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TAX RESOULUTION OF TAX TREATY DISPUTES AND ARBITRATION

Vergi Antlaşmalarından Kaynaklanan Uyuşmazlıkların Çözümlenmesi ve Tahkim

Doç. Dr. Adil NAS[1]

Abstract

The integration of national economies and markets has increased substantially in recent years, putting a strain on the domestic and international tax rules which were designed a long time ago.

In the International tax disputes, Article 25 of the OECD Model Tax Convention provides a mechanism(Mutual Agreement Procudure-MAP), through which competent authorities of the contracting states may resolve difference or difficulties regarding the interpretation or application of the Convention on a mutually agreed basis. The Mutual Agreement Procedure (MAP) article in tax conventions allows, designated representatives (the competent authorities) from governments of the contracting states to interact with the intent to resolve international tax disputes. These disputes involve cases of double taxation (juridical and economic) as well as in consistencies in the interpretation and application of a convention.

But some cases are not solved by MAP. These cases will typically arise when the countries involved cannot agree in a particular situation that the transaction by both states in accordance with the treaty. Since the MAP as currently structured doesn't require the countries to come to a common understanding of the treaty, but only that they endeavour to agree, the result can be unrelieved double taxation or "taxation not according to with Convention" where countries cannot agree .

In addition the specific case MAP has nevertheless attracted much criticism due to the weak position of the taxpayer, who is not a party to the procedure, and the fact that the competent authorities are not under obligation to reach an agreement. The criticism has led to the increasing adaptation of arbitration clauses in tax treaties that provide for mandatory arbitration

Keywords: İnternational Tax Disputes, Double Taxation, Mutual Agreement Procedure (MAP), Arbitration, Mandatory arbitration.

Özet

Ulusal ekonomilerin ve pazarların entegrasyonu (bütünleşmesi) son yıllarda büyük ölçüde artmıştır. Bu durum çok daha önce tasarlanmış olan ulusal ve uluslararası vergi kuralları üzerinde ciddi bir baskı oluşturmaya başlamıştır.

OECD Model Vergi Sözleşmesinin 25. Maddesinde düzenleme konusu yapılmış olan Karşılıklı anlaşma usulü, uluslararası vergi uyuşmazlıklarında bir mekanizma olarak kullanılmaktadır. Karşılıklı Anlaşma Usulü yetkili vergi idareleri arasında sözleşmenin uygulanmasından kaynaklanan yorum farklılıkları ve diğer zorlukların çözümünde bir önemli bir imkan sağlamaktadır. Başka bir deyişle karşılık anlaşma usulü vergi idareleri tarafından, uluslararası vergi uyuşmazlıklarının çözümünde de etkin bir yol olarak benimsenmiştir. Bu uyuşmazlıklar Ekonomik ve Hukuki çifte vergilendirme yanında sözleşmenin yorumlanması ve uygulanmasından kaynaklanan farklılıkları da içermektedir.

Ancak bazı uyuşmazlıklar bu usul tarafından çözülememektedir. Bu anlaşmazlıklar, anlaşmaya bağlı olarak ülkelerin belli bir konuda farklı hareket etmelerinden kaynaklanmaktadır. Bu da sözleşmeye uygun olmayan çifte vergilendirme (lerin) ortaya çıkmasına neden olmaktadır.

Ayrıca bu durum mekanizmaya (karşılıklı anlaşma usulüne) bir takım yöneltilmektedir. Özellikle eleştiriler, mekanizmanın uygulanmasında mükellefin prosedüre dahil edilmemesi (veya zayıf konumu) ve yetkili vergi idarelerinin anlaşmaya varmak konusunda kendilerini zorunlu görmemelerine karşı yöneltilmektedir. Bu eleştiriler tahkimin (özellikle zorunlu tahkimin) vergi antlaşmalarına bir ek olarak konulmasını sağlamış ve zaman içerisinde yaygınlaşmasına neden olmuştur.

Anahtar Kelimeler: Uluslararası Vergi Uyuşmazlıkları, Çifte Vergilendirme, Karşılıklı Anlaşma Usulü, Tahkim Zorunlu Tahkim.

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INTRODUCTION

In recent years, the dramatic increase in international trade and investment has had very important implications for taxation especially for international taxation. Much of the attention has focused on adapting substantive tax principle to the new economic situation. As the frequency of international trade increases, so does the potential number of tax disputes have increased rapidly [2]. And as countries seek to defend their tax bases with increased vigour the implementation at OECD's base erosion and profit shifting (BEPS) proposal, the number of the disputes is likely only to increase [3].

In the international tax area, the existing Mutual Agreement Procedure (MAP) provides a general effective and efficient method of resolving tax disputes. However, there will be inevitably be cases in which the mutual agreement procedure is not able to reach a satisfactory result. The cases will typically arise when the countries involved cannot agree in a particular situation that the taxation by both states is in accordance with the treaty.

Mutual Agreement Procedure is not able to provide for all steps possible to facialete of final resolution of issues arising under tax treaties was pointed out buy the tax payer and tax administrations as one of the principle obstacles to ensuring and effective MAP. The situation causes tax payers to hesitate in making the resource commitment to enter into the MAP and likewise provides no incentive to competent authorities take all steps necessary to ensure a speedy resolution of the issues involved with the case [4].

I. BACKGROUND

The Dispute Resolution Provision of Article 25 of OECD Model (2014) has not changed over the past few decades; the provisions have never included an international institution for the settlement of dispute. Article of the OECD Model (1995) was updated in the OECD Model (2008) to add an arbitration clause in the article 25. It provides for mandatory (at the request of the taxpayer concerned) and binding arbitration as an extension of the MAP procedure. Further, paragraph 86 and 87 were added to the Commentary of Article 25 of the OECD Model (2008) to allow for implementation of other dispute resolution mechanism as part of the MAP [5].

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2 OECD Improving The Resolution of Tax Treaty Disputes, p.2.

3 Joe DUFFY, Tomas BAILEY, the Case for Mandatory Binding Arbitration in International Tax, 2016, Number 2, p.79.

4 OECD Improving The Resolution of Tax Treaty Disputes, p.4.

5 Harm J. OORTWIJN, Dispute Resolution in Cross-Border Tax Matters, IBFD, European Taxation, April 2016, p.163.

II. SCOPE OF MAP

In the international tax area, tax treaties don't contain proper procedural rules, which are instead left to the national of the constructing states. However, various clauses contained in tax treaties allow tax authorities of contracting states to corporate with each other with a view of solving cases of taxation not in accordance with the treaty by means of a mutual agreement [6]. The scope of MAP is below.

- When taxation not in accordance with the OECD Model, Tax Convention arises form an incorrect application in both states, taxpayers are then obligated to litigate in each state with all the disadvantages and uncertainties that such a situation entails. So, Article 25 of Convention makes available to taxpayers affected, without depriving them of the ordinary legal remedies available, a procedure is called the mutual agreement procedure because its aimed resolving the dispute on amicable basis [7].
- The use of domestic law remedies may have an impact on the use of the MAP. The mutual agreement procedure provided for by article 25 is available to taxpayers irrespective of the judicial and administrative remedies provided by the domestic law of the contracting states. Moreover, the constitutions and /or domestic law of many countries provide that no person can be deprived of the judicial remedies available under domestic law. In most cases, a taxpayer's choice of recourse is thus only constrained by the circumstance that most tax administrations will not deal with a taxpayer's case through the MAP and in a domestic court or administrative proceeding at the same time. Uncertainties may also arise with respect to extend to which a competent authority may deport from a decision by a domestic court. Taking account into these uncertainties, it recognizes that it may generally be preferable to pursue the MAP first and to suspend domestic law procedure(s). A domestic law resource procedure, in contrast, will only settle the issue(s) in one state and may consequently fail to relieve international double taxation issue(s) [8].
- In the international tax practice, the procedure applies to cases – by far the most numerous- where the measure in question leads to

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6 Micheal LANG, Pasquale PISTONE, Josef SCHUCH, Clauss STARINGER, The Impact of the OECD and UN MODEL Conventions on Bilateral Tax Treaties, Cambridge, 2012,p.32.

7 OECD Model Commentary art. 25. para.6.

8 OECD, BEPS ACTION 14: Make Dispute Resolution Mechanisms More Effective (Draft), 2015, p.15-16.

double taxation which it is the specific purpose of Convention to avoid. Among the most common cases are following [9]:

- The questing relating to attribution to a permanent establishment of a proportion of the executive and general expenses incurred by the enterprise,
- The taxation in the state of the payer-in case of a special relationship between the payer and the beneficial owners-of the excess part of interest and royalties,
- Cases where lack of information as to the taxpayer's actual situation has led to misapplication of the Convention, especially in regard to the determination of residents, the existing of permanent establishment or temporary nature of the services performed by an employee,
- Cases of application of legislation to deal with thin capitalisation when the state of the debtor company has treated interest as dividends.

MUTUAL AGREEMENT PROCEDURE (MAP)

A. Definition of MAP

A means through which competent authorities consult to resolve disputes regarding of double tax conventions. This procedure, which is described and authorised by Article 25 of the OECD Model Tax Convention, can be used to eliminate double taxation that could arise from tax disputes [10]. In another words, The Mutual Agreement Procedure (MAP) article in tax conventions allows, designated representatives (the competent authorities) from governments of the contracting states to interact with the intent to resolve international tax disputes. These disputes involve cases of double taxation (juridical and economic) as well as in consistencies in the interpretation and application of a convention [11]. There is also different definition of MAP [12].

B. Making A MAP Request

Where a taxpayer considers that the action of one or both countries' tax administrations result or will result in taxation not in accordance with a tax

[9] OECD Model Commentary art 25, p.8.

[10] OECD Dispute Resolution-Annes 3-Glossary (http://oecd.org/ctp/dispute/annes3-glossary.thm, 05.08.2016.

[11] OECD, Manuel on Effective Mutual Agreement Procedures (MEMAP), February 2007 Version, p.8.

[12] The MAP is the mechanism that Contracting States use to resolve any disputes pr difficulties that arise in the course of implementing and applying the treaty. (United Nations (UN) – Guide to the Mutual Agreement Procedure Under Tax Treaties, 2011,4.

convention, the taxpayer may request competent authority assistance under the MAP article of the relevant tax convention. In most cases, such an action is on adjustment to or formal written proposal to adjust, income related to an issue or transaction to which the person is a party. In another words, MAPs allows taxpayers to request intergovernmental dispute resolution by way of negotiations between the competent authorities of contracting states [13].

A request must be presented to competent authority of the taxpayer's state of residence. If the taxpayer is a non-resident of the relevant countries but is entitled to a treaty benefit based on a nationality in one country, then a request may be made to country in which it is a national. In addition, some are more flexible and allow a taxpayer to present a request to the competent authority of either contracting state. Taxpayer should refer to the tax of the particular Mutual Agreement Procedure article to determine their entitlement to present a request to a particular authority [14].

C. A Time Limit to Access the MAP

In tax disputes, the general purpose of the time limit within a convention is to prevent tax administrations from having to made react to adjustment many years after the taxable period at issue. Such late consideration of adjustment may be difficult since the information may very well be stale or no longer available. Information, records, and details regarding an issue or transaction may be very difficult to come by, especially in the case of a country that is unaware of the issue until long after taxable period of at issue.

Tax treaties frequently include one or more time limits relevant to MAP request. One type of limit is that found in Article 25 (1) of the OECD Convention it provides that a case of taxation "not in accordance with the Convention" must be "presented" to the competent authority of the taxpayer's residents country "within three years from the first notification of the action resulting in taxation not in accordance with the provision of the Convention". For most tax administrations, this generally means three years from the date of the notice of adjustment [15] the UN Mutual Agreement Procedure has same rule about time limits [16]. According to Base Erosion and Profit Shifting Project Action 14, Countries should commit to a timely resolution of MAP cases; Countries commit to seek to resolve MAP cases within an average time

[13] Roland ISMER, Sophia PIOTROWSKI, A Bit Too Much: or How Best to Resolve Tax Treaty Disputes, INTERTAX, 2016, Volume 44, Issue 5, p.352

[14] OECD, Manuel on Effective Mutual Agreement Procedures (MEMAP), p.12.

[15] OECD, Manuel on Effective Mutual Agreement Procedures (MEMAP), p.19.

[16] Under Article 25 (1) of the UN Model, a taxpayer must present its request for MAP assistance to the competent authority within three years from notification of the action resulting in taxation not in accordance with treaty (UN-Guide to the Mutual Agreement Procedure Under Tax Treaties), p.20

frame of 24 months. And countries progress towards meeting that target will be periodically reviewed on the basis of the statistics prepared in accordance with the agreed reporting framework. This reporting framework will include agreed milestone for the initiation and conclusion/closing of a MAP case, as well as for other relevant stages of the MAP process. It is also contemplated that the work to develop the reporting framework will seek to establish agreed target timeframes for these different stages of the Mutual Agreement Procedure [17].

D. MAPS WORKS

As I mentioned before, a taxpayer who considers that he is or will be taxed in a manner contrary to the treaty can appeal to the competent authority of his state residents. The authority will then in a first step examine weather objection is justified [18]. In another word, where a request made to competent authority under the MAP article of a tax convention, the competent authority should first, if the request appears to be justifies, attempt to resolve the matter unilaterally.

If the competent authority is not able itself to arrive at a satisfactory solution, it will engage the competent authority and endeavour to resolve the matter by mutual agreement procedures [19]. But there is generally no obligate to resolve the case by an intergovernmental MAP [20].

In MAP procedure, the competent authorities discuss the merits of the case or issue usually based upon a position developed by one of the competent authorities. In double taxation cases, the agreement between competent authorities will outline to what extend its jurisdiction will provide relief and how the relief will be provided. In such cases, if the other competent authority agrees to provide all or some correlative relief, then most cases the relief is provided through a " corresponding adjustment" [21].

When the agreement between the competent authorities has been reached, the taxpayer is notified in writing the decision and is provided with explanation of the result. Upon the acceptance by the taxpayer, written confirmation of the agreement is exchanged between the tax administrations and provided to the taxpayer. And any agreements reached in the course of the administration-to administrations mutual agreement procedure- must be implemented through

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17 OECD, Base Erosion and Profit Shifting Project,-Making Dispute Resolution Mechanisms More Effective – ACTION 14, 2015 Final Report, p.15-16.

18 ISMER, PIPTROWSK, p.352.

19 OECD, Manuel on Effective Mutual Agreement Procedures (MEMAP), p.17.

20 ISMER, PIOTROWSK, p.352

21 The term "corresponding adjustment" is an adjustment to the tax liability of the associated enterprise in a second jurisdiction made by the tax administration of that jurisdiction, corresponding to a primary adjustment made by tax administration in a first tax jurisdiction, so that allocation of profits by the two jurisdiction in consistent (OECD – Dispute Resolution – Annes 3. Glossary, http://www.oecd.org/ctp/disputes/annes3-glossary.htm).

adjustments of assessments and, where appropriate, tax refunds in tax law relationship concerned [22].

As I mentioned above, the MAP itself is not a judicial procedure. MAPs allow the tax administrations to reach a common understanding on their contractual obligations under international tax law and those serve a coordination function. The parties to MAPs are the states, not the taxpayer. And the competent authorities are under no obligation to reach an agreement [23].

III. THE STRENGHT OF MAP

The mutual agreement procedure that contracting countries use to resolve tax disputes or difficulties that arise in the course of implementing and applying the tax treaty. The MAP thereby ensures that this dispute will not frustrate the treaty's goal of preventing international double taxation. In order to achieve the goal, the competent authorities should make every effort to reach a timely agreement [24].

In order to resolve tax disputes, MAP is very pragmatic solver. And it has a good track record. The specific case MAP can be very flexible. Tax dispute negotiations can be conducted with considerable good faith as a consensual solution to the problem needs to be found so that no state can be forced to accept solution it consider unacceptable [25].

The mutual agreement procedure can be very cheap for the taxpayer with the main cost being administrative cost and professional adviser (lawyer, tax advisor and etc.) advisor fees.

In addition, the MAP has been implemented for a long time in many countries. As the result of common implementation, it has gained serious practice experience [26].

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22 OECD, Manuel on Effective Mutual Agreement Procedures (MEMAP), p.17.

23 ISMER, PIOTROWSK, p. 353.

24 UN Guide to the Mutual Agreement Procedure Under Tax Treaties, p.4

25 ISMER, PIOTROWSK, p. 353.

26 The first Draft Double Taxation Convention on Income and Capital was published in 1963. In 1977, OECD Publishing a Model Taxation Convention together with a commentary based on experience of the numerous bilateral double taxation treaties entered into since 1963. This Model Taxation Convention has exerted a tremendous influence on the content of tax treaties entered into, not only between OECD countries but also those entered into with or between non-member states (Marcus DESAX, Mare VEIT, Arbitration of Tax Treaty Disputes: The OECD Proposal, Arbitration International , 2007, VOl.23, No.3,p.408

IV. DRAWBACKS OF THE MAP

A. Absence of an Obligation to Resolve

MAP Cases Presented Under OECD Model Convention:

OECD Model Convention paragraph of an Article 25 provides that competent authorities "shall endeavour" to resolve MAP cases by mutual agreement. It has been argued that the absence of an obligation to resolve an Article 25 (1) MAP case is itself an obstacle to the resolution of treaty – related disputes through the MAP [27]. In another word, the existing OECD MAP framework under 25 of Model Tax Convention is undermined by the absence of an obligation on the contracting parties to resolve the disputes. Instead, contracting states are merely required to "endeavour" to resolve tax disputes [28].

B. Lack of Resources of a Competent Authority

Some competent authorities don't have enough resources. The lack of sufficient resources (personal funding, training, etc.) allocated to a competent authority in order to deal with inventory of MAP cases is likely to result in an increasing inventory of such cases and increased delays in processing these cases. This will have a very important impact on Contracting States' ability to operate an effective mutual agreement programme [29].

C. Taxpayer not Actively Involved

The third drawback of the MAP is the lack of active involvement of the taxpayer. Although OECD Model Tax Convention grants the taxpayer the right to initiate the MAP if he considers that the action by one or both of the Contacting States will result in taxation not in accordance with the provision of the OECD Convention, after the procedure has been set motion, the taxpayer has no longer involved [30]. Shortly, the taxpayer's position is weak.

D. Lack of Clarity Issues Connected with the Collection of Taxes

Where the payment of tax is a requirement for MAP access, the taxpayer concerned may face financial difficulties. If the both Contracting States collect the disputed taxes, double taxation will in fact occur and resultant cash flow problems may have a significant impact on a taxpayer's business at least for as long as it takes to solve the MAP case. Competent Authority may also find it

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27 OECD Public Discussion Draft, BEPS Action 14: Make Dispute Resolution Mechanisms More Effective,p.6.

28 DUFFY, BAILY, p.80.

29 OECD Public Discussion Draft, BEPS Action 14: Make Dispute Resolution Mechanisms More Effective, p.8.

30 DESAX, VEIT, p.410.

more difficult to enter into good faith MAP discussion when it considers that likely have to refund taxes already collected from taxpayer.

E. Lack of Co-operation, Transparency or Good Competent Authority Working Relationship

In the tax disputes, a lack of co-operation, transparency or good working relationship between competent authorities also creates difficulties for the resolution of MAP processes [31]. A good competent authority working relationship is very important part of an effective mutual agreement procedure [32]. MAP negotiations are largely held behind closed doors. The public and taxpayer mostly excluded. This appears a more problematic situation [33]. And also MAP decisions and reasons are usually kept confidential, and while confidentiality encourages specific taxpayer to take the plunge into a MAP. The Absence of published outcomes can lead to the general mess of taxpayer's being worry or even unaware of the MAP [34].

F. Time Limits to Access the MAP

Time limits connected with the MAP presents particular obstacles to an effective mutual agreement procedure. In some cases, uncertainty regarding the first notification of the action resulting in taxation not in accordance with the provision of the Convention pay presents interpretive difficulties [35]. Until OECD Base Erosion and Profit Shifting Project (Final Report Action 14: Making Dispute Resolution Mechanism More Effective), there was not time limit to assess the mutual agreement procedure. According to BEPS Project, Final Report Action 14 "Countries Should Commit to Time Limit Solution of the MAP Cases". Countries commit to seek to resolve MAP cases within an average time frame of 14 months. BEPS action 14 may help to the taxpayer remove uncertainty about mutual agreement procedure [36].

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31 OECD Public Discussion Draft, BEPS Action 14: Make Dispute Resolution Mechanisms More Effective, p.6.

32 The success of mutual agreement procedures "critically depends on strong collegial relationship, grounded in mutual trust between and among competent authorities around the world. Mutual trust foster on environment of cooperation and productivity, while a lack of trust fosters and environment of guardedness and suspicion leading to a cumbersome resolution process. (OECD, Draft, BEPS Action 14: Make Dispute Resolution Mechanisms More Effective, p.19

33 ISMER, PIOTROWSK

34 Chole BURNETT , International Tax Arbitration, Australian Tax Reviev,Vol.36, No:3,p.177-178.

35 OECD, Draft, BEPS Action 14: Make Dispute Resolution Mechanisms More Effective, p.17.

36 OECD Base Erosion and Profit Shifting Project, Making Dispute Resolution Mechanisms More Effective, Action 14; 2015 Final Report, p.15.

G. Lack of Advance Pricing Agreement (APA Programs)

As part of Alternative Dispute Resolution, Advanced Pricing Agreement (APA) is an agreement that determines, in advance of controlled transaction an appropriate set of criteria for determination of transfer pricing for those transaction over a fixed period of time. Where concluded bilaterally between treaty partner competent authorities, bilateral APAs provide an increased level of tax certainty in both jurisdictions lessen the likelihood of double taxation and may proactively prevent transfer pricing dispute. To date, however, not all countries have implemented Advanced Price Agreements [37].

V. MAP AND DOMESTIC LAW

Competent authorities of the Contracting States, i.e. generally the Minister of Finance or their authorized representatives normally responsible for the administration of the OECD Model Tax Convention authority to resolve by mutual agreement any difficulties arising as to the interpretation of the Convention. However, it's important not to lose sight of the fact that, depending on the domestic law of Contracting States, other authorities (Ministry of Foreign Affairs, courts,) have right to interpret international treaties and agreements as well as the "competent authority" designated in the Convention, and that this is sometimes the exclusive right of such other authorities [38].

Domestic law constraints may not prevent initiation of the mutual agreement procedure but may prevent in agreements' being reached by the competent authorities. Whilst, there is no presumption that domestic law constraints operate to prevent an agreement's being reached and starts have a good faith obligation to consider seriously whether an agreement can be reached notwithstanding the apparent of a domestic law constraint, it is acknowledged that the following are typical situations where this issue could arise [39].

- A state takes the view that no agreement can be reached under MAP while the same issue is actively being pursued under its domestic law dispute resolution mechanism, e.g. thorough litigation concerning the taxpayer involved in the MAP or some other taxpayer.
- A court decision in a particular case has been rendered in one State and the competent authority of that state considers that there is no legal authority to agree to a different solution of that case in the context of MAP.

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37 OECD, Draft, BEPS Action 14: Make Dispute Resolution Mechanisms More Effective, p.11.

38 OECD Commentary on Article 25 Concerning the Mutual Agreement Procedure, p.307.

39 OECD, Improving the Resolution of Tax Treaty Disputes, February 2007, p.36.

- There is a judicial or statutory interpretation of the treaty rule in one State which is not shared by other State and the competent authority of the first State considers that there is no legal authority to agree to a different interpretation under the MAP procedure.
- A State takes the position that domestic law rules are not specifically overridden by the provision of the treaty and, as a result, its competent authority considers that it does not have the legal authority to reach a satisfactory solution that would differ from domestic law.

VI. ARBITRAGE AND ARBITRATION IN TAXATION

A. Overview

The Mutual Agreement Procedure (MAP)is generally used for resolving international tax dispute. But some cases are not solved by MAP. These cases will typically arise when the countries involved cannot agree in a particular situation that the transaction by both states in accordance with the treaty. Since the MAP as currently structured doesn't require the countries to come to a common understanding of the treaty, but only that they endeavour to agree, the result can be unrelieved double taxation or "taxation not according to with Convention" where countries cannot agree [40].

The current map may not to provide for all steps possible to facilitate a final resolution of issues arising under treaties under treaties was pointed out by both tax payers and tax administrations as one of the principle obstacles to ensuring an effective mutual agreement procedures. It causes taxpayers to hesitate in making the resource commitment to enter into the MAP and likewise provide no incentive to competent authorities to take all steps necessary to ensure a speedy resolution of the issues involved cases [41]. And also The OECD Discussion Draft has acknowledged the need to improve dispute resolution mechanism, especially at a time when the number of disputes have increased, and with the work on BEPS being likely to further increase the number of treaty disputes [42].

The existing mutual agreement procedure can be improved by dispute resolution techniques (Arbitration) which can help to resolve issues which have prevented the countries from reaching agreement in a MAP. In this way, international tax disputes will get to the greatest extent possible to be resolved in a final principle, fair and objective manner for both the countries

40 OECD, Improving The Resolution of Tax Treaty Disputes, p.4.
41 OECD, Improving The Resolution of Tax Treaty Disputes, p.4.
42 Michelle MARKHAM, Mandatory Binding Arbitration – Is This A Pathway to More Efficient MAP? Arbitration International, December 2015, Oxford University Press, p.2.

and taxpayer concerned [43]. In another word, there is nop doubt that dispute resolution processes require urgent attention and improvement. As a part of dispute resolution system, arbitration provisions should be expected to increase the timelines of the MAP procedure and reduce case inventories [44].

B. Definition of Arbitration

Arbitration as a term is used for the determination of a dispute by the judgement of one or more persons, called arbitrators, who are chosen by the parties and who typically don't belong to a normal court of competent jurisdiction [45].

Arbitration as a technique for the resolution of disputes in which the parties to a dispute refer the matter to one or more independent person, referred to as "arbitrators" or an "arbitral panel" [46]. In another words, arbitration is the method of settling disputes outside of the jurisdiction of any particular court. The two (or more) parties agree to settle their disputes by the decision of one or more third party neutrals of their choosing. Though arbitration is an Alternative Dispute Resolution (ADR) method, it is similar to litigation in that by entering into it, the parties give up the right to determine the outcome of their disputes. In litigation, that third party is known as judge. In arbitration, that party is known as arbitrator or arbitral panel [47].

C. Different Types of Arbitration

Mainly; there are two types of different arbitration; mandatory or optional (voluntary) arbitration. In another word, arbitration can be an "obligatory" or an "optional" procedure. In the formal type of arbitration, the submission of specific case is subject to the consent of both parties, while in the latter the unilateral referral of a case the arbitration board is mandatory and the other party doesn't have the right to oppose this [48].

By definition, a mandatory norm is one that must be applied regardless of wishes of the parties and/or the arbitrator [49]. According to a mandatory arbitration provision, the contracting states are obliged to proceed to

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43 OECD, Improving The Resolution of Tax Treaty Disputes, p.4.
44 MARKHAM, p.2.
45 IBFD, International Tax Glossary, Seventh Revised Edition, 2015,p.25.
46 Jacques SASSEVILLE, Resolving Issues That Prevent A Mutual Agreement: Supplementary Mechanisms For Dispute Resolution, Committee of Experts on International Cooperation in Tax Matters, Geneva , October 2008, p.6.
47 Maya GANGULY, Tribunals and Taxation: An Investigation of Arbitration in Recent US Tax Conventions, Wisconsin International Law Journal, Vol.29,No.4,p.737-738..
48 LANG, PISTONE, SCHUCH, STRAINSER, STORCK, ZAGLER, p.460.
49 Jeffory WAINLYMER, Procedure and Evidence in International Arbitration Wolters Kluwer, 2012,The Netherlands, p.70.

the arbitration of unresolved MAP issues. Under a voluntary arbitration procedure, in contrast, the competent authorities must generally agree before a disagreement will proceed to arbitration [50].

In accordance of OECD Model Tax Convention Article 25 (5), mandatory arbitration due to the fact that the submission of unresolved issues to arbitration takes place at the request of taxpayer and is not conditional on agreement of either or both of the competent authorities [51]. Under the UN Model Double Taxation Convention Article 25, paragraph 5, mandatory arbitration under which the competent authorities are obliged to submit unresolved issues to arbitration if one of them so request after they were unable to resolve these issues within a given period of time [52].

D. Scope of Arbitration

Arbitration should be expected to make contribution to the effectiveness of mutual agreement procedure where there are no imitations on the types of MAP cases that may be referred to arbitration. Consistent with this view, the model arbitration provision allows to a taxpayer to request arbitration, subject to a certain conditions, with respect to any unresolved issue that have prevented the competent authorities from reaching a mutual agreement [53]. In another word, arbitration is not available independently of MAP or if the competent authorities of contacting states agree that taxation has been imposed in accordance with the treaty: it's available only where the competent authorities have not been able to reach an agreement on one or more issues. Arbitration is used to resolve certain issues within the MAP That the competent authorities cannot find the solutions. Because arbitration is a part of MAP, it is subjected to any and all limitations of MAP [54].

Even though, paragraph 68 of Commentary on Article 25 (OECD Model Convention) provides that a taxpayer should be able to request arbitration of unresolved issues in all cases dealt with under the mutual agreement procedure that have been presented under paragraph 1 all the basis that the action of one or both of the Contracting States have resulted for a person in taxation not in accordance with the provision of this convention. Some countries restrict access to arbitration to a specific range of MAP cases. In practice, some countries have followed this approach and have limited the scope of MAP arbitration to cases regarding the application of specific treaty articles, or exclude arbitration under

50 SASSEWILLE, p.7
51 Micheal LANG , Jeffery OWENS, International Arbitration in Tax Matters, IBFD, 2015, p.33
52 United Nations, United Nations Double Taxation Convention Between Developed and Developing Countries, New York, 2011, p.393
53 SASSEVILLE, p.10
54 LANG, OWENS, p.114

specific circumstances [55]. And also in some states, there may be constitutional barriers preventing arbitrators from deciding issues[56]. Further, some countries limit i,ts application to a more restricted range of cases. For example, access to arbitration could be restricted to cases involving issues which are primarily factual in nature. It could also possible to provide that arbitration would always be available for issues arising in certain classes, for example highly factual cases such as those related to transfer prising or the question of the existence of a permanent establishment [57].

Some issues are not able to resolve by competent authorities. If the mutual agreement has been reached on some but not all the issues, taxpayer is prevented from submitting the issues on which agreement had been reached to the arbitrators even the taxpayer is dissatisfied with the result. Only the remaining under solved issues may be submitted to the arbitrators for making a decision [58].

E.Arbitration Procedure

1. Initiation of the Arbitration

A taxpayer may submit a request to arbitrate by sending a writing request to the appropriate competent authority. According to OECD Model, once a MAP has run for two years without mutual agreement as to relief double taxation, a taxpayer may (but does not have to) summit a request [59]. But unresolved issues shall not be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either contracting state [60].

The request shall contain sufficient information to identify the case. Within 10 (ten) days of receipt of the request, the competent authority who receive it shall send a copy of the request and the accompanying statement to other component authority [61].

2. Terms of Reference

According to OECD Model Convention, the sustentative content of the arbitration needs to be articulated in one or more question for resolution. The OECD sample agreement calls these the Terms of Reference [62]. The Terms of Reference may also provide procedural rules that are additional to

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55 OECD, Draft, BEPS Action 14: Make Dispute Resolution Mechanisms More Effective, p.20
56 OECD, Improving The Resolution of Tax Treaty Disputes, 2007,p.7.
57 OECD, Improving The Resolution of Tax Treaty Disputes, p.7.
58 DESAY, VEIT, p.413
59 BURNETT, p.182
60 SASSEVILLE, p.11
61 OECD, Improving The Resolution of Tax Treaty Disputes, p.13.
62 BURNETT, p.183

or different from, the procedures provided in the contracting states general mutual agreement on arbitration [63].

Within three months after the request for arbitration has been received by both competent authorities, the competent authorities shall agree on the question to be resolved by the arbitration panel and communicate them in writing to go person who made request for arbitration.

If the terms of reference have not been communicated to the person who made request for arbitration within the period, that person and each competent authority may, within one month after the end of that period, communicate in writing to each other a list of issues to be resolved by the arbitration. All the lists so communicated during that period shall constitute the Tentative of Terms of Reference.

Within one month after all the arbitration have been appointed, the arbitrators shall communicate to the competent authorities and the person who made request for the arbitration a revised version of the Tentative Terms of Reference based on the lists so communicated.

Within one month after revised version has been received by both of them, the competent authority will have the possibility to agree on different Terms of Reference and communicate them.

If they do so within that period, these different Terms of Reference shall constitute the Terms of Reference for the case. If no different Terms of Reference have been agreed to between the competent authorities and communicative in writing within that period, the revised version of the Tentative Terms of Reference prepared by the arbitrators shall constitute the terms of reference for the case [64].

3. Selection of Arbitrator and Arbitral Panel

The selection of arbitrators is very important issues in the arbitration procedure . In another way, the appointment of arbitrator is a sensitive and divisive issue, with experts recognizing that in designing a tax treaty arbitration regime, few aspects are more important than the process for choosing the arbitrators (64).

The commentary on the sample mutual agreement describes how arbitrators will be selected unless the Terms of Reference drafted a particular case provide otherwise. Normally, the two competent authorities will each appoint one arbitrator. These appointments must be made within three months after the terms of reference have been received by the person who made the request for arbitration.

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63 SASSEVILLE

64 OECD, Improving The Resolution of Tax Treaty Disputes, p.13.

According to OECD Commentary on Agreement, there is no need to stipulate any particular qualification for an arbitrator as it will be in the interest of the competent authorities to have qualified and suitable persons act as arbitrators and in the interest of the arbitrators to have a qualified chair. However, it might be possible to develop a list of a qualified person to facilitate the appointment that the chair of the panel have experience with the types of procedural, evidentiary and logistical issues which are likely to arise in the course of the arbitral proceedings as well as having familiarity with tax issue. There may be advantages in having representatives of each Contracting State appointed as arbitrators as they would be familiar with this type of issue. Thus, it should be possible to appoint to the panel governmental officials who have not been directly involved in the case. Once an arbitrator has been appointed, it should be clear that his role is to decide the case on a neutral and objective basis; he has no longer functioning as an advocate for the country that appointed him [65].

But there is s strong idea against above conditions. The possibility for a competent authority to appoint a government official was heavily criticised as constituting a violation of the universally accepted principle of international arbitration that arbitrators should be neutral and independent from the parties who have appointed them [66].

Under OECD Commentatory, arbitrators thus appointed will select a chair who must be appointed within two months of time which the last of initial appointments was made. If the competent authorities do not appoint an arbitrator during the required period, or if the arbitrator so appointed do not appoint the third arbitrator within the required period, that the appointment will be made by the Director of OECD Centre for Tax Policy and Administration (CTBA) [67]. The competent authorities may, of course, provide for other ways to address these rare situations but it seems important to provide for an independent appointing authority to solve any deadlock in the selection of the arbitrators [68]. In another word, to make sure the process function in a timely manner, there are must also be a mechanism to ensure that if one of the parties does not appoint an arbitrator within time of period, one will be appointed by an Appointing Authority. But some Non-OECD Countries may have reservation about appointed arbitrator by CTBA [69].

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65 OECD, Improving The Resolution of Tax Treaty Disputes, p.20.

66 The fear was expressed that with arbitrators coming from the tax administrations involved in the case the role of the Chair will be reduced to one of a sole arbitrator. It was also pointed out the difficulty that a neutral arbitrator may have if he realises that his co-arbitrator lack the same quality(DESAX, VEİT, p.420).

