations and especially provisions regarding surety contracts were amended in 2012 significantly, and standard business terms were regulated by the law for the first time. Some of these changes regarding suretyship are the requirements relating to the written form, and the consent of the spouse. If we accept that these amendments aim to secure public order, these norms will also be applied to ongoing lawsuits before the date of 01.07.2012, that is to say the effective date of the new Turkish Code of Obligations. The same rule would apply if unfamiliar (unexpected and unpredictable to the nature of the agreement and the characteristic of the matter) standard business terms are considered as being related to the public order and morality. These two are related to each other, because provisions regarding suretyship stated in or in the appendix to general credit contracts are considered as standard business terms.

Keywords: suretyship, standard business terms, public order, retroactivity, consent of the spouse

Özet

6101 sayılı Türk Borçlar Kanununun Yürürlüğü ve Uygulama Şekli Hakkında Kanunu'nun 2. maddesine göre, Türk Borçlar Kanununun kamu düzenine ve genel ahlaka ilişkin kuralları gerçekleştikleri tarihe bakılmaksızın bütün işlemlere ve aynı kanunun 7. maddesi uyarınca görülmekte olan davalara uygulanır; bir diğer ifadeyle geriye yürür. Türk Borçlar Hukuku, özellikle de kefalete ilişkin hükümler, 2012 yılında önemli ölçüde değişikliğe uğramıştır. Aynı zamanda kanunda genel işlem şartları adı altında yeni bir kurum düzenlenmiştir. Kefalete ilişkin değişikliklerin bir kısmı kefalet sözleşmesinin şekline ve kefalet sözleşmesinde eşin rızasının bulunmasına yönelik getirilen koşuldur. Eğer bu değişikliklerin kamu düzenine ilişkin olduğu kabul edilecek olursa, bu kurallar 01.07.2012 tarihinden, yani yeni Türk Borçlar Kanunu'nun yürürlük tarihinden önce devam eden davalara da uygulanacaktır. Aynı husus, sözleşmeye veya işin niteliğine yabancı (sözleşmenin niteliğine ve işin özelliğine beklenemez ve öngörülemez) genel işlem şartlarının kamu düzenine ilişkin sayılması halinde de söz konusu olacaktır. Bu iki konu birbiriyle bağlantılıdır; zira genel kredi sözleşmelerinin metninde veya ekinde yer alan kefalete ilişkin hükümler genel işlem şartları nitelindedir.

Anahtar Kelimeler: kefalet, genel işlem şartları, kamu düzeni, kanunların geriye yürümesi, eşin rızası

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I) INTRODUCTION

According to article 2 of The Code numbered 6101 relating to the Mode of Enforcement and Implementation of The Turkish Code of Obligations, [1]

"The provisions of the Code of Obligations regarding the public order and morality shall apply to all actions and transactions without giving importance to when they are performed."

Similarly, article 7 of the Code of Enforcement concerning "*Ongoing Lawsuits*" indicates the same point by making the above-mentioned article more concrete.

According to the article 7,

"The provisions of the Code of Obligations regarding the public order and morality, article 76 concerning interim payments, article 88 concerning interest rates, article 120 concerning failure to meet a financial obligation (default), and article 139 concerning hardship on performance shall also apply to ongoing lawsuits."

The former Turkish Code of Obligations dated 1926 [2] was adopted from Swiss Code of Obligations,[3] so did the provisions regarding contract of surety. However, Switzerland amended almost all of the provisions concerning suretyship in 1942,[4] and thus a discrepancy had been emerged in that matter between Turkey and Switzerland.[5] This discrepancy had remained until the new Turkish Code of Obligations[6] was enacted. To overcome this discrepancy the provisions regarding suretyship were amended by TCO in 2012 in accordance with the provisions prescribed by the model code, OR. Through the new amendments concerning suretyship in TCO between articles 581-

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1 Türk Borçlar Kanununun Yürürlüğü ve Uygulama Şekli Hakkında Kanun, Number: 6101, OJ 12.1.2011-27836. The Code is abbreviated, and hereinafter referred as the Code of Enforcement.

2 Code of Obligations, Number: 818, OJ 29.04.1926-359. The Code is abbreviated, and hereinafter referred as CO. This Code was annulled in 2012.

3 Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht). The Code is abbreviated, and hereinafter referred as OR.

4 The provisions in OR concerning suretyship came into force in 1.7.1942, and are still in effect (Bundesgesetz, AS 1942, 279, 290, 644 dated 10.12.1941 respecting the revision of part 20 of OR). This is also called the revision of 1941. The aim of this revision is to protect the person who enters into a contract without thinking thoroughly, and to enhance the situation of the surety. See **Honsell/Vogt/Wiegand (Pestalozzi)**, Basler Kommentar, Obligationenrecht I, Art.1-529, 3. Ed., Basel/Genf/München 2003, vor. zu Art.492-512 Nr.1.

5 See **Seza Reisoğlu,** Türk Hukukunda ve Bankacılık Uygulamasında Kefalet, Ankara 1992; **Seza Reisoğlu**, Türk Kefalet Hukuku, Ankara 2013.

6 Turkish Code of Obligations, Number 6098, OJ 4.2.2011-27836. The Code is abbreviated, and hereinafter aforementioned as TCO.

603, it has been given the utmost importance to the principle of "*protection of surety*".[7]

The aim of the revision in OR was to protect the inattentive person (surety) who concluded a contract without thinking thoroughly and to enhance his or her position. As a result of the revision of 1941, the below-mentioned amendments were made concerning suretyship:[8]

- The capacity to become surety was restricted.
- Requirement of written form was reinforced.
- The position of surety was enhanced.
- The obligations of the creditor, and the right to withdraw from the contract [9] by the surety against the main debtor were reinforced.
- The provisions regarding the termination of the contract were amended in accordance with the principle of "*protection of surety*".

These amendments made under the revision of 1941 have set an example when amending the provisions of TCO concerning suretyship between articles 581 and 603.

However, are these new suretyship provisions in TCO, which also aim at protecting the inattentive surety and enhancing his or her position, retroactive?

The same question may also be asked in regard to Standard Business Terms which are defined as "*the terms drafted unilaterally by one party in advance, and submitted to the other party in order to use them when concluding several future contracts*" and prescribed by TCO. The aim of these articles is to protect the vulnerable party to whom these terms are submitted. The provisions regarding the enforcement and the content of these terms, and the rules of interpretation are regulated between articles 20 and 25 of TCO.

No direct solution had been offered by CO regarding standard business terms until the enactment of TCO, except some specific provisions in Law

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7 **Arif Kocaman**, "Kefalet Hukukunda İrade Özgürlüğünün Sınırları, Alman federal Anayasa Mahkemesinin 19.10.1993 tarihli kararı ile bu çerçevede gelişen Alman Federal Temyiz Mahkemesinin yeni içtihadı ve bunun İsviçre/Türk Hukuku açısından değerlendirilmesi", *Ticaret Hukuku ve Yargıtay Kararları Sempozyumu*, XV, 5 1998, p. 105.

8 **Honsell/Vogt/Wiegand (Pestalozzi)**, vor. zu Art.492-512 Nr.1.

9 For terminology problem regarding "*withdrawing from contract*", See **Başak Bak**, "The Right of Withdrawal in Distance Contracts under Law on Consumer Protection Numbered 6502", *Law & Justice Review*, V. 11, 29 February 2016, p. 129-143, and also **Başak Bak**, Fikri Haklarda Sözleşmeden Cayma, Ankara 2016, 35 pp.

on Consumer Protection, and By-Law regarding its enforcement, and the protection was provided either by these exceptional specific terms (for instance the provision concerning the terms in insurance agreements) or by some irrelevant provisions of CO or by Turkish Code of Commerce. These attempts to protect the vulnerable party in the contract were hitherto realized within the framework of the mandatory rules (articles 99/II-III and 100/III of CO; articles 766 and 1264 of TCC), moral rules, personal rights, the notion of good faith, and even the principle of social state and the principle of equality prescribed in Turkish Constitution, and by the provisions against lesion.[10]

Then, are the provisions concerning standard business terms of TCO retroactive?

The answer to this question is of great importance especially when "*standard business terms which are not in conformity with the type of the agreement and the circumstances"* are in question. In terms of settling the argument related to this question, article 25 of TCO prescribes some rules regarding the supervision of the content of the agreement that is subject to standard business terms. According to article 25 of TCO, "*Standard business terms shall not include provisions that are against the other party or aggravate his or her position against good faith*."

II) THE ENFORCEMENT AND THE IMPLEMENTATION OF THE PROVISIONS CONCERNING SURETYSHIP IN TCO

The provisions concerning suretyship in TCO were amended in 2012 significantly, and TCO set forth new provisions aiming at protecting the surety.

According to article 603 of TCO,

"*The provisions of suretyship regarding the written form, the capacity to act, and the consent of the spouse shall also apply to other personal suretyship agreements concluded under different names."*

According to article 2 of the Code of Enforcement,

"The provisions of the Code of Obligations regarding the public order and morality shall apply to all actions and transactions without giving importance to when they are performed."

Similarly, according to article 7 of the Code of Enforcement,

"*The provisions of the Code of Obligations regarding the public order and morality (….) shall also apply to ongoing lawsuits."*

[10] **Atilla Altop**, "Türk Borçlar Kanunu Tasarısı'ndaki Genel İşlem Koşulları Düzenlemesi", *Prof. Dr. Ergon Çetingil ve Prof. Dr. Rayegan Kender'e Armağan*, İstanbul 2007, p.1.

Article 7 of the Code of Enforcement is only a mere repetition, as "*the provisions of the Code of Obligations regarding the public order and morality shall apply to all actions and transactions without giving importance to when they are performed"* according to article 2 of the same Code.[11]

According to an old decision of the Court of Appeal, *"(…) The provisions of the public order stipulated within the Code of Obligations regarding the written form of the suretyship must also be applied to old suretyship agreements (…)"*.[12]

According to article 583/I of TCO,

"The surety agreement is valid only where the surety makes a written declaration, and indicates in the surety bond the maximum amount for which he or she is liable, and the date of suretyship. It is mandatory that the surety indicates the maximum amount for which he or she liable, the date of suretyship, and if he or she is in the capacity of the joint surety a statement regarding this situation are obliged to be indicated in surety bonds with his or her own handwriting and signature."

Similarly, under the article 584/1 of TCO,

"A married person may validly stand as surety only with the written consent of his or her spouse given in advance or at the latest simultaneously, unless the spouses are separated by court judgment."

The prevailing opinion in Turkey supports the idea that the suretyship agreement, which is contrary to the obligatory written form, is null and void. This can arise from either the absolute violation of the obligatory written form prescribed by article 583/1 of TCO or the non-conformity with the (objective or subjective) essential terms of the suretyship agreement.[13]

Under article 583/I of TCO, the contract of surety is only valid when the surety makes a written declaration, and indicates the date of suretyship and the maximum amount for which he or she is liable (and if it is a joint suretyship, the surety has to state explicitly that he or she is the joint surety) in agreement with his or her own handwriting, and his or her own signature. This new amendment is efficient when the malicious financial companies leave the spaces in the agreements concerning the amount and the date empty in preprinted forms, and fill in these blanks right before the proceeding commences.[14]

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11 **Reisoğlu**, Kefalet, p. 333.

12 Turkish Court of Appeal, 4th CD 20.04.1957, 2318 *(**Reisoğlu**, Kefalet, p. 329 footnote 943)*

13 **Burak Özen**, Kefalet Sözleşmesi, İstanbul 2012, p. 228.

14 **Mahmut Bilgen**, Öğreti ve Uygulamada Kefalet ve Yargılama Hukukuna İlişkin Uyuşmazlıklar, Ankara 2013, p. 28.

TCO stipulates strict norms concerning the written form for suretyship, and article 603 prevents real persons to violate these norms by concluding other forms of personal agreements under different names.

Hence, although the provisions concerning the written form aim at protecting the surety, they also aim at securing the public order. In fact, under Swiss law, the suretyship exceeding the sum of 2,000 Swiss francs is obliged to be done in the official written form before the public notary. (Art. 493/II of OR)

Under article 584 of TCO the consent of the spouse is also necessary if the surety is a married person.[15] This aims to protect the marriage bond. However, it can be said that the aim of this article in Turkey is rather to protect the wife. Of course, the last one is not a legal but a sociological explanation at the most. Nevertheless, this article also aims at securing public order, as protecting the family (especially the children who are ultimately in a position to be affected negatively from the suretyship relation) is considered as a public policy issue.

If we accept that the norms relating to the written form of the suretyship aim at securing the public order within the scope of articles 2 and 7 of the Code of Enforcement, these norms will be applied to the surety contracts, and to ongoing lawsuits before the date of 01.07.2012, that is to say the effective date of TCO.

Reisoğlu, on the other hand, opposed to that by saying;

> "*As to whether the provisions regarding suretyship are subject to the public policy is required to be analyzed. In an old decision, the Court of Appeal (4th CD 20.04.1957, 2318) stated that the provisions concerning public order in TCO regarding the written form are also required to be applied to old suretyship agreements. However, the decision is wrong because although it is a fact that the written form is considered as the validity form, contracts which are contrary to the written form will be considered as null and void not because it is contrary to public order but because the norm regarding the written form primarily aims at protecting the surety.*
>
> *After the revision of suretyship provisions, the Swiss Federal Court* (BGE 84 I 124) *also affirmed that, and in 1958 stated that article 493 of Swiss Code of Obligations (article 583 of TCO) was mandatory; yet the primary purpose of the article was to protect the surety from an urgent*

[15] However, the consent of the spouse is not required for sureties given by owner of an enterprise registered to trade registry or partner or manager of a commercial company regarding the business or the company, or for sureties given by a craftsman or an artisan registered to craftsman's association related to occupational activities or for other sureties enumerated in article 584/III of TCO.

decision (BGE 6 II 350; BGE 65 II 237). *The Court, therefore, refused the idea that suretyship provisions are associated with the public order.*

Similarly, article 582/III of TCO explicitly indicates that the provisions regarding suretyship aim to protect the surety. Therefore, the provisions regarding suretyship are not subject to article 2 of the Code of Enforcement, and TCO cannot be applicable in this regard." [16]

Yet, we disagree.

We are opposed to that idea from several points; however, our justification will be discussed below under the third part concerning standard business terms. The provisions regarding suretyship stated in or in the appendix to general credit contracts are considered as standard business terms, and thus as to whether these terms are associated with the public order will also be mentioned below. The declarations of sureties are subject to articles 20-25 of TCO regarding standard business terms, even though these declarations are stated in the appendix to printed credit contracts.

III) THE ENFORCEMENT AND THE IMPLEMENTATION OF THE PROVISIONS CONCERNING STANDARD BUSINESS TERMS IN TCO

Standard Business Terms are regulated by TCO between articles of 20 and 25 for the first time in Turkish law.

According to articles 2 and 7 of the Code of Enforcement, these new provisions in TCO concerning Standard Business Terms are also applied to the printed (standard) General Loan Agreements concluded before 01.07.2012 under the circumstances where there are terms within these agreements, which can be considered as Standard Business Terms.

According to the prevailing opinion, the provision stating that "*the terms in the standard business contracts which are unfamiliar to the nature of the agreement, and the characteristic of the matter shall be regarded as unwritten*" (art. 21/II of TCO) should also be taken into consideration in printed surety contacts, which were previously prepared by one party in order to be used in several future contracts, and thus considered as standard business terms.[17]

According to article 20/I of TCO: *"Standard business terms are the terms in preprinted forms which are prepared by one of the parties alone, and submitted to the other party in order to use them in several future contracts with similar characteristics. The scope, place, type of the font used, and definition of these terms carry no importance."*

[16] **Reisoğlu**, Kefalet, p. 329-330.
[17] **Reisoğlu**, Kefalet, p. 75.

The provisions relating to suretyship that are set forth in the appendix of the General Loan Agreements can also be regarded as Standard Business Terms.

Financial companies, and banks will still meet the obstacle prescribed by article 21/II of TCO which states that "*the terms in the standard business contracts which are unfamiliar (unexpected and unpredictable) to the nature of the agreement, and the characteristic of the matter shall be regarded as unwritten*" even if the maximum amount, date of the suretyship, and the phrase of "joint surety" are indicated in standard General Loan Agreements. Swiss Federal Court has been enforcing the rule of "*being unexpected*" for many years by reviewing standard business terms.

Provisions in a surety contract, which ignore the accessory feature of suretyship, and compel the surety to accept the conditions, which are severer than those that the main debtor have, should be regarded as unwritten.

Although the party who sets the terms in the standard form contracts usually gives the other party the opportunity to learn the content of these standard business terms, and warns him or her in this regard. Most of the time the other party accepts these terms without reading or examining them properly (global acceptance). Hence, as in § 305c of the German Civil Code (BGB), a second review applies, and unexpected or unfamiliar terms submitted to the other party would no longer be included in the contract. Article 21/II of TCO, therefore, stipulates that terms in the standard business contracts, which are unfamiliar to the nature of the agreement and the characteristic of the matter, are regarded as unwritten. These terms would be regarded as unwritten, even if the party who prepared them gived the other party the option to learn their contents in the beginning, and warned him or her in this regard. Thus, as in § 305c of German Civil Code, unexpected and unfamiliar terms should not be included in the contract.[18]

"Unfamiliar" and "unexpected" terms in the General Loan Agreements are *especially* as follows:

- Provisions which give the bank the right to terminate the agreement, and to close the loan account at any time without giving any reason
- Provisions relating to interest rates
- Provisions stating that books, and records of banks are evidences

[18] **Arif Kocaman**, "Bankaların Tacir ve Sanayicilerle Yapmış Oldukları Genel Kredi Sözleşmelerindeki Genel İşlem Şartlarının hukuki Açıdan Değerlendirilmesi ve Çözüm Önerileri", *Ünal Tekinalp'e Armağan,* V. I, İstanbul 2003, p. 1100.

- Provisions stating that the main debtor, and the sureties are not able to raise the plea of jurisdiction
- Provisions stating that making the loan due and payable does not cause the termination of the agreement

In a decision of court of first instance, it was accepted that provisions in TCO relating to standard business terms should be applied to the General Loan Agreements concluded before 01.07.2012.[19] The court of first instance decided to reject the request by stating that the loan agreements (dated 17.11.2006 and 18.10.2007) were in contrary with articles 20, 21, 22, 23, 24 and 25 of TCO relating to standard form contracts because the loan agreements were formed in preprinted forms by a single party without negotiating the terms, and the sureties signed the agreements without knowing and accepting the conditions.

Similarly, in another lawsuit which was discussed by 11th Chamber of the Turkish Court of Appeal dated 22.10.2012 and numbered 2012/14301 E., 2012/16818 K, the inferior court decided to reject another request by stating that articles 20-25 of TCO relating to standard business terms were mandatory, and when interpreting these provisions together with articles 2, 3, 4 and 7 of the Code Enforcement, the provisions of TCO should be applied even when the agreements were concluded before TCO.

According to article 27 of the TCO, agreements that are contrary to mandatory rules, public order or individual rights are "null and void". Regarding these terms as mandatory on one hand, yet on the other hand considering that they are not associated with the public order and morality would be a dichotomy. Therefore, it will serve the purpose anticipated from articles between 20 and 25 of TCO relating to the standard business terms only if the future precedents will be in conformity with the above-mentioned decisions.

The provisions of TCO relating to the standard business terms are associated with the public order and morality as they are also mandatory. According to *von Tuhr***,** the general provisions of law of obligations target at the interests of the parties, not the public interest. The rules in law of obligations that are generally not related to the public order are not mandatory**.** However, some rules in law of obligations are mandatory because agreements, which are contrary to these rules, also violate public order, morality and individual rights. These mandatory rules aim to protect socially and economically disadvantaged groups, and to prevent individual rights from being restricted

[19] The decision of reversal of 11th Chamber of the Turkish Court of Appeal dated 22.10.2012, and numbered 2012/14301 E., 2012/16818 K. (**Bilgen**, p. 731).

or totally ignored, and thus to secure the public order.[20] Therefore, the provisions relating general business terms are formulated in TCO within the framework of this principle, and aim at protecting socially and economically disadvantaged groups *vis-a-vis* banks, or insurance companies etc., and hence achieving the notion of contractual justice.

The function of the public order prescribed by article 27 of TCO is to secure some "principles", e.g. the freedom of contract, causality, *bona fide*s, protection of individual rights etc., and "legal institutions", e.g. matrimony, private ownership, testament, competition etc. which also form the basis of a law system.[21]

Thus, the term "public order (*ordre public*)", in a broader sense, secures "the law system" as a whole (*die gesamte Rechtsordnung*). Within this framework, violation of "supplementary rules" can be taken into consideration alongside with the violation of "the mandatory rules." [22] The standard business terms are provisions which violate "the supplementary rules" which serve the purpose of balancing the interests of parties in a contract, and legal norms protects the vulnerable party by implying mandatory rules and thus tries to rebuild the contractual justice. The principle of "*interpreting standard business terms against the party who drafted the contract (contra proferentem) when the terms are ambiguous or have controversial meanings*" is set forth in article 23 of TCO, and aims at balancing the contractual justice between the parties.

Before the provisions concerning standard business terms were accepted by TCO, the public order criterion had been used in Turkey. In Germany, public order was not regulated as a limitation to freedom of contract, and § 242 of German Civil Code *bona fides* was used. In Turkey, on the other hand, public order has always been regulated as a limitation to freedom of contract, and public order has been used when deciding as regards to standard business terms.[23]

According to article 25 of TCO "*provisions that are against the other part or aggravate his or her position contrary to good faith shall not be included in standard business terms*". Although article 25 provides protection within the framework of good faith, standard business terms are still associated with the public order. Moreover, the criteria of public order and morality will be in the centre when unfamiliar and unexpected provisions involved.

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20 **Tuhr/Edege,** Borçlar Hukuku, V.1-2, Ankara 1983 & 31/II.

21 **Stockar,** Zur Frage der richtlicher Korrektur von Standvertraegen nach Schweizerische Recht, Basel-Stuttgart 1971, p. 70-71.

22 **Stockar,** 60 pp.

23 **Yeşim Atamer**, Sözleşme Özgürlüğünün Sınırlandırılması Sorunu Çerçevesinde Genel işlem Şartlarının Denetlenmesi, V. 2, İstanbul 2001, p. 30.

On the other hand, article 7 of the Code of Enforcement sets forth that the provisions in TCO regarding the public order and morality, article 76 concerning interim payments, article 88 concerning interest rates, article 120 concerning failure to meet a financial obligation (default), and article 139 concerning hardship on performance are also required to be applied to ongoing lawsuits. However, what could be the intention of the lawmaker when referring public order and morality alongside with the other situations enumerated in article 7 (interim payments, interest rates, default, and hardship)? If the provisions concerning suretyship and standard business terms were not associated with the public order and morality, then what else would be? Is there a difference between the other situations enumerated in article 7, and suretyship or standard business terms? As far as we concern, there is none. Because the principle of legal certainty is not being applied in private law as strict as in public law. Therefore, it not possible to exclude the situations which are not explicitly enumerated by the law from the concept of public order and morality. Besides, if this were the motive, the lawmaker would not regulate some norms as being retroactive. Article 7 of the Code of Enforcement quoted neither suretyship nor standard business terms explicitly; however, this does not mean that article 2 of the Code of Enforcement regarding rectoactivity has been limited. Article 7 of the Code of Enforcement states that norms regarding the public order and morality are also applied to ongoing lawsuits.

IV) REVIEW

1) According to articles 2 and 7 of the Code of Enforcement, *the norms which are related to the public order and morality* can be applied retroactively.

2) The norms relating to suretyship and standard business terms should be applied to the ongoing lawsuits because article 7 of the Code of Enforcement explicitly states that the norms relating to the public order and morality are also applied to the ongoing lawsuits. Thus, articles 7 of the Code of Enforcement should be interpreted alongside with article 2 of the Code of Enforcement, and the meanings of these articles should neither be narrowed nor abolished.

3) Norms relating to the form of the suretyship, provisions aiming at protecting surety and unfamiliar (unexpected and unpredictable to the nature of the agreement, and the characteristic of the matter) standard business terms are all considered as the norms relating to the public order and morality. As there are some opinions stating that the written form aims at protecting surety, we believe that provisions regarding public order aims at protecting family and children. Indeed, the requirement of the consent of the spouse confirms this idea. The same is also true when it comes to the provisions concerning joint sureties. Regarding the standard business terms, on the other, the same is also true without hesitation as the party who does

not prepare the terms and who is economically disadvantaged has nothing but to accept or decline these terms. This party has no other alternative. So, this must definitely be related to the public order and morality.

4) Even though the Court of Appel has stated otherwise, it is promising that the courts of first instance are in the opinion to apply these norms in ongoing lawsuits. Before TCO, there were no provisions regarding surety and standard business terms, so the necessary protection had to be provided by the endeavors of the doctrine and the precedent. Yet, the necessity of protection for ongoing lawsuits still remains even that TCO regulates these provisions now. Moreover, the balance of interests must be given the utmost importance when applying these provisions retroactively. Furthermore, substantial justice must also be achieved rather than implying general and abstract rules. These provisions should also be applied retroactively for the purpose of justice by taking into account the party who is economically disadvantaged, and needs protection thereof. By this means, the balance between protecting the weak by virtue of the public order and morality, and the legal certainty could be maintained.

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BIBLIOGRAPHY

Altop, **A.,** "Türk Borçlar Kanunu Tasarısı'ndaki Genel İşlem Koşulları Düzenlemesi", *Prof. Dr. Ergon Çetingil ve Prof. Dr. Rayegan Kender'e Armağan*, İstanbul 2007.

Atamer, **Y.,** Sözleşme Özgürlüğünün Sınırlandırılması Sorunu Çerçevesinde Genel işlem Şartlarının Denetlenmesi, V. 2, İstanbul 2001.

Bak, **B.,** Fikri Haklarda Sözleşmeden Cayma, Ankara 2016.

Bak, **B.,** "The Right of Withdrawal in Distance Contracts under Law on Consumer Protection Numbered 6502", *Law & Justice Review*, V. 11, 29 February 2016.

Bilgen, **M**., Öğreti ve Uygulamada Kefalet ve Yargılama Hukukuna İlişkin Uyuşmazlıklar, Ankara 2013.

Honsell/Vogt/Wiegand (Pestalozzi), Basler Kommentar, Obligationenrecht I, Art.1-529, 3. Ed., Basel/Genf/München 2003.

Kocaman, **A.**, "Bankaların Tacir ve Sanayicilerle Yapmış Oldukları Genel Kredi Sözleşmelerindeki Genel İşlem Şartlarının hukuki Açıdan Değerlendirilmesi ve Çözüm Önerileri", *Ünal Tekinalp'e Armağan,* V. I, İstanbul 2003.

Kocaman, **A**., "Kefalet Hukukunda İrade Özgürlüğünün Sınırları, Alman federal

Anayasa Mahkemesinin 19.10.1993 tarihli kararı ile bu çerçevede gelişen Alman Federal Temyiz Mahkemesinin yeni içtihadı ve bunun İsviçre/Türk Hukuku açısından değerlendirilmesi", *Ticaret Hukuku ve Yargıtay Kararları Sempozyumu*, XV, 5 1998.

Özen, **B**., Kefalet Sözleşmesi, İstanbul 2012.

Reisoğlu, S., Türk Hukukunda ve Bankacılık Uygulamasında Kefalet, Ankara 1992.

Reisoğlu, **S**., Türk Kefalet Hukuku, Ankara 2013.

Stockar, Zur Frage der richtlicher Korrektur von Standvertraegen nach Schweizerische Recht, Basel-Stuttgart 1971.

Tuhr/Edege, Borçlar Hukuku, V.1-2, Ankara 1983.

THE PROBLEM OF LONG-TERM SUPPLY CONTRACTS CONCLUDED WITHIN THE EUROPEAN ENERGY MARKETS

Avrupa Enerji Pazarında İmzalanan Uzun Dönemli Enerji Tedarik Sözleşmeleri Sorunsalı

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Abstract

With the adaptation of a liberalisation policy within the European energy markets, sector-specific market regulatory rules are enacted in order to regulate and open these markets to competition. The main goal of these rules is to create transparent, sustainable and competitive energy markets with the aim of providing affordable prices for consumers. However, there are still long-term supply contracts concluded between energy producers and wholesalers and/or industrial customers. Although these kinds of contracts provide economic advantages to the parties, they may have a negative impact on the liberalisation process of the energy markets. At this point, the European Union Competition Commission gets involved in the application of long-term contracts and stars competition investigations about them with the recognition of their distortive and restrictive effect on competition as well as market regulation. However, the decisions of the Competition Commission do not seem unambiguous and uniformly caught. Ultimately this leads to legal uncertainty. The purpose of this article is to examine these decisions and to create a formula that outlines the way in which long-term supply contracts are handled.

Keywords: Competition law, European energy markets, Long-term energy supply contracts, the European Commission decisions

Özet

Avrupa Birliği bünyesinde enerji pazarında serbestleşme politikalarının güdülmeye başlanması ile birlikte pazarın liberalleşmesi ve rekabete açılması amacı ile düzenlemeler hayata geçirilmiştir. Bu düzenlemelerin ortak amacı şeffaf, sürdürülebilir, rekabete açık bir ortak enerji pazarı yaratarak tüketicilere uygun fiyatlı enerji sağlanmasıdır. Bununla birlikte enerji pazarında özellikle enerji üreticileri ile toptancıları ve/veya sanayi tüketicileri arasında imzalana gelen uzun dönemli enerji tedarik sözleşmeleri mevcudiyetini korumaktadır. Bu sözleşmeler iktisadi olarak taraflarına bir takım avantajlar sağlamakla birlikte yapılan düzenlemelerde belirtilen hedeflere ulaşılması önünde engel oluşturma niteliğine sahiptir. Bu noktada devreye Avrupa Birliği Rekabet Komisyonu girmekte ve uzun dönemli enerji tedarik sözleşmelerini Rekabet Hukuku açısından incelemektedir. Zira bu tip sözleşmeler hem pazardaki rekabeti engelleyici, bozucu ve kısıtlayıcı sonuçlara neden olabilmekte hem de düzenleyici kuralların istenilen etkiyi doğurmasını sekteye uğratabilmektedir. Ancak, verilen kararlarda yeknesak yakalanamamıştır. Bu durum ise hukuki belirsizliğe neden olmaktadır. Bu makalenin amacı Avrupa Birliği Rekabet Komisyonu'nun verdiği kararları inceleyerek uzun dönemli enerji tedarik sözleşmelerinin ele alınış biçimini gözler önüne koyan bir formül oluşturmaktır.

Anahtar Kelimeler: Rekabet Hukuku, Avrupa enerji pazarı, uzun dönemli enerji tedarik sözleşmeleri, Avrupa Komisyonu kararları

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I. Introduction

In the European energy markets, a top-down reform process to initiate a competitive market structure has been pursued by the European Union since the early 1990s. The goal of the reforms was to create a single competitive market by removing national monopolies and introducing competition, supposedly in order to lead to better services for lower prices.[1] However, in practice, long-term supply contracts remain a pervasive characteristic of the electricity and gas markets in most Member States, as the liberalisation process has not been successful in changing many of the traditional trade patterns.

The current market liberalisation and harmonisation among the European markets which were refined in order to end the monopoly era may be pointless if incumbents continue to engage in long-term supply agreements to control the markets.[2] These agreements frequently create anti-competitive foreclosure effects and these effects are likely to be worsened in energy markets where a monopoly supplier was in place for decades. On the other hand, there is also growing acceptance that their positive impacts on market functioning makes them desirable. As a result, there is a tension between the pro- and anti-competitive effects of these contracts. The impacts of long-term supply contracts are thus ambiguous, and there is a need to balance the efficiency-enhancing effects for individual contracting parties with some possible side effects on competition in the markets.[3]

Despite their importance in the energy markets, long-term supply contracts are hardly mentioned within the gas and electricity liberalisation packages.[4]

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1 A. Cretiand and B. Villeneuve, 'Long-term Contracts and Take-or-Pay Clauses in Natural Gas Markets' (2004) Vol.13 Energy Studies Review 75, p.77

2 A. Neuman and C. von Hirschausen, 'Long-Term Contracts and Asset Specificity Revisited: An Empirical Analysis of Producer–Importer Relations in the Natural Gas Industry' (2008) Vol.32 Review of Industrial Organisation 131; J-M Glanchant and F. Leveque, 'Electricity Internal Market in the European Union: What to Do Next?' in J-M Glanchant and F. Leveque (eds.) *Electricity Reform in Europe: Towards a Single Energy Market* (Edward Elgar Publishing 2009)

3 A. De Hauteclocque, *Market Building through Antitrust: Long-term Contract Regulation in EU Electricity Markets* (Edward Elgar Publishing Limited 2013), p. 73

4 Article 37(1)(l) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L 211/55; Recital 37,42 and Article 32(3) , 41(1)(l) of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L 211/94. Recital 42 of the gas Directive highlights the importance of long-term contracts in the gas sector, and states that such contracts should be maintained as an alternative way of supplying gas for undertakings unless they are not compatible

Therefore, guidance for them must be sought in case law. The current energy cases handled by the Commission indicate that there is significant uncertainty about the competitive/anticompetitive effects of long-term supply contracts. However, in addition, the decisions on the contracts themselves seem rather ambiguous in terms of a procedural aspect regarding the informal/formal antitrust settlements pursued. This uncertainty will be addressed by showing how the Commission tends to investigate these contracts by taking into account competition policy on the one hand and by considering regulatory objectives within energy sectors on the other.

Prior to the first regulatory Directives, there were few antitrust cases over long-term energy supply agreements. In most of these cases the subject matter was the supply of energy on an exclusive basis by power producers to national incumbents. The Commission concluded these investigations by limiting the duration of the contracts. These decisions did not display any insight into the methodology used for the analysis of the foreclosure effect of the contracts. On the other hand, in the early post liberalisation period, the decisions made by the Commission indicated mainly anticompetitive effects of the contract clauses, and also, possible economic and non-economic efficiency gains such as investment and security of supply in terms of steady availability of the primary energy sources. However, a clear model for assessing long-term supply contracts in the context of liberalised energy markets was still missing. Nevertheless, a new series of cases concerning domestic long-term supply contracts across energy industries started to give some hints regarding building up a methodological framework for the analysis of long-term supply contracts.

The aim of this article therefore is to indicate the ambiguous effects of long-term supply contracts from an economic point of view in order to point out the importance of carrying out a case-by-case analysis of them during antitrust investigations. Also, the article aims to build up a clear methodology from the decisions of the Commission regarding these contracts. Since this methodological clarification will shed light on substantive analyses adopted by the Commission the article will also provide a prescription for market operators and national competition authorities for the assessment of agreements, in particular regarding ambiguity in the economic structure of the contracts. The article is divided into two sections in order to explore both the economic side of long-term supply contracts and the legal side of them from the competition policy point of view. Thus, the first section will explore

with EU competition law. Moreover, the Directive states that its provisions should not prevent the conclusion of long-term contracts as long as they comply with the European competition rules.

the negative and positive effects of the contracts from an economic point of view. In the second section, energy cases will be analysed in order to show the assessment of long-term supply contracts from a legal perspective. Finally, the section will attempt to create methodological guidance through the case law.

II. The Appraisal of Long-term Supply Agreements from an Economic Perspective

The objectives of EU competition policy can be briefly explained as the promotion of social welfare with an explicit bias in favour of consumer welfare, and the creation of an integrated single market.[5] These objectives may constrain the freedom of market players in the short-term so as to reach higher social value over a period of time.[6] This is similar to the liberalisation of the energy markets where the commercial activities of pre-liberalisation incumbents should be restricted to facilitate environmentally sustainable and secured energy for affordable prices for everyone, i.e. to promote competition and to increase social welfare.[7] However, the liberalisation process may pose a challenge for the Commission, as it needs to balance the likely efficiency gains deriving from the engagement of the market players in long-term supply contracts and the potential detrimental effects of these contracts on the functioning of the market. Within the next section of the article, there will be an assessment of the economic analyses of long-term supply contracts, considering both the negative and positive effects of the contracts on individual market players and society as a whole.

A. Negative Effects of Long-term Supply Contracts: Market Foreclosure and Decrease in Wholesale Liquidity

One of the main problems with long-term supply contracts is the risk of market foreclosure which hinders market entry by market players that are probably more efficient. Market foreclosure may result from the possible strategic aim of one or several operators to limit the ability of potential competitors to enter either upstream or downstream markets. This strategic aim can be achieved in many different ways, including signing up exclusive

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5 A. Jones and B. Sufrin, *EU Competition Law* (5th edn., Oxford University Press 2014), pp. 33-54

6 J. M. Glachant and A. De Hauteclocque, 'Long-Term Energy Supply Contracts in European Competition Policy: Fuzzy not Crazy' (2009) EUI Working Papers-Robert Schuman Centre for Advance Studies <http://www.eprg.group.cam.ac.uk/working-paper-eprg0919/> accessed 21 April 2011, p. 2

7 D. M. Newbery and M. G. Politt, 'The Restructuring and Privatisation of Britain CEGB – Was it Worth it?' (1997) Vol.45 The Journal of Industrial Economics 269, p. 271; Commission, Communication from the Commission, Progress towards Completing the Internal Energy Market, COM(2014) 634 final

long-term supply contracts.[8] In a situation where a significant part of the demand is tied for a long time at a wholesale level an output foreclosure might occur. On the contrary, if a generation market is highly concentrated input foreclosure may occur and prevent market entry downstream. Therefore, long-term supply contracts may constitute a barrier to entry and result in a negative effect on competition in the upstream and downstream markets.[9] For example, in the electricity markets, long-term supply contracts concluded within Member States may lead to market foreclosure for potential electricity generators (output foreclosure) as well as potential traders (input foreclosure) since these contracts will reduce the number of open positions that need to be closed by wholesale trading. In the gas markets, on the other hand, existing import contracts cover the production from almost all of the existing gas fields from which gas can be transferred to Europe by pipeline (input foreclosure). Such contracts may make it difficult for new entrants to obtain access to adequate supplies of gas. Thus, upstream long-term supply contracts do not allow for effective *ex-ante* competition in the gas markets.[10] Since the foreclosure of markets is very likely to be a result of the combination of long-term supply contracts and a monopolistic or oligopolistic market structure, most of the investigations carried out by the Commission into long-term supply contracts have been based on market foreclosure, as will be seen in the second section of the article.

The Sector Inquiry highlights certain negative effects of long-term supply contracts signed within a country on spot market development particularly in electricity markets. As they are likely to affect the volume that is regularly traded in spot markets they may dry out these markets. The Sector Inquiry states that long-term supply contracts diminish the volume to be traded in a spot and forward market(s) within a Member State, which reduces the liquidity in the wholesale market(s). The absence of competitive spot markets is detrimental to social welfare in two ways. First, a liquid and competitive spot market leads to market integration and price formation based on the supply and demand for electricity.[11] The market-based price formation

8 T. G. Krattenmaker and S. C. Salop, 'Competition and Cooperation in the Market for Exclusionary Rights' (1986) Vol.76(2) The American Economic Review' 109, p. 114; K. Talus, *Vertical Natural gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law* (Kluwer Law International 2011) p. 73

9 Glachant and Hauteclocque, *supra* n 6, 3-6

10 DG Competition Report on Energy Sector Inquiry 10 January 2007 SEC(2006) 1724, para. 63-75

11 Energy Sector Inquiry, *supra* n 10, para.377; Within the context of this thesis, liquidity means a level of market activity that ensures that a counter-party can generally be found to enable the buying or selling of gas in sufficient volumes to meet a commercial need, at competitive prices.

reduces the commercial risk by enabling market players to predict and manage the potential risks, which facilitates market entry. Second, a lack of liquidity in spot markets causes volatility, which encourages market players towards vertical re-integration or long-term contracting. As a result, liquid spot markets reduce the market risk for market players and promote market entry and thus competition in the markets, which promotes social welfare.

Other than the duration and exclusivity of long-term supply contracts, some provisions such as territorial/use restrictions concluded within the contracts pose similar anti-competitive foreclosure effects and endanger market integration. These clauses artificially create multiple dominated markets and increase switching costs through market compartmentalisation, thereby impairing the current market building efforts of the EU.[12] In addition, they reduce competition intensity in the downstream market.[13] Long-term supply contracts concluded between energy producers and wholesalers in the gas markets are mostly subject to competition investigations due to the anticompetitive contract clauses, as will be seen in the case law section. Moreover, long-term supply contracts signed between gas suppliers and end-customers such as large industrial users may include a use restriction, which hinders the latter from reselling gas to the market. Such a restriction has an evident negative impact on overall market liquidity.[14]

B. Positive Effects of Long-term Supply Contracts

Despite the negative effects that long-term supply contracts may have under some circumstances, they can be useful in particular situations. Furthermore, they have various positive effects that are likely to help realise efficiencies and these may offset the possible negative effects.

1. Limitation of Double Marginalisation, Prevention of Abuse of Market Power, Facilitation of Market Entry

Long-term supply contracts may have a positive impact on consumer welfare by limiting double marginalisation and thereby decreasing final energy prices. Double marginalisation may occur to the detriment of consumers when upstream and downstream market players have their own market power.[15] Both upstream and downstream firms want to maximise their

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12 J. Faull and A. Nikpay, *The EC Law of Competition* (2nd edn., Oxford University Press 2007) para. 12.174

13 *Ibid* para. 12.189

14 Energy Sector Inquiry, *supra* n 10, para.377

15 S. Bishop and M. Walker, *The Economics of Competition Law* (3rd edn., Thomas Reuters Limited 2010), pp. 187-211

profits by choosing a monopolistic mark-up over their own costs. This profit maximisation increases the final price of the product to more than it would be if instead the upstream and downstream firms maximised their joint profit under a vertically integrated structure, since the final price decision would be taken with only a mark-up over the total cost. However, different types of vertical restraints such as quantity fixing can be instruments to control this vertical externality.[16] As a consequence, in the presence of market powers at both levels (upstream and downstream) of the markets, such as electricity and gas, long-term supply contracts might contribute to decreasing prices and increasing efficiencies by preventing the double marginalisation problem if the contracts include certain vertical restraints.[17]

Besides, long-term supply contracts may bring some advantages for individual market players such as price and quantity risk reductions, if the contracts are sufficiently long and cover sufficiently high volumes, as will be analysed below.

2. Decrease in Transaction Costs, Improvement in Risk-Sharing Mechanism, and Encouragement to Invest

One of the main advantages of long-term supply contracts for market players is that they hedge price and quantity risks and therefore they may facilitate investments.[18] During the monopoly era, reliability and investment were guaranteed through vertical integration, but in return there was a hidden cost for society.[19] Yet, with the liberalisation of the energy markets, risk-averse investors seem to under-invest in generation capacities in electricity markets, as a result of under-developed spot markets.[20] This is because the illiquid and unstable spot markets do not enable firms to sink their fixed cost investments based on reliable investment signals. This is the fact for European

16 Commission Notice Guidelines on Vertical Restraints SEC(2010) 411 Final, para. 106-109

17 L. Onofri, 'Electricity Market Restructuring and Energy Contracts: A Critical Note on the EU Commission's NEA Decision' (2005) Vol. 20 European Journal of Law and Economics 71, p.78

18 A. Boosm and S. Buehler, 'Restructuring Electricity Markets When Demand is Uncertain: Effects on Capacity Investment, Prices and Welfare' (2007) CIE Discussion Paper 2007-09 <http://www.econ.ku.dk/cie/dp/dp_2010/2007-09.pdf/> accessed 23 June 2011; For an opposing argument please see S. Buehler, A. Schmutzler and M. A. Bezh, 'Infrastructure Quality in Deregulated Industries: Is there an Underinvestment Problem?' (2004) Vol.22(2) Journal of Industrial Organisation 253, pp. 265-267; P. L. Joskow, 'Vertical Integration and Long-Term Contracts: The Case of Coal-Burning Electric Generating Plants' (1985) Vol.1(1) Journal of Law, Economics, & Organization 33, pp. 33-35

19 J. Stern, 'UK Gas Security: Time to Get Serious' (2004) Vol.32 Energy Policy 1967, p. 1970

20 K. Neuhoff and L. De Vries, 'Insufficient Incentive for Investment in Electricity Generations' (2004) Vol.12 Utilities Policy 253, pp. 253-256

spot markets, which are still under-developed. As a result, energy companies tend to make more durable vertical arrangements such as long-term supply contracts, since these contracts increase certainty and provide an insurance device, which reduces the risks for market operators.[21]

By the same token, according to transaction cost theorists, long-term supply contracts can help to minimise transaction costs that are linked to the uncertainty, economise on significant asset specific investment.[22] These theorists argue that if a long-term agreement between a seller and a buyer involves a relationship-specific investment, the contracting parties may have a tendency to benefit from circumstances that may arise in the future such as fluctuations in supply or demand by increasing the costs or reducing the revenues obtained by the other party.[23] This uncertainty or 'opportunistic behaviour' can be eliminated through long-term contracts, as they may provide flexibility in terms of price and quantity via contract provisions such

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21 D. Finon and Y. Peres, 'Investment Risk Allocation in Restructured electricity Markets: the Need for Vertical Arrangements' (2008) Larsen Working Paper No.12 <http://www.gis-larsen.org/fr/travaux/working-paper/investment-risk-allocation-in-restructured-electricity-markets/> accessed 11 May 2011, pp. 16-23

22 O. E. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (Masmillan Publishing Co.,Inc. 1975); B. Klein, R. G. Crawford and A. A. Alchian, 'Vertical Integration, Appropriable Rents, and the Competitive Contracting Process' (1978) Vol.21 Journal of Law and Economics 253, pp. 253-255; P. L. Joskow, 'Contract Duration and Relationship-Specific Investments: Empirical Evidence from Coal Markets' (1987) Vol.77 The American Economic Review 168, pp. 184-185

According to Williamson, a dilemma in making contracts is that, on the one hand, it is technically impossible and prohibitively costly to make complete contingent claims contracts by considering each possible circumstance that may arise in the future. On the other hand, if a contract is seriously incomplete, the diverged interests of the contracting parties will lead them to engage in individually opportunistic behaviour and joint losses. Therefore, Williamson argues that vertical integration can be a better solution to possible opportunistic behaviours of contracting parties, as vertical integration harmonises interests and permits an efficient decision process to be utilised. O.E. Williamson, 'The Vertical Integration of Production: Market Failure Consideration' (1971) Vol.61 American Economic Review 112, pp. 112-115

However, it is also argued that contracts that are incomplete, in the sense that they do not specify the obligations of each party in every possible state of nature, yet, which have certain provisions, can minimise the problem of opportunistic behaviours of the parties. M. Hviid, 'Relational Contracts, Repeated Interaction and Contract Modification' (1998) Vol.5 European Journal Law and Economics 179, pp. 179-185; M. Hviid, 'Long-term Contracts and Relational Contracts' in B. Bouckaert and G. De Geest (ed) *The Encyclopaedia of Law and Economics Vol. III* (Edward Elgar 2000) p. 46

23 Joskow *supra* n 18, 168-175; A. Neumann and C. Hirschhausen, 'Long-term Contracts for Natural Gas Supply- An Empirical Analysis' (ISNIE Conference, Barcelona, 2005) Also see Commission Notice Guidelines on Vertical Restraints SEC(2010) 411 Final, para. 106-109

as take-or-pay,[24] price indexation[25] or redetermination clauses.[26] Therefore, long-term contracts with flexible contract conditions may help to solve the problem of counterparty credibility.[27] The price and quantity risks that parties face depend on their positions in the supply chain and the technology they use. Long-term contracts then enable the parties to allocate the risk to the party that is best able to manage it.[28]

Regarding the market positions of the contracting parties, long-term supply contracts display different results in terms of surplus and risk management depending on the contract's characteristics.[29] For instance, tacit renewal and exclusive purchase clauses may decrease the transaction costs for both parties, whereas reduction clauses allow the buyer to reduce the volume that must be bought under the terms of the contract in case the supplier starts reselling in its commercial area; this protects the buyer's market share. Volume clauses including rebates may reduce the price for the buyer. Take-or-pay clauses may provide enough flexibility to avoid a breach and thus expensive renegotiation of contracts.[30] Thus incomplete long-term supply contracts might be the most efficient governance structure for the contracting parties, as they provide them with flexibility regarding renegotiation and solve the counterparty credibility problem. Yet, at the same time, they may result in market foreclosures due to certain characteristics of these contracts, as will be seen in the next section.

Regarding the technology involved in energy markets, the advantages of long-term supply contracts can be observed in the longer term. If long-term

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24 Take-or-pay provisions force a buyer to pay for energy subject to a long-term contract regardless of the delivery of it and even if he does not purchase any more. In this way, possible opportunistic behaviour by the buyer resulting from a decrease in demand can be prevented. In other words, take-or-pay provisions allocate risks related to the quantity of energy sold to the buyer. If the buyer purchases less than the contractual minimum quantity during each period, he is obliged to pay for the shortfall in the full contractual price, or some proportion, for instance 90% of the contractual prise, pursuant to the provisions of the contract.; S. E. Masten and K. J. Crocker, 'Efficient Adaptation in Long-term Contracts: Take-or-pay Provisions for Natural Gas' (1985) Vol.75 The American Economic Review 1083, p, 1085; G. Coop, 'Long-term Energy Sale Contracts and Market Liberalisation in New Member States- Are They Compatible?' (2006) Vol.2 International Energy Law & Taxation Review 64, pp. 64-69

25 In such contracts an initial price constitutes a floor for the value of the contracts. Besides, this initial price changes as a result of price escalators, like pre-defined increases per year or oil price index. In those contracts, another clause can be a most-favoured-nation, whereby the price is tied to the highest price paid in the same region.

26 Creti and Villeneuve, *supra* n 1, 79

27 Klein, Crawford and Alchian, *supra* n 22, 253-254

28 Finon and Peres, *supra* n 21, 25-26

29 Glachant, and Hauteclocque, *supra* n 6, 5-6

30 Masten and Crocker, *supra* n 24, 1091

supply contracts are long enough and cover enough volume of commodity they may facilitate market entry and promote market building while spot markets remain under-developed.[31] In electricity generation markets, long-term supply contracts may improve fuel mix diversity by enabling new entrants to invest in base-load technologies with high-fixed costs such as nuclear or coal.[32] As these technologies require high-fixed costs, the price and quantity risks are relatively greater than for other types of electricity generation plants, such as combined cycle gas turbines (CCGT).[33] Therefore, investments in more capital-intensive technologies are more risky for generators, in particular for new entrants, since unstable spot markets do not help them to hedge their risks. In order to make an investment in capital-intensive technologies they therefore need to allocate part of their investment risk to their consumers or suppliers through vertical agreements such as long-term supply contracts.[34] Consequently, the application of long-term supply contracts may encourage potential competitors to invest in high-fixed cost technologies for electricity generation by reducing their risk.

European energy case law could be a significant indicator of the role of long-term supply contracts in facilitating investment in generation capacity. In fact, the *Scottish Nuclear* and *Synergen* cases[35] might be given as examples to show the positive effects of long-term supply agreements in terms of removing the problem of counterparty credibility.[36] As will be evaluated in the case law section, the facilitation of investment in energy generation was recognised as an economic efficiency gain by the Commission.

Up to now the article has discussed the effects of long-term supply contracts from the economic point of view. In the next section, these effects will be analysed. Before that Table 1 will provide a summary of the effects of long-term supply contracts.

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31 D. M. Newbery, 'Competition, Contracts and Entry in the Electricity Spot Market' (1998) Vol.29 RAND Journal of Economics 726, p. 730

32 Finon and Peres, *supra* n 21, 22

33 F. A. Roquea, 'Technology choices for new entrants in liberalized markets: The value of operating flexibility and contractual arrangements' (2007) EPRG 0726 & CWPE 0759 <http://www.eprg.group.cam.ac.uk/wp-content/uploads/2008/11/eprg0726.pdf> accessed 21 April 2011, p.17

34 Neuhoff and Vries, *supra* n 20, p. 255; Finon and Peres, *supra* n 21, 17

35 *Scottish Nuclear, Nuclear Energy Agreement* (IV/33.473) Commission Decision 91/329/EEC [1991] OJ L 178/31; *Synergen* (Case COMP/37732) [2002]; Commission, 'Commission clears Irish Synergen venture between ESB and Statoil following strict commitments' IP/02/792

36 The problem of counterparty credibility can be defined as the risk that each party to a contract takes with regard to the counterparty not fulfilling its contractual obligations.

Table 1: The positive and negative effects of long-term supply contracts

POSITIVE EFFECTS	NEGATIVE EFFECTS
Double marginalisation can be limited through vertical restraints included within the contracts such as maximum resale prices, quantity fixing, and non-linear pricing.	The duration and volume of long-term supply contracts, and contract clauses such as exclusive supply obligations may result in input/output foreclosure.
Relationship-specific investment might be encouraged as a result of the minimisation of transaction costs and the decrease in the hold-up problem and also, in the counter party credibility risk for individual market players.	The European energy market can be compartmentalised by anticompetitive clauses such as territorial/use restrictions included in long-term supply contracts.
Investment in high-fixed cost technologies could be facilitated through the allocation of price/quantity risks, and hedge-price.	The division of Europe into national energy markets may limit the objective of the creation of a single European energy market.
Market entry and competition in the energy markets may be improved as a result of the increase in investment.	If individual market players do not have the ability to effectively negotiate, incomplete long-term supply contracts might facilitate losses for them in the long term.

*Source: Own illustration but expired by A. De Hauteclocque, *Market Building through Antitrust: Long-term Contract Regulation in EU Electricity Markets* (Edward Elgar Publishing, 2013)

C. Analysis of Economic Effects of Long-term Supply Agreements

Although the economic literature on long-term contracts provides useful insights, theoretical ambiguities over the effects of long-term supply contracts remain. In other words, they can be both pro- and anti-competitive. Therefore, the effects of these contracts are highly context specific. This makes it difficult to appraise them from a competition policy point of view. The contracts might, for instance, cause input/output foreclosure, thereby preventing market entry. Yet, at the same time, they may facilitate investment, which may improve competition and encourage market entry. As a consequence, it is hardly possible to conclude that there are 'net pro- or anti- competitive effects' of long-term supply agreements.

However, these effects may vary depending on various factors, namely the market positions of the contracting parties, the structure of the agreement itself, the level of competition in the market, and the general level of vertical integration.[37] Hence, these factors should be taken into account by the Commission in order to explore the competitive effects of these agreements during antitrust investigations. On the other hand, these factors are deficient with regard to indicating either how to measure the efficiencies of long-term supply agreements or how to balance them from a dynamic long-term efficiency perspective.[38] Dynamic efficiency creates an appropriate incentive, in the long-term, for a dominant undertaking to invest in its business, develop new ways of delivering better services and engage in efficiency-enhancing transactions, as the undertaking is allowed to benefit from a restrictive agreement.[39] Therefore, it seems difficult to assign precise values to dynamic efficiencies regarding this existing restrictive agreement.[40] Nevertheless, it might be helpful to consider that the objective of the assessment of these kinds of efficiencies is the same as for static efficiencies: to ascertain the overall impact of the agreements on the consumers within the relevant markets.[41] Apparently, this is a subject of case law, as the Commission needs to consider the negative and positive effects of long-term supply contracts in order to appraise the dynamic or static efficiency gains that may stem from the contracts.

To sum up, long-term supply agreements appear both as barriers to entry and as a solution to the problem of counterparty credibility and a lack of investment.[42] Consequently, it seems reasonable to encourage long-term supply agreements when it is likely that the negative effects will be outweighed by the positive effects. However, this advice may change in less competitive

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37 G. Meunier 'Imperfect Competition and Long-term Contracts in Electricity Markets: Some Lessons from Theoretical Models' in A. De Hauteclocque, J. M. Glachant and D. Finon, *Competition, Contracts and Electricity markets* (Edward Elgar Publishing Limited 2011), p.175

38 Glachant and Hauteclocque, *supra* n 6, 11-12

39 D. L. Rubinfeld, 'Evaluating Antitrust Enforcement: Economic Foundations' in B. E. Hawk (ed.), *International Antitrust Law & Policy: Fordham Competition Law* (Juris Publishing 2009), pp. 457-469

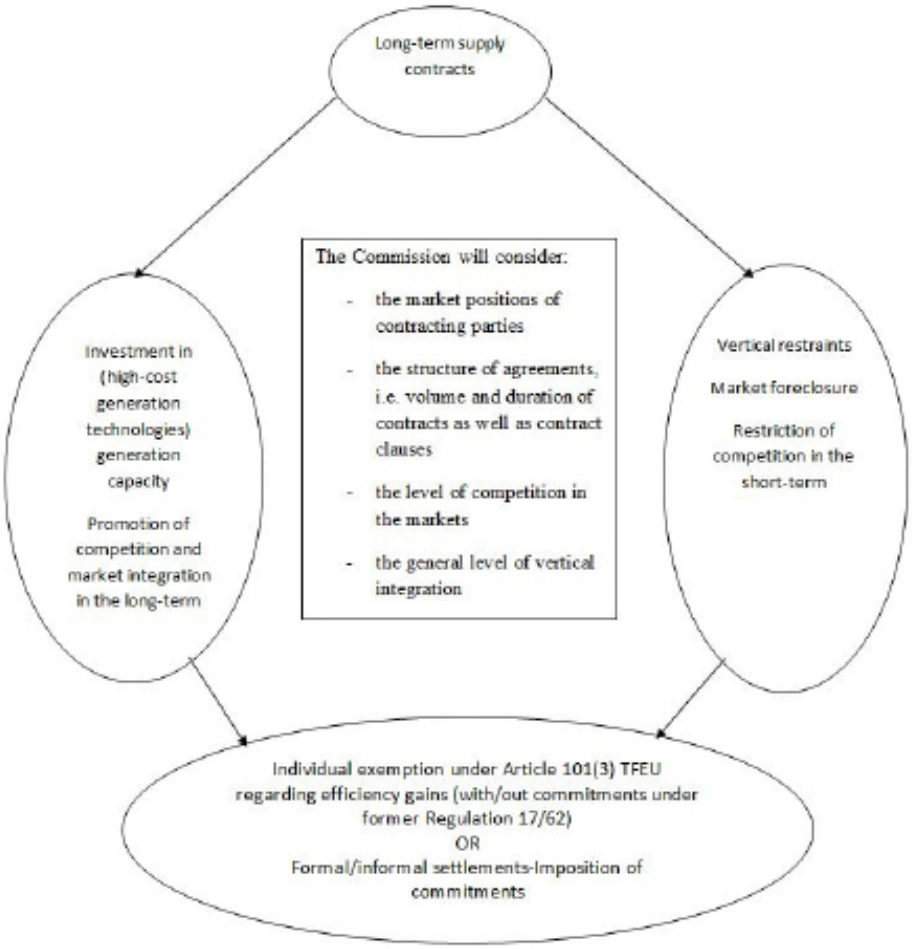
40 Communication from the Commission, Notice Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/97, para.103

41 Even though the static and dynamic efficiency policies seem different, the standard of proof is similar. (Static efficiencies are short-terms gains that flow from a behaviour lowering prices.) In both cases, an efficiency claim must be substantiated so that the nature of the efficiency, the link between the agreement and the efficiency, the magnitude of the efficiency and how it has been or will be achieved can be proved. L. Kjolbye, 'The New Commission Guidelines on the Application of Article 81(3): An Economic Approach to Article 81' (2004) Vol.25(9) European Competition Law Review 566, p. 570

42 Hauteclocque, *supra* n 3, 108

markets, since strong anticompetitive results may derive from the long-term supply agreements in these markets.[43] Thus, it is necessary to examine these agreements individually on a case-by-case basis to see whether long-term supply contracts are anti- or pro-competitive in each case. Diagram 1 below shows certain criteria that are considered by the Commission during antitrust investigations, and the possible outcomes of the assessment of long-term supply contracts.

Diagram 1: The assessment of long-term supply contracts from a competition law point of view



*Source: Own illustration

43 *Ibid*

III. The Appraisal of Long-Term Supply Agreements from a Legal Perspective

As mentioned previously long-term supply contracts may be detrimental to the improvement of effective competition and the development of a single European energy market. On the other hand, they can pose efficiencies for individual market players by having a direct effect on social welfare in terms of encouraging energy investment and the development of new energy resources. Thus, the Commission and other national competition authorities might encounter considerable challenges when assessing the effects of long-term supply agreements. This section will explore how the Commission deals with the problem of long-term supply contracts and reaches solutions to decrease the detrimental effects of them. In addition, the drivers that may shape an antitrust strategy in energy will be observed. First, early case law will be evaluated in order to see the way in which long-term contracts were examined during the monopoly era. Later, certain antitrust investigations that were initiated by the Commission with regard to the possible anticompetitive effects of long-term supply contracts after market liberalisation will be explored in order to develop a methodological model out of these decisions.

A. Early Cases-Monopoly Era

In its early decisions, the Commission, within the limits of the legal environment, aimed to improve the energy markets in terms of security of supply[44] rather than through the introduction of competition or the

[44] Energy supply security can be broadly defined as a concept which is 'geared to ensuring the proper functioning of the economy, the uninterrupted physical availability at a price which is affordable while respecting environmental concerns. Security of supply does not seek to maximise energy self-sufficiency or to minimise dependence, but aims to reduce the risks linked to such dependence'. Commission, 'Towards a European Strategy for the Security of Energy Supply' (Green Paper) COM (2000) 769 Final, pp. 2-3
Three main elements that can be identified from this definition are: access to primary energy sources; a reasonable price; and an uninterruptable energy supply. Furthermore, the definition indicates possible risks that are associated with dependence.
The policy of security of energy supply, from the point of risks related to dependence, can be divided into two groups. The first group includes risks that endanger short-term supply availability such as bad weather, and risks that endanger long-term supply availability such as a failure in major supply sources as well as external relations with energy suppliers. The second group categorises the security measures both on the demand side and on the supply side. While the former involves measures such as energy savings and energy efficiency, the latter deals with measures for guaranteeing access to energy. S. S. Haghighi, *Energy Security: The External Legal Regulations of the European Union with Major Oil and Gas Supplying Countries* (Hart Publishing 2007), p. 9
Long-term supply contracts might result in two different types of efficiency gains on the basis of the policy of security of supply. These are economic efficiencies such as investment

development of integrated European energy markets. Therefore, as can be seen from these decisions, the Commission was happy to let incumbents make exclusive long-term supply contracts for 15 years or so due to the efficiencies that could be gained from these contracts such as improvements in the generation, transmission and distribution of energy as well as the diversity of primary energy sources.

In *Scottish Nuclear*,[45] two long-term contracts concluded between Scottish Nuclear and Scottish Power and Scottish Hydroelectric were notified to the Commission by the former pursuant to the previous Regulation 17/62.[46] The Commission authorised these two long-term supply contracts, although they restricted competition in the market in three ways.[47] First, Scottish Nuclear was not allowed to supply the nuclear electricity produced to any parties other than Scottish Power and Scottish Hydroelectric, unless the contracts between those companies were terminated. Second, an exclusive purchase obligation was imposed on Scottish Power and Scottish Hydroelectric for 74.9% and 25.1% respectively of the production of Scottish Nuclear. Third, the price at which nuclear electricity was purchased was fixed under the contracts and was identical for both companies. In addition, the contracts were signed for an initial period of 30 years.

Despite the anti-competitive features of the contracts, the Commission deemed that the conditions under which an individual exemption for each

in order to facilitate an uninterruptible supply of energy from different energy sources, and non-economic efficiencies that enhance energy supply security without investments. For instance, in *Electrabel*, the case was concerned with an exclusive right granted to Electrabel to supply the distribution company with the electricity required for resale to its final consumers for a 20 to 30-year period. The Commission ended the investigation with final commitments, which were to reduce the duration to 14-years and to gradually decrease the volume of the power supplied. In this case the Commission sought to balance free competition and the principle of security and continuity of supply. See Commission, 'Electrabel: the European Commission obtains satisfaction on the revision of the statutes of mixed intercommunal electricity distribution companies in Belgium' (IP/97/351)

45 *Scottish Nuclear, Nuclear Energy Agreement* (IV/33.473) Commission Decision 91/329/EEC [1991] OJ L 178/31

46 Council Regulation (EEC) No.17 First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 013

47 As will be clarified below, before the modernisation of EU competition law, according to former Regulation 17/62, the contract parties were supposed to notify the Commission of their contract for a negative clearance. The Commission could finalise this notification process in three ways: first, by negative clearance; second, through the application of an individual exemption; and third, by making the contracts invalid. The Commission could also require the parties to modify their contract in order to render it compatible with competition law or to benefit from an individual exemption under Article 101(3) TFEU.

contract under Article 101(3) TFEU could be obtained were satisfied.[48] The objective economic benefit arising from the contracts was the improvement in the generation and distribution of electricity. Also, the second criterion of Article 101(3) TFEU was satisfied through a fair share of the benefit for consumers as a result of the gradual introduction of competition into the energy market. However, the Commission shortened the duration of the contracts from 30 to 15 years. A sufficient timeframe was therefore provided to Scottish Nuclear for long-term planning and necessary adjustments in the new situation after the start-up period. To sum up, the Commission considered an investment in electricity generation as an efficiency gain that outweighed the foreclosure effects of the long-term supply contracts.

In another case, *Jahrhundertvertrag*,[49] through a set of long-term supply contracts, German electricity generating utilities and industrial producers of electricity undertook to purchase a specific amount of German coal in order to produce electricity. The first was a supplementary agreement on the sale of German coal up to 1995, concluded between the General Association of the German Coalmining Industry (GVSt) and the Association of the German Public Electricity Supply Industry (VDEW). The second was a supplementary agreement on the sale of German coal to industrial producers of electricity up to 1995, signed between GVSt and the Association of Industrial Producers of Electricity (VIK). The problems with these contracts were exclusive purchase and supply obligations imposed on the coal and electricity companies who were members of the Associations. The importance of the case stems from an argument that was put forward by the Associations. The argument was that the agreements could not be caught by Article 101 TFEU, as the application of competition rules was precluded by Article 106(2) TFEU[50]

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[48] Article 101(3) TFEU gives the parties to an agreement that is against competition law an opportunity to escape from Article 101 TFEU liability under the following conditions: (1) the agreement will improve the production or distribution of goods or promote technical or economic progress, (2) consumers will have a fair share of the resulting benefit, (3) the anticompetitive restrictions concerned will not be indispensable to the attainment of these objectives, and (4) competition will not be eliminated in the substantial part of the product market.

[49] *Jahrhundertvertrag* (IV/33.151) and *VIK-GVSt* (IV/33.997) Commission Decision 93/126/EEC [1992] OJ L 50/14

[50] Article 106 TFEU: '(1) In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 101 to 109.
(2) Undertakings entrusted with operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks

because the competition rules could prevent the electricity generators and coalmining companies from performing the services of general economic interest[51] assigned by law and the Federal Government for the purpose of safeguarding energy. Therefore, the agreements were not within the scope of the competition rules. However, the Commission deemed that there was an infringement of Article 101 TFEU. In addition, Article 106(2) TFEU was not applicable in the case, since, as long as the application of competition law did not preclude the undertakings entrusted with the operation of the services of general economic interest from performing these services, they were under the scope of the competition rules.[52] Besides, the final decision on the case was in line with the decision given in *Scottish Nuclear* regarding the application of Article 101(3) TFEU. Although the contracts restricted competition among the electricity generators for primary energy resources, the Commission considered that the contract contributed to improving electricity generation and coal production, and safeguarded the procurement of primary energy sources. In addition, the agreements secured the energy supply in the Federal Republic of Germany. Thus, the consumers had a fair share of the resulting benefits.[53]

In other cases, namely *Pego*,[54] *REN/Turbugas*,[55] *Isab Energy*,[56] *Rosen*,[57] *Api Energia*,[58] *Sarlux*[59] the Commission approved the contracts with a condition that their durations should be reduced to 15 years, although no explicit

assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interest of the Community.
(3) The Commission shall ensure the application of the provision of this Article and shall, where necessary, address appropriate directives or decisions to Member States.' Also see Commission 'Green Paper on Services of General Interest' COM(3003) 270 Final, and Commission, 'White Paper on Services of General Interest' COM(2004) 374 Final

51 Services of general economic interest can be defined as economic activities that public authorities identify as being of particular importance to citizens and that would not be supplied if there were no public intervention, for example, transport networks, social services and so on. It has also been stated that to be of a general economic interest a service should be uninterrupted, for the benefit of all consumers in the relevant territory. In addition, there should be continuity, universality and equality, with transparency and affordability. See also R. Whish and D. Bailey, *Competition Law* (7th edn., Oxford University Press 2012), pp. 222-244

52 *Jahrhundertvertrag* (IV/33.151) and *VIK-GVSt* (IV/33.997) Commission Decision 93/126/EEC [1992] OJ L 50/14

53 *Ibid*

54 *Electricidade de Portugal/Pego* (IV/34.598) Commission Decision 93/C 265/03 30 [1993]

55 *REN/Turbogas* (IV/E-3/35.485) Commission Decision 96/C 118/05 [1996]

56 *Isab Energy* (IV/E-3/35.698) Commission Decision 96/C 138/03 [1996]

57 Commission, *XXVIth Report on Competition Policy 1996*, SEC(97)628 final, p.134

58 *Ibid*

59 *Ibid*

explanation about the duration was provided. There was however one exception. In the *Transgas/Turbogas*[60] decision, the Commission approved a 25-year supply contract with a take-or-pay provision concluded between Transgas (a Spanish Power station) and Sonatrach (Algerian gas producer). Here, the longer contract duration was balanced with the facilitation of security of supply resulting from the development of new Algerian supplies. In all these cases the objectives of the Commission were almost the same. They were to facilitate the development of generation technologies, improve electric supply conditions and to develop primary energy sources that had a favourable impact on the environment.

The cases handled by the Commission in the monopoly era imply that the Commission was willing to support the development of generation and supply, and the improvement of security of supply through long-term supply contracts. It was accepted that these efficiencies provided the ability to be exempted under Article 101(3) TFEU. However, none of these cases display a methodological model that was used by the Commission while investigating the long-term supply contracts.

Nevertheless, in the cases handled by the Commission after the liberalisation of the energy markets started, the alleged anticompetitive effects of long-term supply contracts have been addressed. The Commission seems to tend to remove these anticompetitive effects through antitrust enforcement. These differentiations in the substantive appraisal of the contracts and the procedure used in the investigations have resulted from both the market liberalisation and the modernisation of competition law in the EU. The investigations into long-term supply contracts carried out by the Commission since the market liberalisation will be evaluated below.

B. Some Changes in Methodology after Liberalisation Started in the Energy Markets

In this section, decisions given by the Commission will be divided into two groups according to the level of the relevant product markets in which the long-term supply contracts were signed: upstream and downstream cases. However, before analysing the decisions, it is crucial to mention two facts that have caused significant changes in the Commission's approach to energy cases: the liberalisation of the energy markets as well as the modernisation of EU competition law culminating in the enactment of Regulation 1/2003.[61]

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60 *Ibid,* 135

61 Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1; Before the adaptation of Regulation 1/2003, the Commission was given monopoly power to apply the competition rules by Regulation

These steps pose some notable issues.

i.) Before the liberalisation process started, all segments of the energy markets, including generation/importation, and network and supply, were run by national and very often state-owned monopolies. During the 1980s and 1990s, the Commission started to scrutinise long-term supply contracts concluded between energy incumbents with a monopoly power under EU competition law.[62] The decisions made by the Commission regarding long-term agreements in energy are remarkable because they show the Commission's approach to energy cases under different economic structures. The Commission's approach seems to have changed with the market liberalisation.

The first energy regulatory Directives, which were in force between 1996 (1998 for gas) and 2003, aimed to create a partially open market in that the largest consumers were able to choose their suppliers.[63] With the adoption of the second energy package a major step forward was taken to creating a fully open competitive internal market.[64] Finally, in 2009, the third energy package was enacted with the objectives of delivering real choices for all consumers and creating a competitive single energy market in Europe.[65] In addition, the package aimed to create new business opportunities and more cross-border trade in order to achieve competitive prices and higher standards of service. The evolution of the regulations and the level of liberalisation directly affected the Commission's approach to energy cases. For instance, as will be seen below, the Commission has tended to significantly decrease the duration and volume of contracts in the cases that it has handled recently compared with the cases investigated in the early 2000s. Furthermore, the Commission has started to build its decisions upon the objectives of competition policy as well as the goals of regulatory policy. Case law indicates that while applying general competition law, the Commission takes the specific regulatory choices into consideration such as third party access and ownership unbundling. This approach not only underlines the clash between the objectives of

17/62; A. De Hauteclocque, 'EC Antitrust Enforcement in the Aftermath of the Energy Sector Inquiry: A Focus on Long-term Supply Contracts in Electricity and Gas' in B. Delvaux, M. Hunt, and K. Talus, *EU Energy Law and Policy Issues* (Euroconfidentiel 2008), pp. 205-234

62 C. W. Jones (ed.), *EU Energy Law: Volume III – EU Competition Law and Energy Markets* (3rd edn., Claeys & Casteels 2006), para. 3.187

63 Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity [1996] OJ L 27/20; Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas [1998] OJ L 204/1

64 Directive 2003/54/EC *supra* n 4; Directive 2003/55/EC *supra* n 4

65 Directive 2009/72/EC *supra* n 4

EU competition law and those of the sector-specific regulations, such as promoting free competition in order to generate efficiencies in favour of consumers,[66] it also indicates that the Commission attempts to balance competition objectives with regulatory objectives. This attitude generates a question regarding the extent to which the Commission intervenes in market regulation through antitrust enforcement pursuant to the market liberalisation agenda and whether there is a possible danger of using competition law as a regulatory tool. However this question is outside of the scope of this article.

ii.) The structure of the implementation of competition rules was changed with the announcement of Regulation 1/2003. Under the previous regulation, Regulation 17/62, the Commission was the only authority that could exempt long-term supply contracts under Article 101(3) TFEU.[67] With the enactment of Regulation 1/2003, the 'notification system' was replaced by the 'legal exception' regime.[68] Accordingly, long-term supply agreements falling within Article 101(1) TFEU but meeting criteria in Article 101(3) TFEU are directly valid and enforceable without any prior decision. Undertakings have therefore become more responsible under the 'self-reliant' system for making a competition assessment of their agreements or commercial behaviour as well as their potential efficiencies pursuant to Article 101(3) TFEU.[69] Besides, the Commission has started sharing its monopoly power to apply the competition rules to bilateral anticompetitive behaviour of market operators with national competition authorities and national courts.[70]

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66 However, at this point, the differences between the two sets of rules should be regarded. The main objectives of competition law are the enhancement of a competitive market economy and the enhancement of integration of the common market, whereas the objectives of market regulation may include other and broader social objectives including consumer protection and the development of society. These differentiated objectives may define and limit the scope of competition law and sector-specific regulation.

67 Articles 3, 4, 5 and 6 of Regulation No.17 First Regulation implementing Article 85 and 86 of the Treaty [1962] OJ 013

68 Articles 3 and 4 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1

69 D. Roitman 'Legal uncertainty for vertical distribution agreements: the Block Exemption Regulation 2790/1999 (BER) and related aspect of the new Regulation 1/2003' (2006) Vol.27(5) European Competition Law Review 261, pp. 261-268; Commission, Communication from the Commission to the European Parliament and the Council Report on the Functioning of Regulation 1/2003 [2009] SEC(2009) 574, para. 19-22

70 Articles 5 and 6 of Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1. There are some concerns that the new system might increase uncertainty in the application of Article 101(3) TFEU, since non-binding guidelines might not be followed by national competition authorities or national courts. In addition, national courts may not have enough expertise and investigation power to assess the anticompetitive effects of vertical contracts as well

This new system has apparently brought some advantages in terms of saving time and economic resources for other tasks such as the pursuit of cartels and abusive behaviour, which are of much greater significance for the public interest than dealing with notifications, many of which concern agreements that have no serious anticompetitive effects.[71] Nevertheless, in the recently liberalised energy markets, it might be difficult to assess possible efficiencies, since the appraisal of long-term supply contracts that could result in vertical restraints from both the legal and economic aspects is complicated.

Another novelty that came with the enactment of Regulation 1/2003 was the introduction of commitment proceedings into the enforcement of competition law.[72] Accordingly, the Commission can impose a binding decision through commitments proposed by the parties to address the concerns of the Commission without clarifying the existence of any infringement of Articles 101 or 102 TFEU.[73] In most of the energy cases handled by the Commission, the investigations were concluded through commitment proceedings under Article 9 of Regulation 1/2003. Consequently, the observation of Article 9 itself may give some insights into undertakings' and the Commission's attitudes to these cases. One of the reasons to invoke commitment proceedings for both parties is convenience in terms of using time and economic resources efficiently. Since a preliminary assessment is sufficient to initiate commitment proceedings, the Commission does not have to clarify the existence of an

as the possible efficiency gains resulting from them. However, this argument might be rebutted by the report on the functioning of Regulation 1/2003, which shows that no major difficulties with the direct application of Article 101(3) TFEU have been indicated by either national enforcers or firms or their legal counsels following the change in the system of notification and administrative authorisation. Commission, Communication from the Commission to the European Parliament and the Council Report on the Functioning of Regulation 1/2003 SEC(2009) 574

71 Whish and Bailey, *supra* n 52, 166

72 Article 9 Council Regulation 1/2003 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty [2003] OJ L1:
'(1) Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.
(2) The Commission may, upon request or on its own initiative, reopen the proceedings:
(a) where there has been a material change in any of the facts on which the decision was based;
(b) where the undertakings concerned act contrary to their commitments; or
(c) where the decision was based on incomplete, incorrect or misleading information provided by the parties.'

73 Whish and Bailey, *supra* n 52, 255-261

infringement of competition rules, which decreases its workload. Besides, this yields a sort of guarantee mechanism for undertakings not to be subject to any financial punishment as long as they do not breach the commitments imposed. In addition, from the regulation policy point of view, imposing commitments on the undertakings concerned can be more effective as they push the liberalisation of the energy markets further. Commitment proceedings also enable the Commission to reduce the anticompetitive effects of vertical contracts, for instance by reducing their length as well as their volume. Yet, at the same time, possible economic efficiencies can be still gained from these contracts such as investment in energy generation plants or in transmission infrastructure. Furthermore, on the one hand, commitment decisions give undertakings an opportunity to by-pass negative publicity as well as possible private enforcement. On the other hand, commitments proposed by undertakings concerned under Article 9 might go beyond possible remedies that could be imposed under prohibition proceedings.[74]

In the next section, the cases will be explored with consideration of the changes in both the energy regulation process and competition law in order to observe the impact of these in case law.

1. Long-term Supply Contracts: Anticompetitive Contract Clauses

The most important aim of this section is to show that the Commission, particularly after the first regulatory Directives came into force, started investigations in the energy markets on the basis of competition policy. The focus of the Commission apparently shifted from improvements in energy generation and supply to the enhancement of competition and the creation of a single market in Europe.

Besides, given the strategic importance of long-term supply contracts,[75] particularly in the gas sectors in terms of the security of gas importation from non-EU states, the Commission seems to take into account energy supply security when dealing with competition problems and considers balancing trade-offs between competition policy and the security of supply.[76] Regarding

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[74] J. T. Lang 'Commitment Decisions under Regulation 1/2003: Legal Aspect of a new kind of Competition Decision' (2003) Vol.24 European Commission Law Review 347, p. 350; C. J. Cook 'Commitments Decision: the Law and Practice under Article 9' (2006) Vol. 29 World Competition 209, pp. 211-214; W. Wils, 'Settlement of EU Antitrust Investigations: Commitment Decision under Article 9 of Regulation No. 1/2003' (2006) Vol. 29(3) World Competition 345, p. 358

[75] Long-term supply contracts have traditionally been accepted as one of the cornerstones of security of supply in the EU.

[76] Within the context of this article security of supply should be considered as a non-economic gain such as steady availability of primary energy sources, and long-term

the increased dependence on gas imports, long-term supply contracts may limit the risks linked to this dependence and enhance the security of supply.[77] Apparently, even though it is not explicitly displayed, commitment decisions are useful instruments in the hands of the Commission to balance the objectives of competition policy and sector-specific regulation.[78]

With regard to long-term supply contracts signed between energy producers and importers/wholesalers, possible anticompetitive outcomes seem to be mainly resulted from the contract clauses. Thus, in most of the competition investigations the concerns of the Commission are over these anticompetitive contract provisions that strengthen the market power of historical monopolies by dividing the markets into the regions, i.e. the compartmentalisation of the relevant markets. For instance, *territorial restriction (or destination clauses)* prevents a buyer from reselling the product concerned outside of a specified country or area, whereas *use restriction* forces a buyer to use the product purchased for certain purposes decided within the contract. These restrictions not only contribute to price maintenance, but also reduce liquidity in the European energy markets through facilitating collusion between market players.[79] The idea behind the provisions is that by dividing the market into regions or Member States, buyers/wholesalers are precluded from engaging in commercial activities with other buyers/wholesalers; in other words, energy-to-energy competition (mostly gas-to-gas competition) is hampered.

supply. Generally speaking, it cannot be avoided that the policy of security of supply has a significant impact on the Commission when it is dealing with competition concerns in terms of the diversification of sources of supply as well as the routes for transportation through investment.

77 This special role of long-term contracts has also been recognised by the Interim Report of the Parties to the EU-Russia Energy Dialogue. This states that long-term contracts are having an important role in facilitating investment in exploration, production and transport of gas. <http://ec.europa.eu/energy/international/bilateral_cooperation/russia/doc/reports/2006_05_25_interim_report_en.pdf> accessed 14/12/2012, pp. 1-4

78 K. Talus, 'One Cold Winter Day? EC Competition Law and Security of Supply' (2007) Vol.5(4) Oil, Gas and Energy Intelligence <http://www.ogel.org/article.asp?key=2667> accessed 5 June 2013, pp. 3-5; O. Adu, 'Competition or Energy Security in the EU Internal Gas Market: An Assessment of European Commission Decisions on Long-term Gas Contracts' (2011) Vol.9(1) Oil, Gas and Energy Intelligence <http://www.ogel.org/article.asp?key=3071> accessed 13 April 2013, pp. 7-8; For a discussion of economic and non-economic efficiency gains of the policy of security of supply, as well as the approach of non-economic efficiency gains of the Commission under Article 101(3) TFEU see K. Talus, 'Security of Supply Argument in the Context of EU Competition Law' (2010) Vol.8(1) Oil, Gas and Energy Intelligence <http://www.ogel.org/article.asp?key=2986> accessed 21 February 2012, p.5

79 K. Neuhoff and C. Hirschhausen, 'Long-term vs. Short-term Contracts: A European Perspective on Natural Gas' (2005) CPWE 0539 and EPRG 05 Working Paper <http://www.dspace.cam.ac.uk/bitstream/1810/131595/1/eprg0505.pdf> accessed 29 April 2011, p. 4

This clearly undermines the creation of a common market.[80] Article 4(b) of the block exemption regulation on Vertical Agreements and Concerted Practices identifies territorial restrictions as hard-core restrictions and states that the exemption provided by the Regulation does not apply to vertical agreements that contain any provisions that have the direct or indirect effect of territorial restrictions.[81] Therefore, these agreements need to be handled under Article 101(3) TFEU.

The Commission has dealt with territorial restrictions contained within long-term supply agreements in a number of cases. The contracts signed between Gazprom (Russian gas producer) and ENI (Italian oil and gas company), OMV (Austrian oil and gas company), and E.ON Ruhrgas (German gas company), were investigated by the Commission due to territorial restriction provisions included in the contracts.[82] As a result of the settlements between the parties and the Commission, the investigations were closed. The parties agreed to delete the territorial restrictions and other clauses such as a right of first refusal[83] and most favoured customer,[84] which infringed EU competition law on restrictive business practices (Article 101 TFEU). Another remarkable commitment proposed by ENI and OMV was to promote increased capacity in Trans Austria Gasleitung (hereafter TAG), and to improve third party access, which would facilitate efficient and effective use of TAG as a transit pipeline.[85] The commitments also included the introduction of an effective congestion management system, the introduction of a secondary market, and the regular

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80 Faull and Nikpay, *supra* n 12*,* 547

81 Article 4 of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practice [2010] OJ L 102/1; Commission Notice Guidelines on Vertical Restraints SEC(2010) 411 final, para. 47-59

82 *ENI/Gazprom* (Case COMP/37011) [2003]; Commission, 'Commission reaches breakthrough with Gazprom and ENI on territorial restriction clauses' IP/03/1345; *OMV/Gazprom* (Case COMP/38085) [2005]; Commission, 'Competition: Commission secures improvements to gas supply contracts between OMV and Gazprom' IP/05/195; *E.ON Ruhragas/Gazprom* (Case COMP/38307) [2005]; Commission, 'Competition: Commission secures changes to gas supply contracts between E.ON Ruhragas and Gazprom' IP/05/710

83 'Right of first refusal' limits the ability of the energy generator/provider to sell the product to other buyers who operate in the same geographical market, a Member State, as the incumbent buyer. The clause obliges the generator to offer gas to the incumbent buyer before his rivals.

84 'Most favoured customer' puts an obligation on the energy provider to offer similar conditions to the incumbent buyer as it would have offered to his competitors in a certain Member State.

85 *OMV/Gazprom* (Case COMP/38085) [2005]; *ENI/Gazprom* Commission 'Commission reaches breakthrough with Gazprom and ENI on territorial research restriction clauses' IP/03/1345

publication on the Internet of the available capacity.[86] The commitments were apparently suggested to achieve non-discriminatory and transparent capacity allocation and congestion management systems, which were directly related to neither the territorial restriction clauses nor long-term supply agreements.[87] These settlements show that the commitments given by the parties indicate that the aim of the Commission is to intervene in the energy markets via antitrust investigations, as claimed by former Competition Commissioner, Neelie Kroes: '... I intend to use our competition tools actively to speed up the liberalisation process in gas and electricity markets'.[88] As a consequence, these three settlements between the Commission and the parties concerned, and the general approach of the Commission to the energy cases raise the question of whether the Commission should undertake such expanded responsibility in the energy markets, and whether it should pursue the scheme of energy regulation.

Other significant decisions were *GDF/ENEL* and *GDF/ENI*.[89] In most of the cases related to territorial restrictions, the Commission closed the investigations through settlements between itself and the undertakings concerned. Nevertheless, in *GDF/ENEL* and *GDF/ENI*, the Commission concluded the investigations through prohibition proceedings. Regarding the contract signed between GDF and ENEL, GDF was supposed to deliver gas purchased by ENEL from NLGN at the delivery point Oltingue, on the border between Switzerland and France. According to the contract, the gas carried from Nigeria by GDF was only to be used in Italy. Similarly, within the contract signed between GDF and ENI for the transportation of liquefied natural gas (thereafter LNG) purchased by ENI in Northern Europe, it was specified that the LNG could only be re-sold in France. After the investigations started the parties terminated the infringement. However, this did not help to bring the investigations to an end. At the final stage of the investigations, although there was no fine to be imposed, the Commission adopted a decision indicating the existence of an infringement of Article 101 TFEU. These were the first actual decisions in a string of cases arising from the same anticompetitive concerns. Apparently, the aim of the Commission was to provide clear guidance

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86 *ENI/Gazprom* (Case COMP/37011) Commission 'Commission reaches breakthrough with Gazprom and ENI on territorial research restriction clauses' IP/03/1345

87 These systems were actually introduced by the second regulatory package under Regulation (EC) No 1775/2005 (on conditions for access to the natural gas transmission networks) which came into force on 1 July 2006. Thus, Commitments imposed through these settlements were far beyond what the Commission could have achieved through sector-specific regulation.

88 Commission, 'Competition: Commission secures improvements to gas supply contracts between OMV and Gazprom' IP/05/195

89 *GDF/ENEL* and *GDF/ENI* (Case COMP/38662) Commission Decision [2004]

regarding the legal assessment of territorial restriction clauses within the recently liberalised energy markets.

However, the approach of the Commission in *GDF/ENEL* and *GDF/ENI* was criticised on the basis of discrimination between EU and non-EU companies, particularly regarding the settlements reached with Norwegian Statoil and Norsk Hydro (2002), Nigerian NLNG (2002), and Russian Gazprom (2003 and 2005), and specifically with Algerian Sonatrach (2007).[90] In the *Sonatrach* decision, the problem was Sonatrach's insistence on replacing the territorial restriction clauses with *profit splitting mechanisms* within the long-term supply contracts signed between itself and several Member States including Italy, Spain and Portugal (gas) and France, Belgium, Italy, Spain, the UK and Greece (LNG).[91] Profit splitting mechanisms impose an obligation on the buyer to share with the seller a certain part of the revenue gained from reselling the product outside of an allocated territory, typically a Member State, or using the product for a purpose other than that agreed upon.[92] Again, similar to territorial and use restrictions, the mechanism helps a seller to save each geographic market within its portfolio by preventing gas-to-gas competition between buyers. In this way, the seller will be better off from an economic point of view by maximising its profit by for instance, protecting its wholesale outlets or imposing different prices on different purchasers. After seven years of at times discussions the Commission and the Algerian Ministry for Energy and Mines reached a common understanding with regard to the clauses dealing with profit sharing mechanisms.[93] This long lasting negotiation might

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90 In 2000, the Commission started to investigate territorial restriction clauses in gas contracts, with the aim of increasing supply competition. A number of contracts concluded between external suppliers and the European importers were examined and several cases were opened. E. Waktare, 'Territorial Restrictions and Profit Splitting Mechanisms in the Gas Sector: the Algerian Case' (2007) Competition Policy Newsletter 19, pp. 19-22

91 The other one is a change in the delivery point for the products concerned. Since this clause does not create anticompetitive outcomes as profit splitting mechanisms do, it will not be covered by the paper. See also H. Nyssens, C. Cultrera and D. Schnichels, 'The Territorial Restrictions Case in the Gas Sector: a State of Play' (2004) Vol. 2 Competition Policy Newsletter 48, pp. 48-51

92 Waktare, *supra* n 91,19-21; Faull and Nikpay, *supra* n 12, 367
Profit splitting mechanisms may also force a purchaser to share commercially sensitive information such as resale price and the volume of energy resold in a downstream market with an upstream supplier, as the supplier has an interest in knowing how much of the product is diverted into other territories or to other users, and how much of the profit should be split.

93 According to the settlement between the parties, Sonatrach committed to deleting territorial restriction clauses from all existing contracts and to not introducing such clauses into new contracts. Sonatrach also committed to deleting profit sharing clauses from existing pipeline contracts (for gas) and agreed that these would not be inserted into future pipeline contracts or transit contracts where the gas runs through another Member

indicate the enthusiasm of the Commission to end investigations through settlements rather than by making infringement decisions. This approach of the Commission could be justified through energy supply security, particularly given that Algeria was the third largest external gas supplier after Russia and Norway in 2006, with in total 54.6 BCM of gas and an LNG supply that was 11% of the EU's total consumption.[94] After long lasting negotiations, former Commissioner Kroes remarked that: 'the agreement reached constitutes a major breakthrough in our relations with one of Europe's most important suppliers for natural gas and eliminates an important obstacle for the creation of a single EU-wide market in gas'.[95]

The situation of non-EU energy companies can also be ascertained from the aspect of extraterritorial application of EU competition law.[96] According to the Court of Justice, with regard to the universally recognised territoriality principle, an anticompetitive agreement can be considered partially or wholly invalid if it enters into force in the EU, although the contracting parties are non-EU energy undertakings.[97] Nevertheless, the extraterritorial application of

State prior to arriving at its final destination.
Regarding LNG contracts, the parties agreed that profit sharing mechanisms can only be applied in DES contracts, because in DES contracts the title and risk pass to the buyer at the port of destination. (However, under CIF and FOB contracts this is not the case. For this reason, Sonatrach agreed not to include these mechanisms in these types of agreements.) If the gas should be diverted from its initial destination while still underway a change of contract would be required. In addition, as the gas still belongs to the seller, it is difficult to speak of a resale restriction in such circumstances.

94 Waktare, *supra* n 91, 19-21

95 Commission, 'Commission and Algeria reach agreement on territorial restrictions and alternative clauses in gas supply contracts' IP/07/1074

96 Despite many non-EU undertakings being subject to EU competition law the Court of Justice has not ruled on whether there is an effects doctrine under EU law, as the decisions of the Court have been based on different grounds such as the economic entity doctrine (See the *Dyestuffs* decision of the Court of Justice in which the Court held that three non-EU companies had engaged in illegal price fixing within the EU through their subsidiary companies based in the EU. The Court assessed the parent undertakings and their subsidiary companies as one economic entity and considered that the parents exercised decisive influence over the conduct of the subsidiaries. Case C-48/69 *ICI v. Commission* [1972] ECR 619) and/or the fact that the implementation of an agreement entered into outside of the EU occurred within it (Whish and Bailey, *supra* n 52, 495-500). In the *Wood Pulp* decision (*A Ahlström Osakeyhtiö and Others v Commission* (Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85, C-126/85, C-127/85, C-128/85 and C-129/85) [1988] ECR 5193), the Court of Justice stated that, regarding the facts of the case it was not necessary to have an effects doctrine. In fact, the universally recognised territoriality principle was sufficient to deal with the problem, as the agreement was implemented within the EU.

97 K. Talus, *EU Energy Law and Policy: A Critical Account* (London Oxford University Press 2014), pp. 283-285

EU competition law to external energy companies seems difficult with regard to the dependency of the EU on non-EU gas supply. This can be observed in the case law, in particular in settlement proceedings with non-EU companies such as Sonatrach. As a result, it seems that antitrust enforcement can be a solution for anticompetitive contract clauses only if politics permit.[98]

Other provisions that restrict the commercial activities of market operators are *exclusive supply obligations* and *reduction clauses*.[99] Exclusive supply/ purchase obligations require a generator to sell the product concerned only to a wholesaler in an agreed territory, normally a Member State. This reduces the ability of the generator to sell the product to other market operators such as the rivals of the wholesaler, distributors or end users. Consequently, entry barriers are rendered for wholesalers or retailers who want to participate in upstream or downstream markets.[100] As mentioned before, the foreclosure effect of the provision is detrimental to competition in the energy markets due to the fact that it strengthens the dominant position of the wholesaler. Moreover, this provision may aggravate the position of the generator itself by preventing him from selling the product to end users in the downstream market. Thus, the market power of the wholesaler is further protected. Likewise, reduction clauses give the wholesaler the right to reduce the annual volume to be purchased from the generator if the latter starts selling the product concerned into the territory in which the former operates.

These anticompetitive provisions namely exclusive supply obligations and reduction clauses were addressed by the Commission in the *DONG/ DUC* decision.[101] The concerns of the Commission in the case were, first, the joint marketing of North Sea gas by the Danish Underground Consortium (DUC-constituted by gas producers Shell, A.P Moller, and Chevron Texaco), and second, anticompetitive clauses included in long-term supply contracts concluded between DONG, the incumbent Danish gas supplier, and the DUC partners. According to the joint marketing arrangement, the DUC partners were supposed to sell DONG enough gas to satisfy the entire Danish demand

98 *Ibid*

99 'Exclusive supply obligations' are defined as 'any direct or indirect obligation causing the supplier to sell the goods or services specified in the agreement only to one buyer inside the Community for the purposes of a specific use or for resale' within Article 1(3) of Commission Regulation No 2790/1999 on the application of vertical agreements and concerted practices [1999] OJ L 336.

100 Faull and Nikpay, *supra* n 12*,* 370

101 *DONG/DUC* (Case COMP 38187) [2003]; Commission, 'Commission and Danish competition authorities jointly open up Danish gas market' IP/03/566; *Wingas/EDF Trading* (Case COMP/36559) [2002]; Commission, 'Commission clears gas supply contracts between German gas wholesaler WINGAS and EDF-Trading' IP/02/1293

and supply additional volumes to Sweden and Germany. After the investigation started the DUC partners agreed to cease their joint marketing arrangements and market their gas individually. In order to facilitate the establishment of new supply relationships the DUC partners also offered 17% of the total gas production on an annual basis for sale to new customers over a period of five years. Since this commitment would bring competition to the Danish market as well as increase competition in neighbouring Netherlands and Germany, DONG and the DUC partners decided to build a new pipeline linking the Danish gas fields with the existing infrastructure on the European continent in order to increase the network capacity for potential competitors.

According to the provisions of the gas supply agreements concluded between DONG and the DUC partners, DONG was obliged to report to the DUC partners the volumes sold to certain categories of customers so as to obtain a discount or special prices. In return, the DUC partners were supposed to offer all of their future gas finds to DONG first. In order to bring an end to the investigation the parties undertook to exclude anticompetitive clauses from the contract. To facilitate the market entry of the DUC partners and potential other suppliers, DONG also committed to introducing an improved access regime for DONG's offshore pipelines linking the Danish gas field with the Danish mainland. In this respect, DONG undertook to increase the transparency of the system by publishing information on the available capacity, to allow for short term trading in line with the access regime, and to introduce interruptible transport contracts. This decision is another example in which the settlement between the parties and the Commission was not limited to the boundaries of the anticompetitive elements of the contracts but was extended to improvement of the access regime as well as the facilitation of investment in new pipelines.

Furthermore, the contract granted DONG the right to reduce the volumes bought from the DUC partners in a situation where they started selling gas into the Danish market. DONG argued that the reduction clauses were needed for the protection of the Danish market in respect of the take-or-pay obligations. The Commission accepted this argument because of the limited ability of DONG to sell the gas outside Denmark due to the scarce capacity of the interconnector.[102] In this respect the Commission gave a 6-month transitional period in which reduction clauses could be imposed until a new pipeline was commissioned linking the gas fields on the Danish continental shelf with other continental European countries.

[102] *DONG/DUC* (Case COMP/38187) [2003]

From a competition policy point of view, the decisions explored above highlight possible anticompetitive effects of long-term supply contracts such as market compartmentalisation and market foreclosure stemming from the provisions included within the contracts. Besides, the effect of market regulation on competition investigations can clearly be seen particularly from settlements, i.e. from the commitments proposed by the undertakings concerned. The Commission apparently not only removed the anticompetitive clauses from the long-term supply contracts through competition law, but also addressed technical and legal obstacles such as scarce network capacity and inefficient access regimes preventing further liberalisation of the markets and the improvement of competition. These decisions, thus, demonstrate the Commission's aim to use competition rules as vehicles to achieve the objectives of market liberalisation, as it seems to be more appropriate to conclude investigations on the basis of commitments in order to motivate or force undertakings to operate in a way which may be necessary to create conditions facilitating competition and market integration in the EU.[103]

Nevertheless, these decisions do not provide any insights into the methodology used for the investigations into long-term supply contracts. Nor do they explain the economic perspective of these contracts. These two missing parts will be traced in the next section.

2. Long-term Supply Contracts: Volume and Duration of the Contracts

a) The Steps Followed for the Investigation of Long-term Supply Agreements

The long-term supply agreements concluded between wholesalers or importers and large industrial customers can be seen as structural reflections of the long-term supply contracts examined above. However, the focus within the competition investigations of the agreements that will be analysed below is mostly placed on the duration and volume of the contracts. In particular, long-term supply contracts having *de facto* or *de jur*e exclusive purchase character are investigated by the Commission due to their foreclosure impact on the markets.[104]

The decisions explored in this section give some hints regarding the creation of a clear model for the investigation of long-term supply agreements.

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[103] Commission, 'Competition: Commission secures improvements to gas supply contracts between OMV and Gazprom' IP/05/195

[104] Article 3 of Commission Regulation (EU) 330/2010 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practice [2010] OJ L 102/1; G. Kuhne 'Long-term Gas Contracts in Germany: An Assessment of the German Competition Authority' in U. Hammer and M. M. Roggenkamp, *European Energy Law Report III* (Intersentia 2006), p. 72

Basically, the Commission divides the investigation into four sections. In general the Commission first defines the relevant product and geographic markets. Second, the Commission states its concerns about possible anticompetitive outcomes of the contracts. Third, the Commission examines the commitments proposed by the parties to remove the anticompetitive results of the contracts. Finally, in order to render the commitments binding on the undertakings concerned, the Commission assesses the effectiveness and proportionality of the commitments pursuant to Article 9 of Regulation 1/2003.

More specifically, in order to estimate the detrimental effects of the long-term supply agreements, the Commission adopts a more analytical and comprehensive process by pursuing a path specified in the Sector Inquiry.[105] The Sector Inquiry points out four features that should be considered: (1) the volume tied under the individual contracts, (2) the duration of the contracts, (3) the cumulative market coverage of the contracts, and (4) the efficiencies claimed by the parties.[106] The first three factors are examined in order to find evidence to indicate whether new entry barriers have been created by the contracts. The aim of the assessment therefore is to reach a decision showing whether entry by potential competitors has been made more difficult from a factual point of view rather than to define any certain forms in which Article 101 and 102 TFEU may be infringed.[107] With regard to the application of commitment proceedings under Regulation 1/2003, on the whole the Commission tends to emphasise and support its concerns about possible anticompetitive outcomes of contracts through examining these factors, without finding any particular proof pointing to the existence of any breach.

In downstream energy markets, the Commission initiated a number of competition investigations with regard to the volume and duration of long-term supply contracts. These investigations have become key cases that illustrate the significant lines of inquiry pursued by the Commission during the investigation.[108] These cases are *Gas Natural*,[109] *Synergen*,[110] *Distrigas*,[111] and *EDF*.[112]

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105 Energy Sector Inquiry, *supra* n *10*, para. 770

106 *Ibid*, 771

107 *Ibid*, 771

108 Hauteclocque, *supra* n 3, 46; Talus, *supra* n 8, 229

109 *Gas Natural* (Case COMP/37542); Commission, 'Commission closes investigation on Spanish company GAS NATURAL' IP/00/297

110 *Synergen* (Case COMP/37732) [2002]; Commission, 'Commission clears Irish Synergen venture between ESB and Statoil following strict commitments' IP/02/792

111 *Distrigaz* (Case COMP/B-1/37966) Commission Decision [2007]

112 *Long-term Contracts France* (Case COMP/39386) Commission Decision [2010]

In the *Gas Natural* decision, the Commission investigated a long-term gas supply agreement signed between Gas Natural, a dominant company in the gas market, and Endesa, the market leader in the electricity business in Spain.[113] The Commission was concerned about the impediment of the contract to market entry at a particularly crucial moment in the early stages of liberalisation of the energy market in Spain. According to the Commission, the duration and volume of the agreement, which posed *de facto* an exclusive purchase obligation, could have raised market entry barriers for entrants into the Spanish gas market, as electricity generators were one of the largest customers for gas suppliers. The agreement may also have segmented the market to the benefit of the dominant firm through use and resale restrictions obliged on Endesa.[114] In addition, it would have resulted in discrimination against Spanish gas purchasers by providing Endesa with better treatment than other future clients of Gas Natural. In order to remove the Commission's concerns Gas Natural and Endesa proposed some amendments to the gas supply agreement. The volume of the agreement was reduced by around 25% in order to free Endesa's purchasing capacity as well as to eliminate the exclusivity of the contract by creating an available customer for potential entrants.[115] The duration of the contract was reduced to 12 years so as to avoid excessive long-term dependence of the customer on the supplier. This is still rather long compared to other decisions by the Commission given later on. This may be justified through the evaluation of the Commission's thinking and the different level of market opening.[116] Moreover, the parties undertook to delete the use of restriction and other price differentiations compartmentalising the market. This would contribute to competition in both the gas and electricity markets, because, on the one hand, the access of power generators to gas as a substitute for coal would develop a competitive electricity market and, on the other hand, gas would also be a product that electricity purchasers could offer to final consumers.[117]

Although *Gas Natural* did not provide tangible guidance for the industry, several interesting issues such as *de facto* exclusivity and energy release were pointed out in the decision. In addition, this case is a good indicator of the Commission's approach to long-term supply agreements in the early 2000s.

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113 *Gas Natural* (Case COMP/37542); Commission, 'Commission closes investigation on Spanish company GAS NATURAL' IP/00/297

114 M. F. Salas 'Long-term Supply Agreements in the Context of Gas Market Liberalisation: Commission Closes Investigation of Gas Natural' (2000) Vol.2 Competition Policy Newsletter 55, pp. 55-58

115 *Ibid*

116 A. De Hauteclocque, 'Long-term Supply Contracts in European Decentralized Electricity Makrets: an Antitrust Perspective' (PDhil Thesis, University of Manchaster 2009), pp. 151-158

117 Talus, *supra* n 8*,* 229

In the *Synergen* case,[118] in 2000, ESB, a dominant company that effectively controlled 97% of electricity production in Ireland and more than 60% of the supply market for eligible customers, and Statoil, a powerful company with gas reserves inside and outside Ireland, and electricity activities in other countries, notified three agreements related to the construction and operation of a 400 MW gas fired electricity generation plant, Synergen, in Dublin, Ireland. According to the joint venture agreement, ESB would hold a 70% stake in the company while Statoil would hold the remaining 30%.[119]

Regarding the joint venture agreement, the concern of the Commission was over whether the creation of the joint venture would remove Statoil as a potential competitor from the highly concentrated Irish power market, since the agreement imposed an obligation on Statoil that prevented it from participating in any power project in Dublin or entering the electricity market independently. During the settlement process, the parties undertook to delete this provision.

The second contract was a 'supply agreement' that foresaw that a subsidiary of ESB, namely ESBIE, would market electricity generated by Synergen for 15 years. The Commission deemed that the supply contracts would have strengthened the market power of ESB. The parties committed to making 600 MW of electricity available (400 MW generated by ESB, 200 MW generated by Synergen), by means of auctions or direct sales, which would be used by new market entrants to build up a customer base when constructing a new power plant.[120] Also, ESBIE was excluded from the Synergen sales.[121]

Finally, the third contract was a 'gas supply agreement' that provided that Statoil would supply gas to Synergen for electricity generation for 15 years. The gas supply agreement was cleared by the Commission, which considered that it would improve the effective competition in the gas supply market through increasing the market share of Statoil slightly above the so-called *de minimis* threshold.[122] Furthermore, the Commission took into account that Statoil offered a special price discount for its gas, which it would not have offered unless it had been assured long-term exclusivity. Apparently, the

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118 Commission, 'Commission clears Irish Synergen venture between ESB and Statoil following strict commitments' IP/02/792

119 Commission, Notification of a Joint Venture (Case Comp/E-3-37732) 2000/C 255/06

120 Commission, *XXXIInd Report on Competition Policy 2002*, SEC(2003)467 final, pp. 192-193

121 *Ibid*

122 Commission, Notice on Agreements of Minor Importance Which do not Appreciably Restrict Competition under Article 81 [2001] OJ C 368/07. According to Article 7 of the Notice 'agreements between undertakings which affect trade between Member States do not restrict competition if the market share held by each of the parties to the agreement does not exceed 15% on any of the relevant markets affected by the agreement (...)'. Therefore the market share of Statoil in the Irish energy market was less than 15%.

Commission exempted the contract under Article 101(3) TFEU as it considered that an objective economic benefit arising from the contract would be shared by consumers as well as the contracting parties.

Overall, the Commission deemed that the commitments would facilitate market entry into the Irish electricity markets. Not only would the traders be able to purchase electricity from different sources, but also the new producers would have the opportunity to build up a customer base for their future power plant.

This case demonstrates the importance of investments in energy, and also, how the Commission handles a long-term supply contract when it contributes to an investment decision given by the parties to the contract concerned. In *Synergen*, the Commission first considered the special price offered by Statoil as a cost efficiency, which would not have been given if it had not been for the exclusive character of the contract, and counted it towards exemption under Article 101(3) TFEU.[123] In contrast, the price difference in *Gas Natural* was appraised as anticompetitive because of the segmentation of the market, and because it put Endesa in an advantageous position against its competitors. It point out that the Commission is apt to grant an individual exemption under Article 101(3) TFEU in an instance where an undertaking concerned makes an investment.[124] Second, the reinforcement of an incentive to invest through an exclusive long-term supply contract was taken into account by the Commission. The *Synergen* decision is, thus, a significant example which shows that the Commission considers an investment as an efficiency while granting an individual exemption under Article 101(3) TFEU.

In the *Distrigas* case, the Commission launched an investigation into the long-term gas supply contracts concluded between Distrigas (the largest gas importer and supplier in Belgium) and its variety of large gas customers such as industrial users, electricity generators and resellers.[125] The concerns of the Commission were over the market foreclosure for potential competitors of Distrigas and the obstruction to the development of competition in the gas markets following the liberalisation. The long-term supply agreements concerned would have tied a significant part of the market demand to Distrigas for a long period and thereby prevented alternative suppliers from entering the market and building up a viable customer base (output foreclosure). The Commission was therefore concerned that the combined effect of the agreements would have been to significantly close off the market to potential market entrants.

123 *Synergen* (Case COMP/37732) [2002];Hauteclocque, *supra* n 62, 205-234
124 Hauteclocque, *supra* n 62, 205-234
125 *Distrigaz* (Case COMP/B-1/37966) Commission Decision [2007]

The importance of the case derives from two different angles. First, the Commission clarified all of the steps of the investigation. This disclosed a substantive model used by the Commission for the examination of long-term supply contracts. Second, while evaluating the commitments proposed by Distrigas under an Article 9 procedure, i.e. commitment proceedings, the Commission took the principle of proportionality into consideration, which was recently interpreted by the General Court in the *Alrosa* case.[126]

For the assessment of a long-term supply contract, the Commission listed five elements that should be considered: (1) the market position of the supplier, (2) the share of the customer's demand tied under the contracts, (3) the duration of the contracts, (4) the overall share of the market covered by the contracts, and (5) efficiencies.[127]

In its consideration of the first element, the Commission pointed out not only the role of having a dominant position but also the cumulative effects of several contracts. This approach, which considers the actual economics of a given situation, was also adopted in the *Repsol* case.[128] Its subject matter was exclusive long-term supply contracts signed between an oil company, Repsol, and service station operators in Spain.[129] Repsol's market share was only around 30%, which hardly exceeded the dominance threshold. However, the Commission deemed that, because of their cumulative effects and the weak position of the retailers and final customers as compared to Repsol, the contracts would have blocked market entry. In both cases the foreclosure effect of a network of long-term contracts employed in the supply markets was highlighted.[130]

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126 Case T-170/06 *Alrosa v. Commission* [2007] ECR II-260

127 Commission, 'Antitrust: Commission increases competition in the Belgian gas market – frequently asked questions' MEMO/07/407

128 *Repsol C.C.P.* (Case COMP/B-1/38348) Commission Decision [2006]; Although it is an oil case the Commission's approach is quite similar to gas and electricity cases. In order to address the anticompetitive results of the contracts, Repsol submitted a set of commitments to the Commission including the reduction of the duration of the contracts that were from 25-40 years, to 5 years, as well as a commitment to offer concerned service stations a concrete financial incentive to terminate the existing long-term supply contracts. Following the commitments the Commission closed the investigation, as they were sufficient and necessary to address the concerns as well as to improve competition in the market. Also see E. Gippini-Fournier 'The Modernisation of Europe Competition Law: First Experiences with Regulation 1/2003' (2008) Vol.2 Community Report, Fide Congress 41

129 The Commission stressed the foreclosure effects of the long-term exclusive supply contracts with the numerical values. The tied market share of Repsol's sales was deemed considerable at around 25-35%, the length of the contracts was between 25 and 40 years.

130 *Repsol C.C.P.* (Case COMP/B-1/38348) Commission Decision [2006]

Regarding the second (the share of the customer's demand tied under the contracts) and fourth (the overall share of the market covered by the contracts) elements, the Commission took several important tools into account in order to appraise the contracts such as the total volume sold by a supplier and the proportion of that total volume to the total demand in the relevant market, as well as the percentage of a customer's demand tied to the supplier. According to the Commission, when a customer is obliged to buy all or a good part of its requirements from a particular supplier for a certain period of time, the customer is no longer available as a potential customer to other suppliers. Such contracts can therefore render market foreclosure. For this reason, Distrigas committed to reducing the volumes of gas sold in Belgium, and therefore other gas suppliers could compete with it for the demand that was freed up. For industrial users and electricity generators for instance, Distrigas undertook to ensure that on average 70% of the gas contracted to supply to the consumers concerned would return to the market every year.[131] Besides, the Commission claimed that when consumers are bound to a particular supplier through long-term contracts that cover only a small part of the total demand, competitive concerns such as market foreclosure are unlikely to arise. The Commission considered that, given the market power of Distrigas, there would not be a significant anticompetitive effect as long as it met less than 20 to 30% of the total market demand. Thus, the effect of these commitments was to ensure that Distrigas did not tie up an excessive proportion of consumers for more than one year ahead, while they allowed Distrigas as much flexibility as possible in managing its portfolio of contracts.[132]

Furthermore, in considering the third condition (the duration of contracts), in order to speed up the return of customers to the market, Distrigas undertook not to conclude new long-term supply contracts with industrial users and electricity producers for a duration of longer than 5 years, and with resellers for a duration of longer than 2 years, which is far shorter than the duration specified within the Commission's guideline on vertical restraints.[133] In the decision, the Commission divided customers into two groups. Such an approach can be justified by the differentiated effects of the customer groups on the competitiveness of the market due to their attractiveness to a new entrant. The main aim of the commitments was therefore to ensure that Distrigas did not modify its behaviour to cherry-pick the most attractive

131 *Distrigaz* (Case COMP/B-1/37966) Commission Decision [2007]

132 UNSPECIFIED, *Report on Competition Policy 2007 – Including Commission Staff Working Document* (EU Commission – Working Document), p. 46

133 Commission Notice Guidelines on Vertical Restraints SEC (2010) 411 Final, para. 66

customers with long-term contracts.[134] Distrigas was to be bound by these commitments as long as its market share did not fall below the 40% market share threshold.[135]

A very similar approach to the restriction of contract duration was adopted in the *E.ON Ruhrgas* case by Bundeskartellamt. As compared with the *Distrigas* decision it is clear to see that the Commission accepted and endorsed the substantive assessment of *E.ON Ruhrgas*.[136] In the *E.ON Ruhrgas* decision, Bundeskartellamt limited the duration of the contracts to within 2 and 4 years under which respectively more than 80%, and between 50% and 80% of a customer's total demand was supplied. Reflecting the *Distrigas* decision by the Commission, the duration of the contracts signed with resellers was restricted to a time period of 2 years by Bundeskartellamt.[137] Transaction costs could be a reason behind leaving at least 20% of customer demand remaining untied by the long-term supply contracts. Providing a certain amount of gas, such as less than 20% of the total customer demand, might be uneconomic for an alternative supplier. Therefore, 20% of the total customer demand could have been considered as a threshold by Bundeskartellamt to attract a second supplier to enter into a relationship with a buyer.[138]

Regarding the final element (efficiency gains), the Commission found that the likely positive effects of the long-term supply contracts that were concluded between Distrigas and newly established electricity generation companies seemed to outweigh their possible negative effects. As a result, the commitments did not cover newly constructed power plants, given that new generation capacity would promote competition in the market. Also, the investment would not go ahead, unless greater predictability of prices and possible increased security of supply were guaranteed for the investor, i.e. the elimination of quantity and price risks.[139]

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134 *Distrigaz* (Case COMP/B-1/37966) Commission Decision [2007]; These commitments do not have to be applied under two conditions: first, the market share of Distrigas will not exceed 40%, and, second, the market share of the closest competitor of Distrigas will not be 20% less than the market share of Distrigas.