67 OECD, Improving The Resolution of Tax Treaty Disputes, p.20.

68 Hugh J. AULT, Improving The Resolution of International Tax Disputes, Florida Tax Review, 2005, Volume 7, Number 3, p.148-149.

69 The subcommittee on dispute resolution has also raised questions regarding the role of the

Sample agreement of OECD provides that the appointment of the arbitrators may be postponed where the both competent authorities agree that the failure to reach a mutual agreement within two years period is mainly attributable to the lack of cooperation by person directly affected by the case. In that case, the approach taken by the sample agreement is to allow the competent authorities to postpone the appointment of arbitrators by a period of time corresponding to undue delay providing them with the relevant information [70].

4. Taxpayer Participation

A taxpayer who made the request for arbitration may, either directly or through his representatives, present his position to the arbitrators in writing to the some extent that he can do so during mutual agreement procedure. In addition, the permission of the arbitrators, the taxpayer or representatives may present his position orally during the arbitration proceedings [71]. Three constituents of right to fair are trail are implied by terms reference: the first is the right to an oral hearing; the second is the right to be present at the proceedings and third is the right to defence through legal assistance. The existence, however, of these procedural guaranties is not enough to ensure compliance with the fair trial in its particular form of right at access to a court. The procedural guaranties afforded to the taxpayer during the arbitration procedure could only make sense if there were proceedings available to the taxpayer in the first place [72]. In this case, there are no proceedings available to the taxpayer, as the taxpayer is not a party to those proceedings; therefore, the procedural guarantees of an overall hearing, of presence during the proceedings and legal of assistance are, from a human rights of point of view, (legally) meaningless [73].

In tax arbitration, granting the taxpayer right in some respect to participate in the arbitration does not necessarily mean that the taxpayer should be permitted to nominate an arbitrator. As I mentioned earlier, reason for that, efficient arbitration is best advanced by a presiding arbitrator completely independent of both the taxpayer and government [74].

Director of the CTPA in choosing the chair of the arbitral panel, in the event of a deadlock, in the contest of the UN Model Convention Non-OECD Member Countries may not accept in providing such a role for an official of an organisation of which they are not members (SASSEVILLE, p.13).

70 OECD, Improving The Resolution of Tax Treaty Disputes, p.20.

71 OECD, Improving The Resolution of Tax Treaty Disputes, p.15.

72 LANG, OWENS, p.297

73 LANG, OWENS, p.297

74 William W. PARK, David R. TILLINGHAST, Income Tax Treaty Arbitration, 2004, Fiskale en Financiele Uitgevers, Amersfoort, 2004,p.44.

5. Cost

One of the important rights of an arbitrator is entitlement to payment for services by way of fees and reimbursement of expenses. While that easy to state, the right and obligations in that regard can emanate from a range of sources. It can be emanated from an agreement between the arbitrator and the parties. An institution may be involved. There may be rules limiting the amount of fees or the arbitrator's discretionary ability to make orders in that regard as part of the award. There may be ethical issues given an arbitrator's entitlement to promote their own commercial benefit, but their concurent duty organize an efficient hearing, including ensuring reasonable cost. A careful analysis of arbitrator's entitlement to fees and expenses must thus consider a range of other duties and legal constraints [75].

In Arbitration processes, arbitrate fees are generally either determined on a time basis or on the basis of formula alignated to the amounts claimed in the dispute. These are clearly the two key models where institutional fees expenses are determined. Of the two, the "time spent" method is now the most common method used in the international arbitration. Another method is Contingency fee. In this method fee, based on the outcome in dispute, would be highly unethical and would compromise the notions of impartiality [76]. The second method generally was not accepted in international tax disputes by OECD.

According to OECD Sample Agreement, a britra cost [77]. Unless agreed otherwise by the competent authorities:

- Each competent authority and the taxpayer who requested the arbitration will bear the cost related to his own participation in the arbitration proceedings;
- Each competent authority will bear the remuneration of the arbitrator appointed exclusively by that competent authority, or appointed by the Director of OECD Centre for Tax Policy and Administration because of the failure of that competent authority to appoint that arbitrator, together with that arbitrator's travel, telecommunication and secretarial costs;
- The remuneration of other arbitrators and their travel, telecommunication and secretarial costs will be borne equally by the two Contracting States;
- Cost related to the meetings of the arbitral panel and to the administrative personnel necessary for the conduct of the arbitration process will be borne by the competent authority which

75 WAINCYMER, p.340.
76 WAINCYMER, p.340.
77 OECD, Improving The Resolution of Tax Treaty Disputes, p.15-16.

the case giving rise to the arbitration was initially presented, if in both states, will be shared equally and all other costs related to the expenses that both competent authorities have agreed to incur, will be borne equally by the two Contracting States. Some critics were made against OECD sample agreement cost rules [78].

6. Arbitration Decision

a. Time for the Arbitration Decision

The arbitration decision must be communicated to the competent authorities and the person who made the request for arbitration within six months from the date on which the Chairs notify in writing the competent authorities and the person who made the request for arbitration that he has received all of the information necessary to begin consideration of the case [79]. This time generally is not enough for arbitration procedure [80].

If the decision is not communicated within the time period set, the competent authorities may agree to extend that period by a period not exceeding six months or, if failed to do so, within one month from the end of the period they must appoint new arbitrators [81].

b. Taking of Arbitration Decision

There are two principle approaches to decision making in the arbitration process. There is the "conventional" or "independent" opinion approach, strongly resembling a judicial proceeding, where the arbitrators reach and independent decision based on applicable law, typically in the form of a written reasoned analysis. This approach is favoured by EU Arbitration Convention and in the OECD's Sample Mutual Agreement on Arbitration. The other format is the "last best offer" or "final offer" approach colloquially referred to as "baseball arbitration" and utilised by number countries, notably by the USA. It is also the approach referred in the UN Model Double Tax Convention [82]. And also this

78 It would be hard to reconcile with basic philosophy of arbitration that, by refusing bear the cost, the competent authorities have effectively a veto power with respect to administration of evidence proffered by the taxpayer and arbitration panel deems to be admissible. The arbitration practitioner is also struck by the fact that the sample Mutual Agreement on Arbitration does not provide for an advance payments of fees and cost of arbitration (DESAX, VEIT, p.426.9)

79 OECD, Improving The Resolution of Tax Treaty Disputes, p.16

80 Merely the scheduling of a meeting for three person coming from three different countries, even disregarding the wishes of the competent authorities and the taxpayer, may make it possible to meet that requirement time (DESAX, VEIT, p.427).

81 DSAX, VEIT, p.427.

82 MARKHAM, p.19.

king of arbitration referred in different names by some authors [83].

Where more than one arbitrator has been appointed, the arbitration decision will be determined by a simple majority of the arbitrators.

Unless otherwise provided in the Term of Reference, the decision is presented in writing and indicate the sources of law relied upon and the reasoning which led to the result [84]. In other words, decision must also certain processes and meet certain form requirements, including signature, adequate reasoning and service ( ). And especially the decisions were made by arbitrators should state the relevant reasons [85].

c. Publication of Decision

With the permission of the taxpayer who made the request for arbitration and both competent authorities, the decision of the arbitral panel will be made public in the redacted form without mentioning the names of the parties involved or and details that might disclose their identity and with the understanding that the decision has no formal precedential value. Under MAP processes generally, decision on individual cases not made public. In the case of reasoned arbitral decisions, however, publishing the decisions would lend additional transparency to the processes [86]. And also given the specificity of arbitration decisions, and understanding that such decisions are not intended to have any value a precedent, some contracting states may question to extend to which the publication of arbitral decision can be expected to provide useful guidance for users [87].

VII. IMPLEMENTING THE ARBITRAGE DECISION

Once the arbitration process has provided a binding solution to the issues that competent authorities have been unable to resolve, the competent authorities will proceed to conclude a mutual agreement that reflects that decision that will be presented to the taxpayer (person) directly affected by the case. In order to avoid further delays, it is suggested that the mutual agreement that incorporate the solution arrived at should be completed and presented to the taxpayer within six months from date of the communication of the decision.

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83 An arbitration process like the streamlined arbitration process in which arbitrator (or arbitrators) must choose one or the other of the parties' position, rather than come to an independent decision, is commonly referred to as "pendulum" arbitration (SASSEVILLE, p.16).

84 OECD, Improving The Resolution of Tax Treaty Disputes, p.16.

85 WAINLYMER, p.1263.

86 Alexander RUST, Double Taxation within the European Union, Wolters Kluwer, 2011, The Netherlands, p.224

87 SASSEVILLE, p.17.

Failure to assess taxpayer in accordance with the agreement or to implement the arbitration decision though the conclusion of a mutual agreement would therefore would result in taxation not in accordance with convention and, as such, would allow the taxpayer whose taxation is affected to seek relief through domestic legal remedies [88].

Beyond structural question of implementation of arbitration decision, there are a number of important practical issues which must be resolved. Who pays the cost, what language, translation and who pays the translators, where does the panel meet, is there the need for some kind of secretariat? All of these are important and should be taken into account in establishing an effective arbitration process [89].

VIII. SOME OBSTACLE TO THE MANDATORY BINDING ARBITRATION

Mandatory binding mutual agreement procedure arbitration has been included in a number of bilateral treaties following its introduction in paragraph of Article 25 of the OECD Model in 2008. Action 14 of the Base Erosion and Profit Shifting (BEPS) Action Plan recognises, however, that adaptation of MAP arbitration has not been as broad as expected and acknowledges that "the absence of arbitration provisions in most treaties and fact that access to ... arbitration may be denied in certain cases" are obstacles that prevent countries from resolving disputes through the MAP [90]. These obstacles are explained below:

A. Policy Concerns

1. National Sovereignty

One of the main policy concerns with mandatory binding mutual agreement procedure arbitration relates to national sovereignty. This concept of fiscal sovereignty maintains there should never be any delegation on or relinquishment of a party's power and authority to tax. In this context, arbitration has been described as "an anathema" to government because they are afraid that it will take taxation out of their control, and may therefore force them to allow credits or exemptions that, in their, view are justified [91].

88 OECD, Improving The Resolution of Tax Treaty Disputes, p.16.
89 AULT, p.150.
90 OECD, Draft, BEPS Action 14: Make Dispute Resolution Mechanism More Effective, p.20.
91 MARKHAM, p.6.

2. Limited the Scope of MAP Arbitration

A second obstacle to policy concern relates to access to MAP arbitration and its scope. Although Commentary on Article 25 provides that a taxpayer "should be able to request arbitration of unresolved issues in all cases dealt with under the mutual agreement procedure that have been presented under paragraph 1 on the basis that the action of one or both of the Contracting States have resulted for a person in taxation not in accordance with the provision of this Convention", some countries may want to restrict access to arbitration to a specific range of MAP cases. In practice, some OECD member countries have followed this approach and have limited the scope of MAP arbitration to cases regarding the application of specific treaty articles or exclude arbitration under specific circumstances [92].

3. The Conflict Between MAP Arbitration and Domestic Legal Remedies

According to BEPS Action 14 (DRAFT), a third important policy concern is the co-ordination of MAP arbitration and domestic legal remedies. These concerns relate particularly to avoiding risk of conflict between the decision of a court and the decision of an arbitration panel [93].

B. Practical Concerns

1. Appointment of Arbitrators

As I mentioned before, appointment of an arbitrator(s) is very important issue in arbitration procedure. There is no standard set of qualifications for prospective MAP arbitrators. Limited guidance and lack of experience with the appointment of arbitrators may take some countries hesitate to adapt MAP arbitration.

2. Conditions for Arbitration

OECD Model Convention Article 25 (5) provide for the submission for unresolved issues to MAP arbitration after a fixed period of time following the initiation of the MAP case. It's however recognized that there may an occasion, be circumstances in which initiating MAP arbitration may be premature and consequently, that this automatic referral may be an obstacle to the adaptation of arbitration by some OECD and Non-OECD countries [94].

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92 OECD, Draft, BEPS Action 14: Make Dispute Resolution Mechanism More Effective, p.20.

93 OECD, Draft, BEPS Action 14: Make Dispute Resolution Mechanism More Effective, p.21.

94 OECD, Draft, BEPS Action 14: Make Dispute Resolution Mechanism More Effective, p.25.

3. Cost and Administration

In the light of significant resource constrains experienced by many countries recent years, concern about the potential cost of MAP arbitration are an important consideration in designing the format of arbitration process. Depending upon the evidentially procedures established the compensation of the arbitration panel can constitute most significant cost of arbitration.

CONCLUSION

The integration of national economies and markets has increased substantially in recent years, putting a strain on the domestic and international tax rules which were designed a long time ago.

In the International tax disputes, Article 25 of the OECD Model Tax Convention provides a mechanism, independent from the ordinary legal remedies available under domestic law, through which competent authorities of the contracting states may resolve difference or difficulties regarding the interpretation or application of the Convention on a mutually agreed basis. This mechanisms – the mutual agreement procedure (MAP) – is of fundamental importance to the proper application and interpretation of tax treaties, notably to ensure that taxpayer entitled to the benefits of the treaty are not subject to taxation by either of Contracting States which is not in accordance with terms of treaty [95].

The specific case MAP itself is not a judicial procedure, but has a good practical track record as pragmatic problem – solver. The specific case MAP has nevertheless attracted much criticism due to the weak position of the taxpayer, who is not a party to the procedure, and the fact that the competent authorities are not under obligation to reach an agreement. The criticism has led to the increasing adaptation of arbitration clauses in tax treaties that provide for mandatory arbitration. Such tax treaty arbitration, which amounts to a practical judicilisation of the contractual state – to state relationship under tax treaties, forms an integral part of mutual agreement procedure [96].

Actually, the inclusion of binding mandatory arbitration under MAP Article of tax treaties has long been a divisive issue. And the OECD-BEPS Action 14 ; Make Dispute Resolution Mechanisms More Effective (DRAFT) lists numerous obstacles, that currently stand in the way of its widespread adaption, despite it clearly being a pathway to a more efficient mutual agreement procedure. These obstacles appear discourage, and may even suggest a "stalemate" atmosphere with little progress being made, as the OECD has referred to lack of consensus

[95] OECD, Draft, BEPS Action 14: Make Dispute Resolution Mechanism More Effective, p.25-26.

[96] OECD: Base Erosion and Profit Shifting Project – Making Dispute Resolution Mechanisms More Effective ACTION 14: 2015 Final Report.

on moving towards universal mandatory binding MAP arbitration as a reason to fall back on complementary solutions [97].

As I mentioned above, many countries were reluctant to adopt binding mandatory arbitration in their tax treaties because of concerns over sovereignty, and general perception that arbitration procedure could be lengthy, cost lots of money, and take time.

In Dispute of States may be reluctant to give up their tax sovereignty and to be bound by the decision of the arbitration panel, the arbitration clause may urge countries, especially developing countries to solve mutual agreement procedure cases in early stage, providing some certainty to both competent authorities and taxpayers [98].

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97 MARKHAM ,p.20.

98 Carlos PROTTO,Mutual Agreement Procedures in Tax Ttreaties:Problems and Needs in Developing Countries in TRANSACTİON, İNTERTAX, Volume 42, issue 3,p.178.

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DOES SHAREHOLDERS' PARTICIPATORY POWER UNDERMINE THE BOARD AUTHORITY IN THE UK COMPANY LAW?

İngiliz Şirketler Hukukunda Pay Sahiplerinin Yönetime Katilma Yetkisi Yönetim Kurulunun Otoritesini Zayıflatır Mı?

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Abstract

The financial crisis of 2007-8 has focused increasing attention on the accountability of directors. Demands of greater accountability has given further impetus on shareholder empowerment. However,in particular, director primacy theory fiercely advocates limiting shareholder power because shareholder participation undermines the board authority to manage company freely and forces the board to act in the interests of shareholders rather than in the long-term interes ts of the company. The UK perspective has not enjoyed any sustained examination of the relationship between shareholder power and the board authority.

This paper examines the amendment of articles of association, shareholders' reserve power, the appointment and removal of directors, executive remuneration and takeover regulations in the UK and the board authority under UK case law, and argues that shareholder power does not undermine the authority of the board and these two concepts are compatible with each other.

Keywords: UK company law, director primacy theory, directors, shareholders, the allocation of power, the board authority

Özet

2007-8 Finansal Krizi şirket yönetim kurulu üyelerinin hesap verebilirliği kavramını gündeme getirmiştir. Şirket yönetim kurulu üyelerinin daha fazla hesap verebilirliğini sağlamak için pay sahiplerinin yetkilerinin artırılması gerektiği savunulmaktadır. Fakat, özellikle yönetim kurulu üyelerinin üstünlüğünü savunan görüşe göre pay sahiplerinin yönetime katılması yönetim kurulunu etkisiz hale getireceğinden ve yönetim kurulunu sadece pay sahiplerinin kısa dönemli menfaatlerine odaklanmasını sağlayacağından pay sahiplerinin gücünün kısıtlanması gerekmektedir. İngiliz şirketler hukukunda pay sahiplerinin yetkileri ile yönetim kurulunun otoritesi (yetkileri) arasındaki ilişki yeterince incelenmemiştir.

Bu çalışmada pay sahiplerinin ana sözleşme değişikliği, pay sahiplerinin saklı yetkisi, yönetim kurulu üyelerinin atanması ve görevden alınması, yöneticilerin ücret düzenlemesi, şirket devralma düzenlemesi ve yönetim kurulunun otoritesine ilişkin İngiliz Mahkeme Kararları incelenecektir. Bu makale, pay sahiplerinin yönetime katılma haklarının yönetim kurulunun otoritesini zayıflatmadığını ve bu iki kavramın birbiriyle uyumlu olduğunu ileri sürmektedir.

Anahtar Kelimeler: İngiliz Şirketler Hukuku, yönetim kurulunun üstünlüğü teorisi, yönetim kurulu üyeleri, pay sahipleri, yetki paylaşımı

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INTRODUCTION

The financial crisis of 2007-8 has led policymakers to focus on the excessive risk-takings of directors and managerial accountability problems in corporate governance.[2]In the UK, shareholders have been accused of being "asleep".[3]The underlying rationale is that shareholders have not been critical about the business practices of companies in which they invest and should have monitored the board of directors.[4]To bridge the gap between shareholders and the management of companies, the UK Financial Reporting Council has issued the Stewardship Code,[5] which considers shareholder activism a positive regulatory mechanism and aims to encourage shareholder activism. some scholars also argue that shareholder empowerment is necessary for effective corporate governance and the maximisation of shareholder value.[6] Therefore, shareholder power is considered a positive corporate governance attribute.

The literature has been, however, consistently conflicted about whether shareholders should play significant power over the structure and operation of companies.[7]The question of what roles shareholders and directors should play

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2 Jennifer Hill, 'The Rising Tension between Shareholder and Director Power in the Common Law World' (2010) 18(4) *Corporate Governance: An International Review* 344.

3 Jennifer Hughes, 'FSA Chief Lambasts Uncritical Investors', *Financial Times* (11 March 2009).

4 David Walker, A Review of Corporate Governance In Banks And Financial Institutions: Final Recommendations (Nov. 2009) (Hereinafter Walker Review) at 5.10-11, *Available At*Http://Www.Hm-Treasury.Gov.Uk/D/Walker_Review_261109.Pdf.

5 The Financial Reporting Council, UK Stewardship Code, available at https://www.frc.org.uk/investors/uk-stewardship-code.

6 Bernard Black, 'Shareholder Passivity Reexamined' 89(3) *Michigan Law Review* 520; Randall Thomas, 'Improving Shareholder Monitoring of Corporate Management by Expanding Statutory Access to Information' (1990) 38 *Arizona Law Review* 331; Lucian Bebchuk, 'The Case Against Board Veto in Corporate Takeovers' (2002) 69 *The University of Chicago Law Review* 973; Lucian Bebchuk, 'The Case for Increasing Shareholder Power' (2005) 118 *Harvard Law Review* 833; Lucian Bebchuk, 'Pay Without Performance' (2006) 20(1) *Academy of Management Perspectives* 5; Lucian Bebchuk, 'Letting Shareholders Set the Rules' (2006) 119 *Harvard Law Review* 1784; Lucian Bebchuk, 'The Myth of the Shareholder Franchise' (2007) 93 *Virginia Law Review* 675; George Dent, 'Academics In Wonderland: The Team Production and Director Primacy Models of Corporate Governance' 44(5) *Houston Law Review* 1213; George Dent, 'The Essential Unity of Shareholders and the Myth of Investor Short-Termism' (2010) 35 *Delaware Journal of Corporate Law* 97; Lucian Bebchuk, 'The Myth that Insulating Boards Serves Long-term Value' (2013) 113 *Columbia Law Review* 1637; Ronald Gilson and Jeffrey Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revalulation of Governance Rights' 113 *Columbia Law Review* 863; Paul Rose and Bernard Sharfman, 'Shareholder Activism as a Corrective Mechanism in Corporate Governance' (2014) 2014 *Brigham Young University Law Review* 1014.

7 Infra (n. 10and11)

in company law is a comlex one and as old as companies themselves.[8]Each jurisdiction has its own unique system for allocating legal powers between shareholders and directors.[9]For example, while shareholders in the US have historically restricted powerin terms of corporate governance rights,[10] shareholders in the UK possess far more strong corporate governance powers.[11] Therefore, UK company law is highly shareholder-oriented in terms of corporate decision-making power.

Greater shareholder engagement or activism has not been always welcomed and has been met with apprehension and resistance in the literature[12] because it is argued that shareholder empowerment undermines the board authority and the board becomes vulnerable to shareholders and their interests.[13]Therefore, they regard shareholder empowerment as value-reducing and an intervention to the board authority to manage company freely.

While the relationship between board authority and shareholder power has been examined by US company law scholars,[14] it has not benefited a

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8 Sofia Cools, 'The Dividing Line Between Shareholder Democracy and Board Autonomy: Inherent Conflicts of Interest as Normative Criterion' (2014) 2 *European Company and Financial Law Review* 258, p. 259.

9 See, Sofia Cools, 'The Real Difference in Corporate Law between the United States and Continental Europe: Distribution of Powers' (2005) 30 *Delaware Journal of Corporate Law* 697, 703.

10 Christopher Bruner, 'Power and Purpose in the Anglo-American Corporation' (2010) 50(3) *Virginia Journal of International Law* 580, p. 581.

11 Christopher Bruner, *Corporate Governance in the Common-Law World* (Cambridge University Press, 2014) p. 28.

12 See, Martin Lipton & Steven A. Rosenblum, 'Election Contests in the Company's Proxy: An Idea Whose Time Has Not Come' (2003) *59 Business Lawyer* 67; Margaret Blair and Lynn Stout, 'A Team Production Theory of Corporate Law' (1999) 85 *Virginia Law Review* 247; Stephen Bainbridge, 'Director Primacy The Means and Ends of Corporate Governance' (2003) 97 *Northwestern University Law Review* 547; Martin Lipton and Steven Rosemblum, 'Election Contests in the Company`s Proxy An Idea Whose Time Has not Come' (2003) 59 *The Business Lawyer* 67; Lynn Stout, 'The Mythical Benefits of Shareholder Control' (2007) 93(3) *Virginia Law Review* 789; Theodore Mirvis, Paul Rowe, and William Savitt, 'Bebchuk's "Case for Increasing Shareholder Power": an Opposition' (2007) 120 *Harvard Law Review Forum* 43; Lynn Stout, *The Shareholder Value Myth* (Kindle Ed., Berret-Koehler Publishers 2012); Stephen Bainbridge, 'The Case for Limited Voting Rights' (2006) 53 *UCLA Law Review* 601; Stephen Bainbridge, 'Director Primacy and Shareholder Disempowerment' (2006) 119(6) *Harvard Law Review* pp. 1735-1758; Stephen Bainbridge, *The New Corporate Governance in Theory and Practice* (OUP, 2008); William Bratton and Michael Wachter, 'The Case against Shareholder Empowerment' (2010) 158 *University of Pennsylvania Law Review* 653; Alan Dignam, 'The Future of Shareholder Democracy in the Shadow of the Financial Crisis' (2013) 36 *Seattle University Law Review* 639.

13 See, Dignam, (n 11), Part III.

14 See n. 11.

sustained examination from the UK perspective. This paper examines whether shareholders in the are able to undermine the board authority through the amendment of articles of association, the right to direct management, the appointment and removal of directors, say on pay, takeover regulation, and the board authority under UK case law. Such an examination will also wider implications on shareholder primacy and director primacy debates.

This article argues that shareholder power does not undermine the board authority and rejects the idea that the board cannot manage companies freely where shareholders do have strong participatory power. This article proceeds to set out and defend this proposition in four parts. The first part of this introduction, after which, Part II explains the key features of UK Corporate Governance. Part III first examines whether participatory shareholder rights, which enable shareholders to incorporate their perspectives into the decision-making process undermine the authority of directors. It then analyses the extent to which the board has authority and can resist the wishes of shareholders. Part IV concludes that the authority of the board is not undermined by shareholder power and that board authority is compatible with strong shareholder power.

I. KEY FEATURES OF UK CORPORATE GOVERNANCE

Corporate Governancein the UK is generally characterised by dispersed ownership, which means that it is extremely uncommon for a UK company to have a dominant shareholder.[15] Share ownership is not concentrated in the hands of families, banks, or other institutions. Therefore, the UK corporate governance model is aptly described as an outsider system.[16] The term 'outsider' is appropriate because shareholders rarely hold enough shares to have inside influence on public companies. However, in continental Europe, large companies tend to have dominant shareholders, who are well-situated to exercise internal influence.[17]

Share ownership of UK public companies is not static. It evolved from individual ownership to institutional ownership. Institutional shareholders first began to amass sizeable stakes in UK companies in the mid-1950s.[18] In the

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15 Ruth Aguilera and Gregory Jackson, 'The Cross-National Diversity of Corporate Governance: Dimensions and Determinants' (2003) 28(3) *Academy of Management Review* 447, p 448; Brian Cheffins 'Putting Britain on the Roe map: the emergence of the Berle–Means corporation in the United Kingdom'. in J. McCahery and L. Renneboog (eds), *Convergence and Diversity in Corporate Governance Regimes and Capital Markets* (Oxford University Press, 2002) 147–70.

16 Christine Mallin, *Corporate Governance* (4th edition, OUP, 2013) Chapter 10.

17 Aguilera and Jackson (n. 14) p. 448-450.

18 John Armour and David Skeel, 'Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of US and UK Takeover Regulation' (2007) 95 *The Georgetown Law Journal* 1727, p. 1770.

1960s, institutional shareholders held approximately 45 % of the shares of quoted companies, while individual investors held approximately 55%.[19] Over time, these numbers have changed dramatically at the expense of individual investors. In 2016, the proportion of UK individual shareholders had decreased to 12.3% of shares of UK quoted companies, while the proportion of institutional shareholders had increased to 86.7 %.[20] Therefore, according to Davies, "it would be wrong to equate the UK pattern of shareholding with a fully atomised dispersal in which, for example, the largest shareholder typically holds no more than 1% of the voting rights".[21]It shows that single shareholders still do not hold large blocks f shares in UK corporations; therefore, ownership is still separated from control.

In a system of dispersed ownership, shareholders are assumed to be rationally apathetic.[22]Where a shareholder holds a small portion of shares in a company, the shareholder has very little incentive to obtain information regarding the management of the company or to exercise control over management.[23]Shareholder control and monitoring would require the expenditure of time, effort, and capital, and communication with other shareholders.[24]Accordingly, it is not always rational for shareholders to seek control because of the cost of shareholder control and the fact that the benefits of improving the performance of the company would be shared by the shareholders according to the amount of shares they hold, not according to who incurred the cost of shareholder monitoring.[25]This free-rider problem discourages shareholders from expending resources to exercise control over the company.[26] Therefore, the rational strategy for dissatisfied shareholders is to sell their shares rather than seek more control.[27]A rational shareholder engages in monitoring only if the expected benefits of shareholder monitoring exceeds its costs. Additionally, since shareholders hold a small number of

19 Office of National Statistics, 'Share Ownership Survey 2012' (25 September 2013) http://www.ons.gov.uk/ons/dcp171778_327674.pdf (last visited 10 March 2018).

20 Office of National Statistics, 'Share Ownership Survey 2016' (29 November 2017) https://www.ons.gov.uk/economy/investmentspensionsandtrusts/bulletins/ownershipofukquotedshares/2016#main-points (last visited 30 December 2018).

21 Paul Davies, 'Shareholders in the United Kingdom' in Jennifer Hill and Randall Thomas (eds) Research Handbook on Shareholder Power (Edward Elgar 2015) p. 371.

22 Black (n 10) p. 527.

23 Daniel Fischel, 'The Corporate Governance Movement' (1982) 35(6) *Vanderbilt Law Review* 1259, p. 1275.

24 Fischel, (n 22) p. 1277.

25 Fischel, (n 22) p. 1277.

26 Bainbridge, *The New Corporate Governance in Theory and Practice* (n. 11) p. 202.

27 Fischel, (n 22) p. 1277; Bainbridge (n 25) 202; Frank Easterbrookand Daniel Fischel, 'Voting in Corporate Law' (1983) 26(2) *The Journal of Law and Economics* 353, p. 420; see also, Albert Hirschman, *Exit, Voice and Loyalty* (Harvard, 1970).

shares, no shareholder would be likely to influence the outcome of voting in the company; therefore, they would hesitate to engage in monitoring actions.[28] Thus, shareholders are assumed to be inevitably passive, and the ownership and control is separated.

In a system of the dispersed ownership, the dominant paradigm is the separation of ownership and control.[29]Rational shareholder apathy leads to concerns that managers and directors could potentially act in an ill-advised or self-serving manner.[30] In economic parlance, managers could impose agency costs on shareholders.[31]Agency costs are based on the premise that individuals are rational and seeking to maximise their own private interests and managers are no exception to this premise. Agency costs arise from the costs of the opportunistic behaviour of managers, the costs of monitoring, and the costs of mechanisms which align the interests of shareholders and managers.[32]Hence, in a system of dispersed ownership, one of the primary targets of company law is to control and address agency cost problems and managerial accountability concerns.[33]

Since the Cadbury Report in 1992, and through a succession of other reports culminating in the Walker Review of 2009, UK policymakers have consistently supported encouraged shareholder activism in order to address concerns about managerial accountability and agency problems in public companies.[34]Sir Adrian Cadbury was asked to lead a committee to investigate the BCCI and Polly Peck failures caused from management fraud in 1991.[35]The Cadbury Report envisaged shareholders to play a monitoring role, that is to ensure that the board is behaving as stewards. In 1995, excessive executive remuneration in privatised companies caused a public outcry and

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28 Bainbridge, *The New Corporate Governance in Theory and Practice* (n. 11) p. 202.

29 John Armour, Simon Deakin and Suzanne Konzelmann, 'Shareholder Primacy and the Trajectory of UK Corporate Governance' 41(3) *British Journal of Industrial Relations* pp. 531-555, p. 533.

30 See generally, Adolf Berle and Gardiner Means *The Modern Corporation and Private Property* (Transaction Publishers 2009).

31 Michael Jensen and William Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3(4) *Journal of Financial Economics* 305.

32 Jensen and Mecklin (n. 30) p. 308.

33 Klaus Hopt, 'Comparative Company Law' in Mathias Reimann and Reinhard Zimmermann (eds) *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) at 1180-86.

34 Adrian Cadbury 'Report of the Committee on the Financial Aspects of Corporate Governance' (December 1992); Richard Greenbury, *Directors' Remuneration: Report of a Study Group chaired by Sir Richard Greenbury* (17 July 1995); Paul Myners, *Institutional Investment in the UK: A Review* (2001);David Walker, *Review of Corporate Governance in Banks and Financial Institutions* (2009); John Kay, *The Kay Review of UK Equity Markets and Long-Term Decision Making* (2012).

35 Iris H-Y Chiu, *The Foundations and the Anatomy of Shareholder Activism*

led to the creation of Greenbury Committee. The Report recommended greater shareholder engagement on remuneration matters. The Myners Report focused on the institutional investment and encouraged managers of the institutional shareholders to have private meetings with the management of companies. In the wake of the Financial Crisis, Sir David Walker has been asked to look into what role corporate governance issues played in the banks' crises. The Walker Report recommended shareholders to be more active as stewards of companies and suggested the publication of the Stewardship Code. In 2010, the UK Financial Reporting Council adopted the UK Stewardship Code.[36] The Stewardship Code operates on a comply-or-explain principle, and encourages institutional shareholders to engage in corporate matters. This is not limited to voting in corporate decision-making processes but also includes engaging with companies on governance, performance, capital, and environmental and social matters through both formal and informal means.[37]In the eyes of regulators, the private goals of shareholders overlap with public policy, which is to ensure the sustainability of companies and, indirectly, the economy in general by preventing managerial failures.[38]Therefore, shareholder engagement has been one of the key aspects of UK Corporate Governance.

II. THE RELATIONSHIP BETWEEN SHAREHOLDER ENGAGEMENT AND THE AUTHORITY OF THE BOARD OF DIRECTORS

While policymakers in the UK have long supported shareholder engagement with the board of directors, shareholder engagement is not always welcomed and is often found unconducive to the effective functioning of companies.[39] Director primacy theory provides the most theoretical of separation of ownership and control is efficient and shareholder is destructive for corporate governance.[40] According to this theory, it is vital from economic perspective that a central body collects all the information and exercises the power of fiat to tell the team members what to do. This theory rejects the direct or indirect shareholder control in the name of accountability into the corporate decision-

36 Financial Reporting Council (FRC), *The UK Stewardship Code 2012*< https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Stewardship-Code-September-2012.pdf>.

37 See also, Iris H-Y Chiu, 'International Shareholders as Stewards: toward a New Conception of Corporate Governance' (2012) 6 *Brooklyn Journal of Corporate Finance and Commercial Law* 387; Lee Roach, 'The UK Stewardship Code' (2011) 11 *Journal of Corporate Law Studies* 463; Brian Cheffins, 'The Stewardship Code's Achilles' Heel' (2010) 73 *MLR* 1004.

38 Iris H-Y Chiu, *The Foundations and Anatomy of Shareholder Activism* (Hart, 2010) 33-63;

39 Seesupra n 11.

40 See generally, Bainbridge, *The New Corporate Governance in Theory and Practice* (n. 11).

making.[41] In a system where shareholders routinely control and interfere with corporate decisions, the board's power of fiat becomes diluted and advisory rather than authoritative. Hence the theory argues that accountability and authority are antithetical.[42] Any attempt to address managerial accountability concerns through shareholder empowerment would undermine the board authority, which would in turn be value-reducing for the functioning of corporate governance.

Under this theory, shareholder engagement could have the detrimental impacts on the long-term interests of companies because shareholders may have short-term preferences and prefer to hold shares for such a short duration.[43] The influence of short-term shareholders arguably leads the boards to focus on the short-term gains and to overlook the long-term value creation.[44] It plays a role in the boards' propensity to underinvest in long-term business strategies.[45]Likewise, Dignam argued that the UK learned wrong lessons from the recent financial crisis because activity of shareholders rather than passivity of shareholders is the major problem.[46]It is also claimed that short-term preferences of shareholders are transmitted to the board and affect the board discretion.[47]Accordingly, shareholder participation affects corporate decision-making and corporate time horizons, and the boards are not completely free to decide on corporate investments and time horizons.

It must be, however, assessed whether UK company law allows shareholders to undermine the board authority to manage company. By examining the shareholder rights and case law related to the board authority, it will be clearer whether UK company law allows shareholders to undermine the authority of the board of directors.