135 The threshold for these commitments is 40% market share, which complies with the threshold defined as an indicator for a dominant position in a relevant market within the guidance on the application of Article 102 TFEU. Commission, Communication form the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7, para. 14

136 Commission, 'Antitrust: Commission increases competition in the Belgian gas market-frequently asked questions' MEMO/07/407

137 *Ibid*; *E.ON Ruhrgas* (Case COMP/B 8-113/03)

138 Hauteclocque, *supra* n 62

139 Commission, 'Antitrust: Commission increases competition in the Belgian gas market-frequently asked questions' MEMO/07/407

In its consideration of the principle of proportionality, the Commission assessed the necessity and sufficiency commitments by taking into account a number of factors. First, the obligation to return an adequate volume of gas was necessary and sufficient to reduce the level of foreclosure of the customers, thereby enabling alternative suppliers to build up a significant customer base in the gas market. Second, the reduction of the duration of the contracts improved the level of competition in the market by facilitating market entry, as attractive customers such as electricity generators, industrial customers or gas resellers would not be tied for a long-period of time. Finally, the application of commitments was limited to a total period of four years, which was crucial to promote gradually developing competition and liberalisation of the market.[140]

The approach adopted by the Commission and Bundeskartellamt in these gas cases can be seen in electricity cases as well. In the *EDF* decision, the Commission investigated the exclusive long-term supply contracts concluded between EDF and its large industrial customers by taking into account the factors clarified in *Distrigas*.[141] Similarly to other long-term supply cases, the concerns of the Commission were the foreclosure effects stemming from the *de facto* exclusivity of the contracts and the imposition of resale restrictions on large industrial customers. Under the settlement proceedings, several commitments addressing these concerns were proposed by EDF. First, EDF undertook to ensure that at least 65% of the electricity contracted with large customers would return to the market every year. The main objective of the set of commitments was to enable consumers to meet their electricity demand from alternative suppliers, and to make it easier for alternative suppliers to enter the market or to expand their market power. In addition, EDF pledged that the duration of its contracts with industrial customers would not exceed 5 years. However, given the interests of industrial customers, and on the grounds of greater cost transparency, the Commission highlighted that in a situation where the customer wanted to make a supply contract for more than 5 years, they could do so, as long as EDF provided them with a termination right without any penalty at least every five years. Similarly to *Distrigas*, EDF would be released from its commitments only if its market share fell below the 40% market share threshold.

b) The Analysis of the Decisions: Economic Efficiency Gains

Although the investigations examined in this section seem respectively clearer and more detailed it is still hard to find effective guidance for possible

[140] *Distrigaz* (Case COMP/B-1/37966) Commission Decision [2007]
[141] *Long-term Contracts France* (Case COMP/39386) Commission Decision [2010]

investigations about long-term supply in the future. Nevertheless, by considering all of the related cases investigated by the Commission a brief formative guideline might be created.

Broadly speaking, it can be stated that, from a procedural point of view, the Commission follows a general structure for settlement proceedings by dividing investigations into four stages: (i) the definition of the relevant product and geographic markets as well as the identification of the market positions of the companies under investigation, (ii) the specification of competition concerns of the Commission, (iii) the examination of the commitments proposed by the parties, and (iv) the assessment of potential efficiency gains which may offset the anticompetitive effects of the contracts.

More specifically, it can be seen from the case law that the Commission adapts a more economic-based approach for the first and second stages. This observation could be captured from the matters indicated by the Commission during the investigations. For instance, the Commission takes the market shares of the companies under investigation into consideration in order to see whether they have market power or are likely to strengthen their market power. This consideration is clearly based on economic principles regarding the fact that anticompetitive effects will be correlated with the market power.[142] Similarly, the cumulative effects of parallel contracts are also based on economic principles as the Commission appraises the share of market demand tied by each single contract to measure a cumulative effect.[143]

In addition, the volume and duration of contracts are significant factors considered by the Commission during its investigations. The Commission tends to force the firms concerned to reduce the volume and duration of the contracts, given that the greater volume and duration of the contracts the more likely it is that market foreclosure will occur. Regarding the volume of the contracts, it seems that the Commission wants to be sure that a significant amount of the demand for electricity and/or gas from large industrial customers and/or electricity generators is returned to the market every year so that other market players have an opportunity to enter the energy markets (i.e. the elimination of output foreclosure). Likewise, the duration of the contracts tends to be shortened to 5 years or less.

Even though the market shares of firms, and the durations and volumes of contracts are certain elements that are considered by the Commission during its investigations, the outcomes of each investigation are different depending on the specific circumstances of each case. For instance, while the Commission

[142] Hauteclocque, *supra* n 3, 107
[143] Hauteclocque, *supra* n 3, 107

cleared contracts with durations of more than 10 years in *Gas Natural* and *Synergen*, in *Distrigas* and *EDF* the duration was shortened to 5 years or less depending on the volume of the contracts and to whom the electricity or gas was supplied. Similarly, the threshold set by the Commission for the volume of the contracts that should be returned to the market was different in the *Distrigas* and *EDF* decisions. Overall, although there are no defined thresholds for either the volume or duration of contracts, the Commission follows general principles, which are based on economic grounds, and which are observed within the guidelines on vertical restraints.[144] Besides, if there is a relationship-specific investment or an objective economic benefit deriving from long-term supply contracts, the contracts could benefit from an exemption provided under Article 101(3) if a number of the conditions listed within Article 101(3) are satisfied.[145] For instance, as demonstrated by the *Synergen* and *Distrigas* decisions, an investment in electricity generation capacity was recognised as a releasing efficiency by the Commission.

Finally, the case law shows that since the modernisation of EU competition law with the enactment of Regulation 1/2003, commitment proceedings under Article 9 of the Regulation seem to be used to replicate in effect the functioning of the notification system for agreements under former Regulation 17/62, which was abolished by the new Regulation.[146] In this sense, in particular regarding the *Distrigas* and *EDF* decisions, it looks as though the Commission has cleared the long-term supply contracts by adapting necessary changes in order to make them comply with competition law as well as to eliminate possible anticompetitive effects of the contracts. In this way, while ensuring the compliance of the contract with EU competition law, the Commission guarantees the legitimacy of the contracts that generate economic efficiencies. The case law also indicates that the Commission and energy companies have an increased tendency to use the settlement procedure under Article 9 of Regulation 1/2003 within the energy markets.

IV. Conclusion

This article attempted to draw a general frame around long-term supply agreements in two perspectives: economic and legal. First, the economic outcomes of the agreements were examined in terms of their negative and positive effects. In this part of the article, it was found that although there are a great number of academic works on long-term supply contracts there

144 Commission, Notice Guidelines on Vertical Restraints SEC(2010) 411 Final

145 Commission, Communication from the Commission, Notice Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/97, para. 40-116

146 N. Dunne, 'Commitment Decisions in EU Competition Law' (2014) Vol.6(3) Journal of Competition Law and Economics 399, p. 407

is no certain and unambiguous clarification regarding their net anti- or pro-competitive effects.[147] Consequently, it is crucial to analyse each single long-term supply contract concluded in the energy markets with respect to its own market conditions such as the market positions of the contracting parties, the structure of the agreement itself, the intensity of retail competition and the general level of vertical integration, in order to properly assess the impact of them on competition in the relevant market.

Second, the article drew a methodology adopted by the Commission for the investigation of long-term supply agreements through an analysis of case law. It was found that under monopoly market conditions, the Commission tended to support the application of long-term supply contracts regarding efficiencies, in particular the development of generation and transmission technologies and capacities, and improvements in security of supply. However, the early cases did not spell out a clear and certain methodology in terms of an analysis of the anti- or pro-competitive effects of long-term supply agreements. Even though there is a lack of explanation as to why and how these decisions were reached, the Commission intimated that long-term supply contacts of less than 15 years would benefit from an exemption under Article 101(3) TFEU given the market conditions, and the high up-front investment cost in energy markets.[148]

In contrast, since the liberalisation of the energy markets in the EU, the Commission has tended to focus on the likely detrimental effects on competition and market integration. Within the first group of decisions the Commission mostly pointed out the anticompetitive contract clauses such as territorial restrictions and non-compete obligations. In most of the decisions, the investigations were brought to an end following the undertakings concerned proposing to delete the contract clauses from the agreements. Yet, still the decisions examined within this group did not draw out a clear methodology. Besides, it was highlighted that the antitrust settlements reached after long-lasting negotiations between the Commission and non-European energy incumbents or relevant national authorities had a significant role particularly in the wholesale gas markets.

With regard to the second group of the decisions, there are more detailed investigations and clarifications regarding the process of examination of the long-term supply contracts. Although the decisions do not individually provide proper guidelines regarding the methodology they may help to create formative guidance. Therefore, it can be drawn out that the Commission examines long-term supply contracts in four stages: in the first step, the

147 Hauteclocque, *supra* n 3, 105-107
148 Talus, *supra* n 8,150-158

Commission analyses the undertakings and the relevant market subject to investigations by considering the market power of the contracting parties and the competition degree in the markets. In the second step, possible anticompetitive effects of long-term supply agreements are examined, and in the third and fourth stages, the Commission assesses efficiencies that could possibly arise from the agreements and accepts the commitments proposed by the parties to bring the investigations to an end. Then, the Commission attempts to eliminate the anticompetitive effects and protect or enhance the efficiency gains (if there are any) through the commitments, which are mostly energy-specific.

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BIBLIOGRAPHY

Books

Bishop, S. and Walker, M., *The Economics of Competition Law* (3rd edn., Thomas Reuters Limited 2010)

De Hauteclocque, A., *Market Building through Antitrust: Long-term Contract Regulation in EU Electricity Markets* (Edward Elgar Publishing Limited 2013)

Faull, J. and Nikpay, A., *The EC Law of Competition* (2nd edn., Oxford University Press 2007)

Glanchant, J.M. and Leveque, F., (eds.) *Electricity Reform in Europe: Towards a Single Energy Market* (Edward Elgar Publishing 2009)

Haghighi, S. S., *Energy Security: The External Legal Regulations of the European Union with Major Oil and Gas Supplying Countries* (Hart Publishing 2007)

Jones, A. and Sufrin, B., *EU Competition Law* (5th edn., Oxford University Press 2014)

Jones, C. W. (ed.), *EU Energy Law: Volume III – EU Competition Law and Energy Markets* (3rd edn., Claeys & Casteels 2006)

Talus, K., *Vertical Natural gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law* (Kluwer Law International 2011)

Williamson, O. E., *Markets and Hierarchies: Analysis and Antitrust Implications* (Masmillan Publishing Co.,Inc. 1975)

Whish R. and Bailey D., *Competition Law* (7th edn., Oxford University Press 2012)

Talus, K. *EU Energy Law and Policy: A Critical Account* (London Oxford University Press 2014)

Articles

Adu, O., 'Competition or Energy Security in the EU Internal Gas Market: An Assessment of European Commission Decisions on Long-term Gas Contracts' (2011) Vol.9(1) Oil, Gas and Energy Intelligence <http://www.ogel.org/article.asp?key=3071> accessed 13 April 2013

Boosm, A. and Buehler, S., 'Restructuring Electricity Markets When Demand is Uncertain: Effects on Capacity Investment, Prices and Welfare' (2007) CIE Discussion Paper 2007-09 <http://www.econ.ku.dk/cie/dp/dp_2010/2007-09.pdf/> accessed 23 June 2011

Cook, C. J., 'Commitments Decision: the Law and Practice under Article 9' (2006) Vol. 29 World Competition 209

Coop, G., 'Long-term Energy Sale Contracts and Market Liberalisation in New Member States- Are They Compatible?' (2006) Vol.2 International Energy Law & Taxation Review 64

Cretiand, A., and Villeneuve, B., 'Long-term Contracts and Take-or-Pay Clauses in Natural Gas Markets' (2004) Vol.13 Energy Studies Review 75

De Hauteclocque, A., 'EC Antitrust Enforcement in the Aftermath of the Energy Sector Inquiry: A Focus on Long-term Supply Contracts in Electricity and Gas' in B. Delvaux, M. Hunt, and K. Talus, *EU Energy Law and Policy Issues* (Euroconfidentiel 2008)

De Hauteclocque, A., 'Long-term Supply Contracts in European Decentralized Electricity Makrets: an Antitrust Perspective' (PDhil Thesis, University of Manchaster 2009)

Dunne, N., 'Commitment Decisions in EU Competition Law' (2014) Vol.6(3) Journal of Competition Law and Economics 399

Finon, D. and Peres, Y., 'Investment Risk Allocation in Restructured electricity Markets: the Need for Vertical Arrangements' (2008) Larsen Working Paper No.12 <http://www.gis-larsen.org/fr/travaux/working-paper/investment-risk-allocation-in-restructured-electricity-markets/> accessed 11 May 2011

Gippini-Fournier, E., 'The Modernisation of Europe Competition Law: First Experiences with Regulation 1/2003' (2008) Vol.2 Community Report, Fide Congress 41

Glachant, J. M. and De Hauteclocque, A., 'Long-Term Energy Supply Contracts in European Competition Policy: Fuzzy not Crazy' (2009) EUI Working Papers-RoberT Schuman Centre for Advance Studies <http://www.eprg.group.cam.ac.uk/working-paper-eprg0919/> accessed 21 April 2011

Hviid, M., 'Relational Contracts, Repeated Interaction and Contract Modification' (1998) Vol.5 European Journal Law and Economics 179

Hviid, M., 'Long-term Contracts and Relational Contracts' in B. Bouckaert and G. De Geest (ed) *The Encyclopaedia of Law and Economics Vol. III* (Edward Elgar 2000)

Joskow, P. L., 'Vertical Integration and Long-Term Contracts: The Case of Coal-Burning Electric Generating Plants' (1985) Vol.1(1) Journal of Law, Economics, & Organization 33

Joskow, P. L., 'Contract Duration and Relationship-Specific Investments: Empirical Evidence from Coal Markets' (1987) Vol.77 The American Economic Review 168

Kjolbye, L., 'The New Commission Guidelines on the Application of Article 81(3): An Economic Approach to Article 81' (2004) Vol.25(9) European Competition Law Review 566

Klein, B., Crawford, R. G., and Alchian, A. A., 'Vertical Integration, Appropriable Rents, and the Competitive Contracting Process' (1978) Vol.21 Journal of Law and Economics 253

Kuhne, G., 'Long-term Gas Contracts in Germany: An Assessment of the German Competition Authority' in U. Hammer and M. M. Roggenkamp, *European Energy Law Report III* (Intersentia 2006)

Krattenmaker, T. G. and Salop, S. C., 'Competition and Cooperation in the Market for Exclusionary Rights' (1986) Vol.76(2) The American Economic Review' 109

Lang, J. T., 'Commitment Decisions under Regulation 1/2003: Legal Aspect of a new kind of Competition Decision' (2003) Vol.24 European Commission Law Review 347

Masten, S. E. and Crocker, K. J., 'Efficient Adaptation in Long-term Contracts: Take-or-pay Provisions for Natural Gas' (1985) Vol.75 The American Economic Review 1083

Meunier, G., 'Imperfect Competition and Long-term Contracts in Electricity Markets: Some Lessons from Theoretical Models' in A. De Hauteclocque, J. M. Glachant and

Neumann, A. and Hirschhausen, C., 'Long-term Contracts for Natural Gas Supply- An Empirical Analysis' (ISNIE Conference, Barcelona, 2005)

Neuhoff, K. and Hirschhausen, C., 'Long-term vs. Short-term Contracts: A European Perspective on Natural Gas' (2005) CPWE 0539 and EPRG 05 Working Paper <http://www.dspace.cam.ac.uk/bitstream/1810/131595/1/eprg0505.pdf> accessed 29 April 2011

Neuman, A. and Von Hirschausen, C., 'Long-Term Contracts and Asset Specificity Revisited: An Empirical Analysis of Producer–Importer Relations in the Natural Gas Industry' (2008) Vol.32 Review of Industrial Organisation 131

Newbery, D. M. and Politt, M. G., 'The Restructuring and Privatisation of Britain CEGB – Was it Worth it?' (1997) Vol.45 The Journal of Industrial Economics 269

Newbery, D. M., 'Competition, Contracts and Entry in the Electricity Spot Market' (1998) Vol.29 RAND Journal of Economics 726

Neuhoff, K. and De Vries, L., 'Insufficient Incentive for Investment in Electricity Generations' (2004) Vol.12 Utilities Policy 253

Nyssens H., Cultrera, C. and Schnichels, D., 'The Territorial Restrictions Case in the Gas Sector: a State of Play' (2004) Vol. 2 Competition Policy Newsletter 48

Onofri, L., 'Electricity Market Restructuring and Energy Contracts: A Critical Note on the EU Commission's NEA Decision' (2005) Vol. 20 European Journal of Law and Economics 71

Roitman, D., 'Legal uncertainty for vertical distribution agreements: the Block Exemption Regulation 2790/1999 (BER) and related aspect of the new Regulation 1/2003' (2006) Vol.27(5) European Competition Law Review 261

Roquea, F. A., 'Technology choices for new entrants in liberalized markets: The value of operating flexibility and contractual arrangements' (2007) EPRG 0726 & CWPE 0759 <http://www.eprg.group.cam.ac.uk/wp-content/uploads/2008/11/eprg0726.pdf> accessed 21 April 2011

Rubinfeld, D. L., 'Evaluating Antitrust Enforcement: Economic Foundations' in B. E. Hawk (ed.), *International Antitrust Law & Policy: Fordham Competition Law* (Juris Publishing 2009)

Salas, M. F., 'Long-term Supply Agreements in the Context of Gas Market Liberalisation: Commission Closes Investigation of Gas Natural' (2000) Vol.2 Competition Policy Newsletter 55

Schmutzler, A. and Bezh, M. A., 'Infrastructure Quality in Deregulated Industries: Is there an Underinvestment Problem?' (2004) Vol.22(2) Journal of Industrial Organisation 253

Stern, J., 'UK Gas Security: Time to Get Serious' (2004) Vol.32 Energy Policy 1967

Talus, K., 'Security of Supply Argument in the Context of EU Competition Law' (2010) Vol.8(1) Oil, Gas and Energy Intelligence <http://www.ogel.org/article.asp?key=2986> accessed 21 February 2012

Talus, K., 'One Cold Winter Day? EC Competition Law and Security of Supply' (2007) Vol.5(4) Oil, Gas and Energy Intelligence <http://www.ogel.org/article.asp?key=2667> accessed 5 June 2013

Waktare, E., 'Territorial Restrictions and Profit Splitting Mechanisms in the Gas Sector: the Algerian Case' (2007) Competition Policy Newsletter 19

Williamson, O.E., 'The Vertical Integration of Production: Market Failure Consideration' (1971) Vol.61 American Economic Review 112

Wils, W., 'Settlement of EU Antitrust Investigations: Commitment Decision under Article 9 of Regulation No. 1/2003' (2006) Vol. 29(3) World Competition 345

Cases

Scottish Nuclear, Nuclear Energy Agreement (IV/33.473) Commission Decision 91/329/EEC [1991] OJ L 178/31

Jahrhundertvertrag (IV/33.151) and *VIK-GVSt* (IV/33.997) Commission Decision 93/126/EEC [1992] OJ L 50/14

Electricidade de Portugal/Pego (IV/34.598) Commission Decision 93/C 265/03 30 [1993]

REN/Turbogas (IV/E-3/35.485) Commission Decision 96/C 118/05 [1996]

Isab Energy (IV/E-3/35.698) Commission Decision 96/C 138/03 [1996]

Gas Natural (Case COMP/37542) [2000]

Wingas/EDF Trading (Case COMP/36559) [2002]

Synergen (Case COMP/37732) [2002]

DONG/DUC (Case COMP 38187) [2003]

ENI/*Gazprom* (Case COMP/37011) [2003]

GDF/ENEL and *GDF/ENI* (Case COMP/38662) [2004]

OMV/Gazprom (Case COMP/38085) [2005]

E.ON Ruhragas/*Gazprom* (Case COMP/38307) [2005]

Repsol C.C.P. (Case COMP/B-1/38348) [2006]

Distrigaz (Case COMP/B-1/37966) Commission Decision [2007]

Distrigaz (Case COMP/B-1/37966) Commission Decision [2007]

Case T-170/06 *Alrosa v. Commission* [2007] ECR II-260

Distrigaz (Case COMP/B-1/37966) [2007]

Long-term Contracts France (Case COMP/39386) [2010]

THE NEW TAX ISSUE: TAXING ROBOTS

Yeni Vergi Konusu: Robotların Vergilendirilmesi

Dr. Faculty Member Gülşen GEDİK*

Abstract

Robots can be used as, inter alia, soldiers, journalists, car drivers, doctors, bankers, nurses and even lawyers. For example, if they are used for the performance of work in social areas, they can then analyze thousands of documents in a very limited time frame and can eventually replace hundreds of lawyers and/or paralegals in the research process. Accordingly, there will undoubtedly be no limit to the income that robots can earn.

All of the areas of law will be affected by new issues raised by the development of robotics technology. An EU Report has started to clarify the rights and liabilities of robots in civil law and has defined a new term called the "electronic person," and as a result, this new term will affect the tax laws. Robot taxing not only creates income tax or corporate tax issues, but it may also create issues related to Value Added Taxes, Special Consumption Taxes, Motor Vehicle Taxes or any other taxes and tax agreements. In Turkey, there has been no preparatory work done related to the new issue of "robot taxing," but there is an urgent need to start to prepare specific reports and to develop specific regulatory rules.

Keywords: Robot Taxing, Robot Taxes

Özet

Robotlar, askerler, gazeteciler, araç sürücüleri, doktorlar, bankacılar, hemşireler ve hatta avukatların yerini alabilirler ve örneğin eğer sosyal alanda kullanılır ya da çalışırlarsa, araştırma süreçlerinde, binlerce dokümanı çok kısa bir süre içerisinde ayrıntılı biçimde inceleyerek yüzlerce avukatın ve/veya stajyerlerin yerini alabilirler. Buna bağlı olarak da hiç şüphesiz robotların elde edeceği gelir konusunda bir sınırlama olmayacaktır.

Robot teknolojisinin gelişiminden tüm hukuk alanları etkilenecektir. AB Raporu robotların, medeni hukuk alanında hakları ve sorumluluklarını açıklamış ve yeni "elektronik kişi" tanımına yer vermiş olup, bunun bir sonucu olarak da bu yeni terimden vergi hukuku da etkilenecektir. Robotların vergilendirilmesi sadece gelir vergisi ve kurumlar vergisi alanında bir sorun olmayıp, aynı zamanda katma değer vergisi, özel tüketim vergisi, motorlu taşıtlar vergisi veya diğer vergiler ve vergi anlaşmalarını da etkileyecektir. Türkiye'de henüz yakın gelecekteki robot vergilendirilmesi tartışması hakkında bir çalışma bulunmamaktadır; ancak acilen özel bir rapor düzenlenerek özel yasal düzenlemeler yapılmalıdır.

Anahtar Kelimeler: Robotların Vergilendirilmesi, Robot Vergisi

Introduction

For many years, technological and scientific developments and improvements have changed society, from the invention of the wheel to agriculture, the computer and the Internet;[1] in the near future, robot technology will also be a societal change.

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1 Brederode Robert van, "Introduction", Science, Technology and Taxation", Editor: Brederode Robert van, Wolters Kluwer, Series on International Taxation, Volume 40, 2012, p. 1.

The eight significant issues the courts and the public at large will face if robots are placed side-by-side with human officers are the following:

(1) Robots will be smarter, faster, and more efficient than human officers.

(2) Robots will intrude on the citizens' rights to privacy more often than will human officers, as robots will have access to more third party data in a shorter period of time.

(3) Robot capabilities will require a complete rethinking of the Fourth Amendment doctrine, based upon the amount of information they will access on a daily basis

(4) Free-thinking robots will require human intervention and supervision.

(5) Robots and human officers may follow the same laws but may use different standards to arrest people, i.e., the use of inflexible programming versus discretion.

(6) Robots will have less people skills and common sense than human officers, and it is unclear how they will handle tense situations.

(7) The community will perceive robots differently from the way the community perceives human officers.

(8) Robots should be treated identically to their human counterparts when it comes to law enforcement and Fourth Amendment issues, e.g., motions to suppress evidence filed on the basis of a robot's action (or omission), or abuse of civil rights claims filed by suspects against a robo-cop while in performance of the robot's duties[2].

On February 17, 2017, the following statement was made by Bill Gates, co-founder of Microsoft, regarding the tax issue associated with robots; "*It is really bad if people overall have more fear about what innovation is going to do than they have enthusiasm; that means they won't shape it for the positive things it can do. And, you know, taxation is certainly a better way to handle it than just banning some elements of it. Right now, the human worker who does, say, $50,000 worth of work in a factory, that income is taxed and you get income tax, social security tax, all those things. If a robot comes in to do the same thing, you'd think that we'd tax the robot at a similar level*[3]*".* Academicians and economists have started to be criticized for their opinions, in newspapers, journals and web pages[4].

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2 Reid Melanie, *"Rethinking The Fourth Amendment In The Age Of Supercomputers, Artificial Intelligence, And Robots*",West Virginia Law Review, Spring 2017, Lexis Nexis online database (20.06.2017)

3 https://www.ft.com/content/d04a89c2-f6c8-11e6-9516-2d969e0d3b65?mhq5j=e1 (20.06.2017)

4 http://www.businessinsider.com/bill-gates-robot-tax-brighter-future-2017-3?international=true&r=US&IR=T,https://www.theguardian.com/business/2017/mar/22/robots-

Robots can be used as, inter alia, soldiers, journalists, car drivers, doctors, bankers, nurses and even lawyers. For example, if they are used to perform work in a social area, they can then analyze thousands of documents in very limited time frame and may eventually replace hundreds of lawyers and/or paralegals in the research process. Accordingly, there will undoubtedly be no limit to the income that robots can earn[5].

This paper aims to analyze the improvements that are brought about by the use of robots and their potential effects on the tax law system, according to some papers.

1. Definition

A robot is a machine capable of carrying out a complex series of actions automatically, especially a machine programmable by a computer and, especially in science fiction, is a machine resembling a human being and is able to replicate certain human movements and functions automatically[6].

According to the Robot Institute of America in 1979, "Robots are a reprogrammable, multifunctional manipulator designed to move material, parts, tools, or specialized devices through various programmed motions for the performance of a variety of tasks"[7].

This term was coined by the Czech playwright Karel Capek. His use of the word Robot was introduced into his play Rossum's Universal Robots (RUR), which opened in Prague in January 1921. The play was an enormous success, and productions soon opened throughout Europe and the US. R.U.R's theme, in part, was the dehumanization of man in a technological civilization. Subsequently, the word "robotics" was first used in *Runaround*, a short story published in 1942. *I, Robot*, a collection of several of these stories, was published in 1950. American scientist and writer Isaac Asimov also proposed his three "Laws of Robotics", and he later added a 'zeroth law'[8]. According to this documentation, "A robot may not injure humanity, or, through inaction, allow humanity to come to harm. A robot may not injure a human being, or,

tax-bill-gates-income-inequality, https://techcrunch.com/2017/04/22/save-the-robots-from-taxes/,http://www.cnbc.com/2017/06/02/bill-gates-robot-taxeu.html,https://www.forbes.com/forbes/welcome/?toURL=https://www.forbes.com/sites/quora/2017/06/13/should-robots-pay-taxes-no-capitalism-should change/&refURL=https://www.google.nl/&referrer=https://www.google.nl/...etc. (20.06.2017)

5 ObersonXavier, *"Taxing Robots? From the Emergence of an Electronic Ability to Pay to a Tax on Robots or the Use of Robots",*World Tax Journal, 2017 (Volume 9), No. 2, p.248.

6 https://en.oxforddictionaries.com/definition/robot (19.06.2017)

7 https://www.robotics.org/Robotic-Resources (19.06.2017)

8 Dowling Kevin, "*What is Robotics*?", http://www.cs.cmu.edu/~chuck/robotpg/robofaq/1.html (19.06.2017)

through inaction, allow a human being to come to harm, unless this would violate a higher order law. A robot must obey orders given to it by human beings, except where such orders would conflict with a higher order law. A robot must protect its own existence as long as such protection does not conflict with a higher order law"[9].

As robots are increasingly replacing human activities, often in a more efficient way, the legal issue of granting robots a new sort of legal personality has started to emerge. On May 31, 2016, the Committee on Legal Affairs of the European Union published a draft report (EU Report) addressing some recent issues linked to the growing importance of the use of robots in all aspects of modern society, such as in production, commerce, transport, medical care, education and farming. The report clearly takes the view that the development of the "autonomous and cognitive features" of robots "has made them more and more similar to agents that interact with their environment and are able to alter it significantly". The report was accepted by the EU Parliament on January 1, 2017[10].

In the EU Report, the EU Parliament suggests that the definition of "smart robots" should be based on the following characteristics: the acquisition of autonomy through sensors and/or by exchanging data with its environment (interconnectivity) and the trading and analysis of those data; self-learning from experience and by interaction (optional criterion); at least a minor physical support; the adaptation of its behavior and actions to the environment; and the absence of life in the biological sense.[11] The EU Report also stresses that the development of robot technology should focus on complementing human capabilities and not on replacing them and considers it essential, in the development of robotics, to guarantee that humans have control over intelligent machines at all times[12].

2. Improvements of Robots

When we think back over the past 20 years, we see something that has come true that we could not have imagined: the development of robot

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9 Clarke Roger, *"Asimov's Laws for Robotics: Implications for Information Technology", Part 1 and Part 2, Computer, December 1993, pp. 53-61 and Computer, January 1994", http://www.rogerclarke.com.au/SOS/Asimov.html (23.06.2017)*

10 Oberson, p. 247.
248. See to report: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2017-0005+0+DOC+XML+V0//EN (20.06.2017)

11 Oberson p.247.

12 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2017-0005+0+DOC+XML+V0//EN(20.06.2017)

technology. However, this development affects not only our "social life" but also our "law system".

Some scholars maintain that developments with robotics should have an impact similar to that of other technological developments. However, robots can not only replace the arms and legs of workers; they are also able to "think", repair other robots, learn from past experiences and improve their own capabilities. Following this reasoning, robots can now perform the same activities (usually more efficiently) than humans. They have the capacity to produce, develop and learn, just like humans. They replace human workers in the humans' working activities (for example, the supply of goods and services) and can improve their own capacities even further. This leads to the debate concerning the "autonomy" of robots[13].

When we begin to utilize robotic engineering in our homes or offices, the ability of robots to sense and record information and the likelihood that they will share that information with third parties for storage and processing purposes are clearly legally salient features from a privacy perspective. On the one hand, the fact that robots must take in information to properly navigate an environment (just as a phone call must be made on telephone lines) suggests that the sensing capability might be treated as necessary for their functionality and deserving of legal privacy protection. On the other hand, the known ability of robots to record massive amounts of private information raises the question of whether household robot owners have implicitly or explicitly consented to that recording, by having a robot in the home.[14] It clearly seems that improving technologies bring many law problems. Nevertheless, some universities in the United States have specific "robotics institutes" and continue with development studies in robotics[15].

3. Liabilities of Robots in Law

According to the EU Report, major changes to the current legal system could be contemplated, such as granting robots a sort of "electronic personality" and possibly holding robots liable for actions, not to mention the contemplated changes related to certain aspects of privacy, intellectual property or criminal law[16]. This idea remains, of course, quite controversial. Recent commentators

13 Oberson, p.252.

14 Kaminski Margot E., "*Robots In The Home: What Will We Have Agreed To?",* Idaho Law Review, 2015 (Lexis Nexis online database) (20.06.2017)

15 See lists, https://robotics.nasa.gov/students/robo_u.php(20.06.2017)

16 See about "legal responsibilities of robots"; Yüksel Bozkurt, Armağan Ezgi; "*Robot Hukuku*", Türkiye Adalet Akademisi Dergisi, Yıl:7, Sayı:29, Ocak 2017.

tend to favor the idea of granting robots a legal personality, while others still believe that this is not necessary, or at least not at this stage[17]. Advances in technology will clearly change the tax environment in countries by changing the underlying economy, and countries need political, administrative and judicial safeguards to protect the privacy of individuals and to protect against the potential misuse of information gathered for tax or other purposes[18].

Robot innovation also represents a challenging "wicked problem" that requires creative, collaborative approaches to develop real-world technology solutions.[19] While there is tremendous potential for using robots to perform tasks, there are several studies that need to be done and several questions that need to be answered regarding their use. For example, there is a definite need to conduct research on the economic feasibility of using robots: the costs of using robots, including the implementation cost, need to be determined..[20]

Eighteenth- and nineteenth-century philosophers were not thinking about contemporary robots. However, it is undoubtedly clear that a modern-day definition of an Intelligent Agent (IA) does not meet the requirements of personhood in the idealistic sense. Looking back at the rapid changes that have taken place in computer sciences in recent decades, it is likely, however, that the IA of the future will acquire qualities and capabilities that make them even more like humans. Should these IAs gain the capacity for self-reflection and something like a conscience, the issue of their personhood may have to be rethought[21].

As the existing definition of the legal liabilities of robots was insufficient, a new approach was needed to address this issue. Therefore, the European Parliament approved the "European Civil Law Rules in Robotics" draft on February 16, 2017, which includes 34 pages.[22] However, the European Parliament rejected a proposal to impose a so-called robot tax on owners to fund support for or the retraining of workers put out of a job by robots.

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17 Oberson, p.249.

18 Bird Richard M. Zolt Eric M., "*Technology and Taxation in Developing Countries*", Science, Technology and Taxation, Editor: Robert F.Brederode, Wolters Kluwer, Series On International Taxation, Volume 40, 2012, p.150.

19 Sixsmith Andrew, Mihailidis Alex, Simeonov Dorina, "*Aging and Technology: Taking the Research into the Real World*", Public Policy & Aging Report, 2017, p.4.

20 Kweku K. Bentil, American Association of Cost Engineers. Transactions of the American Association of Cost Engineers; 1989; Accounting, Tax & Banking Collection ,p.I.1.3.

21 Gless Sabine, Silverman Emily, Weigend Thomas, "*If Robots Cause Harm, Who Is To Blame? Self-Driving Cars And Criminal Liability*", New Criminal Law Review, Summer 2016, Lexis Nexis online database. (21.06.2017)

22 http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_ATA(2017)599250(20.06.2017)

The European Parliament has put forward initial proposals in its resolution on legal rules for machines that are able to act with a high degree of autonomy and make their own decisions through being equipped with artificial intelligence (AI) and having physical freedom of movement. This will not be the final word on the matter from a legal perspective, and we are still some years away from corresponding laws being enacted. In the meantime, technical developments in the field of AI and robotics will not wait for national or European lawmakers and are set to continue unabated. It remains to be seen whether technical progress might not soon overtake the legal discussion[23].

Consequently, EU Reporters used the term "smart autonomous robots" and "smart robot" rather than the term "robotics or robots." The differences in terminology are based on the fact that the smart autonomous robot acquires autonomy through sensors and/or by exchanging data with its environment (inter connectivity), trades and analyses data, is self learning, and has the capability to provide physical support; adapting its behaviors and actions to its environment, smart robots present no operational difficulties, and as scientists label them as smart, this generation of robots is no longer confined to work on fixed production lines and to operate automatically but is able to adapt to changes and instability in their surroundings[24].

From a legal viewpoint, there are still a host of unanswered questions around robotics and the artificial intelligence incorporated into robots. The recommendations of the European Parliament relate to general principles around the development of robotics and AI for civil use and address various topics involving these new technologies. Key points include the desire to establish ethical principles for developing and using AI-based robotics and resolving the numerous liability issues that arise. In this context, the European Parliament is calling on the Commission to consider introducing a specific legal status for intelligent robots in the long term. The Parliament's resolution also advocates the establishment of a European agency for robotics and artificial intelligence, with the aim of providing in a timely and informed manner the technical, ethical and regulatory expertise required to meet the challenges and opportunities arising from the development of robotics. There are also recommendations with regard to setting up a register of robots across the European Union and introducing mandatory registration and insurance for intelligent robots.

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23 Hauser Marcus, *"Do Robots Have Rights? The European Parliament Addresses Artificial intelligence and Robotics",*http://www.cms-lawnow.com/ealerts/2017/04/do-robots-have-rights-the-european-parliament-addresses-artificial-intelligence-and-robotics (20.06.2017)

24 http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_ATA(2017)599250(20.06.2017)

The Parliament's proposal to consider introducing a specific legal status for robots in the long term is likely to spark a huge debate. Should robots really be given a special legal status, often referred to as an "electronic person" or "e-person"?

Although the idea sounds rather strange and downright bizarre at first, on closer inspection, it is actually based on very practical considerations. If a robot has its own specific legal status, it can also be made responsible for its own actions and decisions via this status. If it causes damage, for instance, the robot itself could be sued for compensation. That will only be worth doing if the damage is covered by insurance, of course. For this reason, Parliament is also proposing the introduction of obligatory insurance for intelligent robots. From a legal perspective, the introduction of an "electronic person" could make sense when combined with obligatory insurance for intelligent robots.

Human responsibility will decline in importance as machines become more autonomous and make more decisions on their own. Increasingly, humans will deny responsibility by saying that they were entitled to rely completely on intelligent technology. After all, the whole aim of automation and artificial intelligence is to avoid the need to continuously give instructions to and monitor such devices. It is also debatable whether continuous human control will even be feasible in the case of intelligent, sophisticated systems that act autonomously.

In addition, it will not always be possible to determine who is responsible or to establish the exact degree of responsibility if damage is caused, particularly in situations in which an interaction between multiple intelligent systems is involved.

In this context, robot legislation will be a collaboration between experts in the fields of jurisprudence, philosophy, psychology, sociology and technology. However, having said that, over-intervention and strict rules may decrease or restrain the growth and innovation in robotics[25].

Robot technology may not only create problems that have to be resolved in the civil or criminal legal system but may also create issues that have to be resolved through the tax law system.

4. Taxing robots

4.1. General Aspect

Although Bill Gates started a recent discussion of the concept, the idea of a tax on robots was raised on May 31, 2016, in a draft to the European Parliament[26] (EU First Report) prepared by Mady Delvaux from the Committee

[25] Bozkurt Armağan Ebru, p.107.
[26] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML%2

on Legal Affairs. Emphasizing how robots could boost inequality, the report proposed that there might be a "need to introduce corporate reporting requirements on the extent and proportion of the contribution of robotics and AI to the economic results of a company for the purpose of taxation and social security contributions"[27]. However, this draft was rejected in the final Report.

Critics of a robot tax have emphasized that the ambiguity of the term "robot" makes defining the tax base difficult. The critics also stress the enormous, undeniable benefits of robotics to productivity growth.

Introducing a tax on robots or on their usage would result in recognizing a specific tax status of robots. It could therefore be argued that the tax law should grant a legal capacity to robots, introducing a new type of legal personality into tax law. Similar to the justification used for recognizing other existing legal entities (such as corporations), it follows that recognition of robots as a separate legal entity is possible. Following such recognition and from the activities exercised by robots (work or services), it appears at least arguable that a "specific tax ability" of robots to pay should be recognized, resulting in accepting the robots' "electronic ability to pay"[28].

In a recent interview, Bill Gates discussed the option of tax on robots. He argued that if human workers' income is taxed today, and then a robot comes in to do the same thing, it seems logical to think that we would tax the robot at a similar level. While the form of such taxation is not entirely clear, Gates suggested that some of the tax could come from the profits that are generated by the robot's labor-saving efficiency, and some could come directly in the form of some type of robot tax.

The idea of regulating robotics has been an issue that has been discussed over the past months. Earlier in February 2017, the EP called EU-wide legislation to regulate the rise of robots, including an ethical framework for their development and deployment and the establishment of liability for the actions of robots including self-driving cars. However, the EP rejected a proposal to impose a robot tax on owners to fund support for the retraining of workers put out of a job by robots. According to the Reuters report, the decision to reject the robot tax was hailed by the robotics industry, which said it would have stunted innovation[29]"

BCOMPARL%2BPE-582.443%2B01%2BDOC%2BPDF%2BV0//EN(20.06.2017)

27 https://www.weforum.org/agenda/2017/03/taxing-robots-this-is-why-we-might-need-to(20.06.2017)

28 Oberson, p.251.

29 Merler Silvia, "*Taxing Robots*", http://bruegel.org/2017/03/taxing-robots/(20.06.2017)

4.2. Problem for Companies

Returning to Bill Gate's opinion, although he stated, "*If a robot comes in to do the same thing, you'd think that we'd tax the robot at a similar level",* the International Federation of Robotics (IFR) objected to this idea with the following argument: "*A robot tax would make these much-needed investments in technology more expensive for companies. Profits, not the means of making them, should be taxed"*[30].

Researchers studying this issue have made similar arguments and have expressed the following: 1. "Getting companies to pay their fair share of taxes won't solve the larger societal challenge that automation will eventually displace low-skilled workers, nor would a robot tax. Instead, governments should focus on using corporate tax revenues to create free or low-cost education programs to prepare people to work alongside automation. For those unable to find work in tomorrow's tech-driven society, governments could provide universal basic income or other safety nets for the least-advantaged. There are no easy answers to the growing divide between rich and poor, which will only accelerate in an automated age that leaves unskilled workers at a distinct disadvantage. But a robot tax is not the answer to this problem"[31].

2. "A robot tax would help offset the reduced revenues flowing into public coffers as machines take some jobs previously held by humans. However, before we start taxing companies that deploy robotics, let's first agree on what a robot actually is. We could narrow the definition of a robot to include only those machines that do tasks once done by a human, but then we'd have to include Microsoft's vast hardware and software offerings, since computers do things like word processing, transcribing, calculating mathematical formulas, and analyzing data—all of which used to be human tasks. Implementing a robot tax wouldn't just be difficult due to the challenge of defining what is and isn't a robot. In reality, robots, like most automation, help people be more efficient and productive, rather than replace them"[32].

3. "Harder and less rational would it be to imagine a system in which

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30 https://ifr.org/ifr-press-releases/news/world-robotics-federation-ifr-why-bill-gates-robot-tax-is-wrong: " Research shows that automation actually results in a positive tax balance for social systems. Repetitive or dangerous tasks are replaced by industrial robots, leading to the creation of new, safer, higher-skilled and higher-income jobs that increase pension contributions".

31 Cousins Steven, "*Is A Robot Tax Really An Innovation Penalty*", https://techcrunch.com/2017/04/22/save-the-robots-from-taxes/(20.06.2017)

32 Cousins Steven, *"Is A Robot Tax Really An Innovation Penalty",*https://techcrunch.com/201/04/22/save-the-robots-from taxes/(20.06.2017)

robots are individually identified and hit. In fact, the issue is not about taxing technology but about making taxation more equitable, rational and balanced. This would, however, involve reorganization and a rethinking of the design and functioning of current social security systems. In essence, if "robots" are used by companies that increase their profits share with respect to total GDP, it is clear (certain?) that, in the future, these growing profits will become a favorite taxable base"[33].

Another issue in considering a new form of taxation for robots is the direct and indirect impact of robots on employment. First, robots could, in the long term, replace many, if not most, human activities and therefore have a major impact on employment. This may then result in important tax and social security losses linked to the disappearance of revenues, notably, salaries. Second, at the same time, the need for additional sources of state revenue would increase to support the growing number of unemployed people[34].

4.3. Problem for Taxpayer Definition

According to the EU Report, a robot is considered an "electronic person", but there is no country associated with the "electronic person".

Oberson states the following: "*The specific ability to pay robots, or of their usage, it remains to be analyzed how to implement such an ability to pay. Indeed, notwithstanding the legal norm, which recognizes the legal personality of an entity, as of now, the structures to which a tax capacity has been granted also benefit from a capacity to pay. Principle of separation has been used to justify the double economic taxation of profits, first at the level of the company and second upon distribution as dividends, even if recent rules tend to alleviate the tax at the level of qualifying dividend participations. Even if this principle is subject to criticism, it seems that there is a consensus that companies, as legal entities, benefit from a sort of "objective" ability to pay, justified by various privileges (including the limited liability) that corresponds to a capacity of payment. In other words, as long as the profits are not distributed to the shareholders, the company benefits from a sort of "transitory" ability to pay.*

If an attempt is made to transpose this reasoning onto the case of robots, it appears that they indeed benefit from an ability to pay, which is, however, derived from the activities they exercise (work, transfer of goods and services) or that they will perform without consideration (salary or income). As such, the robot does not generally have a financial capacity, such as equity, personal

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33 Visco Vincenzo, "*Getting The Robots To Pay Tax*", https://www.socialeurope.eu/2017/05/getting-robots-pay-tax/(20.06.2017)

34 Oberson, p. 249.

assets or liquidities. It is the employer (enterprise) or owner who, ultimately, benefits from a capacity to pay"[35].

The discussion of a robot tax should consider what alternative we have to deal with rising inequality. It would be natural to consider a more progressive income tax and a "basic income." However, these measures do not have widespread popular support. If support is not widespread, the tax, even if imposed, will not last. While this would not tax individual human success, as income taxes do, it might in fact imply somewhat higher taxes on higher incomes if high incomes are earned in activities that involve replacing humans with robots[36].

Obserson states the following: "*To the extent that a practical and justifiable definition of robots may be implemented, the recognition of a new legal personality for robots could lead to the recognition of a new tax capacity. Indeed, robots, as legal subjects, could then have legal responsibilities, and their activities (work, transfer of goods and services), which would normally be subject to tax if effectuated by humans, could then also be taxed. The type of tax would then depend on the legal position of the robot. In the case that the robot is employed by a company, and based on the idea that a robot replaces humans, and consequently prevents such humans from being paid their salaries, a tax on the imputed hypothetical salary that robots should receive from equivalent work done by humans could be introduced. In other words, the tax could be levied on the hypothetical amount of salary that workers would have received to exercise the activity that was replaced by robots. This concept would rely on the legal characterization of the relationship between the company owner (and user of the robot) and the robot itself (as a tax person), in a similar way to a working contract. If the relationship differs from a working contract—for instance, if the robot is owned by a company or a person and acts under a contract of services (entertainment, help, advice, etc.)—then the imputed income could be some approximated amount of an arm's length consideration for similar services rendered by humans*[37].

In parallel with these developments South Korea introduced the world's first robot tax plan in August 2017[38].

In South Korea's announced tax law revision plan, the tax deduction benefits that previous governments provided to enterprises for infrastructure investment aimed at boosting productivity will be downsized and the following

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35 Oberson, p.253.

36 Robert J. Shiller, https://www.weforum.org/agenda/2017/03/taxing-robots-this-is-why-we-might-need-to(20.06.2017)

37 Oberson, p. 254.

38 https://www.telegraph.co.uk/technology/2017/08/09/south-korea-introduces-worlds-first-robot-tax/,(04.03.2018)

statement was given: "Though it is not about a direct tax on robots, it can be interpreted as a similar kind of policy considering that both involve the same issue of industrial automation"[39].

5. The Effects for Turkey

The Turkish direct taxation system consists of two main taxes: the personal income tax and the corporate income tax. An individual is subject to the personal income tax on his income and earnings, in contrast to a company, which is subject to corporate income tax on its income and earnings. Personal income tax is levied on the income of individuals. The term "individual" is defined as a natural person, and according to Turkish Tax Procedural Code Article 8, a "taxpayer is a natural or juridical person who has tax liabilities".

Robotics technologies will be used in many areas in the near future, and Turkey will be faced with related tax problems, such as the following: Who is the taxpayer? Is the robot considered a real natural person or an electronic person taxpayer? What is the definition of a robot's income and what kind of income pertains to work done by robots, i.e., salary, self-employment income or some other type that is not defined in the existing Tax Code?

In this case, the EU Reports, the EU Member Countries' legal regulations and maybe plans drafted by South Korea concerning robot technology will guide Turkey. First, in Turkey, we urgently need to legislate the definition of robots. After determining the legal definition of robots, The Ministry of Finance should cooperate with other related entities and prepare a specific report that includes definitions of robots, liabilities, civil rights, tax issues and changing legal provisions. In addition, in this effort, tax academicians should collaborate with tax practitioners and develop a draft recommendation.

Conclusion

The development of robots with their exponential possibilities of combination and/or development will create activities performed by robots, which are difficult to compare with human activities. Alternative valuation methods should therefore be considered. In addition, such development could also lead to potential aggressive planning concerns. It appears that some work has already been done to develop rules of "civil law" on robotics. However, the development of a tax capacity of robots, in the form of an "electronic ability to pay", is also required. Well-designed robots should, at the very least, be programmed to be tax compliant, or one day, they may decide to refuse to pay taxes without representation[40].

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39 http://www.koreatimes.co.kr/www/news/tech/2017/08/133_234312.html. (04.03.2018) "But when this paper was writing the Counrty did not adopt the rule yet".

40 Oberson, p.261.

A generally accepted definition of robots and a tax on robots should be adopted in order to try to mitigate potential conflicts of characterization and/or of attribution of income. In addition, new characterization issues related to the rules on the tax treatment of the robots' income may occur. Furthermore, if we were to recognize a tax capacity of robots, the proper tax treatment, cost allocation rules and transfer pricing rules should be revisited as well.

Related to the development of robotics technology, all of the areas of law will be affected by this new issue. The EU Report has started to clarify the rights and liabilities of robots in civil law and defined a new "electronic person". As a result, this new term will affect tax laws. Robot taxation not only raises income tax or corporate tax issues but also raises issues related to Value Added Taxes, Specific Consumption Taxes, Motor Vehicle Taxes and other taxes and tax agreements. In Turkey, there has been no preparation for this future issue of "robot taxation", but there is an urgent need to start to prepare specific reports and to develop specific regulatory rules.

Last Word

"Could taxation of robots ever happen? Certainly it could, but the $64,000 question is whether there is the political will to do it. It would take a major paradigm shift in our attitude towards taxation to see it as a possible force for good, rather than simply a dead weight and burden. However, in the 1960s and 1970s today's attitude towards taxation would have been equally inconceivable. Never say never"[41].

REFERENCES

BOOK

Brederode Robert van, "Introduction", Science, Technology and Taxation, Editor: Brederode Robert van, Wolters Kluwer, Series on International Taxation, Volume 40, 2012

Kweku K. Bentil, American Association of Cost Engineers. Transactions of the American Association of Cost Engineers; 1989; Accounting, Tax & Banking Collection.

[41] Malcolm James, *"Could Bill Gates' plan to tax robots really lead to a brighter future for all"?,* https://theconversation.com/could-bill-gates-plan-to-tax-robots-really-lead-to-a-brighter-future-for-all-73395

ARTICLES

Bird Richard M. Zolt Eric M., "*Technology and Taxation in Developing Countries", Science, Technology and Taxation*", Editor: Robert F.Brederode, Wolters Kluwer, Series On International Taxation, Volume 40, 2012.

Bozkurt Yüksel Armağan Ebru, Robot Hukuku, Türkiye Adalet Akademisi Dergisi, Yıl:7, Sayı: 29, Ocak 2017.

Clarke Roger, *"Asimov's Laws for Robotics: Implications for Information Technology", Part 1 and Part 2, Computer, December 1993, pp. 53-61 and Computer, January 1994",* (www.rogerclarke.com.au)

Cousins Steven, "*Is A Robot Tax Really An Innovation Penalty",* (www.techcrunch.com)

Dowling Kevin, *"What is Robotics?",* (www.cs.cmu.edu)

Gless Sabine, Silverman Emily, Weigend Thom*as, "If Robots Cause Harm, Who Is To Blame? Self-Drıvıng Cars And Crımınal Liability"*, New Criminal Law Review, Summer 2016

Hauser Marcus, "*Do Robots Have Rights? The European Parliament Addresses Artificial intelligence and Robotics*", (www.cms-lawnow.com)

Kaminski Margot E., "*Robots In The Home: What Will We Have Agreed To?",* Idaho Law Review, 2015 (Lexis Nexis online database)

Malcolm James, "*Could Bill Gates' plan to tax robots really lead to a brighter future for all?",* (www.theconversation.com)

Merler Silvia, *"Taxing Robots",* (www.bruegel.org)

Oberson Xavier, *"Taxing Robots? From the Emergence of an Electronic Ability to Pay to a Tax on Robots or the Use of Robots*", World Tax Journal, 2017 (Volume 9), No. 2

Reid Melanie, "*Rethinking The Fourth Amendment In The Age Of Supercomputers, Artificial Intelligence, And Robots",* West Virginia Law Review, Spring 2017,(Lexis Nexis online database)

Robert J. Shiller, (www.weforum.org)

Sixsmith Andrew, Mihailidis Alex, Simeonov Dorina, "*Aging and Technology: Taking the Research into the Real World",* Public Policy & Aging Report, 2017.

Visco Vincenzo, "Getting The Robots To Pay Tax", (www.socialeurope.eu)

Yüksel Bozkurt, Armağan Ezgi; "*Robot Hukuku*", Türkiye Adalet Akademisi Dergisi, Yıl:7, Sayı:29, Ocak 2017.

OTHER SOURCES

www.businessinsider.com

www.cnbc.com

www.en.oxforddictionaries.com

www.europarl.europa.eu

www.forbes.com

www.ft.com

www.ifr.org

www.koreatimes.co.kr

www.robotics.org

www.theguardian.com

www.telegraph.co.uk

DIRECT DEMOCRACY AND JUDICIAL REVIEW: A COMPARATIVE STUDY OF US AND SWISS LEGAL SYSTEMS

Doğrudan Demokrasi ve Yargı Denetimi: ABD ve İsviçre Hukuk sistemlerinin karşılaştırmalı bir incelemesi

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Abstract

In the US, almost half of the states have established direct democracy mechanisms, but there is a paucity of such mechanisms at the federal level. By contrast, the Swiss system knows extensive direct democracy at both the cantonal and the federal level, including rights of referendum on laws enacted by the parliament and popular initiatives for constitutional revision.

This paper focuses on how direct democracy mechanisms, such as referendums and citizens' initiatives serving an overarching ideal of public sovereignty, may inform and affect judicial review. The paper also examines certain differences in treatment between federal and state laws when it comes to judicial review, as the courts will not necessarily apply the same standards despite the existence of similar democratic mechanisms at both levels.

In this contribution, I first argue that none of the existing systems is fully satisfactory. The *status quo* in the Swiss model might be a source of instability and threaten legal certainty, coherence and transparency and could ultimately be more harmful to public sovereignty in that federal acts may in practice be set aside without constitutional basis. As to the US model, the combination of an absence of citizen involvement at the federal level with extensive judicial review might ultimately be deemed as unsatisfactory from the perspective of democratic rights.

This does not mean however that direct democracy is somehow superior to representative, or that either of judicial or legislative power should prevail over the other. To the contrary, in this paper I argue that in a federal system all are complementary. Furthermore, I claim that one should recognise the limits of direct democracy and of judicial review in order to improve both by striking a balance between them.

Keywords: Direct Democracy, Judicial Review, US legal system, Swiss legal system, referendum, popular initiative, individual rights, popular sovereignty

Özet

ABD'de, eyaletlerin yaklaşık yarısında doğrudan demokrasi mekanizmaları bulunurken, federal seviyede aynı mekanizmalarda bir eksiklik olduğu gözlemlenmektedir. Buna karşılık, İsviçre'de gerek kantonal gerekse federal düzeyde parlamento tarafından çıkarılan yasaların referanduma sunulmasını ve anayasa değişimi için halk inisiyatiflerinin düzenlenebilmesini de içeren şekilde geniş doğrudan demokrasi mekanizmaları mevcuttur.

Bu çalışmada halk iradesini temsil eden referandum ve halk inisiyatifleri gibi doğrudan demokrasi mekanizmalarının yargı denetimi ile olan ilişkisi incelenmektedir. Bu bağlamda, yargı denetiminin federal ve yerel kanunlar açısından farklılıklarına da değinilmektedir.

Bu çalışmada yapılan değerlendirmede, öncelikle mevcut sistemlerin hiçbirinin tamamen tatmin edici olmadığı savunulmaktadır. İsviçre'deki mevcut modelin bir istikrarsızlık kaynağı olabileceği ve hukuki güvenlik, tutarlılık ve şeffaflık gereklerine bir tehdit oluşturabileceği; ayrıca, pratikte anayasal temeli olmadan federal yasaların yürürlükten kaldırılabilme imkanı tanımasının kamu egemenliğine faydadan çok zararları olabileceği tartışılmaktadır. ABD modelinde ise, kapsamlı yargı denetiminin varlığı ile federal düzeyde vatandaş katılımının noksanlığının birleşimi sonucunda demokratik haklar açısından yetersiz olabileceği tartışılmaktadır.

Ancak bu doğrudan demokrasinin temsili demokrasiden üstün olduğu ve/veya yargı veya yasama gücünün baskın olması gerekliliği anlamına gelmez. Aksine, bu çalışmada federal sistemlerde yargı denetimi ile doğrudan demokrasi mekanizmalarının tamamlayıcı olduğu ortaya konulmaktadır. Dahası, gerek doğrudan demokrasinin gerekse yargı denetiminin sınırlarının belirlenip, aralarında adil bir denge oluşturulması gerekliliği savunulmaktadır.

Anahtar Kelimeler: Doğrudan Demokrasi, Yargı Denetimi, ABD Hukuk Sistemi, İsviçre Hukuk Sistemi, Referandum, Halk İnisiyatifi, Bireysel Haklar, Kamu Egemenliği

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Introduction

In a hierarchical account of legal systems such as that of Hans Kelsen, the Supreme Courts are tasked with upholding the primacy of the Constitution. In this context, the doctrine of judicial review may be defined as the courts' power to declare acts of the executive or the legislative branches unconstitutional. As such, judicial review has been the object of much criticism and praise. Put in the broadest terms, critics question the democratic legitimacy of the doctrine as the court overrides the will of the majority, whilst scholars in favor of the doctrine argue that the "double check" by the judge is necessary to guarantee effective protection of constitutional rights, thus rejecting the quest for so-called "popular constitutionalism".

Although the topic of judicial review is generally seen as the preserve of scholars of American law, it is also much debated in Switzerland. This paper suggests that a comparative study of both systems in this area is both relevant given their comparable characteristics (federalism, direct democracy), and useful given certain fundamental differences of approach to the doctrine of judicial review.

Direct democracy decision-making ensures the primary exercise of popular sovereignty. The citizenry are part of machinery of the state, in addition to the classical elected or appointed judicial, executive and legislative government bodies. Nonetheless, to fully exercise its power, this fourth body might depend on the other bodies. In this respect, judicial review challenges the conformity of acts enacted by the popular will. But does this challenge necessarily mean that direct democracy and judicial review are conflicting? Or is it possible to conceive of a way to ensure the smooth functioning of both in a well-organised democracy? This contribution seeks to analyse the interrelation between direct democracy and judicial review. As constitutional scholarship has largely covered both, there is little to be added to that literature. In this comparative analysis, I argue that one should recognise the limits of direct democracy and of judicial review and strike a balance between them. To this end, I will focus on how direct democracy mechanisms, such as referendums and citizens' initiatives serving an overarching ideal of public sovereignty, may inform and affect judicial review.

First and foremost, I refer to judicial review for the protection of human rights. Thus, the analysis will mainly focus on the role of courts, particularly regarding the protection of civil rights and liberties. For this purpose, mainly the rights-based challenges to certain initiatives will be analysed, as opposed to those that are powers-based.[1] Second, as a comparative study I will compare

[1] For the distinction see Kenneth P. Miller, *Direct Democracy and The Courts*, Cambridge

the American experience of judicial review with the Swiss legal order, as well as the Swiss electoral system (direct democracy) with the American (Electoral College). This comparison will help show that both systems are more inclusive than exclusive within their own countries respectively. Obviously, the objective is not to compare what is not comparable, but I will attempt by a thorough examination of these two systems to assess a proposal for reforming the existing legal frameworks. To this end, the current state of the relatonship between popular democracy and constitutionality, that appears at first sight to be conflictual, should be briefly described as it exists in Switzerland and the United States. Only afterward can eventual reciprocal influences be apprehended.

Comparison between Switzerland and the United States is justified for several reasons. It is therefore worth beginning with a brief reminder of the differences and similarities between these legal orders. First of all, the Swiss institutional structure is historically based on the American model. Both of the countries are federal and utilize some form of direct democracy, though at different levels. Furthermore, like the United States legal system, Switzerland's constitutional jurisdiction is diffuse. The extent of judicial federalism is much greater in Switzerland, as there is a superposition of cantonal and federal courts which are competent to adjudicate over national law, while in the United States state and federal courts have distinct and complementary competencies[2]. Nonetheless, there is not as such a constitutional jurisdiction in the United States either, given that all courts are empowered to review constitutionality.

It should be noted that to ensure the uniformity of federal law, as the highest authority of the judiciary in the Confederation[3], the Federal Supreme Court rules in the final instance. Therefore, the Federal Court[4] assumes a role similar to that of America's Supreme Court.

1. Direct democracy and Judicial review in general

Direct democracy embodies the idea that legislative power resides in the people[5]. Independently of whether or not direct democracy enhances citizenship virtues, it is undeniable that by recognising the authority of the people, elected parliamentarians become accountable. Thus, the citizens

University Press, Cambridge, (2009) at 115.

2 Article III sec. 2 § 1 U.S. Constitution.

3 Article 188 (1) Swiss Constitution placing it over the Federal Criminal Court, the Federal Administrative Court and the Cantonal Judicial Authorities.

4 Hereinafter: Swiss Supreme Court.

5 Jean-Jacques Rousseau, *Contrat Social II*, 4, (1790), at 352.

constitute a balancing power rendering politicians more responsible towards the people they represent. Sovereignty ultimately remains with the people, i.e. the body politic which is bound by the social pact which is the constitution.

Judicial review raises the obvious question of whether the legislator or the judge is best placed to protect fundamental rights. To put it differently, this raises the difficult question of democratic legitimacy of judicial review, along with the paradox of democratic representation. Still, one should ask if there is a reason to divide the labour strictly between the legislature and the judiciary,[6] or whether there might be a different manner to conceive of the checks and balances in constitutional adjudication. A limited judicial review, while providing a competitive alternative to direct participatory democracy will lead to the better protection of constitutional rights, intended solely as fundamental human rights.

Historically, only the legislator elaborated the law. Today, the roles have evolved: the judge is no longer perceived as being limited in role to the strict and rigorous interpretation of the law, acting only as the "mouth of the law".[7] Indeed, this "modern judge" is one who acts as a legislator and emits normative jurisprudence.[8] If the adjustment of the judiciary was initially met with some reluctance (due to the distancing from the legal syllogism), it is now recognized that judicial interpretation of legislation also involves some form of lawmaking, as a positive legislator.

The national courts must discharge their duty to protect fundamental rights, in particular where legislative gaps remain. It should be specified that the term legislator not only refers to the elected parliament but also includes the whole citizenry when exercising the same power through instruments of direct democracy. The lack of judicial review, seemingly overrides the supremacy of international law over national law. Without judicial review, what protections can remain for constitutional rights?

A. The Swiss Experience

Given the institution of (semi-) direct democracy, Swiss federalism is characterized by its allowing citizens to have the first and/or last word by empowering them to act directly to make and repeal laws and to change the constitution. Conceived as early as 1848[9], the Swiss Constitution, as of

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6 See Samantha Besson, The Morality of Conflict, A Study on Reasonable Disagreement in the Law, Hart Publishing, Oxford, (2005).

7 Montesquieu, *De l'Esprit des lois*, livre XI, chapitre VI, Genève (1748).

8 *See* François Ost, ''Retour sur l'interprétation'', *Aux confins du droit*, Berne (2001), at 133.

9 For the history of direct democracy in Switzerland, *see* Kris W. Kobach, *The referendum : direct democracy in Switzerland*, Dartmouth, Aldershot, (1993).

today, allows the mandatory referendum, the optional referendum, and the popular initiative at the federal level. Consecrated as political rights of all Swiss citizens satisfying the prescribed conditions of age and legal capacity,[10] the Swiss Constitution provides a right of popular initiative at the federal level to request a partial or complete revision of the Federal Constitution, as well as mandatory or optional referendum rights over legislation.

Any amendment of the Swiss Constitution triggers a mandatory referendum, as does accession to organisations for collective security or supranational communities.[11] Both a majority of cantons and of voters is required.[12] Strictly speaking, the validity of any such measure ultimately depends on the approval of the people. Thus, there are no material limits to the revision of the constitution in Switzerland. This is not to imply that there are no material limits on the exercise of popular sovereignty. The most binding of such material limits to the exercise of popular sovereignty is found in international treaties, especially those pertaining to human rights.

A law adopted by the Federal Assembly, or parliamentary approval of important treaties, will be subject to an optional referendum upon request by 50'000 persons eligible to vote or upon request by eight Cantons,[13] thus allowing the people to have the final say in legislative matters as well as constitutional. Indeed, laws promulgated by the Federal Assembly may not be challenged in the Federal Supreme Court,[14] but they remain subject to referendum within 100 days of their adoption.

Particularly, as pertains to the purpose of this analysis, the popular initiative allows for the possibility of triggering a partial or total revision of the Constitution upon the demand of 100,000 voters.[15] A popular initiative is successful upon approval by a majority of both voters and of Cantons.[16]

All these components of direct democracy demonstrate the citizenry's sovereignty, as they are binding upon the other branches of the government. Indeed, the Federal Assembly and the Federal Council are bound by the popular will, and even the Federal Supreme Court is not entitled to declare a referendum or initiative unconstitutional. At the most, the Federal Assembly can declare an initiative invalid if it does not comply with the principle

10 Article 136 Swiss Constitution.
11 Article 140 (1) Swiss Constitution.
12 Article 140 (1) and 142 (2) Swiss Constitution.
13 Article 141 (1) Swiss Constitution.
14 Article 189 (4) Swiss Constitution.
15 Articles 138 and 139 Swiss Constitution.
16 Article 139 (5) and 142 (2) Swiss Constitution.

of cohesion of subject matter[17], the principle of consistency of form or contravenes *jus cogens* provision of international law.[18]

It is necessary to point out three main failures of the current system.[19] The first of these flaws is related to parliament's power to declare a popular initiative void, and this without clearly established grounds in the Constitution. The second of these flaws is the fact that a political body is deciding on a legal issue, instead of an independent judicial authority that may provide a formal reasoned decision. It is indeed preferable that the Federal Assembly pass statutes only after consultation of the Supreme court. As Häfelin raises it, even the control itself is an assertion of the supremacy of the democratic principle, whereas the same cannot be said about the respect of the rule of law.[20]

Pursuant to Article 148 (1) Swiss Constitution, the Federal Assembly is the supreme authority of the Confederation. Subsequently, in accordance with Article 190 Swiss Constitution, federal statutes enjoy immunity from judicial review. The only remaining control over legislative acts consists therefore in subjecting them to public review in the form of referendum. Subject to the rights of the people and the cantons[21], federal statutes based on popular initiatives escape monitoring. As the saying goes: "*vox populi, vox dei*".[22] Therefore, the lack of judicial review of acts representing the popular will may lead to a deficiency in the protection of fundamental rights. This lack of safeguards for fundamental rights is further "exacerbated by a loophole in constitutional jurisdiction, whereby federal laws remain valid even if they contravene the constitution. There is no independent body to check whether federal laws are unconstitutional".[23]

According to Article 190 of the Swiss Constitution, all authorities are bound by law to enforce federal statutes and international treaties. Thus, Article

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17 i.e. the single-subject rule.

18 Article 173 (1) f ; 193 (4) and 194 (3) (4) Swiss Constitution.

19 Ulrich Häfelin, «Le référendum et son contrôle en Suisse», in *Justice constitutionnelle et démocratie référendaire*, Actes du Séminaire UniDem organisé à Strasbourg les 23 et 24 juin 1995 en coopération avec l'Institut des hautes études européennes de Strasbourg, Université de Schuman, et avec le soutien de l'Union européenne, éditions du Conseil de l'Europe, Strasbourg, (1996), 62-75, at 73.

20 *Idem*, p. 75. In this context, the Federal Council launched in March 2013 a consultation procedure to instaure a preliminary substantive examination of popular initiatives and the extension of the grounds for their refusal or invalidity if they are inconsistent with fundamental rights, but to no avail.

21 Article 148 (1) Swiss Constitution.

22 Michel Hottelier, «Suisse», AIJC, (2011) 417-442, at 420.

23 Bruno Kaufmann, Rolf Büchi, Nadja Braun, *Guidebook to direct democracy: in Switzerland and beyond*, 4th ed., Initiative & Referendum Institute Europe, Marburg, (2010) at 98.

190 of the Federal Constitution grants total immunity to federal statutes, prohibiting the Swiss Supreme Court from reviewing their constitutionality; however, the control of federal statutes has undergone major changes over the years.[24]

In several occasions, the Swiss Supreme Court has admitted verification of a federal statute's compliance with the Constitution. However, in the event that a federal statute is found unconstitutional, the Federal Supreme Court may not set the conflicting unconstitutional provisions aside.

Hence, unlike in the United States, constitutional review of federal statutes is not possible in Switzerland. As a result, the lack of judicial review is replaced by public review in the form of a right to referendum: just as the people have the possibility to challenge laws passed by parliament before they are enacted. In theory this may be seen as a reflection of popular will and of democratic sovereignty. The people will have expressly or tacitly (in the absence of a referendum) accepted an act that is unconstitutional.

Nonetheless, in practice where a grievance relates to a fundamental right, especially if guaranteed by the ECHR, federal judges allow themselves to put aside a federal statute—acting themselves in violation of the Constitution, in order to ensure its supremacy[25]. A coherent and sustainable strategy should ideally apply the same scrutiny when it comes to a fundamental right, as when the plaintiff argues solely on the basis of an ordinary constitutional disposition.

Over the past years, Swiss voters have approved, among others, three popular initiatives on very controversial issues. The first of these, on a constitutional ban on the construction of minarets, was approved by 58% of voters on 29 November 2009.[26] The second initiative, which concerned a new constitutional provision entailing the automatic expulsion of foreign nationals convicted of certain criminal offences specified by law, obtained approval of 53 % of voters on 28 November 2010. Most recently, on 9 February 2014, the initiative "against mass immigration" was approved with 50.3% of votes cast in favor, and was passed by a majority of cantons.

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24 A first popular initiative on Constitution supremacy - by extending judicial review to federal statutes - has been overwhelmingly rejected, FF 1939 I 161. Again, the proposal to repeal Article 190 of the Swiss Constitution, in order to revoke federal statutes' immunity, failed due to the refusal of two chambers in December 2012 : BO 2011 N 1918 ; 2012 E 432 ; N 1968.

25 See infra.

26 *See* Daniel Moeckli, «Of Minarets and Foreign Criminals : Swiss Direct Democracy and Human Rights», Human Rights Law Review (2011) 11 (4) : 774-794.

The outcome of these, especially the first and the last, attracted attention from all over the world and have been widely condemned. The so-called "minarets initiative" restricting freedom of religion[27], for a constitutional amendment banning the construction of new minarets, has been translated as a constitutional provision providing that "the construction of minarets is prohibited".[28] Again, the "expulsion initiative", restricting among others the right to private and family life, is discerned as a constitutional amendment.[29] The latest initiative on immigration policy is even more problematic in that it challenges not only Switzerland's international obligations and is also likely to restrict the free movement of people, but also reveals the clash among its citizens. As a matter of fact, the majority of Swiss voters (54.6%) voted favorably at the time of an optional referendum for the bilateral accords with the EU which took place on 5th June 2005[30].

As regards these amendments, it should be noted that both the Federal Council and the Federal Assembly, along with many social organisations, recommended that the proposed amendment be rejected as inconsistent with the basic principles of the Suisse Constitution, but to no avail.[31]

With this, one notes that a judicial review sometimes better ensures effective protection of fundamental rights. Indeed, on the one hand, even if putting aside a federal act allows for the protection of a fundamental right in a given case and, as it constitutes a declaration of incompatibility with constitutionnaly declared rights and as such gives a legislative opportunity to rectify, currently there is no real mechanism to put pressure on parliament to follow judicial opinion.

On the other hand, in order to ensure legal stability, the citizenry must be able to foresee the circumstances under which their fundamental rights may be limited. This must be precisely indicated in the legal basis for the interference with the legal norm. And it must be formulated with precision as to its meaning and scope – the *foreseeability* of the law.

B. The United States Experience

In accordance with the Constitution, the founders opted at the national level solely for a representative democracy, excluding any form of direct

27 Article 15 Swiss Constitution.

28 Article 72 (3) Swiss Constitution.

29 Article 121 (3) Swiss Constitution.

30 Referendum over the Federal decree of 17 December 2004 on the approval and implementation of the bilateral agreements between Switzerland and the EU on the Schengen and Dublin accords. FF 2005 4891.

31 *See* FF 2013 6575, FF 2013 279.

democracy[32]. Since then, efforts to establish a democracy based on the people's consultation at the national level have failed[33]. The constrained use of popular democracy at the national level in America appears to be in contrast with expanded use of direct democracy in Switzerland. Among other reasons, this was also justified by the large territory and widely dispersed population.[34]

Nonetheless, almost half of the States have established direct democracy mechanisms.

Again, the U.S. legal system differs from the Swiss one, as long as the courts' power "to strike down any state law that conflicts with state constitutions or the Constitution of the United States (…) extends to law enacted directly by the people", and thus "provides a broad institutional limitation on the people's rule".[35] On the other hand, in several states as the constitution can be directly amended, the people hold a counterweight to judicial power.[36] A counter-example of what exists currently in Switzerland i.e. lack of judicial power over initiatives can be found, where a strong form of direct democracy and an expansive judicial power prevail.

When it comes to judicial review of individual initiatives, the question can be asked whether or not the scrutiny / standard of review changes compared to one exercised in relation to acts of parliament in order to respect those expressed by the people's will. Eule framed the question thus: "Should the conflict between the lawmaker and judge be played out differently when the people express their preferences directly rather than through an agent?".[37]

It follows from case law that both legislative- and initiative-issued acts are subject to the same standards of review[38]. This has been expressly

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32 *See* James Madison, *Federalist* No. 63, at 385, where he pleads for a republican government that "*in the total exclusion of the people, in their collective capacity*, from any share in" the legislative process. See also Madison, Federalist No. 51, at 319 and Federalist No. 10, at 73.

33 Julian N. Eule, "La justice constitutionnelle et la démocratie référendaire aux Etats-Unis", Actes du Séminaire UniDem organisé à Strasbourg les 23 et 24 juin 1995 en coopération avec l'Institut des hautes études européennes de Strasbourg, Université de Schuman, et avec le soutien de l'Union européenne, éditions du Conseil de l'Europe, Strasbourg, (1996), 76-97, at 77. Eule refers in particular to the attempt to amend the constitution in 1977 and the call launched by Ross Perot in 1992. *See* W. Richard Merriman, "To collect the wisest sentiments : Representative Government and Direct Democracy", The Jefferson Foundation on Direct Democracy.

34 See James Madison, *Federalist* No. 10.

35 Miller, *supra* note 2, at 2.

36 *Idem*, at 3.

37 Julian N. Eule, "Judicial Review of Direct Democracy", 99 Yale L.J., (1990), 1503-1510, at 1505.

38 Craig B. Holman, Robert Stern, "Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts" refer to *Gordon v. Lance*, 403 U.S. 1 (1971); *James v. Valtierra*,

acknowledged by the popular statement of Chief Justice Burger in *Citizens Against Rent Control /Coalition for Fair Housing v. City of Berkeley*: "It is irrelevant that the voters, rather than a legislative body, enacted [this law], because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation."[39]

As Justice Robert Jackson made it clear in *West Virginia State Board of Education v. Barnette* : "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[40] On another note Justice Hugo Black opined on a greater deference when the law is adopted by the people, observing that "when the voters of the State establish their policy, which is as near to a democracy as you can get".[41]

In the same vein, in California: *In Re Marriage Cases* - a citizen initiative called "Proposition 22" aimed to restrict the definition of marriage as a union between persons of the opposite sex. Chief Justice George stated that "the circumstance that the limitation of marriage to a union between a man and a woman (…) was enacted as an initiative measure by a vote of the electorate (…) neither exempts the statutory provision from constitutional scrutiny nor justifies a more deferential standard of review. Although California decisions consistently and vigorously have safeguarded the right of voters to exercise the authority afforded by the initiative process, (…) our past cases at the same time uniformly establish that initiative measures adopted by the electorate are subject to the same constitutional limitations that apply to statutes adopted by the Legislature, and our courts have not hesitated to invalidate measures enacted through the initiative process when they run afoul of constitutional guarantees provided by either the federal or California Constitution".[42]

402 U.S. 137 (1971); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Forty-Fourth Gen. Assembly v. Lucas*, 379 U.S. 693 (1965); *Legislature v. Deukmejian*, 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983).

39 Citizens Against Rent Control /Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290 (1981).

40 *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), 638.

41 *Reitman v. Mulkey*, 387 U.S. 369 (1967). This remark was made in a spirited exchange with then-Solicitor General Thurgood Marshall in oral arguments before the Court. See *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*, Philip B. Kurland & Gerhard Casper eds., vol. 64, University Publications of America, Arlington, (1975) at 668.

42 *In re Marriage Cases*, 43 Cal. 4th 757 (2008), 851.

Even more recently, dealing with the same subject matter, and following similar decisions made in Utah[43], Oklahoma[44] and Virginia[45], the District Court for the Western District of Texas struck down the state's ban on same-sex marriage, ruling it was unconstitutional[46].

The Oregon Compulsory Public Education Initiative – which aimed to close private Catholic schools and integrate the children into the public school system – serves as a leading case to better comprehend the court's power over the exercise of direct democracy. Obtaining approval of 52.7 % of the voters on 7 November 1922, the bill's constitutionality was challenged before the Federal Court, which ruled that the bill violated not only the constitution of Oregon but also the U.S. Constitution, namely the 14th amendment, and declared the bill unconstitutional. The U.S. Supreme Court, in its turn, affirmed the Federal Court's decision and overturned the litigious bill in *Pierce v. Society of Sisters.* [47]

Judicial review of abortion initiatives is undoubtedly a leading example with respect to the subject matter. The U.S. Supreme Court recognized that a woman's decision to interrupt her pregnancy was constitutionally protected in *Roe v. Wade*[48], and motivated Congress to undertake statutory responses to the abortion issue, in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* such as the Freedom of Choice Act. Following this, numerous initiatives have been launched in several States, in order to prohibit or limit the practice of abortion[49]. Among these, the Supreme Court of Oklahoma struck, over the course of ten years, two initiatives[50] from the state ballot, considering that if the measure was to be enacted it would be unconstitutional under the Supreme Court's decision in *Casey*.

Referring to the debate on the counter-majoritarian nature of judicial review, Eule asks why "the argument for judicial intervention [does] not abate as it becomes clearer what the majority prefers".[51] Outlining the complexity and difficulties encountered in the process of implementing direct democracy, particularly on account of required percentages and sufficiently informed

43 *Kitchen v. Herbert*, No. 2:13-CV-217 (Dec. 20, 2013).
44 *Bishop v. Oklahoma*, No. 4:04-cv-00848-TCK-TLW (Jan. 14, 2014).
45 *Bostic v. Rainey*, No. 2:13-cv-00395-AWA-LRL (Feb. 13, 2014).
46 *DeLeon et al v. Perry et al.*, No. 5:13-CV-00982 (Feb. 26, 2014).
47 *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).
48 *Roe v. Wade*, 410 U.S. 113 (1973).
49 *See* Jon O. Shimabukuro, "Abortion: Judicial History and Legislative Response", Congressional Research Service, 7-5700, RL33467, www.crs.gov.
50 *In re Initiative Petition* No. 349, 838 P.2d 1,3 (OK 1992) and *In re Initiative Petition* No. 395., 286 P.3d 637 (OK 2012).
51 Eule, *supra* note 38, at 1506.

voters, Eule urges the need to "conceptualize a different judicial role when the law under review emanates from the electorate rather than a legislative body."[52] Thus, he claims that "when laws enacted by plebiscite are challenged under other provisions of the Federal constitution, the republican form clause informs the nature of the judicial role" and calls for more judicial scrutiny, not less[53]. Making this same point, Miller explains Justice Robert Jackson's statement as "the principle of higher constitutionalism – the idea that constitutional rights rise above normal democratic politics and that courts, not the people, are the final interpreters and guardians of these rights".[54] He further specifies that this reasoning applies only to federal constitutional rights, as long as at the state-level voters can still amend constitutional rights[55].

It is true that "a judicial ruling that an initiative violates the federal Constitution is the most powerful institutional limitation on direct democracy"[56]. Yet, this is the only way to ensure constitutionally recognised fundamental rights. If not, minority rights would not be ensured by any power. To put it differently, "eliminating judicial review would cause a complete collapse of the process. The addition of more judicial review is inadequate, but the total absence of any judicial review would be a far worse situation".[57] Surely, as in the case of California, "a constitutional system that combines a strong form of direct democracy and an expansive judicial power can produce dramatic conflict". In sum, neither lesser nor greater deference is required, but rather an intermediate level of scrutiny over laws enacted by popular initiative, as well as for those of the legislature, sufficient to verify constitutional compatibility.

First of all, a distinction should be made between basic constitutional principles that we will refer to as constitutional rights (in reference to the catalogue of human rights in Swiss Constitution and the Bill of Rights, respectively) and the rest of the constitution.

Considering that courts are not better placed than legislators, Waldron pleads for the abolishment of judicial review.[58] His main argument relies on that majority decision should preveal over court decision in sake of political and democratical legitimacy. In answer to Waldron's position, Fallon argues

52 *Idem*, at 1533.
53 *Idem* , at1544.
54 Miller, *supra* note 2 at 9.
55 *Idem*, at 10.
56 *Idem*, at 14.
57 Douglas C. Hsiao, "Invisible Cities: The Constitutional Status of Direct Democracy in a Democratic Republic," Duke Law Journal 41 (Apr. 1992), 1267–1310.
58 Jeremy Waldron, "The Core of the Case Against Judicial Review", 115 Yale L.J., 1346, (2006), 1388-1392.

that political legitimacy should not be understood in a unique way of the majority claim, but that can still be satified with the judicial review, which is itself legitimate.[59] As regards Waldron's scepticism: it is not simply that judges are more likely to protect fundamental rights than legislators. For a case to be brought before the Court, one will have already edicted this law- and will have had the opportunity to check whether or not it is respectful of fundamental rights. But as the legislative deliberation is general and abstract, before the concrete application of a statute it is not evident to perceive its implications, which is not to say that judges are better protectors, but that they are simply better positioned. In other words, it is not about advocating for judicial review in the absolute. The truth is that judicial review also has its deficiencies[60]. It is obvious that when a judge declares a statute adopted by a legislator void, he acts as a negative legislator, or as a positive one when he plugs a loophole. Implicit in this understanding, is that judicial review is an inherently legal activity[61]. This does not mean that the judge impinges and/ or infringes on the legislator's capabilities. Rather, he is supposed to exercise oversight in order to ensure foreseeability for the citizenry. This is tantamount to saying that, rather than limiting the legislature's authority, judicial review ensures its credibility in respect to right holders. In the same vein, we can mention implicit constitutional rights that the judiciary granted or recognised by means of extensive interpretation of existing provisions, but not expressly those that are enshrined as such in the Constitution. The judge acts as a *de facto* lawmaker by determining and materializing the content and scope of the rights and freedoms provided initially by the Constitution to adapt them to a concrete case[62]. With regard to dichotomy between originalism and the living constitution, I will not dwell on that issue. Rather, I will assume with Balkin that, originalism and living constitutionalism "are two sides of the same coin".[63] In other terms, implicit constitutional rights are nothing more than the recognition than "living originalism"[64] a in order to adjust the Constitution, by interpretation in the light of changing social and political values while

59 Richard H. Fallon, Jr, "The Core of an Uneasy Case *For* Judicial Review", (2008) 121 Harv LR 1693-1736, at 1718.

60 *See* Mark Tushnet, "How Different are Waldron's and Fallon's Core Cases For and Against Judicial Review ?" Oxford JLS, Vol. 30 No.1, (2010), 49-70.

61 Alon Harel, "Rights-Based Judicial Review: A democratic Justification", Law and Philosophy, vol. 22, No.3/4, Judicial Review (Jul., 2003), 247-276, note 12. *Contra* Christopher L. Eisgruber, *Constitutional Self-Government*, Harvard University Press, (2001), 57-64.

62 *See* Allan R. Brewer-Carias, Constitutional Courts as Positive Legislators, A Comparative Law Study, Cambridge University Press, New York, (2011), 173-193.

63 Jack M. Balkin «Framework Originalism and the Living Constitution» 103 Nw. L. Rev. 549 (2009) at 549.

64 Jack M. Balkin, *Living Originsalism*, Harvard University Press (2011).

remaining faithful to its origin. The recognition of the right to privacy in the U.S.[65] and the recognition of the freedom of expression in Switzerland[66], before it has been incorporated into the Constitution demonstrate this form of interpretation which transforms, in a sense, the judge into a legislator. In sum, when it comes to unwritten basic rights, judicial lawmaking is not the same as impinging on ordinary legislative competencies, but more often it is "merely a temporary solution because it only becomes effective if the legislator [has] failed to decide on a required rule and the legislation therefore suffers from a lack of completeness, contrary to plan".[67]

Miller asks "Who is sovereign in this system- the people or the judges?".[68] Opposing the one to the other and considering them as a near opposite powers, this statement seems to deny that the judges derive their power from the people[69], and when it comes to denying the will of the majority , it is not a denial but a recall to respect the social contract that the people adhere to in order to establish their democracy. When it comes to the relation between judicial review and direct democracy, one should notice that rather than limiting it, judicial review enhances popular sovereignty by promoting respect of individual rights[70]. This is to say that judicial review does not necessarily conflict with direct democracy. Instead of focusing too much on the dichotomy between the legislature and courts, what must be recognised is the complementarity of the two powers. "One might also view the rights-protecting function of judicial review as a part of a system of checks and balances, aimed at preventing an undemocratic rule by the judiciary".[71] The reasoning behind this argument recalls, to some extent, Hamilton's point in *Federalist* 78, stating that judicial review does not "by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people,

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65 *See Griswold v. Connecticut* 381 U.S. 479 (1965). See also *Roe v. Wade* 410 U.S. 113 (1973) and Ronald Dworkin, "Unenumerated Rights : Whether and How Roe Should Be Overruled", in: *The Bill of Rights in The Modern State*, Geoffrey R. Stone, Richard A. Epstein, and Cass R. Sunstein (eds), University of Chiago Press : Chicago, (1992), at 386.

66 ATF 87 I 114. Now Article 16 Swiss Constitution.

67 Tobias Jaag, "Constitutional Courts as Positive Legislators, National Report:Switzerland", Allan R. Brewer-Carias, Constitutional Courts as Positive Legislators, A Comparative Law Study, Cambridge University Press, New York, (2011) 783-802, at 799.

68 Miller, *supra* note 2, at 128.

69 *See* Christopher L. Eisgruber, *supra* note 62 at 64-65. *See* also Harel, *supra* note 62 at 258 : "The judges themselves are ultimately political appointees nominated and confirmed either directly or indirectly by elected officials".

70 Yuval Eylon - Alon Harel, "The Right to Judicial Review", Virginia Law Review, Vol. 92, No. 5, September (2006), 991-1022, at 1021.

71 Jon Elster, "On Majoritarianism and Rights", 1 E. Eur. Const. Rev. 19 (1992), 19-24, at 22.

as declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental".[72]

Bickel considers that judicial review acts against the majority and therefore that it is "a deviant institution in our democracy".[73] Judicial review which declares "unconstitutional" a legislation does not mean in every case that the judges are counter-majoritarian but rather that they voice a challenge in order to protect the right of a minority. For instance, judicial review should not be seen as a "watchdog that protects rights from the legislature, and ultimately from the people it represents".[74] Rather, judicial review has to be considered as a watchdog of minority rights. At most, it might be conceded that judicial review recalls "rights-based limitations on the power of the legislature".[75] And by doing so, "judicial review facilitates a better reflection and implementation of the will of the people"[76]. Therefore, this "rights-based judicial review can be described as an alternative form of democratic participation".[77] Moreover, as Raz puts it, "assertions for rights are typically intermediate conclusions in arguments from ultimate values to duties".[78] Therefore, even though it seems as if direct democracy is being limited, judicial review recalls the duty to respect the latter by protecting minority rights. One can draw a parallel with conflicting constitutional rights. Actually, as political rights are also enshrined in the Constitution, judicial review over these constitutes a kind of body of conflicting rights. One's rights stop where the other's start. The protection of political rights which is conducive to sovereignty stand just before the protection of fundamental rights which is conducive to autonomy. To draw a parallel with Rawls' *Law of Peoples*, when minority rights are protected by the means of judicial review, we refer to a small number of core rights, that we consider fundamental- such as the UDHR does for its own contents. According to this line of thinking, judicial review does not deprive "the right of rights".[79] Along these lines, we advocate that the effective protection of constitutional rights requires a system of judicial review.

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72 Hamilton, Federalist 78, at 466.

73 Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics, Bobbs-Merrill, New York, 2d ed., (1986), at 16-23.

74 Eylon, Harel, *supra* note 71, at 2.

75 Harel, *supra* note 62, at 261.

76 *Idem*, at 249.

77 *Idem*, at 247.

78 Joseph Raz, *The Morality of Freedom*, Clarendon Press, Oxford, (1986), at 181.

79 Jeremy Waldron, *Democracy and Disagreement*, Clarendon Press, Oxford, (1999), Chap.11.

C. Comparison of effects

Does it mean that "individual rights are any better protected in the United States than in Switzerland?"[80]

It is true that the people are sovereign and the exercise of that sovereignty may affirm or reject a federal law through an optional referendum. In other terms, it is the optional referendum which ensures the checks and balances on the power of the legislative branch. Nonetheless, this popular control, even if justified on the basis of free will, may not find any constitutional grounding. Or, reconciliation of competing values as direct democracy and minority rights could be ensured through a heightened scrutiny of laws enacted by popular vote.[81]

"Majority in the heat of passion may fail to perceive what is in its true interest"[82]. One should "identify the motives which move the members of the majority to infringe on the rights of the minority"[83]. While, in case of constitutional breach , the Swiss Supreme Court can only have an informative impact with the opportunity to draw the parliamentarians' attention to the need for legislative reform, the federal judges are still bound to apply the (unconstitutional) statute pursuant to Article 190[84]. Put differently, if the Assembly Federal does not adapt the litigious disposition to the Constitution, the Swiss Supreme Court remains bound by this latter's application. The situation grows more complicated if the federal statute contravenes an international treaty, such as European Convention on Human Rights. Constraint to respect and apply both the federal statutes and international law, the Swiss Supreme Court faces a major dilemma where to set the priority when the latter conflict with the former.[85] In this regard, given the fact that international law covers almost all areas, and especially human rights, the traditional opposition between the legislature - comprised as parliamentarianism and direct democracy- on the one hand and the constitutional judge on the other hand is more complex today than ever before.[86]

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80 Wojciech Sadurski, "Judicial Review and the Protection of Constitutional Rights", Oxford Journal of Legal Studies, Vol. 22, No. 2, (2002), 275-299, at 275.

81 Marc Slonim, James H. Lowe, "Judicial review of laws enacted by popular vote", 55 Wash. L. Rev. 175, (1979-1980) at 209.

82 Jon Elster, « On Majoritarianism and Rights », 1 E. Eur. Const. Rev. 19 (1992),19-24, at 20.

83 *Idem*.

84 Hottelier, *supra* note 23 p. 440.

85 Intended when an interpretion of the national law in conformity with the international law is not possible.

86 Hottelier, *supra* note 23, at 442.

II. Constitutional Amendment

The greatest difference between the American and the Swiss constitutions is found in the respective countries' mechanisms for constitutional amendment. Whereas the Swiss Constitution is a flexible one, the U.S. Constitution is rigidly framed.

A. Swiss Constitution

Article 192 (1) provides that the Federal Constitution may be totally or partially revised at any time. To amend the Constitution, an obligatory referendum and a double majority is required[87]. For instance, a total revision of the Swiss Constitution may be proposed by the People or by either of the two Councils or be decreed by the Federal Assembly.[88] As to a partial revision, it may be requested by the People or decreed by the Federal Assembly.[89] The only constitutional limit consists in the respect of *jus cogens*.[90] Therefore, a decision taken through a direct democratic procedure enjoys a secure legitimacy.

B. U.S. Constitution

In the United States legal system, the basic principle of limitation is a high barrier to amend the federal constitution. Compared to its Swiss counterpart, the U.S. mechanism seems to embody Thomas Jefferson's concerns of a constitution "like the ark of the covenant, too sacred to be touched".[91] The efforts to permit people to amend it were proved too difficult.[92] As prescribed by Article V Constitution, there are basically two methods by which the the federal constitution may be amended. The first method consists in a proposition supported by two-thirds of both houses of Congress which requires ratification by three-quarters of the states. As to the second method prescribed, two-thirds of state legislatures can collectively force congress to call a constitutional convention, to be approved again by the three-quarters of states.

87 Article 140 (1) (a) and Article 195 Swiss Constitution.
88 Article 193 (1) Swiss Constitution.
89 Article 194 (1) Swiss Constitution.
90 Article 193 (4) Swiss Constitution.
91 Thomas Jefferson, Letter to Samuel Kercheval (1816) in: *The Writings of Thomas Jefferson*, Andrew A. Lipscomb and Albert E. Bergh, eds., Vol.15 (Washington D.C.: Thomas Jefferson Memorial Association, (1904) at 40, cited by Miller, *supra* note 2, at 157.
92 Miller, *supra* note 2, at157.

Miller recalls that the courts have consistently interfered with citizens' attempts to take part in the process of amending the Constitution[93] and this holds true even though the Supreme Court has recognized that the term "Legislatures" in the article V application clause is unclear.[94] Mainly, it amounts to a refusal to politicize the Constitution to avoid degeneration[95].

C. Comparison of effects

A related point as to the outcome of an amendment process are the eventual unconstitutional constitutional amendments[96]. Under the Swiss amendment process, if the citizens could in theory contravene the constitution, such as, for instance, by repealing the human rights catalogue (which to a large extent reproduces ECHR), they remain bound by *jus cogens*.

In addition to the restrictive process in the United States, there are two substantive limitations on the power to amend the Constitution. The first is related to the prohibition of amending any constitutional amendment dating before 1808. The second restriction prohibits any amendment that would deprive a State of its equal suffrage in the Senate. Therefore, by contrast to what might happen in the Swiss legal system, unconstitutional constitutional amendments are very unlikely to arise in the United States[97]. As long as the Constitutional provisions increase legal stability[98], it is important to avoid unconstitutional constitutional provisions.

As can be seen from the above examples, unlike its Swiss counterpart, when an initiative contravenes supreme law and thus violates or threatens minority rights as guaranteed in the Bill of Rights[99], both the state and federal court are entitled to declare it unconstitutional and to refuse to apply such a statute. This is true even when there is a jurisdictional distinction in between.

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93 *Idem* at 171. California Proposition 35 of 1984 and Montana Constitutional Initiative No. 23 of 1984.

94 *Uhler v. AFL-CIO* 468 U.S. 1310 (1984).

95 Kathleen Sullivan, "What's Wrong with Constitutional Amendments" in: Great and Extraordinary Occasions: Developing Guidelines for Constitutional Change, the Century Foundation Press, New York City, (1999), 39-44.

96 Mark A. Graber, *A New Introduction to American Constitutionalism*, Oxford University Press, New York, (2013) at 149: "It is not conceptually impossible, because there are constitutional provisions that are so fundamental that they also bind the framer of the constitution". *See Leser v. Garnett* 258 U.S. 130 (1922); ATF 139 I 16.

97 Mark Tushnet, The Constitution of the United States of America, A Contextual Analysis, Hart Publishing, Oxford, (2009) at 239.

98 Graber, *supra* note 97 at 47.

99 Miller, *supra* note 2 at 131, See also *Gitlow v. New York*, 268 U.S. 652 (1925).

This is not to say that direct democracy at the national level is detrimental to a federal state. On the contrary it allows citizens to make their voices heard at the federal level. So far as the Swiss practice is concerned, what is needed is a better circumstantial control of these instruments. In order to strike a balance between direct and representative democracy, it is therefore necessary to provide some room for constitutional amendments to ensure popular sovereignty in respect of the rule of law. Direct democracy and representative democracy are not mutually exclusive.

Indeed, optional legislative referendum is directly connected to representative democracy, insofar as "the referendum vote is on decisions which have been reached by parliament, and which have to be either approved or rejected".[100] Therefore one may confirm that they are not exclusive but complementary in order to counterbalance the inconvenience of the one and the other. Thus, "the direct democracy does not oppose, but completes the representative democracy"[101].

III. Impact of International Law

The rank recognised by international law in a given national order might have an influence over the judicial review, and to some extent, direct democracy.

A. The United States of America

Following the wording of Article VI of the U.S. Constitution[102] which states that treaties constitute part of the supreme law of the land, one might asses that the U.S. legal system has monist tendencies[103] similar to the Swiss legal system. Nonetheless, practice demonstrates that it is inclined more to a dualist approach. As to treaties as Supreme Federal law[104], with reference to *Ware v. Hylton*[105], Bradley ascertains "the ability of the Supreme Court to

100 Kaufmann, Büchi, Braun, *supra* note 24, at 43.

101 Andreas Auer, "La justice constitutionnelle et la démocratie déréfendaire: Rapport de synthèse", in : Justice constitutionnelle et démocratie référendaire, Actes du Séminaire UniDem organisé à Strasbourg les 23 et 24 juin 1995 en coopération avec l'Institut des hautes études européennes de Strasbourg, Université de Schuman, et avec le soutien de l'Union européenne, éditions du Conseil de l'Europe, Strasbourg, (1996) 167-184, at 169.

102 Article VI sec.2. U.S. Constitution.

103 *See* Curtis A. Bradley, International Law in the U.S. Legal System, OUP, (2013). See also, Frederic L. Kirgis, "Int'l Agreements and U.S. Law," ASIL Insights, May 27, 1997, available at https://www.asil.org/insights/volume/2/issue/5/international-agreements-and-us-law, (last visited on May 19 2018).

104 *Idem*, at 39.

105 *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

enforce the supremacy of treaties over state law".[106] As to the supremacy rule over Constitution, when interpreting the latter the Supreme Court takes into account international treaties.[107] Moreover, as stated above, the U.S. legal system does not contain implications for citizen's involvement to ratify international treaties, hence direct democracy at the federal level does not apply. Therefore, an assessment regarding the impact of direct democracy on the influence of international law is not possible.

B. The Swiss Confederation

According to the rule enshrined in Article 5 (4) and Article 190 of the Constitution, the Confederation and the cantons must respect peremptory international law. While it is clear that the Constitution must be interpreted and applied in accordance with the ECHR, its position in the hierarchy of the Swiss legal system still remains unclear.[108] As regards to federal statutes previous to adhesion to the ECHR, the Swiss Supreme Court recognized immediately that to be applicable, the former must be interpreted in conformity with the latter[109]; otherwise, they should be set aside.[110]

If the Swiss Supreme Court first recognized the full supremacy of international law[111], subsequently by reference to principles of *lex specialis* and *lex posterior*, the Court considered that no hierarchy applies to international law and domestic law.[112] Thus, the jurisprudence *Schubert* was established, where the Federal Supreme Court, while recognizing the primacy of international law, over federal statutes, recognizes that a provision can waive the latter if the lawmaker has enacted it deliberately.[113] In this sense, the Swiss Supreme Court implicitly recognizes the superiority of the national lawmaker in the exercise of its sovereignty to derogate from international obligations.

It is in the *PKK* case that the Swiss Supreme Court excluded explicitly for the first time the application of federal law contrary to the ECHR, ruling that "a norm of domestic law which would, in any particular case not conform to international law, should not be applied [especially when] the primacy is given to the international public law, which seeks to protect human rights."[114]

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106 Bradley, *supra* note 104 at 40.

107 *See Roper v. Simmons*, 543 U.S. 551, 575 (2005) ; *Lawrence v. Texas*, 539 U.S. 558, 577 (2003). For an overview, see Peter J. Spiro, "Treaties, International Law, and Constitutional Rights", Stan. L. Rev. 55 (2003); Carlos M. Vázquez, "Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties", Harv. L. Rev. 122 (2008).

108 *See* Michel Hottelier; Hanspeter Mock ;Michel Puéchavy, *La Suisse devant la Cour européenne des droits de l'homme*, 2nd ed., Geneva, (2011) 11-15.

109 ATF 120 V 1 ; ATF 119 V 171 ; ATF 105 V 1.

110 ATF 122 II 485, 487 ; ATF 125 II 417 ; ATF 128 I 254; ATF 128 IV 201; ATF 131 V 66, 70.

111 ATF 35 I 467.

112 ATF 59 II 331.

113 ATF 99 Ib 39. V.a. ATF 111 V 201; ATF 112 II I, JdT 1986 I 633; ATF 118 Ib 277.

114 ATF 125 II 417, SJ 2000 I p. 202.

However, despite this approach, in a more recent decision on the compliance of federal law with respect to the ECHR, although having referred to the PKK case, the Swiss Supreme Court has backtracked and followed the ruling in the *Schubert* case[115]. Thus, while admitting that the refusal to amend the legislation and adapt to the ECHR respectively, the current jurisprudence of the Court underlines the willingness of the Swiss legislature to consciously waive treaty law, and ruled that national legislation overrode it. Although The Swiss Supreme Court is accurate in its jurisprudence relating to the PKK, in a subsequent decision it held that "when there is an insurmountable contradiction between the two legal orders, (...) public international law prevails in principle over the domestic law, especially when the protection of human rights are at stake, but also without any implication of human rights, so that conflicting national provisions can not be applied." [116] It thus seems to relativize the *PKK* case-law to allow greater flexibility to the national legislature.

Finally, in a decision in 2012, The Swiss Supreme Court has clearly established that "a federal statute which violates a fundamental right guaranteed by international convention, such as the ECHR must be set aside."[117]

With regard to federal standards prior to the entry into force of the ECHR in the Swiss legal system, the judge reveals him/herself to be more flexible than the legislature, since the compliance of federal statues with the ECHR should be verified.

In sum, there is a form of a judicial review over the federal statues which overrides Article 190 of the Constitution. As such, it definitely undermines not only democratic legitimacy, but also legal certainty. In other words, the current practice gives an illusion of direct democracy which is circumvented by judicial review.

In sum, the establishment of judicial review power in Switzerland will certainly not only ensure a more effective protection of fundamental rights, but above all ensure the coherence of the legal order.

The unclear rank of international law (except for peremptory provisions) in the Swiss constitutional system is also found in the American constitutional system, where it is by the means of interpretative presumptions in order to ensure compliance of the former to the latter where such construction is possible.[118]

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115 ATF 136 III 168, JDT 2010 I, p. 335, consid. 3.3.2. et 3.3.4. V. M. Hottelier, V. Martenet, "La pratique suisse relative aux droits de l'homme 2010", RSDIE (2011) 455–493, at 462.

116 TF 2C_319/2009, January 26, 2010.

117 TF 4A_238/2011, January 4th, 2012, para. 3.1.

118 Graber, *supra* note 97, at 207.

IV. Proposals for reforming the current systems

As an interim conclusion, even if the two legal orders subject to this analysis are essentially distinct, as common to all constitutional democracies, both establish fundamental law and respect the rule of law.

It goes without saying that wherever possible, both courts rules on the basis of the percept of interpretation in conformity with the Constitution, holding, out of several possible interpretation of a statute, the one which leads to its conformity with the Constitution. Given the state formation—representative in the United States and direct democracy in the case of Switzerland, it is reasonable that we have found these dissimilarities.

Comparative analysis suggests that is the amenability of a Constitution often determines the judiciary's attitude of interpretation. The greatest difference between the American and Swiss legal systems is found in their respective Constitutions.

On the one hand the U.S. legal system is too restrictive. In the US, the Constitution is considered almost "untouchable". Furthermore, judicial review activism is too present to ensure the expression of popular will in a satisfactory measure. On the other hand, the Swiss legal system is distinguished by a flexible constitution given the ease of the amendment processes, whilst the deficiency of judicial review concerning federal statutes and constitutional amendments threatens the rule of law.

Thus, on the one, U.S., hand we have excess constitutionalism creating the danger of a state ruled by judges so that legalistic interpretations of fundamental rights replace politics, by extensive recourse to judicial review, especially at national level. On the other, Swiss, hand, we have deficient constitutionalism, giving expression to the threat of the tyranny of the majority, so that minorities and human rights may be disregarded for lack of review.[119] Thus, both extremes undermine democracy, underlining the need to strike a correct balance in order to enforce true democratic values.

A. The Swiss Legal System

Defined as a constitutional democracy, "democracy is no longer seen only in terms of the supreme and unlimited power of the people, but finds its basis and material limits in being bound to a constitution and to the fundamental human rights set out therein".[120] Accordingly, a decision by popular vote cannot be legitimate if it violates the constitution or constitutionally protected fundamental rights.

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[119] Kaufmann, Büchi, Braun, *supra* note 24, 95-105.

[120] *Idem*.

Pursuant to existing positive law in Switzerland, "the principle of direct democracy prevails over the rule of law".[121] However, Chemerinsky properly identifies deficiency of two other branches in upholding the primacy of the Constitution giving way to override the respect of civil rights and liberties.[122]

A judicial review mechanism over direct democracy instruments should be implemented in order to ensure both minority rights and international obligations. If it is true that judicial review might have a restrictive effect on the will of the people , it is indeed *sine qua non* to ensure rule of law. "Democratic, a State is also a State of rule of law which commands unconditional respect of the protection of human rights and protection of minorities. Thus, there is an urgent need to establish a new form of organization of power."[123] A vision which no longer encompasses a conflict, but a complementarity between direct democracy and judicial review in order to ensure minority rights.

Brettschneider argues that judicial review is sometimes justified by the democratic outcomes that it secures—and in particular, by the ability of judges to protect core democratic rights.[124] The US Supreme Court 'can act democratically by overriding majoritarian decision making' when the "core values of democracy" are at stake. Adopting the American model, the Swiss Supreme Court should be entitled to review popular initiatives as well as federal statutes which contravene fundamental human rights. Strictly speaking, taken in this sense, the purpose of judicial review is not to substitute popular self-government by judges, but promoting the rule of law and preventing disastrous political choices.[125] Thus, this represents an equivalent to a system of checks and balances considering all powers on an equal footing. As Auer emphasizes: "The delicate but essential task to recall the sovereign people to respect the Constitution is often left to judges who shall ensure that civil rights and liberties of others are respected. Entrusted with legislative capabilities, people are and remain a State power which derives its authority from the Constitution and therefore can neither impinge on the capabilities that the Constitution attributes to other State organs, nor violate the civil rights and liberties".[126]

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121 Jaag, *supra* note 68, at 786.

122 Erwin Chemerinsky, "In Defense of Judicial Review : The Perils of Popular Constitutionnalism", 2004 U. III. L. Rev. 673 (2004), 673-690, at 679.

123 Hottelier, *supra* note 23, at 442.

124 *See* Corey Brettschneider, "Democratic Rights and the Substance of Self-Government", Princeton University Press, Princton (2007).

125 *Contra*, Waldron, *supra* note 59.

126 Auer, *supra* note 102, at 172.

In sum, through civil rights and liberties protections, a judicial review of peoples' enacted statutes or amendments will ensure to protect minorities not only from the government[127] but also from the people who will ignore others' rights. Hence in the words of Madison "a pure democracy can admit no cure for the mischiefs of faction. A common passion or interest will be felt by a majority, and there is nothing to check the inducements to sacrifice the weaker party".[128]

B. The American Legal System

One might argue that, given the Swiss experience, the institution of direct democracy at the national level would not constitute an ideal to be pursued. While the reasoning behind the the idea of constraining direct democracy at the level of individual states in the U.S. might be justified to protect individual rights against the "tyranny of the majority", representative democracy is nothing more than the expression of the majority.

Yet, one must reckon with the fact that it is not direct democracy in itself which is precarious, but how it is administered. In order to mitigate the detrimental impact of greater judicial review and thus the critics as to "government of judges", it remains crucial to allow citizens more opportunities to be involved in the political process.[129] Thus, setting up direct democracy at the national level will ensure checks and balances over elected bodies which might (and often do) deviate from the programmes put forward during electoral periods. Or, as is the case today, citizens are strictly deprived of the possibility to directly call for a federal constitutional convention, to ratify or reject constitutional amendments.[130] Given that "constitutional compromises promote consensus as opposed to majoritarian democracy"[131], it is important to allow the citizenry the instrument of direct democracy in order to amend the Federal Constitution, as well as it is equally important to check its compliance with the Bill of Rights. Allowing a constitutional initiative and statutory referendum will certainly increase the legitimacy of parliamentary acts but also constitute a counter-power to the represented majority. As such, initiatives and referenda at national level would enhance the accountability of government. In sum, even if one can argue that representative democracy is better at protecting minority rights, this does not justifies excluding any forms of direct democracy - political rights - which equals to deny popular

127 Robert Dahl, How Democratic Is the American Constitution ?, Yale University Press, New Haven, (2001).

128 Madison, The Federalist, No.10, at 133.

129 As Bryan Woodrow Wilson and Theodore Roosevelt believed that the initiative process would increase accountability of elected officials and make government more responsible.

130 Miller, *supra* note 2, at 216 quoting Reformers from William Jennings Bryan to Ralph Nader who tried to introduce direct democracy at national level.

131 Graber, *supra* note 97, at 59.

sovereingty. Finally, given the technological facilities of today, the great territory argument no longer appears relevant to exclude direct democracy instruments at national level.

Conclusion

As regards legislative power, it must be asserted that direct democracy and representative democracy are not mutually exclusive. Indeed, optional legislative referendum is directly connected to representative democracy, insofar as "the referendum vote is on decisions which have been reached by parliament, and which have to be either approved or rejected", which underlines the complementarity of direct democracy to the representative one.[132] Therefore, one may confirm that they are not exclusive but complementary in order to counterweigh the inconveniences of the one and the other. Thus, "the direct democracy does not oppose, but completes the representative democracy ". [133]

Both legislators and judges have virtues and vices. In this sense, instead of viewing them as conflicting powers, one should consider them – as they have been instructed- as complementary. From this perspective, "constitutionalism and democracy may also be complementary rather than antagonistic".[134] In order to avoid the threats inherent to direct democracy - majoritarian abuse -, an appropriate check over the laws enacted by popular vote would not be detrimental to popular sovereignty. If direct democratic instruments enhance the role of citizenry in government, at the same time they often undermine the protection of individual and minority rights.[135] While prohibiting popular enactment would help avoid such threats, it would unnecessarily sacrifice the democratic and educational values of the initiative process. An appropriate reconciliation of these competing values can therefore be reached only by establishing thorough scrutiny of laws enacted by popular vote. To put it another way, scrutiny over a provision will be justified as far as its purpose is to ensure that none of the four powers exceeds its capabilities.

Last but not least, direct democracy does not undermine representative democracy or parliament but reinforces its legitimacy. Therefore, a balance between direct democracy and judicial review is urged in order to ensure greater legal certainty, coherence and transparency, and ultimately, a satisfying degree of democratic rights.

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132 Kaufmann, Büchi, Braun, *supra* note 24, at 43.

133 Auer, *supra* note 102, at 169.

134 Graber, *supra* note 97, at 43.

135 Comment, "Judicial Review of Laws Enacted by Popular Vote", 55 WASH. L. REv. 175 n.l (1979).

BIBLIOGRAPHY

Auer Andreas, "La justice constitutionnelle et la démocratie déréfendaire: Rapport de synthèse", in : Justice constitutionnelle et démocratie référendaire, Actes du Séminaire UniDem organisé à Strasbourg les 23 et 24 juin 1995 en coopération avec l'Institut des hautes études européennes de Strasbourg, Université de Schuman, et avec le soutien de l'Union européenne, éditions du Conseil de l'Europe, Strasbourg, (1996) 167-184.

Balkin Jack M. «Framework Originalism and the Living Constitution» 103 Nw. L. Rev. 549 (2009).

Balkin Jack M., *Living Originsalism*, Harvard University Press (2011).

Besson Samantha, *The Morality of Conflict, A Study on Reasonable Disagreement in the Law*, Hart Publishing, Oxford, (2005).

Bickel Alexander M*., The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Bobbs-Merrill, New York, 2d ed., (1986), at 16-23.

Bradley Curtis A., *International Law in the U.S. Legal System*, OUP, (2013).

Brettschneider Corey, "Democratic Rights and the Substance of Self-Government", Princeton University Press, Princton (2007).

Brewer-Carias Allan R., *Constitutional Courts as Positive Legislators, A Comparative Law Study*, Cambridge University Press, New York, (2011), 173-193.

Chemerinsky Erwin, "In Defense of Judicial Review : The Perils of Popular Constitutionnalism", 2004 U. III. L. Rev. 673 (2004), 673-690.

Dahl Robert, *How Democratic Is the American Constitution ?*, Yale University Press, New Haven, (2001).

Dworkin Ronald, "Unenumerated Rights : Whether and How Roe Should Be Overruled", in: *The Bill of Rights in The Modern State*, Geoffrey R. Stone, Richard A. Epstein, and Cass R. Sunstein (eds), University of Chiago Press : Chicago, (1992).

Elster Jon, "On Majoritarianism and Rights", 1 E. Eur. Const. Rev. 19 (1992), 19-24.

Eule Julian N., "Judicial Review of Direct Democracy", 99 Yale L.J., (1990), 1503-1510.

Eule Julian N., "La justice constitutionnelle et la démocratie référendaire aux Etats-Unis", Actes du Séminaire UniDem organisé à Strasbourg les 23 et 24 juin 1995 en coopération avec l'Institut des hautes études européennes de

Strasbourg, Université de Schuman, et avec le soutien de l'Union européenne, éditions du Conseil de l'Europe, Strasbourg, (1996), 76-97

Eylon Yuval - Harel Alon, "The Right to Judicial Review", Virginia Law Review, Vol. 92, No. 5, September (2006), 991-1022.

Fallon Richard H., Jr, "The Core of an Uneasy Case *For* Judicial Review", (2008) 121 Harv LR 1693-1736.

Graber Mark A., *A New Introduction to American Constitutionalism*, Oxford University Press, New York, (2013)

Häfelin Ulrich, "Le référendum et son contrôle en Suisse", in *Justice constitutionnelle et démocratie référendaire*, Actes du Séminaire UniDem organisé à Strasbourg les 23 et 24 juin 1995 en coopération avec l'Institut des hautes études européennes de Strasbourg, Université de Schuman, et avec le soutien de l'Union européenne, éditions du Conseil de l'Europe, Strasbourg, (1996).