1. The Role of Shareholders in UK Corporate Governance

UK company law considers the division of power between the board of directors and shareholders a contractual matter which should be laid down in the articles of association.[48] As far as most of the substantive matters required for the general conduct of a company are concerned, they are to be regulated

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41 Bainbridge, 'The Means and Ends of Corporate Governance' (n 11) p. 563.

42 Bainbridge, 'The Means and Ends of Corporate Governance' (n 11) p. 573.

43 See for the short-termism argument, Mark Roe, 'Corporate Short-Termism - In the Boardroom and in the Courtroom' (2013) 68 *The Business Lawyer* 978, p. 985.

44 Dignam (n. 11).

45 John Kay, 'The Kay Review of UK Equity Markets and Long-Term Decision Making' Final Report (BIS 2012) p. 10.

46 See also, Dignam (n. 11).

47 Andrea Bowdren, 'Contextualising Short-Termism: Does the Corporate Legal Landscape Facilitate Managerial Myopia' (2016) 5(2) *UCL Journal Of Law And Jurisprudence* 285.

48 385; Alan Dignam and John Lowry *Company Law* (8th Edition, Oxford University Press 2012), 287.

through the articles of association rather than the CA 2006, as opposed to many jurisdictions.[49]This also highlights the enabling and flexible approach of UK company law.[50]

It is, therefore, essential for companies to have articles of association.[51] Section 19 of the Companies Act 2006 (CA 2006) authorises the Secretary of State to promulgate the model articles of association for different types of companies. Unless companies choose otherwise, the model articles apply to companies.[52] Most people tend to use model articles[53] (default articles of association) given by the Companies Act (CA) 2006.[54] In this regard, the Companies Act 2006, the model articles and case law will be used in examining shareholder power and the board authority for decision-making in the UK. However, it should be noted that it is impossible to analyse every shareholder right in a short article; therefore, the focus will be merely on shareholder power to intervene directly in corporate governance. In this regard, this article will examine the amendment of articles of association, the reserve power of shareholders, the appointment and removal of directors, say on pay regulation, and takeover regulation.[55]

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49 Sec. 17 of the Companies Act 2006; Paul Davies and Sarah Worthington, *Principles of Modern Company Law* (10th Edition, Sweet&Maxwell, 2016), p. 58-61.

50 Dan Prantice, 'The Role of Shareholders in the UK' in Sabrina Bruno and Eugenio Ruggiero (eds) *Public Companies and the Role of Shareholder* (Kluwer 2011) p. 196.

51 Sec. 18 of the CA 2006.

52 Sec. 20 of the CA 2006.

53 The model articles which apply unless excluded by shareholders might be helpful to understand the distribution of decision-making power in UK company law. For public and private companies, two different types of model articles have been issued.

54 Alan Dignam, 'The Future of Shareholder Democracy in the Shadow of the Financial Crisis' (2013) 36 *SeattleLaw Review* 636, p. 660.in the form of \"stewardship\" and shareholder engagement, is an error built on a misunderstanding of the key active role shareholders played in the enormous corporate governance failure represented by the banking crisis. Shareholders' passivity,2 rather than activity, has characterized the reform perception of the shareholder role in corporate governance. This characterization led to the conclusion that if only they were more active3 they would be more responsible \"stewards\" of the corporation. If, as this Article argues, shareholder activity was part of the problem in the banks, then encouraging increased shareholder action and exporting it outside of banks, as we have subsequently done in the United Kingdom, risks a wider systemic corporate governance failure. In short, we have learned the wrong lesson about shareholders from the bankin", "author" : [{ "dropping-particle" : "", "family" : "Dignam", "given" : "Alan", "non-dropping-particle" : "", "parse-names" : false, "suffix" : "" }], "container-title" : "Seattle Law Review", "id" : "ITEM-1", "issue" : "138", "issued" : { "date-parts" : [["2013"]] }, "title" : "The Future of Shareholder Democracy in the Shadow of the Financial Crisis", "type" : "article-journal", "volume" : "639" }, "uris" : ["http://www.mendeley.com/documents/?uuid=bf028087-ffbf-4817-ac65-a8828c0bff8d"] }], "mendeley" : { "formattedCitation" : "Alan Dignam, \u2018The Future of Shareholder Democracy in the Shadow of the Financial Crisis\u2019 (2013

55 In the context of shareholder power to intervene in the management of companies,

a. Amendment of Articles of Association

Articles of association play a remarkable role in UK corporate governance because the regulation of internal affairs of a company is left to be regulated through them. Therefore, the division of power between shareholders and the board is regulated through articles of association.

The articles can be altered by a special resolution in a general meeting, since any changes in the articles of association affect the balance between the shareholders and directors, and between shareholders and shareholders.[56] As the Act requires a special resolution in order to alter the articles, at least 75% of the total voting rights of the members who (being entitled to do so) vote in person, by proxy or in advance on the resolution.[57]

Accordingly, shareholders can amend the articles without the involvement of the board and are not inferior and powerless. Such an ability gives rise to the concern that shareholders could collect all corporate decision-making power through a change in articles of association at the expense of the board authority. However, as noted above, high majority of public companies apply model articles of association for public companies, which lays down that 'Subject to the articles, the directors are responsible for the management of the company's business, for which purpose they may exercise all the powers of the company'.[58] As seen, shareholders understand and recognise the value of the board authority. In addition, given the collective action problems mentioned above, it is extremely difficult for a shareholder proposal to satisfy the high threshold required for the amendment of articles of association, which does not benefit to all shareholders. Hence, the high threshold and the behavioural limitation arising from the coordination difficulties serve a filtering role and prevents the ill-considered shareholder proposals.

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academics tend to examine the amendment of articles of association, shareholders' reserve power, the appointment and removal of directors, takeover regulation in order to highlight how shareholder-centric UK corporate governance is. Bruner, for instance, analyses the right to call special meetings, remove directors without cause, initiate charter amendments, approve takeover rights to show that UK shareholders possess substantial power to intervene directly in corporate governance, see Christopher Bruner "Power and Purpose in the Anglo-American Corporation" 50(3) *Virginia Journal of International Law* 580, p. 603; Bebchuk, for example, places focus on the amendment of articles of association, the replacement of directors, the reserve power of shareholders, and takeover regulation to highlight the extent to which shareholders could intervene in corporate governance, see Lucian Bebchuk, "*The Case for Increasing Shareholder Power*" 118(3) *Harvard Law Review* 833, p. 847.

56 Sec. 21 of the CA 2006.

57 Section 283(5) of the CA 2006.

58 Article 3 of Model Articles for Public Companies.

b. The Reserve Power of Shareholders

Until the end of nineteenth century, it was broadly accepted that the general meeting was the supreme decision-making body of the company and the board of directors was subject to the control of the general meeting.[59]However, the Court of Appeal in *Automatic Self-Cleansing Filter Syndicate v. Cuninghame*[60] held that the division of power between shareholders and directors depended on the articles of association and that, where articles of association provided the board with the power, general meeting cannot interfere in how the board exercise its power.Since *Quin &Axtens v Salmon,*[61] it has been acknowledged that shareholders cannot interfere with a decision of the board where the power is vested in the board of directors. The modern doctrine was stated in *Shaw & Sons (Salford) Ltd v Shaw*[62] as follows:

"A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors; certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to reelect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders".

The model articles of association contains specific articles now make clear that the authority of the board of directors is subject to the articles, and that shareholders have reserve power.[63]Article 4 of the Model Articles of Association lays down that shareholdersby a special resolution, can direct the directors to take or refrain from taking a specified action.[64]This is an instruction right by which shareholders can tell the board and management what to do.It should be noted that special resolution giving instruction to directors does not have any effect on the validity of the decision taken by the directors before the passing of the resolution. UK companylawprovidesshareholders an uniqueright, which is almost a reminder that shareholders are at the heart of UK corporate governance. As a result, UK company law is more generous than many other

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59 Paul Daviesand Sarah Worthington, *Principles of Modern CompanyLaw*(10th Edition, Sweet&Maxwell, 2016) p. 358.

60 *Automatic Self-Cleansing Filter Syndicate v. Cuninghame* [1906] 2 Ch. 34 CA.

61 *Quin &Axtens v Salmon* [1909] 1 Ch. 311; [1909] AC 442.

62 *Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 K.B. 113 CA.

63 Article 4 of the Model Articles of Association.

64 Article 4 of the Model Articles.

jurisdictions in this regard. However, as a practical manner, it may not be worrying in terms of the board authority because of the collective action and free-rider problems mentioned above.

c. Appointment and Removal of Directors

aa. The Nomination and Appointment of Directors

The appointment of directors is an important mechanism that incentivises the board to perform better and to reduce agency cost and accountability problems in corporate governance.[65] The right to nominate and appoint directors, i.e. a competitive board election, is a means of providing discipline on the board of directors[66] and management.

Despite its importance, the Companies Act 2006 is almost silent about the appointment of directors[67] and only requires that the appointment of each director must be voted for separately.[68] In the absence of any specific regulation, according to Article 20 of the Model Articles, the general meeting has the power to appoint a director by an ordinary resolution which is adopted by a simple majority.[69] There is no restriction on the ability of shareholders to nominate a director. However, contested elections are rare rather than being a norm in the UK.[70] Davies argues that due to the provisions in the articles of association, it may be difficult for shareholders to nominate a director instead of the board's candidates.[71] In practice, the board usually prepares a list of proposed candidates for the board for the shareholders to appoint; therefore, shareholder appointment can be a formality.[72]Therefore, shareholders rarely interfere in the election of directors.

bb. The Removal of Directors

As seen above, company law does not interfere heavily in the appointment process, which is regulated predominantly by the articles of association. By contrast, section 168 of the CA stipulates that a director could be removed by a simple majority of shareholders at any time without any reason for so doing.

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65 Lucian a Bebchuk, 'The Myth of the Shareholder Franchise' (2007) 93 *Virgina Law Review* 675, p. 679.

66 See Lucian Bebchuk, 'The Case for Shareholder Access to the Ballot' (2003) 59(1) *The Business Lawyer* 43.

67 Len Sealy and Sarah Worthington, *Sealy's Cases and Materials in Company Law* (9th edition, Oxford, 2010), p. 265.

68 Section 160 of the CA 2006.

69 Section 282 of CA 2006.

70 Bebchuk (n 63) at 725.

71 Davies and Worthington (n 52) p. 367.

72 Paul Davies, 'Corporate Boards in the UK' in Paul Davies et al (eds) *Corporate Boards in Law and Practice* (OUP 2013) p. 744.

This section could be enforced even if there is, 'anything in any agreement between it and him'.[73]

It can easily be argued that the right to remove a director by an ordinary resolution significantly restrains the discretionary power of the board and provides a strong bargaining power to shareholders,[74] because directors are aware that they could easily be removed by shareholders in the case of disobedience of shareholders' instructions. This can undermine the value of the board's authority and management, and put shareholders in a position where they can impose their selfish demands on management.

There is, however, one formal and one behavioural limitation that restrict the ability of shareholders to remove directors, and it will be shown that shareholders can remove directors in the case of serious misconduct rather than for arbitrary reasons.

First, under section 168(5) a director cannot be deprived of any claim for compensation in the event of termination. The resolution removing a director may oblige the company to pay a substantial amount of compensation, which can be around several million pounds, if section 168 is triggered without any reasons – other than for serious misconduct. This can be prohibitive for shareholders unless there are solid reasons to remove directors.

The second limitation comes from coordination problems and the market culture of the UK. Shareholders need to form a coalition to remove the board of directors or management. Such coalitions are indeed formed in practice, but rarely, and on an ad hoc basis.[75]Historically, British institutional investors tend to oust management in poor performances.[76] The removal of management takes place when the lack of ability of management became evident or there is no doubt that the company's management is wrong. Until this point, institutional investors are in contact with the existing management.[77] Once a large institution has strong suspicion about the financial situation of the company, this proactive institution raises voices against the impugned management through 'behind-the-scenes negotiation'[78] and starts seeking support from other investors.

As a result, shareholders have a very strong right to remove a director by an

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73 Section 168(1) of the CA 2006.

74 See Dignam (n 11) p. 660.

75 Bernard Black and John Coffee, 'Hail Britannia?: Institutional Investor Behavior under Limited Regulation' (1994) 92(7) *Michigan Law Review* 1997, p. 2044-6.

76 RafelCrespi and Luc Renneboog, 'Is (Institutional) Shareholder Activism New? Evidence from UK Shareholder Coalitions in the Pre-Cadbury Era' (2010) 18(4) *Corporate Governance: An International Review* 274.

77 GeofStapledon*Institutional Shareholders and Corporate Governance* (Clarendon Press 1996) 123.

78 Stapledon (n 91) 125.

ordinary resolution at any time. Such a right could be possibly used to influence the way in which the board manages the company because a director will be aware that disobedience may result in the removal from office. However, the formal and the behavioural limitations prevents shareholders from using the right to remove only for their own interests; therefore, shareholders are less likely to undermine the discretion of the board.

d. Say on Pay Regulation

The remuneration of directors and managers comes from fees paid to them and other monetary benefits under service contract entered into by them and company itself. This has been and continue ahuge source of concerns and controversy. The UK has preferred to address this controversy by making the executive remuneration contracts subject to shareholder approval.[79]

The first steps to implement an executive remuneration regulation were taken by the UK Department of Trade and Industry (DTI) in the 2000s. The DTI suggested that shareholder engagement would be more efficient if a legal framework requiring a shareholder vote on executive pay were to be provided.[80] The DTI reasonably believed that, under appropriate circumstances, shareholders might exert better controls over the pay-setting process. The UK introduced a non-binding 'say on pay' reform in 2002, through the Directors' Remuneration Report (DRR) regulations, and remuneration decisions were not based on the approval of shareholders. Under section 420 of the Companies Act 2006, the directors of a listed company are required to prepare a DRR for each financial year of the company. This approach also demonstrates the traditional British approach of negotiated regulation, which imposes a balanced bottom-up approach to solve problems without heavy regulatory involvement.[81]

Shareholder dissent has been observed in a number of high profile cases. For instance, in 2003, the golden parachute for the CEO of GlaxoSmithKline, which amounted to $35 million was not approved by shareholders and their dissenting view led to the rejection of the remuneration committee's report.[82] Since the enactment of 'say on pay' regulation, it has attracted attention from the academic literature. The impact of the regulation is controversial. Some empirical evidence suggests that the regulation had no substantial impact on

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79 Jeffrey Gordon 'Executive Compensation: If There's A Problem, What's the Remedy? The Case for 'Compensation Discussion and Analysis'' (2005) *The Journal of Corporation Law* 675, p. 698.

80 Department of Trade and Industry (DTI), 'Rewards for Failure' Directors' Remuneration - Contracts, Performance and Severance' (2003) p. 8.

81 Iris HY Chiu, 'Learning from the UK in the Proposed Shareholders' Rights Directive 2014? European Corporate Governance Regulation from a UK Perspective' (2015) SSRN Paper 2589173.

82 Gordon (n 111) 700.

executive pay growth.[83] Nevertheless, it might have 'a moderating effect on the level of CEO compensation only *conditional upon poor performance*'.[84] Shareholders express their dissatisfaction more where executive remuneration is higher than average and not related with the performance.[85]Ferri and Maber argue that shareholders 'regard say on pay as a value-creating governance mechanism.'[86]

After the financial crisis, the growing public opinion against high executive remuneration prompted debates on the potential introduction of binding shareholder votes on the remuneration policy of a company. In 2013, the UK adopted a binding shareholder vote on the directors' remuneration policy, to take place at least every three years.[87] It has to be highlighted that the UK Listing Authority will continue to require the approval of shareholders for *employees' share schemes* and *long-term incentive schemes*.[88]

With regard to the directors' remuneration reports, shareholders basically vote on two reports: a backward-looking annual report (advisory) and a forward looking remuneration policy (binding at least every three years). The first report is related to the implementation of remuneration policy reports and is subject to an advisory vote of the shareholders every year. The major decisions as to remuneration, the major changes during the year, and the reasons for changes must be stated by the chair of the remuneration committee.[89] The annual report on remuneration must contain information with regard to how much directors have been paid, and how the remuneration policy will be enforced. Furthermore, the report must include a single total figure for each director, and in particular, a table setting out the details of their remuneration.[90] The report enables investors to analyse the remuneration in the context of corporate performance, cash flow, and remuneration of the wider workforce. Shareholders will deliver their opinion through the annual advisory vote under section 439 of the CA 2006.

The second report is concerned with the remuneration policy of the company, which contains information about, 'the making of remuneration payments and

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83 FabrizioFerri and David A. Maber 'Say on Pay Votes and CEO Compensation: Evidence from the UK' (2013) 17*Review of Finance* 527 528 (emphasis added).

84 Ferri and Maber (n 115) 530.

85 See Randall Thomas and Christoph Van Der Elst, 'Say on Pay Around the World' (2015) 92 *Washington University Law Review* 653 666.

86 See Ferri and Maber (n 115) 534.

87 Section 439A of CA 2006; see also BIS, *Directors' Remuneration Reform: Frequently Asked Questions* (2013) p. 4.

88 Listing Rules 9.4.

89 The Large and Medium-sized Companies and Groups (Accounts and Reports) (Amendment) Regulations 2013 (SI 2013/1981), Part 2 of Schedule 8.

90 SI 2013/1981 (n 80) part 3 of Schedule 8.

payments for loss of office'[91] and is subject to a binding vote by shareholders.[92] Section 439A of CA 2006 introduced a new part to the directors' remuneration policy. The remuneration policy must account for how the pay arrangements affect the short and long-term strategies of the company.[93] In short, this policy report ensures that investors are able to understand the general remuneration policy, and how the pay arrangements are related to performance.

Consequently, shareholders have an advisory vote on a backward-looking report and a binding vote on a forward-looking remuneration policy report.

e. Takeover Regulation

The UK takeover regulation is often used to elucidate how shareholder-centric UK corporate governance is[94];however, it will be also shown here that the board still plays a role in a shareholder-oriented model.

The market for corporate control regards takeovers as an important mechanism for aligning the interests of directors and managers with the interests of shareholders.[95]This approach assumes that there is correlation between corporate managerial efficiency and the share price of companies.[96] If the existing management of the company underperforms, share prices will drop and other market participants may consider it an opportunity to take over the company.[97] However, the theory may not function as a disciplinary mechanism in the market. It is also argued that the threat of takeover may force the board to satisfy the share price expectation of shareholders in order to prevent them from selling their shares to a predator.[98] Accordingly, the focus will be on increasing share prices at the expense of the long-term investment and research and development (R&D) and job growth due to the threat of takeovers. Therefore, Martin Lipton, for instance, advocated to stop hostile takeovers to deal with short-termism problem.[99]

The extent to which the market for corporate control may align the interests of shareholders and managers depends on the legal and regulatory landscape.

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91 Section 421(2A) of the CA 2006.

92 Section 439A of the CA 2006; see also Statutory Instrument, *The Large and Medium-sized Companies and Groups (Accounts and Reports) (Amendment) Regulations*, (2013) No. 1981, Part 4.

93 SI 2013/1981 (n 80) part 4 of Schedule 8.

94 Bruner (n. 9) p. 32.

95 Henry Manne, 'Mergers and the Market for Corporate Control' (1965) 73 *Journal of Political Economy* 110.

96 Manne (n. 84) p. 112.

97 Manne (n. 84) p. 113.

98 Bowdren (n. 46) p. 296.

99 Martin Lipton, 'Takeover Bids in the Target's Boardroom' (1979) 35 *Business Lawyer* 101, p. 104.

In the UK, a quasi self-regulatory approach has been adopted, regulating takeovers through The City Code on Takeovers and Mergers (the Takeover Code), and establishing a Panel on Takeovers and Mergers (the Takeover Panel) to administer the Takeover Code and to enforce it.[100] The Takeover Panel was formed by primarily institutional shareholders and investment bankers operating in the City of London, where the business community is based. While these groups were powerful in the UK, corporate managers were not in a position to influence the formulation of the Takeover Code, unlike their counterparts in the US.[101] Institutional investors were key players in the formation of takeover regulation in the 1960s. This also coincidences with the time when they became the key players in the market in the UK.[102] It is reasonable to conclude that institutional shareholders have been key players in the establishment of governance rules in the UK since they emerged in the 1950s.

The UK legal framework is very prohibitive of employing anti-takeover tactics without the consent of shareholders and is strikingly shareholder oriented.[103] Regulation in the UK has been based on the 'no frustration' rule. It considers the takeover to be a transaction between the bidder and the shareholders of the target company; therefore, the board of directors, in principle, does not have legitimate grounds to take action.[104] The core tenet of the UK takeover regulations is that the future of the target corporation rests only with its shareholders.

In the UK, Rule 21 of the Takeover Code does not allow managers to take any frustrating actions without the approval of shareholders, 'during the course of an offer, or even before the date of the offer if the board of the offeree company has reason to believe that a bona fide offer might be imminent'.[105] This 'no frustration' rule is only applicable when a bid is imminent. The rules attribute the directors an advisory role and leave the final decision to the shareholders. It was similarly decided in *Dawson International Plc v Coats Paton Plc* that the board is under a duty to provide their honest view about the effects of the takeover on the company to shareholders.[106]

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100 In the UK, in particular institutional shareholders played a pivotal role in the development of takeover code in order to avoid *ex-post* litigation. See John Armour and David A. Skeel 'Who Writes the Rules for Hostile Takeovers, and Why?— The Peculiar Divergence of U.S. and U.K. Takeover Regulation' (2007) 95 *The Georgetown Law Journal* 1727, p. 1731.

101 See for the history of the formation of the Takeover Panel, Armour and Skeel (n 86) at 1730.

102 Armour and Skeel (n 86) p. 1767.

103 John Armour et al., 'Shareholder Primacy and the Trajectory of UK Corporate Governance' (2003) 41(3) *British Journal of Industrial Relations* 531, p. 534.

104 Davies (n 52) 1010.

105 Rule 21 of Takeover Code; See also general principle 3 of the Takeover Code.

106 *Dawson International plc v Coats Paton plc and others* (1989) BCLC 233.

Defensive mechanisms such as the issue of new shares attached more voting rights, the use of golden shares, or setting very high compensation for managers are, however, still possible if they are imposed well before any bid. However, this so-called 'embedded mechanisms' are less likely to be successful because the issue of new shares is subject to shareholder approval; while dual class voting rights are not specifically prohibited,[107] they are not welcomed by institutional shareholders. Furthermore, as seen below, the issue of share for purposes other than commercial purposes might be considered a breach of fiduciary duties due to the improper use of authority to retain their positions rather than seeking the interest of company.

The takeover regulation in the UK has been criticised on the grounds that it increases the vulnerability of UK companies to takeovers, and that it leaves the company's fate in the hands of the shareholders.[108]The acquisition of the Cadbury by Kraft[109] heated the debate about short-term investors and this takeover is attributed to the increasing ownership of the short-term investors, hedge funds, instead of the long-term shareholders in the company. Hedge funds were blamed for this takeover and argument against hedge funds such as short-termism at the expense of long-term profitability of company played a role in calls for the reforms of the UK takeover regulation.[110] Although the bid was accepted by shareholders, some mainstream shareholders such as Legal & General and Frankling Mutual Advisers disapproved the transaction on the basis that the bid does not reflect the fundamental value of Cadbury; yet, some institutional investors argued that Cadbury is sold because of the underperformance over years, the less skilled management for company's operations, and mistrust to management.[111]

The boards in the UK holds indirect power to prevent a hostile takeover by advising the target shareholders.[112] The view of the board' influence does not only find ground in theory but also is supported in some empirical research.[113]

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107 Stapledon (n 91) at 58-60.

108 Bowdren (n. 46) p. 298.

109 Tim Webb, 'Lord Mandelson Calls for Overhaul of Takeover Rules' *The Guardian* (1 March 2010).

110 Tsagas (n 136) at 269.

111 Jenny Wiggins 'The inside story of Cadbury Takeover' *The Financial Times* (12 March 2010); Zoe Wood, 'Kraft Set for Higher Cadbury Bid as Deadline Looms' *The Guardian* (18 January 2010).

112 Paul Davies and Klaus Hopt, 'Control Transactions' in Reiner Kraakman et al (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (2nd edn, OUP 2009) at 235; see also, Georgina Tsagas, 'A Long-Term Vision for UK Firms? Revisiting the Target Director's Advisory Role since the Takeover of Cadbury's Plc' (2014) 14 *Journal of Corporate Law Studies* 241.

113 Blanaid Clarke 'Reinforcing the Market for Corporate Control' (2010) *UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper* No 39/2010 at 11.

Following the heated debates among British community the Panel added a new section to the notes explaining Rule 25.2, which sets out that the board could take into consideration financial merits of the offer as well as other relevant factors, and bid price is not the only factor in providing opinion to the board. In the context of section 172 of CA 2006, general duties of directors, the new interpretative notes to the Rule 25.2 and general principle 3 of the Takeover Code, the board of directors have broader discretion and can consider a range of issues from financial merits of the bid to sustainability of the company in the formation of their opinion as to the bid.

In the UK, therefore, the board of directors play an indirect role in the context of takeovers. Directors can issue their opinion in prioritising the sustainability of company or the interest of the future company. The board could ensure that shareholders make informed decision about the takeover bid. If shareholders finds the board's opinion that the bid does not reflect the long-term value of company, shareholders could overturn the offer, but this depends on the trust between the board and shareholders.

2. The Role of the Board of Directors in UK Corporate Governance

The section above demonstrated the favourable treatment of UK company law to shareholders. Shareholders have an arsenal of participatory power to shape the rules of corporate governance. However, the analysis above demonstrated that the market and coordination problems prevent shareholders from exercising their rights arbitrarily, and that the board plays an important role by ensuring that shareholders exercise informed voting. As noted above, article 3 of the model articles for public companies confers a broad range of powers on the board to manage company. Article 3 stipulates that "*subject to the articles, the directors are responsible for the management of the company's business, for which purpose they may exercise all the powers of the company*". It is therefore necessary to analyses whether the board is able to exercise its power to manage the company. When there is a conflict between this broad managerial power of the board, and the participatory rights of shareholders, the court may have to interfere and determine the outcome. Striking a balance between the board's authority and accountability to shareholders was not a straightforward task for the court. The core question is here whether the board of directors is able to take decisions against the wishes of shareholders.

At the beginning of the twentieth century, the court stopped equating shareholders with the company and recognising directors as the shareholders' agent in *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cunninghame.*[114] The court decided that the power given to the board could be exercised by them and that shareholders have no power to interfere with their discretion.In another

[114] [1906] 2 Ch. 34, CA.

decision, the court denied that directors are agents of and bound to serve shareholders and accepted that the company can be the only principal of the directors.[115]

The modern doctrine on the legal effect of the articles of association as to the division of power among shareholders and directors is established in *Shaw & Sons (Salford) Ltd v Shaw*[116]and reiterated in *Howard Smith Ltd v Ampol Petroleum Ltd*:

Just as it is established that directors, within their management powers, may take decisions against the wishes of the majority of shareholders, and indeed that the majority of shareholders cannot control them in the exercise of these powers while they remain in office.[117]

In a relatively recent case in 2001, the court applied the same line of reasoning.[118]It seems clear that where the default regime is applied the common law protects and respects the authority of the board of directors. In principle, the board of directors is not obliged to follow the shareholders' demands at general meetings or through other means unless there is a special provision in the articles.[119]It is difficult to deduce that the board is vulnerable to activist shareholders as a result of the allocation of power between shareholders and directors. However, it is still possible that the authority of the board could be restrained by a special resolution directing the directors what to do,[120] but in practice, it might be very difficult. Moreover, the removal of directors has, of course, influence on the bargaining power of shareholders, which will be examined in the following sections.

The way in which directors are allowed to exercise their power can also constitute a limitation to their discretion. The authority of the board of directors is subject to the general duties of directors in order to ensure that the delegated power is not misused. This is also related with the broader questions of what are the objectives and interests of the company? In the light of the approach explained above, the general formulation of directors' duties does not confer any obligation to focus on merely shareholder interests. Rather, section 170 clearly sets out that the duties are owed to the company. Section 172 mandates

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115 *Gramophone and Typewriter v Stanley* [1908] 2 KB 89 at 106; Likewise, the decisions of a general meeting instructing the board to distribute interim dividend were found invalid by the court. *Scott v Scott* [1943] 1 All E.R. 582.

116 *Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 K.B. 113, CA.

117 *Howard Smith Ltd. v. Ampol Petroleum* [1974] A.C. 821 (P.C.) at 837; see also *Quin &Axtens v Salmon* [1909] 1 Ch. 311, CA; *Breckland Group Holdings Ltd v London & Suffolk Properties Ltd &Ors* [1988] 4 BCC 542.

118 *Towncester Racecourse Co Ltd v Racecourse Association Ltd* [2002] EWHC 2141 (Ch).

119 Furthermore, article 70 of the Model Articles provides right to declare dividend to the board of directors.

120 See Article 4(1) of the Model Articles.

a director to act 'in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard' the stakeholders' concerns. In this sense, it is very straightforward: the duties are owed to the company and directors are under a duty to act in the best interest of the company. However, when one delves into the question of what are the interests of the company, the picture becomes more complicated, because a company as an artificial entity is not in a position to identify its own interests.[121] Therefore, it is a device for benefitting an identified group or groups depending on the interpretation of the interest of the company with reference to shareholders, primarily.[122]

The scope of authority, therefore, is also based on the interpretation of the interest of the company. For instance, if the shareholders' interest is equated to the interests of the company the result may be an inconsistent situation, in which, on the one hand, the company is a separate legal entity from its shareholders and on the other hand, its substance is the interest of shareholders. Dignam argues that if directors are indirectly obliged to pursue the interest of shareholders, it is questionable to what extent they can take actions against the shareholders' demands and that they would violate their duties if they acted against the interests of shareholders.[123] In this case, he further legitimately asks, 'what exactly are the directors for if no real delegation of power takes place?'[124]

The difficulty starts here, as the company is an artificial legal entity, and its interest is often identified with reference to its shareholders. In some cases, the judiciary has adopted a narrow approach in which it strictly acknowledged the shareholders as the substance of the company.In other cases, it has applied a broader approach where the board has delegated power and uses its power for the proper purposes.

In general, the interest of the company has been traditionally defined with reference to the shareholders. The predominant example of this narrow interpretation of the interest of the company can be found in *Greenhalgh v Arderne Cinemas Ltd*.[125]The court held that, 'the phrase "the company as a whole" does not…mean the company as a commercial entity, distinct from the corporators: it means the corporators as a general body'.[126] Similarly, in another decision, the court stated that, 'so long as the company is solvent the

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121 See, John Parkinson, *Corporate Power and Responsibility* (first published 1993, Clarendon Press, 2002) 76.
122 See Parkinson (n 110) 79.
123 Dignam (n 11) p. 663.
124 Dignam (n 11) p. 663.
125 *Greenhalgh v. Arderne Cinemas Ltd*., [1951] Ch. 286, 291.
126 *Greenhalgh* (n 114) p. 291.

shareholders are in substance the company.'[127] In *Brady v Brady*,the court stated that, 'the interests of a company, an artificial person, cannot be distinguished from the interests of the persons who are interested in it.'[128]This exemplifies the narrow understanding of the interest of the company. However, the courts are also aware of the danger that strict adherence to the narrow approach could undermine the authority of the board. The courts solve this problem by adopting a broader approach when the board exercises power for the proper purposes.

First, the courts made a distinction between 'current shareholders' and 'future' shareholders.[129] The court acknowledged that the interest of the company cannot be determined without including the current and future shareholders within the concept of the company as a whole.[130] The emphasis on the future interest of shareholders within the interests of the company highlights that shareholders' interests are also related with the company's long-term performance, because the interest of future shareholders depends on investing in R&D projects, the reputation of the company as to the ESG issues, and training programmes for employees. The interest of shareholders therefore involves both immediate and long-term performance of companies according to judicial views. Indeed, this distinction is required because the shareholder base of a listed company consists of different types of shareholders and there is no one typical interest of shareholders. It also implies that there are a variety of interpretations of the interests of shareholders.

The courts have demonstrated sympathy by interpreting the interest of the company broadly to embrace some stakeholder concerns and this, in turn, expands the board's authority. The early and often-quoted example for this understanding is the *Hutton v West Cork Railway Co* case in which, while acknowledging the significance of shareholders' interests, there were early signs of stakeholder concerns that could be incorporated into the decision-making by directors. Lord Justice Bowen stated that:

The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company… liberal dealing with servants eases the friction between masters and servants, and is, in the end, a benefit to the company.[131]

This broad understanding of the interest of the company is even more evident in *Evans v Brunner Mond & Co.*[132] The court held that a company

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127 *Multinational Gas & Petrochemical Co. v. Multinational Gas & Petrochemical Services*., [1983] Ch. 258, 288.

128 *Brady & Anor v Brady & Anor [1988] BCLC* 20 at 40.

129 *Gaiman and Others v National Association for Mental Health* [1971] Ch. 317, 329.

130 See *Gaiman and others* (n 118).

131 *Hutton v. West Cork Ry. Co.*, [1883] 23 Ch.D. 654, 672–73

132 Evans v. Brunner Mond & Co., [1921] 1 Ch. 359.

can make donations to universities for educational purposes even if there is no expectation of immediate and direct return to the company. The *Fulham Football Club v Cabra Estates*case supports this understanding, 'the duties owed by the directors are to the company and the company is more than just the sum total of its members'.[133]

This shows that the courts tend to broaden the scope of the 'company as a whole' and indirectly the authority of the board. This inclusive understanding is now found in section 172 which imposes a duty on directors to, 'promote the success of the company for the benefit of its members as a whole, and in doing so have regard' for the stakeholder concerns. For the first time, the directors are given statutory protection to balance stakeholder concerns in order to promote the long-term success of the company for the benefit of its members. It is open to discussion whether the law creates an obligation on directors to regard stakeholder concerns or if directors are entitled to further stakeholders' interests at the expense of shareholders' interests, or if directors have been given power to consider stakeholder interests as a means to advance the success of the company for the interest of shareholders. However, it is now clear that the board is given statutory discretion to incorporate stakeholder concerns into the decision-making process.

This interpretation by the courts is significant for the authority of directors because it expands the scope of the board's power, by allowing the board to justify their actions with reference to the success of the company, even if it is against the wishes of current shareholders. The courts acknowledge the fact that directors owe fiduciary duties to the company and that the interests of the company could be different from those of shareholders and should not be sacrificed for a group of shareholders.[134]

When the board uses its delegated power outside the proper purposes, then their actions are subject to judicial scrutiny. The directors are not allowed to exercise their authority as they wish.[135]In the *Howard Smith v Ampol* decision (discussed above), after emphasising the importance of the independent discretion of the board, the court held that the issue of shares to thwart a takeover bid was not a proper use of the delegated power, because the power had been provided to raise capital. These decisions show that when the power is delegated for a specific purpose, it must be used for this purpose, rather than with the aim of protecting the board or management.[136]

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133 *Fulham Football Club Ltd &Ors v Cabra Estates plc* [1992] B.C.C. 863 at 876.

134 *Re a Company (No.004415 of 1996)* [1997] 1 B.C.L.C. 479 at 491; *Re BSB Holdings Ltd (No 2)* [1996] 1 BCLC 155, 251.

135 *Hogg v Crampborn* [1967] Ch. 254.