Harel Alon, "Rights-Based Judicial Review: A democratic Justification", Law and Philosophy, vol. 22, No.3/4, Judicial Review (Jul., 2003), 247-276, note 12. *Contra* Christopher L. Eisgruber, *Constitutional Self-Government*, Harvard University Press, (2001), 57-64.

Holman Craig B., Robert Stern, "Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts" refer to *Gordon v. Lance*, 403 U.S. 1 (1971).

Hottelier Michel, «Suisse», AIJC, (2011) 417-442.

Hottelier Michel, Martenet Vincent, "La pratique suisse relative aux droits de l'homme 2010", RSDIE (2011) 455–493.

Hottelier Michel; Mock Hanspeter ; Puéchavy Michel, *La Suisse devant la Cour européenne des droits de l'homme*, 2nd ed., Geneva, (2011) 11-15.

Hsiao Douglas C., "*Invisible Cities: The Constitutional Status of Direct Democracy in a Democratic Republic*," Duke Law Journal 41 (Apr. 1992), 1267–1310.

Jaag Tobias, "Constitutional Courts as Positive Legislators, National Report: Switzerland", Allan R. Brewer-Carias, Constitutional Courts as Positive Legislators, A Comparative Law Study, Cambridge University Press, New York, (2011) 783-802.

Jefferson Thomas, "Letter to Samuel Kercheval (1816)" in: *The Writings of Thomas Jefferson*, Andrew A. Lipscomb and Albert E. Bergh, eds., Vol.15 (Washington D.C.: Thomas Jefferson Memorial Association, (1904).

Kaufmann Bruno, Büchi Rolf, Braun Nadja, *Guidebook to direct democracy: in Switzerland and beyond*, 4th ed., Initiative & Referendum Institute Europe, Marburg, (2010).

Kirgis Frederic L., "Int'l Agreements and U.S. Law," ASIL Insights, May 27, 1997, available at https://www.asil.org/insights/volume/2/issue/5/international-agreements-and-us-law, (last visited on May 19 2018).

Kobach Kris W., *The referendum : direct democracy in Switzerland*, Dartmouth, Aldershot, (1993).

Madison James *Federalist* No. 10.

Madison James, *Federalist* No. 51.

Madison James, *Federalist* No. 63.

Merriman W. Richard, "To collect the wisest sentiments : Representative Government and Direct Democracy", The Jefferson Foundation on Direct Democracy.

Miller Kenneth P., *Direct Democracy and The Courts*, Cambridge University Press, Cambridge, (2009).

Moeckli Daniel, «Of Minarets and Foreign Criminals : Swiss Direct Democracy and Human Rights», Human Rights Law Review (2011) 11 (4) : 774-794.

Montesquieu, *De l'Esprit des lois*, livre XI, chapitre VI, Genève (1748).

Ost François, "Retour sur l'interprétation", *Aux confins du droit*, Berne (2001).

Raz Joseph, *The Morality of Freedom*, Clarendon Press, Oxford, (1986), at 181.

Rousseau Jean-Jacques, *Contrat Social II*, 4, (1790).

Sadurski Wojciech, "Judicial Review and the Protection of Constitutional Rights", Oxford Journal of Legal Studies, Vol. 22, No. 2, (2002), 275-299.

Slonim Marc, Lowe James H., "Judicial review of laws enacted by popular vote", 55 Wash. L. Rev. 175, (1979-1980).

Spiro Peter J., "Treaties, International Law, and Constitutional Rights", Stan. L. Rev. 55 (2003).

Sullivan Kathleen, "What's Wrong with Constitutional Amendments" in: *Great and Extraordinary Occasions: Developing Guidelines for Constitutional Change*, the Century Foundation Press, New York City, (1999), 39-44.

Tushnet Mark, *The Constitution of the United States of America, A Contextual Analysis*, Hart Publishing, Oxford, (2009) at 239.

Tushnet Mark, "How Different are Waldron's and Fallon's Core Cases For and Against Judicial Review ?" Oxford JLS, Vol. 30 No.1, (2010), 49-70.

Vázquez Carlos M., "Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties", Harv. L. Rev. 122 (2008).

Waldron Jeremy, *Democracy and Disagreement*, Clarendon Press, Oxford, (1999), Chap.11.

Waldron Jeremy, "The Core of the Case Against Judicial Review", 115 Yale L.J., 1346, (2006), 1388-1392.

PSYCHOLOGICAL AND JUDICIAL FACTORS INFLUENCING ON DECISION MAKING

Karar Verme Üzerinde Etkili Olan Psikolojik ve Yargısal Faktörler

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Abstract

Decision making is one of the most important ability of human. This high level cognitive ability occurs as a result of processes like perception, thinking, reasoning and realizing. In addition to this, decision making has dimensions like problem solving, critical judgments, and deliberation on uncertainty, electing, and making a choice. All of these processes and dimensions are open to various psychological and cognitive effects. Decision making is a process of a reveal of willpower that is a process not only an ordinary flow of daily life but also the sharpest points of law. As for Judiciary decision making, it is a crucial and important business that all of these processes and dimensions as well as underlying laws and other judiciary factors.

The goal of this article is to provide awareness about decision making in the direction of studies and obtained information. A lot of factors, such as cognitive, psychological, emotional intelligence, personality, and judicial factors affect decision making. Scrutinized these factors with literature review and strive to present for consideration of decision makers. Intersecting points of psychology and law are mentioned in this interdisciplinary study. It is thought that the scientific approaches and analyses in this article will benefit most especially for high level decision makers and judges.

Keywords: Decision, Decision Making, Cognitive Neuroscience, Psychological Factors, Emotional Intelligence, Personality Traits, Judicial Factors

Özet

Karar verme insanın sahip olduğu en önemli kabiliyetlerden birisidir. Bu üst düzey bilişsel kabiliyet, algılama, düşünme, muhakeme ve idrak etme gibi süreçlerin neticesinde meydana gelmektedir. Bununla birlikte karar verme, problem çözme, kritik kararlar alma, belirsizlikler üzerinde düşünme, seçim yapma ve tercih etme gibi boyutlara sahiptir. Tüm bu süreç ve boyutlar çeşitli psikolojik ve nörobilişsel etkilere açıktır. Karar verme günlük hayatın olağan akışının yanı sıra hukukun en keskin noktalarına kadar iradenin ortaya çıktığı bir süreçtir. Hukuki karar verme ise bu insani süreç ve boyutların yanı sıra kanunlar ve yargısal diğer unsurlar temelinde ciddi ve önem arz eden bir iştir.

Bu makalenin yazılmasındaki amaç, karar verme süreçleri hakkında yapılan araştırmalar ve elde edilen bilgiler doğrultusunda bir farkındalık artışının sağlanmasıdır. Karar vermeyi etkileyen, bilişsel, psikolojik, duygusal zeka, kişilik özellikleri ve yargısal faktörler gibi birçok etken bulunmaktadır. Literatür taraması ile bu faktörler incelenmiş ve karar vericilerin dikkatine sunulmaya çalışılmıştır. Disiplinlerarası olan bu çalışmada psikoloji ile hukuğun kesiştiği noktalara temas edilmiştir. Makalede yer alan bilimsel yaklaşımların ve yapılan analizlerin, özellikle de üst düzey karar vericilere ve yargıçlara fayda sağlayacağı düşünülmektedir.

Anahtar Kelimeler: Karar, Karar Verme, Bilişsel Nörobilim, Psikolojik Faktörler, Duygusal Zekâ, Kişilik Özellikleri, Yargısal Faktörler

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INTRODUCTION

In the 11th century, Ibn-i Sina, who was a scientist and a doctor, studied medicine and psychology and he was mentioned about cognition (meaning in Turkish: ruh - kuvvet). His studies also related to thinking, imagination, intuition, feelings, intelligence, memory and recall, and cognizance. These terms in his book are relevant to psychology and also medicine. He also mentioned about comprehend which occurs in the prefrontal lobe in the brain and psychological and mental factors.[1] Yunus Emre, a Turkish wise man, mentioned about mind and knowledge in 13th - 14th centuries. He said that "the mind can help to carry out of justice".[2] People can speak and put into practice on a level with their knowledge and cognizance. The most important advance in humans is intelligence, namely hegemonies of mind. Mind composes an idea.

Actually, the mind has mentioned as "Bilig" at Turkish monuments in Asia much earlier.[3] In Europe, Francis Bacon, a lawyer, statesman, and philosopher, was concerned with mind, intelligence and learning in 16 - 17th centuries. And he cared about knowledge, nature of knowledge, and psychology of scientific thinking.[4]

Behavioral science, especially psychology, is relevant to law and legal analysis. Psychology is defined as the scientific study of thinking and behavior. It is a science because psychologists use some rigorous methods of research found in other areas of scientific investigation. Psychology can help us for the legal consciousness, legal decision making, and the interaction between the two. And psychology can have useful insights and awareness to the analysis of legal decision making processes. Psychologist contributes to legal science about these contexts with their scientific competence.

It is difficult, if not impossible, to think of a facet of life where psychology is not involved. Psychologists employ the scientific method — stating the question, offering a theory and then constructing rigorous laboratory or field experiments to test the hypothesis. Psychologists apply the understanding gleaned through research to create evidence based strategies that solve problems and improve lives. The result is that psychological science unveils new and better ways for people to exist and thrive in a complex world. The psychological science contributes to justice by helping the courts understand

1 İbn-i Sina, El-Kanun Fi't-Tıbb, 1th Book, Translator: Esin Kahya, Atatürk Culture Center Publication: 371, Ankara, 2009, pp. 122-162

2 Faruk Dilaver, Gel Dosta Gidelim - Yunus Emre Hayatı, Divanı ve Risaletün Nushiyye, Destek Yayınları, No: 357, İstanbul, 2013

3 Şemseddin Sami, Orhun Abideleri, Hazırlayan: Gıyasettin Aytaş, Akçağ Yayınları: 1093, 3. Baskı, Ankara, 2017

4 Stephen Gaukroger, Francis Bacon and The Transformation of Early-Modern Philosophy, Cambridge University Press, USA, 2001

the minds of criminals, evidence and the limits of certain types of evidence or testimony.[5]

Every day we face countless decisions, ranging from what cereal to buy at the grocery store to how to respond when a cat runs into the road in front of our car. In addition to having practical significance, decision making plays a central role in many academic disciplines: psychology, economics, political science, and law. But in the legal system, decision making is much more important and crucial than everyday decisions. Decision and decision making is an intriguing psychological process and related to brain and cognitive neuroscience. Besides that, decision making is affected by various psychological factors like emotions, intelligence, personality traits. What is more judicial decision making is a step ahead. Because the base of judicial decisions is law and consequences of judicial decisions can be binding and very impressive.

On the other hand, judges to employ techniques of argument, reasoning, and decision making that diverge from those of even expert nonlawyer reasoners and decision makers.[6]

The aim of this article is to raise the awareness and consciousness to comprehend about decision and decision making. Psychology tries to help us to understand the mechanism of thinking, decision, and decision making processes. In this perspective, psychology can much contribute to law literature and legists.

I. DECISION AND DECISION MAKING

"*The entity we call mind is perhaps that part of the brain's functional organization of which we are conscious*."

- Noam Chomsky, Language, and Mind (1968)

The mind, an exclusively human neural system, is always accompanied by a sensation of an active "self" that is part of the experience.[7] The human mind is unique; it is not only the epicenter of our knowledge but also the outer limit of our intellectual reach.[8]

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5 From definition of American Psychological Association (APA), http://www.apa.org/action/science/index.aspx

6 Barbara A. Spellman, Frederick Schauer, Legal Reasoning, The Oxford Handbook of Thinking and Reasoning, Edited by Keith J. Holyoak, Robert G. Morrison, Oxford University Press, New York, 2016, Chapter 36, p. 719

7 Zoltan Torey, The Conscious Mind, The MIT Press Essential Knowledge Series, USA, 2014, p. 82

8 Zoltan Torey with a foreword by Daniel C. Dennett, The Crucible of Consciousness an Integrated Theory of Mind and Brain, MIT Press Edition, 2009, from overview

The decision is a complex process relevant to memory and brain in psychological science. Many scholars argue that decision processes influence decision making effectiveness.

Thinking is the systematic transformation of mental representations of knowledge to characterize actual or possible states of the world, often in service of goals.[9]

Rational thinking is one of the most important matter and essentiality of decision making. Rationality is a multifarious concept, not a single mental quality. Rational thought has a lot of dimensions, such as: resistance to my side thinking, resistance to miserly information processing, absence or irrelevant context effects in decision making, actively open-minded thinking, value placed on reason and truth, tendency to seek information, objective reasoning styles, sensitivity to contradiction and tendency to seek consistency in belief and argument, sense of self-efficacy, self-control skills, emotional regulation, probabilistic reasoning, qualitative decision, knowledge of scientific reasoning, rules of logical consistency and validity, avoidance of biases and dysfunctional personal beliefs. We might be that a comprehensive assessment of rational thinking could not be accomplished in a single setting.[10] Rational decision making is based on a clearly defined and rational process of defining, diagnosing, designing, and finally deciding.[11]

Reasoning places emphasis on the process of drawing inferences (conclusions) from some initial information (premises). Making a decision is often a problem that requires reasoning.[12] Decision making refers to a set of mental activities that occur when the decision maker is trying to generate and choose among different alternatives.[13] Every human being thinks, rightly or wrongly, that on many occasions he has made a choice between different alternatives.[14] Decision making can involve simple or complex decisions. Multi-attribute decisions are those that involve multiple aspects that are present in the options available to someone.[15]

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9 Keith J. Holyoak, Robert G. Morrison, The Oxford Handbook of Thinking and Reasoning, Oxford University Press, New York, 2016, p. 1

10 Keith E. Stanovich, Richard F. West, Maggie E. Toplak, Intelligence and Rationality, The Cambridge Handbook of Intelligence, Edited by Robert J. Sternberg, Scott Barry Kaufmann, Cambridge University Press, USA, 2011, Chapter 39, pp. 784-816

11 Henry Mintzberg, Frances Westley, "Decision Making: It's Not What You Think", MIT Sloan Management Review Cambridge, 2001, Volume 42, Issue 3, pp. 89-93

12 Holyoak and Morrison, pp. 2-3

13 Kathleen M. Galotti, Making Decisions That Matter: How People Face Important Life Choices, Lawrence Erlbaum Associates Publishers, New Jersey, 2009

14 Jean-Charles Pomerol, "Artificial Intelligence and Human Decision Making", European Journal of Operational Research, 1997, 99, pp. 3-25

15 Daniel C. Krawczyk, "Decision Making and Abductive Reasoning", Reasoning The

Expert decision making, judicial and otherwise, is the ability to identify and take into account all of the relevant information and draw reasonable conclusions. Judicial decision making is an exercise of legal expertise and also the personal and situational factors can help us for understand the decision making.[16] A judge's ability to perform this cognitive balancing act when making highly consequential decisions is almost accepted as a given: after all, judges are recruited on the basis of their "sound judgment".[17] Judges should highly confident in their decision making.

II. COGNITIVE NEUROSCIENCE AND DECISION MAKING

For the past 40 years, neuroscience methods have played an increasingly important role in the study of cognition. The development of the field of the cognitive neuroscience is a natural consequence of the fact that "cognition is what the brain does".[18] Cognitive neuroscience originated in two disciplines: in psychology, in the development rigorous methods for analyzing behavior and cognition, and in neurobiology, in the effort to understand the structure and function of neuronal circuits of the sensory and motor systems of the brain.[19] The brain is a largely symmetrical organ with the left side of the brain controlling the right side of the body and the right side of the brain controlling the left side of the body. The activities of each side of the brain are normally coordinated by the great cerebral commissure called the corpus callosum.[20]

Neuroscience research relevant to cognitive processes has grown dramatically in the past two decades, largely due to the increasing availability of sophisticated technologies such as those used in neuroimaging. This growth has led to great advances in our understanding of the brain bases of cognitive processes.[21] Positron emission tomography (PET), and functional magnetic resonance imaging (fMRI), are the most reliable for ascertaining the anatomical location of the activation in the brain. It may use the term

Neuroscience of How We Think, Elsevier Academic Press, 2018, Chapter 11, pp. 255–282

16 Daniel A. Farber, Suzanna Sherry, "Building Better Judiciary", The Psychology of Judicial Decision Making, Edited by David Klein, Gregory Mitchell, Oxford University Press, New York, 2010, Part 18, pp. 287-288

17 Mandeep K. Dhami, Ian K. Belton, "On Getting Inside the Judge's Mind", Translational Issues in Psychological Science, 2017, Volume 3, No. 2, pp. 214–226

18 Robert G. Morrison, Barbara J. Knowlton, Neurocognitive Methods in Higher Cognition, The Oxford Handbook of Thinking and Reasoning, Edited by Keith J. Holyoak, Robert G. Morrison, Oxford University Press, New York, 2016, Chapter 6, pp. 67

19 Brenda Milner, Larry R. Squire, Eric R. Kandel, "Cognitive Neuroscience and The Study of Memory", Neuron, 1998, 20, p. 445

20 Michael S. Gazzaniga, Tales From Both Sides of The Brain A life in Neuroscience, Harper Collins Publishers, New York, 2015, p. 37

21 Tim Shallice, Richard P. Cooper, The Organization of Mind, Oxford University Press, 2011, from preface

"functional imaging" to refer to these two techniques.[22] Another neuroimaging technique is electroencephalography (EEG) which directly measures changes in voltage resulting from firing neurons whereas fMRI indirectly measures neuronal activity by measuring increased blood flow to the area of the brain recently active.[23]

There are neurophysiological approaches to investigate the representation and utilization of cognitive and emotional parameters. In this framework, functional interactions between the amygdala and prefrontal cortex in the brain, mediate emotional influences on cognitive processes such as decision making, as well as the cognitive regulation of emotion. The amygdala is a structurally and functionally heterogeneous collection of nuclei lying in the anterior medial portion of each temporal lobe. Sensory information enters the amygdala from advanced levels of visual, auditory, and somatosensory cortices. The prefrontal cortex (PFC), located in the anterior portion of the cerebral cortex in the brain, is composed of a group of interconnected other brain areas.[24]

Notably, the judgment process, which precedes choice, involves evaluating the merits of and preferences for different options. The process of choice is highly influenced by the cognitive processes that occur before a choice is made such as perception, recognition, and judgment and those that occur after a choice is made such as feedback and learning. A decision maker perceives information from the environment and transforms that information to find alternatives, build preferences, and evaluate options that lead a choice or decision.[25] One of the cognitive psychological models of decision making is open – loop model involves a presentation of choice options or alternatives, beliefs about objective events and outcomes (see figure 1). And another decision making model is closed – loop model. In this model, decisions are influenced by goals and external events and are the result of previous decisions and previous outcomes. Under this view, decision making is a learning process in which decisions made based on experience and are feedback dependent. Decision making is a learning loop.[26]

The prefrontal cortex has a key role in flexible decision making. Findings

22 Shallice and Cooper, pp. 151-152

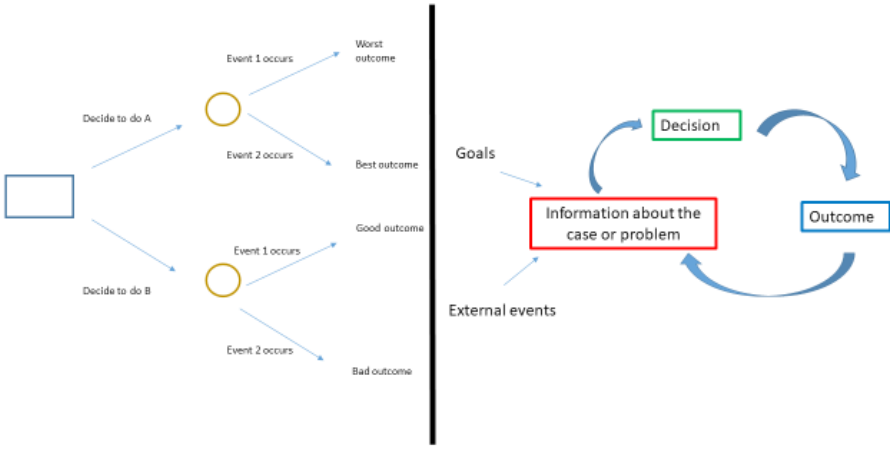
23 Morrison and Knowlton, p. 73

24 C. Daniel Salzman, Stefano Fusi, "Emotion, Cognition, and Mental State Representation in Amygdala and Prefrontal Cortex", The Annual Review of Neuroscience, 2010, 33, pp. 173–202

25 Cleotilde Gonzales, "Decision Making: A Cognitive Science Perspective", The Oxford Handbook of Cognitive Science, Edited by Susan E. F. Chipman, Oxford University Press, New York, 2017, Chapter 13, p. 249

26 Gonzales, pp. 250-253

highlight the importance of the PFC in organizing complex cognitive functions and in translating stimulus properties into task appropriate behaviours. In particular, persistent neuronal activity in the PFC has been observed during decision making, working memory and response selection tasks. Temporally, information integration and decision making were reflected in persistent stimulus-to-response neuronal activity, triggered during initial stimulus processing and lasting until the response.[27] Another important brain area, the ventromedial prefrontal cortex is activated in neuroimaging experiments when we process value. Damage to this area impairs people's decision making ability often leading them to make risky decisions.[28-29]



Figures. 1. The open – loop, linear model of decision making (on the left).

2. The closed – loop view of decision making (on the right).[30]

27 Matar Haller, John Case, Nathan E. Crone, Edward F. Chang, David King-Stephens, Kenneth D. Laxer, Peter B. Weber, Josef Parvizi, Robert T. Knight, Avgusta Y. Shestyuk, "Persistent Neuronal Activity in Human Prefrontal Cortex Links Perception and Action", Nature Human Behaviour, 2017, Volume 2, pp. 80-91

28 Joshua A. Weller, Irwin P. Levin, Baba Shiv, Antoine Bechara, "Neural Correlates of Adaptive Decision Making for Risky Gains and Losses", Psychological Science, Volume 18, Number 11, pp. 958-964

29 Krawczyk, pp. 255

30 from Gonzales, pp. 250-253

III. PSYCHOLOGICAL FACTORS ON DECISION MAKING

Skills of analysis are powerful cognitive and psychological tool. Human is unique in respect to deliberative analysis. The analysis is disintegrating whereas synthesis is reached to integrity via replacing the parts. Gaining the synthetic opinion skill means able to see objects as is that more difficult than analytical opinion. These intellectual skills have a special place in thinking systematic of a human.[31] Decisions are easy when decision makers know what they want and what they will get, making choices from a set of well defined options. Such decisions could be easily but reach different conclusions. Decision making can become more difficult when there is uncertainty about either what will happen or what one wants to happen.[32] Cognitive components of decision making include information acquisition and evaluation, retrieval from memory and response selection.[33] There are a lot of psychological factors influences on decision making. These factors play an important role in decision making.

A. Empathy

Empathy which can be broadly defined as the capacity to share and understand other people's emotions has recently become an important focus of attention in the field of psychology and neuroscience.

We have the cognitive ability to understand the thoughts, beliefs, and intentions of others, which is called mentalizing, perspective taking, or theory of mind. On the other hand, we have the capacity to understand the motor intentions of others, which has been associated with the discovery of mirror neurons. Psychological and neural processes underlying these distinct routes to understanding others. Cognitive processes related to the theory of mind have been associated with activations in the medial prefrontal cortex (mPFC), superior temporal sulcus (STS), whereas the neural correlates of action understanding are found in a neural network spanning the inferior parietal lobe (IPL), the inferior frontal gyrus, and ventral premotor areas. Together, the theory of mind, action understanding, and empathy allow us to infer the thoughts, motor intentions, and emotions of other, thereby facilitating social interactions.[34]

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31 Nancy C. Andreasen, Cesur Yeni Beyin, Çeviren: Yıldırım B. Doğan, Okuyan Us Yayın, İstanbul, 2003, pp. 43-44.

32 Baruch Fischhoff, Judgment and Decision Making, Earthscan Publishing, London and New York, 2012, pp. 1-2

33 Corey K. Fallon, April Rose Panganiban, Ryan Wohleber, Gerald Matthews, Almira M. Kustubayeva, Richard Roberts, "Emotional Intelligence, Cognitive Ability and Information Search in Tactical Decision Making", Personality and Individual Differences, 2014, 65, pp. 24–29

34 Olga Klimecki, Tania Singer, The Cambridge Handbook of Human Affective Neuroscience,

Empathy consistently correlates positively with values relating to altruistic behaviors; empathy directed feelings, or emotional concern, which drives altruism. The altruism, "Knowing the perspective of others is not the same as feeling others," is of vital importance for anyone who wants to make an impact.[35]

Notably, many of the empathy term uses and components of empathy are affective and emotion related. Mencl and May define empathy as having positive intentionality, such that there is a relationship between empathy and pro-social behavior. They explain empathy as: "the moral emotion concerning the welfare of others that facilitates interpersonal relationships and positively influences people to engage in pro-social and altruistic behaviors".[36] Developmental psychologists have identified self-regulatory processes such as planning, the inhibition of behavior, activation of behavior, voluntary control of the allocation of attention, and integration of information such that one can detect errors.[37]

Decety and Moriguchi (2007) proposed the empathy model suggests that four major functional components dynamically interact to produce the experience of empathy:

1. Affective sharing between the self and the other, based on the automatic perception-action coupling and resulting shared representations.

2. Self-awareness. Even when there is some temporary identification between the observer and its target, there is no confusion between self and other.

3. Mental flexibility to adopt the subjective perspective of the other.

4. Regulatory processes that modulate the subjective feelings associated with emotion.

In this view, none of these components can account solely for the potential of human empathy. The four components are intertwined and interact with one another to produce the subjective experience of human empathy.

Edited by Jorge Armony, Patrik Vuilleumier, Chapter 23, Empathy from the Perspective of Social Neuroscience, Cambridge University Press New York, 2013, pp. 533-535

35 Björn N. Persson, Petri J. Kajonius, "Empathy and Universal Values Explicated by The Empathy-Altruism Hypothesis", The Journal of Social Psychology, 2016, Volume 156, No. 6, pp. 610–619

36 Jennifer Mencl, Douglas R. May, "The Effects of Proximity and Empathy on Ethical Decision Making: An Exploratory Investigation", Journal of Business Ethics, 2009, Volume 85, Issue 2, pp. 201–226

37 Nancy Eisenberg, Natalie D. Eggum, "Empathic Responding: Sympathy and Personal Distress", The Social Neuroscience of Empathy, Editors: Jean Decety and William Ickes, Published to MIT Press Scholarship Online, 2013, Part 6

Empathy is a fundamental ability for social interaction and moral reasoning.[38]

Intuit of others' feelings without they do not tell, builds the core of empathy. But first, we must have the ability that can understand our feelings. Communication and good listening play a key role in empathy. Especially listening primarily effects on empathy.[39]

Empathy alone or embedded in a moral principle, can influence one's moral judgment of oneself or of the other direction, or indirectly through the moral principles it activates.[40]

Empathy shapes the landscape of our social lives. It motivates prosocial behaviors, plays a role in inhibiting aggression and empathy is often conceived as a driving motivation for moral behavior and justice. Empathy is implemented by a complex network of distributed, often recursively connected, interacting neural regions including the brainstem, amygdala, hypothalamus, striatum, insula, anterior cingulate cortex, and orbitofrontal cortex. Justice sensitivity modulates activity across several domain-general systems, particularly in regions of the prefrontal cortex involved in intention, understanding, and goal representations in service of moral decision making. Besides that, empathy is related to moral reasoning and is also a prosocial behavior. Thus empathy influences many facets of our social relations with others and is clearly an essential input into decision making, but not necessarily for the best.[41]

B. Stress

Decision making often has to take place in stressful situations. Stress is an everyday phenomenon. Our organism is constantly challenged by internal and external forces, psychological or physiological, real or anticipated. Stress can be defined as an actual or anticipated disruption of homeostasis, which is defined as a dynamic and harmonious equilibrium. The stress response has evolved as a highly adaptive response, aimed at maintaining physiological or psychological integrity in the face of an anticipated threat to the physiological or psychological well being.[42]

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38 Jean Decety, Yoshiya Moriguchi, "The Empathic Brain and Its Dysfunction in Psychiatric Populations: Implications for Intervention Across Different Clinical Conditions", BioPsychoSocial Medicine - The Official Journal of the Japanese Society of Psychosomatic Medicine, 2007, 1: 22, pp. 1-21

39 Daniel Goleman, İşbaşında Duygusal Zeka, Varlık Yayınları A.Ş., Sayı: 579, İstanbul, 2000, p. 221-223

40 Martin L. Hoffman, Empathy and Moral Development: Implications for Caring and Justice, Cambridge University Press, USA, 2000

41 Jean Decety, Jason M. Cowell, "Empathy, Justice, and Moral Behavior", American Journal of Bioethics: Neuroscience, 2015, 6 (3), pp. 3–14

42 George P. Chrousos, "Stress and Disorders of the Stress System", Nature Reviews Endocrinology, 2009, 5, pp. 374–381, doi:10.1038/nrendo.2009.106

Stress is defined with a quantity of hormones that as physiologically stress hormones secreted from adrenal gland in general. When these hormones secrete they enter to blood circulation and reaches to the brain.[43]

Humans often make decisions in stressful situations, for example when the stakes are high and the potential consequences severe, or when the clock is ticking and the task demand is overwhelming. When under stress, fast and effortless heuristics may dominate over slow and demanding deliberation in making decisions under uncertainty. According to behavioral studies and neuroimaging research on decision making under stress and propose that stress elicits a switch from an analytic reasoning system to intuitive processes, and predict that this switch is associated with diminished activity in the prefrontal executive control regions and exaggerated activity in subcortical reactive emotion brain areas. The high pressure may dramatically change decision making strategies, leading to different choices that would be made without such pressure. Stress impairs prefrontal cortex functions such as working memory and attention regulation.[44]

According to another study, 5 or 18 min of stress exposure caused less risky decision making. In contrast, 28 min after stress onset, decision making was riskier. Increasing cortisol concentrations may lead to riskier decision making. As a result, acute stress has a rapid and time dependent effect on decision making.[45] Cortisol, the stress hormone, affects metabolic, cardiovascular and central nervous systems both acutely and chronically. Studies presented that investigate the specific role of the hippocampus, amygdala, prefrontal cortex, and brainstem nuclei in cortisol regulation in response to stress. Hippocampus, amygdala and prefrontal cortex regions in the brain together may contribute to stress processing.[46] Cortisol responses are closely related to the decisions. The peak cortisol response is approximately 21–40 min after the onset of a stressor. Stress alters underlying decision making mechanisms.[47]

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43 Joseph Ledoux, "Paralel Hafızlar: Duyguları Beyne Yeniden Yerleştirmek", Zihin, Editör: John Brockman, Çeviri: Beyza Bilal, Zeynel Gül, Alfa Basım Yayın Dağıtım San. ve Tic. Ltd. Şti., İstanbul, 2011, 3. Kısım, s. 63

44 Rongjun Yu, "Stress Potentiates Decision Biases: A Stress Induced Deliberation-To-Intuition (SIDI) Model", Neurobiology of Stress, 2016, Volume 3, pp. 83-95

45 Stephan Pabst, Matthias Brand, Oliver T. Wolf, "Stress and Decision Making: A Few Minutes Make All the Difference", Behavioural Brain Research, 2013, Volume 250, pp. 39-45

46 Katarina Dedovic, Annie Duchesne, Julie Andrews, Veronika Engert, Jens C. Pruessner, "The Brain and The Stress Axis: The Neural Correlates of Cortisol Regulation in Response to Stress", NeuroImage, 2009, Volume 47, Issue 3, pp. 864-871

47 Katrin Starcke, Matthias Brand, "Decision Making Under Stress: A Selective Review", Neuroscience & Biobehavioral Reviews, 2012, Volume 36, Issue 4, pp. 1228-1248

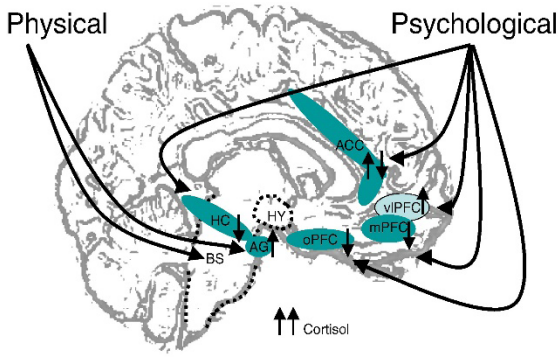

Figure 3. The basic framework of brain areas involved in processing physical and psychological stressors. The model summarizes data from functional studies in human populations. It is based on a hierarchical integration of physical versus psychological stress processing in the central nervous system (Herman et al., 2003).[48] BS: brainstem; HY: hypothalamus; HC: hippocampus; AG: amygdala; PFC: prefrontal cortex; oPFC: orbital PFC; mPFC: medial PFC; vlPFC: ventrolateral PFC, different color indicates that this region is found on the lateral surface of the brain; ACC: anterior cingulate cortex.

Both acute and chronic stressors appear to lead to impaired prefrontal function in the brain and increased reliance on striatal and limbic structures to guide decision making. This altered brain function reduces cognitive flexibility and increases perseveration, potentially resulting in higher levels of exploitation.[49]

Judges face unusually high levels of stress. When the workload grows steadily, stress also occurs. Occupational stress among judges showed that the primary stressor is the actual work performed. There are positive correlations between stress and case variety and massive caseloads.[50] If stress reduction and job satisfaction result in improved mental and physical health for judges, such benefits are both personal and systemic. Moreover, the ambiance in a courtroom where the judge is happy and satisfied provides a positive atmosphere in which the litigants are more likely to be comfortable and perform at their maximum. It is also believed that the therapeutic effects of some types of courts.[51]

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48 James P. Herman, Helmer Figueiredo, Nancy K. Mueller, Yvonne Ulrich-Lai, Michelle M. Ostrander, Dennis C. Choi, William E. Cullinan, "Central Mechanisms of Stress Integration: Hierarchical Circuitry Controlling Hypothalamo–Pituitary–Adrenocortical Responsiveness", Frontiers in Neuroendocrinology, 2003, Volume 24, Issue 3, pp. 151-180

49 Madeline B. Harms, "Stress and Exploitative Decision Making", Journal of Neuroscience, 2017, 37 (42), pp. 10035-10037

50 Tracy D. Eells, C. Robert Showalter, "Work Related Stress in American Trial Judges", Bulletin of the American Academy of Psychiatry & the Law, 1994, Volume 22, No. 1, pp. 71-83

51 Deborah J. Chase, Peggy Fulton Hora, "The Implications of Therapeutic Jurisprudence for Judicial Satisfaction", Court Review, 2000, Volume 37, pp. 12-20

C. Executive Functions

Executive functioning is an umbrella term for several related cognitive functions like selective and sustained attention, working memory, and inhibition. These processes are also related to intelligence.[52] Executive functions broadly, as a psychological construct, refer to cognitive processes that are required for the conscious, top-down control of the action, opinion, and emotions, and that is associated with neural systems involving the prefrontal cortex in the brain. Executive function overlaps other constructs, such as self-regulation, self-control, and effortful control, planning, judgment, concept formation, abstract thinking, cognitive flexibility, use of feedback, impulse control, synthesis of multiple pieces of information across time and space, attention, temporal ordering of events, divergent production of ideas, fluid or general intelligence, monitoring one's own actions, self-perception, and decision making.[53] Decision making is an important executive function for the mind.

High level cognitive functions include that memory awareness of recall process (what I hardly or easily remember) and awareness of pieces of information (what do I know or don't know, what ratio I remember). In cognitive behavioral psychology, high level functions controls, tracks, manages and enables suitable and goal oriented behaviors.[54]

High level executive functions such as planning, flexible thinking, problem solving, impulse control, concept formation, logical analysis, and abstract thinking, are carried out by prefrontal cortex in the brain.[55]

Stimulants that reach to our brain (sensual information), make up conscience process in three phase. Firstly, sensual areas in brain activate in 100 msec. Around 200 msec, stimulants are associated with former components (memory parts) by the mechanism of attention control. Thus far be followed an autonomous process before the conscience. From around 300 msec, stimulants are analyzed, compared, and associated according to familiar or similar instances. In this way consciously information processing starts

52 Samuel D. Mandelman, Elena L. Grigorenko, Intelligence – Genes, Environments, and Their Interactions, The Cambridge Handbook of Intelligence, Edited by Robert J. Sternberg, Scott Barry Kaufmann, Cambridge University Press, USA, 2011, Chapter 5, pp. 92

53 Ulrich Müller and Kimberly Kerns, "The Development of Executive Function", Handbook of Child Psychology and Developmental Science, Editor: Richard M. Lerner, Wiley Online Library, 2015, DOI: 10.1002/9781118963418, Chapter 14, pp. 1-5

54 Sirel Karakaş, Kognitif Nörobilimler, Bölüm 1, MN Medikal & Nobel, Ankara, 2008

55 Julie A. Alvarez, Eugene Emory, "Executive Function and The Frontal Lobes: A Meta - Analytic Review", Neuropsychology Review, 2006, Volume 16, Issue 1, pp. 17–42

and progresses.[56] Cognitive performance increase by means of eliminating irrelevant stimulants and focus on relevant stimulants for cases or events. In this manner, decision making process gets easier.[57]

D. Framing

The decision maker must mentally put the events in the proper context to give them meaning (framing), which allows him or her to draw on previous experience to decide what to do. If this is a situation that is very similar to a situation that has been encountered before, he can use that experience to deal with the experience. If the situation is substantially different from previously encountered situations, he can set about formulating an action plan that deals with its uniqueness. Even past experience usually provides only a general strategy for dealing with the situation. Therefore, the decision maker must diagnose the situation by evaluating the states of its most salient features.[58] Incoherent experience sometimes occurs under extreme stress but under normal circumstances, most of us are aware of a meaningful flow the past to the present and into the future.[59] Past experiences and associated salient current events interactions. For this reason, experiences are very important for thinking, judgment and decision making.

Experts (Judges) may well be experts because their training and past experience allow them to recognize situations or cases and apply familiar frames to them. Once the situations are framed, the expert's knowledge about what to expect and what has worked or not worked in the past can be brought to bear on the current problem or case.[60]

E. Consciousness

Consciousness is a fascinating but elusive phenomenon.[61] The term of consciousness having perceptions, thought and feeling awareness.

The use of the mental state, mental process and mental event terms such as hear and think, when we use them about ourselves, are all dependent upon our ability to reflect on our own mental processes and have as their

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56 Thilo Hinterberger, "The Science of Consciousness – Basics, Models, and Visions", Journal of Physiology – Paris, 2015, 109, pp. 143–151

57 Fabio Del Missier, Timo Mäntylä, Wändi Bruine de Bruin, "Executive Functions in Decision Making: An Individual Differences Approach", Thinking & Reasoning, 2010, 16:2, pp. 69-97

58 Lee Roy Beach, Terry Connolly, The Psychology of Decision Making People in Organizations, Second Edition, Sage Publication, USA, 2005, pp. 2-3

59 Beach and Connoly, pp. 18-19

60 Beach and Connoly, p. 28

61 Shallice and Cooper, pp. 428

common denominator conscious experience.[62] The most obvious functions of consciousness are namely to provide planning and decision making.[63] In other words, metacognition, the ability to think about our own thoughts, is a fundamental component of our mental life and is involved in memory, learning, planning and decision making. Today, the introspective nature of metacognition is considered a core part of what makes us human and a necessity to form the basis of conscious awareness.[64]

Consciousness operatively defined as the awareness of one's self and environment.[65] Awareness is linked with knowledge of the consequences of our actions. Conscious experience involves specific mechanism in neural states become the target of further processing.[66]

Automatic movements are guided by physical causal sequences, not information.[67] On the one hand, the conscious brain may select and strength one of interprets of the current aim of mind. Conscious knowledge echoes in the brain and this state include a stable and automatically cycle which holds knowledge steady and long time.[68] Our brain can try to minutely arrange and expedite to decide on every action on and on. We give heuristical reaction to almost everything, especially moral stimulants. The reasoning is completed in second, and it is slow as a course of its nature.[69]

Cognitive control, a general term for cognitive functions that allow us to rapidly and flexibly adapt our behavior when necessary. Cognitive control functions include error detection and correction mechanisms, conflict

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62 Shallice and Cooper, pp. 429

63 Nicholas Humprey, "Consciousness as Art", Scientific American, Summer 2017, Volume 26, No. 3, p. 7

64 Piercesare Grimaldi, Hakwan Lau, Michele A. Basso, "There Are Things That We Know That We Know, And There Are Things That We Do Not Know We Do Not Know: Confidence in Decision Making", Neuroscience & Biobehavioral Reviews, 2015, Volume 55, pp. 88-97

65 David B. Fischer, Robert D. Truog, "Conscientious of the Conscious: Interactive Capacity as a Threshold Marker for Consciousness", AJOB Neuroscience, 2013, Volume 4, Issue 4, pp. 26-33

66 Bert Timmermans, Leonhard Schilbach, Antoine Pasquali, Axel Cleeremans, "Higher Order Thoughts in Action:
Consciousness as an Unconscious Re-Description Process", Philosophical Transactions of the Royal Society B, 2012, 367, pp. 1412–1423

67 Lee M. Pierson, Monroe Trout, "What is Consciousness for?", New Ideas in Psychology, 2017, Volume 47, pp. 62-71

68 Stanislas Dehaene, "Bilincin İşaretleri", Zihin, Editör: John Brockman, Çeviri: Beyza Bilal, Zeynel Gül, Alfa Basım Yayın Dağıtım San. ve Tic. Ltd. Şti., İstanbul, 2011, 16. Kısım, pp. 244-245

69 Jonathan Haidth, "Dinin Yanlış Anlaşılması ve Ahlak Psikolojisi", Zihin, Editör: John Brockman, Çeviri: Beyza Bilal, Zeynel Gül, Alfa Basım Yayın Dağıtım San. ve Tic. Ltd. Şti., İstanbul, 2011, 18, Kısım, p. 270

resolution, response inhibition, and task-switching. These functions are all strongly associated with the prefrontal cortex in the brain, which may consider pivotal for generating awareness. Moreover, awareness is beneficial for enabling strategic changes in decision making and the level of awareness of information changes decision making. [70] Consciousness is a psychological factor that facilitates and clarify judgment, reasoning, and decision making process.

F. Emotions and Affects

"Hence, in order to have anything like a complete theory of human rationality, we have to understand what role emotion plays in it."

- Herbert Simon, Reason in Human Affairs, 1983

Many psychological scientists now assume that emotions are the dominant driver of most meaningful decisions in life. Decisions serve as the conduit through which emotions guide everyday attempts at avoiding negative feelings (e.g., guilt, fear, regret) and increasing positive feelings (e.g., pride, happiness, love), even when we lack awareness of these processes. Put succinctly, emotion and decision making go hand in hand.[71]

Emotions may prioritize thinking or allow people to be better decision makers. A person's inner well being and external performance often mutually influence one another.[72] On the other hand, the central purpose of a statute or legal principle is to ensure that emotions like empathy, anger, and revenge do not poison the objective analysis of facts and the uniform application of rules.

Emotions and effect have played a key role in many theories as important components of judgment and decision making. These factors also play a central role in what has come to be known as dual process theories of thinking, knowing, and information processing (Sloman, 1996).[73] Many psychologist and theorists have given affect a direct and primary role in motivating behavior.

One of the most comprehensive and dramatic theoretical accounts of the role of affect in decision making is presented by neurologist Antonio Damasio

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[70] Simon van Gaal, Floris P. de Lange, Michael X Cohen, "The Role of Consciousness in Cognitive Control and Decision Making", Frontiers in Human Neuroscience, 2012, Volume 6, Article 121, pp. 1-15

[71] Jennifer S. Lerner, Ye Li, Piercarlo Valdesolo, Karim Kassam, "Emotion and Decision Making", Annual Review of Psychology, br2015, Volume 66, pp. 799-823

[72] Sonja Lyubomirsky, Laura King, Ed Diener, "The Benefits of Frequent Positive Affect: Does Happiness Lead to Success?", Psychological Bulletin, 2005, Volume 131, No. 6, pp. 803–855

[73] Steven A. Sloman, "The Empirical Case for Two Systems of Reasoning", Psychological Bulletin, 1996, 119, No. 1, pp. 3-22

(1994), in his book *Descartes' Error: Emotion, Reason, and Human Brain*. Damasio's theory is derived from observations of patients with damage to the ventromedial frontal cortex of the brain that has left their basic intelligence, memory, and capacity for logical thought intact but has impaired their ability to feel that is, to associate effective feelings and emotions with the anticipated consequences of their actions. Damasio argues that this type of brain damage induces a form of sociopathy that destroys the individual's ability to make rational decisions.[74]

Research on choice and decision making, albeit indirect, further suggests that happy people make better and more efficient decision. Happy individuals are also more likely than their unhappy peers to optimize or satisfice in their decision making, rather than maximizing to achieve the best outcome regardless of the cost in time and effort.[75]

Emotions can be influencing the momentary evaluation of outcomes and, thus choice. The anticipated pain of loss is apparently greater for people in positive than in a negative mood; this leads to greater risk aversion among those in a good mood as they strive for mood maintenance. Furthermore, risk judgments tend to be more pessimistic among people in a negative than in a positive mood. Another emotion, anger, a negative emotion, seems to increase appraisals of individual control, leading to optimistic risk assessment and to risk seeking. Emotions, or "effect", also influence the associations or images that come to mind in decision making. Because images can be consulted quickly and effortlessly, an "affect heuristic" has been proposed, wherein the effective assessment of options and outcomes guides decisions.[76]

We should regulate our emotions. But regulating is not depressing of stress or drives. Self control can help us while the regulating of emotions; this is aware of the emotions and involves choice how acting with feelings. Two essential ability, manage drives and cope with the problems, are important for emotional sufficiency. People who have an emotional sufficiency, regulate their feelings very good, acts calm, positive, and nonchalant, their thoughts are clear and their attention not distracts under pressure.[77] Consciousness and self confidence also helps to this emotional process.

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74 Antonio R. Damasio, Descartes' Error: Emotion, Reason, and Human Brain, 1994, New York

75 Barry Schwartz, Andrew Ward, John Monterosso, Sonja Lyubomirsky, Katherine White, Darrin R. Lehman, "Maximizing Versus Satisficing: Happiness Is a Matter of Choice", Journal of Personality and Social Psychology, 2002, Volume 83, No. 5, pp. 1178–1197

76 Robyn A. Leboef, Eldar Shafir, Decision Making, The Oxford Handbook of Thinking and Reasoning, Edited by Keith J. Holyoak, Robert G. Morrison, Oxford University Press, New York, 2016, Chapter 16, pp. 315

77 Goleman, s. 34-40

Emotion regulation has been linked to such important outcomes as mental health, physical health, and work performance. During emotion regulation, people may increase, maintain, or decrease positive and negative emotions. Accordingly, emotion regulation often involves changes in emotional responding. Closely related to emotion regulation are constructed such as mood regulation, coping with stress, and affect regulation. Empirical evidence indicates that individuals with high emotion regulation competencies are characterized by greater self-reflexivity and a more profound awareness of their emotions.[78]

In conclusions, emotional processes can influence cognitive processes; on the other hand, cognitive processes can regulate or modify our emotions. Emotions and thoughts shift together, corresponding to the new mental state.[79]

G. Heuristics Approach

Heuristics (heuristic: a label that characterization of a mental shortcut) are rules-of-thumb that can be applied to guide decision-making based on a more limited subset of the available information. Because they rely on less information, heuristics are assumed to facilitate faster decision making than strategies that require more information. Heuristics are simple, yet effective, strategies that people use to make decisions. Because heuristics do not require all available information, they are thought to be easy to implement and to not tax limited cognitive resources, which has led heuristics to be characterized as fast-and-frugal.[80]

These heuristics typically yield accurate judgments but can give rise to systematic error. Kahneman and Tversky originally identified three such general purpose heuristics: availability, representativeness, and anchoring and adjustment. These heuristics underlie many intuitive judgments under uncertainty and are simple and efficient. Each heuristic is associated with a set of biases. Use of the availability heuristic, for example, leads to error whenever memory retrieval is a biased cue to actual frequency because of an individual's tendency to seek out and remember dramatic cases or because of the broader world's tendency to call attention to examples of a particular (restricted) type. Some of these biases were defined as deviations from some "true" or objective value, but most by violations of basic laws of probability.

78 Sander L. Koole, "The Psychology of Emotion Regulation: An Integrative Review", Cognition and Emotion, 2009, 23 (1), pp. 4-41

79 Salzman and Fusi, pp. 196

80 Sebastian Bobadilla - Suarez, Bradley C. Love, "Fast or Frugal, but Not Both: Decision Heuristics Under Time Pressure", Journal of Experimental Psychology: Learning, Memory, and Cognition, 2017, Advance Online Publication, http://dx.doi.org/10.1037/xlm0000419

Representativeness, availability, and anchoring and adjustment were proposed as a set of highly efficient mental shortcuts that provide subjectively compelling and often quite serviceable solutions to such judgmental problems. But, the solutions were just that serviceable, not exact or perfectly accurate.[81]

The ancient idea that cognitive processes can be partitioned into two main families – traditionally called intuition and reason – is now widely embraced under the general label of dual – process theories. And adopted the generic labels: System 1 and System 2. These systems use as a label for collections of processes that are distinguished by their speed, controllability, and the contents on which they operate (Table 1).[82]

System 1 (Intuitive)	System 2 (Reflective)
Process Characteristics	
Automatic	Controlled
Effortless	Effortful
Associative	Deductive
Rapid, parallel	Slow, serial
Process opaque	Self - aware
Skilled action	Rule application
Content on Which Processes Act	
Affective	Neutral
Causal propensities	Statistics
Concrete, specific	Abstract
Prototypes	Sets

Table 1. The dual process systems of cognitive decisions

In the particular dual – process model assumed, System 1 quickly proposes intuitive answers to judgment problems as they arise, and System 2 monitors the quality of these proposals, which it may endorse, correct or override. The roles of two systems in determining stated judgments depend on features of the task and of the individual, including the time available for deliberation (Finucane et al., 2000), the respondent's mood (Isen, Nygren, & Ashby, 1998), intelligence (Stanovich & West), and exposure to statistical thinking (Agnoli, 1991)[83]. System 1 heuristics – they result from cognitive processes that are rapid and not entirely controllable whereas System 2 heuristics – they result from slower and more deliberate mental processes.

[81] Thomas Gilovich, Dale Griffin, Daniel Kahneman, Heuristics and Biases, 2002, Cambridge University Press, USA, pp. 1-4
[82] Gilovich et al., p. 51
[83] Gilovich et al., p. 51

Although either System 1 or System 2 processing can lead to rational behavior, most individual differences in rational thought result from variation System 2 processing. In addition to this, we cannot simply diagnose a System 2 process when we see normatively correct answers, or System 1 process when we see a bias. A process that is fast and fails to tax working memory sufficiently to correlate with cognitive ability may, nevertheless, be System 2 in some cases. Similarly, not all answers influenced or biased by belief are the result of System 1 processes[84].

This dual-process theory is the focus of much contemporary research in cognitive and social psychology and has a number of origins. Research on dual - process theory remains a hot topic in psychology and it is encouraging that linkage between such theories in reasoning, decision making, learning, and social cognition[85].

Moreover, stress should enhance the System 1 intuition related neural activity (e.g., in subcortical regions) and decrease System 2 reasoning associated brain activity (e.g., in the prefrontal cortex). Stress shapes decision making with dual - process system[86].

H. Sleep

"Sleep on it" are common words of advice given to individuals making important or difficult decisions. When decisions are complex and involve weighing multiple risks and benefits of several options, many believe that a night of sleep can help sort through information to provide a clear answer upon awakening. Sleep plays a critical role in memory consolidation and brain plasticity. Higher – order cognitive procedural tasks are enhanced by post learning REM sleep[87 - 88]. Although more work is needed to determine the origin of theta activity in the prefrontal cortex during REM sleep, sleep can improve complex decision making by enhancing emotional insight.[89]

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84 Jonathan St. B. T. Evans, Dual-Process Theories of Deductive Reasoning: Facts and Fallacies, The Oxford Handbook of Thinking and Reasoning, Edited by Keith J. Holyoak, Robert G. Morrison,Oxford University Press, New York, 2016, Chapter 8, p. 129

85 Evans, p. 129

86 Yu, p. 8

87 REM sleep: The brain cycles through five distinct phases during sleep: stages 1, 2, 3, 4, and rapid eye movement sleep (REM). REM sleep makes up about 25% of your sleep cycle and first occurs about 70 to 90 minutes after you fall asleep. Because your sleep cycle repeats, you enter REM sleep several times during the night. From: https://www.nichd.nih.gov/health/topics/sleep/conditioninfo/Pages/rem-sleep.aspx

88 Carlyle Smith, Kevin R. Peters, Sleep, "Memory, and Molecular Neurobiology", 2011, 98, pp. 259-272

89 Corrine J. Seeley, Carlyle T. Smith, Kevin J. MacDonald, Richard J. Beninger, "Ventromedial Prefrontal Theta Activity During Rapid Eye Movement Sleep is Associated with Improved DecisionMaking on The Iowa Gambling Task", Behavioral Neuroscience, Special Issue: Behavioral Neuroscience of Sleep, 2016, Volume 130, No. 3, pp. 271–280

Sleep and sleep habits could influence our ability to monitor and successfully manage our internal resources as we make decisions and choices while awake. The circadian system influences many daily functions such as the timing of sleep cycles, body temperature, arousal, and hormone secretion. Circadian rhythms also influence food processing and glucose metabolism. Moreover, the different biological components governed by the circadian system affect each other. The ability to metabolize glucose, for example, is negatively affected by sleep habits and times and by sleep deprivation. Sufficient sleep at night may help restore necessary internal resources for self-control, restores the nervous system and contributes to long term health and well being. Better managing sleep and self-control capacity could improve worker performance and health. And good sleep habits improve long term health and productivity[90].

FFurthermore sleep related that immune system to proper hormonal balance, to emotional and psychiatric health, to learning and memory, to the clearance of toxins from the brain. In general, sleep seems to enhance the performance of these systems instead of being absolutely necessary. Sleep deprivation negatively affects brain functions, including memory, emotion, regulation of appetite, and endocrine system. Moreover, according to several studies, poor sleep can, under certain circumstances, lead to depression. Sleep after learning leads to the selective stabilization, strengthening, integration and analysis of new memories. In doing so, it controls what we remember and how we remember it. And the inescapable conclusion: the brain strengthens different types of memories during stages of sleep[91]. There are many functions of sleep relevant to the thinking, acting, and deciding.

I. Intelligence

Integration of information is a never-ending process that goes on even when we are at rest. This ongoing integration of information enables us to evaluate the world around us and to respond quickly and flexibly to complex situations. Recent studies have shown that the functional connections of the brain network are organized in a highly efficient. Findings suggest a strong positive association between the efficiency of functional brain networks and intellectual performance[92].

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90 June J. Pilcher, Drew M. Morris, Janet Donnelly, Hayley B. Feigl, "Interactions Between Sleep Habits and Self-Control", Frontiers in Human Neuroscience, 2015, Volume 9, Article 284, pp. 1-5

91 Robert Stickgold, "Sleep on It", Scientific American, 2017, Volume 26, No. 3, pp. 54-59

92 Martijn P. van den Heuvel, Cornelis J. Stam, René S. Kahn, Hilleke E. Hulshoff Pol, "Efficiency of Functional Brain Networks and Intellectual Performance", Journal of Neuroscience, 2009, 29 (23), pp. 7619-7624

There are many definitions of intelligence, although intelligence is typically defined person's ability to adapt to the environment and to learn from experience (Sternberg & Detterman, 1986)[93]. According to Binet, intelligence consisted in a multiplicity of different abilities and depended on a variety of higher psychological faculties – attention, memory, imagination, common sense, judgment, and abstraction[94].

Human intelligence describes the general mental capability that involves the ability to reason, to think abstractly, and to learn quickly from experiences. It is associated with many important outcomes in life, including education, occupation, socioeconomic status, health, and longevity. General intelligence is a psychological construct that captures in a single metric the overall level of behavioral and cognitive performance in an individual[95].

Differences in cognitive abilities and the resulting differences for example in academic success and professional careers are attributed to a considerable degree to individual differences in intelligence. A study shows that more intelligent person's certain brain regions are clearly more strongly involved in the exchange of information between different sub-networks of the brain in order for important information to be communicated quickly and efficiently. On the other hand, the research team also identified brain regions that are more strongly 'de-coupled' from the rest of the network in more intelligent people. And researchers speculate that the observed differences in network integration of three brain regions may enable intelligent people to more quickly detect, evaluate, and mark salient new stimuli for further processing and to protect ongoing cognitive processing from an interference of irrelevant information, ultimately contributing to higher cognitive performance and high[96] .

Recent neuroscience evidence to elucidate how general intelligence, emerges from individual differences in the network architecture of the human brain. Extensive neuroscience data indicate that the topology of brain networks is shaped by learning and prior experience reflecting the formation

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93 Robert J. Sternberg, Douglas K. Detterman, What is Intelligence? Ablex Publishing Corporation, 1986

94 N. J. Mackintosh, History of Theories and Measurement of Intelligence, The Cambridge Handbook of Intelligence, Edited by Robert J. Sternberg, Scott Barry Kaufmann, Cambridge University Press, USA, 2011, Chapter 1, pp. 5

95 Kirsten Hilger, Matthias Ekman, Christian J. Fiebach, Ulrike Basten, "Intelligence Is Associated with The Modular Structure of Intrinsic Brain Networks", Nature Scientific Reports, 2017, 7, Article number: 16088, pp. 1-12, doi:10.1038/s41598-017-15795-7

96 Kirsten Hilger, Matthias Ekman, Christian J. Fiebach, Ulrike Basten, "Efficient Hubs in The Intelligent Brain: Nodal Efficiency of Hub Regions in The Salience Network is Associated with General Intelligence", Intelligence, 2017, 60, pp. 10-25

of new neurons, synapses, connections, and blood supply pathways that promote the accessibility of crystallized knowledge. Whereas crystallized intelligence engages easy-to-reach network states that access prior knowledge and experience, fluid intelligence instead recruits difficult-to-reach network states that support cognitive flexibility and adaptive problem solving[97].