136 Wen Shuangge, 'The Magnitude of Shareholder Value as the Overriding Objective in the United Kingdom--The Post-Crisis Perspective' (2011) 26 *Journal of International Banking*

As a result, the broad managerial authority of the board conferred by article 3 of model articles for public companies has been protected and respected by case law. The authority of the board is further expanded by section 172 of CA 2006 and case law which incorporate the interests of future shareholders and stakeholders into the interests of companies. Hence, the board is able to act in the long-term interests of the company as long as the authority is used for the proper purposes. Therefore, the board has authority to take difficult decisions within its delegated power, and are not required to maximise the short-term profit of the company at the expense of its long-term success.

CONCLUSION

In the UK company law, the board of directors is given the managerial power through the articles of association of the company. UK corporate governance is highly shareholder-oriented and shareholders are empowered to contribute corporate governance matters such as amendment of articles of association, the appointment and removal of directors, executive pay and takeovers. In a conceptual sense, UK company law allows shareholders to exercise ultimate authority in a company, which is considered a limitation on the exercise of the authority of the board of directors.

However, this article argues that shareholder power does not necessarily undermine the board authority, and that the board has substantial power to make decisions against the wishes of shareholders. The practice in the UK has not been to constrain the authority of the board and the board of directors is conferred a broad range of authority to run the company. The board is the primary decision-making body in UK public companies. In the UK, shareholders are also subject to free-rider and collective action problems. While these problems constitute an impediment to shareholder activism, they serve a filtering role, which prevents self-interested shareholders. More importantly, The Companies Act 2006 and case law do not lend any support for the idea that shareholders are entitled to force the board to focus on only their interests. The board's discretion is further expanded and protected by the courts and statutory duties that incorporate the current and future shareholders' interests and various stakeholder interests into the interests of the company.

Law & Regulation 325 at 329. There are some dissent approaches to the strict application of proper purpose doctrine. The court did not eliminate the possibility that the proper use of authority may include the issue of shares to discourage takeover bid. See, *Criterian Properties Plc v Stratford UK Properties LLC* [2003] B.C.L.C 129 (CA).

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A SURVEY OF DOCTRINAL DEBATES ON "THE GENERAL PRINCIPLES OF LAW RECOGNIZED BY CIVILIZED NATIONS"

"Medeni Milletlerce Tanınmış Hukukun Genel İlkeleri"ne Dair Doktrin Tartışmalarına İlişkin Bir İnceleme

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Abstract

Article 38/1-c of the Statute of International Court of Justice qualifies the "general principles of law recognized by civilized nations" as one of the three main sources of international law which the Court will apply. Compared to the other two sources, namely international treaties and international custom, general principles of law have been the subject of a much more intense doctrinal controversy. This debates started with the inclusion of general principles of law in the Statute of the Permanent Court of International Justice as a third source by the Advisory Committee of Jurists during *travaux préparatoires* of the Statute and still continues. This study is an effort to collect and comprehend these doctrinal controversies. For this purpose, first, the discussions in the Advisory Committee of Jurists when drafting the Statute which can be used as a supplementary mean of interpretation and later, the controversy among international lawyers and their thoughts which I think derived mostly from the prejudgments of their authors about the binding nature of international law and their approaches to the jurisprudence of this field have been dealt. As a result, the functions of general principles of law can be described in three different categories: They can be used for providing a framework for interpreting, defining, and implementing other sources. Secondly, they can be used as a material source of the other two sources. Finally, in order to avoid *non liquet*in international law, where the other rules are not available, these general principles appear as substitute sources.

Keywords: General Principles of Law Recognized by Civilized Nations, Sources of International Law, International Court of Justice, Statute of the Court

Özet

Uluslararası Adalet Divanı Statüsünün 38/1-c maddesi, "medeni milletlerce tanınmış hukukun genel ilkeleri"ni, Divan'ın kendisine sunulan uyuşmazlıkları çözerken kullanacağı üç temel kaynaktan biri olarak nitelendirmektedir. Diğer iki kaynakla, yani uluslararası andlaşmalar ve uluslararası teamülle karşılaştırıldığında, genel hukuk ilkeleri, çok daha yoğun bir doktrinel ihtilafın konusu olmuştur. Bu tartışmalar, Statu'nün hazırlık çalışmaları sırasında Hukukçular Komitesi tarafından genel hukuk ilkelerinin üçüncü kaynak olarak Uluslararası Daimi Adalet Divanı Statüsü'ne eklenmesiyle başlamış, ve hala sürmektedir. Bu çalışma, bu kavramın ve tartışmaların anlaşılması çabasıdır. Bu amaca yönelik olarak, ilk olarak, Hukukçular Komitesi'nde Statü hazırlanırken ortaya konulan, yardımcı yorum aracı olarak kullanılabilecek, tartışmalar ve daha sonra, uluslararası hukukçular arasındaki ihtilaf ve bunların düşünceleri -ki bunlar çoğu zaman uluslararası hukukun bağlayıcılığına ilişkin bu kişilerin ön kabullerinden ve bu alana dair hukuk ilmine yaklaşımlarından doğmaktadır- ele alınmıştır. Sonuç olarak, hukukun genel ilkelerinin işlevleri üç kategori altında değerlendirilebilir: Diğer kaynakların yorumlanması, tanımlanması ve uygulanması konusunda bir çerçeve sunabilirler. İkinci olarak, diğer iki kaynağın maddi kaynakları olarak kullanılabilirler. Son olarak, diğer kaynakların uygun olmadığı durumda, uluslararası hukukta *non liquet*ten kaçınabilmek için bu genel ilkeler ikame kaynak olarak kullanılabilir.

Anahtar Kelimeler: Uluslararası Hukukun Kaynakları, Uluslararası Adalet Divanı Statüsü, Medeni Milletlerce Tanınmış Hukukun Genel İlkeleri, Genel Hukuk İlkeleri

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Introduction

Regardless of their approach to international law theory, all international lawyers agree on that the conventional and customary law should be considered as sources of international law. In the Advisory Committee of Jurists, which is responsible for the preparation of the Statute of the Permanent Court of International Justice, these two sources were accepted without any discussion. The main subject of the sessions on the sources of international law was whether there will be any sources other than these two in the Statute. After the discussions, "the general principles of law recognized by civilized nations" was added as one of the rules to be applied by the Court. This provision has led to intense doctrinal controversy.

Disputes related to the general principles of law appear under different headings. International jurists expressed different views on the source nature, content, autonomous and independent existence from the other two sources, function, relationship and hierarchy with the other two sources of the general principles of law and which legal systems these general principles will be derived and the legitimacy of analogy between domestic and international legal systems.

Some authors identify these general principles with the natural law. The result of this thought is the rejection of this new source from positivist point of view and acceptance gladly from naturalist thought. Some naturalists even declared the defeat of the positivism with the adoption of this provision. Some authors, on the other hand, argue that this provision reflects the positivist view based on the condition of "recognition by the civilized nations" in the Statute.

Some authors suggest that these principles have already been applied in modern arbitration practices[2], and that their implementation has become the customary rule. Another group, however, argues that these practices do not mean anything, and that the decisions are binding only on the parties, but do not have any effect on the general international law.

There are those who place the general principles of law to the basis of the international legal system. Some others reduce them to the application of a principle of domestic laws, only in the absence of two other sources, only in a specific case and to be binding only in respect of these cases and parties. A group of authors reject the idea that common principles may exist between different legal systems. Since such common principles cannot be found, a source in the form of general principles of law recognized by civilized nations will also become useless. On the other hand, some others reject the existence

[2] For a survey of these arbitration practices before the establishment of the Permanent Court of International Justice, see Mehmet Emin Büyük, **Uluslararası Hukukta Hukukun Genel İlkeleri**, İstanbul: On İki Levha, 2018, pp. 70-86.

of general principles of law as an autonomous source by placing them into the custom. Some argue that these principles can be considered as auxiliary means for determining the sources like judicial decisions and doctrine. Beyond that, some authors place them outside of both the main and auxiliary sources and equate them with *ex aequo et bono*.

Another subject of discussion arises from the relation of the law established by the treaty and the general international law. A group of writers, especially positivist jurists, argue that the general principles of law can only be asserted in the context of the Statute before the International Court of Justice. While another group, especially naturalists, argue that they are binding in terms of general international law independently of the Statute.

Furthermore, there are writers who consider that the general principles of law can be used only in the absence of the other two sources as a substitute source. And, on the contrary, some others put them to the top of the hierarchy between sources and argue that these principles should be applied in the first place. A different view suggests that these three sources are of equal weight and that they must be applied together.

Different ideas also appear concerning the systems from which the general principles will be derived. A group of writers is of the view that the Statute refers exclusively to the domestic law principles, especially with reference to preparatory work. Another idea is that the Statute's provision implies the principles of international law in the first place. Another group considers that all principles, regardless of domestic law or of international law, that can be dealt under the general principles of law can be applied as a binding norm under Article 38. Furthermore, there is an opinion that equates the application of the general principles of law specially with the private law analogy. And finally, some authors do not accept certain general principles within the limits of the Article suggesting that they are merely the results of legal reasoning.

All these different views on the interpretation of the text are based on the different theoretical perspectives of the authors. It is obvious that the text of the Article is not clear. This study is an effort for understanding the meaning of the relevant Article.

For this purpose, two occasions of theoretical debates will be dealt: First, in the Advisory Committee of the Jurist; and later, the opinions of international lawyers about the provision 38/3 -or 38/1(c) in the Statute of the International Court of Justice- after the creation of the Permanent Court of International Justice. About the theoretical debates of the international law writers, first, the negative views will be discussed in separate groups and then, the opinions of the writers who support the autonomous nature of the general principles will be explained. And, in the Conclusion, the positive and the negative opinions will be evaluated together, with the views of the author of this study.

I. Adoption of Article 38 of the Statute of the Permanent Court of International Justice

In February 1920, the Council of the League of Nations, in accordance with Article 14 of the Covenant of the League of Nations, constituted an Advisory Committee of Jurists (*Comité Consultatif de Juristes*), consisting of 10 members of different nationalities[3], in order to prepare the Statute for the establishment of the Permanent Court of International Justice and to submit a report to the Council. From mid-June to the end of July, the Committee held meetings at the Peace Palace in The Hague and submitted a draft text to the Council.[4] This text has been discussed at two meetings held in the Council in August and October, and adopted with minor amendments and presented to the General Assembly. Later, with a few simple improvements, this text was adopted unanimously on 13 December 1920 at the General Assembly as the Statute of the Court.[5]

During *travaux préparatoires* of the Statute the Statute, the Committee discussed many different issues related to the establishment and operation of the Court and put forward valuable insights on this day. One of the issues of discussion was the rules which the Court will apply in disputes. In particular, which rules other than treaties and custom will be within the authority of the judge to apply and whether the general principles of law will be included among these rules or how they will take place.[6]

At 13th Session, the President of the Committee Baron Descamps submitted his proposal of the article as follows:

"*The following rules are to be applied by the judge in the solution of international disputes; they will be considered by him in the undermentioned order:*

1. *conventional international law, whether general or special, being rules expressly adopted by the States;*

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3 The Committee consists of the following members: Minichiro ADATCI (Japan), Rafael ALTAMIRA (Spain), Clovis BEVILAQUA (Brazil; later Raoul FERNANDES appointed as a member of the Committee to replace Bevilaqua), Baron Édouard DESCAMPS (Belgium), Francis HAGERUP (Norway), Albert De LaPRADELLE (France), Bernard LODER (Netherlands), Elihu ROOT (USA). See **Permanent Court of International Justice/ Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, June 16th – July 24th**, The Hague, Van Langenhuysen Brothers, 1920, Preface, s. III.

4 Olof Hoijer, **Le Pacte de la Société des Nations – Commentaire Théorique et Pratique**, Paris: Editions Spes, 1926, p. 229.

5 International Court of Justice, **The Permanent Court of International Justice; La Cour Permanente de Justice Internationale; El Tribunal Permanente de Justicia Internacional, 1922-2012**, The Hague, 2012, p. 19 (hereinafter: PCIJ, 1922-2012).

6 Procès-Verbaux, p. 293 ff.

2. *international custom, being practice between nations accepted by them as law;*
3. *the rules of international law as recognized by legal conscience of civilized nations;*
4. *international jurisprudence as a means for application and development of law."*[7]

This proposal led to controversies among the members. American member of the Committee, Elihu Root, said that he "*could not understand the exact meaning of the clause 3*."[8]According to him, it is necessary to draw boundaries of the jurisdiction in order for the States to accept the compulsory jurisdiction of the Court. He has no objection to the first two clauses, but also not sure that States will accept even the clause relative to custom. But he believes that the rules in the last two paragraphs extend the Court's jurisdiction. States will not accept the jurisdiction of a Court which will apply not only the law but also the rules that exist in conscience of civilized nations.[9]It must be stated that, in all sessions, as a highly experienced international lawyer who has been involved in such organizations several times, the primary concern of Elihu Root, was, considering the examples such as the failed International Prize Court experience, that the text prepared to be acceptable to the States.

From a different conception, Lord Phillimore, the British member, arrived at the same point as Root. He believes that clauses 3 and 4 of the proposal give the Court the power of legislation, but in international law, the legislation can only be possible by the universal agreement of all States. The rules which will be applied must be conventional law and international law in force. The other two clauses are either included in clause 2 or else, additions to this clause. However it shouldn't go beyond this bound.[10]

The French member of the Committee, Lapradelle, stated that he prefers a short wording such as "*the Court shall judge in accordance with law, justice and equity*." However, it further stated that the Court should not act as a legislative body. He also argues that forcing the Court to take into account only (positive) law can be too strict and even unjust. According to him, there should be no harm in taking into account by the Court that whether a legal solution of

7 Procès-Verbaux, Annex No. 3, p. 306.

8 It is important to note that all members of the Committee, except Elihu Root, spoke in French and the English texts for the records are the translation, except for the speeches and remarks of Root. Although Root makes his objection on the basis of the paragraph, he seems to be drawing attention to the language difference. See Procès-Verbaux, Preface, p. IV.

9 Procès-Verbaux, p. 293-294.

10 Procès-Verbaux, p. 295.

a situation is just and equitable, and even when necessary, changing this legal solution according to requirements of justice and equity.[11]

Norwegian member Hagerup agreed with Lapradelle as the formula must be short, simple and as little theoretical as possible but on the other hand, the Court should apply equity if the parties authorized him to do so. The important thing is that the Court should not refrain from making any decision on the grounds that there is no positive law rule to be applied.[12] He stated that one of the tasks of the new Court would be to develop international jurisprudence and, directed this as a question to Root that how a Court that would declare *non liquet* in the absence of a positive rule of law would contribute to the development of international law.[13]

According to Root, the question is not about the material basis of jurisdiction but instead, the readiness of the world to accept this compulsory jurisdiction. In his view, States are ready to accept the compulsory jurisdiction of a Court that will apply universally recognized rules of international law, but he doesn't think that they will accept the compulsory jurisdiction of a Court that will apply principles which are differently understood in different countries. It is better to establish a Court with relatively limited jurisdiction than a Court with broad competence but not working.[14]

In response to the statement by Root's that the principles of justice may vary from country to country, President Descamps said that may be true for certain rules of secondary importance. He thinks, however, that "*fundamental law of justice and injustice deeply engraved on the heart of every human being and which is given its highest and most authoritative expression in the legal conscience of civilized nations."*[15] Degan correctly says that Grotius would probably undersign this statement but it is far from convincing the majority members of the Committee in 1920.[16]

Phillimore thinks that these serious differences of opinion arise from the differences between continental Europe and Anglo-Saxon concepts of justice. According to him, in continental Europe, judges are initially surrounded by strict rules. Later, with the fear that they are too constrained, they are given complete freedom within these boundaries. However, the British system is different. In this system, the judge takes an oath "*to do justice according to*

[11] Procès-Verbaux, p. 295.
[12] Procès-Verbaux, p. 295-296.
[13] Procès-Verbaux, p. 307-308.
[14] Procès-Verbaux, pp. 308-309.
[15] Procès-Verbaux, pp. 310-311.
[16] Vladimir Đuro Degan, **Sources of International Law**, The Hague: Martinus Nijhoff Publishers, 1997, p. 47.

law."[17] If Lord Phillimore's statements are examined carefully, it will be seen that he does not think much differently from Descamps. In fact, in terms of the law to be applied by the Court, he draws a line that implies more freedom than Descamps' proposal.[18] Phillimore states that the conventional law and the rules of international law "*from whatever source they may be derived"* will be sufficient to define as applicable law.[19]

At the 15th meeting, with the request of other members at the previous meeting, Root presented his amendment which they had prepared along with Phillimore for the article.[20] In this new proposal, some changes have been made to the draft prepared by Descamps. In paragraph 3, the expression "*the rules of international law as recognized by legal conscience of civilized nations*" was replaced with "*general principles of law recognized by civilized nations*" and in paragraph 4, the expression "*international jurisprudence as a means for application and development of law" was replaced with "the authority of judicial decisions and the opinions of writers as a means for application and development of law." Clauses related to conventions and custom were maintained without any changes.*[21]

The Italian member Ricci-Busatti made some reservations. Despite the fact that he is not opposed to the substance of the proposed text, he thinks that the expression "*undermentioned order*" (*ordre successif*) must be removed because the judge should consider the sources at the same time in relation to each other. He also considers that, in paragraph 3, "*principles of equity*" should be mentioned and included; and the opinions of writers in paragraph 4, should be seen as a source of law.[22]

Phillimore said that the inclusion of "equity" as a source of law would result too much liberty to the judge. Other members shared this idea. And also, he said that he didn't attach much importance to the successive order of sources; he simply took it from the proposal of Descamps.[23]

Lapradelle considers that the expression of "*general principles of law"* is proper but the expression of "*civilized nations*" is problematic. For the jurist, this is an unnecessary expression because "*law implies civilization*".[24] As can be seen from the meeting records, the members of the Committee didn't attach

17 Procès-Verbaux, p. 315.
18 Bin Cheng, **General Principles of Law as Applied by International Courts and Tribunals**, Cambridge: Cambridge University Press, 2006, p. 13.
19 Procès-Verbaux, p. 295.
20 Procès-Verbaux, pp. 331-344.
21 See Procès-Verbaux, Annex No. 1, p. 344.
22 Procès-Verbaux, p. 332-333.
23 Procès-Verbaux, p. 333.
24 Procès-Verbaux, p. 335.

any importance to Lapradelle's objection and didn't eliminate the following discussions concerning the qualification of civilization in the Statute.[25]

Lord Phillimore stated that the general principles referred here are principles *"accepted by all nations in foro domestico, such as certain principles of procedure, the principle of good faith, and the principle of res judicata, etc.*" And also added that he indented to mean "maxims of law" by "general principles of law". Lapradelle, however, said that the principles that formed the bases of national law were also accepted as sources of international law but those considered "generally recognized principles" are must have obtained unanimous or quasi-unanimous support. [26]

As far as the explanations for the amendment are concerned, the idea behind this new proposal must be, especially, Lord Phillimore.[27] These explanations of Phillimore are widely accepted in the doctrine and the practice of the Hague Courts and other arbitrations.[28]

Thus, in the draft text prepared by the Committee, the article which is accepted as draft article 35 of the Statute, concerning the legal rules to be applied is as follows:

"*The Court shall, within the limits of its jurisdiction as defined in Article 34, apply in the order following:*

1. *international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;*
2. *international custom, as evidence of a general practice, which is accepted as law;*

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25 For this discussions and the possible meanings of "*recognized by civilized nations*" and the effective interpretation of the Article concerning this text, see Büyük, Uluslararası Hukukta Hukukun Genel İlkeleri, pp. 140-160.

26 Procès-Verbaux, pp. 335-336.

27 Cheng reaches this conclusion by the fact that Root doesn't seem to have said anything more during the discussion. The members asked this amendment from Root and he came with the proposal but later on, the defense of this amendment was made by Phillimore. Cheng, General Principles of Law, p. 15 and footnote 63.

28 See for instance, **Dissenting Opinion of M. Anzilotti**, **Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzow)**, PCIJ, Judgment No. 11, Series A, No. 13, 1927, p. 27. See also **Separate Opinion of Judge Cancado Trindade, Pulp Mills on the River Uruguay, Merits**, Judgment, ICJ Reports, 2010, p. 140. See also examples of doctrine, Alfred Verdross, "Les Principes Généraux du Droit comme Source du Droit des Gens" **Recueil d'Études sur les Sources du Droit en l'Honneur de François Geny, Tome III - Les Sources des Diverses Branches du Droit** içinde, Paris: Librairie du Recueil Sirey, 1935, p. 387; Hersch Lauterpacht, **Private Law Sources and Analogies of International Law (with special reference to international arbitration),** London: Longmans, Green and Co. Ltd., 1927, p. 70-71, footnote 3; Clive Parry, **The Sources and Evidences of International Law,** Manchester: Manchester University Press, 1965, p. 83.

3. *the general principles of law recognized by civilized nations;*
4. *judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."*[29]

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At its 10th Session at Brussels, October 1920, some amendments were made by the Council of the League of Nations on draft scheme presented by the Advisory Committee of Jurists and as related to Article 35, the Council added at the beginning of Paragraph 4 the expression of "*subject to the provisions of Article 57(bis)*"30 (eventually became Article 59) as a formal modification because of the inclusion of Article 57(*bis*) to the draft of the Statute by the Council which follows: "*The decision of the Court has no binding force except between the parties and in respect of that particular case*."[31]

On the other hand, first, in the report of Italian Delegate to the Council for the amendments to the draft scheme[32], and then, with the objections of the French (Framegout) and Dutch (Loder) members of the Sub-Committee of the Third Committee[33], the expression "*in the order following*" at the beginning of the draft article has been deleted. Thus, a situation that can be interpreted as a hierarchy between the three main sources of international law has been eliminated.[34] And, by the suggestion of the British member (Cecil Hurst), the expression of "*within the limits of its jurisdiction as defined above*" has also been deleted.[35]

In the Sub-Committee, the French member proposed a modification at paragraph 3 of Article 35 as "*general principles of law and justice*" and this was accepted. Then, at the 10th meeting, the Greek member (Politis) proposed to modify the paragraph as follows: "*the general principles of law and with the consent of the parties, the principles of justice recognized by civilized nations"*.[36] Consequently, by the proposition of the French member (Framegout), at the end of Article 35, a separate provision has been added which as follows: "*This provision shall not prejudice the power of the Court to*

29 Procès-Verbaux, p. 680.
30 League of Nations, Permanent Court of International Justice, **Documents concerning the Action taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court**, League of Nations Publications, 1920, p. 58 (Hereinafter: Documents, 1921).
31 Documents, 1921, p. 60.
32 Documents, 1921, p. 29.
33 Documents, 1921, p. 145.
34 Cheng, General Principles of Law, p. 20.
35 Documents, 1921, p. 145.
36 Documents, 1921, p. 157.

decide a case ex aequo et bono, if the parties agree thereto."[37] This provision was accepted as paragraph 2 of Article 35 of Statute and the paragraph 1 was remained unchanged. It was stated that the aim of this clause is to give the article a more flexible character[38]

In this way, the general principles of law are separated from "*the general principles of equity*", and with the adoption of paragraph 2, the general principles of law have gained the character of positive law.[39]Therefore, the general principles of law took place in the Statute of Permanent Court of International Justice as a separate source which is different from conventional law and international custom but in the same category as main sources, and different from the judicial decisions and doctrine and not in the same category with them, and separate from equity as a positive rule of law. In other words, the consent of parties isn't required in the application of general principles of law; this means that these principles constitute part of the international law in force.[40]

The settlement of *ex aequo et bono* (from equity and goodness)[41] gives to the Court the authority to decide according to principles of equity *contra legem*[42] (or sometimes equity *praeter legem*[43]) if the parties of dispute expressly agree on that authorization. The Sub-Committee has made a clear distinction between making decisions on the general principles of law and the equity *contra legem*. It should be noted, however, that this provision doesn't provide any benefit in the practice of the Court. There is not a single decision given on *ex aequo et bono* in nearly a hundred years by the two Hague Courts.[44]

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37 Documents, 1921, p. 157.

38 Documents, 1921, p. 211.

39 Degan, Sources of International Law, p. 51

40 Cheng, General Principles of Law, p. 20.

41 Aaron X. Fellmeth ve Maurice Horwitz, **Guide to Latin in International Law,** Oxford: Oxford University Press, 2009, p. 91.

42 "*Against the law;based on a principle of equity in contradiction to a rule of positive law*" See Fellmeth-Horwitz, Guide to Latin, p. 65.

43 "*Apart from the law; Relating to a matter not clearly addressed by the law*" See Fellmeth-Horwitz, Guide to Latin, p. 227.

44 In the case of the Free Zones of Upper Savoy and the District of Gex between France and Switzerland, there was a debate about the Court's authority to decide *ex aequo et bono*. The idea that the facts of the case and the special agreement between parties concerning the jurisdiction of the Court can be interpreted as such has been examined. The Court, on the other hand, considered that no such authority was given: "(…) *even assuming that it were not incompatible with the Court's Statute for the Parties to give the Court power to prescribe a settlement disregarding rights recognized by it and taking into account considerations of pure expediency only, such power, which would be of an absolutely exceptional character, could only be derived from a clear and explicit provision to that effect, which is not to be found in the Special Agreement*". See **Case of the Free Zones of Upper Savoy and the District of Gex (Second Phase), Order of December 6th**, PCIJ, Series A, No. 24, 1930, p.

With these modifications, the draft article has been adopted as Article 38 of the Statute of the Permanent Court of International Justice which is as follows:

"*The Court shall apply:*

1. *International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;*
2. *International custom, as evidence of a general practice accepted as law;*
3. *The general principles of law recognized by civilized nations;*
4. *Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*

This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto."[45]

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After the World War II, at the Conference of San Francisco, as the rapporteur of the Committee of Jurists which was responsible for drafting the Charter of the United Nations and the Statute of the International Court of Justice, Jules Basdevant pointed out that according to him even though Article 38 of the Statute of Permanent Court of International Justice wasn't well drafted, there was no time to spent for redrafting it.[46] In the final report of the Committee, the following statements are given concerning Article 38:

> "*Article 38, which determines, according to its terms, what the Court "shall apply" has given rise to more controversies in doctrine than difficulties in practice. The Committee thought that it was not the*

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And as to the scope of *ex aequo et bono,* Judge Kellogg stated, on his Observations in the same case, that the power given to the Court would only mean a somewhat broad interpretation of equity and justice. See **Observations by Mr. Kellogg,** PCIJ, Series A, No. 24, 1930, pp. 40-41. On the other hand, *ad hoc* Judge Dreyfus stated in his dissenting opinion that *ex aequo et bono* is "(…) *to play the part of an arbitrator in order to reach the solution which, in the light of present conditions, appeared to be the best, even if that solution required the abolition of the zones*". See **Dissenting Opinion by M. Eugène Dreyfus, Case of the Free Zones of Upper Savoy and District of Gex,** Judgment, PCIJ, Series A/B, No. 46, 1932, p. 212.

See also Manley O. Hudson, **Permanent Court of International Justice 1920-1942 - A Treatise**, New York: The Macmillan Company, 1943, p. 620-621; L. Oppenheim - H. Lauterpacht (Ed.), **International Law, A Treatise, Vol. II,** 7. Edition, Delhi: Orient Longman Ltd., 1955, p. 69, footnote 2.

45 Documents, 1921, p. 264.

46 **Documents of the United Nations Conference on International Organization**, **UNCIO**, San Francisco, Vol. XIV, 1945, p. 170. (Hereinafter: UNCİO, Vol. XIV).

> *opportune time to undertake the revision of this article. It has trusted to the Court to put it into operation, and has left it without change other than that which appears in the numbering of the provisions of this article.*"[47]

The only modification made by the Committee was that the addition of the expression "*whose function is to decide in accordance with international law such disputes as are submitted to it*" to the initial paragraph of Article 38.[48] This amendment is likely to have been put in place to emphasize that the International Court of Justice is an international judicial body, but it is unclear what the practical importance of this addition is[49], since the Permanent Court of International Justice has served as an international judicial body and has tried to resolve disputes according to rules of international law.[50]

II. Skeptical Approaches to the Nature and Autonomy of General Principles of Law as a Source of International Law

A) Dualist and Voluntarist Ideas and the Role of Principles of Domestic Law in International Law

For some authors, especially from the Positivist/Dualist school of thought, the general principles of law cannot be an autonomous source of international law. A strict dualist approach wouldn't accept the application of the principles of domestic law directly in international law. For such an application, there should be a clear authorization of reception, and this can only be possible if the authorization is in the classical sources *i.e.* custom or treaty.[51]

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47 UNCİO, Vol. XIV, p. 843.

48 **Documents of the United Nations Conference on International Organization**, **UNCIO**, San Francisco, Vol. XIII, 1945, pp. 284-285. (Hereinafter: UNCİO, Vol. XIII).

49 Nevertheless, it should be noted that Manley Hudson, one of the judges of Permanent Court of International Justice, clearly defined the lack of emphasis of the application of international law as a deficiency of the Statute. See Manley O. Hudson, **Permanent Court of International Justice 1920-1942 - A Treatise,** New York: The Macmillan Company, 1943, p. 615. On the other hand, Soviet writer Tunkin thinks that the addition of this statement to the Statute revokes the application of general principles of domestic laws. Grigory I. Tunkin, International Law in the International System, **Collected Courses of Hague Academy of International Law,** 1975 (IV), Alphen aan den Rijn: Sijthoff&Noordhoff, 1978, pp. 99-101.

50 **Separate Opinion of Judge Cancado Trindade, Pulp Mills on the River Uruguay, Merits**, Judgment, ICJ Reports, 2010, s. 142; Géza Herczegh, "The General Principles of Law Recognized by Civilized Nations", **Acta Juridica**, Vol. 6, 1964, s. 9. See also UNCİO, Vol. XIII, s. 392.

51 Robert Kolb, **La Bonne Foi en Droit International Public: Contribution à l'Étude des Principes Généraux de Droit,** Genève: Graduate Institute Publications, 2000, Web: http://books.openedition.org/iheid/2253, para. 70-74.

As an example to the international lawyers who have advocated this view, Anzilotti[52], Strupp[53], Cavaglieri[54], Härle[55], Seferiades[56], Morelli[57], Ross[58], Weil[59],

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52 Dionisio Anzilotti, **Cours de Droit International** (Premier Volume), (French Trans. 3rd Ed.: Gilbert Gidel), Paris: Librairie du Recueil Sirey, 1929, pp. 116-118.

53 Karl Strupp, "Droit de la Paix", **Recueil des Cours de l'Académie de Droit International**, T. 47, 1934 (I), Paris: Librairie du Recueil Sirey, 1934, pp. 334-337; Karl Strupp, "Justice Internationale et Équité», **Recueil des Cours de l'Académie de Droit International,** T. 33, 1930 (III), Paris: Librairie du Recueil Sirey, 1931, pp. 449-452.

54 Arrigo Cavaglieri, "Règles Générales du Droit de la Paix", **Recueil des Cours de l'Académie de Droit International**, T. 26-1, 1929, Paris: Librairie Hachette, 1930, p. 323. According to Cavaglieri, these principles do not belong to international law. He also describes these principles as natural law and justice rules and states that the Court can apply these principles in the absence of custom and treaty. See *Ibid.* p. 544. Cheng expresses that such a thought seems dangerous for a positivist, such as Cavaglieri, because Cavaglieri, in these words, indirectly acknowledges that the principles of natural law and justice are widely recognized in the domestic law of civilized nations. See Cheng, General Principles of Law, p. 4, footnote 14.

55 Elfried Härle, "Les Principes Généraux de Droit et le Droit des Gens", **Revue de Droit International et de Législation Comparée**, T. 16-4, 1935, pp. 664-687. "*In the international life, on the other hand, it is the States themselves which takes part in the creation of law, in the external form of treaties or in the form of the constant practice of government, recognized as law. If one now wants, as in the dominant view, to incorporate the "general principles of law" of the 3rd paragraph of Article 38 into the field of positive international law, it is important to provide proof that their validity in the law of nations through the creation of ordinary law in international law, in other words, they must be originated from either a treaty or a consistent governmental practice.*" (my translation) See *Ibid*. 670-671. "*The general principles of law are positive principles of law arising from customary law and having, in principle, only subsidiary validity in international law.*" (my translation) See *Ibid.* p. 687.

56 Stelios Seferiades, "Principes Généraux du Droit International de la Paix", **Recueil des Cours de l'Académie de Droit International**, T. 34, 1930 (IV), Paris: Librairie du Recueil Sirey, 1931, p. 210.

57 "*Article 38, as well as the other articles of the Statute, are procedural norms. Their aim is to point out the criteria that will form the basis of the proceedings of the Court; not the create material norms to regulate in a general way the relations between the contracting States. Therefore, the principles contained in Article 38/3 are unfamiliar with the international legal order. Article 38/3 provides the judge with a source other than international law and is considered to be apurely material source. This source enables the formulation of the rule to be created specifically for the present case.*" (my translation) See Gaëtano Morelli, "La théorie générale du procès international", **Recueil des Cours de l'Académie de Droit International**, T. 61, 1937 (III), Paris: Librairie du Recueil Sirey, 1938, p. 350.

58 Alf Ross, **A Textbook of International Law,** 1st Ed., London/New York/Toronto: Longmans, Green and Co., 1947, pp. 90-91; 2nd Ed., New Jersey: The Lawbook Exchange Ltd, 2008, p. 90-91. In defining the general principles of law, the author gives reference to the principles of domestic law, in accordance with the discussions in *travaux préparatoires* of the Statute. However, the author doesn't consider these principles in the same category of sources with the custom and treaty. According to the author, objectification or abstraction, which must exist in a source, is incomplete at this point, because by using these principles, the judge creates and applies the norm only for a concrete case. It would be appropriate to emphasize the similarities of the author's considerations with Anzilotti.

59 Prosper Weil, "Le Droit International En Quête de Son Identité, Cours Général de Droit International Public", **Recueil des Cours de l'Académie de Droit International**, T. 237,

Bokor-Szegö[60] can be mentioned. It is also possible to consider some of the analyses of Kelsen[61] and Kopelmanas[62] and also the views of Herczegh[63], one of the judges of International Court of Justice, in this category. On the other hand, with regard to the Turkish international law doctrine, Akipek[64] clearly opposes the general principles of law and the adoption of this separate source in the Statute, and Çelik[65] seems to share this idea.

According to some of these authors, there is no general rule of international law that allows the application of general principles which are taken from domestic law. Unless there is a general custom in this regard, this process may be possible only through a treaty.[66] A group of writers, e.g. Anzilotti, Strupp, Bokor-Szegö, from this point of view, consider the matter within the scope of the Statute of the International Court of Justice (and the Permanent Court of International Justice) and, are of the opinion that the judges of Court can apply the principles of domestic law with only explicit authority given by the Statute.[67] Another group of writers, e.g. Morelli, Weil, based on these ideas, oppose the formal source character of these principles, and according to them, the general principles of law can be only material sources of law.[68]

1992 (VI), The Hague: Martinus Nijhoff Publishers, 1996, pp. 148-151.

60 "*The author of this chapter shares the view that the Statute authorizes the International Court of Justice to apply the principles accepted by the States in foro domestico, but does not consider these principles to be a source of international law. Under the authorization given to the Court in Article 38, the parties to the Statute did not rank the general principles of law as a source of international law. What they did was to ratify the rules of procedure of a court, not a convention listing exhaustively the sources of international law. The Court applying the law is not authorized to create, through the general application of the principles of municipal law, new sources of international law applicable outside the scope of the dispute settled by the Court.*" Hanna Bokor-Szegö, «General Principles of Law», Mohammed Bedjaoui (Ed.), in **International Law: Achievements and Prospects**, Paris: UNESCO, 1991, p. 217.