In differentiating between functional (brain activation) and structural (amount of grey matter) correlates of intelligence, in differentiating between positive and negative associations of intelligence and brain activation, and in extending the set of brain regions considered relevant for intelligence by including the insular cortex, the posterior cingulate cortex, and subcortical structures. This neurocognitive model of intelligence can serve as a guide for future research on intelligence. In sum, according to the researchers, meta - analyses on the neurocognitive bases of intelligence support the notion that frontal and parietal brain regions are important for human intelligence[98].

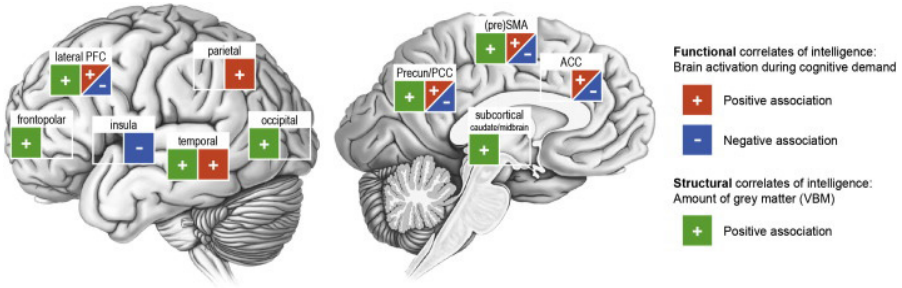

Figure 4**.** The brain bases of intelligence — an updated model. Lateral (left) and medial (right) surfaces of the brain. ACC: anterior cingulate cortex; PCC: posterior cingulate cortex; PFC: prefrontal cortex; (pre)SMA: (pre-) supplementary motor area; VBM: voxel-based morphometry. Schematic drawing of a brain adapted from the textbook Neurowissenschaften (title); Andreas Engel (publisher); Mark F. Bear, Barry W. Connors, Michael A. Paradiso (authors); 2009 © Spektrum Akademischer Verlag.[99]

Stanovich and West observed a generally negative correlation between intelligence and susceptibility to judgment biases and they expressed that provide adequate cues to the correct answer and therefore provide a test of reasoning rationality. Not surprisingly, intelligent people are more likely to

97 Aron K. Barbey, "Network Neuroscience Theory of Human Intelligence", Trends in Cognitive Sciences, 2017, in Press, pp. 1-13

98 Ulrike Basten, Kirsten Hilger, Christian J. Fiebach, "Where Smart Brains Are Different: A Quantitative Meta-analysis of Functional and Structural Brain Imaging Studies on Intelligence", 2015, Intelligence, 51, pp. 10-27

99 from Basten at al., p. 23

possess the relevant logical rules and also to recognize the applicability of these rules in particular situations. High IQ respondents benefit from relatively efficient System 2 cognitive operations that enable them to overcome erroneous intuitions when adequate information is available.

What is the relation between intelligence and achievement? There is a reciprocal relation between intelligence and achievement. First, intelligence (which is the ability to learn) helps you to acquire knowledge (which is the outcome of learning). In short, intelligence enables learning. Second, the knowledge that you have improves your ability to learn. In short, achievement enables intelligence. This reciprocal relation is illustrated in Figure 2.[100]

Figure 5. The reciprocal relation between intelligence and achievement

According to research, there are positive correlations between decision making competence and intelligence. In addition, there are positive correlations between decision making competence and four "constructive" cognitive styles: polarized thinking = contradictory points of view, self-consciousness, self-monitoring, and behavioral coping.[101] And in conclusion, the abilities of the intelligence should develop with age and experience.[102]

J. Memory

Learning is a process of long lasting change in behavior caused by experience. Memory is the record of experience underlying learning.[103] Studies of memory focus on how information is encoded, stored, and retrieved. Memory is related to a delayed effect of life. Firstly, information about stimulant or action is taken and encoded in the nervous system (acquisition stage). After this, information is stored due to using in later retention stage). Eventually, information can be

100 Richard E. Mayer, Intelligence and Achievement, The Cambridge Handbook of Intelligence, Edited by Robert J. Sternberg, Scott Barry Kaufmann, Cambridge University Press, USA, 2011, Chapter 36, p.740

101 Fischhoff, pp. 13-15

102 John D. Mayer, David R. Caruso, Peter Salovey, "Emotional Intelligence Meets Traditional Standards for an Intelligence", Intelligence, 1999, Volume 27, Issue 4, pp. 267-298

103 Matthew M. Walsh and Marsha C. Lowett, "The Cognitive Science Approach to Learning and Memory", The Oxford Handbook of Cognitive Science, Edited by Susan E. F. Chipman, Oxford University Press, New York, 2017, Chapter 11, p. 215

retrieval (retrieval stage). All of these stages take part of memory studies.[104]

Memory can take many forms. It can reflect the conscious access of factual knowledge or past experiences (explicit or declarative memory), or it can be revealed as a change in our behavior that results from the influence of past experiences (implicit or non-declarative memory).[105] Besides that, topics of short term memory (STM), working memory (WM)[106] and long term memory (LTM) have central both in psychology and cognitive neuroscience. Working memory is closely linked to LTM and its contents consist primarily of currently activated LTM representations, which are closely linked to activated retrieval cues and, hence can be quickly reactivated.[107] Working memory is also closely linked to intelligence.

Each experience with a time interval is stored as a separate memory trace. Memory traces decay over time, which means that the most recent and most frequent traces are most active.[108]

Anderson (1982) proposed three stage of memory skill acquisition. 1- Cognitive stage. The individual may learn from instruction or examples. Performance is slow and effortful. To solve problems, one must retrieve facts from memory and interpret them. 2- Associative stage. Initial errors of understanding are gradually detected and eliminated. Additionally, task knowledge is compiled into specialized procedures that minimize the amount of information that must be retrieved from long term memory and held in working memory. 3- Autonomous stage. Performance becomes increasingly automatic, requires less attention, and interferes less with other ongoing tasks. Performance continues to improve with practice, but more slowly.[109] Counter to the common belief that experts are innately talented, their performance constitutes an extreme point along a continuous learning trajectory. Experience, paired with learning, engenders change in experts'

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104 Michael Domjan, Koşullama ve Öğrenmenin Temelleri, Çeviren: Hakan Çetinkaya, Türk Psikologlar Derneği Yayınları No: 28, 2004, p. 172

105 Alisha C. Holland, Elizabeth A. Kensinger, The Cambridge Handbook of Human Affective Neuroscience, Edited by Jorge Armony, Patrik Vuilleumier, Chapter 20, Emotion in Episodic Memory, Cambridge University Press New York, 2013, p. 465

106 Working memory: is a mechanism or processes that are involved in the control, regulation, and active maintenance of task relevant information in the service of complex cognition, including novel as well as familiar, skilled tasks.

107 Shallice and Cooper, pp. 244-245

108 Hedderik van Rijn, Niels A. Taatgen, "An Integrative Acoount of Psychological Time", The Oxford Handbook of Cognitive Science, Edited by Susan E. F. Chipman, Oxford University Press, New York, 2017, Chapter 8, pp. 161

109 John R. Anderson, "Acquisiton of Cognitive Skill", Psychological Review, 1982, Vol. 89, No. 4, pp. 369-406

strategies, perception, and long term knowledge structures. The development of expertise, then, depends on the same learning and memory processes. Experts possess the basic collection of facts, definitions, and concepts needed to perform a task. In addition, they have amassed an extensive collection of memories based on meaningful patterns, conditions, and problems previously encountered.[110]

Stress effects on memory. According to the main findings, memory functions of memory systems at the temporal lobe in the brain may deteriorate in severe stress periods.[111] Working memory capacity and reasoning ability are known to be highly correlated.[112]

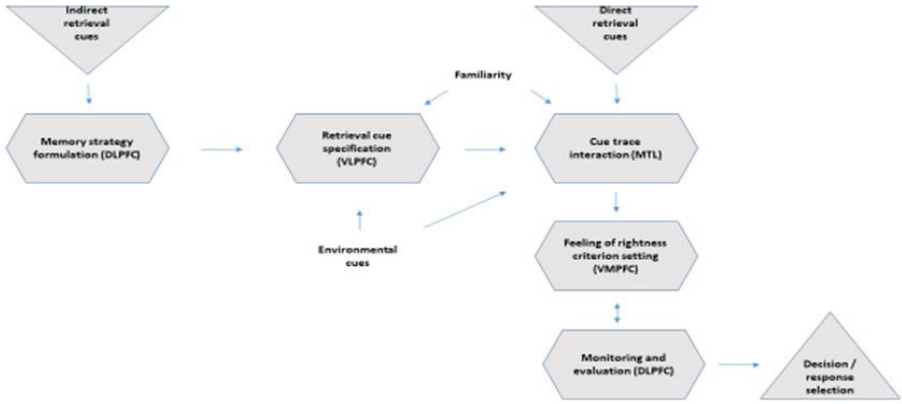

Figure 6. Levels of memory processes and relevant brain areas. Adapted from the memory control model of Gilboa and colleagues (2006).[113]

K. Predictions

One of the most robust findings in the psychology of prediction is that people's predictions tend to be optimistically biased. By a number of metrics and across a variety of domains, people have been found to assign higher probabilities to their attainment of desirable outcomes than either objective criteria or logical analysis warrants. Given that many of the decisions people make, most of their choices, and virtually all plans are based on expectations about future, it would seem imperative that people's predictions and expectations be free from bias. All predictions are made under varying

110 Walsh at al., pp. 217-218
111 Ledoux, p. 63
112 Jonathan St. B. T. Evans, "In Two Minds: Dual Process Accounts of Reasoning", Trends in Cognitive Sciences, 2003, Volume 7, No. 10, pp. 454-459
113 Shallice and Cooper, p. 423

degrees of uncertainty, with no meaningful prediction ever being completely certain. People's predictions will therefore necessarily contain at least some component of error.[114]

L. Psychological Other Variables

To desire to make the right choice often leads people to look for good reasons when making decisions, and considering this reliance on reasons. Relying on good reasons seems like sound practice; after all, the converse, making a choice without good reason, seems unwise.[115]

Decisions can also be influenced by metacognitive experiences that arise while processing stimuli. For example, when choice options are more difficult to process, people are more likely to defer a decision than when the options are easier to process, although the options themselves have not changed. Ease of processing can thus be seen to inform decision behavior, even when it is triggered by features irrelevant to the decision.[116]

The decision making literature shows people's preferences to be highly malleable and systematically affected by a host of factors. People's preferences are heavily shaped, among other things, by particular perceptions of risk and value, by influences on attribute weights, by the tendency to avoid decision conflict and rely on compelling reasons for choice, by salient identities and emotions, and by a general tendency to accept decision situations as they are described, rarely reframing them in alternative ways.[117]

Many extraneous variables can also influence judicial decisions. According to research, demonstrating the effects of taking a break to eat a meal or a short rest, positive mood, and glucose on mental resource replenishment.[118]

The findings suggest that self-regulation, active initiative, and effortful choosing draw on the same psychological resource. Making decisions depletes that resource, thereby weakening the subsequent capacity for self-control and active initiative. The impairment of self-control was shown on a variety of tasks, including physical stamina and pain tolerance, persistence in the face of failure, and quality and quantity of numerical calculations. It also

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114 Gilovich et al., pp. 334-347

115 Leboef, p. 308

116 Joseph P. Simmons, Leif D. Nelson, "Intuitive Confidence: Choosing Between Intuitive and Nonintuitive Alternatives", Journal of Experimental Psychology, 2006, Volume 135, No. 3, pp. 409–428

117 Leboef, pp. 315

118 Shai Danzigera, Jonathan Levavb, Liora Avnaim-Pessoa, edited by Daniel Kahneman, "Extraneous Factors in Judicial Decisions", Proceeding of the National Academy of Sciences, 2011, Volume 108, No. 17, pp. 6889–6892

led to greater passivity. Decision making and self-control are both prominent aspects of the self's executive function. In particular, making many decisions leaves the person in a depleted state and hence less likely to exert self-control effectively.[119]

IV. EMOTIONAL INTELLIGENCE AND DECISION MAKING

To reason, to analyze, to distinguish, to draw analogies, to speak and to write well. These are the qualities of successful law graduate. Moreover, need to better prepare for other aspects of the practice of law such as counseling, negotiating, and drafting. Legal education should cultivate emotional intelligence.[120] Although the law may denigrate the role of emotions, the successful practice of law requires a high level of emotional intelligence.[121] Emotional intelligence is a soft skill for judges.

Emotional intelligence (EI) is related to both emotion and intelligence, but it also is distinct from them.[122] Emotional Intelligence is the ability to perceive and express emotion, assimilate emotion in thought, understand and reason with emotion, and regulate emotion in the self and others (Mayer, Salovey, and Caruso, 2000).[123] These traits also are essential to developing the sense of personal meaning, responsibility, and fulfillment that distinguish expert performers.[124]

Emotions and intelligence can work hand in hand. Emotions reflect relationships between a person and a friend, a family, the situation, a society, or more internally, between a person and a reflection or memory. Emotional Intelligence refers in part to an ability to recognize the meanings of such emotional patterns and to reason and decision.[125]

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119 Kathleen D. Vohs, Roy F. Baumeister, Brandon J. Schmeichel, Jean M. Twenge, Noelle M. Nelson, Dianne M. Tice, "Making Choices Impairs Subsequent Self-Control: A Limited Resource Account of Decision Making, Self-Regulation, and Active Initiative", Journal of Personality and Social Psychology, 2008, Volume 94, No. 5, pp. 883–898

120 Marjorie A. Silver, "Emotional Intelligence and Legal Education", Psychology, Public Policy and Law, 1999, Volume 5, No. 4, pp. 1173-1203

121 Randall Kiser, "The Emotionally Attentive Lawyer: Balancing The Rule of Law with The Realities of Human Behavior", Nevada Law Journal, 2015, Volume 15, Issue 2, Article 3, pp. 442-463

122 John D. Mayer, Richard D. Roberts, Sigal G. Barsade, "Human Abilities: Emotional Intelligence", Annual Reviews Psychology, 2008, 59, pp. 507-536

123 John D. Mayer, Peter Salovey, David Caruso, Models of Intelligence, Handbook of Intelligence, Edited by Robert J. Sternberg, Cambridge University Press, New York, 2000, pp. 396

124 *see generally*, K. Anders Ericsson, Neil Charness, Paul J. Feltovich, Robert R. Hoffman, The Cambridge Handbook of Expertise and Expert Performance, Cambridge University Press, Cambridge; New York, 2006

125 Robert J. Sternberg and Scott Barry Kaufmann, pp. 531

According to Goleman (1995), an account of emotional intelligence included a number of personality qualities. Goleman depicted the five areas of emotional intelligence: 1- Knowing one's emotions, 2- Managing emotions, 3- Motivating oneself, 4- Recognizing emotions in others, 5- Handling relationships. Goleman argued that IQ contributes about 20% to the factors that determine life success, EI would account much of the 80% left to other factors.[126]

However, emotional intelligence, as an ability, is often measured in other ways, can be assessed most directly by asking a person to solve emotionally problems, such as identifying the emotion in a story or painting, and then evaluating the person's answer against criteria of accuracy.[127] Emotional intelligence is a hot intelligence. It can be thought of as one member of an emerging group of potential hot intelligence that includes social intelligence, practical intelligence, personal intelligence, nonverbal perception skills, and emotional creativity.[128] Emotional intelligence also related social and interpersonal relations. Persons with higher emotional intelligence should have a greater ability to experience empathy. Empathy is an important component or correlates of emotional intelligence.[129]

Others perceive high EI individuals as more pleasant to be around, more empathic, and more socially adroit than those low in EI. EI is correlated with some aspects of family and intimate relationships as reported by self and others. EI is also correlated with better academic achievement. EI is correlated with greater life satisfaction and self-esteem and lower ratings of depression, and better social relations during work performance and in negotiations.[130]

All of these emotional skills, necessarily entail an integration of substantive legal knowledge with a broader range of competencies embraced by emotional intelligence —listening, understanding, communicating, conceptualizing, anticipating, simulating, and perspective taking.[131]

Competent and successful legist and judges understand their personal motivations, biases, habits, weaknesses, and strengths and they develop integrity, credibility, humility, and maturity by embracing all dimensions of their personalities.

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126 Daniel Goleman, Emotional Intelligence, Bantam Books, New York, 1995

127 John D. Mayer, Maria DiPaolo, Peter Salovey, "Perceiving Affective Content in Ambiguous Visual Stimuli: A Component of Emotional Intelligence", Journal of Personality Assessment, 1990, 54, pp. 772-781

128 Mayer et al. (1999), p. 268

129 Nicola S. Schutte, John M. Malouff, Chad Bobik, Tracie D. Coston, Cyndy Greeson, Christina Jedlicka, Emily Rhodes, Greta Wendorf, "Emotional Intelligence and Interpersonal Relations", The Journal of Social Psychology, 141:4, pp. 523-536

130 Mayer et al. (2008), pp. 525-526

131 Kiser, p. 446

V. PERSONALITY TRAITS

Personality develops in childhood and is probably most malleable in childhood; researchers are also finding that personality influences health over time and it is relevant that mental health, problem solving, reasoning and decision making abilities.[132] One of the most widely accepted definitions of traits are the unique ways individuals tend to exhibit enduring patterns of thoughts, feelings, and actions.[133]

Personality and decisions are closely relevant. Some personality traits can be an indicator of decision making.

Some scholars like Lawrence Solum (2003), have listed some judicial virtues: 1- Judicial temperance, 2- Judicial courage, 3- Judicial temperament, 4- Judicial intelligence, 5- Judicial wisdom. He identifies of justice from three aspects: 1- Judicial impartiality (even-handed sympathy for those affected by adjudication), 2- Judicial integrity (respect for the law and concern for its coherence), and 3- Legal vision.[134]

American Bar Association (ABA) explains a lot of characteristic for judges, include in canons of Judicial Ethics:[135]

1. A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.
2. A judge shall perform the duties of judicial office impartially, competently, and diligently.
3. A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.
4. A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.

One scholar tried a study about defining good judge (Rosenberg, 1966). He asked 144 trial judges of varying experience and backgrounds to define best qualities to become a trial judge. He gave each judge a list of 23 possible

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132 Kathryn E. Flynn, Maureen A. Smith, "Personality and Health Care Decision Making Style", The Journals of Gerontology: Series B, 2007, Volume 62, Issue 5, pp. 261–267

133 Robert R. McCrae, Paul T. Costa, Personality in Adulthood: A Five-factor Theory Perspective, Guilford Press, New York, 2003

134 Lawrence B. Solum, "Virtue Jurisprudence: A Virtue Centered Theory of Judging", Metaphilosophy, 2003, 34, pp. 178-213

135 from American Bar Association (ABA), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html

attributes compiled from the preexisting literature on judicial qualifications and other various sources. Those the judges rated as highest in importance were: (1) moral courage, (2) decisiveness, (3) reputations for fairness and uprightness, (4) patience, (5) good health, physical and mental, and so on.[136] Other traits like that foresighted, and common sense are also crucial traits for the decision making.

Training or educating of a legist that good, mature, and virtuous most important issue all over the world. Being a good legist is also the extraordinary difficult thing. A judge must know both the law and traditions of folk. A legist must be logician as much as a psychologist and familiar with principles of reasoning related to the account.[137]

In view of Ottoman Law, essentially everybody equal vis-a-vis legislation. Kadis (Ottoman Judge) have protected rights against to unfair people from cruelty and injustice. Objectivity, professional knowledge and be cognizant of trial methods were important for Kadis. Reliance and righteousness were valid and noteworthy. Non-Muslims also have applied to Kadi to resolving their conflicts like that places of worship and foundation affairs etc.[138] In addition to this, Kadis have been required proper sentenced, strong comprehension, strong personality, iron will, and judicial competence. Kadis does not distinguish between dignitary, Muslim, Christian, rich or poor people; they have tried reveal to justice merely.[139] According to historical records, famous and dignified Turkish lawyers have a qualification such as prestige, solemnity, spiritual, dignity, straightforward, do their duty even dangerous situation, and respectful to justice. At the same time for the successful and effective law, lawyers' knowledge and personality traits are very important.[140]

According to Mecelle[141] m. 1792, a judge should have scholar (hakim), quick of comprehension (fehim), straightforward (müstakim), trustworthy (emin), cautious (mekin), sturdiness (metin). These traits are the expression of judges' qualifications and trial ethics.[142]

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136 Milton J. Rosenberg, "The Qualities of Justice – Are They Strainable?", Texas Law Review, 44, 1063

137 Sulhi Dönmezer, "Hukuk ve Hayat", İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, 1957, Cilt 21, Sayı 1-4, p. 431

138 A. Refik Gür, Osmanlı İmparatorluğu'nda Kadılık Müessesi, Türkiye İş Bankası Kültür Yayınları, İstanbul, 2015

139 Pelin Çift, Ahmet Şimşirligil, Adalet Ustaları, Destek Yayınları: 878, İstanbul, 2017

140 H. Hilmi Özdemir, "Hâkim ve Savcılarda Bulunması Gereken Nitelik ve Yeteneklerle, Tutum ve Davranışlar", Yargıtay Dergisi, 2002, Cilt 28, Sayı 3, p. 261-280

141 Mecelle was an Ottoman's Civil Code, was prepared based on Islamic Law between 1868-1876

142 Mustafa Avcı, "Mecelle'ye Göre Hâkimin Nitelikleri ve Yargılama Etiği", Türkiye Adalet Akademisi Dergisi, 2016, Yıl: 7, Sayı: 27, pp. 33-58

Judges should be knowledgeable about the law, willing to undertake in-depth legal research, and able to write decisions that are clear, logical and cogent. Judges should be fair and open-minded devoid of any kind of political fervor. The judge is supposed to conduct the trial impartially and in an open court. The judge hears all the witnesses and any other evidence presented by the parties of the case, assesses the credibility and arguments of the parties, and then issues a ruling on the matter at hand based on his or her interpretation of the law and his or her own personal judgment. The qualities of a good judge include free from anger, patience, wisdom, courage, firmness, alertness, incorruptibility and the gifts of sympathy and insight. The judges are certainly, accountable but they are accountable to their conscience and people's confidence. The judiciary must be manned by persons of high quality, courage, determination, devotion and an independent and unbiased mind. Moreover, they should carefully introduce to the issues of legal ethics and professional responsibility.[143] The judge has the duty to render a decision in all impartiality. In criminal and correctional matters, the psychological mechanisms of a magistrate have a notable incidence in the research of truth.[144] And all these together with, another important trait is leadership that associate with many personality characteristics is relevant to decision making.

A. Leadership

"Strong (truth - based) convictions make great leaders"

- Forbes

Leadership has studied from many perspectives (e.g. personality traits, power relationships, behavior change) and by many different disciplines (e.g. psychology, administration, politic science). Leadership, decision making, and justice terms are intimately connected.[145] Good decision making is one of the key functions of leadership and also quality decision making is incredibly important.

Judges' judicial and managerial roles overlap. Judges also have a judicial role in which their leadership and management role is overlaid. Leadership provides to judge's development that understanding the organization,

143 Manjur Hossain Patoari, Mohammad Hasan Murad, Salahuddin Mahmud, "The Desired Qualities of a Good Judge", Academic Journal of Interdisciplinary Studies - MCSER Publishing, Rome – Italy, 2014, Volume 3, No 1, pp. 97-103

144 Michèle Bernard-Requin, "The Search for Truth in Judicial Psychology and Psychiatry. Psychology in The Judicial Decision Making", Annales Médico-Psychologiques, Revue Psychiatrique, 2012, Volume 170, Issue 2, from abstract

145 B. Charles Tatum, Richard Eberlin, Carin Kottraba, Travis Bradberry, "Leadership, Decision Making, and Organizational Justice", Management Decision, 2003, 41 / 10, s. 1006-1016

communicating and working with others, people management, managing yourself as a leader.[146]

Some research has examined what strong leaders are like as people by looking at demographic variables, personality traits, skills, and so on. Without followers, there can be no leaders; accordingly, some research has examined leader – follower relations.[147]

The trait approach in psychology emphasizes the personal attributes of leaders. Some individual traits that appear to be related to leadership success are high energy level, tolerance for stress, emotional maturity, integrity, and self-confidence. High energy level and stress tolerance help people cope with the hectic pace and demands of most leadership positions, frequent role conflicts, and the pressure to make important decisions without adequate information. Leaders with high emotional maturity and integrity are more likely to maintain cooperative relationships with subordinates, peers, and superiors. Emotional maturity means that a leader is less self–centered, has more self–control has more stable emotions and is less defensive. Integrity refers to a person's behavior being constant with expressed values and that the person is honest and trustworthy. Self–confidence makes a leader more persistent in the pursuit of difficult objectives, despite initial problems and setbacks.[148]

Motivation is another aspect of personality related to leader effectiveness. Identified three leader motives: the need for power, need for achievement, and need for affiliation. Someone with a high need for power enjoys influencing people and events and is more likely to seek positions of authority. Someone with a high need for achievement enjoys attaining a challenging goal or accomplishing a difficult task, prefers moderate risks, and is more ambitious in terms of career success. Someone with a high need for affiliation enjoys social activities and seeks close, supportive relationships with other people.[149]

According to Mendonca (2001), to maintain one's faith in the vision and stay the course, leaders need to habitually exercise prudence, fortitude, and temperance. The practice of prudence and fortitude is the source of patience that gives leaders the strength to refrain from unethical actions and behaviors.[150]

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146 Kay Evans, "A Story of Leadership and Management Development: How The Judicial College in England and Wales Supports Modern Judges in Their Roles as Leaders and Managers", Questione Giustizia, 2016, 1, pp. 1-7

147 Paul M. Muchinsky, Psychology Applied to Work, Wadsworth / Thomson Learning, USA, 1999, p. 363

148 Muchinsky, pp. 367-368

149 Muchinsky, p. 368

150 Manuel Mendonca, "Preparing for Ethical Leadership in Organizations", Canadian Journal

The power possessed by a leader is important not only for influencing subordinates but also for influencing peers, superiors, and people outside the organization.[151]

Some of the traits and skills that predict leader effectiveness relate to the use of power. Leaders with a high need for power and high self–confidence make more influence attempts. Self–confidence, persuasive ability, and relevant expertise facilitate the effectiveness of influence attempts. Effective leaders establish cooperative relationships characterized by high levels of mutual trust and loyalty. Tact and diplomacy, listening skills are important other skills.[152]

Much of the activity of leaders seldom make important decisions at a single point in time, except for problem solving in response to immediate crises. In dealing with day – to – day decisions, effective leaders are guided by their long term objectives and strategies. People who effectively solve problems or develop successful strategies gain in status and power as a result. The reputation for expertise gained from a successful decision made in the past gives a person greater influence over subsequent decisions. Several of the traits and skills predictive of leadership effectiveness are relevant for decision making. Leaders with extensive technical knowledge and cognitive skills are more likely to make high quality decisions. These skills are important for analyzing problems, identifying causal patterns and trends, and forecasting likely outcomes of different strategies for attaining objectives. Self–confidence, and tolerance for ambiguity and stress help leaders cope with the responsibility for making major decisions on the basis of incomplete information.[153] Problem solving is an important specialty for leaders and expert people. Problem solving defines as: "The process by which individuals attempt to overcome difficulties, achieve plans that move them from a starting situation to the desired goal, or reach conclusions through the use of higher mental functions such as reasoning and thinking".[154] Many managers and responsible decision makers attempt to be rational, wise and thoughtful in their decision making.[155]

B. Patience

of Administrative Sciences, Version of Record online: 8 APR 2009, Volume 18, Issue 4, pp. 266-276

151 Muchinsky, p. 371

152 Muchinsky, p. 385

153 Muchinsky, pp. 385-386

154 Gary R. VandenBos, APA Dictionary of Psychology, Washington, DC: American Psychological Association, 2015

155 Daniel J. Power, "Data Science: Supporting Decision Making", Journal of Decision Systems, 2016, Volume 25, No. 4, pp. 345–356

Patience, as a leadership quality, has been an overlooked virtue in the social and psychological sciences. The English word patience comes from the Latin *patientia*, for suffering, endurance, and forbearance (Patience, 2010).[156] In Turkish, mean of patience is "waiting for anything that will happen or come without rush" (Patience = Sabır, in Turkish).[157] Patience is often discussed alongside self-control, self-regulation, and character strength.[158] Both functions and processes of patience are an effect on decision making.

According to Zhang and Chua (2009), individuals with positive character traits are better liked, are more influential, and are viewed as making better decisions. Leaders can learn to be patient. On the other hand, inner realm of individuals influences decision making. Finally, although patience often reduces the decision speed, causing a delay in decision making studies show that a patient leader who is willing to wait also tends to be objective, resilient, and committed.[159]

Sometimes people act out of himself less than required for efficient interaction. And for the high level managers have a self control over their affective responsiveness and whatever their emotions they act with calm and patient.[160]

Yunus Emre also has mentioned about patient versus anger many centuries ago. Because anger is harmful to thinking and decision. He recommended being patient for success and well being. Furthermore, he recommended righteousness by wisdom.[161]

C. Wisdom

"*Erdem başı tıl*"

- An old Turkish proverb

"Start of the virtue is speech." In this proverb, aimed association between virtue and expression. Who knows eloquence is respected. According to Kaşgarlı Mahmut (12th century) with this proverb, for being virtuous, firstly use speech to correctly and he pointed out, use of speech gain power and effectiveness to person.[162]

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156 Patience, Oxford English Dictionary, 3rd ed., 2010

157 Sabır, http://www.tdk.gov.tr

158 MD Haque, Lu Liu, Angela TitiAmayah, "The Role of Patience as A Decision Making Heuristic in Leadership", Qualitative Research in Organizations and Management: An International Journal, 2017, Vol. 12, No. 2, pp. 111-129

159 MD Haque et al., pp. 224-225

160 Goleman (2000), pp. 34-40

161 Dilaver, pp. 395-403

162 Şükrü Haluk Akalın, Bin Yıl Önce Bin Yıl Sonra Kaşgarlı Mahmud ve Divanü Lugati-t Türk,

There has been little research on wisdom in either the psychological or legal literature and wisdom remain largely unexplored.[163] Wisdom is a construct characterized by a rich history and complex associations. Definition of wisdom is the ability to make a decision based on the combination of knowledge, experience, and intuitive understanding.[164] Psychologist has described wisdom as the search for the moderate course between extremes, a dynamic between knowledge and doubt, a sufficient detachment from the problem at hand, and well balanced coordination of emotion, motivation, and thought.[165]

Since the beginnings of human culture, wisdom has been viewed as an ideal and point of human development. Indeed, the idea of wisdom is one of the highest forms of knowledge and skill. Wisdom related thought, judgment, and advice in terms of psychological categories and also wisdom mean is knowledge, knowledge about the limitations of knowledge and about when to apply which strategy of problem solution or self-regulation. Furthermore, items like that judgment, effective, discreet, intuitive, sensible, logical mind, reasoning ability, spiritually, virtuous, and awe are related the wisdom.[166] Justice also takes part in fundamental of wisdom.

According to Mevlana, people have a freedom of the will. And there are a lot of factors for the deciding. Especially doubt and fear very powerful and influential psychological effects on decision making. But who has to reach moral and spiritually mature and has an iron will surpass these emotional and psychological obstacles easily.[167] Hacı Bektaşi Veli, Yunus Emre, and Mevlana are the wise people and they recommended us that using heart and mind together. The respectable and meritorious decision can be made by with this way.

Wisdom is associated with judgment about important matters, knowledge and the implementation of knowledge, achieving well being of all, and awareness of the social consequences of one's action.[168] And it is related to excellence and ideals of human development. Wisdom is viewed as associated with a high degree of personal and interpersonal competence, including the

Türk Dil Kurumu Yayınları, 945, Ankara, 2008

163 Bridget R. Dunnavant, Heidi M. Levitt, "The Development of Wisdom in Judicial Decision Making", The Humanistic Psychologist, 2015, 43, pp. 1–23

164 www.seslisozluk.net

165 Ursula M. Staudinger, Judith Glück, Intelligence and Wisdom, The Cambridge Handbook of Intelligence, Edited by Robert J. Sternberg, Scott Barry Kaufmann, Cambridge University Press, USA, 2011, Chapter 40, pp. 827

166 Staudinger and Glück, pp. 828-831

167 Ramazan Altıntaş, "Mevlânâ'da İrade Hürriyeti", Cumhuriyet Üniversitesi İlahiyat Fakültesi Dergisi, 2004, Cilt: VIII / 2, p. 1-15

168 Jennifer Rowley, Frances Slack, "Conceptions of Wisdom", Journal of Information Science, 2008, Volume: 35 Issue 1, pp. 110-119

ability to listen, evaluate, and to give advice. Wisdom involves good intentions. It is used for the well being of oneself and others. Wisdom represents a truly superior level of knowledge, judgment, and advice. And moreover, wisdom constitutes knowledge with extraordinary scope, depth, measure, and balance; wisdom involves a perfect synergy of mind and character.[169]

Awareness is one of the fundamental personal qualities of wise people. For a wise individual and especially manager, it is important to be well aware of their own strengths and weaknesses, knowledge, and that which they do not know. Understanding of wisdom as multidimensional, a blending and balance of cognition, affect and conation, which results in wise products such as decisions. Consistent with an Aristotelian approach that practically wise people deliberate about things that have good ends and can be brought about by action.[170] And wisdom has accumulated the knowledge. Having knowledge per se does not lead one to make wise decisions, and that wisdom is about applying knowledge.[171]

A wise person weighs the knowns and the unknowns, resists overwhelming emotion while maintaining interest, and carefully chooses when and where to take action.[172]

Wisdom does not necessarily need to be viewed as a characteristic of individuals. It can also be a characteristic of solutions in general sense, for example, political or legal decisions. Understanding characteristics of wise strategies of information processing and decision making may be highly fruitful beyond the boundaries of psychology.[173]

VI. JUDICIAL FACTORS ON DECISION MAKING

The study of judicial decision making has indisputably made great strides in recent years. Thinking about the intersection of psychology and judicial decision making can help us for awareness, consciousness and give an opportunity to evaluate decisions from the psychological perspective.

Legal reasoning occurs in the legal system, between two competing views: law and fact. And four thinking and reasoning processes that are common in legal reasoning: following rules, categorization, analogy, and fact finding.

169 Paul B. Baltes, Ursula M. Staudinger, "Wisdom: A Metaheuristic (Pragmatic) to Orchestrate Mind and Virtue Toward Excellence", American Psychologist, 2000, Volume 55, No. 1, pp. 122-136

170 Ali Intezari, David J. Pauleen, "Conceptualizing Wise Management Decision Making: A Grounded Theory Approach", Decision Sciences, 2017, pp. 1-66

171 Tim LeBon, Wise Therapy: Philosophy for Counsellor, Sage Publications, London, 2001

172 Peter Matthews, "What Lies Beyond Knowledge Management: Wisdom Creation and Versatility", Journal of Knowledge Management, 1997, Volume 1, Issue 3, pp. 207-214

173 Staudinger and Glück, p. 842

Decision makers are often focused on reaching specifically desired conclusions, the motivations to reach an antecedently desired conclusion will affect their information search and recall, as well as other components of the decision making process.[174] There are three important aspects of decision making for judges. 1- The quantification of sufficient proof, 2- The weighing of pieces of evidence, and 3- The relevancy of evidence.[175]

Following, applying, and interpreting formal, written, and authoritative rules, as well as arguing within a framework of such rules, are important tasks for judges, and they are consequently emphasized in the standard picture of legal reasoning. The psychology literature does not address this kind of rule following per se.[176] And, there are at least two ways to make poor decisions, the first is about misperceiving the facts as just explained, the second one is to make bad inferences about well evaluated facts. Different interpretations can result from some differences existing in the prior knowledge of different individuals and also contextual knowledge influences decision making.[177] Legal decision making also requires heavy deference to precedent law. Judges know that if they deviate too far from case law or statutory guidelines, their ruling will be appealed and likely overturned by an appellate court. And, if one or both of the opposing parties deficient or incomplete evidence, the quality of the decision will be affected.[178]

Judicial decision making is a constellation of analysis of law, past cases, experimental methods, matters of fact, and common sense as well as judges' personality, values, background, and legal education.[179] Judges' decisions must have several characteristics: they must "uphold rights, create predictability and certainty, and support the workings of successful social and economic systems."[180]

Judges' efforts to interpret the law well do much to influence their choices. Their decisions are supposed to be guided by the law, not personal

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174 Spellman, pp. 719-720

175 Audun Jøsang, Viggo A. Bondi, "Legal Reasoning with Subjective Logic", Artificial Intelligence and Law, 2000, Volume 8, Issue 4, pp. 289–315

176 Spellman, p. 722

177 Jean-Charles Pomerol, "Decision Making Biases and Context", Journal of Decision Systems, 2003, Volume 12, Issue 3-4, pp. 235-252

178 Neil Vidmar, "The Psychology of Trial Judging", Current Directions in Psychological Science, 2011, Volume 20, No. 1, Special Issue on Psychology and Law, pp. 58-62

179 Farnaz Sabahi, Mohammad R. Akbarzadeh, "Introducing Validity in Fuzzy Probability for Judicial Decision Making", International Journal of Approximate Reasoning, 2014, Volume 55, Issue 6, pp. 1383-1403

180 John N. Drobak, Douglass C. North, "Understanding Judicial Decision Making: The Importance of Constraints on Non-Rational Deliberations", Washington University Journal of Law & Policy, 2008, Volume 134, pp. 26-131

preferences. Barman (2004) has analyzed judicial decision making in terms of motivated reasoning. In the motivated reasoning framework, one goal is accuracy. Individuals are motivated tacticians who select different cognitive strategies under different circumstances.[181]

The distinction between easy cases and hard cases is widely discussed in the legal literature. In an easy case, a single and plainly applicable rule gives unambiguous guidance and, as applied to the situation at hand, appears to give the right result. On the other side there are three kinds of hard cases: one which the language of an applicable rule is unclear; ones in which it is unclear which of several rules apply; and ones in which the language of plainly applicable rule is clear but produces what the interpreter or decision maker of the rule believes is the wrong outcome.[182] Hence the legal decisions are often hard and compelling.

Understanding how to use previous decisions to make an argument or the decision in the current dispute is consequently a substantial component of legal reasoning. Previous decisions play a large role in legal reasoning.[183] Using previous decisions that are not exactly like the current question in order to guide, persuade, and justify is a process that heavily dependent on, or perhaps identical to, analogical reasoning.[184] The traditional legal theory posits that in making decisions judges strive to reach the correct legal decisions as dictated by precedent. On account of judges as case managers highlight the effects of caseload pressures on judicial decision making. Managerial judges are thought to be concerned with saving time, reducing delays, and improving efficiency.[185]

Trial court judges variously serving as finders of fact, trial supervisors, and overall case managers. These judges decide some cases on the merits, but they also manage their trail process – ruling on objections and motions about the law. Trial court judges may hold hearings to determine the admissibility of scientific evidence, conduct post trial assessments of damage awards. In addition, trial judges spend much time managing the pretrial and case settlement processes as well as overseeing the implementation of remedies

181 Eileen Carol Braman, Motivated Reasoning in Legal Decision Making, Doctoral Dissertation, Ohio State University, 2004

182 Spellman, p. 722

183 Frederick Schauer, "Why Precedent in Law (and Elsewhere) is Not Totally (or Even Substantially) About Analogy", Perspectives on Psychological Science, 3, pp. 454-460

184 Spellman, p. 727

185 Jennifer K. Robbennolt, Robert J. MacCoun, John M. Darley, "Multiple Constraint Satisfaction in Judging", The Psychology of Judicial Decision Making, Edited by David Klein, Gregory Mitchell, Oxford University Press, New York, 2010, Part 2, pp. 28-29

post trial.[186] As fact finders, judges may struggle to simultaneously accomplish myriad goals, making accurate factual determinations and reaching verdict consistent with the evidence, accomplishing optimal deterrence, awarding appropriate compensation, accomplishing some measure of distributive justice, punishing when appropriate, using the appropriate rules to guide decision making. And they evaluate scientific, expert, or statistical evidence.[187] In addition, judges to be susceptible to a variety of cognitive heuristics such as anchoring, framing, hindsight bias, the representativeness heuristic and the egocentric bias.[188]

Sometimes other scientific disciplines help decision making processes in many cases. For example, in medical malpractice litigation, is one of the most difficult types of civil litigation in Japan, because lawyers and judges are not experts in medical services or familiar with medical knowledge. These judicial decisions are of great interest to patients and physicians and may affect the actual practice of medicine and future patients. Since proper and accurate judicial decisions based on medical knowledge are necessary, special judicial practices are needed to help lawyers and judges use medical knowledge in court. This might contribute to lengthy proceedings.[189]

From a cognitive styles perspective, judges will naturally vary in the ways that they process case relevant information and solve problems, and these stable process of thought are likely to have important implications for the content of judges' thoughts and ultimately the content of their judicial opinions.[190] While other things being equal, judges demonstrate by their conduct that they have the humanistic and legalistic values required by their profession. These factors are relevant to decision making in Russia.[191]

Quality of judicial decisions, especially in the highest courts, allows for the analytical evaluation of the different dimensions which judges resort when resolving a legal controversy. Furthermore, the analysis of the quality of judicial decisions is important because judges' legitimacy is based on the

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186 Judith Resnik, "Managerial Judges", Harvard Law Review, Faculty Scholarship Series, 1982, 96: 374, pp. 376-446

187 Robbennolt et al., p. 31

188 Jeffrey J. Rachlinski, "Bottom-Up versus Top-Down Lawmaking", University of Chicago Law Review, Cornell Law Faculty Publications, 2006, 883:891, pp. 933-964

189 Nozomu Hirano, "The Latest Developments in The Judicial Practices of Special Departments of Medical Malpractice Litigation in Japanese Courts", UCLA Pacific Basin Law Journal, 2014, Volume 32, Issue 1, pp. 55-76

190 Gregory Mitchell, Philip E. Tetlock, "Cognitive Style and Judging", The Psychology of Judicial Decision Making, Edited by David Klein, Gregory Mitchell, Oxford University Press, New York, 2010, Part 17, p. 280

191 Ella Paneyakh, "The Practical Logic of Judicial Decision Making", Russian Politics & Law, 2016, 54: 2-3, pp. 138-163

content of their decisions. Educational background, experience, and other skills such as research could be part of the attitudinal variables that influence the quality of judicial decisions. Other variables related to the conditions in which justices' work could be determinants of the quality of their decisions; such as workload, number of clerks by each justice, or salary.[192]

Mentioned about that emotions, feelings, and empathy effect on decision making in this article. Nevertheless, we should consider that a good judge is able to insulate his decision making from any emotional influence and he has a good control of emotion regulation even though regulating his emotions is difficult. Regulation is the mechanism for controlling emotion's pernicious influence and achieving rationality. Emotion regulation is a crucial tool for personal wellbeing and professional success. judges should engage in those regulatory with predictable benefits and fewer effects that impair the type of decision making. They are expected both to feel and project affective neutrality.[193]

Judicial decisions are best appreciated when they are accompanied by reasoned opinions, which are based in turn on the proofs and arguments furnished by the parties.[194] Judges with the talented and hardworking characteristics, possess an ability to try to reduce the frequency and magnitude of error in trial court decision making.[195] An important type of decision making in legal proceedings is "fact finding" and most of the factual determinations in legal proceedings are made by judges.[196] Judges are free under the law to decide the case either way. And they have serious responsibility about their decisions and discretion. Judges should devote most of their attention to discerning the demands of existing legal standards.[197]

A. Biases

Even though judges are experienced, well trained, and highly motivated decision makers, they might be vulnerable to the cognitive illusions, such

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192 Santiago Basabe-Serranoa, "The Quality of Judicial Decisions in Supreme Courts: A Conceptual Definition and Index Applied to Eleven Latin American Countries", Justice System Journal, 2016, Volume 37, No. 4, pp. 331–347

193 Terry A. Maroney, "Emotional Regulation and Judicial Behavior", California Law Review, 2011, Volume 99, Issue 6, pp. 1485-1556

194 Dan Simon, Nicholas Scurich, "Lay Judgments of Judicial Decision Making", Journal of Empirical Legal Studies, 2011, Volume 8, Issue 4, pp. 709–727

195 Andrew J. Wistrich, "Defining Good Judging", The Psychology of Judicial Decision Making, Edited by David Klein, Gregory Mitchell, Oxford University Press, New York, 2010, Part 15, p. 264

196 Spellman, p. 728

197 Kent Greenawalt, "Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges", Columbia Law Review, 1975, Volume 75, No. 2, pp. 359-399

as anchoring, framing, hindsight bias, the representativeness heuristic, and egocentric biases. For example, heuristics (mental shortcuts) facilitates good judgment most of the time, but it can also produce systematic errors in judgment. These biases effect on most of professionals and experts. Furthermore, judges make a decision under uncertain and time pressured conditions. Judges may be able to reduce the effect of some cognitive illusions and biases by approaching decisions from multiple perspectives. Judges should attempt to reach their decisions by utilizing facts, evidence, and highly constrained legal criteria while putting aside personal biases, attitudes, emotions and other individuating factors.[198] Biased judgment and decision making are that which systematically deviates from the prescriptions of objective standards such as facts, rational behavior, statistics, or logic. Biased judgment and decision making affect people negatively. Biases in judgment and decision making often lead to making costly errors. Thus aware of the biases and remove biases from the mind are an important issue when making a decision. Decision making is pervasive in professional work life. Its study and improvement can contribute much to the public good.[199]

Individual awareness and keeping away biases provide positive effects on decision making. Awareness is provided by observing the opinion, emotion, and behavior. People have a high level awareness when a making decision, have some abilities such as high level focusing, attention, reflection rather than relying on heuristics.[200] As a matter of fact, awareness and consciousness have an active role and effect on decision making.

B. Time Pressure

Decision making almost always takes place under time pressure. The review of literature seems to indicate that the goal of any decision maker is to balance the demands for fast decisions against the demands for decision quality.

Decision making may be affected by tight time constraint and therefore the quality of decision making may be affected.[201] Several studies find a significant influence of time pressure on the decision making process in various experimental settings. There might be a tradeoff between speed and

198 Chris Guthrie, Jeffrey J. Rachlinski, Andrew J. Wistrich, "Inside the Judicial Mind", Cornell Law Faculty Publications, 2001, Paper 814, pp. 777-830

199 Carey K. Morewedge, Haewon Yoon, Irene Scopelliti, Carl W. Symborski, James H. Korris, Karim S. Kassam, "Debiasing Decisions: Improved Decision Making with a Single Training Intervention", Behavioral and Brain Sciences, 2015, Volume 2 (1), pp. 129–140

200 Tess M. S. Neal, Eve M. Brank, "Could Mindfulness Improve Judicial Decision Making?", Monitor on Psychology, 2014, Volume 45, No. 3, Print version: page 26

201 Matthias Sutter, Martin Kocher, Sabine Strauß, "Bargaining Under Time Pressure in an Experimental Ultimatum Game", Economics Letters, 2003, Volume 81, Issue 3, pp. 341-347

accuracy. When the time pressure, people seek cognitive closure and stop considering important aspects of multiple alternatives and this is a cause of heuristics and rules of thumb for decision making.[202] The obvious cost of making fast decisions through the use of heuristics is that such heuristics or a focus on salient cues frequently result in systematic decision making errors[203] or preference reversals.[204] This is the crucial problem for the decision making.

Evidence from psychological research on individual decision making tasks suggests that a tight time constraint for decisions may impair the capacity for information processing or the consistency of decision making, thus reducing decision making quality. Findings suggest that time pressure has a negative effect on the quality of decision making.[205] Time pressure effects on individual decisions may occur stress. And individuals may be more or less risk seeking in the presence or absence of strict deadlines.[206] Researchers have revealed that time pressure affects human judgment in a number of ways. Under conditions of time pressure, individuals become more inconsistent. Individuals also tend to switch to simple judgment strategies. Judges are often faced with a heavy caseload and despite the lack of time limits this may lead to an implicit feeling of time pressure.[207] In conclusion, to reveal, the good decisions with high quality should provide adequate time.

Time for each case or file is very important. Insufficient working time and attention in each case may pose a problem in both high level courts and trial courts. Allow for more time for the cases can provide a positive effect on decision making.[208]

CONCLUSION

Law is not only a domain of decision makers with unique abilities, training, and experience.[209] And with the psychological skills good and deep law knowledge is more effective and beneficial.

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202 Martin G. Kocher, Matthias Sutter, "Time is Money — Time Pressure, Incentives, And The Quality of Decision Making", Journal of Economic Behavior & Organization, 2006, Volume 61, Issue 3, pp. 375-392

203 Amos Tversky, Daniel Kahneman, "Judgment under Uncertainty: Heuristics and Biases", Science, New Series, 1974, Volume 185, No. 4157, pp. 1124-1131

204 Adele Diederich, "Dynamic Stochastic Models for Decision Making under Time Constraints", Journal of Mathematical Psychology, 1997, 41, pp. 260-274

205 Kocher and Sutter, p. 388

206 Diana L. Young, Adam S. Goodie, Daniel B. Hall, Eric Wu, "Decision Making Under Time Pressure, Modeled in A Prospect Theory Framework", Organizational Behavior and Human Decision Processes, 2012, Volume 118, Issue 2, pp. 179-188

207 Mandeep K. Dhami, Peter Ayton, "Bailing and Jailing the Fast and Frugal Way", Journal of Behavioral Decision Making, 2001, Volume 14, Issue2, pp. 141-168

208 Klein and Mitchell, pp. 293-294

209 Spellman, p. 732

Human judgments are neither sufficiently direct nor intense sculpt the kind of mental machinery that would guarantee error free or bias free judgment.[210]

Most likely judges simply become better analogical decision makers by virtue of their legal training and experience. Perhaps judges, and to some extent lawyers, are experts at analogical reasoning in ways that laypeople are not.[211] In addition to this probably, legal psychology courses provide an enviable opportunity to stimulate and develop critical thinking processes.[212] Judges differ from non-judges and non-lawyers on a variety of dimensions. On average, they have higher IQs than others. They have more formal schooling. They may differ on some personality variables. They have chosen to go into, and stay in, the legal field. And, as a result, they are likely motivated to "get it right", or at least not to "get it badly wrong".[213]

Despite the major advances in our understanding of the decision making, many questions remain to be answered and need to study on many factors. Nevertheless, we must aim for efficient decision making with fairly, neutrally, and properly. A decision should make prudent, conscientious, wisely, virtuously, and of course legal by the decision maker. In addition, a keen vision and persistence on the accurate or fair are the most important criteria.

In summary, we can say decision making is influenced by a lot of factors. Supreme or crucial decision making may more difficult and serious. If we can understand decision making processes from the psychological and judicial aspects, we can use our abilities like awareness and discernment more efficiently, rationally and logically. Particularly judges benefit from psychological techniques and clues and may gain an advantage in terms of knowledge. Scientific research and information about decision making in psychology have strongly contributed to law and justice.

"If you kill the mind, morals also die. If mind and morals die, the people are divided. The day when you kill the justice, the state also dies."

- Mehmed the Conqueror (in the 15th century)

210 Gilovich et al., p. 9

211 Spellman, p. 731

212 Solomon E. Fulero, Edith Greene, Valerie Hans, Michael T. Nietzel, Mark A. Small, Lawrence S. Wrightsman, "Undergraduate Education in Legal Psychology", Law and Human Behavior, 1999, Volume 23, No. 1, 1999, pp. 137-153

213 Spellman, p. 731

BIBLIOGRAPHY

Books

A. Refik Gür, Osmanlı İmparatorluğu'nda Kadılık Müessesi, Türkiye İş Bankası Kültür Yayınları, İstanbul, 2015

Adele Diederich, "Dynamic Stochastic Models for Decision Making under Time Constraints", Journal of Mathematical Psychology, 1997, 41, pp. 260-274

Ali Intezari, David J. Pauleen, "Conceptualizing Wise Management Decision Making: A Grounded Theory Approach", Decision Sciences, 2017, pp. 1-66

Amos Tversky, Daniel Kahneman, "Judgment under Uncertainty: Heuristics and Biases", Science, New Series, 1974, Volume 185, No. 4157, pp. 1124-1131

Antonio R. Damasio, Descartes' Error: Emotion, Reason, and Human Brain, New York, 1994

Aron K. Barbey, "Network Neuroscience Theory of Human Intelligence", Trends in Cognitive Sciences, 2017, in Press, pp. 1-13

Audun Jøsang, Viggo A. Bondi, "Legal Reasoning with Subjective Logic", Artificial Intelligence and Law, 2000, Volume 8, Issue 4, pp. 289–315

B. Charles Tatum, Richard Eberlin, Carin Kottraba, Travis Bradberry, "Leadership, Decision Making, and Organizational Justice", Management Decision, 2003, 41 / 10, pp. 1006-1016

Barry Schwartz, Andrew Ward, John Monterosso, Sonja Lyubomirsky, Katherine White, Darrin R. Lehman, "Maximizing Versus Satisficing: Happiness Is a Matter of Choice", Journal of Personality and Social Psychology, 2002, Volume 83, No. 5, pp. 1178–1197

Baruch Fischhoff, Judgment and Decision Making, Earthscan Publishing, London and New York, 2012

Bert Timmermans, Leonhard Schilbach, Antoine Pasquali, Axel Cleeremans, "Higher Order Thoughts in Action: Consciousness as an Unconscious Re-Description Process", Philosophical Transactions of the Royal Society B, 2012, 367, pp. 1412–1423

Björn N. Persson, Petri J. Kajonius, "Empathy and Universal Values Explicated by The Empathy-Altruism Hypothesis", The Journal of Social Psychology, 2016, Volume 156, No. 6, pp. 610–619

Brenda Milner, Larry R. Squire, Eric R. Kandel, "Cognitive Neuroscience and The Study of Memory", Neuron, 1998, 20, pp. 445-468

Bridget R. Dunnavant, Heidi M. Levitt, "The Development of Wisdom in Judicial Decision Making", The Humanistic Psychologist, 2015, 43, pp. 1–23

C. Daniel Salzman, Stefano Fusi, "Emotion, Cognition, and Mental State Representation in Amygdala and Prefrontal Cortex", The Annual Review of Neuroscience, 2010, 33, pp. 173–202

Carey K. Morewedge, Haewon Yoon, Irene Scopelliti, Carl W. Symborski, James H. Korris, Karim S. Kassam, "Debiasing Decisions: Improved Decision Making with a Single Training Intervention", Behavioral and Brain Sciences, 2015, Volume 2 (1), pp. 129–140

Carlyle Smith, Kevin R. Peters, Sleep, "Memory, and Molecular Neurobiology", 2011, 98, pp. 259-272

Chris Guthrie, Jeffrey J. Rachlinski, Andrew J. Wistrich, "Inside the Judicial Mind", Cornell Law Faculty Publications, 2001, Paper 814, pp. 777-830

Corey K. Fallon, April Rose Panganiban, Ryan Wohleber, Gerald Matthews, Almira M. Kustubayeva, Richard Roberts, "Emotional Intelligence, Cognitive Ability and Information Search in Tactical Decision Making", Personality and Individual Differences, 2014, 65, pp. 24–29

Corrine J. Seeley, Carlyle T. Smith, Kevin J. MacDonald, Richard J. Beninger, "Ventromedial Prefrontal Theta Activity During Rapid Eye Movement Sleep is Associated with Improved Decision Making on The Iowa Gambling Task", Behavioral Neuroscience, Special Issue: Behavioral Neuroscience of Sleep, 2016, Volume 130, No. 3, pp. 271–280

Dan Simon, Nicholas Scurich, "Lay Judgments of Judicial Decision Making", Journal of Empirical Legal Studies, 2011, Volume 8, Issue 4, pp. 709–727

Daniel C. Krawczyk, Reasoning the Neuroscience of How We Think, Elsevier Academic Press, 2018

Daniel J. Power, "Data Science: Supporting Decision Making", Journal of Decision Systems, 2016, Volume 25, No. 4, pp. 345–356

Daniel Goleman, Emotional Intelligence, Bantam Books, New York, 1995

Daniel Goleman, İşbaşında Duygusal Zeka, Varlık Yayınları A.Ş., Sayı: 579, İstanbul, 2000

David B. Fischer, Robert D. Truog, "Conscientious of the Conscious: Interactive Capacity as a Threshold Marker for Consciousness", AJOB Neuroscience, 2013, Volume 4, Issue 4, pp. 26-33

David Klein, Gregory Mitchell, The Psychology of Judicial Decision Making, Oxford University Press, New York, 2010

Deborah J. Chase, Peggy Fulton Hora, "The Implications of Therapeutic Jurisprudence for Judicial Satisfaction", Court Review, 2000, Volume 37, pp. 12-20

Diana L. Young, Adam S. Goodie, Daniel B. Hall, Eric Wu, "Decision Making Under Time Pressure, Modeled in A Prospect Theory Framework", Organizational Behavior and Human Decision Processes, 2012, Volume 118, Issue 2, pp. 179-188

Ella Paneyakh, "The Practical Logic of Judicial Decision Making", Russian Politics & Law, 2016, 54: 2-3, pp. 138-163

Eileen Carol Braman, Motivated Reasoning in Legal Decision Making, Doctoral Dissertaiton, Ohio State University, 2004

Fabio Del Missier, Timo Mäntylä, Wändi Bruine de Bruin, "Executive Functions in Decision Making: An Individual Differences Approach", Thinking & Reasoning, 2010, 16:2, pp. 69-97

Farnaz Sabahi, Mohammad R. Akbarzadeh, "Introducing Validity in Fuzzy Probability for Judicial Decision Making", International Journal of Approximate Reasoning, 2014, Volume 55, Issue 6, pp. 1383-1403

Faruk Dilaver, Gel Dosta Gidelim - Yunus Emre Hayatı, Divanı ve Risaletün Nushiyye, Destek Yayınları, No: 357, İstanbul, 2013

Frederick Schauer, "Why Precedent in Law (and Elsewhere) is Not Totally (or Even Substantially) About Analogy", Perspectives on Psychological Science, 3, pp. 454-460

Gary R. VandenBos, APA Dictionary of Psychology, Washington, DC: American Psychological Association, 2015

George P. Chrousos, "Stress and Disorders of the Stress System", Nature Reviews Endocrinology, 2009, 5, pp. 374–381, doi:10.1038/nrendo.2009.106

H. Hilmi Özdemir, "Hâkim ve Savcılarda Bulunması Gereken Nitelik ve Yeteneklerle, Tutum ve Davranışlar", Yargıtay Dergisi, 2002, Cilt 28, Sayı 3, pp. 261-280

Henry Mintzberg, Frances Westley, "Decision Making: It's Not What You Think", MIT Sloan Management Review Cambridge, 2001, Volume 42, Issue 3, pp. 89-93

İbn-i Sina, El-Kanun Fi't-Tıbb, 1th Book, Translator: Esin Kâhya, Atatürk Culture Center Publication: 371, Ankara, 2009

James P. Herman, Helmer Figueiredo, Nancy K. Mueller, Yvonne Ulrich-Lai, Michelle M. Ostrander, Dennis C. Choi, William E. Cullinan, "Central Mechanisms of Stress Integration: Hierarchical Circuitry Controlling Hypothalamo–Pituitary–Adrenocortical Responsiveness", Frontiers in Neuroendocrinology, 2003, Volume 24, Issue 3, pp. 151-180

Jean-Charles Pomerol," Artificial Intelligence and Human Decision Making", European Journal of Operational Research, 1997, 99, pp. 3-25

Jean-Charles Pomerol, "Decision Making Biases and Context", Journal of Decision Systems, 2003, Volume 12, Issue 3-4, pp. 235-252

Jean Decety, Jason M. Cowell, "Empathy, Justice, and Moral Behavior", American Journal of Bioethics: Neuroscience, 2015, 6 (3), pp. 3–14

Jean Decety, Yoshiya Moriguchi, "The Empathic Brain and Its Dysfunction in Psychiatric Populations: Implications for Intervention across Different Clinical Conditions", BioPsychoSocial Medicine - The Official Journal of the Japanese Society of Psychosomatic Medicine, 2007, 1:22, pp. 1-21

Jean Decety, William Ickes, The Social Neuroscience of Empathy, Published to MIT Press Scholarship Online, 2013

Jeffrey J. Rachlinski, "Bottom-Up versus Top-Down Lawmaking", University of Chicago Law Review, Cornell Law Faculty Publications, 2006, 883:891, pp. 933-964

Jennifer Mencl, Douglas R. May, "The Effects of Proximity and Empathy on Ethical Decision Making: An Exploratory Investigation", Journal of Business Ethics, 2009, Volume 85, Issue 2, pp. 201–226

Jennifer Rowley, Frances Slack, "Conceptions of Wisdom", Journal of Information Science, 2008, Volume 35, Issue 1, pp. 110-119

Jennifer S. Lerner, Ye Li, Piercarlo Valdesolo, Karim Kassam, "Emotion and Decision Making", Annual Review of Psychology, 2015, Volume 66, pp. 799-823

John Brockman, Zihin, Çeviri: Beyza Bilal, Zeynel Gül, Alfa Basım Yayın Dağıtım San. ve Tic. Ltd. Şti., İstanbul, 2011

John D. Mayer, David R. Caruso, Peter Salovey, "Emotional Intelligence Meets Traditional Standards for an Intelligence", Intelligence, 1999, Volume 27, Issue 4, pp. 267-298

John D. Mayer, Richard D. Roberts, Sigal G. Barsade, "Human Abilities: Emotional Intelligence", Annual Reviews Psychology, 2008, 59, pp. 507-536

John D. Mayer, Maria DiPaolo, Peter Salovey, "Perceiving Affective Content in Ambiguous Visual Stimuli: A Component of Emotional Intelligence", Journal of Personality Assessment, 1990, 54, pp. 772-781

John N. Drobak, Douglass C. North, "Understanding Judicial Decision Making: The Importance of Constraints on Non-Rational Deliberations", Washington University Journal of Law & Policy, 2008, Volume 134, pp. 26-131

John R. Anderson, "Acquisiton of Cognitive Skill", Psychological Review, 1982, Volume 89, No. 4, pp. 369-406

Jonathan St. B. T. Evans, "In Two Minds: Dual Process Accounts of Reasoning", Trends in Cognitive Sciences, 2003, Volume 7, No. 10, pp. 454-459

Jorge Armony, Patrik Vuilleumier, The Cambridge Handbook of Human Affective Neuroscience, Cambridge University Press New York, 2013

Joseph P. Simmons, Leif D. Nelson, "Intuitive Confidence: Choosing Between Intuitive and Nonintuitive Alternatives", Journal of Experimental Psychology, 2006, Volume 135, No. 3, pp. 409–428

Joshua A. Weller, Irwin P. Levin, Baba Shiv, Antoine Bechara, "Neural Correlates of Adaptive Decision Making for Risky Gains and Losses", Psychological Science, Volume 18, Number 11, pp. 958-964

Judith Resnik, "Managerial Judges", Harvard Law Review, Faculty Scholarship Series, 1982, 96: 374, pp. 376-446

Julie A. Alvarez, Eugene Emory, "Executive Function and The Frontal Lobes: A Meta - Analytic Review", Neuropsychology Review, 2006, Volume 16, Issue 1, pp. 17–42

June J. Pilcher, Drew M. Morris, Janet Donnelly, Hayley B. Feigl, "Interactions between Sleep Habits and Self-Control", Frontiers in Human Neuroscience, 2015, Volume 9, Article 284, pp. 1-5

K. Anders Ericsson, Neil Charness, Paul J. Feltovich, Robert R. Hoffman, The Cambridge Handbook of Expertise and Expert Performance, Cambridge University Press, Cambridge; New York, 2006

Katarina Dedovic, Annie Duchesne, Julie Andrews, Veronika Engert, Jens C. Pruessner, "The Brain and The Stress Axis: The Neural Correlates of Cortisol Regulation in Response to Stress", NeuroImage, 2009, Volume 47, Issue 3, pp. 864-871

Kathleen D. Vohs, Roy F. Baumeister, Brandon J. Schmeichel, Jean M. Twenge, Noelle M. Nelson, Dianne M. Tice, "Making Choices Impairs Subsequent Self-Control: A Limited-Resource Account of Decision Making, Self-Regulation, and Active Initiative", Journal of Personality and Social Psychology, 2008, Volume 94, No. 5, pp. 883–898

Kathleen M. Galotti, Making Decisions That Matter: How People Face Important Life Choices, Lawrence Erlbaum Associates Publishers, New Jersey, 2009

Kathryn E. Flynn, Maureen A. Smith, "Personality and Health Care Decision Making Style", The Journals of Gerontology: Series B, 2007, Volume 62, Issue 5, pp. 261–267

Katrin Starcke, Matthias Brand, "Decision Making Under Stress: A Selective Review", Neuroscience & Biobehavioral Reviews, 2012, Volume 36, Issue 4, pp. 1228-1248

Kay Evans, "A Story of Leadership and Management Development: How The Judicial College in England and Wales Supports Modern Judges in Their Roles as Leaders and Managers", Questione Giustizia, 2016, 1, pp. 1-7

Keith J. Holyoak, Robert G. Morrison, The Oxford Handbook of Thinking and Reasoning, Oxford University Press, New York, 2016

Kent Greenawalt, "Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges", Columbia Law Review, 1975, Volume 75, No. 2, pp. 359-399

Kirsten Hilger, Matthias Ekman, Christian J. Fiebach, Ulrike Basten, "Efficient Hubs in The Intelligent Brain: Nodal Efficiency of Hub Regions in The Salience Network is Associated with General Intelligence", Intelligence, 2017, 60, pp. 10-25

Kirsten Hilger, Matthias Ekman, Christian J. Fiebach, Ulrike Basten, "Intelligence Is Associated with The Modular Structure of Intrinsic Brain Networks", Nature Scientific Reports, 2017, 7, Article number: 16088, pp. 1-12, doi:10.1038/s41598-017-15795-7

Lawrence B. Solum, "Virtue Jurisprudence: A Virtue Centered Theory of Judging", Metaphilosophy, 2003, 34, pp. 178-213

Lee M. Pierson, Monroe Trout, "What is Consciousness for?", New Ideas in Psychology, 2017, Volume 47, pp. 62-71

Lee Roy Beach, Terry Connolly, The Psychology of Decision Making People in Organizations, Second Edition, Sage Publicitaion, USA, 2005

Madeline B. Harms, "Stress and Exploitative Decision Making", Journal of Neuroscience, 2017, 37 (42), pp. 10035-10037

Mandeep K. Dhami, Ian K. Belton, "On Getting Inside the Judge's Mind", Translational Issues in Psychological Science, 2017, Volume 3, No. 2, pp. 214–226

Mandeep K. Dhami, Peter Ayton, "Bailing and Jailing the Fast and Frugal Way", Journal of Behavioral Decision Making, 2001, Volume 14, Issue 2, pp. 141-168

Manjur Hossain Patoari, Mohammad Hasan Murad, Salahuddin Mahmud, "The Desired Qualities of a Good Judge", Academic Journal of Interdisciplinary Studies - MCSER Publishing, Rome – Italy, 2014, Volume 3, No 1, pp. 97-103

Manuel Mendonca, "Preparing for Ethical Leadership in Organizations", Canadian Journal of Administrative Sciences, Version of Record online: 8 APR 2009, Volume 18, Issue 4, pp. 266-276

Marjorie A. Silver, "Emotional Intelligence and Legal Education", Psychology, Public Policy and Law, 1999, Volume 5, No. 4, pp. 1173-1203

Martin G. Kocher, Matthias Sutter, "Time is Money — Time Pressure, Incentives, And The Quality of Decision Making", Journal of Economic Behavior & Organization, 2006, Volume 61, Issue 3, pp. 375-392

Martin L. Hoffman, Empathy and Moral Development: Implications for Caring and Justice, Cambridge University Press, USA, 2000

Martijn P. van den Heuvel, Cornelis J. Stam, René S. Kahn, Hilleke E. Hulshoff Pol, "Efficiency of Functional Brain Networks and Intellectual Performance", Journal of Neuroscience, 2009, 29 (23), pp. 7619-7624

Matar Haller, John Case, Nathan E. Crone, Edward F. Chang, David King-Stephens, Kenneth D. Laxer, Peter B. Weber, Josef Parvizi, Robert T. Knight, Avgusta Y. Shestyuk, "Persistent Neuronal Activity in Human Prefrontal Cortex Links Perception and Action", Nature Human Behaviour, 2017, Volume 2, pp. 80-91

Matthias Sutter, Martin Kocher, Sabine Strauß, "Bargaining Under Time Pressure in an Experimental Ultimatum Game", Economics Letters, 2003, Volume 81, Issue 3, pp. 341-347

MD Haque, Lu Liu, Angela TitiAmayah, "The Role of Patience as a Decision Making Heuristic in Leadership", Qualitative Research in Organizations and Management: An International Journal, 2017, Volume 12, No. 2, pp. 111-129

Melissa L. Finucane, Ali Alhakami, Stephen M. Johnson, "The Affect Heuristic in Judgments of Risks and Benefits", Behavioral Decision Making, 2000, 13, pp. 1–17

Michael Domjan, Koşullama ve Öğrenmenin Temelleri, Çeviren: Hakan Çetinkaya, Türk Psikologlar Derneği Yayınları No: 28, 2004

Michael S. Gazzaniga, Tales from Both Sides of the Brain A life in Neuroscience, Harper Collins Publishers, New York, 2015

Michèle Bernard-Requin, "The Search for Truth in Judicial Psychology and Psychiatry. Psychology in The Judicial Decision Making", Annales Médico-Psychologiques, Revue Psychiatrique, 2012, Volume 170, Issue 2

Milton J. Rosenberg, "The Qualities of Justice – Are They Strainable?", Texas Law Review, 44, 1063

Mustafa Avcı, "Mecelle'ye Göre Hâkimin Nitelikleri ve Yargılama Etiği", Türkiye Adalet Akademisi Dergisi, 2016, Yıl: 7, Sayı: 27, pp. 33-58

Nancy C. Andreasen, Cesur Yeni Beyin, Çeviren: Yıldırım B. Doğan, Okuyan Us Yayın, İstanbul, 2003

Neil Vidmar, "The Psychology of Trial Judging", Current Directions in Psychological Science, 2011, Volume 20, No. 1, Special Issue on Psychology and Law, pp. 58-62

Nicola S. Schutte, John M. Malouff, Chad Bobik, Tracie D. Coston, Cyndy Greeson, Christina Jedlicka, Emily Rhodes, Greta Wendorf, "Emotional Intelligence and Interpersonal Relations", The Journal of Social Psychology, 141:4, pp. 523-536

Nicholas Humprey, "Consciousness as Art", Scientific American, Summer 2017, Volume 26, No. 3, pp. 4-9

Nozomu Hirano, "The Latest Developments in The Judicial Practices of Special Departments of Medical Malpractice Litigation in Japanese Courts", UCLA Pacific Basin Law Journal, 2014, Volume 32, Issue 1, pp. 55-76

Oxford English Dictionary, 3rd ed., 2010

Paul B. Baltes, Ursula M. Staudinger, "Wisdom: A Metaheuristic (Pragmatic) to Orchestrate Mind and Virtue toward Excellence", American Psychologist, 2000, Volume 55, No. 1, pp. 122-136

Paul M. Muchinsky, Psychology Applied to Work, Wadsworth / Thomson Learning, USA, 1999

Pelin Çift, Ahmet Şimşirligil, Adalet Ustaları, Destek Yayınları: 878, İstanbul, 2017

Peter Matthews, "What Lies Beyond Knowledge Management: Wisdom Creation and Versatility", Journal of Knowledge Management, 1997, Volume 1, Issue 3, pp. 207-214

Piercesare Grimaldi, Hakwan Lau, Michele A. Basso, "There Are Things That We Know That We Know, And There Are Things That We Do Not Know We Do Not Know: Confidence in Decision-Making", Neuroscience & Biobehavioral Reviews, 2015, Volume 55, pp. 88-97

Ramazan Altıntaş, "Mevlânâ'da İrade Hürriyeti", Cumhuriyet Üniversitesi İlahiyat Fakültesi Dergisi, 2004, Cilt: VIII / 2, pp.1-15

Randall Kiser, "The Emotionally Attentive Lawyer: Balancing The Rule of Law with The Realities of Human Behavior", Nevada Law Journal, 2015, Volume 15, Issue 2, Article 3, pp. 442-463

Richard M. Lerner, Handbook of Child Psychology and Developmental Science, Wiley Online Library, 2015, DOI: 10.1002/9781118963418

Robert J. Sternberg, Handbook of Intelligence, Cambridge University Press, New York, 2000

Robert J. Sternberg, Douglas K. Detterman, What is Intelligence? Ablex Publishing Corporation, 1986

Robert J. Sternberg, Scott Barry Kaufmann, The Cambridge Handbook of Intelligence, Cambridge University Press, USA, 2011

Robert R. McCrae, Paul T. Costa, Personality in Adulthood: A Five-factor Theory Perspective, Guilford Press, New York, 2003

Robert Stickgold, "Sleep on It", Scientific American, 2017, Volume 26, No. 3, pp. 54-59

Rongjun Yu, "Stress Potentiates Decision Biases: A Stress Induced Deliberation-To-Intuition (SIDI) Model", Neurobiology of Stress, 2016, Volume 3, pp. 83-95

Sander L. Koole, "The Psychology of Emotion Regulation: An Integrative Review", Cognition and Emotion, 2009, 23 (1), pp. 4-41

Santiago Basabe-Serranoa, "The Quality of Judicial Decisions in Supreme Courts: A Conceptual Definition and Index Applied to Eleven Latin American Countries", Justice System Journal, 2016, Volume 37, No. 4, pp. 331–347

Sebastian Bobadilla - Suarez, Bradley C. Love, "Fast or Frugal, but Not Both: Decision Heuristics under Time Pressure", Journal of Experimental Psychology: Learning, Memory, and Cognition, 2017, Advance Online Publication, http://dx.doi.org/10.1037/xlm0000419

Shai Danzigera, Jonathan Levavb, Liora Avnaim-Pessoa, edited by Daniel Kahneman, "Extraneous Factors in Judicial Decisions", Proceeding of the National Academy of Sciences, 2011, Volume 108, No. 17, pp. 6889–6892

Simon van Gaal, Floris PP. de Lange, Michael X Cohen, "The Role of Consciousness in Cognitive Control and Decision Making", Frontiers in Human Neuroscience, 2012, Volume 6, Article 121, pp. 1-15

Sirel Karakaş, Kognitif Nörobilimler, MN Medikal & Nobel, Ankara, 2008

Solomon E. Fulero, Edith Greene, Valerie Hans, Michael T. Nietzel, Mark A. Small, Lawrence S. Wrightsman, "Undergraduate Education in Legal Psychology", Law and Human Behavior, 1999, Volume 23, No. 1, 1999, pp. 137-153

Sonja Lyubomirsky, Laura King, Ed Diener, "The Benefits of Frequent Positive Affect: Does Happiness Lead to Success?", Psychological Bulletin, 2005, Volume 131, No. 6, pp. 803–855

Stephan Pabst, Matthias Brand, Oliver T. Wolf, "Stress and Decision Making: A Few Minutes Make All the Difference", Behavioural Brain Research, 2013, Volume 250, pp. 39-45

Stephen Gaukroger, Francis Bacon and The Transformation of Early-Modern Philosophy, Cambridge University Press, USA, 2001

Steven A. Sloman, "The Empirical Case for Two Systems of Reasoning", Psychological Bulletin, 1996, 119, No. 1, pp. 3-22

Sulhi Dönmezer, "Hukuk ve Hayat", İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, 1957, Cilt 21, Sayı 1-4, pp. 424-433

Susan E. F. Chipman, The Oxford Handbook of Cognitive Science, Oxford University Press, New York, 2017

Şemseddin Sami, Orhun Abideleri, Hazırlayan: Gıyasettin Aytaş, Akçağ Yayınları: 1093, 3. Baskı, Ankara, 2017

Şükrü Haluk Akalın, Bin Yıl Önce Bin Yıl Sonra Kaşgarlı Mahmud ve Divanü Lugati-t Türk, Türk Dil Kurumu Yayınları, 945, Ankara, 2008

Terry A. Maroney, "Emotional Regulation and Judicial Behavior", California Law Review, 2011, Volume 99, Issue 6, pp. 1485-1556

Tess M. S. Neal, Eve M. Brank, "Could Mindfulness Improve Judicial Decision Making?", Monitor on Psychology, 2014, Volume 45, No. 3, Print version: page 26

Thilo Hinterberger, "The Science of Consciousness – Basics, Models, and Visions", Journal of Physiology – Paris, 2015, 109, pp. 143–151

Thomas Gilovich, Dale Griffin, Daniel Kahneman, Heurisitcs and Biases, Cambridge University Press, USA, 2002

Tim LeBon, Wise Therapy: Philosophy for Counsellor, Sage Publications, London, 2001

Tim Shallice, Richard P. Cooper, The Organization of Mind, Oxford University Press, 2011

Tracy D. Eells, C. Robert Showalter, "Work Related Stress in American Trial Judges", Bulletin of the American Academy of Psychiatry & the Law, 1994, Volume 22, No. 1, pp. 71-83

Ulrike Basten, Kirsten Hilger, Christian J. Fiebach, "Where Smart Brains Are Different: A Quantitative Meta-analysis of Functional and Structural Brain Imaging Studies on Intelligence", Intelligence, 2015, 51, pp. 10-27

Zoltan Torey, The Conscious Mind, The MIT Press Essential Knowledge Series, USA, 2014

Zoltan Torey with a foreword by Daniel C. Dennett, The Crucible of Consciousness an Integrated Theory of Mind and Brain, MIT Press Edition, 2009

Web Sites

https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html

http://www.apa.org/action/science/index.aspx

https://www.nichd.nih.gov/health/topics/sleep/conditioninfo/Pages/rem-sleepp.aspx

https://www.seslisozluk.net/

http://www.tdk.gov.tr

https://www.forbes.com/sites/groupthink/2017/07/10/how-elon-musk-proved-that-thought-leadership-is-the-new-patriotism/#32bcd0a82440

THE RIGHT TO SELF-REPRESENTATION BEFORE THE INTERNATIONAL CRIMINAL TRIBUNALS

(*Uluslararası Ceza Mahkemeleri Önünde Sanıkların Kendini Savunma Hakkı*)

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Abstract

Although the right to self-representation is recognised by many international human rights documents and the statutes of the international criminal tribunals (the ICTs), there have been difficulties in case management while enforcing the right for defendants before ICTs. It has been well argued that those accused of international crimes should be fully afforded the right to defend themselves if they choose so, despite associated difficulties. This paper examines the difficulties caused by the (ab) use of self-representation before the ICTs and discusses whether defendants at the ICTs should be fully accorded the right to defend themselves, scrutinising key cases from different ICTs.

Keywords: self-representation, right to defend in person, international criminal tribunals, ICTY, ICTR, *Milošević*, human rights, fair trial

Özet

Uluslararası insan hakları sözleşmeleri ve uluslararası ceza mahkemelerinin kuruluş statüleri sanıklara kendilerini savunma hakkı tanımaktadır. Fakat, pratikte bu hakkın (kötüye) kullanılması davanın yürütülmesi açısından birçok zorluğa neden olmuştur. Uygulamada meydana gelen bütün zorluklara rağmen, uluslararası ceza mahkemelerinde yargılanan sanıkların kendilerini savunma hakkından yararlanmaları gerekliliği doktrinde sıkça ifade edilmiştir. Bu makalede, sanıkların uluslararası ceza mahkemelerinde kendilerini savunma hakkını kullanmalarının pratikte ne gibi zorluklara yol açtığı ve hakkın kullanılmasının hangi durumlarda kısıtlanması gerektiği tartışılacaktır.

Anahtar Kelimeler: kendini savunma hakkı, müdafi, adil yargılanma, uluslararası ceza mahkemeleri, uluslararası suçlar, savunma hakkı, ICTY, ICTR

1. Introduction

A number of international and regional human rights instruments guarantee that every person is entitled to the right to a fair trial, which entails a bundle of entitlements, one of which is a defendant's entitlement to defend himself or herself in person or through legal assistance.[1] In the international sphere, the International Covenant on Civil and Political Rights (ICCPR)[2] was the first international document guaranteeing that the accused has the

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1 See for the right of a defendant to be defended: Sylvia de Bertodano, 'Defence Counsel', in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press 2009) at 292-294

2 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

right "to defend himself in person or through legal assistance".[3] With slight modifications, this provision was also reiterated in regional human rights documents such as Art. 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[4] and Art. 8(2)(e) of the American Convention on Human Rights (ACHR).[5] In addition, Art. 20(4)(d) of the Statute of the International Criminal Tribunal of Rwanda (ICTR),[6] Art. 21(4)(d) of the Statute of the International Criminal Tribunal of Former Yugoslavia (ICTY),[7] Art. 17(4)(d) of the Statute of the Special Court for Sierra Leone (SCSL),[8] and Art. 67(1)(d) of the Rome Statute of the International Criminal Court (ICC)[9] guarantee the right to "defend himself in person or through legal assistance".

Given this widespread recognition of the right to self-representation, one could presume that it is considered to be a guaranteed prerequisite of a fair trial, however the historical analysis of this right demonstrates that its inclusion in the international human rights institutions happened without such a *de jure* assumption.[10] This was observed by Eugene Cerruti:

> Self-representation slipped unnoticed through the international door at Nuremberg . . . The right received no notice and was of no consequence, since none of the Nazi war criminals elected to represent themselves. The right was thereafter incorporated, again without review or consequence, in the seminal document that inaugurated the 'rights of accused' in international criminal proceedings: the International Covenant on Civil and Political Rights (the ICCPR). The ICCPR rights of the accused then became a standard package of rights that were incorporated wholesale in a broad number of newly established national constitutions and international conventions.[11]

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3 Art. 14(3)(d) of the ICCPR reads that "In the determination of any criminal charge against him, everyone shall be entitled … To be tried in his presence, and *to defend himself in person or through legal assistance of his own choosing".* (*emphasis added*)

4 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

5 Organization of American States (OAS), *American Convention on Human Rights*, *"Pact of San Jose", Costa Rica*, 22 November 1969

6 UN Security Council, *Statute of the International Criminal Tribunal for Rwanda* (as last amended on 13 October 2006), 8 November 1994

7 UN Security Council, *Statute of the International Criminal Tribunal for Rwanda* (as last amended on 13 October 2006), 8 November 1994

8 UN Security Council, *Statute of the Special Court for Sierra Leone*, 16 January 2002

9 UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998

10 Rabeea Assy, *Injustice in Person: The Right to Self-Representation* (Oxford: Oxford University Press 2015) at 187

11 Eugene Cerruti, 'Self-Representation in the International Arena: Removing a False Right of Spectacle' (2009) 40 *Georgetown Journal of International Law* 919, at 965.

In drafting international human rights documents, the right to self-representation was overshadowed by the right to access a lawyer and legal aid for counsel. With regard to the drafting process of the ICCPR, Scharf and Rassi stated that "According to official records, no discussion ensued concerning an absolute right to defend oneself; rather the delegates were solely concerned about the right to access counsel, the choice of counsel, and who pays for counsel if the defendant is indigent".[12]

This was partly because of the fact that no defendants before the international criminal tribunals (ICTs) had enforced the right to defend themselves; hence, any particular issue surrounding it did not need to be debated at the international level when drafting international human right documents. However, the atmosphere surrounding the right to self-representation was significantly changed from 1990s onwards, when some defendants before the *ad hoc* tribunals such as the ICTY and ICTR insisted to defend themselves in person instead of engaging professional legal assistance. The ICTY made an explicit distinction between the right to self-representation and legal representation, recognising that the provision 'to defend oneself in person *or* through legal assistance' entitles defendants to two separate rights,[13] as affirmed by both the Trial Chamber and the Appeals Chamber of the ICTY. The Trial Chamber interpreted that "a plain reading of this provision indicates that there is a right to defend oneself in person".[14] This interpretation was corroborated by the Appeals Chamber, which stated that "given the text's binary opposition between representation "through legal assistance" and representation "in person"', there was 'no reasonable way to interpret Article 21 except *as a guarantee of the right to self-representation*".[15]

Consequently, the right to defend oneself in person is regarded as a fundamental right by the ICTY,[16] by use of which some defendants before the ICTs have raised a number of difficulties in case management.[17] There is a heated debate whether or to what extent a defendant should *not* be entitled

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12 Michael P Scharf and Christopher M Rassi, 'Do Former Leaders Have an International Right to Self-Representation in War Crimes Trials' (2005) 20 *Ohio St. J. on Disp. Resol.* 3, at 4

13 Assy (*supra note* 10) at 185

14 *Prosecutor v. Milošević*, 'Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel', Case No: IT-02-54, Trial Chamber, 4 April 2003, §18

15 *Prosecutor v. Milošević,* 'Decision on Interlocutory Appeal of The Trial Chamber's Decision on the Assignment of Defense Counsel', Case No: IT-02-54-AR73.7, Appeals Chamber, 1 November 2004, § 11 (*emphasis added*)

16 Steven W Kay, 'Fair Trials and the International Criminal Tribunals - Whose Case Is It Anyway? The Right of an Accused to Defend Himself in Person before International Criminal Courts' (2007) 4 *International Commentary on Evidence* 2, at 3

17 Michael P Scharf, 'Chaos in the Courtroom, Controlling Disruptive Defendants and Contumacious Counsel in War Crimes Trials' (2007) Paper 114 *Faculty Publications* 155, at 165.

to the right of self-representation before the ICTs. In this respect, the purpose of this paper is to explore how the ICTs dealt with particular difficulties in case management due to the enforcement of the right to self-representation by defendants who used this right, arguably in order to sabotage trials. To this end, Section 2 scrutinises four key cases concerning the issue of the right to self-representation before the ICTs: *"Prosecutor v. Milošević and Prosecutor v. Šešelj at the ICTY; Prosecutor v. Barayagwiza at the ICTR and Prosecutor v. Norman at the SCSL."* Section 3 discusses the competing interests in the use of the right to defend oneself in person and delivering a fair trial, considering the interests of justice in the context of the development of case law, and arguing that defendants should not be widely accorded a right to self-representation, highlighting when and why the use of this right should be restricted by the ICTs. The paper concludes that the ICTs had to restrict this right by imposing different means to prevent abuse posed by the enforcement of the right by defendants accused of international crimes.

2. The Right to Self-Representation before the ICTs

There are a number of reasons why those accused of international crimes may prefer to use the right to defend *pro se* before the ICTs.[18] They may simply want to have their own voice in their trials, or they may mistrust the representation of counsel due to their understanding of events.[19] In addition, they may want to make political speeches in televised proceedings, to cross-examine witnesses, and to challenge the legitimacy of trials without any pressure of expulsion from the courtroom.[20]

Scholars have diverse opinions on whether defendants before ICTs should be allowed to *fully* enjoy the right to self-representation, despite some overreaching desires of the defendants to sabotage the trial. Some claim that ICTs should prioritise a fair and *expeditious* trial, thus whenever self-representation poses a risk contrary to these interests (e.g. by delaying and obfuscating normal proceedings), the right should be restricted;[21] however, others maintain the general principle of allowing defendants who want to

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18 Jarinde Temminck Tuinstra, 'The ICTY's Continuing Struggle with the Right to Self-representation' in Bert Swart, Alexander Zahar, and Göran Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press 2011) at 352-354

19 Gideon Boas, *Milosevic Trial: Lessons for the Conduct of Complex International Trial* (Cambridge University Press 2007) at 206.

20 Michael P Scharf, 'Self-Representation versus Assignment of Defence Counsel before International Criminal Tribunals' (2006) 4 *Journal of International Criminal Justice* 31, at 33

21 Wolfgang Schomburg, 'Some Reflections on the Right to Self-Representation Before International Tribunals' (2011) 12 *ERA Forum* 189, at 195

represent themselves the right to do so.[22] To arrive at a conclusion in this heated debate, the case law of ICTs is analysed in this section with regard to some high-profile cases. However, it is important at this stage to note that no case from the ICC with regard to the right to self-representation is discussed in this paper, simply because no defendant at the ICC has yet exercised the right to self-representation as counsel, although the Rome Statute entitles ICC defendants to do so.[23]

1.1. *Milošević Case*

Instead of being assisted by defence counsels, Milošević preferred to defend himself in person.[24] In August 2001, the ICTY Trial Chamber rejected the request of the Prosecution that it must assign a defence counsel contrary to the accused's will, and allowed the accused to represent himself, noting that under the customary international law, a defendant has the rights both to have a counsel and not to have a counsel.[25]

However, Milošević disturbed the pace of trial and delayed the proceedings many times "through defiance, complaints and filibustering", and also because of his ill health.[26] Milošević's choice of the self-representation was generally viewed as a strategy "to delegitimize the ICTY and the proceedings against him".[27] Due to the difficulties posed by the self-representation, the Trial Chamber eventually imposed assigned counsel on Milošević, contrary to his will.[28] However, the reason behind imposing legal counsel on the accused was not his disrespectful behaviour or obstructionist acts, but his ill-health, which prevented him from managing his defence and attending the proceedings.[29]

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22 Jarinde Temminck Tuinstra, *Defence Counsel in International Criminal Law* (TMC Asser Press 2009) at 248; Steven W Kay and Gillian Higgins, 'The Right of Self-Representation – The Lawyers in the Eye of the Storm' [2010] *International Criminal Law Bureau* 1, at 21; Constantinos Hotis, 'A " Fair and Expeditious " Trial : A Reappraisal of Slobodan Milosevic's Right to Self-Representation before the International Criminal Tribunal Fo the Former Yugoslavia' (2006) 6 *Chicago Journal of International Law* 775, at 789.

23 William Schabas, *An Introduction to The International Criminal Court* (Cambridge: Cambridge University Press 5th ed. 2017) at 290

24 Evelyn Anoya, 'In the Shadow of Nonrecognition: Milošević and the Self-Represented Accused's Right to Justice' in Timothy William Waters (ed.), *The Milošević Trial: An Autopsy* (Oxford: Oxford University Press 2013) at 160

25 ibid at 162-164

26 Mirjan Damaška, 'Assignment of Counsel and Perceptions of Fairness' (2005) 3 *Journal of International Criminal Justice* 3, at 4.

27 Yuval Shany, 'The Legitimacy Paradox of Self-Representation' in Timothy William Waters (ed.), *The Milošević Trial: An Autopsy* (Oxford: Oxford University Press 2013) at 176

28 *Prosecutor v. Milosevic*, 'Reasons for Decision on Assignment of Defence Counsel', Case No: IT-02-54-T, Trial Chamber, 22 September 2004.

29 Nancy Amoury Combs, 'Regulation of Defence Counsel: An Evolution Towards Restriction

Milošević's ill-health caused frequent delays in trials and precluded the carrying out of an expeditious trial.[30] His medical condition entailed that he had to reduce his workload, hence the Court could only sit for three days a week, and a string of adjournments were made.[31]

In imposing assigned counsel over the accused objection, the Trial Chamber based its decision on the fair trial provisions on the Statute of the ICTY, Art. 20 and 21(4).[32] It expressed that the defendant's medical condition harmed the Court's duty to guarantee that he was provided a fair and expeditious trial.[33] It emphasised that the right to self-representation or the right to be defended by legal counsel, which are "the minimum guarantees" involved in Art. 21(4) (d) of ICTY Statute, were factors of the inclusive essentiality of a fair trial;[34] but it also stated that if there is a genuine risk, at any stage of the proceedings, that the proceedings would be damaged or would not be carried out fairly, this risk could be removed, including where necessary the appointment of counsel to defend on the accused's behalf.[35] It appears that the Trial Chamber emphasised the importance of the fair trial, especially the necessity of an effective defence to deliver a fair trial, even if contrary to the will of accused parties wishing to defend themselves in person.

Although the ICTY Appeals Chamber upheld the conclusion of the Trial Chamber that the right to defend *pro se* can be limited, it overruled the Trial Chamber's ruling since it found that the imposition of assigned counsel on the defendant was disproportionate.[36] It held that the right to defend oneself in person can be restricted only in a situation where the defendant's right to self-representation is "substantially and persistently" disturbing the expeditious and proper proceedings of the trial.[37] The Appeals Chamber stressed that the Trial Chamber made "a fundamental error of law" because it "failed to recognize that any restrictions on Milošević's right to represent himself must

and Legitimacy' in Bert Swart, Alexander Zahar, and Göran Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press 2011) at 306

30 Damaška (*supra note* 26) at 4.

31 John Jackson, 'Autonomy and Accuracy in the Development of Fair Trial Rights' [2009] *University College Dublin Law Research Paper No. 09/2009* 1, at 15.

32 Gideon Boas, 'Self-Representation before the ICTY: A Case for Reform' (2011) 9 *Journal of International Criminal Justice* 53, at 59.

33 *Prosecutor v. Milosevic*, 'Reasons for Decision on Assignment of Defence Counsel' (*supra note* 28)

34 Jackson (*supra note* 31) at 15-16.

35 ibid at 16.

36 *Prosecutor v. Milosevic*, 'Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel' (*supra note* 15) §§ 17-18.

37 ibid § 13.

be limited to the minimum extent necessary to protect the Tribunal's interest in assuring a reasonably expeditious trial".[38]

In this respect, the Appeals Chamber appeared to specify the threshold of the imposition of legal counsel on a defendant's objection. According to the Appeals Chamber, the accused should be accorded his right to use self-representation, and counsel should not be assigned as long as the defendant is able to present a defence in person.[39] Therefore, it could be argued that in situations like the *Milošević* case, an appointed counsel's role in the case can be considered as ancillary or standby, whereby the counsel can take over the case as and when required in the event that the accused disturbs the proceedings "substantially and persistently".[40] In his particular case, Milošević enjoyed the right to defend himself in person in the 16 months of his trial until he died without a verdict being issued.[41] In this regard, it has been argued that Milošević's trial tactics disturbed the proceedings and damaged their legitimacy, thus the ICTY should have appointed the counsel over the accused's objections after it became apparent that he was not able to mount an effective defence in good faith, in order to deliver a fair and expeditious trial.[42]

2.2. *Šešelj Case*

Vojislav Šešelj decided to defend himself in person before the ICTY six months after the death of Milošević. Šešelj attempted to provoke the judges in his pre-trial process and deployed many obstructionist behaviours to disturb the proceedings of the trial.[43] Finally, in May 2003, the Trial Chamber imposed standby counsel on the accused, contrary to his will.[44] After explaining that the accused's behaviour was obstructionist and disruptive, and using intimidating

38 ibid § 17.

39 ibid § 19.

40 Boas, 'Self-Representation before the ICTY: A Case for Reform' (*supra note* 32) at 61.

41 Jackson (*supra note* 31) at 16.

42 Scharf, 'Self-Representation versus Assignment of Defence Counsel before International Criminal Tribunals' (*supra note* 20)

43 Tuinstra, 'The ICTY's Continuing Struggle with the Right to Self-representation' (*supra note* 18) at 360-361.

44 The imposition of standby counsel before the ICTs was first expressed in the *Barayagwiza* case and then evolved in the Šešelj case before the ICTY. Judge Gunawardana, in a concurring opinion, emphasised the role of court-appointed standby counsel on conducting the proceeding properly by referring Art. 20(4)(d) of the Statute as "an enabling provision for the appointment of a 'standby counsel" and stated that "in any event, the Court has inherent power to control its own proceedings, which in this case, could be achieved by such an appointment". See: *Prosecutor v. Barayagwiza*, 'Decision on Defence Counsel Motion to Withdraw, Case No: ICTR-97-19-T, Trial Chamber, 2 November 2000, Concurring and Separate Opinion of Judge Gunawardana

speeches about witnesses, the Trial Chamber stated that "there is a strong indication that his self-representation may substantially and persistently obstruct the proper and expeditious conduct of the trial".[45] In reaching its decision, the Trial Chamber based on the Art. 21 of the ICTY Statute by interpreting that assignment defence counsel contrary to the accused's objection on a case-by-case basis is necessary for the interests of justice.[46]

In *Šešelj*, the Trial Chamber stated that the accused's right to self-representation was "left absolutely untouched", because appointing standby counsel did not affect the statutory right of the accused's self-representation if he did not behave in a "destructive" manner.[47] The order of the Trial Chamber considered that the standby counsel's work did not constitute representation, rather it was assistance of the accused's case, but it imposed a duty to take over representation in the accused's defence if the accused was removed from the courtroom due to obstructionist conduct.[48] As the Trial Chamber expressed, standby counsel would temporarily undertake the representation of defence in the case if "the accused is engaging in disruptive conduct or conduct requiring his removal from the courtroom".[49]

However, it is very hard to predict the interaction of the case mounted by standby counsel in the aftermath of a defendant's *pro se* defence, particularly when the accused challenges the legitimacy of the court and rejects cooperation and communication with standby counsel.[50] In a situation wherein the accused intentionally manipulates the trial, it is not easy for standby counsel to prepare and defend the accused, which undermines the guaranteed right of the accused to receive a fair trial.

In August 2006, the Trial Chamber had to determine whether the accused's obstructionist behaviour warranted the imposition of counsel, and if so, whether doing so was "in the interests of a reasonably expeditious trial".[51] This decision differed from that of the *Milošević* case, in which the Trial Chamber's reasoning on assigning counsel was the accused's ill-health, whereas in *Šešelj* the reason was his overtly obstructionist, destructive and disrespectful

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45 *Prosecutor v. Šešelj*, 'Decision on Assignment of Counsel', Case No: IT-03-67-PT, Trial Chamber I, 21 August 2006 § 79.

46 *Prosecutor v. Šešelj*, 'Decision on the Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence', Case No: IT-03-67-PT, Trial Chamber II, 09 May 2003 § 11.

47 ibid § 28.

48 Kay and Higgins (*supra note* 22) at 6.

49 *Prosecutor v. Šešelj*, 'Order Concerning Appointment of Standby Counsel and Delayed Commencement of Trial', Case No. IT-03-67-PT, Trial Chamber I, 25 October 2006 § 6(h)

50 Boas, *Milosevic Trial: Lessons for the Conduct of Complex International Trial* (*supra note* 19) at 230.

51 *Prosecutor v. Šešelj*, 'Decision on Assignment of Counsel' (*supra note* 45) §§ 77-79.

conduct in the proceedings.[52] The Trial Chamber explained the accused's disrespect for the Court and proceedings, his breach of witness protection and other rules in the trial, and that it was necessary in the interests of justice to appoint counsel against the defendant's objection.[53]

The Trial Chamber's ruling was overturned by the Appeals Chamber, on the basis of which the Trial Chamber did not issue a specific warning to the defendant about his obstructionist behaviour and its results if he would continue to conduct himself in the same manner, before appointing counsel in accordance with Rule 80(b) of the ICTY Rules.[54] This rule was revoked by the Appeals Chamber allowed enhanced specificity in the required warning.[55] For example, in a Decision on 24 November 2009, the Trial Chamber expressed that the warning should be for a specific behaviour, which means that even if defendants are warned about the same conduct many times, they must be warned by a specific warning pertaining to engaging in particular obstructionist behaviour.[56] However, when taking into account that defendants may intentionally engage in obstructionist conduct to disturb and frustrate the proceedings of the case, the entailment of an elaborate warning system can further delay proceedings.[57]

After issuing specific warnings about the accused's disruptive behaviours, the Trial Chamber removed his self-representation, and once again imposed standby counsel to take over the case temporarily.[58] As a response to the Trial Chamber's ruling, Šešelj went on a hunger strike and applied to the Appeals Chamber to obtain an overrule for the Trial Chamber's decision.[59] Even though Šešelj did not meet the formal requirements for appeal, the Appeals Chamber

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52 *Prosecutor v. Šešelj*, 'Decision on Appeal against the Trial Chamber's Decision (No. 2) on Assignment of Counsel', Case No: IT-03-67-AR73.4, Appeals Chamber, 8 December 2006 § 28.

53 Tuinstra, 'The ICTY's Continuing Struggle with the Right to Self-representation' (*supra note* 18) at 361.

54 *Prosecutor v. Šešelj*, 'Decision on Appeal against the Trial Chamber's Decision on Assignment of Counsel', Case No: IT-03-67-AR73.3, Appeals Chamber, 20 October 2006 §§ 23-26.

55 The Trial Chamber included many specific and general warnings about the defendant's obstructionist behaviours. See: Gillian Higgins, 'The Development of the Right to Self-Representation before the International Criminal Tribunals' in Shane Darcy and Joseph Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press 2010) at 267-271.

56 *Prosecutor v. Šešelj*, 'Public Version of the ''Consolidated Decision on Assignment of Counsel, Adjournment and Prosecution Motion for Additional Time with Separate Opinion of Presiding Judge Antonetti in Annex' Case No: IT-03-67-T, Trial Chamber, 11 December 2009 §§ 74-75.

57 Boas, 'Self-Representation before the ICTY: A Case for Reform' (*supra note* 32) at 62.

58 *Prosecutor v. Šešelj*, Decision on Assignment of Counsel, Case No. IT-03-67-T, Trial Chamber, 27 November 2006 § 81.

59 See generally; Göran Sluiter, 'Compromising the Authority of International Criminal Justice: How Vojislav Seselj Runs His Trial' (2007) 5 *Journal of International Criminal Justice* 529.

was satisfied to consider his appeal, implying that Šešelj's hunger strike was a justification for this exceptional measure.[60] The Appeals Chamber once again overruled the Trial Chamber's ruling on imposition of counsel on the accused's objection.[61] Because the Appeals Chamber in its ruling seemed to be defeated by the accused's "blackmail",[62] it was subject to criticisms implying that it had rewarded Šešelj, despite his destructive and obstructionist behaviour, hence the ruling of the Appeals Chamber was argued to be contrary to the interests of justice and a fair trial.[63] Sluiter claimed that the Appeals Chamber's ruling served 'no other purpose than to put an end to Šešelj's hunger strike'.[64]

2.3. *Barayagwiza Case*

The issue of the right to defend *pro se* before the ICTs was dealt with for the first time in the ICTR.[65] After considering that the right to self-representation is not an absolute one,[66] the ICTR Trial Chamber appointed defence counsel to represent Jean-Bosco Barayagwiza over his objection to such an appointment. However, Barayagwiza sought a withdrawal of his counsel by alleging the "lack of competence, honesty, loyalty, diligence, and interest" of the appointed counsel.[67] His request for the withdrawal of the counsel was declined, whereupon he did not show up in the trial, and instructed the defence counsel not to represent him during the proceedings.[68] Accordingly, the defence counsel themselves requested to withdraw from the case. The problem was whether or not the Trial Chamber would let the defence counsel withdraw from the proceedings.[69] The Trial Chamber noted that Barayagwiza tried "to obstruct proceedings. In such a situation, it cannot reasonably be argued that Counsel is under an obligation to follow them, and that not do so

60 Combs (*supra note* 29) at 309.

61 *Prosecutor v. Šešelj*, 'Decision on Appeal against the Trial Chamber's Decision (No. 2) on Assignment of Counsel' (*supra note* 52)

62 Zahar observed that "the Appeals Chamber capitulated to Šešelj's blackmail, twisting process and law to effect the second reversal of the Trial Chamber's decision." Alexander Zahar, 'Legal Aid, Self-Representation, and the Crisis at the Hague Tribunal' (2008) 19 *Crim Law Forum* 241, at 244; See also: Sluiter, 'Compromising the Authority of International Criminal Justice: How Vojislav Seselj Runs His Trial'(*supra note* 59) at 534.

63 Boas, 'Self-Representation before the ICTY: A Case for Reform' (*supra note* 32) at 64.

64 Göran Sluiter, 'Karadžić on Trial: Two Procedural Problems' (2008) 6 *Journal of International Criminal Justice* 617; See also for a greater detail on this: Sluiter, 'Compromising the Authority of International Criminal Justice' (*supra note* 59)

65 Higgins (*supra note* 55) at 253.

66 *Prosecutor v. Barayagwiza*, 'Decision on Defence Counsel Motion to Withdraw (*supra note* 44)

67 *Prosecutor v. Barayagwiza*, 'Judgment and Sentence', Case No: ICTR-99-52-T, Trial Chamber, 3 December 2003 § 82.

68 ibid §§ 82-83.

69 Kay (*supra note* 16) at 4.

would constitute grounds for withdrawal".[70] It held that the defence counsel should not withdraw from the trial despite the defendant's instructions to do so, since the Trial Chamber "must ensure the rights of the accused, taking into account what is at stake for him".[71]

2.4. *Norman Case*

In the trial of Samuel Hinga Norman before the SCSL, the Prosecutor made the opening statement, then the defendant indicated his wish to represent himself in June 2004, dismissing his defence counsel and conducting his defence *pro se* in the proceedings.[72] This case was different from that of *Milošević* in two respects: first, Norman showed no indication to defend himself *pro se* during the initiation of the proceedings, and second, he was being tried with two co-defendants.[73]

In this case, it was expressed that the right to have a counsel is "an essential and necessary part of a fair trial", and in the absence of such counsel, the judges could not carry out their duty as arbiters, which is one of the fundamental principles of an adversarial proceeding.[74] The SCSL Trial Chamber pointed out the complexity and magnitude of the proceedings, and the importance of "expeditious completion of the trial" for national and international interests by indicating the likelihood of the disruption of the court timetable.[75] It also mentioned that the use of the self-representation by the accused may pose a risk against the interests of other defendants in the trial.[76]

Due to Norman's failure to appear in Court, the Trial Chamber ordered that standby counsel would represent the accused as "Court Appointed Counsel", stating that the proceeding in a trial can be carried out in the defendant's absence in some circumstances if the defendant intentionally disturbed the proceedings.[77] In addition, the Trial Chamber noted, reflecting the Trial Chamber's approach in *Milošević*, that "the exercise of the right to self-representation should not become an obstacle to the achievement of a fair trial".[78]

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70 *Prosecutor v. Barayagwiza*, 'Judgment and Sentence' (*supra note* 67) § 83.

71 *Prosecutor v. Barayagwiza*, 'Decision on Defence Counsel Motion to Withdraw' (*supra note* 44) § 23.

72 *Prosecutor v. Norman, Fofana, and Kondewa*, 'Decision on the Application of Samuel Hinga Norman for Self-Representation Under Art. 17(4)(d) of the Statute of the Special Court', Case No. SCSL 04-14-T, Trial Chamber, 8 June 2004.

73 ibid § 19.

74 ibid § 26.

75 ibid.

76 ibid § 9.

77 Nina HB Jørgensen, 'The Right of the Accused to Self-Representation before International Criminal Tribunals: Further Developments' (2005) 99 *The American Journal of International Law* 663.

78 *Prosecutor v. Norman, Fofana, and Kondewa*, 'Ruling on Non-Appearance of First Accused,

In that regard, it is significant that the SCSL marks out a considerably restricted and qualified right to defend *pro se* in comparison with the right to self-representation identified by the ICTY.[79] In *Norman*, the SCSL emphasised the issue of a fair trial and noted the wide public interest by explaining that defendants would not waive their right to a fair trial. Therefore, it stated that allowing self-representation irrespective of its results may pose a danger to delivering a fair trial.[80] It seems that the Trial Chamber attributed more meaning to the right to a fair trial than the interests of the defendant *per se*, since it considered that the fair trial serves for the interests of the judicial system along with the interests of the accused.[81] Thus, the Trial Chamber appeared to serve to expedite trials in the interests of the judicial system against the wishes of obstructive defendants, within the scope of the rights of the latter.

3. Competing Interests in the Use of the Right

The question of whether and to what extent those accused of international crimes before ICTs should be accorded the right to defend themselves in person hinges on whether the right to self-representation is an absolute or a qualified right. Judge May in the *Milošević* case considered the right to self-representation to be an absolute right under customary international law, and stated that a defendant has the rights both to have a counsel and not to have a counsel. This robust interpretation was similar to that of the United Nations Human Rights Committee ('the HRC') in *Michael and Brian Hill v. Spain*, in deciding whether mandatory legal representation violated the right to defend oneself in person as embedded in Art. 14(3)(d) of the ICCPR.[82] In this case, one of the applicants –Michael Hill– insisted that he wanted to defend himself in person in order to examine the prosecution's witnesses and to call a person as his witness, but his request was not met by the Court on the basis of the fact that he did not speak Spanish (i.e. the official language of the Court) and was not a qualified lawyer.[83]

Second Accused and Third Accused at Trial Proceedings, Case No: SCSL-04-14-PT, Trial Chamber, 1 October 2004 § 23.

79 Boas, 'Self-Representation before the ICTY: A Case for Reform' (*supra note* 32) at 71.

80 *Prosecutor v. Norman, Fofana, and Kondewa*, 'Decision on the Application of Samuel Hinga Norman for Self-Representation Under Art. 17(4)(d) of the Statute of the Special Court' (*supra note* 72) § 25.

81 ibid.

82 *Michael and Brian Hill v. Spain*, Human Rights Committee, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993, 2 April 1997.

83 ibid § 3.3

Because Spanish law required the appointment of defence counsel under these circumstances, a lawyer was assigned by the court to conduct the defence on the applicant's behalf.[84] The Spanish Government informed the HRC that even though Spain recognized the right to defend oneself in person, pursuant to the ICCPR and the ECHR, such defence should take place by competent counsel, appointed by the State when necessary. The HRC did not hesitate to find a violation of the right to self-representation because the Spanish "legislation does not allow an accused person to defend himself in person, as provided for under the Covenant".[85] This was a strict interpretation of the right to self-representation, which requires respect for the right to defend oneself in person even in the cases where the possible sentence is a lengthy prison term (the applicants in this case were sentenced to six years in prison) and where the defendant cannot speak the official language of the court.

However, the perception of the right to defend *pro se* by the European Court of Human Rights ('the ECtHR') is somewhat different from that of the HRC, despite the fact that both the ICCPR and the ECHR recognise this right with a *verbatim* provision. In *Lagerblom v. Sweden*,[86] the ECtHR dealt with the issue of the appointment and replacement of the defence counsel on a defendant. The applicant claimed that he did not wish to have a public lawyer appointed for him and contested that the offence with which he was charged was not "serious enough to warrant such an appointment against his will".[87] The ECtHR in this case did not find a violation of the right to self-representation, because it recognised that this right can be restricted where the interests of justice so require. The Court held that

> A legal requirement that an accused be assisted by counsel in criminal proceedings cannot be deemed incompatible with the Convention … In determining whether the interests of justice require that an accused be given free legal assistance, regard must be had to the seriousness of the offence and the severity of the possible penalty as well as the complexity of the case.[88]

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84 ibid § 5.5

85 ibid § 14.2

86 *Lagerblom v. Sweden* [2003] ECHR 28

87 ibid § 46

88 ibid §§ 50-51; See also *Croissant v. Germany* [1992] ECHR 60; With regard to the justification of the imposition of a lawyer against the will of the accused, the ECtHR held that "it is, in particular, a measure in the interests of the accused designed to ensure the proper defence of his interests". See for a detail account: Stefan Trechsel, 'Rights in Criminal Proceedings under the ECHR and the ICTY Statute—A Precarious Comparison' in Bert Swart, Alexander Zahar, and

In order to restrict the right to self-representation, the ECtHR held that "the seriousness of the offence and the severity of the possible penalty as well as the complexity of the case" should be taken into account. In that regard, this line of the ECtHR's judgement has merits for the cases before the ICTs. There is no doubt about the seriousness of the offence, the severity of the possible penalty and the complexity of the cases before ICTs. Additionally, the cases they hear have a high prevalence of obstructive behaviours by defendants, as described in the exampled in the previous section. In effect, with regard to the defendants' obstructive behaviours in the trials, the US Supreme Court in *Faretta v. California* held that although those accused of a criminal offence have a constitutional right to defend *pro se*, "the right of self-representation is not a license to abuse the dignity of the courtroom".[89]

In that regard, Bassiouni's finding in in his comparative study was significant: he expressed that "whenever it is in the best interest of justice and in the interest of adequate and effective representation of the accused, the court should disallow self-representation and appoint professional counsel".[90] Therefore, it cannot be claimed that the right to self-representation is an absolute right;[91] rather, it can be qualified where the interests of justice require. In this respect, both the ICTR in *Barayagwiza* case and the SCSL in *Norman* case held that imposition of legal counsel contrary to the will of the accused is justifiable under international law and could even sometimes be essential to protect the legitimacy of the trials.[92] In *Milošević*, the ICTY imposed assigned counsel on the accused by reversing Judge May's ruling after three years.[93] Consequently, the ICTs appear to agree on that the right to self-representation is a qualified right, and may subject to restrictions.

The right to defend *pro se* and the right to have defence counsel are regarded as fair trial rights in the statutes of the ICTs. For instance, the Trial Chamber in *Milošević* said that these rights are "mere elements of overarching requirement of a fair trial".[94] However, the use of self-representation by

Göran Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press 2011) at 175-180

89 *Faretta v. California*, 422 US 806 (1975) § 835; See also: Mark D Ridley, 'The Right to Defend Pro Se: Faretta v. California and Beyond Note' (1976) 40 *Albany Law Review* 423

90 Cherif M Bassiouni, 'Human Rights in The Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions' (1993) 3 *Duke Journal of Comparative & International Law* 235 at 284-285.

91 Robert Sloane, 'Self-Representation', in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press 2009) at 508

92 Scharf, 'Self-Representation versus Assignment of Defence Counsel before International Criminal Tribunals' (*supra note* 20) at 45.

93 ibid.

94 Boas, 'Self-Representation before the ICTY: A Case for Reform' (*supra note* 32) at 60.

accused persons in order to obstruct proceedings poses a risk that harms achievement of a fair trial in the manner required by the interests of justice. The Trial Chamber in *Šešelj* expressed that the interests of justice entail that the trial proceedings must be conducted "in a timely manner, without interruptions, adjournments or disruptions".[95] However, as explained in the previous section, those defendants who used their right to represent themselves in person have often sought to prevent the course of a fair trial by using their right to self-representation with obstructionist and disruptive behaviours, particularly given the inherent complexity and magnitude of war crimes tribunals (entailing thousands of pages of documents and hundreds of witnesses). Therefore, it can be argued that the defendant's narrow fair trial rights (i.e. the right to self-representation) conflict with the broader interests of justice requiring a timely, fair trial without interruption, adjournments or disruption.[96] As a result, ICTs should prioritise (as they have done) the broader interests of justice for which they are instituted rather than the accused's narrow fair trial rights, to deliver a fair trial that the interests of justice require.