61 Hans Kelsen, **Principles of International Law**, 3rd Ed., New York: Rinehart & Company Inc., 1959, pp. 393-394.

62 Lazare Kopelmanas, "Quelques Réflexions au Sujet de l'Article 38(3) du Statut de la Cour Permanente de Justice Internationale", **Revue Générale de Droit International Public**, T. 43, 1936, pp. 295-296.

63 Géza Herczegh, "The General Principles of Law Recognized by Civilized Nations", **Acta Juridica**, Vol. 6, 1964, pp. 22-28.

64 Edip F. Çelik, **Milletlerarası Hukuk**, 3rd Ed., İstanbul: Fakülteler Matbaası, 1969, pp. 81-88.

65 Ömer İlhan Akipek, **Devletler Hukuku - Birinci Kitap: Başlangıç**, 2nd Ed., Ankara: Başnur Matbaası, 1965, pp. 67-69.

66 Härle, Les Principes Généraux de Droit et le Droit des Gens, pp. 670-671.

67 Anzilotti, Cours de Droit International, s. 117-118; Strupp, Justice Internationale et Équité, p. 452; Strupp, Droit de la Paix, p. 336, Bokor-Szegö, General Principles of Law, p. 217.

68 Weil, Recueil des Cours, s. 148-151; Morelli, Recueil des Cours, p. 350.

According to the Italian jurist Anzilotti, who was one of the prominent figures of classical positivism in international law in the first half of the twentieth century, the usual forms of establishment of international rules are the treaties which are accepted by the States with their explicit consent and the customs which are accepted with their tacit consent.[69] The general principles of law that referred in Article 38/3 of the Statute are the general principles of international legal order or universally accepted principles in the laws of civilized nations. This latter group is also implicitly recognized in international law and the Court, therefore, applies them.[70] If the principle to be applied is exclusively a principle of national legal systems, then these principles can only be considered as a material source. Anzilotti opposes the formal sources characters of the general principles of law derived from domestic laws, and according to him, these principles do not exist in the international legal order. The judge determines the norm he will apply by using these principles in a concrete case, and thus, he creates a norm only for this case.[71]

As an example of his idea of implicit recognition of universally accepted principles in the laws of civilized nations in international law, Anzilotti makes the following remarks in his dissenting opinion in the Interpretation of Judgments Nos. 7 and 8 concerning the Factory of Chorzow:

> "*(...) it appears to me that if there be a case in which it is legitimate to have recourse, in the absence of conventions and custom, to "the general principles of law recognized by civilized nations", mentioned in No. 3 of Article 38 of the Statute, that case is assuredly the present one. Not without reason was the binding effect of res judicata expressly mentioned by the Committee of Jurists entrusted with the preparation of a plan for the establishment of a Permanent Court of International Justice, amongst the principles included in the above-mentioned article*"[72]

As can be seen, Anzilotti considers that a number of principles are implicitly accepted because of the nature of the international legal system, and gives *res judicata* as an example of them. The basis of this idea is that according to Anzilotti, treaties do not only consist of written provisions; furthermore,

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69 Anzilotti, Cours de Droit International, p. 68.

70 In this respect, the author gives as an example the Chorzow Factory Case which he had served as a judge, and the principle that *a violation of a liability entails an obligation to repair*. See Anzilotti, Cours de Droit International, p. 117.

71 The author refers to Article 59 of the Statute of the Permanent Court of International Justice which as follows: "*The decision of the Court has no binding force except between the parties and in respect of that particular case*." See Anzilotti, Cours de Droit International, p. 118.

72 Dis. Op. of M. Anzilotti, **Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzow)**, PCIJ, Judgment No. 11, Series A, No. 13, 1927, p. 27.

the logical presuppositions of these written provisions and the necessary logical consequences are also part of the treaties. The consent of the parties to the norms in the treaty means that their consent to these hidden norms in the absence of which the treaty will become meaningless. Anzilotti calls these hidden norms, which are necessary for every legal system, "the constructive rules" (*les règles constructives*).[73] The author refers as an example to the *pacta sunt servanda* rule/principle regarding the binding force of treaties, and in the absence of this rule, the international legal system will become a hypothesis or an indemonstrable postulate.[74] Similarly, it places this rule on the basis of the binding force of the custom.[75]

The German lawyer Karl Strupp, who was another important representative of positivism in the period after the First World War, and who described himself as a "*pure-blooded positivist*", states that public international law is a law between States, not above them. Hence, with the equality of States among themselves, international law also represents a coordination. As a result, the States will only be bound by the norms they accept with their free will.[76]

Strupp argues that there is a tendency in the doctrine and even amongst the proponents of positivism (or believing themselves to be such) to put a third source of the law of the nations on the side of the custom and treaty. They speak of, in this sense, that legal norms common to the legal bodies of civilized nations, principles which would be qualified by the legal order of civilized nations or fundamental elements necessarily existing in every legal order.[77]

The author, who is an advocate of the dualist view, opposes the ideas of writers who accept this third source of international law, that general principles which are jointly accepted by civilized nations should be accepted in the same manner in international law and for the implementation of a norm in international law, it is sufficient to prove that it is accepted by a large number of civilized States as legal principles.[78] He also suggests that such common norms will not be much. But even if they really existed, the situation would not be so different. According to Strupp, these norms must be proved by the will of the States as the only creators of the law of nations.

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73 Anzilotti, Cours de Droit International, p. 68.

74 Anzilotti, Cours de Droit International, p. 69.

75 Anzilotti, Cours de Droit International, p. 74.

76 Stephen C. Neff, **Justice Among Nations - A History of International Law,** Massachusetts: Harvard University Press, 2014, p. 366.

77 Karl Strupp, "Droit de la Paix", **Recueil des Cours de l'Académie de Droit International**, T. 47, 1934 (I), Paris: Librairie du Recueil Sirey, 1934, p. 334.

78 Karl Strupp, "Justice Internationale et Équité», **Recueil des Cours de l'Académie de Droit International**, T. 33, 1930 (III), Paris: Librairie du Recueil Sirey, 1931, p. 450.

With the exception of Article 38 of the Statute and the treaties which have taken the Statute as an example, constituting law between the parties in a case, Strupp expresses that he can't recognize other receptions of the general principles of law belonging to other areas of law, in the law of nations, unless these principles are specially and individually admitted (usually by custom and exceptionally by conventions) and not by virtue of an act in anticipation.[79] As a strict positivist, the author *categorically refuses* the existence of the third source of international law and in particular, the general principles of law as a third source.[80]

According to the French jurist Weil, the general principles of law cannot be an autonomous formal source of international law, despite the importance attached to Article 38 of the Court's Statute. They can only be considered as a material source. These principles may be important to avoid *non liquet* but with the development of international law, this temporary and limited role loses its importance. The general principles of international law have their normative characteristics by the way of the international custom.[81]

Kopelmanas, by approaching the matter through the legal technique, makes a similar observation at this point. For the author, it is not possible to create formal sources without human will. Each of these formal sources has its own competent agent determined *by* this legal order and *for* this legal order, and the method of regulation of law belongs to them. The general principles of law taken from domestic law are not regulated by the competent bodies of international law and it is not possible them to be the formal sources of this order.[82]

According to Kelsen, the possibility of the Court applying the general principles of law recognized by civilized nations is only possible if the two other norms *viz.* treaty and custom, do not bring a rule in a case. Obviously, the provision of Article 38/1(c) presupposes the existence of gaps in international law. This means that in cases where the other two norms do not provide a satisfactory solution, the Court authorized in a case to apply a rule which it considers as a general principle of law.[83]

The author, however, states that he is in doubt that the preparers of the Statute intended to give to the Court such an authorization. On the other hand, in the first paragraph of the Statute of the International Court of Justice, it is expressly stated that the duty of the Court is to act in accordance with

79 Strupp, Droit de la Paix, p. 336.
80 Strupp, Justice Internationale et Équité, p. 452; Strupp, Droit de la Paix, p. 336.
81 Weil, Recueil des Cours, p. 151.
82 Kopelmanas, Quelques Réflexions au Sujet de l'Article 38(3), pp. 295-296.
83 Kelsen, Principles of International Law, p. 393.

international law. Accordingly, the application of these general principles of law would only be possible if they are part of international law. This means that they are included in the rules listed in clauses (a) and (b). The conclusion of Kelsen from this is that *clause (c) is superfluous*.[84]

The Hungarian jurist Géza Herczegh, who served as the judge of the International Court of Justice, has also a positivist approach to the general principles of law.[85] The famous jurist places the principles of law in concrete norms and makes his distinction from this point. Each branch of law has its own principles. According to the author, the principles of law always mean that the concrete provisions of positive law which are formulated in a general and comprehensible form. In this case, the general principles of international law mean the generalization of the concrete rules of international law. Therefore, the general principles in this group should be sought in the context of international treaties and international customs.[86] The author answers negatively to the question of whether the general principles of law are an independent source of international law. The sources of law in international law should be the result of the common consent, express or tacit, of the States appears in the form of treaty or custom. An another form of common consent cannot be produced. Consequently, the general principles referred in Article 38/1(c) cannot be the general principles of international law (which cannot be considered as a separate source of international law).[87]

To comprehend the norms expressed in this provision *viz.* Article 38/1(c), Herczegh will look at arbitration practices. As a result of this examination, he reaches to the result that certain domestic law principles are already being implemented. According to the author, these domestic law principles are not the sources of international law. However, the process of implementation and the preparation of the Statute is followed, it will be seen that the principles referred to in Article 38/1(c) are the principles of domestic law. These principles shall apply if there is no rule in treaties and customs, regulating the dispute.[88] The Statute has made this practice which became a customary law, a part of international law. The way to do this will be the analogy with domestic law. The role of these principles is to technically stretch and improve the rigid aspects of international law by creating the new international customary rules.[89]

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84 Kelsen, Principles of International Law, pp. 393-394.
85 Degan, Sources of International Law, p. 73.
86 Herczegh, The General Principles of Law Recognized by Civilized Nations, pp. 18-21.
87 Herczegh, The General Principles of Law Recognized by Civilized Nations, p. 22.
88 Herczegh, The General Principles of Law Recognized by Civilized Nations, pp. 24-28.
89 Herczegh, The General Principles of Law Recognized by Civilized Nations, pp. 32-33.

B) Three Different Appearance of the Strict Monist Approach to the General Principles of Law:

Some writers who contribute to the theory of international reaches a similar conclusion with the positivist/dualist writers, following a different path from them. The difference here is that the authors will be mentioned here have reached this result with a radical monist look.[90] However, it is essential to talk about the authors' approaches in the strict monist view. In this section, the sociological method of the the French jurist Scelle[91], the pure theory of law and normative systematic of Kelsen[92] and his follower Guggenheim[93], and modern strict monist theory of Conforti[94] will be treated as three different methods.

1) Scelle's Intersocial Monism and a New Perspective of Sovereignty:

The French theorist Georges Scelle, known as the protagonist of sociological objectivism in international law[95], argues that the positivists' and specially Anzilotti's ideas about the application of the general principles of law by a Court is possible if it is only envisaged in a treaty, and only by this Court, and if there is a clear authorization for the reception of these principles, are strictly logical deductions from the dualist point of view but these ideas are contradicted with the facts. The general principles were always implemented by the Courts without the need by explicit authorization for reception.

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90 Kolb, La Bonne Foi en Droit International Public, para. 75-76.

91 Georges Scelle, "Droit de la Paix", **Recueil des Cours de l'Academie de Droit International,** T. 46, 1933 (IV), Paris: Librairie du Recueil Sirey, 1934, pp. 435-437; Georges Scelle, "Essai sur les Sources Formelles du Droit International", **Recueil d'Etudes sur les Sources du Droit en l'Honneur de François Geny, Tome III - Les Sources des Diverses Branches du Droit** içinde, Paris: Librairie du Recueil Sirey, 1935, pp. 423-426; Georges Scelle, **Manuel de Droit International Public**, Paris: Domat-Montchrestien, 1948, pp. 578-582.

92 Hans Kelsen, "Théorie du Droit International Public", **Recueil des Cours de l'Académie de Droit International,** T. 84, 1953 (III), The Hague: Kluwer Law International, 2002, pp. 119-122; Kelsen, Principles of International Law,pp. 393-394.

93 Paul Guggenheim, **Traité de Droit International Public - Tome I,** Genève: Librairie de l'Université, Georg &Cie., 1953, pp. 149-157.

94 Benedetto Conforti, "Cours Général de Droit International Public", **Recueil des Cours de l'Académie de Droit International,** T. 212, 1988 (V), The Hague: Martinus Nijhoff Publishers, 1991, pp. 77-80; Benedetto Conforti, **International Law and the Role of Domestic Legal Systems,** René Provost ve Shauna Van Praagh (trans.), Dordrecht: Martinus Nijhoff Publishers, 1993, pp. 63-67; Benedetto Conforti ve Angelo Labella, **An Introduction to International Law**, Boston: Martinus Nıjhoff Publishers, 2012, pp. 39-41.

95 Neff, Justice Among Nations, p. 375 ff. Two interesting articles on Scelle's theory of international law and for detailed information see Hubert Thierry, "The European Tradition in International Law: Georges Scelle", **European Journal of International Law,** Vol. 1, 1990, pp. 193-209**;** Gökhan Güneysu, "Uluslararası Hukuka Sosyolojik Bakış***;* Georges** Scelle ve Uluslararası Hukuk Kuramı**", Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi,** T. 16, 2014, pp. 4117-4137.

Moreover, the Committee of Jurists didn't intend to enact a specific positive legal text that will be applied only to the League of Nations.[96] According to Scelle, these thoughts emerged as a result of common dualist prejudice. In the author's thinking, the legal system is a whole, and all the general principles to be adopted are part of not only domestic law but also international law.[97]

Thus, the author places the discussion in his own theory of international law and the monist method. Scelle states that he can't agree with either of following conclusions which are defended by the majority of authors that there is this third source of the law of nations distinct from the custom as well as conventional law; and the Court can apply it only subsidiarily, that is, in the absence of a customary or conventional rule.[98] He argues that a formal source of law is the adoption of the rule by a competent agent and converted into a positive rule of law. *The general rules of law* which are not conventional rules, are originally established by the custom or by the legislative bodies of states; or they are also created by international judges. The latter are jurisprudential sources and are the work of the judge judging in equity; in the first hypothesis, they remain legislative rules or domestic law.[99]

This is essentially what the preparers of the Statute of the International Court of Justice are interested in: they have attempted to create a separate source different from conventional law and customary law.[100] The general principles of law are not the general principles of international law. These are essentially the *rules* of domestic law that must be searched in the legal orders of States, especially in statute law. They are found in all States or at least great majority of them. These principles take place in the conscience of the civilized nations and thus, turn into international rules.[101]

However, as mentioned above, since, according to Scelle, the legal system is in a single structure, the general principles of law are part of both domestic and international law. Accordingly, in terms of the monist doctrine that the author is a proponent of, the general principles of Article 38, there is none other than the fact of customary law of the law of nations.[102] It can be understood that Scelle did not see any difference among the general principles of law and customary law because the writer eliminated the line between the domestic law and the international legal system.

96 Scelle, Essai sur les Sources, p. 424.
97 Scelle, Recueil des Cours, p. 437.
98 Scelle, Essai sur les Sources, p. 423.
99 Scelle, Essai sur les Sources, p. 423.
100 Scelle, Recueil des Cours, p. 436.
101 Scelle, Essai sur les Sources, p. 423.
102 Scelle, Essai sur les Sources, p. 424

Nevertheless, the famous jurist states that there is a nuance between clauses 2 and 3 of Article 38. In clause 2, special or general, any custom are referred; whereas clause 3 is only about general customs and not special customs. This is important in terms of hierarchy between norms, because in this case, the general principles will be applied primarily either of the particular customs, or the conventional rules which would be in contradiction with them.[103] According to Scelle, this last point is clearly contradictory to the generally accepted view in the doctrine[104] -which is indeed the case. However, the author considers that the secondary role attributed to the general principles of law does not correspond to the legal or sociological facts.[105]

2) Vienna School and the Pure Theory of Law; Kelsen, Guggenheim:

The Austrian theorist Hans Kelsen is the founder and the most prominent name of the Vienna School, or with other names given to their ideas such as *analytical positivism, critical positivism or neo-positivism*.[106] The most important thing in Kelsen's theory is the strict normative nature of his approach. As will be explained below, a chain is established between norms and each norm is based on the previous norm. However, the source of these norms is certainly not the natural law. The school of Vienna builds the system within the limits of positivism and opposes to natural law.

According to theory of Kelsen, the norm that regulates the creation of other norms is *superior* to those which created according to former. The norms regulated in accordance with the provisions of another norm are considered *inferior* to the latter. İn this sense, each *superior* norm is the source of another *inferior* norm.[107] At the top of the chain established between the norms and the authorities, Kelsen puts not a sovereign ruler, but a sovereign norm which he called *Grundnorm* (the basic norm). With regard to the content of this norm, Kelsen makes reference to international custom as the reality that creates the law.[108] Kelsen states that "*the basis of customary law is the general principle that we ought to behave in the way that our fellow men usually behave and*

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103 Scelle, Essai sur les Sources, p. 425; Scelle, Manuel de Droit International Public, p. 580. In contrast to his ideas in these publications in 1935 and 1948, Scelle stated in his lecture at the Hague in 1933 that if the treaties and customs could not bring a solution to a dispute, the judge will search a relevant norme in general principles of law. *Cf.* see Scelle, Recueil des Cours, p. 437.

104 Scelle, Essai sur les Sources, p. 425.

105 Scelle, Manuel de Droit International Public, p. 580.

106 Neff, A History of International Law, p. 367. Josef Kunz and, for a time, Alfred Verdross, can be cited as examples of Austrian international lawyers of this school.

107 Kelsen, Théorie du Droit International Public, p. 119; Hans Kelsen, Principles of International Law, p. 303.

108 Neff, A History of International Law, p. 368.

during a certain period of time used to behave."[109] Custom, as one of the two principles methods of creating international law with treaties, is the older and the original source of either general or particular international law.[110] The author abandoned dualism of positivism and constructed domestic and international law systems within a single hierarchy of norms and in this hierarchy, puts the international law above.

Kelsen argues that, law creating methods *viz.* sources of domestic laws are legislation and custom, and international law are treaties and custom.[111] In terms of implementation in concrete cases, treaties and particular customs have priority over general customs. If there is no treaty of particular customary law to applicable to the situation, then general custom will be applied. According to the author, the absence of any treaty or customary law applicable to a concrete case is logically impossible. The present international law will provide a solution for each concrete case, that means, there will always be an answer to the obligation of a State -or another subject of international law- to act or not to act in a certain way. If an international legal person is not given an international obligation to act in a certain way, it is free to act as it wishes, and the decision will be made in this way.[112] Of course, such a decision may not be morally or politically satisfactory. Only this dissatisfaction may justify the introduction of "gaps" in international law, as in any legal order.[113]

The idea that the bodies responsible for the application of international law fill such gaps with norms other than customary of conventional law implies that these bodies have the authority to create law if they deem necessary. According to Kelsen, the authority to create law under the name of filling the gaps means an extraordinary authorization. Nevertheless, from the positivist point of view, the author states that it is possible to recognize such a power through a treaty and consider the Statute of the International Court of Justice as an example for such power.[114]

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109 Kelsen, Principles of International Law, p. 307.

110 Kelsen, Principles of International Law, p. 304.

111 Kelsen, Théorie du Droit International Public, p. 120; Kelsen, Principles of International Law, p. 304.

112 Kelsen's thought reminds the Lotus Case. As it is known, in this case, in this case, the absence of a rule of limitation arising from international law for jurisdiction has been interpreted as the legitimacy of such behavior. Nevertheless, according to the jurisdiction based on the nationality of the victim on the high seas rule has changed over time. On the other hand, in the area of international law, which is dominated by positivism, Kelsen's approach is dominant, but there is a tendency to expand the scope of binding rules for States in various ways.

113 Kelsen, Théorie du Droit International Public, p. 121; Kelsen, Principles of International Law, p. 305.

114 Kelsen, Théorie du Droit International Public, pp. 121-122; Kelsen, Principles of International Law, pp. 306-307.

In the opinion of the author, the possibility of the Court applying the general principles of law recognized by civilized nations is only possible if the two other norms *viz.* treaty and custom, do not bring a rule in a case. Obviously, the provision of Article 38/1(c) presupposes the existence of gaps in international law. This means that in cases where the other two norms do not provide a satisfactory solution, the Court authorized in a case to apply a rule which it considers as a general principle of law.[115] The author, however, states that he is in doubt that the preparers of the Statute intended to give to the Court such an authorization. On the other hand, in the first paragraph of the Statute of the International Court of Justice, it is expressly stated that the duty of the Court is to act in accordance with international law. Accordingly, the application of these general principles of law would only be possible if they are part of international law. This means that they are included in the rules listed in clauses (a) and (b). The conclusion of Kelsen from this is that *clause (c) is superfluous.*[116]

The Swiss jurist Paul Guggenheim, one of the followers of Kelsen, thinks that, form a monist point of view, the general principles are the norms passed from domestic law to international law via customary law. He argues that the application of general principles that clearly recognized in the treaties falls within the scope of conventional law. If a principle isn't recognized in the treaty, then the validity of the principle shall be based on customary law. For this reason, the general principles of law are based on either conventional or customary law.[117] According to this author, there is no technical requirement for the inclusion of the principles taken from domestic law as a source to the Statute because it is possible to resolve all international legal disputes by using custom and treaty. Accordingly, there will not be any situation requiring to declare *non liquet.*[118]

3) A modern approach to the monist theory of the superiority of domestic law; Conforti:

The monist theory that defended the dominance of domestic law over international law, which had important representatives of German international lawyers such as Jellinek, Zorn, Wenzel, has lost its effectiveness since the beginning of the 20th century. This theory affirms the supremacy of the law, and the whole legal order emerges as a result of the activities of State bodies. International treaties gain their validity only through the recognition by a law in domestic law.[119]

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115 Kelsen, Principles of International Law, p. 393.
116 Kelsen, Principles of International Law, pp. 393-394.
117 Guggenheim, Traité de Droit International Public, p. 151.
118 Guggenheim, Traité de Droit International Public, p. 150.
119 See for more information Lazare Kopelmanas, "Du Conflict entre le Traité International et

Conforti, the Italian lawyer, will come to a similar point with the other monists above *viz.* Scelle, Kelsen, Guggenheim, by defending a different method of monism which is domestic law being relatively dominant to international law. The existence of international law is based on the old theory of self-limitation because there is no supra-state organs to make the law.[120] According to Conforti, as of today, the way of ensuring the effectiveness of international law may be possible through the "domestic legal operators". Because the international law field has never had an integrated organization; there is not an absolute sanction power. Conforti consider that the enforcement of international law rules goes through the domestic legal systems of States. Thus, domestic law networks should be effective on this regard because a domestic legal system could prevent a State from violating international law.[121]

Conforti will also hand over the function of law creation in international law to domestic legal mechanisms. The rules of international law are formed by the compatibility of institutions' procedures in domestic law. For this reason, all kinds of domestic proceedings have an international dimension as long as they have an impact on the international interests of the State. There is no distinction between domestic law and international law; both arises from the actions of the same legal person *viz.* State. All kinds of competent bodies, even if they are not authorized in international relations, contribute to the development of the custom.[122]

Such a contribution is more evident in the general principles of law recognized by civilized nations. According to the author, in this case, Article 38/1(c) doesn't mean anything other than a particular kind of custom.[123] From this point, the author sets out parallel rules in terms of the application of the general principles of domestic laws in international law. Accordingly, these principles should primarily exist in the majority of States' domestic laws and be implemented on a regular basis. On the other hand, from the point of view of States, these principles must be considered mandatory in terms of both domestic law and international law. The Italian jurists, in his own words, defines a *sui generis* category of customary international law.[124]

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la Loi Interne" **Revue de Droit International et de Législation Comparée**, T. 18, 1937, pp. 326-330.

120 Kolb, La Bonne Foi en Droit International Public, para. 79.

121 Conforti, International Law and the Role of Domestic Legal Systems, pp. 8-10.

122 Conforti, Recueil des Cours, pp. 63-64; Conforti, International Law and the Role of Domestic Legal Systems, pp. 49-50.

123 Conforti, Recueil des Cours, p. 77; Conforti, International Law and the Role of Domestic Legal Systems, p. 63; Conforti, International Law and the Role of Domestic Legal Systems, p. 39.

124 Conforti, Recueil des Cours, p. 78; Conforti, International Law and the Role of Domestic Legal Systems, p. 64; Conforti, International Law and the Role of Domestic Legal Systems, p. 40.

C) General principles of law as subsidiary means for determining the applicable rule of law

While most of the above-mentioned authors attempt to shift the general principles of law in clause 38/1(c) into the norms contained in (a) and (b), a thought substitutes them in clause (d). The Polish jurist Makowski can be given as an example to the authors of this view.[125] According to the author, the general principles of law have only interpretative functions in a way similar to that envisaged in the Statute for judicial decisions and doctrine.[126]

> "*As for paragraph three, it has been even more subject to criticism than the first two. In fact, the judge does not apply the general principles of law in a concrete case, as he does with conventional or customary rules; at most, it can use them as an auxiliary means to discover and recognize a norm applicable to this case. Consequently, this provision should be written either as paragraph four or put these two paragraphs together in one."*[127]

Cheng states that Salvioli does not see more than a means of interpretation and application of treaty and custom in general principles of law.[128] Tunkin also sees something similar.[129] From Turkish doctrine, Akipek travels along the shores of this idea: As a source of positive law, Akipek accepts only the custom and the treaty. The author considers that to seeing a third source qualification in the general principles of law is to go beyond positive law. On the other hand, the Statute gives the Court the authority to use the sources of domestic law and, if necessary, to use of auxiliary sources such as doctrine and jurisprudence. Hence, the author says that if it is necessary to give a place to the principles of domestic law, perhaps it may be included among the auxiliary sources, but in the end, he indicates that they can be determined by the doctrine through induction; and therefore, he is opposed to giving an independent place even in the context of auxiliary sources.[130]

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125 French writers Ch. Rousseau and Charles Crozat state that Makowski identified the general principles of law with equity. In accordance with the references given by authors, it is true that Makowski used in his Hague Academy lesson which can be understood that he considered general principles of law and equity as the same. However, he makes his assessment on the basis of the Court Statute in a different way. *Cf.* see Charles Rousseau, **Principes Généraux du Droit International Public**, **Tome I: Introduction - Sources,** Paris: Éditions A. Pedone, 1944, p. 897; Charles Crozat, **Devletler Umumi Hukuku, Cilt: I, Umumi Prensipler ve Tarihçe**, Edip F. Çelik (tran.), İstanbul: İsmail Akgün Matbaası, 1950, p. 138.

126 Kolb, La Bonne Foi en Droit International Public, para. 100-101.

127 Julien Makowski, "L'Organisation Actuelle de l'Arbitrage International", **Recueil des Cours de l'Académie de Droit International**, T. 36, 1931 (II), Paris: Librairie du Recueil Sirey, 1932, pp. 360-361.

128 Cheng, General Principles of Law, p. 5, footnote 15.

129 Tunkin, Collected Courses, p. 106.

130 Akipek, Devletler Hukuku, pp. 68-69.

D) General principles of law as the authority to decide *ex aequo et bono*

In addition to his other criticisms[131], Kopelmanas reduces the general principles of law to the same level of equity as in paragraph 2 of Article 38, which can only be applied if the parties agree thereto.[132]

The author considers that the arbitral awards put forward by the advocates of the general principles of law have not been adequately examined, and according to the author, arbitration decisions cannot provide sufficient evidence on the existence of this source.[133] On the other hand, the idea that common principles can be found in different legal systems is also wrong. Each of these legal systems regulates different social relations -and this difference also applies to international law and domestic law.[134]

Another objection of the author is related to legal technique. Kopelmanas connects the creation of sources exclusively to the human will. Moreover, there is a body in charge in every legal order for creation of each formal source, and these organs regulates the law. The general principles of law taken from domestic law are not regulated by the competent bodies of international law and it isn't possible for those to be the sources of this order.[135]

Kopelmanas, at one point, puts close thoughts to the ideas of Anzilotti: According to the author, the judge who based his judgment on general principles of law makes legislative process because these principles are unfamiliar with international law and become international norms only by the judge who designs them according to international law. At this point, the author differs from Anzilotti: Eventually, it is impossible, in the opinion of the author, to draw a border between the application of a general principle and the decision based on equity (*équité*). Therefore, the provision 38/3 of the Statute gives the judge the authority to decide on the basis of equity. However, according to the last paragraph of Article 38, the parties must have explicitly declared their consent for a decision to be made on the basis of equity (*ex aequo et bono*). If we don't want to authorize the judge to create law in international law -and the Committee of Jurists who drafted the Statute clearly opposed that- the paragraph 3 related general principles of law becomes completely meaningless.[136]

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131 Kopelmanas, Essai d'une Théorie des Sources Formelles, p. 123; Kopelmanas, Quelques Réflexions au Sujet de l'Article 38(3), pp. 303-308.

132 Kolb, La Bonne Foi en Droit International Public, para. 102-107.

133 Kopelmanas, Quelques Réflexions au Sujet de l'Article 38(3), pp. 288-290.

134 Kopelmanas, Quelques Réflexions au Sujet de l'Article 38(3), p. 295.

135 Kopelmanas, Quelques Réflexions au Sujet de l'Article 38(3), pp. 295-296.

136 Kopelmanas, Essai d'une Théorie des Sources Formelles, p. 123; Kopelmanas, Quelques Réflexions au Sujet de l'Article 38(3), pp. 303-308.

E) *A priori* rejection of Common legal principles in different nations

Another group of lawyers rejects the possibility that there may be common principles of different societies. According to these authors, each legal system is based on its own historical, cultural, political, ideological, economic and social elements, and it is not possible to have common principles among the different structures built on these foundations. This view is especially advocated by the doctrine of socialist international law and Kelsen[137] seems to be joining this view. The Soviet writer Tunkin[138] appears as the protagonist to whom this thought is frequently referred. Herczegh[139] and Kopelmanas[140] also seem to emphasize this difference between societies.[141]

Among his other criticisms about the Court's Statute, Kopelmanas also opposes the idea that it is possible to determine a number of common general principles in different legal systems. The author asserts that it is difficult to determine the common general principles in this way by pointing out the differences between societies.[142] In addition, social relations which are the basis for the formation of legal rules are quite different between international law and domestic law. The common existence of certain principles in domestic law will not result as the implementation of these principles in international law if the existence of similar social cohesion is not proven.[143]

Concerning the general principles of law recognized by civilized nations in the context of the Statute of the International Court of Justice, Kelsen is suspicious of the existence of such common principles in the legal systems of civilized nations, particularly in view of the ideological opposition that *separates the communist and capitalist, autocratic and democratic legal systems*.[144]

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137 Kelsen, Principles of International Law, p. 393.

138 Tunkin, Collected Courses, p. 102; Grigory I. Tunkin, **Theory of International Law,** William E. Butler (Tran.), Massachusetts: Harward University Press, 1974, p. 199.

139 Herczegh, The General Principles of Law Recognized by Civilized Nations, p. 18.

140 Kopelmanas, Quelques Réflexions au Sujet de l'Article 38(3), pp. 294-295.

141 Kolb, La Bonne Foi en Droit International Public, para. 62-69. For similar ideas put forward by French author Charles Chumont, see Pellet, Article 38, p. 769; Kolb, La Bonne Foi en Droit International Public, para. 68, footnote 132.

142 According to the author, for example, how will common principles be mentioned between European countries like industrial England, mostly proletarian Germany or middle-class bourgeois France etc.? The creation of treaties is completely different in German and French law. The principle of *clausula rebus sic stantibus* is interpreted differently even by the two judicial bodies of France (La Cour de Cassation and Conseil d'Etat). For other examples given by the author, see Kopelmanas, Quelques Réflexions au Sujet de l'Article 38 (3), pp. 294-295.

143 Kopelmanas, Quelques Réflexions au Sujet de l'Article 38(3), p. 295.

144 Kelsen, Principles of International Law, p. 393.

Even though it has been dissolved as of today, the Soviet doctrine, and in particular Tunkin, is frequently referred for the critiques of the formal source nature of the general principles of law.[145] The main point that the Soviet jurist builds his thoughts is that the Statutes of the PCIJ and the ICJ are two separate Conventions. The new Statute appeared under different conditions than former and was signed by different parties. In this case, according to the author, the comments to be given to the provisions should not always be the same.[146]

Tunkin criticizes the studies in the Western literature on general principles of law. First of all, the author doesn't find acceptable the references given to arbitration practices in order to verify these principles. According to him, these practices took place between a certain number of *bourgeois* States and cannot be regarded as "general" practices in this sense.[147] The other point of criticism of his, on the other hand, is that the starting point of the studies is always *travaux préparatoires* of the Statute of the Permanent Court of International Justice.[148]Although in some instances the opinions of the lawyers in the Committee are important in terms of the interpretation technique of international treaties, they are mostly composed of representatives of the *bourgeois* legal systems, and the idea in their minds is that *the Court will resolve the disputes by using the general principles contained in the national legal systems of these bourgeois States.*[149]

However, according to the author, this method will not be accepted on the basis of the new Court Statute adopted at the San Francisco Conference. The provision 38/1(c) of the new Statute should be interpreted together with the addition to the initial paragraph which follows: "*whose function is to decide in accordance with international law such disputes as are submitted to it*". With this amendment, it is not possible to interpret this provision simply as "the common general principles in all civilized nations". It is clearly the general

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145 See Michel Virally, "The Sources of International Law" Max Sørensen (Ed.), **Manual of Public International Law** içinde, London: Palgrave McMillan, 1968, p. 147.; Johan G. Lammers, "General Principles of Law Recognized by Civilized Nations", Frits Kalshoven and others (Ed.), **Essays on the Development of the International Legal Order,** Alphen aan den Rijn: Sijthoff and Noordhoff, 1980, pp. 54-55; G.J.H. Van Hoof, **Rethinking the Sources of International Law,** Deventer: Kluwer Academic Publishers, 1983, p. 132; Fabian O. Raimondo, **General Principles of Law in the Decisions of International Criminal Courts and Tribunals,** PhD Thesis, Amsterdam Center for International Law (ACIL), 2007, pp. 42-43; Hüseyin Pazarcı, **Uluslararası Hukuk Dersleri - 1. Kitap,** 12. Edition, Ankara: Turhan, 2014, p. 238;

146 Tunkin, Collected Courses, pp. 98-99.

147 Tunkin, Theory of International Law, p. 198.

148 Tunkin, Collected Courses, p. 98. For the views of different *bourgeois* and socialist writers, see Tunkin, Theory of International Law, pp. 190-197; Tunkin, Collected Courses, pp. 99-101, 104-105.