For this aim, it was necessary to provide manageable trials. The ICTs applied different measures in interferences of self-representation by appointing '*amicus curiae',* 'standby counsel' and 'appointed counsel' in order to maintain the proceedings and to preserve the rights of the accused persons. For example, in *Milošević*, the ICTY Trial Chamber first appointed *amicus curiae* to assist the court, but not to represent the defendant.[97] In the initial process, Milošević made objections and rejected to cooperate with *amicus curiae,* but throughout the proceedings he actually benefited from *amicus curiae* in many ways that placed reliance on their examining of witnesses, and issues of law revoked by them, and granted them *carte blanche* to carry out all fillings in the trial.[98] When Milošević's ill-health did not allow him to appear in the trial and caused many adjournments, the ICTY Trial Chamber took the measure to impose appointed counsel to take over the case.

In *Šešelj*, while the ICTY Trial Chamber first imposed standby counsel on the accused, it then took measures to appoint defence counsel due to the failure of the accused to appear in the trial. It stated that the right to self-representation was "left absolutely untouched" because appointing standby

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95 *Prosecutor v.* Šešelj, 'Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence' (*supra note* 46) § 21.

96 Scharf, 'Chaos in the Courtroom, Controlling Disruptive Defendants and Contumacious Counsel in War Crimes Trials' (*supra note* 17) at 170; Mitzi M S White and Thomas G A Gutheil, 'Proposed Model for Assessing Defendant Competence to Self-Represent', 2016 (44)4 *The Journal of the American Academy of Psychiatry and the Law* 425, at 427-429

97 Tuinstra, *Defence Counsel in International Criminal Law* (*supra note* 22) at 237-239.

98 Kay (*supra note* 16) at 6.

counsel did not affect the statute of the accused, since he could enjoy the right to self-representation if he did not behave in a destructive manner.[99] In *Barayagwiza* and *Norman*, appointed counsel was imposed on the defendants to take over the cases.

Whereas standby counsel can represent defendants only when they cannot appear in the trial or take over the case, an appointed counsel takes over the case and represents defendants entirely in the court on their behalf. In that regard, it can be said that while *amicus curiae* comprises the lightest interference in self-representation, appointed counsel is the heaviest. Therefore, ICTs decide what measures are the most suitable on a case-by-case basis, while cautiously restricting the accused's right to defend *pro se* if such restrictions are in the interests of a just and expedient trial.

4. Conclusion

Although the right to self-representation is an important fair trial guarantee, it is a qualified right, and could be subject to restrictions under international criminal law, wherever it is necessary to safeguard the legitimacy of the trials before ICTs. In this respect, it appears that it is *not* always required to accord a right of self-representation to those accused of international crimes in every case, and sometimes it can be vitally important to interfere with this right to deliver a fair trial in a manner that serves the interests of justice. In effect, those defendants at ICTs who wanted to use their right to defend themselves in person resorted to trial tactics by misusing the right of self-representation. In order to prevent any challenge to the legitimacy of the international criminal courts, the ICTs have different measures such as *amicus curiae,* standby counsel and appointed counsel, to be implemented on a case-by-case basis. From the experiences of the case law of the ICTs, it seems evident that where the enforcement of this right obscures the case management to deliver a fair trial, the right to self-representation can be restricted or the accused persons may not be allowed to use it.

References

Anoya E, 'In the Shadow of Nonrecognition: Milošević and the Self-Represented Accused's Right to Justice' in Timothy William Waters (ed.), *The Milošević Trial: An Autopsy* (Oxford: Oxford University Press 2013)

Assy R, *Injustice in Person: The Right to Self-Representation* (Oxford: Oxford University Press 2015)

[99] *Prosecutor v. Šešelj*, 'Decision on the Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence' (*supra note* 46) § 28.

Bassiouni CM, 'Human Rights in The Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions' (1993) 3 *Duke Journal of Comparative & International Law* 235

Bertodano S, 'Defence Counsel', in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press 2009)

Boas G, *Milosevic Trial: Lessons for the Conduct of Complex International Trial* (Cambridge University Press 2007)

Boas G, 'Self-Representation before the ICTY: A Case for Reform' (2011) 9 *Journal of International Criminal Justice* 53

Eugene Cerruti, 'Self-Representation in the International Arena: Removing a False Right of Spectacle' (2009) 40 *Georgetown Journal of International Law* 919

Combs NA, 'Regulation of Defence Counsel: An Evolution Towards Restriction and Legitimacy' in Bert Swart, Alexander Zahar, and Göran Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press 2011)

Damaška M, 'Assignment of Counsel and Perceptions of Fairness' (2005) 3 *Journal of International Criminal Justice* 3

Higgins G, 'The Development of the Right to Self-Representation before the International Criminal Tribunals' in Shane Darcy and Joseph Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press 2010)

Hotis C, 'A " Fair and Expeditious " Trial : A Reappraisal of Slobodan Milosevic's Right to Self-Representation before the International Criminal Tribunal Fo the Former Yugoslavia' (2006) 6 *Chicago Journal of International Law* 775

Jackson J, 'Autonomy and Accuracy in the Development of Fair Trial Rights' [2009] *University College Dublin Law Research Paper* No. 09/2009 1

Jørgensen NHB, 'The Right of the Accused to Self-Representation before International Criminal Tribunals: Further Developments' (2005) 99 *The American Journal of International Law* 663

Kay SW, 'Fair Trials and the International Criminal Tribunals - Whose Case Is It Anyway? The Right of an Accused to Defend Himself in Person before International Criminal Courts' (2007) 4 *International Commentary on Evidence* 2

Kay SW and Higgins G, 'The Right of Self-Representation – The Lawyers in the Eye of the Storm' [2010] *International Criminal Law Bureau* 1

Ridley MD, 'The Right to Defend Pro Se: Faretta v. California and Beyond Note' (1976) 40 *Albany Law Review* 423

Schabas W, *An Introduction to The International Criminal Court* (Cambridge: Cambridge University Press 5th ed. 2017)

Scharf MP, 'Self-Representation versus Assignment of Defence Counsel before International Criminal Tribunals' (2006) 4 *Journal of International Criminal Justice* 31

Scharf MP, 'Chaos in the Courtroom, Controlling Disruptive Defendants and Contumacious Counsel in War Crimes Trials' (2007) Paper 114 *Faculty Publications* 155

Scharf MP and Rassi CM, 'Do Former Leaders Have an International Right to Self Representation in War Crimes Trials?' (2005) 20 *Ohio State Journal on Dispute Resolution* 3

Schomburg W, 'Some Reflections on the Right to Self-Representation Before International Tribunals' (2011) 12 *ERA Forum* 189

Shany Y, 'The Legitimacy Paradox of Self-Representation' in in Timothy William Waters (ed.), *The Milošević Trial: An Autopsy* (Oxford: Oxford University Press 2013)

Sloane R, 'Self-Representation', in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press 2009)

Sluiter G, 'Compromising the Authority of International Criminal Justice: How Vojislav Seselj Runs His Trial' (2007) 5 *Journal of International Criminal Justice* 529

Sluiter G, 'Karadžić on Trial: Two Procedural Problems' (2008) 6 *Journal of International Criminal Justice* 617

Trechsel S, 'Rights in Criminal Proceedings under the ECHR and the ICTY Statute—A Precarious Comparison' in Bert Swart, Alexander Zahar, and Göran Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press 2011)

Tuinstra JT, *Defence Counsel in International Criminal Law* (TMC Asser Press 2009)

Tuinstra JT, 'The ICTY's Continuing Struggle with the Right to Self-representation' in Bert Swart, Alexander Zahar, and Göran Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press 2011)

White MS and Gutheil TG, 'Proposed Model for Assessing Defendant Competence to Self Represent', 2016 (44)4 *The Journal of the American Academy of Psychiatry and the Law* 425

Zahar A, 'Legal Aid, Self-Representation, and the Crisis at the Hague Tribunal' (2008) 19 *Crim Law Forum* 241

Cases

US Supreme Court:

Faretta v. California 422 U.S. 806 (1975)

ECtHR:

Croissant v. Germany [1992] ECHR 60

Lagerblom v. Sweden [2003] ECHR 28

HRC:

Michael and Brian Hill v. Spain, Human Rights Committee, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993, 2 April 1997

ICTY:

Prosecutor v. Milosevic, 'Reasons for Decision on Assignment of Defence Counsel', Case No: IT-02-54-T, Trial Chamber, 22 September 2004.

Prosecutor v. Milosevic, 'Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel', Case No: IT-02-54-AR73.7, Appeals Chamber, 1 November 2004.

Prosecutor v. Milošević, 'Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel', Case No: IT-02-54, Trial Chamber, 4 April 2003.

Prosecutor v. Šešelj, 'Decision on the Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence', Case No: IT-03-67-PT, Trial Chamber II, 09 May 2003.

Prosecutor v. Šešelj, 'Decision on Assignment of Counsel', Case No: IT-03-67-PT, Trial Chamber I, 21 August 2006.

Prosecutor v. Šešelj, 'Decision on Appeal against the Trial Chamber's Decision on Assignment of Counsel', Case No: IT-03-67-AR73.3, Appeals Chamber, 20 October 2006.

Prosecutor v. Šešelj, 'Order Concerning Appointment of Standby Counsel and Delayed Commencement of Trial', Case No. IT-03-67-PT, Trial Chamber I, 25 October 2006.

Prosecutor v. Šešelj, Decision on Assignment of Counsel, Case No. IT-03-67-T, Trial Chamber, 27 November 2006.

Prosecutor v. Šešelj, 'Decision on Appeal against the Trial Chamber's Decision (No. 2) on Assignment of Counsel', Case No: IT-03-67-AR73.4, Appeals Chamber, 8 December 2006.

Prosecutor v.Šešelj, 'Public Version of the ''Consolidated Decision on Assignment of Counsel, Adjournment and Prosecution Motion for Additional

Time with Separate Opinion of Presiding Judge Antonetti in Annex' Case No: IT-03-67-T, Trial Chamber, 11 December 2009.

ICTR:

Prosecutor v. Barayagwiza, 'Decision on Defence Counsel Motion to Withdraw, Case No: ICTR-97-19-T, Trial Chamber, 2 November 2000.

Prosecutor v. Barayagwiza, 'Judgment and Sentence', Case No: ICTR-99-52-T, Trial Chamber, 3 December 2003.

SCSL:

Prosecutor v. Norman, *Fofana, and Kondewa*, 'Decision on the Application of Samuel Hinga Norman for Self-Representation Under Art. 17(4)(d) of the Statute of the Special Court', Case No. SCSL 04-14-T, Trial Chamber, 8 June 2004.

Prosecutor v. Norman, Fofana, and Kondewa, 'Ruling on Non-Appearance of First Accused, Second Accused and Third Accused at Trial Proceedings, Case No: SCSL-04-14-PT, Trial Chamber, 1 October 2004.

Statutes & Covenants & Conventions

Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5

Organization of American States (OAS), *American Convention on Human Rights*, *"Pact of San Jose", Costa Rica*, 22 November 1969

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998

UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia* (as amended on 17 May 2002), 25 May 1993

UN Security Council, *Statute of the International Criminal Tribunal for Rwanda* (as last amended on 13 October 2006), 8 November 1994

UN Security Council, *Statute of the Special Court for Sierra Leone*, 16 January 2002

AUTONOMOUS (DRIVERLESS) CARS AND AN ANALYSIS OF THE PROPOSED REGULATION OF THE EUROPEAN PARLIAMENT

Otonom (Sürücüsüz) Araçlar Ve Avrupa Parlamentosu'nun Yasa Tasarısının Analizi

Tunca BOLCA*

Abstract

The developments of modern technology offer new ways to improve our daily lives. Autonomous agents will be an important part of our future and autonomous (driverless) cars are scheduled to be on the public roads soon. This technology will help reduce the massive traffic casualties world-wide and offer people the chance to gain back the time that is lost in their daily commute. However, such a technology presents various legal challenges as well. Today, the current laws are not equipped to handle claims arising from full autonomy. Areas such as personhood status, civil liability, cyber security and protection of personal data should be regulated in order to ensure that the technology is beneficial to society, without posing serious risks. The European Parliament adopted the "Civil Law Rules on Robotics" resolution on February 16th, 2017 with recommendations to the European Commission for a new legislation. The resolution offers important suggestions in regulating the autonomous robots and ground breaking suggestions on personhood status of autonomous robots and the civil liability that will arise from their actions. The Parliament's suggestions have been attracting attention world-wide and if legislated, can set a precedent for the rest of the world.

Keywords: *Autonomy, Driverless Cars, Legal Liability, Electronic Personhood.*

Özet

Teknolojik gelişmeler bizlere günlük hayatlarımızı birçok yönden geliştirme fırsatları sunuyor. Otonom nesneler yakın geleceğimizin çok önemli bir parçası olacaklar ve bu yeni teknolojinin gündelik hayata en önemli etkilerinden biri de yakında yollarda görmeyi beklediğimiz otonom (sürücüsüz) araçlar olacaktır. Bu teknoloji sayesinde dünya çapında trafik kazalarına bağlı yaşanan ölüm ve yaralanmalar çok ciddi oranda azalacağı gibi, aynı zamanda insanlara trafikte kaybedilen zamanını değerlendirme şansını sunulacaktır. Ancak, bu teknolojinin kullanımı, yasal olarak birçok zorluğu da beraberinde getirmektedir. Günümüzde mevcut yasal normlar tam otonom nesnelerin neden oldukları uyuşmazlıkların çözümü için yeterli değildir. Böylesine önemli teknolojik gelişmelerin toplumun yararına olması ve kullanımlarının insanlara zarar verici mahiyette olmaması adına, kişilik hakları, yasal sorumluluk, siber güvenlik ve kişisel verilerin korunması alanlarında yasal düzenlemelerin yapılması zorunludur. Avrupa Parlamentosu tarafından kabul edilen "Robotlar İçin Medeni Hukuk Kuralları" yasa tasarısında, otonom robotların yasalaştırılması hususu ve özellikle robotların kişilik statüsü ve otonom davranışlarından kaynaklanacak zararlardan doğacak hukuki sorumluluk konularında önemli prensipler belirlendi. Parlamento'nun dünya çapında yankı uyandıran bu tasarısı yasalaşacak olursa, tüm dünyaya emsal teşkil edecek niteliktedir.

Anahtar Kelimeler: *Otonom, Sürücüsüz Araçlar, Hukuki Sorumluluk, Elektronik Kişilik*

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I. INTRODUCTION

Movies have shaped the future we imagined. As we are now living in the future of those movies, some things are different. Robots are here but they are not quite similar to *R2-D2* or *The Terminator (thankfully),* they look different, their purpose is different, but they are here. One of the most drastic changes that we expected was the invention of the flying cars, which was supposed to happen by October 21, 2015, according to what "*Doc." Brown* and *Marty McFly* showed us in 1989[1]. Even though the cars are not flying yet[2], many of the movie's predictions of the future like self-lacing[3] shoes and hoverboards[4] have been invented.

Although the flying car was the number one image of the future in movies, the more accurate autonomous (driverless) cars were also imagined by the moviemakers. In *Total Recall (1990)* we see a robot driver behind the wheel and in *Minority Report (2002)* we see the total autonomous cars speeding on the highway. These visions turned out to be more accurate; the flying car may still be a fantasy of the future but the driverless car is here.

The use of robots and artificial intelligence is fun to imagine and deeply interesting. But in the case of driverless cars, it is more than that. In 2016, 7.300 people have died in traffic accidents in Turkey[5]. In the United States, 37.500 people[6] were killed on the road in the same year and studies show that at least %90 of the accidents were caused by human error[7]. The makers of the driverless cars explain that their vision is to eliminate human error and make driving safer. In this regard, we can see the need of the development of driverless cars is urgent and vital.

With the development of technology, the vision of the future has become a reality and as it becomes a routine part of our lives, many lives will be

1 Back to the Future Part II http://www.imdb.com/title/tt0096874/?ref_=nv_sr_2

2 A Slovakian company "AeroMobil" has been working a prototype flying car since 2010 and claimed that it would be available by 2017. It is now suggested that it will be available in 2020.

3 Ahiza Garcia, Nike's self-lacing HyperAdapt Sneaker Will Cost You $720. (CNN Money, 2016) http://money.cnn.com/2016/11/15/news/companies/nike-hyperadapt-self-lacing/index.html

4 Hendo Hoverboards http://hendohover.com/the-hendo-hoverboard/

5 Turkish Statistical Institute, Road Traffic Accident Statistics 2016 www.tuik.gov.tr/PdfGetir.do?id=24606

6 Aarian Marshall, To Save the Most Lives, Deploy (Imperfect) Self-Driving Cars ASAP (Wired, 2017) https://www.wired.com/story/self-driving-cars-rand-report/

7 Bryant Walker Smith, "Human Error as a Cause of Vehicle Crashes" (Stanford Law, Center For Internet and Society, 2013) http://cyberlaw.stanford.edu/blog/2013/12/human-error-cause-vehicle-crashes

saved. However, along with substantial advantages, the driverless car has also brought a challenging task for the lawmakers. Matters of criminal and civil liability, personal data protection and cyber security have to be dealt with first and the regulation is not there yet.

The European Parliament (EP) adopted the "Civil Law Rules on Robotics" resolution on February 16th, 2017[8]. In the resolution, EP has set important rules that will define the legal situation of the use of autonomous vehicles and other autonomous robots at a Union level. It is an important study that will regulate the liabilities that will arise from the use of autonomous agents that will set a precedent, if legislated by the European Commission.

II. THE DEVELOPMENT OF DRIVERLESS CARS

1. Levels of Autonomy

First the definition of autonomy has to be made: Autonomy is the ability to make decisions and implement them independently, without the need of human assistance or any external interference[9]. Therefore, less human intervention will mean a higher level of autonomy of the subject[10].

There are 5 levels of autonomy in driverless cars:[11]

- Level 0 : No autonomy at all. The classic car where the human is in charge of everything.
- Level 1 : Driver Assistance. Human driver is still in control but the car can control its speed or steering with cruise control or lane guidance.
- Level 2 : Partial Automation. The car is in charge of both speed and steering at the same time and the driver is disengaged. But the driver needs to monitor the road and be ready to take control at any time.

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8 The resolution was adopted by the European Parliament with 396 votes in favor, 123 against and 85 abstentions. The recommendations are based on a report published by the European Parliament's Committee on Legal Affairs on 12.01.2017. http://www.europarl.europa.eu/oeil/popups/sda.do?id=28110&l=en

9 The European Parliament resolution of 16.02.2017 with recommendations to the Commission on Civil Law Rules on Robotics "EP Resolution" Liability. Article AA. http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0051+0+DOC+PDF+V0//EN

10 M. Buning & L. Belder & R. de Bruin, Mapping the Legal Framework for the Introduction into Society of Robots as Autonomous Intelligent Systems (Law of the Future Series No.I, 2012), page 198 https://www.fichl.org/fileadmin/fichl/documents/LOTFS/LOTFS_1_Web.pdf

11 Path to Autonomy: Self-Driving Car Levels 0 to 5 Explained (Car and Driver, 2017) https://www.caranddriver.com/features/path-to-autonomy-self-driving-car-levels-0-to-5-explained-feature

- Level 3: Conditional Automation. The car is also monitoring the environment and is in charge. If the conditions are optimal, it will make the decisions such as changing lanes and execute them. However, the driver is still present and the car will inform the driver if it sees a situation that it cannot handle.
- Level 4: High Automation. The car is fully automated in a specific environment. It performs all actions on its own but is restricted to a certain area and the owner cannot take it anywhere he/she wants.
- Level 5: Full Automation. No human assistance is needed at all. There is no need for brakes, pedals or a steering wheel. The car can operate itself in every landscape or scenario. The human present is just a passenger.

2. A Brief History of the Driverless Car

The first driverless car was operated by the Houdina Radio Control Company in 1925. Francis P. Houdina equipped a 1926 Chandler with a transmitting antenna and operated from a second car that followed it with a transmitter. The radio signals operated small electric motors that directed every movement of the car. He publicly demonstrated his radio-controlled driverless car, "American Wonder" in New York City streets, traveling up Broadway and down Fifth Avenue through traffic[12].

Studies in the 50s and 60s focused on using electric impulses with sensors installed in electrical highways in the United States. The sensors were designed to detect the location and speed of other vehicles and transmit guiding information to the autonomous car. Receivers for the system were built in the 1956 GM Firebird II. However, the circuits built in roads did not become widespread for this technology to advance[13]. In 1958, the first cruise control system was introduced in the Chrysler Imperial. This automation, placed on level 1 of the scale, was the first example of its kind.

In 1979, the Stanford Cart, which was originally designed as a moon rover project, successfully crossed a chair-filled room without human intervention in about five hours[14]. In the 1980s, Mercedes-Benz designed a van that used visual input from cameras and provided commands to the steering wheel, throttle and brakes while speeding up to 96 km/h[15]. Later the company produced a second prototype in an S class Mercedes which travelled more than 1.000 kilometers with speed up to 185 km/h[16].

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12 Houdina Radio Control (Revolvy) https://www.revolvy.com/main/index.php?s=Houdina+Radio+Control

13 The Road to Driverless Cars: 1925 – 2025 (Engineering.com, 2016) https://www.engineering.com/DesignerEdge/DesignerEdgeArticles/ArticleID/12665/The-Road-to-Driverless-Cars-1925--2025.aspx

14 Les Earnest, Stanford Cart (Stanford.edu, 2012) http://web.stanford.edu/~learnest/cart.htm

15 The Road to Driverless Cars: 1925 – 2025 (Engineering.com, 2016)

16 Alex Oagana, A Short History of Mercedes-Benz Autonomous Driving Technology

In 1995, Carnegie Mellon's project "No Hands Across America" completed a 3.000 miles long journey with a semi-autonomous car, which the throttle and brakes were human controlled. In 2004, the DARPA (Defense Advanced Research Projects Agency) of America proposed a grand challenge offering a $1 million prize to the challengers to build an autonomous vehicle that will be able to navigate 142 miles through the Mojave Desert. However, none of the participants were able to finish the challenge[17] [18].

In 2009 Google started its driverless car project (Waymo). By 2012, the company had driven more than 300,000 miles and started experimenting in city centers. Google lobbied for making the self-driving car legal and got the legislation passed in Nevada in 2011 and other states followed[19]. In 2014, 4 cities were chosen by the UK for everyday trial of autonomous vehicles[20].

3. Where Are We Now and What Lies Ahead?

As of 2015 we can say that two companies got more attention in their work on autonomous vehicles; Tesla and Google. In 2015, Tesla Motors released its Autopilot[21] and it was widely received as the next step towards fully autonomous cars. The Autopilot software has sensors and radars that can detect any obstacles. When driving on the highway, Autopilot can control the vehicle's speed based on the traffic it detects and determines to change lanes, moves between freeways, and takes exits[22]. However, the system requires a

(autoevolution.com, 2016) https://www.autoevolution.com/news/a-short-history-of-mercedes-benz-autonomous-driving-technology-68148.html

17 Luke Dormehl & Stephen Edelstein, Sit back, relax, and enjoy a ride through the history of self-driving cars (Digital Trends, 2018) https://www.digitaltrends.com/cars/history-of-self-driving-cars-milestones/

18 The challenges in 2005 and 2007 were more successful. In 2005, Stanford's autonomous Volkswagen Touareg completed the challenge in 6 hours and 54 minutes. In 2007, Carnegie Mellon's team completed the course in 4 hours and 10 minutes with an autonomous Chevrolet Tahoe. Tom Vanderbilt, Autonomous Cars Through the Ages (Wired, 2012) https://www.wired.com/2012/02/autonomous-vehicle-history/

19 Since then, 20 other states—Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Louisiana, Michigan, New York, North Carolina, North Dakota, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia and Vermont—and Washington D.C. have passed legislation related to autonomous vehicles. Governors in Arizona, Delaware, Massachusetts, Washington and Wisconsin issued executive orders related to autonomous vehicles.
Autonomous Vehicles, National Conference of State Legislatures, 2018.
http://www.ncsl.org/research/transportation/autonomous-vehicles-self-driving-vehicles-enacted-legislation.aspx

20 Driverless cars: 4 cities get green light for everyday trials. Innovate UK, 2014.
https://www.gov.uk/government/news/driverless-cars-4-cities-get-green-light-for-everyday-trials

21 Known as 'Enhanced Autopilot' since 2016

22 Mark Matousek, The most impressive things Tesla's cars can do in Autopilot. (Business Insider, 2017)

driver ready at all times to take charge and once it is off the highway, the driver needs to take back the control. With these features, it is certain that the car is not fully autonomous and it can be classified as level 2 autonomy as the driver always needs to pay attention.

Google has been working on developing its driverless car "Waymo" since 2009. In 2017 Google announced that its fully autonomous car has arrived[23]. The car reportedly travelled over 4 million miles without a major accident or fatality and with minimal driver interventions[24]. This is considered to be a level 4 autonomous car which can act with total autonomy in certain areas[25].

Google is the frontrunner but companies like Tesla, Toyota, Volvo, General Motors, Nissan, Mercedes, Audi, Hyundai, Honda and BMW are planning to debut their autonomous cars in the years to come[26]. It is speculated that level 4 autonomous cars might be ready for purchase by 2019[27] but level 5 cars will take more time to hit the streets.

III. REGULATING DRIVERLESS CARS

1. Why Do We Need to Regulate Driverless Cars, What Are the Potential Risks?

The technology is fascinating and very promising. Fully automated cars will have 2 major impacts on our lives. The most important impact will be the elimination of human error in traffic. The experts claim that 1.2 million people die every year world-wide in traffic accidents and this technology can reduce that number by %90[28]. Another significant improvement will be avoiding the significant loss of time in our daily routine, stuck in traffic[29].

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http://www.businessinsider.com/tesla-autopilot-functions-and-technology-2017-12/#all-new-tesla-cars-have-the-necessary-hardware-for-enhanced-autopilot-but-customers-have-to-pay-to-turn-the-semi-autonomous-system-on-enhanced-autopilot-costs-5000-at-the-time-of-purchase-or-a-buyer-can-activate-it-later-for-6000-5

23 Waymo – Journey (Google) https://waymo.com/journey/

24 Waymo – On the Road (Google) https://waymo.com/ontheroad/

25 Richard Waters, Google Owner Test First Driverless Car On City Streets (Financial Times, 2017) https://www.ft.com/content/397134f8-c36c-11e7-a1d2-6786f39ef675

26 Danielle Muoio, These 19 companies are racing to put driverless cars on the road by 2020 (Business Insider, 2016) http://www.businessinsider.com/google-apple-tesla-race-to-develop-driverless-cars-by-2020-2016-7/#baidu-a-beijing-based-search-company-is-aiming-to-have-a-commercial-model-of-its-driverless-car-ready-by-2018-12

27 John Rosevear, Here's how soon you could be riding in a driverless car. (Business Insider, 2017)http://www.businessinsider.com/heres-how-soon-you-could-be-riding-in-a-driverless-car-2017-12

28 Iyad Rahwan, What Moral Decisions Should Driverless Cars Make? (TEDx Cambridge, 2016) https://www.ted.com/talks/iyad_rahwan_what_moral_decisions_should_driverless_cars_make

29 It is estimated that an average commuter in US spends 42 hours per year in traffic. http://inrix.com/resources/inrix-2016-traffic-scorecard-us/
TomTom estimates that in Istanbul, an average commuter spends an extra 175 hours in

The advancement also comes with possible problems that lawmakers need to regulate before the technology can take off. We can categorize the potential problems of the use of driverless cars into 4 categories: a) Liability, b) Cyber Security, c) Protection of Personal Data, d) Employment.

a. Legal Liability

The most controversial topics in legal circles regarding driverless cars are the criminal and civil liability issues. What will happen if; i) an autonomous car crashes another car, potentially injuring or killing its driver, ii) an autonomous car hits a pedestrian, iii) an autonomous car crashes and kills or injures its passenger.

The first fatal accident with a partial autonomous car occurred in Florida in 2016 as a Tesla Model S car crashed when it was operating with the Autopilot. The car's sensors failed to notice a large white 18-wheel truck crossing the highway under a bright sky[30]. Investigation showed that the car warned the driver 7 times before the accident to take control[31] and Tesla was cleared of charges and it was decided that the car was acting as designed. The investigators stressed the fact that not all systems are capable of everything and that *"There are driving scenarios that automatic emergency braking systems are not designed to address"*[32]. The fact that the car had warned the driver to take over 7 times before the crash shifted the blame from the car to the deceased driver. However, this incident shows that carmakers need to be more detailed and be very clear on the car's limitations. The car in this incident is a level 2 autonomous car and the driver should be engaged at all times.

However, in a different situation, liability might not be so clear. In the situation above, the driver was negligent and there were no other fatalities or injuries. If an autonomous car gets out of control and kills a bystander, how will legal liability be assigned? We need regulations that specify each party's responsibilities. Did the manufacturer inform the owner/driver of the car's capabilities? If the car does not act as designed, we can assume that it is the manufacturer to blame; however, does the owner have some liability

traffic because of congestion. https://www.tomtom.com/en_gb/trafficindex/city/istanbul

30 D. Yadron & D. Tynan, Tesla driver dies in first fatal crash while using autopilot mode. (The Guardian, 2016) https://www.theguardian.com/technology/2016/jun/30/tesla-autopilot-death-self-driving-car-elon-musk

31 Chris Isidore, Driver killed in Tesla crash was warned seven times to put hands on wheel (CNN, 2017) http://money.cnn.com/2017/06/20/technology/tesla-autopilot-fatal-crash-warnings/index.html

32 Neal E. Boudette, Tesla's Self-Driving System Cleared in Deadly Crash. (The New York Times, 2017) https://www.nytimes.com/2017/01/19/business/tesla-model-s-autopilot-fatal-crash.html

in the maintenance of the vehicle, such as updates of the software? Did the owner use the latest firewalls and anti-virus programs to ensure that the car is not hacked? Or perhaps the driver (or the passenger depending on the level of autonomy) has a part to blame, as he/she used the driverless car in an unauthorized environment.

In the current legal system in the EU[33], liability for harm by autonomous agents would only cover foreseeable damage caused by manufacturing defects and in such a case, the manufacturer would be liable. However, if the agent is fully autonomous and is able to learn and adapt to their environment, it would be harder for the manufacturer to anticipate problems that can cause harm to third parties.

It is also important to consider the scenario when the car understands that a crash is inevitable and needs to choose an action. In a TEDx speech[34] in September, 2016, Iyad Rahwan[35] proposes an ethical dilemma where the car has a mechanical failure and is unable to stop. The car will either; go straight and hit pedestrians crossing the street, swerve and hit a bystander on the sidewalk or crash the car into a wall and kill its passenger. In such a situation how will the car decide, how will the manufacturer program the car deal with such an ethical choice? Will the owner be able to implement a choice to the software in order to save himself/herself at all costs? Even though such a scenario may be unlikely, it is important to consider the impact of such a decision in the society. This scenario and the decision will ultimately lead to the civil liability that will arise from that choice.

There are many different scenarios so the legal responsibility and liability of the parties should be clearly set in legislation in order to ensure that legal liability is assigned correctly to ensure accountability.

b. Cyber Security

A very big concern for the potential users of the technology is cyber security. The cars on the market today already have many electronic features such as entertainment systems with wireless and Bluetooth connections. There are already many reports on the insufficient security of those systems, so when you buy your autonomous car that drives itself, will you be able to protect it?

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33 Directive 85/374/EEC - Liability for Defective Products https://osha.europa.eu/en/legislation/directives/council-directive-85-374-eec

34 Iyad Rahwan, What Moral Decisions Should Driverless Cars Make? (TEDx Cambridge, 2016) https://www.ted.com/talks/iyad_rahwan_what_moral_decisions_should_driverless_cars_make

35 Iyad Rahwan is the AT&T Career Development Professor and an associate professor of media arts & sciences at the MIT Media Lab https://www.ted.com/speakers/iyad_rahwan

A recent study[36] in the US shows that 3 out of 4 drivers are afraid of riding in autonomous cars. This is a result of people's reluctance to lose control and their doubt in trusting a new unproven technology. But I believe that cybersecurity is also a very important factor in gaining the people's trust.

In 2015, a story was posted on Wired[37], showing how hackers hacked into a 2014 Jeep Cherokee. The hackers took control of the vehicle as it was being driven in a highway. The Uconnect entertainment system used by Fiat Chrysler Company proved to be very vulnerable to attacks and enabled the attacker to take total control of the car remotely. Further research on similar technologies revealed that most of the systems were vulnerable to hacks and automakers were criticized for not doing their part to protect the public[38]. Ransomware[39] and other malicious attacks are a danger today but more is at stake with fully autonomous cars without an active driver. Therefore, necessary steps need to be taken by the developers of this technology and lawmakers should consider setting liabilities to the carmakers to ensure that the best possible standards of security are applied.

c. Protection of Personal Data

Another important concern relating the use of driverless cars is regarding the protection of personal information. As the autonomy of the cars increase, the data that the car will need in order to operate will also increase significantly. Today, many cars have GPS features and navigation systems, but the use of these systems are optional for the driver. However, in order for an autonomous car to operate, all of the actions of the car will be monitored (e.g. driving speed, routes taken, distance travelled etc.).

How will the carmakers deal with all this data about the driver / passenger? Will they share the driving habits of the driver with his/her insurance company

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36 Erin Stepp, Three-Quarters of Americans "Afraid" to Ride in a Self-Driving Vehicle (AAA Newsroom, 2016) http://newsroom.aaa.com/2016/03/three-quarters-of-americans-afraid-to-ride-in-a-self-driving-vehicle/

37 Samuel Gibbs, Jeep owners urged to update their cars after hackers take remote control (The Guardian, 2015) https://www.theguardian.com/technology/2015/jul/21/jeep-owners-urged-update-car-software-hackers-remote-control

38 Dominic Rushe, Most cars are vulnerable to 'hacking or privacy intrusions' (The Guardian, 2015) https://www.theguardian.com/business/2015/feb/09/most-cars-vulnerable-hacking-privacy-intrusions-senate-report

39 Ransomware is a subset of malware in which the data on a victim's computer is locked, typically by encryption, and payment is demanded before the ransomed data is decrypted and access returned to the victim. http://searchsecurity.techtarget.com/definition/ransomware

or law enforcement agencies? Will they sell this valuable information to third parties? How will sensitive information, such as the location that the person travelled or how long he/she stayed there, be processed?

Assuming that the car has more than one passenger and the driver (or the 'main' passenger-owner) of the car gives his/her consent for the collection of his/her personal data; how will this affect the protection of the other passengers' personal data?

The autonomous car will need this information to act as designed and even to improve itself through machine learning[40]. So, denying the car certain information does not seem to be possible. However, regulations need to be made regarding the collection, storage, process, de-identification and destruction of the personal data.

d. Employment

There are concerns by the professional drivers regarding the autonomous cars. It can be said that their fear is justified; as the cars get completely autonomous there will not be a requirement for a driver to be present and this will no doubt affect the job market, eliminating taxi drivers, bus drivers, truck drivers etc.

It can also be argued that this new technology will create jobs as well but the prospects will need to be familiar with computer sciences, therefore it can be said that it would change the job market. A report claims that 1.8 million truck drivers are at risk of losing their jobs, perhaps beginning in the next five to 10 years[41].

In a study made by MIT it is suggested that millions of angry and recently unemployed truckers may look for ways to attack autonomous trucks and that the autonomous trucks may need to defend themselves from such attacks[42]. Governments will need to address this issue in order to ensure a smooth transition to the autonomous age.

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[40] Machine learning is a type of artificial intelligence (AI) that allows software applications to become more accurate in predicting outcomes without being explicitly programmed. The basic premise of machine learning is to build algorithms that can receive input data and use statistical analysis to predict an output value within an acceptable range. http://whatis.techtarget.com/definition/machine-learning

[41] David Roberts, 1.8 million American truck drivers could lose their jobs to robots. What then? (Vox, 2016)
https://www.vox.com/2016/8/3/12342764/autonomous-trucks-employment

[42] Ethan Goffman, How can truck-driver jobs fit into a driverless economy? (Mobility Lab, 2017)
https://mobilitylab.org/2017/12/19/can-truck-driver-jobs-fit-driverless-economy/

2. What Does the European Parliament Suggest?

The European Parliament (EP) has adopted the Civil Law Rules on Robotics resolution on 16 February 2017 with recommendations to the European Commission on legislating autonomous agents and robots. EP lays out the potential problems that artificial intelligence (AI) and autonomous robots (such as the autonomous car) will cause and offers ways of regulating these problems. One of the initial principles of the study was that even though regulation is desperately needed, the constant innovation of the field should not be precluded and stifled with unnecessary obstacles[43]. This is a very important aspect that any legislative body in any state must consider while establishing the necessary regulation for the use of this technology.

The EP acknowledges that the rise of the use of autonomous robots and AI is substantial and will probably surpass human intellectual capacity in the long run[44]. It is set out that there will be legal, ethical and social challenges regarding the use of this technology; such as the effects to the job market, legal liabilities, protection of personal data and the need of a union-wide regulation. An important emphasis is given to the suggestion that the robots should be made to complement humans, not replace them and that humans should always have control over the robots[45].

The EP sees the regulation of the autonomous car as an urgent need and it suggests that all forms of remotely piloted, automated, connected and autonomous ways of road, rail, waterborne and air transport, including vehicles, trains, vessels, ferries, aircrafts and drones should be included in the regulation[46].

a. Liability

The EP advises the Commission to analyze and address the issue of liability at a Union level in order to ensure the consistency and uniformity of the regulations in the EU. It is pointed out that different legislations in the EU on this matter would not be efficient and cause problems for both consumers and businesses[47].

EP sets out a principle regarding the civil law applications of compensation due to a damage caused by an autonomous agent other than damage to property. It is recommended that there should not be any limit to the type or extent of the damages to be recovered or its form solely on the basis that the "*damage was caused by a non-human agent*"[48].

43 "EP Resolution" Introduction, article B.
44 "EP Resolution" Introduction, article P.
45 "EP Resolution" article 3
46 "EP Resolution" article 24
47 "EP Resolution" article 49
48 "EP Resolution" article 52

EP considers that the civil liability should not focus on a person that has acted negligently but on the person "*who is able to minimize risks and deal with negative impacts*" of the use[49]. It is also advised that, the liability of the responsible party "*should be proportional to the actual level of instructions given to the robot and of its degree of autonomy*"[50]. EP believes that as the learning capacity of the autonomous agent rises, the greater the responsibility of its 'trainer' human should be. It is also stated that the training responsibility should not be confused with the self-learned skills of the agent.

The EP further makes recommendations on 3 essential subjects for liability and accountability:

i. Insurance Matters and Compensation Fund

The EP advises an insurance model with a compensation fund as a possible solution of designating responsibility for damages caused by autonomous agents. An "obligatory insurance scheme" is suggested by the EP that covers all potential responsibilities that could arise from the use of all and any autonomous agents. It suggests that a fund could be integrated into the insurance system that can ensure the damages to be collected in cases where no insurance cover exists. This fund would come into effect only in cases where the damage caused is not already covered by insurance. The EP suggests an incentive to be given to the manufacturer, programmer, owner or the user of the autonomous agent where these parties can benefit from a "limited liability" if they contribute to the compensation fund[51].

ii. Registry of Robots

The Parliament suggests forming a registry of robots to ensure the link between the autonomous agent, its fund and the party that has been damaged by its actions. In the registry, it would be possible to find the agent in question with a unique Union register number and anyone interacting with the agent can be informed at the registry about the nature of the agent, its funds and insurance conditions and the information of the responsible parties (e.g. manufacturer, owner)[52].

iii. Electronic Personhood

Perhaps the most significant suggestion that the EP has made is

[49] "EP Resolution" article 55
[50] "EP Resolution" article 56
[51] "EP Resolution" articles 57, 58, 59/a/b/c.
[52] "EP Resolution" article 59/e

the formation of a specific legal status[53]. This suggestion drew a lot of attention to the EP resolution world-wide and there were many discussions in different articles from various jurisdictions. The EP suggests on creating an electronic personhood for the fully autonomous agents to be applied in the cases where the damage is occurred by the decision of that autonomous object. In such cases where the object interacts with a third party on its own, without any instructions and by the capacity of its autonomy, the electronic personhood of the object will be responsible for the damages.

This was not the first time the electronic personhood of robots were suggested in the EU. In the "Suggestions for a Green Paper on Legal Issues in Robotics"[54] by the European Robotics Coordination in 2012, the electronic personhood of robots is considered. It is stated that the legal personhood of companies or corporations are taken as a model and as autonomous robots can develop personalities, giving them a legal status would be optimal. The personhood status would be established with the registration of the robot in the registry, just like a commercial register for companies. In case of an injury to a third party, the damaged party would be able to file a claim directly to the autonomous agent with electronic personhood, unless a human was responsible for the agent's actions that led to the damage[55].

a) Protection of Personal Data

The General Data Protection Regulation[56] (GDPR) will come into effect in the EU as of 25 May 2018. The regulation has very strict standards on the process of personal data and EP suggests the legislation that will be made to be in accordance with the GDPR. The EP underlines the principles of "necessity" and "proportionality" as the basic principles that the legislation should support[57].

Furthermore, the 39th International Conference of Data Protection and Privacy Commissioners[58] was held in September 2017 and The Connected Car Resolutions below were taken:

53 "EP Resolution" article 59/f

54 Christophe Leroux & Roberto Labruto, 'euRobotics' The European Robotics Coordination Action, Suggestion for a green paper on legal issues in robotics, 2012. https://www.researchgate.net/publication/310167745_A_green_paper_on_legal_issues_in_robotics

55 euRobotics, p.60-62

56 General Data Protection Regulation of the EU. http://ec.europa.eu/justice/data-protection/reform/files/regulation_oj_en.pdf

57 "EP Resolution" article 20

58 https://www.privacyconference2017.org/eng/index.html

- "Give data subjects comprehensive information about what data is collected, for what purposes and by whom and provide granular and easy to use privacy controls for vehicle users enabling them to, where appropriate, grant or withhold access to different data categories in vehicles;
- Utilize anonymization measures to minimize the amount of personal data collected;
- Retain personal data no longer than necessary and provide technical means to erase personal data when a vehicle is sold or returned to its owner and restrict the collection of data;
- Provide secure data storage devices that put vehicle users in full control regarding the access to the data collected by their vehicles and provide technical measures to protect against cyber-attacks and prevent unauthorized access to and interception of personal data;
- Respect the principles of privacy by default and privacy by design;
- Guarantee that self-learning algorithms needed for automated and connected cars are made transparent in their functionality and have been subject to prior assessment by an independent body in order to reduce the risk of discrimination by automated decisions;
- Provide vehicle users with privacy-friendly driving modes with default settings; and
- Enter into a dialogue with the data protection and privacy commissioners to develop compliance tools to accompany and provide legal certainty to connected vehicles' related processing."[59]

The resolutions above coincide with the regulations of GDPR, as the GDPR sets these principals as a general rule on data protection. Additionally, the "proof of clear consent" of the subject is a very important and integral necessity of the GDPR and the driverless car manufacturers will need to take this into consideration in order to be in accordance with the regulation. The resolutions of the Conference above are not binding, however they should be integrated into all of the jurisdictions that the driverless car will be sold and used.

The autonomous cars present the possibility of a substantial data mining and it can be presumed that the companies will try to process and share every possible data to use for marketing, advertising etc. Therefore, even if there is a hypothetical "off switch", the owner / driver should be able to use and enjoy

[59] Katherine E. Armstrong, Connected Car Resolution adopted by the International Conference of Data Protection and Privacy Commissioners. (The National Law Review, 2017) https://www.natlawreview.com/article/connected-car-resolution-adopted-international-conference-data-protection-and

the product. In other words, the manufacturer should not design the product to be inoperational in case the "clear consent" required by the GDPR is not given by the owner / driver. Although it is acceptable that some features will not be available, the owner / driver should still be able to operate the vehicle at acceptable conditions.

b) Employment

The Parliament acknowledges that the job market will change and as some jobs are taken by the autonomous vehicles, other opportunities in computer technologies will arise. Therefore advises the Commission to provide significant support to all levels of learners of all ages and employment status to be educated in a basic level of digital skills[60].

EP advises the Commission to start analyzing various ways to create jobs in the digital age and launch initiatives to ensure that the citizens embrace the change of the job market and are educated accordingly[61].

IV. CONCLUSION

Driverless cars offer the chance of a better future for all of us. As our technology advances in the years to come and scientists improve the intelligence capabilities of the autonomous vehicles, our life will improve significantly. Road safety will be the undeniable benefit of this technology; it is stated that every year there are about 1.2 million traffic causalities and this technology might save 10 million lives per decade globally[62].

However, the transition to the next age will not be very easy as our laws are not equipped to deal with problems that will arise from the use of fully automated vehicles or other robots. Determining the responsibilities of the parties regarding criminal and civil liabilities are the most urgent matters that need to be resolved. Protection of personal property and cyber security issues are just as important as people need to feel safe in order to accept and adopt this technology in their lives.

Another important aspect for lawmakers around the globe is to make sure that the regulations that will be made are constructed with an international policy. If ultimately, every state has different and conflicting regulations, it may cause problems in practice. For example, what will happen if a country

60 "EP Resolution", article 41

61 "EP Resolution" articles 42, 43, 44, 45.

62 Adrienne Lafrance, Self-Driving Cars Could Save 300,000 Lives Per Decade in America (The Atlantic, 2015) https://www.theatlantic.com/technology/archive/2015/09/self-driving-cars-could-save-300000-lives-per-decade-in-america/407956/

requires a fully autonomous car to have a steering wheel and/or brakes, and another does not? What if the fully autonomous car, which is registered as an autonomous car in its origin country, crosses the border to the other aforementioned country and causes damage the third parties; will it be considered to be an autonomous car even though it does not possess the necessary features to be classified as one in that country? An issue like this example demonstrates the necessity of a regulation in an international level. I believe that a framework of law can be agreed upon internationally in an international treaty, in which the basic definitions and foundations of law can be set. Each country or state can build its own legislation in accordance with the international regulation, which will help to achieve uniformity in practice.

I believe that the resolution of EP is a very important study in the EU. The suggestions of the EP, such as electronic personhood will be a discussion point in the years to come, which is essential in constructing the best possible legal framework for the future. There are some other suggestions[63] regarding personhood, but I believe that the electronic personhood approach of the EP is the most promising one yet as it does not classify the agent as human or as an object and proposes an alternative in between; just like companies. However, granting such a status will give the subject certain rights and responsibilities, therefore a multi-disciplinary approach is needed; especially the ethical and sociological outcomes must be studied.

It is usual for law to follow technology, it is necessary for the legislators to observe and understand the possible legal problems when a new technology arises. Therefore technology will always be one step ahead, and law will try to catch up. In the case of the driverless cars, the technology is here, and the legislation needs to catch up with it soon in order to preserve the well-being of the people and the order of society. Even though there are still a few years for the fully autonomous cars to be speeding on our highways, the process has started and it is coming at full speed. If people are harmed by the use of technology and the legislation is not there to determine the responsibilities of the parties involved, the public will be anxious and react in a bad way, which will definitely decelerate the growth of the technology. Therefore, establishment of the legal regulations is vital for the development and implementation of the technology in the near future.

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[63] i) "artificial personality suggestion" euRobotics
ii) "constitutional personhood suggestion" Samir Chopra & Laurence White, Artificial Agents - Personhood in Law and Philosophy http://www.sci.brooklyn.cuny.edu/~schopra/agentlawsub.pdf
iii) "slave robots suggestion" Thomas Pérennou, State of the Art on Legal Issues https://ethicaa.greyc.fr/media/files/ethicaa.delivrable.1.pdf

REFERENCES

Internet Movie Database "IMDb", *Back to the Future Part II* http://www.imdb.com/title/tt0096874/?ref_=nv_sr_2 (Access date: 22.12.2017)

CNN Money**,** Ahiza Garcia, *Nike's self-lacing HyperAdapt Sneaker Will Cost You $720.* (2016) http://money.cnn.com/2016/11/15/news/companies/nike-hyperadapt-self-lacing/index.html (Access date: 22.12.2017)

Hendo Hoverboards http://hendohover.com/the-hendo-hoverboard/ (Access date: 22.12.2017)

Turkish Statistical Institute, Road Traffic Accident Statistics 2016 www.tuik.gov.tr/PdfGetir.do?id=24606 (Access date: 23.12.2017)

Wired, Aarian Marshall, *To Save the Most Lives, Deploy (Imperfect) Self-Driving Cars ASAP* (2017) https://www.wired.com/story/self-driving-cars-rand-report/ (Access date: 23.12.2017)

Stanford Law, Center For Internet and Society, Bryant Walker Smith, *Human Error as a Cause of Vehicle Crashes* (2013)

http://cyberlaw.stanford.edu/blog/2013/12/human-error-cause-vehicle-crashes (Access date: 23.12.2017)

European Parliament / Legislative Observatory, Statistics, *Results of Final Vote 16.02.2017* (2017) http://www.europarl.europa.eu/oeil/popups/sda.do?id=28110&l=en (Access date: 06.01.2018)

The European Parliament resolution of 16.02.2017 with recommendations to the Commission on Civil Law Rules on Robotics http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0051+0+DOC+PDF+V0//EN (Access date: 19.12.2017)

M. Buning & L. Belder & R. de Bruin, *Mapping the Legal Framework for the Introduction into Society of Robots as Autonomous Intelligent Systems* (Law of the Future Series Volume II, 2012)

https://www.fichl.org/fileadmin/fichl/documents/LOTFS/LOTFS_1_Web.pdf

(Access date: 24.12.2017)

Car and Driver, *Path to Autonomy: Self-Driving Car Levels 0 to 5 Explained* (2017) https://www.caranddriver.com/features/path-to-autonomy-self-driving-car-levels-0-to-5-explained-feature (Access date: 24.12.2017)

Revolvy, *Houdina Radio Control* https://www.revolvy.com/main/index.php?s=Houdina+Radio+Control

(Access date: 24.12.2017)

Engineering.com, *The Road to Driverless Cars: 1925 – 2025* (2016) https://www.engineering.com/DesignerEdge/DesignerEdgeArticles/ArticleID/12665/The-Road-to-Driverless-Cars-1925--2025.aspx (Access date: 24.12.2017)

Stanford University, Les Earnest, *Stanford Cart* (2012) http://web.stanford.edu/~learnest/cart.htm (Access date: 24.12.2017)

Autoevolution, Alex Oagana, *A Short History of Mercedes-Benz Autonomous Driving Technology* (2016) https://www.autoevolution.com/news/a-short-history-of-mercedes-benz-autonomous-driving-technology-68148.html (Access date: 24.12.2017)

Digital Trends, Luke Dormehl & Stephen Edelstein, *Sit back, relax, and enjoy a ride through the history of self-driving cars* (2018) https://www.digitaltrends.com/cars/history-of-self-driving-cars-milestones/ (Access date: 22.01.2018)

Wired, Tom Vanderbilt, *Autonomous Cars Through the Ages* (2012) https://www.wired.com/2012/02/autonomous-vehicle-history/ (Access date: 23.12.2017)

U.S. National Conference of State Legislatures, *Autonomous Vehicles | Self-Driving Vehicles Enacted Legislation* (2018) http://www.ncsl.org/research/transportation/autonomous-vehicles-self-driving-vehicles-enacted-legislation.aspx (Access date: 28.12.2017)

Innovate UK, *Driverless cars: 4 cities get green light for everyday trials* (2014) https://www.gov.uk/government/news/driverless-cars-4-cities-get-green-light-for-everyday-trials (Access date: 28.12.2017)

Business Insider, Mark Matousek, *The most impressive things Tesla's cars can do in Autopilot* (2017) http://www.businessinsider.com/tesla-autopilot-functions-and-technology-2017-12/#all-new-tesla-cars-have-the-necessary-hardware-for-enhanced-autopilot-but-customers-have-to-pay-to-turn-the-semi-autonomous-system-on-enhanced-autopilot-costs-5000-at-the-time-of-purchase-or-a-buyer-can-activate-it-later-for-6000-5 (Access date: 28.12.2017)

Google, Waymo - Journey https://waymo.com/journey/ (Access date: 02.01.2018)

Google, Waymo - On the Road https://waymo.com/ontheroad/ (Access date: 02.01.2018)

Financial Times, Richard Waters, *Google Owner Test First Driverless Car On City Streets* (2017)

https://www.ft.com/content/397134f8-c36c-11e7-a1d2-6786f39ef675 (Access date: 02.01.2018)

Business Insider, Danielle Muoio, *These 19 companies are racing to put driverless cars on the road by 2020* (2016)

http://www.businessinsider.com/google-apple-tesla-race-to-develop-driverless-cars-by-2020-2016-7/#baidu-a-beijing-based-search-

company-is-aiming-to-have-a-commercial-model-of-its-driverless-car-ready-by-2018-12 (Access date: 02.01.2018)

Business Insider, John Rosevear, *Here's how soon you could be riding in a driverless car* (2017) http://www.businessinsider.com/heres-how-soon-you-could-be-riding-in-a-driverless-car-2017-12 (Access date: 02.01.2018)

TEDx Cambridge, Iyad Rahwan, *What Moral Decisions Should Driverless Cars Make?* (2016) https://www.ted.com/talks/iyad_rahwan_what_moral_decisions_should_driverless_cars_make (Access date: 30.12.2017)

https://www.ted.com/speakers/iyad_rahwan (Access date: 30.12.2017)

INRIX 2016 Traffic Scorecard http://inrix.com/resources/inrix-2016-traffic-scorecard-us/ (Access date: 23.12.2017)

TomTom Traffic Index Istanbul https://www.tomtom.com/en_gb/trafficindex/city/istanbul (Access date: 23.12.2017)

The Guardian, D. Yadron & D. Tynan, *Tesla driver dies in first fatal crash while using autopilot mode* (2016) https://www.theguardian.com/technology/2016/jun/30/tesla-autopilot-death-self-driving-car-elon-musk (Access date: 21.12.2017)

CNN, Chris Isidore, *Driver killed in Tesla crash was warned seven times to put hands on wheel* (2017) http://money.cnn.com/2017/06/20/technology/tesla-autopilot-fatal-crash-warnings/index.html (Access date: 21.12.2017)

The New York Times, Neal E. Boudette, *Tesla's Self-Driving System Cleared in Deadly Crash* (2017) https://www.nytimes.com/2017/01/19/business/tesla-model-s-autopilot-fatal-crash.html (Access date: 21.12.2017)

EU Directive 85/374/EEC - Liability for Defective Products https://osha.europa.eu/en/legislation/directives/council-directive-85-374-eec (Access date: 02.01.2018)

AAA Newsroom, Erin Stepp, *Three-Quarters of Americans "Afraid" to Ride in a Self-Driving Vehicle* (2016) http://newsroom.aaa.com/2016/03/three-quarters-of-americans-afraid-to-ride-in-a-self-driving-vehicle/ (Access date: 21.12.2017)

The Guardian, Samuel Gibbs, *Jeep owners urged to update their cars after hackers take remote control* (2015) https://www.theguardian.com/technology/2015/jul/21/jeep-owners-urged-update-car-software-hackers-remote-control (Access date: 28.12.2017)

The Guardian, Dominic Rushe, *Most cars are vulnerable to 'hacking or privacy intrusions'* (2015) https://www.theguardian.com/business/2015/feb/09/most-cars-vulnerable-hacking-privacy-intrusions-senate-report (Access date: 28.12.2017)

Search Security, Ransomware

http://searchsecurity.techtarget.com/definition/ransomware (Access date: 02.01.2018)

WhatIs, Machine Learning, http://whatis.techtarget.com/definition/machine-learning (Access date: 02.01.2018)

Vox, David Roberts, *1.8 million American truck drivers could lose their jobs to robots. What then?* (2016) https://www.vox.com/2016/8/3/12342764/autonomous-trucks-employment (Access date: 04.01.2018)

Mobility Lab, Ethan Goffman, How can truck-driver jobs fit into a driverless economy? (2017) https://mobilitylab.org/2017/12/19/can-truck-driver-jobs-fit-driverless-economy/ (Access date: 04.01.2018)

The European Robotics Coordination Action, Suggestion for a green paper on legal issues in robotics, Christophe Leroux & Roberto Labruto (2012) https://www.researchgate.net/publication/310167745_A_green_paper_on_legal_issues_in_robotics (Access date: 19.12.2017)

General Data Protection Regulation (GDPR) http://ec.europa.eu/justice/data-protection/reform/files/regulation_oj_en.pdf (Access date: 04.01.2018)

39th International Conference of Data Protection and Privacy Commissioners, https://www.privacyconference2017.org/eng/index.html (Access date: 04.01.2018)

The National Law Review, Katherine E. Armstrong, *Connected Car Resolution adopted by the International Conference of Data Protection and Privacy Commissioners* (2017) https://www.natlawreview.com/article/connected-car-resolution-adopted-international-conference-data-protection-and (Access date: 04.01.2018)

The Atlantic, Adrienne Lafrance, *Self-Driving Cars Could Save 300,000 Lives Per Decade in America* (2015) https://www.theatlantic.com/technology/archive/2015/09/self-driving-cars-could-save-300000-lives-per-decade-in-america/407956/ (Access date: 23.12.2017)

Samir Chopra & Laurence White, *Artificial Agents - Personhood in Law and Philosophy* http://www.sci.brooklyn.cuny.edu/~schopra/agentlawsub.pdf (Access date: 08.01.2018)

Thomas Pérennou, *State of the Art on Legal Issues* (2014) https://ethicaa.greyc.fr/media/files/ethicaa.delivrable.1.pdf (Access date: 08.01.2018)

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