149 Tunkin, Collected Courses, p. 99.

principles of international law, expressed here as the general principles of law. In this case, the fact that a principles takes place in the legal systems of all States will not make these principles the general principles of law. To be implemented in international law, they must be part of this legal system.[150]

Tunkin states that there is no common existence of any normative principles between two opposing systems *viz.* the socialist and capitalist legal systems. Even the rules that are seen as similar in these systems are actually different from each other. Because, in the author's view, the rules of law are not simple rules of conduct, but social rules with social content. Different class demands, objectives and different roles in these different societies, differentiate the norms of socialist and capitalist legal systems.[151] As a result, Tunkin argues that there will be no common normative legal principles between these two legal systems. However, the author acknowledges that some general legal concepts, logic rules, and some legal techniques that can be used in the application and interpretation of law can take place in common. But such "principles" are not normative; do not create rights and obligations. Tunkin gives the maxims *lex specialis derogat generali, lex posterior derogat priori, nemo plus juris transferre potest quam ipse habet* as examples.[152]

The application of such non-normative principles in international law would only be possible if they were recognized by States as applicable in international law, in other words, by an international treaty or custom. Therefore, the author accepts only conventional and customary law as sources of international law.[153] General principles of law cannot form the basis of a decision, but they can be used in the application and interpretation of other international law rules.[154]

III. The Rise of Neo-Naturalism in the Twentieth Century: the General Principles of Law as an Autonomous Source of International Law

Positivist and voluntarist authors have never doubted to reject the autonomy of the general principles of law. In particular, for authors with dualist views, the adoption of a distinct source of law based on the principles that derived from domestic law, would also contradict with the views of this very authors about the theory of international law. Some of these authors have tried to solve the problem on the basis of the classical theory and conventional nature of the Statute. For those who are not very strict in their opinions, in order to be the norm of positive law, it is sufficient for the general principles of law that they recognized in domestic laws.

150 Tunkin, Collected Courses, p. 99-101.
151 Tunkin, Collected Courses, p. 102; Tunkin, Theory of International Law, p. 199.
152 Tunkin, Theory of International Law, p. 200.
153 Tunkin, Theory of International Law, p. 202.
154 Tunkin, Collected Courses, p. 106.

The 19th Century has passed with the absolute dominance of positivism in international law doctrine. The period between the two World Wars was very lively and productive in terms of discussions on the theory of international law. With the impact of the World War I, serious criticisms directed to the strict positivism. Apart from the sociological theory and the internal demands for the reform of dogmatic positivism like Vienna School or neo-positivism, theorists, in this period, try also to interpret the natural law with new understandings. Lauterpacht announced in his book Private Law Sources and Analogies of International Law in 1927 that "*the dogmatic positivism of ten years ago is no longer predominant*". The author calls this new era as "*the renaissance of natural law*", and this rebirth is evolving with the increasing awareness of the *inadequacy of the rigid positivist method*. He argues that this is different from classical natural law, but rather "*the modern 'natural law with changing contents', 'the sense of right', 'the social solidarity', or 'the engineering' law in terms of promoting the ends of the international society.*[155]

In the same or later period with Lauterpacht, the writers such as Louis le Fur, Alfred Verdross, James Leslie Brierly, James Brown Scott and Erich Kaufmann can be mentioned as the examples of international lawyers on the side of natural law in this challenge.

For the naturalist authors, the inclusion of the general principles of law in the Statute of PCIJ has been seen as a life-saver and welcomed. These writers perceived this new development as a position gained in the battle they entered with positivist thought. The general principles of law imply for naturalist writers, a number of general rules of law outside the will of States. In this respect, one of the important areas where this above-mentioned theoretical debates took place is about the sources of international law and, in particular, the existence of the general principles of law as an autonomous source and the nature of these principles. At this point, the contributions of Lauterpacht and especially Verdross to the international legal literature have been enormous.

For these reasons, among authors who have a naturalist approach, the opinions of the four authors whose thoughts should have a special place of their own, will be examined under their own headings in order to ensure that the connection between reasoning is not broken.

[155] Lauterpacht, Private Law Analogies, p. 58, dipnot 7.

A) Hersch Lauterpacht:

Lauterpacht[156] argues that it isn't correct to conclude that there is a gap in the law and that international law cannot be applied if there is no international treaty or custom to apply in a legal dispute. In these cases, we also have a reserve source: the general principles of law recognized by civilized nations.[157]

According to the famous jurist, these principles cannot be the principles of moral justice apart from the law. They are not the rules of equity in the ethical sense, or the rules of theoretical law filtered through the legal and moral principles. "*They are, in the first instance, those principles of law, private and public, which contemplation of the legal experience of the civilized nations leads one to regard as obvious maxims of jurisprudence of a general and fundamental character.*"[158]

He argues that the paragraph 3 of Article 38 of the Statute is a *declarative* provision, but it is rare that the recognition of an existing social and legal reality has had a revolutionary effect than this article.[159] He sees the inclusion of the general principles of law to the Statute as an important landmark in international law since the States expressly recognized a third source independent of custom and treaty.[160]This article is declarative because the previous arbitration decisions and arbitration treaties clearly recognize the general principles of law as a source for decision and beyond that, it is declarative because the general principles of law expresses a social necessity which surpass the consensus-based conventions and customary law, often incomplete and controversial and law in their developments, and without this social necessity, the development of international law or any other law is difficult.[161]

With the beginning of the modern international arbitration, States have always authorized the arbitrators to use of norms other than custom and treaty[162] and an opposite example is very rare. This fact points to awareness of

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156 For two separate studies on Hersch Lauterpacht's contribution to international law, see Martti Koskenniemi, **The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960,** Cambridge: Cambridge University Press, 2004, pp. 353-412; Wilfred Jenks, "Hersch Lauterpacht: The Scholar as a Prophet", **British Year Book of International Law**, Vol. 36, 1960, pp. 1-103.

157 Hersch Lauterpacht, **International Law - Being the Collected Papers of Hersch Lauterpacht - Vol. I - The General Works,** Elihu Lauterpacht (Ed.), Cambridge: Cambridge University Press, 1978, pp. 68-69.

158 Lauterpacht, Collected Papers, p. 69.

159 Hersch Lauterpacht, "Droit de la Paix", **Recueil des Cours de l'Academie de Droit International,** T. 62, 1937 (IV), Paris: Librairie du Recueil Sirey, 1938, p. 163.

160 L. Oppenheim - H. Lauterpacht (Ed.), **International Law, A Treatise, Vol. I,** 8. Ed., London: Longman Green and Co., 1955, p. 30.

161 Lauterpacht, Recueil des Cours, p. 164.

162 Lauterpacht, Private Law Analogies, p. 61-62. For the examples of arbitration practices

the inadequacy of these two norms. Lauterpacht consider that this practice *viz.* the recognition of effectiveness of rules other than treaty and custom, itself has become a customary rule of international law.[163] The author, however, underlines that the application of the general principles of law or the authorization of the Court by the "rules of justice and equity", doesn't grant the judge the jurisdiction to decide *ex aequo et bono*.[164]

According to Lauterpacht, Article 38 of the Statute of the PCIJ puts an end to the *embarrassing uncertainty* as to the sources of law to be applied by international courts.It has a guiding characteristic in many ways. It refers to a fundamental and competent abandonment of misguided doctrine that international law consists of a set of self-sufficient rules.

The Committee of Jurists were also aware of the importance of the text they prepare. At the end of all discussions, the agreement reached by mutual compromises was also the rejection of dogmatic positivism.[165] On the other hand, referring to the recognition by civilized nations means the rejection of the naturalist view. In this sense, this practice is of a nature that can be characterized as *Grotian* view[166], which, as the founding father of international law did, focuses on the will of States but doesn't completely detach this area from the general legal experience and practices of humanity.[167] In addition to the practices before the establishment of the Court, also after its establishment, although they were not bound with the Statute, some international tribunals have accepted Article 38 as being declaratory of the existing law and have taken the sources listed here as basis of their judgments.[168] In this respect, the author also doesn't share the opinion of some positivists (specially Anzilotti's) that the authorization in the Statute will be valid only for PCIJ (or ICJ).[169] The fact that the Court (and its successor) rarely used its authority to apply the general principles of law is because, in the case of disputes up to that time, the customary and conventional rules were sufficient in terms of deciding the

about the subject given by the author, see Hersch Lauterpacht, **The Function of Law in the International Community,** Oxford: Oxford University Press, 1933, Reprint 2011, pp. 123-126.

163 Lauterpacht, Private Law Analogies, pp. 62-63; Lauterpacht, Recueil des Cours, p. 164, footnote 1.

164 Lauterpacht, Private Law Analogies, pp. 63-64.

165 Lauterpacht, Private Law Analogies, pp. 67-68; Oppenheim-Lauterpacht, International Law, pp. 30-31.

166 See Hersch Lauterpacht, "The Grotian Tradition in International Law", **British Year Book of International Law**, Vol. 23, 1946, pp. 1-53.

167 Oppenheim-Lauterpacht, International Law, Vol. I, pp. 30-31. See also Lauterpacht, Collected Papers, p. 74-75.

168 Oppenheim-Lauterpacht, International Law, Vol. I, p. 30; Lauterpacht, Collected Papers, p. 75.

169 See Lauterpacht, Recueil des Cours, pp. 166-167.

case.[170]

The paragraph 3 of Article 38 was put against declaration of *non liquet* in dispute which cannot be solved by custom and treaty and the author states that *non liquet* theory hasn't been applied in arbitration practices in a long time.[171] Therefore, the role of these principle is the safety valve: an insurance/ assurance against which hasn't been realized, but to a continuing danger, that is, the Court cannot find a norm to apply in a conflict. The provision 38/3 has eliminated the danger of *non liquet* and this is its primary duty.[172] Furthermore, according to the author, prohibition of *non liquet* is also a general principle of law recognized by civilized nations.[173]

On the other hand, this provision doesn't eliminate the wills of States declared in treaties and customs. On the contrary, it puts them on top the hierarchies between sources. The judge must give priority to the norms that parties clearly express their will. However, the strict implementation of this order doesn't grant fruitful results. How, although they are at the second place in the ranking, the customs affect the treaties, because the latter need to be interpreted in the light of the customs; these two norms must be interpreted in accordance with the general principles of law.[174]

As for the question, "*What is the exact meaning of those general principles of law as recognized by civilized nations?*", Lauterpacht offers, to clarify this issue, to look three sources: First of all, it may be possible to determine what the concept is from arbitration practices before the establishment of the Permanent Court of International Justice. Secondly, this question can be sought on the basis of simple logical inferences that can be filtered through the content of Article 38/3. The Statute refers to the general principles of law that do not specifically belong to international law or to correspond *ex aequo et bono*. Consequently, the Court may apply for a particular case the principles of criminal law or administrative law; but generally, the principles of private law as a whole must be understood in the sense of this provision. Thirdly, the discussions of the jurists in the Committee preparing the Statute has some clues on the issue. For example, the President of the Committee, Descamps, exemplified the principle of *res judicata* in the Pious Fund Case. Another member Phillimore, stated

170 Oppenheim-Lauterpacht, International Law, Vol. I, pp. 29-30. For the examples given by the author, see Hersch Lauterpacht, **The Development of the International Law by the International Court,** London: Stevens and Sons Limited, 1958, pp. 158-172; Lauterpacht, Recueil des Cours, pp. 166-167; Lauterpacht, Private Law Analogies, pp. 293-296; Lauterpacht, Collected Papers, pp. 69-70.

171 Lauterpacht, Recueil des Cours, p. 165.

172 Lauterpacht, Recueil des Cours, p. 167-169.

173 Lauterpacht, Recueil des Cours, p. 166.

174 Lauterpacht, Recueil des Cours, p. 166.

about the aforementioned rule that it is of the same nature as any written rule and that the general principles of common law are also a part of international law and can be applied in international law.[175]

B) Alfred Verdross

Austrian author Verdross believes that the idea of the positivist doctrine that States will be bound by only their implicit or explicit will is entirely *dogmatic*. On the other hand, it defends a realist method which requires looking for the practice of international law.[176] The opinion of dominant dogmatic positivism[177] that there is only two sources of international law doesn't reflect the realities of international law.[178]

First of all, there is a large number of arbitration decision that apply not only custom and treaty, but also a third set of rules of law, namely the general principles of law.[179] This shows that the disputes between States are resolved not only by conventional and customary law, but also by using the general principles of the law found in the domestic laws of the civilized States.[180] Verdross concludes from these practices that the international judicial bodies have never accepted a pure positivist doctrine.[181]

The author states that some may claim this argument that the arbitration authorities have overstepped their powers to evaluate the sources of law in deciding the cases. According to him, however, that this objection would be overruled by the fact that the States parties to the cases didn't raise any objection on this issue. States have accepted all these decisions.[182] Consequently, it can be said that the States have found the application of these principles as appropriate. States would have objected to these arbitration awards if they had any possible opinion that the general principles of law were not binding on them.[183]

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175 Lauterpacht, Private Law Analogies, pp. 69-70.

176 Alfred Verdross, "Les Principes Généraux du Droit Applicables aux Rapports Internationaux",**Revue Générale de Droit International Public**, T. 45, 1938, p. 44.

177 Alfred Verdross, "Droit International de la Paix", **Recueil des Cours de l'Academie de Droit International**, T. 30, 1929 (V), Paris: Librairie Hachette, 1931, p. 301.

178 Verdross, Études sur les Sources du Droit en l'Honneur de F. Geny, p. 383.

179 The author gives examples of different arbitration decisions, see Verdross, Études sur les Sources du Droit en l'Honneur de F. Geny, p. 384. See also Alfred Verdross, "Les Principes Généraux du Droit dans la Jurisprudence Internationale", **Recueil des Cours de l'Academie de Droit International**, T. 52, 1935 (II), Paris: Librairie du Recueil Sirey, 1936, pp. 195-251.

180 Verdross, Droit International de la Paix, p. 302.

181 Verdross, Principes Généraux du Droit Applicables aux Rapports Internationaux, p. 45.

182 Verdross, Principes Généraux du Droit et le Droit des Gens, p. 490-491.

183 Verdross, Études sur les Sources du Droit en l'Honneur de F. Geny, p. 384.

And finally, Article 38 of the Statute of PCIJ obliges the Court to implement the general principles of law recognized by civilized nations, unless there is a conventional or customary rule in the matter.[184] Similar provisions are also included in many arbitration agreements.[185]

The conclusion to be obtained from this information is that Article 38/3 of the Statute doesn't provide a new source for international law; but it has codified a long-recognized principle in international practice.[186]

One of the critical issues here is that will these principles be effective only on the Hague Court because of the provision 38/3 of the Statute; or, in the same way, on the States and, in the absence of a clear provision, on any international court or arbitral tribunal. Verdross doesn't share the idea of positivists that it is only the Court that is obliged to apply these principles and it is not obligatory for other tribunals and States. According to the author, such an interpretation contradicts the new jurisprudence of that time.[187] Verdross argues that even if a provision in this direction is not included in the arbitration, the judge whose duty is to apply international law, should determine the sources to be applied by using Article 38 of the Court's Statute. And also, if States had not been convinced that these principles were internationally valid, they wouldn't have accepted that the new Court had such authority.[188]

Verdross opposes the view that the general principles of law are natural law rules. He thinks that Article 38, in conformity with the international law, gives the Court the authority to apply general principles of law *viz.* positive principles adopted by civilized nations. However, in order for a principle to be compulsory in the international sphere, it is not sufficient to be accepted in the domestic law of one or more States. Again, it is not enough to be written in the laws of several States. On the contrary, this principle must have been the subject of an intense practice and must also have been adopted in domestic laws not by all civilized States, but of the civilized States in general.[189]

These principles are the subsidiary sources in the law of nations.[190] If there is a customary or conventional rule that eliminates a general principle of law;

184 Verdross, Études sur les Sources du Droit en l'Honneur de F. Geny, pp. 384-385.

185 For different arbitration agreements given as examples by the author, see Verdross, Études sur les Sources du Droit en l'Honneur de F. Geny, p. 385.

186 Verdross, Études sur les Sources du Droit en l'Honneur de F. Geny, p. 385.

187 For the examples given by the author, see Verdross, Principes Généraux dans la Jurisprudence Internationale, p. 232; Verdross, Droit International de la Paix, p. 302. See also Verdross, Principes Généraux du Droit et le Droit des Gens, p. 496; Verdross, Études sur les Sources du Droit en l'Honneur de F. Geny, p. 385.

188 Verdross, Études sur les Sources du Droit en l'Honneur de F. Geny, p. 386.

189 Verdross, Études sur les Sources du Droit en l'Honneur de F. Geny, pp. 387-388.

190 Verdross, Droit International de la Paix, p. 303.

these are the norms that will be applied in first place. Such a situation is not extraordinary. In fact, it is a requirement of the generally accepted principle that *lex specialis derogat legi generali*. As a result, the special rules of international law, that is, the treaty and convention, have priority over the principles of law which do not belong to international law but which are common in the internal laws of civilized States. This natural order was also accepted by the Committee of Jurists who prepared the Statute,[191] and it is envisaged to apply this sort of ranking in the Statute at the beginning.[192]

C) Louis le Fur

The French jurist le Fur also presents the practices of the modern arbitration and the PCIJ and the texts adopted in the Hague Conferences and the Court's Statute as the examples of the recognition of the general principles of law. In the same way, the author has examined the discussions in the preparation of the Statute and concludes that the authority given to the Court is not new.[193]

According to the author, in the context of Article 38/3, for the existence of a general principle of law, two conditions must be present:

First, there should be a situation that requires an urgent implementation of the superior principle of justice, a direct consequence of objective law. According to the author, it is an exaggeration to say that the general principles of law are confused with natural law or objective law. In fact, it is possible to reduce the principles covered by natural law to two to abide by the promise given by free will, to compensate for the damage caused by injustice. However, the general principles of law within the scope of 38/3 are numerous. However, it would not be wrong to say that, if they are not confused, they are in very close relationship. The general principles of law come through directly from natural law or objective law. They both derive their source from the concepts of justice and morality which is universal and can be said to be natural in man.

Secondly, however, this requirement is not sufficient. In order for the general principles of law to be regarded as objective international law, they must also be found in the positive domestic law of almost all civilized States; in other words, they must recognized by the positive law of the States.[194]

This character distinguishes the principles set out in the Article from the principles of international law. Because the principles of international law are recognized directly by international law practice and they form the international

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191 Verdross, Principes Généraux du Droit et le Droit des Gens, pp. 494-495.

192 Verdross, Études sur les Sources du Droit en l'Honneur de F. Geny, p. 388.

193 Louis le Fur, "Droit International de la Paix", **Recueil des Cours de l'Academie de Droit International,** T. 54, 1935 (IV), Paris: Librairie du Recueil Sirey, 1936, pp. 199-204.

194 Le Fur, Recueil des Cours, p. 205.

law directly. In the Statute, the general principles of international law cannot be pointed out; because in this case it will be an unnecessary repetition with paragraph 2.[195] Moreover, the general principles of law can only be a part of international law if they are recognized as positive in domestic law. Often these principles are the principles of civil law; and there is a simple reason for this that the conflicts often arise between individuals and must be solved first.[196]

Do these principles have to be recognized by all States without exception, or can they be proposed against a State that has never accepted them? According to Le Fur, the answer to these questions is clear: general principles are a reflection of objective law and are binding on both States and individuals.[197] Sometimes States may also have norms that are the reflection of objective law in their domestic law but they do not become the rules of international law. The fact that a few states have placed a rule in domestic law is not sufficient in terms of becoming the rule of international law in the context of Article 38/3.

Le Fur also considers that the application of the general principles of law is only possible in the absence of a provision in customary and conventional law to settle the case. The general principles of law completes the other two sources. Furthermore, the general principles of law have another function: they enable the interpretation and clarification of an international treaty or customary rule. In this case, the general principles of law have a dual function: interpretative and complementary.[198]

D) Kotaro Tanaka

The dissenting opinion of Tanaka in the South West Africa Case[199]is frequently cited in studies concerning the general principles of law in the doctrine of international law. In this case, the applicant States, as one of their arguments, relied on the general principles of law recognized by civilized nations under Article 38/1(c) of the Statute. Judge Tanaka, regarding this claim of the parties, examines whether the prohibition of discrimination that forbids the *apartheid* practice can be considered within the meaning of this article of the Statute.

The Japanese Judge states that the meaning of the provision of the Statute is not very clear. In this case, Tanaka would first oppose the reduction of these general principles to the principles of private law or principles of procedural

195 Louis le Fur, **Précis de Droit International Public**, 4. Ed., Paris: Librairie Dalloz, 1939, p. 246.
196 Le Fur, Recueil des Cours, pp. 205-206.
197 Le Fur, Recueil des Cours, p. 207.
198 Le Fur, Recueil des Cours, p. 213.
199 **Dissenting Opinion of Judge Tanaka, South West Africa, Second Phase**, Judgment, ICJ Reports, 1966, pp. 250-324.

law. Since there is no qualification for what the "general principles of law", the expression of law here must be understood to meet all branches of law; including municipal law, public law, constitutional and administrative law, private law, commercial law, substantive and procedural law, etc. As for the analogies to be drawn, he refers the ideas of Judge McNair in his separate opinion to the Advisory Opinion of the Court for the International Status of South West Africa that "*not by means of importing private law institutions "lock, stock and barrel", ready-made and fully equipped with a set of rules*". It would not be right to reduce these principles to the written provisions and institutions of national law. On the contrary, it should be extended to the basic concepts of each branch of law as long as they meet the requirement of being recognized by the civilized nations.[200]

Tanaka, in his interpretation of Article 38/1(c), argues that human rights the protection of these rights are within the general principles set forth in this article. If a norm arises out of the will of the State and cannot be changed even with this will *because it is deeply rooted in the conscience of mankind and of any reasonable man*, it is possible to call it 'natural law' as the opposite of 'positive law'. In the constitutions of some States, it is the case that human rights are categorized as *"inalienable", "sacred", "eternal", "inviolate"*, etc. If we mention about *jus cogens* in international law which can't be changed by States, the rules about the protection of human rights can be considered as *jus cogens.*

Judge Tanaka says these thoughts can be criticized on the grounds that they have a dogmatic understanding of natural law. In this respect, he will continue his reasonings as follows:

> " (…) *it is undeniable that in Article 38, paragraph 1 (c), some natural law elements are inherent. It extends the concept of the source of international law beyond the limit of legal positivism according to which, the States being bound only by their own will, international law is nothing but the law of the consent and auto-limitation of the State. But this viewpoint, we believe, was clearly overruled by Article 38, paragraph 1 (c), by the fact that this provision does not require the consent of States as a condition of the recognition of the general principles. States which do not recognize this principle or even deny its validity are nevertheless subject to its rule. From this kind of source international law could have the foundation of its validity extended beyond the will of States, that is to say, into the sphere of natural law and assume an aspect of its supra-national and supra-positive character*."[201]

[200] Diss. Op. of Tanaka, South West Africa, pp. 294-295.
[201] Diss. Op. of Tanaka, South West Africa, p. 298.

Famous jurist states that the aim of eliminating the danger of *non liquet*, which is expressed as one of the important reasons for adopting Article 38/1-c, is the point of recognition of the inadequacy of positive law.[202] Tanaka makes his assessment of the order among the sources in Article 38 in accordance with the above considerations. According to the judge, from a voluntary/positivist point of view, first the application of the treaty and the custom, then of the general principles of law will be accepted. On the other hand, with the view of the supranational objective law, the general principles of law precede; and the other two norms will follow. Because, if we accept the convention and customary law as the concretization and expression of the general principles already exists, we give priority to this third source vis-à-vis the other two sources.[203]

IV. The Basis of the General Principles of Law

A) The General Principles of Law Derived from Domestic Laws as an Autonomous Source of International Law

Many international jurists have taken into account the ideas that emerged in the Committee of Jurists on the preparation of the Statute of the International Court of Justice, and the words "recognized by civilized nations" in the Statute to explain these general principles.[204]In the Committee, Lord Phillimore, in response to the question of Lapradelle how to determine these general principles, states that these principles *accepted by all nations in foro domestico, such as certain principles of procedure, the principle of good faith, and the principle of res judicata, etc*.[205] According to this view, the general principles of the law serve the purpose of filling the gaps arising from the convention and convention, which present a danger to the functioning of international law. For this purpose, the general principles discovered by a comparative study and available to meet international requirements, which are common in different domestic laws, can be transferred to international law through analogy.[206] This thought is defended by many jurists including Ch. De Visscher[207], Verdross[208],

202 Diss. Op. of Tanaka, South West Africa, p. 299.

203 Diss. Op. of Tanaka, South West Africa, p. 300.

204 Kolb, La Bonne Foi en Droit International Public, para. 110-121; Hugh Thirlway, **The Sources of International Law**, Oxford: Oxford University Press, 2014, p. 95.

205 Procès-Verbaux, p. 335.

206 Portugal submitted to the Court a comparative study of principles for free passage in different civilizations and legal systems in the Right of Passage Case, see **Right of Passage over Indian Territory, Merits**, Judgment, ICJ Reports, 1960, pp. 6-144.

207 Charles De Visscher, "Contribution à l'étude des Sources du Droit International", **Revue de Droit International et de Législation Comparée,** Vol. 14, 1933, pp. 405-406. For the same article of the author see also **Recueil d'Etudes sur les Sources du Droit en l'Honneur de François Geny, Tome III - Les Sources des Diverses Branches du Droit**, Paris: Librairie du Recueil Sirey, 1935, pp. 395-396.

208 Verdross, Droit International de la Paix, p. 302; Verdross, Études sur les Sources du Droit

Le Fur[209], Lauterpacht[210], Brierly[211], Ripert[212], Bourquin[213], Virally[214], McNair[215],

en l'Honneur de F. Geny, pp. 387- 388; Verdross, Principes Généraux du Droit Applicables aux Rapports Internationaux, p. 49.

209 Le Fur, Recueil des Cours, pp. 205-206; Le Fur, Précis de Droit International Public, p. 246.

210 Lauterpacht, Private Law Analogies, pp. 69-70; Oppenheim-Lauterpacht, International Law, Vol. I, p. 29.

211 James Leslie Brierly, **The Law of Nations - An Introduction to the International Law of Peace**, 5. Ed., Oxford: Oxford University Press, 1955, pp. 63-64; Andrew Clapham, **Brierly's Law of Nations,** 7. Ed., Oxford: Oxford University Press, 2012, p. 64; James Leslie Brierly, "Règles Générales du Droit de la Paix", **Recueil des Cours de l'Académie de Droit International**, T. 58, 1936 (IV), Paris: Librairie du Recueil Sirey, 1937, pp. 77-78.

212 Georges Ripert, "Les Règles du Droit Civil Applicables aux Rapports Internationaux (Contribution à l'Etude des Principes Généraux du Droit Visés au Statut de la Cour Permanente de Justice Internationale)", **Recueil des Cours de l'Académie de Droit International**, T. 44, 1933 (II), Paris: Librairie du Recueil Sirey, 1934, p. 580.

213 Maurice Bourquin, "Règles Générales du Droit de la Paix", **Recueil des Cours de l'Académie de Droit International**, T. 35, 1931 (I), Paris: Librairie du Recueil Sirey, 1932, p. 73-74.

214 "*Originating in municipal systems of law, or, more exactly, in municipal law in general, and constituting a distinct source, the general principles of law must be distinguished from the principles of inter- national law itself, which are in reality no more than those rules of international law which are derived from custom or treaty.*" See Michel Virally, "The Sources of International Law" Max Sørensen (Ed.), **Manual of Public International Law** içinde, London: Palgrave McMillan, 1968, pp. 143-148; See also Michel Virally, "Panorama du Droit International Contemporain", **Recueil des Cours de l'Académie de Droit International**, T. 183, 1983 (V), The Hague: Martinus Nijhoff Publishers, 1985, pp. 171-175.

215 "*The way in which international law borrows from this source is not by means of importing private law institutions "lock, stock and barrel", ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of "the general principles of law". In my opinion, the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions.*" See **Separate Opinion By McNair**, **International Status of South West Africa**, Advisory Opinion, ICJ Reports, 1950, p. 148.

Habicht[216], Waldock[217], Sørensen[218], Schwarzenberger[219], Lachs[220], Paul De

[216] "*A grammatical interpretation must admit that this provision applies both to the general principles of the law of nations and to the general principles of national law. In practice, only the latter interest us, because we are of the opinion that the general principles of the law of the people can already find their application according to the paragraphs 1 and 2 of article 38, and that, if the paragraph 3 it is only a repetition. What we would like to emphasize is the fact that the paragraph 3 of Article 38 allows the Court to apply the general principles of law recognized by civilized nations in their domestic law.*" (My translation). See Max Habicht, "Le Pouvoir du Juge International de Statuer «ex aequo et bono»", **Recueil des Cours de l'Académie de Droit International**, T. 49, 1934 (III), Paris: Librairie du Recueil Sirey, 1935, pp. 286-287.

[217] "(…) *we further know that the text was then amended to its present form in order to make it plain that by "the general principles of law" was meant exclusively principles actually recognized and applied in national legal systems -in foro domestico, as Lord Phillimore explained.*" Humphrey Waldock, "General Course on Public International Law", **Recueil des Cours de l'Académie de Droit International**, T. 106, 1962 (II), The Hague: Kluwer Law International, 1993, p. 57.

[218] Max Sørensen, "Principes de Droit International Public", **Recueil des Cours de l'Académie de Droit International**, T. 101, 1960 (III), The Hague: A. W. Sijthoff, Leyde, 1961, pp. 18-34.

[219] Georg Schwarzenberger, **International Law as Applied by International Courts and Tribunals: I**, 3rd Ed., London: Stevens & Sons Limited, 1957, pp. 43-49.

[220] Manfred Lachs, "The Development and General Trends of International Law in Our Time (General Course in International Law)", **Collected Courses of Hague Academy of International Law**, 1980 (IV), The Hague/Boston/London: Martinus Nıjhoff Publishers, 1984, p. 195 and particularly 196. The author thinks that the principles of international law are either in the treaties, or, usually, related to custom.

Visscher[221], Abi-Saab[222], Rosenne[223], Dupuy[224], Thierry[225], Pellet[226], Cassese[227] and from Turkish doctrine Bilsel[228] and Eroğlu[229]. In addition, even though he didn't openly take a side, it is understood that Gündüz interpreted the Statute in this context.[230]

The main idea here is to strengthen the normative structure of international law. The preparers of the Statute of the Permanent Court of International Justice wanted to prevent the idea of the rigid positivism that the sources of international law are consisted solely of conventional and customary law. The idea to declare *non liquet*in a case if there are no rules to apply in these

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221 Paul de Visscher, "Cours Général de Droit International Public", **Recueil des Cours de l'Académie de Droit International**, T. 136, 1972 (II), The Hague: Kluwer Academic Publishers, 1993, pp. 112-119 (Particularly pp. 115-116).

222 Abi-Saab states that, with the reference to the Committee of Jurists preparing the Statute, he understands the expression in the Statute as principles derived from domestic law, in particular to strengthen the normative qualities of the other two sources. Therefore, these principles do not cover the principles of international law. Georges Abi-Saab, "Cours Général de Droit International Public", **Recueil des Cours de l'Académie de Droit International**, T. 207, 1987 (VII), The Hague: Martinus Nijhoff Publishers, 1996, pp. 188-189.

223 Shabtai Rosenne, **The Perplexities of Modern International Law,** Leiden/Boston: Martinus Nijhoff Publishers, 2004, pp. 40-41.

224 "*The general principles of international law, unlike the preceding category, are proper to this legal order. Their origins are diverse, but they are essentially the product of the combined action of the international judge and the normative diplomacy of the States. The doctrine sometimes helps to define them. Contrary to the general principles of law recognized by civilized nations, they are often of contemporary enunciation.*" (My translation) Pierre-Marie Dupuy, "L'Unité de l'Ordre Juridique International. Cours Général de Droit International Public", **Recueil des Cours de l'Académie de Droit International**, T. 297, 2002, The Hague: Martinus Nijhoff Publishers, 2003, p. 182.

225 Hubert Thierry, "L'évolution du Droit International", **Recueil des Cours de l'Académie de Droit International,** T. 222, 1990 (III), The Hague: Martinus Nijhoff Publishers, 1991, pp. 39-40.

226 Alain Pellet, "Article 38", Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm ve Christian J. Tams (Ed.), **The Statute of International Court of Justice - A Commentary** içinde, 2. Ed., Oxford: Oxford University Press, 2012, pp. 764-773.

227 "*These principles (general principles of law) must not be confused with the general principles of international law which are sweeping and loose standards of conduct that can be deduced from treaty and customary rules by extracting and generalizing some of their most significant points*." Antonio Cassese, **International Law,** 2. Ed., Oxford: Oxford University Press, 2005, p. 188.

228 Cemil Bilsel, **Devletler Hukuku - Giriş,** 2. Ed., İstanbul: Kenan Basımevi, 1940, pp. 48-49.

229 HamzaEroğlu, **Devletler Umumi Hukuku - El Kitabı**, 2. Ed., Ankara: Turhan, 1984, pp. 86-88.

230 Aslan Gündüz, **Milletlerarası Hukuk Temel Belgeler ve Örnek Kararlar,** 8. Ed., İstanbul: Beta, 2015, p. 24-26.

two sources has been rejected.[231] In this way, the framework of the rules of international law to be applied was expanded. Hence, the judge's authority to reach a more equitable decision was made possible.

B) General Principles of Both Domestic and International Law as an Autonomous Source of International Law

Some jurists tend to extend the scope of Article 38/1(c). According to these authors, the general principles of law mentioned in the Article cover the principles of international law together with the common principles in different domestic legal orders.[232] The starting point of this idea is that the Statute did not use an epithet of law in which the principles would be derived; therefore, there is not an issue in inclusion of a number of international legal principles. At the same time, the idea of transferring the principles from internal law through analogy was also abandoned. The general principles of law are the general rules of law that are inherent in the concept of law itself. Wherever there is law, there are *legal experiences that are crystallized in these principles*, regardless of internal law or international law.[233] In this view, the strict dualist approach was clearly abandoned. This idea is defended by the authors such as Wolff[234], Ræstad[235], Kaufmann[236], Kellogg[237], Basdevant[238], Rousseau[239], Crozat[240],

231 See Procès-Verbaux, pp. 308, 315.

232 Kolb, La Bonne Foi en Droit International Public, para. 122-127; Thirlway, The Sources of International Law, pp. 95-96.

233 Kolb, La Bonne Foi en Droit International Public, para. 122.

234 Karl Wolff divides the general principles of law into three and states that the analogy is only necessary for the principles to be taken from domestic law. Furthermore, according to the author, the past practices of the general principles of law have made, not just certain principles, but the application of the general principles of law, the customary rule of law in general international law. See Karl Wolff, "Les Principes Généraux du Droit Applicables dans les Rapports Internationaux", **Recueil des Cours de l'Académie de Droit International**, T. 36, 1931 (I), Paris: Librairie du Recueil Sirey, 1931, p. 498.

235 Arnold Ræstad, "Droit Coutumier et Principes Généraux en Droit International", **Nordisk Tidsskrift for International Ret**, 4, 1933, pp. 61-84 (Particularly pp. 72-73).

236 Erich Kaufmann, "Règles Générales du Droit de la Paix", **Recueil des Cours de l'Académie de Droit International**, T. 54, 1935 (IV), Paris: Librairie du Recueil Sirey, 1936, pp. 507-524.

237 Observations by Mr. Kellogg, PCIJ, Series A, No. 24, 1930, p. 40.

238 Jules Basdevant, "Règles Générales du Droit de la Paix", **Recueil des Cours de l'Académie de Droit International**, T. 58, 1936 (IV), Paris: Librairie du Recueil Sirey, 1937, pp. 499-504 (Particularly p. 504.)

239 Charles Rousseau, **Principes Généraux du Droit International Public**, **Tome I: Introduction - Sources,** Paris: Éditions A. Pedone, 1944, pp. 901-924; Charles Rousseau, **Droit International Public Approfondi**, Paris: Dalloz, 1958, pp. 88-87.

240 Crozat, Devletler Umumi Hukuku I, pp. 137-143.

Cheng[241], Mosler[242], Zemanek[243], Akehurst[244], Tanaka[245], Schachter[246], Degan[247], Gaja[248] and Trindade[249]. Turkish writers Lütem[250], Meray[251], Pazarcı[252] and Sur[253] seem to share this view. On the other hand, some international lawyers, such as Hudson[254] and Castberg[255], think that the Article primarily refers to the

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241 "*It is of no avail to ask whether these principles are general principles of international law or of municipal law; for it is precisely of the nature of these principles that they belong to no particular system of law, but are common to them all.*" Cheng, General Principles of Law, p. 390.

242 Hermann Mosler, "General Principles of Law", Bernhardt, Rudolf (Ed.), **Encyclopedia of Public International Law** içinde, Amsterdam: North-Holland, Elsevier, Instalment 7, 1984, pp. 89-105; Hermann Mosler, **The International Society as a Legal Community**, Alphen aan den Rijn: Sijthoff and Noordhoff International Publishers, 1980, pp. 122-140.

243 "*The orthodox interpretation of Article 38, paragraph 1 (c), accepts only concurrent recognition of a principle by domestic legal orders as valid "recognition by civilized nations". This interpretation neglects genuine principles of international law. Such principles may originate in conventions, like the principles of the Charter which have been reiterated and elaborated in the Friendly Declaration and which the ICJ found in the Nicaragua case to have become part of international custom. It also excludes rules of international custom on which the opinio juris, or better: the consensus of opinion among States, has not yet developed beyond the stage of principle.*" Zemanek also states that, about this aforementioned interpretation, it is not caused by the text in the Statute of ICJ and the text doesn't exclude the principles other than their existence *in foro domestico*. Karl Zemanek, "General Course on Public International Law", **Recueil des Cours de l'Académie de Droit International**, T. 266, 1997, The Hague: Martinus Nijhoff Publishers, 1998, pp. 135-136.

244 Peter Malanzcuk, **Akehurst's Modern Introduction to International Law,** 7. Ed., London: Routledge, 1997, p. 48.

245 Diss. Op. of Tanaka, South West Africa, p. 295.

246 Oscar Schachter, "International Law in Theory and Practice, General Course in Public International Law", **Recueil des Cours de l'Academie de Droit International**, 1982 (V), Kluwer Academic Publisher Group, 1983, p. 75.

247 Degan, Sources of International Law, p. 73.

248 Giorgio Gaja, "General Principles of Law", in **Max Planck Encyclopedia of Public International Law**, Vol. 7, Oxford: Oxford University Press, 2008, para 7-20.

249 **Separate Opinion of Judge Cançado Trindade, Pulp Mills on the River Uruguay (Argentina v. Uruguay),** Judgment, ICJ Reports, 2010, pp. 135-215 (Particularly pp. 143-145).

250 İlhan Lütem, **Devletler Hukuku Dersleri I,** Ankara: Balkanoğlu Matbaacılık, 1956, pp. 91-92.

251 Seha L. Meray, **Devletler Hukukuna Giriş - Birinci Cilt**, 2. Ed., Ankara: Ajans-Türk Matbaası, 1960, pp. 86-87.

252 Hüseyin Pazarcı, **Uluslararası Hukuk Dersleri - 1. Kitap,** 12. Ed., Ankara: Turhan, 2014, p. 238.

253 Melda Sur, **Uluslararası Hukukun Esasları**, 9. Ed., İstanbul: Beta, 2015, pp. 86-88.

254 Hudson, Permanent Court of International Justice, 611.

255 Frede Castberg, "La Méthodologie du Droit International Public", **Recueil des Cours de l'Académie de Droit International**, T. 43, 1933 (I), Paris: Librairie du Recueil Sirey, 1933, p. 370.

principles of international law and then the principles of domestic law.

In the process of adopting the Statute of PCIJ in the Committee, as explained above, based on the fact that the expression contained in the first proposal of President Descamps was "*the rules of international law as recognized by legal conscience of civilized nations*"[256], it is suggested that Descamps also considered that the third source outside the treaty and the custom is general principles of both domestic and international law.[257] Likewise, it is seen in the Committee that Fernandes, in his statement, refers to the principles of international law.[258]

As a final example, Article 2 of the draft articles of the Institute of International Law which has been debated and uncovered among qualified jurists from different schools of thought is as follows: "*General principles of law are rules grounded in universal legal consciousness, whether these rules result from the nature of the relations between subjects of international law, or are recognized by civilized nations in their domestic law, and are applicable to international relationships.*"[259]

Conclusion

As stated earlier, the addition of the general principles of law to the Statute was particularly welcomed by the natural jurist writers; however, there were different reactions from different schools of thought.

The idea that general principles of law cannot be a source of international law with a prejudice that it is not possible to have common principles among different nations is open to criticism. Lammer thinks that it is not possible to convince others with such assumptions. According to the author, empirical researches should be made on this subject and the issue must be based on this.[260] On the other hand, for instance Kopelmanas offers serious examples of the impossibility or difficulty of identifying common principles.[261] However, I think these examples will always be insufficient, no matter how many given. While it may be accepted that such common norms may be difficult to find, the categorical rejection of their existence appears to be unacceptable, no matter how large the given examples are.[262] Virally finds this thought exaggerated.

256 Procès-Verbaux, p. 306.

257 See Hudson, Permanent Court of International Justice 1920-1942, p. 611. See also Sep. Op. of Judge Cancado Trindade, Pulp Mills on the River Uruguay, pp. 135-215.

258 Procès-Verbaux, p. 346.

259 My Translation. See Alfred Verdross, "Les Principes Généraux du Droit et le Droit des Gens", **Revue de Droit International, fondée et dirigée par A. de Geouffre de La Pradelle**, Tome XIII, 1934, p. 353.

260 Lammers, General Principles of Law Recognized by Civilized Nations, pp. 55-56.

261 Kopelmanas, Quelques Réflexions au Sujet de l'Article 38(3), pp. 294-295.

262 *Cf.* see H. C. Gutteridge, **Comparative Law: An Introduction to the Comparative**

According to author, although it may be difficult to find a number of ideological principles among different legal systems, principles that can be applied in the procedural and international arena can be found.[263] Kolb also implies that it would be difficult for universal international law to exist if this kind of opinion is true. Moreover, a number of general principles, which are also present in domestic law, have been considered indispensable or prescriptive because of the social nature of man without them society will be dragged into chaos.[264]

The most fundamental problem of the views which *a priori* rejects the common norms or places general principles of law under different categories is that they make a provision in the Statutes of the International Court of Justice and its predecessor completely useless and, in other words, make a *dead provision*.[265] This is contrary to the widely known principle of effective interpretation of treaties (*ut res magis valeat quam perat*).[266] In the context of this principle, in a situation that multiple interpretations of a text is possible, one severely restricts the value of the treaty, while the other imposes a reasonable interpretation; the latter will be preferred.[267] There are more than one decisions of the Court that emphasize this principle.[268]

It is evident that the States parties to the Statutes and preparers of the Statutes have framed and understood the general principles of law differently from the customary and conventional law, subsidiary means of determining the law, and to decide a case ex aequo et bono. If there was an opposite situation; they put this provision in the other paragraphs.[269] The Committee of Jurists has created a text that can be seen as a compromise between different legal opinions, and in this text, the general principles of law are deemed separate from the treaties and custom and equity. So, the common opinion of the Committee is that it is possible that some legal rules which cannot be considered within the scope

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Method of Legal Study and Research, Cambridge: Cambridge University Press, 2015, p. 65.

263 Virally, The Sources of International Law, p. 147.

264 Kolb, La Bonne Foi en Droit International Public, para. 68-69.

265 Paul de Visscher, Recueil des Cours, p. 115; Van Hoof, Rethinking the Sources of International Law, p. 133; Kolb, La Bonne Foi en Droit International Public, para. 82; Lammers, General Principles of Law Recognized by Civilized Nations, p. 55.

266 Fellmeth-Horwitz, Guide to Latin, p. 286. For further explanation, see Oliver Dörr, "Interpretation of Treaties", Oliver Dörr ve Kirsten Schmalenbach (Ed.), in **Vienna Convention on the Law of Treaties - A Commentary**, Berlin: Springer, 2012.

267 Verdross, Principes Généraux du Droit Applicables aux Rapports Internationaux, pp. 47-48.

268 **Acquisition of Polish Nationality**, Advisory Opinion, PCIJ, Series B, No. 7, 1923; p. 23; **Case of the Free Zones of Upper Savoy and District of Gex, Order,** PCIJ, Series A, No. 22, 1929, p. 13**; Corfu Channel, Merits,** Judgment. ICJ Reports, 1949, pp. 23-24;**Fisheries Jurisdiction (Spain/Canada)**, **Jurisdiction of the Court**, Judgment, ICJ Reports, 1998, para 52.

269 Verdross, Principes Généraux du Droit Applicables aux Rapports Internationaux, p. 48.

of the conventional and customary law can be applied to international legal disputes. Particularly in relation to fairness, The Committee's attitude is clear. There is agreement between the members that no authority can be given to the Court that can be understood as the authority to create law. The broad and vague wording of Descamps's initial proposal was rejected for this reason and, in the latter case, the issue was resolved by referring to the existing law with the condition of "*recognition by civilized nations*".[270]

According to Descamps, the Chairman of the Committee, the fact that the international courts donot make the case inconclusive because of the lack of a rule in customary and conventional law and the application of certain other rules *viz.* the general principles of law in these instances, constitute an ongoing practice.[271] For this reason, the Committee's activity is not the creation of a new norm, but the codification of old practices.[272]

On the other hand, some authors, such as Strupp and Kopelmanas, argue that these arbitration practices cannot be a precedent because States are the only authorities in the creation of international law. Furthermore, in the absence of explicit authorization, the arbitrators who applied the general principles of the law overstepped their authorities. Moreover, these arbitration decisions do not reflect general international law; only constitute a judgment *inter partes* and only are binding only for the parties.[273]

As Verdross expressed in more than one of his works, if such an excess of power had been existed, or if the States were in a position to think that these norms could not be applied, they wouldn't accept and would object to these decisions.[274]The author believes that a rigid positivism has never been accepted by international judicial bodies. As a contribution to this idea, it can be said that there is an awareness that a pure or rigid positivism was never been and will never be a solution for the activities and operations of the international judiciary.[275]

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270 Procès-Verbaux, p. 315.

271 Procès-Verbaux, p. 316.

272 Lauterpacht, Private Law Analogies, pp. 62-63; Verdross, Droit International de la Paix, pp. 302; Le Fur, Recueil des Cours, pp. 202-204.

273 Strupp, Justice Internationale et Équité, p. 451; Strupp, Droit de la Paix, pp. 335-336; Kopelmanas, Quelques Réflexions au Sujet de l'Article 38(3), p. 290.

274 Verdross, Principes Généraux du Droit et le Droit des Gens, pp. 490-491; Verdross, Études sur les Sources du Droit en l'Honneur de F. Geny, p. 384; Verdross, Principes Généraux du Droit Applicables aux Rapports Internationaux, p. 47; Verdross, Principes Généraux dans la Jurisprudence Internationale, pp. 199-200.

275 Apart from being a party to the Statute, for the examples of the claims and defenses of the States using general principles of law before the Court, see South West Africa, Second Phase, p. 47; **Temple of Preah Vihear, Preliminary Objections**, Judgment, ICJ Reports, 1961, p. 30; **Merits**, Judgment, ICJ Reports 1962. p. 26; **The Gabcikovo-Nagymaros Case**

The idea that degrades the general principles of the law with the auxiliary means of determination of the law in the 38/1(d) of the Statute[276]must be rejected without doubt because the Statute itself has clearly demonstrated this distinction and counted the general principles of the law as a separate clause within the main sources. Moreover, the practice of the general principles of law, even if it is not very wide, reflects the opposite situation of this view. The general principles of law are the norms of international law which are binding in themselves.

As for the consideration that the general principles of the law do not have a qualification of source in terms of general international law, outside of the Courts' Statutes; first of all, it should be noted that this idea is unfounded in terms of the practices before the establishment of the Permanent Court of International Justice as well as subsequent arbitration practices. Apart from the examples where the parties to the case refer to the Statute or transfer the sources contained in the Statute to the arbitration agreement, it is possible to mention the arbitration practices based on the Statute of the Court in cases where the norms to be applied aren't specified in the agreement.[277]

The fact that a number of rules, which are accepted as the general principle of law, have been transformed into a customary rule or have a place in an agreement will not change the general principle of law character of these norms. The principles of *pacta sunt servanda*, and in connection with it, the principle of good faith can be given as examples. Undoubtedly, these rules have taken place in State practices over time and have formed *opinio juris* among the States. At the same time, these rules are also included in the Vienna Convention on the Law of Treaties. However, the fact that *pacta sunt servanda* fall within these sources, this will not change its general principle of law character.[278] Besides, it is clear that even if a basic rule such as *pacta sunt servanda* has not gained a customary character or is not included in the treaty, it is still necessary for the functioning of a legal system and in particular international law. Moreover, for the custom, the State practice condition which is the necessary material element other than *opinio juris*, doesn't exist in first place. In this case, it is necessary to acknowledge the existence of the general principles of law for the construction of a legal system.[279]

(Hungary-Slovakia), Judgment, ICJ Reports, 1997, p. 53.

276 Makowski, Recueil des Cours, pp. 360-361.

277 Oppenheim-Lauterpacht, International Law, Vol. I, p. 30; Lauterpacht, Collected Papers, p. 75. See also for the examples of arbitration practices following the establishment of the PCIJ Verdross, Principes Généraux dans la Jurisprudence Internationale, pp. 230-238 and Verdross, Droit International de la Paix, p. 302.

278 Degan, Sources of International Law, p. 74.

279 Verdross, Principes Généraux du Droit Applicables aux Rapports Internationaux, p. 50.

The general principles of law and more advanced domestic law systems were widely used, especially in the periods when international law began to emerge.[280] Likewise, up to the present day, especially in the codification works, this source have been used inevitably. In this respect, in many cases, it should be said that the general principles of law formulate the idea and practice of international law as archetypes of other norms.

Apart from the example of *pacta sunt servanda* given above, the rules of interpretation contained in the Vienna Convention on the Law of Treaties are based on a number of general principles in this area. In addition to that, some invalidity causes have been envisaged under the international law of treaties by using the contractual rules in the civil laws. Principles such as error, fraud, and corruption of a representative of a State are included in the Convention. Of course, the International Law Commission, while transferring these principles, arranged them in accordance with the international law. However, it should be noted that the development of international law is based on the general principles of law, without relying on an established customary law in these areas and without giving examples of the practice.[281]

It could be observed, however, that The Hague Courts applied appropriate customary or conventional rules which reflect also general principles of law and didn't name them as the general principles of law. This is a correct method because the generally accepted principles such as *lex posterior derogat legi priori, lex specialis derogat legi generali and lex posterior generalis non derogat legi priori speciali* make it necessary. These three principles are the basic principles governing the relationship between the rules of international law.[282]

It would not be wrong to suggest that the difference of the authors who place the general principles of law together with the customary law because of their strict monist point of view *eg.* Kelsen, Scelle, Guggenheim and Conforti etc. is due to their conceptualization. It can also be said that these authors have attributed an important role to general principles.[283] For example, Kopelmanas thinks that the naturalist Verdross and the monist Scelle have come to the same conclusion from different ways. Both understand the principles taken from domestic law in the provision 38/3 but there is only a difference in their terminology. However, it should be added that Scelle considered the general principles of law are the general customary law and placed them at the top of the hierarchy in terms of implementation.[284] On the other hand, Verdross sees a

280 In this regard, see Lauterpacht, Private Law Analogies, pp. 8-17.
281 For further explanation, see Degan, Sources of International Law, pp. 77- 78.
282 Cassese, International Law, p. 154; Raimondo, General Principles of Law, p. 44.
283 Kolb, La Bonne Foi en Droit International Public, para. 98.
284 Scelle, Essai sur les Sources, p. 425; Scelle, Manuel de Droit International Public, p. 580.

substitute source in the general principles of law.[285]

In my opinion, a debate concerning general principles of international law or of exclusively domestic law is relatively secondary. Because international law, like every legal order, needs some basic and logical principles and framework rules, and the implementation of these principles is a necessity. The principles of territorial sovereignty, freedom of high seas, equidistance, freedom of communication in the seas, elementary considerations of humanity as in the Corfu Channel Case have emerged in the field of international law, without relying directly on the rules of practice and without analogy with domestic laws. After an acceptance of the general principles of international law separate from the custom and the treaty, there are two ways to comprehend this: 1) either these principles will be considered under Article 38/1(c); 2) or these principles shall be deemed to be binding principles for States outside of the Statute of the Court.

Thus, disagreements about the legal order to which the general principles of law belong are shaped by these possibilities. It is understood from the preparatory work of the Committee of Jurists that the Statute provision refers to domestic law, and these preparatory works are considered as complementary interpretation instruments in the framework of the interpretation rules in the Vienna Convention on the Law of the Treaties. But this does not preclude the parties of an agreement to understand a certain interpretation from an expression in a treaty. Moreover, the text of the Statute itself does not explicitly refer to internal law, the general principles of law is used without an epithet. Therefore, it is possible to evaluate the general principles of international law within the scope of the Article.

About the substitute source nature attributed to the general principles of law and the question of the possible hierarchy between the sources, I think *a priori* assignment of the priority between sources and an idea of an hierarchy doesn't make any sense. It can be said that these ideas, especially for the first periods, represent a resentment against the dominant positivist view and based on seeing these principles exclusively domestic law principles. In addition, the phrase "the following order" in the text of the Committee has been deleted and there is no priority regulation in the present text.[286] Also, the principles of *lex posterior derogat legi priori; lex specialis derogat legi generali* which are the basic principles governing the relationship between the rules are the general principles of law. In this case, the right way for the judge to consider the sources to be applied as a whole and to resolve the dispute according to

[285] Verdross, Droit International de la Paix, p. 303.
[286] Cheng, General Principles of Law, p. 20.

these aforementioned principles.[287]

As a conclusion, the general principles of law have important functions in the international law. As stated above, every legal system, and therefore international legal system, needs these general principles. The practice of judicial organs and States proves this. These functions may be in the form of being material source of the other two formal sources and these rules are already a reflection of the general principles of law. Another function is they provide a framework for the interpretation, scope and implementation of the other sources. Finally, and most importantly, they can be used in the absence of the other rules to prevent *non liquet* as a substitute source. This latter function is the source of almost all the discussions and objections mentioned above. And all the stated reasons indicate the need for an independent source in the international legal system.

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[287] "*The priority given by Article 38 of the Statute of the Court to conventions and to custom in relation to the general principles of law in no way excludes a simultaneous application of those principles and of the first two sources of law.*" See **Dissenting Opinion of Judge Fernandes**, Right of Passage over Indian Territory, Merits, ICJ Reports, 1960, pp. 139-140.

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ELECTORAL SYSTEMS, ADMINISTRATION AND CONTROL OF ELECTIONS IN TERMS OF CASE LAW OF ECtHR

Avrupa İnsan Hakları Mahkemesi İçtihadları Kapsamında Seçim Sistemleri, Seçimlerin Yönetim ve Denetimi

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Abstract

European Court of Human Rights evaluates electoral issues within the scope of right to free elections. The right to free electionsis enshrined in Article 3 of the Additional Protocol to the Convention. On Article 3 of the Protocol the Court has repeatedly stated that States have a wide margin of appreciation in this sphere. Therefore, confirmation of the margin of appreciation enjoyed by States is a constant factor in cases involving the right to free elections. However the application of the margin of appreciation in election cases is an important problem. In the study, it will be assessed whether the States has the margin of appreciation in the administration and control of the elections and electoral systems.

Keywords: Electoral Systems, Administration and Control of Elections, ECtHR, Human Rights, Right to Free Elections.

Özet

Avrupa İnsan Hakları Mahkemesi seçime ilişkin hususları serbest seçim hakkı kapsamında ele almaktadır. Serbest seçim hakkı, 1 Numaralı Protokol'ün 3. Maddesinde düzenlenmektedir. Bu hak, taraf devletlere geniş bir takdir yetkisi sağlar. Seçim davalarında "takdir marjı" kavramının uygulanması önemli bir problemdir. Çalışmada da, seçim sistemleri ve seçimlerin yönetim ve denetim konularında taraf devletlerin takdir yetkisinin geniş olup olmadığı, varsa yükümlülüklerinin neler olduğu ele alınmaya çalışılacaktır.

Anahtar Kelimeler: Seçim Sistemleri, Seçimlerin Yönetim ve Denetimi, AİHM, Insan Hakları, Serbest Seçim Hakkı

Introduction

Although elections are the main elements of democratic legitimacy of a state, they are notenough on their own. The general democratic character of astate is also determined by the principle of legality. Domestic law should, therefore, regulate the methods of formation of representative bodies constitutionally and legally. Another criterion providing the rule of law and respect for democracy is adopting a rights-based approach, which calls for a right-based perspective on electoral processes. In other words, such issues as voting and standing for election or electoral management and electoral systems should be included in individual rights, which should also be brought into effect in order to establish a legal ground for political processes.

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In the 21st century, states approach free elections from a rights-based legal perspective. The minimum requirements of criteria such as general and equal vote are met, particularly within the framework of democratic election principles.At first, important dimensions of electoral processes were not addressed by states from human rights perspective. This is due to the fact that the constitutional regulations, which constitute the essence of sovereignty, are regarded as a national issue of states.As a result of the repercussion of this understanding, free elections have been regarded as a right, but have not movedbeyond institutional regulations.

In fact, many cases of the electoral process are of particular concern to human rights. This situation, which is important from an individual standpoint, guarantees the right to legal remedies. For this reason, both binding and non-binding contracts and documents have addressed free elections from a human rights perspective, andemphasized particularly the importance of this right in a democratic society. For example, Article 21 of the Universal Declaration of Human Rights (UDHR), Article 25 of the International Covenant on Civil and Political Rights (ICCPR) and Article 3 of Protocol No. 1 of the European Convention on Human Rights (ECHR) regulate this right. The human rights bodies also address electoral systems, and administration and control of elections within the framework of the right to free elections.

Unlike other rights, the right to free elections does not provide effective protection for individuals.This is due to the fact that electoral arrangements are regarded as internal affairs of a state inwhich other states are particularly deterred from intervening. The right to free elections is a right over which states enjoy a widemargin of appreciation. However, some developments have been observed in recent years in the case law of the ECtHR regarding the right to free elections.

In order to provide a better understanding of the main issue, this study will present an overview of the right to free elections within the framework of the case-law of the ECtHR. We will explain the components of the right to free elections, the scope of states' margin of appreciation over it, and the concept of impliedlimitations leading to the exercise of that margin of appreciation. After addressing the relevant issues, we will examine how the ECtHR approaches electoral systems and administration and control of elections within the framework of the right to free elections. We will especially look for answers to the question of whether the ECtHR isextending the scope of individual freedom or prioritizing states' margin of appreciation.

1. Right to Free Elections

The ECHR system, which defines the scope of this study, places special emphasis on the right to free elections.Although the Convention's drafters

initially objected to the regulation of the right to free elections, it has subsequently been regarded as a characteristic principle of democracy. An effective political democracy is an essential element of modern countries and, therefore, values constituting the issue of the right to free elections are of great importance for the establishment and protection of the foundations of an effective democracy governed by rule of law[2].

The values constituting the issue of the right to free elections have been determined by the ECHR system as the right to vote and stand for election. This was first settled by the ECtHR in the case of Mathieu-Mohin and Clerfayt v. Belgium 1978[3]. This case, in which the principles on the right to free elections were laid down, has also set a precedent for other cases. In the relevant case, the Court has changed the view of "an institutional right only in the form of free elections" and recognized, under Article 3, the subjective right to participate in the form of "the right to vote" and "the right to stand for election" in the choice of the legislature[4], followed by the recognition of the right to sit as a member. Thus, the idea that Article 3 contains a subjective right has been consolidated and the Article has laid down the values protected by the right to free elections[5].

Limitations to the right to free elections and the legality of those limitations are very important. First, it should be noted that Article 3 of Protocol No. 1 does not contain any regulatory limitations. Nevertheless, the ECtHR has not recognized the right to free elections as an absolute right, and introduced the concept of "impliedlimitations" regarding the right to free elections. The concept of "implied limitations" refers to the limitations arising from the nature of a particular right that is not explicitly stated in the Convention[6]. This concept is not new in ECtHR proceedings. For example, early implications of implied limitations on the right to education guaranteed by Article 2 of Protocol 1 of the ECHR were accepted and called for the regulation of this right due to its nature, and the ECtHR stated that the regulation can be shaped according to the resources and needs of the individual and the society, and may change

2 Yumak and Sadak v. Turkey (GC), Application No. 10226/03, 08.07.2008, para. 105.

3 Mathieu-Mohin and Clerfayt v. Belgium, Application No. 9267/81, 02.03.1987.

4 Mathieu-Mohin and Clerfayt v. Belgium, Application No. 9267/81, 02.03.1987, para. 57; Jacobs vd, European Convention on Human Rights, 6. Edition, Oxford University Press, Oxford, 2014, p.538; Cremona, J, J, "The Right to Free Elections in the European Convention on Human Rights", Protection des droits de l'homme: la perspective europeenne/Protecting Human Rights: The European Perspective, Carl Heymanns Verlag KG, Köln, 2000, p. 312.

5 Koçak, M, "Seçim Sistemleri ve Demokrasi Karşılaştırmalı Analiz: İHAM ve AB Ölçütleri", s. 125-126.

6 Golubok, S, "Right to Free Elections: Emerging Guarantees or Two Layers of Protection?", Netherlands Quarterly of Human Rights, 27(3), 2009, 361-390, p. 371.

over time[7].Implied limitations to free elections start with the case of Mathieu-Mohin and Clerfayt v. Belgium. The Court has made it clear that the fact that limitations to the right to vote and stand for election have not been determined does not make it an absolute right[8] and that Article 3 of Protocol No. 1 allows for implied limitations by only defining and not regulating those rights in clear terms[9]. Implied limitations, however, need to bear certain conditions. In order not to impair the essence of the right with an implied limitation, the right of the individual to use that right should not be restricted or reduced to some degree or to some extent[10] and in order for an implied limitation to be appropriate, it must follow a legitimate aim and the proportionality between the desired purpose and the mean used must be reasonable[11].This shows that implied limitations such as being mature, not being convicted, not being restricted, depositing a certain amount for candidacy can be determined by the ECtHR in the framework of Article 3.

This also provides the legitimacy of states'margin of appreciationover free elections.Margin of appreciation is defined as the freedom granted to national bodies by the Court before a limitation to or restriction on a right guaranteed by the Convention constitutes a violation of one of the fundamental elements protected by the Convention itself[12]. From this point of view, it is stated that the rationale behind the margin of appreciation granted to states is a way of recognizing that the sovereignty of states and the protection of human rights on the international scene are not contradictory, but complementary[13]. Consequently, it has been argued that it is likely that states enjoya widemargin of appreciation in electoral cases presented to the Court in relation to oftencounteredcomplicated and controversial political, economic or social problems. Article 3 of the ECtHR emphasizes that states enjoy a wide margin of appreciation in this area.This view has been met with strong opposition from judges who were in the minority. According to them, margin of appreciation depends on effective respect for the rights protected by the Convention and,

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7 "Relating to certain aspects of the laws on the use of languages ın education in Belgium" v. Belgium, Application No. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 ve 2126/64, 23.06.1968, para. 5.

8 Akbulut, O, "Serbest Seçim Hakkı", İnsan Hakları Avrupa Sözleşmesi ve Anayasa- Anayasa Mahkemesine Bireysel Başvuru Kapsamında Bir İnceleme, ed. Sibel İnceoğlu, 3. Baskı, 2013, Beta Yayınları, İstanbul, s. 544; Jacobs vd, European Convention on Human Rights, 6. Edition, Oxford University Press, Oxford, 2014, s. 538.

9 Golder/Birleşik Krallık, Başvuru No. 4451/70, 21.02. 1975, para. 37.

10 Ashingdane v. United Kingdom, Application No. 8225/78, 28.05.1985, para. 57.

11 Lithgow and others v. United Kingdom, Application No. 9006/80, 08.06.1986, para. 194.

12 Yourow, Howard C, The Marjin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence, Kluwer Law International, Dordrecht, 1996, p. 13.

13 Merrills, J. G, The Development of International Law by the European Court of Human Rights, Manchester University Press, Manchester, 1993, p. 174.

therefore, there is no need to step back on the margin of appreciation in this case[14]. However, according to the Court, margin of appreciation recognized in electoral cases depends largely on the political history of the state. In other words, the rules that apply to one country may be clearly unacceptable for the other. The Court has, therefore, noted that rules in this area vary according to political and historical factors specific to each state[15].Margin of appreciation with special emphasis on historical and political development has become a useful tool for the Court to settle the problems of new European democracies. There is, however, the danger that the Court's decisions will be abused, leading to the existence of contradictions or the deprivation of the necessary unity [16].

The contracting states may subject Article 3 of Protocol No. 1 to certain conditions in their domestic laws. The states enjoy a wide margin of appreciation in this regard. However, this power granted to the states through implied limitations is not infinite. It is the task of the Court to make a final decision on the compliance of those limitations with the Convention[17]. The Court should come to the conclusion that limitations do not restrict the essence of the rights in question and do not deprive them of their effectiveness. These limitations should follow a legitimate purpose and the means used should not be disproportionate. In addition, those limitations should not prevent the free expression of the opinion of the people in the choice of the legislature[18]. Here, the Court does not use the criteria of necessity and societal need when it checks the appropriateness of limitations to free elections, as is the case with the rights set forth in Articles 8, 9, 10 and 11[19]. Since legitimate means to justify limitations to the rights have not been clearly laid down byArticle 3[20], the contracting states are at liberty to set those means on the condition that they are consistent with the Convention's general purpose and the principle of the

14 Mathieu-Mohin and Clerfayt v. Belgium, Application No. 9267/81, 02.03.1987, Opinion of Cremona, Bindschedler- Robert, Bernhardt, Spielmann ve Valticos Judges.

15 Yumak and Sadak v. Turkey (GC), Application No. 10226/03, 08.07.2008, para. 111.

16 Zdanoka v. Latvia (GC), Application No. 58278/00, 16.03.2006, para. 91; Opinion of Rozakis ve Jacquemot Judges; Bowring, B, "Negating Pluralist Democracy The European Court of Human Rights Forgets the Rights of the Electors", KHRP Legal Review, 67-96, 2007, p. 93.

17 Harris, D. J, Law of the European Convention on Human Rights, Oxford University Press, New York, 2014, p. 929.

18 Mathieu-Mohin and Clerfayt v. Belgium, Application No. 9267/81, 02.03.1987, para. 52; Schokkenbroek, J, "Free Elections By Secret Ballot", Pieter Van Dijk, Fried Van Hoof, Arjen Van Rijn, Leo Zwaak (Ed.), Theory and Practice of the European Convention on Human Rights, Fourt Edition, Intersentia, Oxford, 2006, 911-936, p. 918.

19 Jacobs vd, European Convention on Human Rights, p.538.

20 Grabenwarter, C, European Convention on Human Rights: Commentary, Verlag C. H. Beck oHG, 2014, p. 404.

rule of law[21]. The final decision is, however, made by the Court.

As understood, the contracting states can restrict or limit the use of the right to vote and stand for election provided that they remain within the limits of margin of appreciation granted to them. For example, the states can make the exercise of the right to free elections subject to certain conditions such as age, nationality, residence and criminal record[22]. There is, however, a distinction between the right to vote and the right to stand for election. The conditions for having the right to vote should be very narrow in scope. In contrast, some additional requirements that are not sought for the right to vote may be sought for the right to stand for election. For example, one does not have to be literate in order to have the right to vote, however, being literate may be a condition to be able to exercise the right to stand for election. Undoubtedly, the regulations of the contracting states in this respect are subject to the Court's supervision in terms of compliance with the requirements of the Convention.

2. Electoral Systems

We have addressed the general information on the right to free elections. Through implied limitations to free elections, we have determined the plurality of the margin of appreciation enjoyed by contracting states. The protection of individual rights becomes more difficult given the enormous breadth of this power. It is, therefore, crucial to determine whether or not the contracting states have the margin of appreciation in terms of electoral systems.

Apart from the right to vote and the right to stand for election, both of which constitute the individual dimension of electoral processes, there are also more general aspects of the right to free elections, such as electoral systems, and administration and control of elections.Electoral systems refer to the methods and rules applied in elections in order to chooserepresentatives in a society. In the broad sense, the concept of electoral system includes all aspects of elections, such as competence to vote and stand for election, rules on candidacy, voting procedures, constituencies, principles of election, regulation of elections, and administration and control of elections[23]. On the other hand, electoral systems refer, in the strict and technical sense, to the conversion of votes into seats in the parliament or the appointment of administrators to certain authorities. In the broadest sense, electoral systems are classified into three main categories; the majorityelectoral,proportional representationandmixed systems[24].

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21 Zdanoka v. Latvia (GC), Application No. 58278/00, 16.03.2006, para. 115.

22 Reisoğlu, S, Uluslararası Boyutlarıyla İnsan Hakları, Beta Yayınları, İstanbul, 2004, p. 123; Akbulut, O, "Serbest Seçim Hakkı", p. 544.

23 Atar, Y,**Türkiye'de Seçim Sistemlerinin Gelişimi ve Siyasi Hayat Üzerindeki Etkileri**, Yayınlanmamış Doktora Tezi, Selçuk Üniversitesi, Konya, 1990, s. 1.

24 Günal, E,**Türkiye'de Seçim Sistemlerinin Siyasal Kurumlar Üzerindeki Etkileri**, Turhan Kitabevi, Ankara, 2005, s. 25.

The ECHR does not contain any regulations as to how elections should be held, which was discussed particularly during the preparation of the ECHR, but no agreement was reached on either of the system[25]. Therefore, Article 3 of the Protocol does not specify any obligation for the implementation of electoral systems[26]. In other words, it does not specify any obligation for the adoption of an electoral system, such as the proportional representation system or single or two-round majority system[27]. Thus, the ECtHR's approach to electoral systems suggests that the contracting states enjoy a wide margin of appreciation over designing their own electoral systems, taking into account their own history, traditions and conditions[28]. However, it is also reminded that the main objective of electoral systems is to reflect the views of the public in a fair and authentic way and to direct the movements of thought leading to the emergence of a clear and harmonious political will [29].

Electoral systems strive to achieve goals that are difficult to reconcile. On the one hand, they aim to reflect the views of the public in a fair and reliable manner, while, on the other hand, they try to provide the grounds for the emergence of a clear and strong will. In this context, some of the requirements of the right to free elections are ensuring that those entitled to vote and stand for election have a free choice, that citizens are treated equally for the exercise of the right and that they are not denied of their freedom of opinion. However, according to the Court, the principle of equal treatment does not mean that all votes are equally weighted in terms of the outcome of the election, or that all candidates should have equal chances of winning. No obligation can, therefore, be imposed on the contracting states to consider the residual votes. The Court has clearly stated that "no electoral system can completely remove the residual votes"[30].

An electoral system implemented by a state should at least provide conditions that guarantee "the free expression of the opinion of the people in the choice of the legislature"[31]. As long as this condition is fulfilled, specifications that are not accepted by a system may be justified by another. As a matter of fact, in the case of Liberal Party and others v United Kingdom,

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25 Akbulut, O, "Serbest Seçim Hakkı", p. 552.

26 Yumak and Sadak v. Turkey (GC), Application No. 10226/03, 08.07.2008, para. 110.

27 Mathieu-Mohin and Clerfayt v. Belgium, Application No. 9267/81, 02.03.1987, para. 54.

28 Jacobs vd, European Convention on Human Rights, 6. Edition, Oxford University Press, Oxford, 2014, p.541.

29 Yumak and Sadak v. Turkey (GC), Application No. 10226/03, 08.07.2008, para. 112.

30 Mathieu-Mohin and Clerfayt v. Belgium, Application No. 9267/81, 02.03.1987, para. 54.

31 Schokkenbroek, J, "Free Elections By Secret Ballot", Pieter Van Dijk, Fried Van Hoof, Arjen Van Rijn, Leo Zwaak (Ed.), Theory and Practice of the European Convention on Human Rights, Fourt Edition, Intersentia, Oxford, 2006, 911-936, p. 912; Jacobs vd, European Convention on Human Rights, 6. Edition, Oxford University Press, Oxford, 2014, p.541.

the applicants alleged that the simple majority electoral system in England had violated the right to free elections due to less weighted voting for the candidates of the Liberal Party than for those of the Conservative Party and Labor Party[32].The European Commission on Human Rights stated that such an electoral system is completely acceptable in terms of the choice of the legislature and that election results did not render that electoral system unfair. Having stated that Article 3 does not contain any protection for equal weight of all votes, the Commission rejected the allegation.The attitude assumed by the Commission is to not interfere with the electoral systems of the contracting states, whatever the consequences.However, the Code of Good Practice in Electoral Matters (CGPEM)) adopted by the Venice Commission (VC) states that equal voting rights should be determined in such a way that the number of votes of each constituency is close to each other. Seats should, therefore, be equally distributed among constituencies in the context of equal voting rights[33]. At this point, the Court gave priority to respect for the margin of appreciation without adequately discussing the principle of equal voting with respect to conflicting interests between the two sides. However, the results of the election at issue clearly show that the electoral system causes inequality, which violates the right to free elections under the principle of equal voting.

What is important to the Court within the electoral systems is that everyone has an equal opportunity to vote[34], which means thatthe Courtdoes not guarantee that every vote is equal in terms of election results, or that every candidate has an equal chance of winning. Therefore, legal regulations that require political parties to receive a certain percentage of the total votes across the country in order to gain seats in the legislative body may be consistent with Article 3 of Protocol No. 1. Drawing this conclusion, the Court reminded that the contracting states are very much at liberty to choose their own electoral systems, but also stressed that the Court is the ultimate decision maker to make sure that the electoral system chosen complies with the Convention. In this respect, the Court should make sure that limitations imposed by the contracting states on electoral laws neither infringe the essence of those rights, nor do they invalidate them.In other words, those conditions imposed by the contracting states on electoral laws should not be detrimental to the essence of those rights and should not deprive them of their effectiveness. Also the states should pursue a legitimate aim and there should be no disproportion between the

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32 The Liberal Party, R., P v. United Kingdom, Application No. 8765/79, 18.12.1980.

33 European Commission for Democracy through Law, Venice Commission, Code of Good Practice in Electoral Matters, Guidelines and Explanatory Report, Adopted by the Venice Commission at its 52. Session, 18-19 Aralık 2002; http://www.venice.coe.int/webforms/documents, (10.06.2016), para. 2.2.

34 Yumak and Sadak v. Turkey (GC), Application No. 10226/03, 08.07.2008, para. 112.

means employed and the aim sought to be achieved. In short, according to the ECtHR, the contracting states have the right and authority to freely determine in their domestic laws the general elections, the intervals at whichelections are held, their electoral systems and electoral thresholds. However, this authority is not unlimited. The limit of this authority is determined by the principles of "not tampering with the essence of the rights,""pursuing a legitimate aim," and "proportionality"[35].

In the case of Yumak and Sadak v. Turkey regarding the electoral threshold of 10% imposed by the state[36], the Courtreached a decision in the framework of these criteria. The Court stated that the rights guaranteed under the right to free elections are not absolute, that they can be restricted and that the contracting states enjoy a wide margin of appreciation in this respect. The Court also underlined that Article 3 does not specify clearly what purposes a limitation imposed on Article 3 should entail. According to the Court, the aim of the electoral threshold is to prevent the formation of a multi-party parliament and to ensure government stability.The proportionality of the limitation should be evaluated based on the Court's case-law and Turkey's political and historical characteristics. In this context, the Court pointed to the instability experienced in the 1970s and acknowledged that the electoral threshold was intended to prevent excessive fragmentation of parliament and to reinforce government stability. The Court argued that the electoral threshold had been set before the elections held on November 3, 2002 and that the applicants knew that they would not be elected if their political party failed to pass the electoral threshold regardless of the number of votes that they won in their constituencies. The Court also maintained that the electoral threshold has the legitimate aim of preventing excessive fragmentation of parliament and reinforcing government stability and that it does not prevent the emergence of political alternatives in society and allows small parties to prove themselves at the national level and thus become part of the political arena.

The Court notes that the contracting states have quite different electoral systems from each other, that some of the countries that implement the proportional representation system also have electoral thresholds, that the Turkish authorities are in the best position to choose an appropriate electoral system, and that the Court would be in no position to offer an ideal solution to correct the deficiencies of the Turkish electoral system. Avoiding taking an active position for offering solution proposals, the Court nevertheless stated that the electoral threshold of 10% is the highest among the members of the European Council. The Court confirmed the view of the Parliamentary Assembly

35 Koçak, M, "Seçim Sistemleri ve Demokrasi Karşılaştırmalı Analiz: İHAM ve AB Ölçütleri", Anayasa Yargısı, 23, 2006, 115-132, p. 130.

36 Yumak and Sadak v. Turkey (GC), Application No. 10226/03, 08.07.2008.

of the Council of Europe (PACE) which stated that the electoral threshold of 10% should be reduced.In 2004, the PA called to the Turkish authorities for a reduction of the ten percent electoral threshold, which was considered to be "excessive"[37]. In fact, according to the Parliamentary Assembly, the electoral threshold should not be higher than 3 percent in parliamentary elections held in established democracies[38]. The Court, therefore, recommended that corrective elements be introduced to the electoral system for the reduction of the electoral threshold or for the representation of various political fractions without compromising the objective of establishing a stable parliamentary majority. In conclusion, although the Court stated that the electoral threshold of 10% is too high, it found no violation of the right to free elections considering the fact that Turkey did not exceed the margin of appreciation granted to it.

It should be noted that the electoral systems of some contracting states of the European Council lack necessary legal protections. For example, Russia explicitly prohibits the formation of coalitions of different parties or electoral blocs, andthe election legislation sets the electoral threshold at seven percent for federal parliamentary elections. Moreover, it does not allow participation in elections as an independent candidate[39]. It is clear that these practices are an intervention in the right to free elections. The Court should, therefore, treat the electoral systems and election results more actively. The Court emphasizes, in its decisions on Article 11 of the Convention, that the majority of the population should be represented in parliament based on the principle of pluralism in a democratic society[40]. The Court's approach to the electoral threshold is, therefore, open to criticism in this respect.

3. Administration of Elections

The contracting states have a number of positive obligations to respect the right to free elections. In this framework, the ECtHR states that elections should be administered by a body that operates transparently and maintains neutrality and independence from political manipulations[41].However, the contracting states of the European Councildo not have a common practice regarding the operation of this body and determination of its members. For this reason, the ECtHR stated that governments have a wide margin of appreciation in the

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37 Parliamentary Assembly Resolution 1380 (2004) 'Honouring of obligations and commitments by Turkey', para. 23(ii).

38 Parliamentary Assembly Resolution 1547 (2007) 'State of human rights and democracy in Europe', para. 58.

39 Golubok, S, "Right to Free Elections: Emerging Guarantees or Two Layers of Protection?", p. 378.

40 ÖZDEP v. Turkey, Application No. 23885/94, 08.12.1999; Refah Party and the others, Application No. 41342/98, 31.07.2011.

41 The Georgian Labour Party v. Georgian, Application No. 9103/04, 08.07.2008, para. 101.

administration of elections provided that the the free expression of theopinion of the people in the choice of the legislature is respected.

The Court stands firm inits general approach to the right to free elections and grants the states more leeway regarding the technical aspects of the administration of elections.Bompard v. France is a case in point. In this case, it was alleged that the right to free elections had been violated because the state had not reviewed the constituency boundaries before the elections[42]. The Court noted that the margin of appreciation granted to the states in this area is wide[43] and that the drawing of constituency boundaries should take place after extensive assessments without haste. In this case, although the Court found the application inadmissible, it has set its criteria in this area. The CGPEM adopted by theVC contains more detailed information on constituency boundaries. According to this document, the principle of equal vote requires equal voting power, which refers to the equal distribution of voters in constituencies. Therefore, within the framework of equal voting power, seats should be evenly distributed among constituencies[44].This right should be implemented at least in the election of the lower house of the parliament and in regional or local elections.The principle of equal vote requires that the population specified in constituencies be distributed in an open and balanced manner, using one or a combination of the criteria; the number of registered residents, the number of registered voters and the number of people who actually vote. Geographical criteria, and administrative and even historical boundaries can also be taken into account. The distribution of seats should be reviewed at least every ten years, preferably outside election periods, in order to provide equal voting power.Seats in multi-member constituencies should be distributed, preferably based on administrative borders, and without redefining, if possible, the constituency boundaries that should be consistent. Constituency boundaries should be redrawn in an impartial manner without harming national minorities. The views of a commission should be taken into consideration during the redrawing of constituency boundaries. The commission should consist mostly of independent members, a geographer and a sociologist, and representatives of political parties and national minorities, where necessary.Otherwise, the redrawing of constituency boundaries may violate the equality of voters.

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42 Bompard v. France, Application No. 44081/02, 04.04.2006.

43 Harris, D. J, Law of the European Convention on Human Rights, Oxford University Press, New York, 2014, p. 947.

44 European Commission for Democracy through Law, Venice Commission, Code of Good Practice in Electoral Matters, Guidelines and Explanatory Report, Adopted by the Venice Commission at its 52. Session, 18-19 Aralık 2002; http://www.venice.coe.int/webforms/documents, (10.06.2016).

The Court attaches particular importance to the preparation of registers of electors in the administration of elections. According to the Court, registers of electors should be kept up-to-date as a prerequisite for free and fair elections. Themeticulous care of registers of electors is important for the exercise of not only the right to vote but also to stand for election[45].In the case of the Georgian Labor Party v. Georgia, the applicant party alleged that only one month before the repeat parliamentary election, the change in the rules on voter obligated voters to register for voting. The Court clarified its Article 3 case-law in this case, which relates to the administration of elections under special circumstances. In 2003, a general parliamentary election based on a mixed electoral system was held in Georgia. The Georgian Labor Party received 12.04% of the votes and won 30 of the 150 seats in Parliament according to the proportional representation system. However, the Parliament's first session was disrupted by demonstrators who claimed that the elections had been rigged, and the President had to submit his resignation.The Constitutional Court canceled the elections and new elections were held in 2004 under the auspices of the Central Electoral Commission, which annulled the election results of two constituencies and requested that elections be repeated there. However, the polling stations had not opened on election day. On the same day, the Central Electoral commission declared the results of the election. The Georgia Labor Party received 6.01% of the votes and failed to pass the 7% national electoral threshold, and therefore, it failed to win seats in parliament. In this case, the Court first examined the complaint of the applicant party on the method of the drawing-up of registers of electors, and concluded that the right to free elections had not been violated.The Court emphasized that the preparation and management of registers of electors is essential to the validity of elections and noted that the method used inthe preparation of thevoter lists in question is used in many European countries and also that the elections had been monitored by international organizations. The Court reached the conclusion that the state had fulfilled its positive obligation to provide free expression of public opinion in terms of the management of voter lists.Although the Court acknowledged that the rules on elections should not be amended while a new election is under way in some other countries, it added that the changes made to the system, albeit late, were acceptable in view of the declaration of the elections in question shortly after the failed elections in 2003 and of the political situation of the country in the post-revolutionary period[46].

The VC, on the other hand, addresses registers of electors within the scope of the principle of general voting and states that they should meet certain

[45] The Georgian Labour Party v. Georgian, Application No. 9103/04, 08.07.2008, para. 82-83.
[46] Gürcistan İşçi Partisi/Gürcistan, Başvuru No. 9103/04, 08.07.2008, para. 89.

criteria in order to be reliable[47]. According to the VC, first of all, registers of electors should be permanent and regularly updated at least once a year. The registration process should be performed in a relatively long period of time in locations where voters are not automatically registered. Registers of electors should be published. There should be an administrative or judicial procedure that allows for the registration of a non-registered elector, and that procedure should be subject to judicial review. Registration should not be performed in the polling station on election day. There should be a similar procedure that allows voters to correct their erroneous records. There should also be a complementary register to allow those who have moved to a different location or have become eligible to vote after the last publication date of registers of electors.

In the same case, the applicant party claimed that the Central Electoral Commission was under political influence because the majority of the members of the Commission had been appointed by the president. According to the claim, 7 of the 15 members of the Commission are determined by the President and his party. The Court criticized the structure of the Commission, underlining the importance of an independent, impartial and transparent administration, and stressed that it may be difficult for the Commission members to remain independent from the pressures of political power. However, the Court ruled that there had been no violation of Article 3 since there had been no proof of electoral fraud committed by the electoral commissions.The Court also stressed that these issues can be addressed in the procedural aspect of Article 3 of Protocol No. 1 of the ECHR. The Court notes that proceedings are independent of those involved in accordance with the procedure of Article 2 of the Convention[48]. If this analysis is applied to electoral issues, then the independence of electoral management has the potential to fall within the procedural scope of the right to free elections[49].

In the last part of the case, the Court decided that the registered voters in the two constituencies had been denied their right to vote and, therefore, their right to free elections had been violated. According to the Court, the applicant party had the right to rely on the votes that it would receive from the two constituencies. However, the Central Commission arbitrarily canceled the elections in those two constituencies without a legal basis. Considering the positive obligation of a state to execute the principle of general voting,

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47 European Commission for Democracy through Law, Venice Commission, Code of Good Practice in Electoral Matters, Guidelines and Explanatory Report, Adopted by the Venice Commission at its 52. Session, 18-19 Aralık 2002; http://www.venice.coe.int/webforms/documents, (10.06.2016), para. 2.2.

48 Khamila Isayeva v. Russia, Application No. 6846/02, 15.11.2007, para.128.

49 Golubok, S, "Right to Free Elections: Emerging Guarantees or Two Layers of Protection?", p. 380-381.

the Court held that the state's legitimate aim to have a parliament as soon as possible does not justify the violation of about 60.000 voters' right to vote in the two constituencies. Therefore, the exclusion of one category or group of people from the larger group may affect the principle of general voting and democratic legitimacy of the legislative body. The Court noted that the unused votes were highly likely to influence the right to stand for election and that the applicant party was not obligated to prove that if the voters who had been denied the right to vote had voted, the party would have had a chance to win the elections. The Court held that the voters had been denied the right to vote in the general elections arbitrarily and in contradiction to the rule of law. Therefore, the Court ruled that Article 3 of Protocol No. 1 had beenfundamentally violated.

Providing equal opportunities for political parties in the management of elections is another important issue. The ECtHR addresses political parties within the scope of freedom of association. For example, although the ECHR does not contain a definite statement, the Court ruled that the application of Article 3 is not necessary in political party closure cases[50]. However, there are also cases where a number of actions against political parties are addressed within the scope of the management of elections. This includes examples such as public funding of political parties or use of media by political parties.

The criteria for public funding of political parties varies from country to country. Early period decisions of the contracting bodies that take this into account did not perceive the requirement of winning at least three percent of votes to receive public funding as contrary to the Convention[51]. In this regard, the European Commission of Human Rights stated that the Convention does not regulate public funding of political parties and that the relevant Article recognizes candidates' and political parties' right to stand for election. Section 1 of Law no. 2820 in Turkey states that political parties that received at least 7% of the votes in the preceding election are entitled to financial assistance. In the case of Freedom and Solidarity Party (Özgürlük ve Dayanışma Partisi) v. Turkey, the applicant party alleged that it had been discriminated against due to the refusal of its application for the public funding to political partiesand thatthe refusal of its application violated the prohibition of discrimination in connection with Article 3.According to the applicant party, political parties that do not receive financial assistance are in a more disadvantageous position in conveying their views to the public than those that receive financial assistance. The Court first pointed to the legitimate aim of state funding for political parties.According to the Court, financial assistance to political parties protects them from extreme dependency on individual or institutionaldonations, and

[50] Refah Partisi and others (GC) v. Turkey, Application No. 41340/98, 41342/98, 41344/98, 13.02.2003.

[51] New Horizons v. Cyprus, Application No. 40436/98, 10.09.1998.

thus serves a legitimate purpose[52]. In the case of financial support, the criteria set by the European Councilmember states are full equality or fair distribution. The contracting states, however, set a minimum percentage of votes in order to prevent unnecessary proliferation of candidates. The Court also points out that there is not a common minimum percentage of votes determined by the contracting states.The Court acknowledges that the determination of a percentage of votes for financial assistance to political parties serves a legitimate purpose in the way of preventing the proliferation of candidates, while preserving pluralism. Although Turkey has the highest minimum percentage of votes among the European countries, the Court stated that it does not result in a monopoly on public funding and that many parties have benefited from it. The Court held that the percentage of votes which the applicant party obtained had been well below 7% in the preceding elections and that it would not qualify for financial assistance in other European countries either. The Court stated that different measures had been taken by the Turkish state to promote the political parties and that the applicant party had also benefit from them, and therefore, the Court ruled that the right to free elections had not been violated.

In a similar case, the Court reached the same conclusion. Addressing the case concerning the external financing of political parties, the Court used its own investigative power motu proprio and demanded that the VC prepare a report on the case[53]. The Court maintained the approach adopted by the VC and ruled that the regulation prohibiting political parties from receiving financial assistance from foreign institutions had not violated the right to free elections.

The use of media by political parties during election campaigns is another subject regarding the administration of elections.In the case of the Communist Party of Russia and Others v. Russia, the applicant parties alleged that their right to free elections had been violated due to the biased media coverage of the elections by five major TV stations[54]. The Court addressed the complaints of the applicants in terms of the positive obligations of the state. According to the Court, the state has positive and negative obligations to meet the requirement of free elections. In the context of Article 3 of Protocol No. 1, the state has an obligation to adopt not only negative measures such as abstention or non-interference, as with the majority of civil and political rights, but also positive measures to organize democratic elections. In addition, the Court noted that the state has a procedural obligation. Concerning the role played by media in elections, the Court emphasized that the state is under an obligation to establish an effective system for the examination of individual complaints regarding media manipulation of elections.

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52 Özgürlük ve Dayanışma Partisi v.Turkey, Application No. 7819/03, 10.05.2012.

53 Parti Nationaliste Basque–Organisation Regionale d'lparralde v. France, Application No. 71251/01, 07.06. 2007, para. 3.

54 Russia Communist Party and Others v. Russia, Application No. 29400/05, 19.06.2012.

The Court also interpreted the case by referring to the principle of equality in its decision. According to the Court, Article 3 of Protocol No. 1 is the basic principle of an effective political democracy and has priority in the Convention system[55]. Apart from Article 10 of Protocol 1 of the ECHR, which protects the freedom of expression, the clause "under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature" in Article 3 sets out the principle of equal treatment, essentially when all citizens exercise their right to vote and stand for election. According to the VC, public authorities should treat political parties and candidates in elections in an impartial manner, and the principle of equal opportunity should especially be observed in terms of benefiting from election campaigns and the media. The laws and procedures in effect should ensure that the opposition has at least minimum visibility on TV and that the state-controlled mass-media should be impartial. As a result of the evaluation made within these criteria in the case of the Communist Party of Russia and Others v. Russia, the Court noted that the applicants' complaints had been examined by the national high court and that the court ruled that the allegationshad not been proven[56].Considering all the evidence presented, the ECtHR acknowledged that the decision of the national court could not be regarded as arbitrary or reasonable.The Court ruled that the defendant state had provided media coverage for the opposition parties, that measures had been taken to ensure the independence of the Russian media and that, despite inequality in media coverage by parties in practice, the right to free elections had not been violated considering all the evidence and the wide margin of appreciation enjoyed by states in the field of electoral legislation. Although no violation was found, this case is crucial in terms of free elections because the Court made explicit emphasis on obligations of states regarding the right to free elections. This is not a common practice in the decisions made by the Court on the right to free elections. It is, however, clear that addressing the right to free elections from the perspective of obligations of states will further clarify the scope of the right. It is, therefore, hoped that this procedure will be widely used in the future.

The Court addresses the issue of media use during election campaigns by making a distinction between independent candidates and political parties. In the case of Oran v. Turkey[57], the applicant alleged that the prohibition of independent candidates by law from campaigning on the state television had violated the right to free elections in the context of the principle of equality. First of all, the ECtHR reiterated the principle of equality. According to the Court,

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55 Grabenwarter, **European Convention on Human Rights: Commentary**, s. 400.

56 Jacobs vd, European Convention on Human Rights, 6. Edition, Oxford University Press, Oxford, 2014, p.544.

57 Oran v. Turkey, Application No. 28881/07, 37920/07, 15.04.2014.

Article 3 of Protocol No. 1 cannot be interpreted as imposing a prohibition on states from broadcastingpolitical programs on mass media by law. However, what is important here is that one group is not treated differently from the other unless justified in the context of the Convention.The Court continued to examine the case by differentiating independent candidates and political parties. The Court observed that political parties have the capacity to influence the entire country as they address all sectors of the population with the policies that they promise or projects that they have implemented while the election campaigning by independent candidates is confined to a single constituency and thusindependent candidates do not have the capacity to exercise the same influence as political parties. The Court, therefore, found it legitimate that the right to campaign on Turkey's state-run channel TRT applied only to political parties. Considering the fact that the applicant was running without a party ticket, the Court took the view that independent candidates were not comparable to political parties. The Court continued to examine the case, comparing it with the regime to which other independent candidates were subject. In this context, the Court stated that the applicant had had the same opportunity as the other independent candidates to use other means of campaigning in the constituency where he was standing as an independent candidate. Given the fact that TRT was a public channel broadcasting throughout the country,the Court ruled that the limitation had been based on objective and reasonable grounds and had not resulted in disproportionate interference with the right to free elections.

It is not appropriate for the Court to justify this practice against the independent candidate by making a comparison between political parties and independent candidates. Such a comparison means taking a stand in favor of political parties. It should be borne in mind that when an independent candidate is elected, he/she performs important functions in political life. In addition, the principles of equality and non-discrimination are of particular importance in elections. Election is a race in which political parties and independent candidates are competing to win votes. Every obstacle put before the principle of equality is an advantage for some while a disadvantage for others, which infringes the principle of equality. In the same vein, different treatment is discrimination if it does not pursue a legitimate aim and if there is no reasonable proportionality between the means employed and the aim sought to be achieved.Though the issue of legitimate aim was brought up by the Court in this case due to the fact that there was no possibility for all candidates to campaign on the state-run TV channel, it is not appropriate for the Court to reach a conclusion based on the criteria of becoming a political party or an independent candidate, which finding suggests that there is no reasonable proportionality between the means employed and the aim sought to be achieved. It is, therefore, clear that there has been a violation of Article 3 in connection with Article 14 of the Convention. At

this point, it would be appropriate to reiterate the criterion of equal opportunity stated in the CGPEM adopted by the VC. In accordance with the principle of equal opportunity, the VC clearly stressed that state authorities should observe their duty of neutrality by making sure that political parties and candidates are accorded balanced amounts of airtime including on state television stations[58].

4. Control of Elections

In addition to an independent and impartial body administering elections, the contracting states should also include in their domestic laws a body with the same qualifications to resolve electoral disputes. This is a positive obligation for the contracting states.In the case of Namat Aliyev v. Azerbaijan[59], the applicant alleged that serious irregularities and numerous breaches of the Electoral Law had taken place in his electoral constituency on election day, which rendered it impossible to determine the true opinion of the voters in his constituency. Therefore,he argued that his right to stand for election had been violated.The court conducted its investigations based on the premise that if a certain candidatecomplained of specific instances of irregularities that occurred during elections, there should be anauthority available in the legal system of the country concerned towhich the applicant can submit his complaints. According to the Court, the existence of a national system for the effective examination of individual complaints on electoral rights is one of the fundamental safeguards for free and fair elections. Such a system is key to ensuring effective use of the right to vote and stand for election, to maintaining public confidence in the state in the electoral process and to making sure that the state fulfills its positive obligations under Article 3 of Protocol No. 1.In the absence of an effective domestic authority to examine incidents affecting democratic elections during the entire electoral process, the state's obligation to protect the right to free elections becomes meaningless. In this case, the Court held thatthe attitudes and judgments of the electoral commissions and courts had revealed a lack of genuine concern for the protection of the applicant's right to stand for election, and therefore, the Court ruled that there had been a violation of Article 3. The case-law of the Court on the right to an effective domestic remedy for individual complaints regarding electoral issues have also been addressed in the case of Grosaru v. Romania[60]. The Court held that the absence of a domestic authority with such qualifications in Romania

[58] European Commission for Democracy through Law, Venice Commission, Code of Good Practice in Electoral Matters, Guidelines and Explanatory Report, Adopted by the Venice Commission at its 52. Session, 18-19 Aralık 2002; http://www.venice.coe.int/webforms/documents, (10.06.2016), para. 2.3.

[59] Namat Aliyev v. Azerbaijan, Application No. 18705/06, 08.04.2010.

[60] Grosaru v. Romania, Application No. 78039/01, 02.03.2010.

had infringed the essence of the right to free elections, and therefore, the Court ruled that the right to free elections had been violated. With this decision, the Court also held that there had been a violation of the right to an effective remedy provided for by Article 13 of the Convention.

Another important issue regarding the right to free elections is that the body that administers elections makes decisions on electoral disputes reasonably, objectively and effectively, otherwise, the right to free elections is violated. Drawing attention to the case of Podkolzina v. Latvia regarding sufficient knowledge of the official language as a condition for candidacy, the Court emphasized that arbitrary decisions should be avoided while determining whether the criteria required to be elected according to national legislation have been met[61]. According to the Court, such an important finding should be made by a body that can provide a minimum of guarantees of its impartiality. In addition, the relevant body should not have too wide a margin of appreciation, on the contrary, its authority should be limited and specific[62]. Decisions on unsuitable candidates should be procedural, fair and objective, and prevent the abuse of power[63].This body should also be effective. The conclusion part of the decision of the case of Namat Aliyev v. Azerbaijan suggests that the existence of a body charged with examining incidents affecting elections in the contracting states is not sufficient to ensure the right to free elections but that that body should also be effective. What makes that body effective is if it investigates the allegations of irregularities related to elections in a serious and comprehensive manner. In other words, the body in question should show genuine concern for the protection of the right to stand for election. In the case of Karimov v. Azerbaijan, the applicant alleged that numerous violations of electoral law had occurred in the 2005 parliamentary elections, claiming that special polling stations were set up for military personnel in his constituency despite the fact that the conditions had not been met, and that this situation had affected the election result in his constituency. Similarly, the Court held that the electoral commissions and courts had failed to address the applicant's claims, and that their attitudes and judgments had revealed a lack of genuine concern for the protection of the applicant's right to stand for election, and therefore, the Court ruled that there had been a violation of Article 3[64].

Complaints continued that the central electoral commission and local courts in Azerbaijan failed to effectively address objections to irregularities in the elections. In its final decisions, the ECtHR stated that the ineffectiveness of the central electoral commission in examining the election complaints was

61 Podkolzina v. Lithuanian, Application No. 46726/99, 09.04.2002, para. 35.
62 Kovatch v.Ukraine, Application No. 39424/02, 07.02.2008, para. 61.
63 Podkolzina v. Lithuanian, Application No. 46726/99, 09.04.2002, para. 35.
64 Karimov v. Azerbaijan, Application No. 12535/06, 25.09.2013.

due to the high proportion of ruling party members in the Azerbaijani central electoral commission and other electoral commissions, and suggested that the contracting states introduce structural reforms. In the case of Gahramanli and Others v. Azerbaijan, candidates for opposition political parties in the parliamentary elections held in 2010 filed a complaint on the grounds of illegitimate intervention in the election process by electoral commission members, excessive influence over voter choice, obstruction of observers and ballot-boxes. The Court held that the electoral commission had not sufficiently and comprehensively assessed the evidence presented by the applicants and that the applicants had not been called for the electoral commission hearing. No observer statements had been adequately taken into account and no further investigation into the allegations had been conducted. Upon approval by the domestic courts, the ECtHR ruled that the electoral commissions and courts had revealed a lack of genuine concern for the prevention of instances of electoral fraud and for the protection of the applicant's right to stand for election, and therefore, the Court ruled that there had been a violation of Article 3[65]. Shukurov's decision is the final decision on the ineffective examination by the electoral commissions of election irregularities in the parliamentary elections in 2010.In the case of Shukurov v. Azerbaijan, the applicant, a candidate of the Popular Front Party in the parliamentary elections of 2010, alleged, after the election day, that numerous irregularities had occurred in his constituency such as interference by public officials, obstruction of election observers and repeated voting, and the applicant submitted video and audio recordings as evidence to the Central Electoral Commission (CEC) to support his allegations. Upon rejection of his claims by the CEC, the applicant filed further complaints with the Baku Court of Appeal and the Constitutional Court, both of which rejected his appeals. However, theConstitutional Court, without resolving the allegations of instances of irregularities, ruled that the election results were final. The ECtHR delivered the same decision as it did in the case of Gahramanli and Others v. Azerbaijan, and ruled that structural reforms should be introduced to the electoral commissions, and that the applicant's right to stand for election had been breached due to the fact that the electoral commissions and courts had not effectively addressed his complaints[66].

These cases show that judicial proceedings arising from election disputes are within the scope of the right to free elections. the Court, however, has failed to determine the decisive criteria in these procedural matters. In this regard, the CGPEM adopted by the VC contain moreexplanatory regulations. For example, the section "procedural safeguards" in the CGPEM state that an impartial body responsible for implementing the electoral law should be

[65] Gahramanli and others v. Azerbaijan, Application No. 36503/11, 08.11.2015.
[66] Shukurov v. Azerbaijan, Application No. 37614/11, 27.10.2016.

set up. This body should consist of at least one member from the judiciary and representatives of political parties who have received more than a certain percentage of votes in the elections. It is also stated that the body can also include a representative of the Ministry of the Interior and representatives of national minorities[67]. The CGPEM emphasized that final appeal to a court regarding electoral matters should be possible, and proceeded to set out the rules which regulate an effective system of appeal. In addition, the Explanatory Report of the CGPEM draws attention to the importance of the formation and operation of central electoral commissions, and stresses the significance of whether electoral commissions make decisions by a qualified majority (2/3) or by consensus[68].

If these conditions are not met for the working methods and formation of the administration and control of elections, it is difficult to imagine fair and transparent execution of elections which guarantee the free expression of the opinion of the people especially in the young democracies of the Eastern and Central Europe. The preparation of international standards in this area brings with it what is referred to by Goodwin-Gill as "the effective institutionalization of political rights and fundamental electoral rights"[69]. It must, therefore, be examined whether all elements of the electoral procedure are free and fair within the scope of Article 3 of Protocol No. 1 of the ECHR. A contrary case may downplay the importance of the electoral process, which should be simple enough to determine people's true will.

Conclusion

Apart from the right to vote and stand for election and the right to sit as a member, which constitute the individual aspect of the electoral process, the right to free elections also includes more general issues such as electoral systems, administration of elections, and political parties. However, the ECtHR adopts the principle of respect for the margin of appreciationenjoyed by the states. In this context, the ECtHR takes into account the historical and political characteristics of a state when making decisions on its electoral system. Thus, the ECtHR does not impose any obligations on the contracting states regarding their electoral systems and electoral thresholds. However, some electoral

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67 European Commission for Democracy through Law, Venice Commission, Code of Good Practice in Electoral Matters, Guidelines and Explanatory Report, Adopted by the Venice Commission at its 52. Session, 18-19 Aralık 2002; http://www.venice.coe.int/webforms/documents, (10.06.2016), para. 3.1.

68 Explanatory Report to the Code of Good Practice in Electoral Matters, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev-e,(23.04.2016), para. 80.

69 Goodwin-Gill, G S, Free and Fair Elections, New Expanded Edition, Inter-Parliamentary Union, Geneva, 2006, p.164.

systems do not allow equal distribution of votes and, therefore, seats should be equally distributed among constituencies in the context of equal voting rights. However, according to the Court, the principle of equal treatment does not mean that all votes are equally weighted in terms of the outcome of the election, or that all candidates should have equal chances of winning. The Court refers directly to the states' margin of appreciation without adequately considering the principle of equal voting, which contributes to the perpetuation of the unequal electoral systems. High electoral thresholds also have the same consequences. The Court should be more active in terms of electoral systems and election results. Certain parts of the population should be represented in parliament to ensure pluralism in a democratic society, and therefore, the Court's approach is open to criticism in this respect.

Having referred to the margin of appreciation enjoyed by the contracting statesin terms of electoral systems, the Court has taken a more active stance on the administration of elections. The Court has underlined that the contracting states have positive obligations in this matter. According to the Court, elections should be administered by an independent and impartial body, and the contracting states should include in their domestic laws abody with the same qualities to resolve electoral disputes.The Court has also stated that the absence of such a body impairs the essence of the right to free elections. Another issue regarding the right to free elections is that the body that administers elections should deliver its decisions on electoral disputes reasonably, objectively and effectively, otherwise, the right to free elections is violated. The close bond between the administration of elections and political parties is also crucial. However, this bond is very limited in terms of human rights decisions, which is due to the fact that the freedom of political parties is addressed within the scope of freedom of association. It is, however, observed that a number of cases are addressed in terms of the right to free elections. For example, concerns related to violations of the right to free elections have been brought up regarding the provision of public funding for political parties and use of media by political parties during election campaigns. In such cases, the ECtHR has acknowledged the contracting states' margin of appreciation and held that there had been no violation of the right to free elections. These decisions of the Court are open to criticism because it acts as an authority which approves of the decisions of the contracting states without conducting a thorough investigation. However, what is expected of the Court is that it makes decisions that guarantee the right to free elections within the framework of the criteria set by the VC. Thus, the Court can make the right to free elections more effective.

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BITCOIN REVOLUTION AND REGULATION PERPLEXITY IN PRACTICE OF SOME COUNTRIES

Bitcoin Devrimi ve Bazı Devletlerin Uygulamalarında Yasaların Karmaşıklığı

Hassan RANJBAR[1]

Abstract

Since its launch, Bitcoin[2] has challenged the mainstream view of finance.One factor that has historically laid big blows on Bitcoin has been regulatory stirrings. Due to its economic behaviour,the uncontrollable, independent virtual currency bypasses every law so far madeand is located in a so-called 'legal grey area'.The legal status of Bitcoinvaries substantially from country to country and is still undefined or changing in many of them.[3] Likewise, various government agencies and courts have classified Bitcoins differently. However, they are never really big enough to bring it under full control. This article will discuss thelegal status of Bitcoin and the cases that support classification of Bitcoin as currency and further identifies those that support its classification as a security. Following this discussion, this study analyzescurrent regulatory landscape in the United States, China, the European Union, the United Kingdom, Turkey and Iran.

Keywords: Digital Currency, Cryptocurrency, Bitcoin, Decentralized System, Mining, Blockchain

Özet

Bitcoin, piyasaya sunulduğundan bu yana, finans'ın ana görüşlerini tartışmaya başladı. Tarihsel olarak Bitcoin'e büyük darbe vuran faktörlerden biri de yasal düzenlemelerdir. Bitcoin'ın, ekonomik tarzı, kontrol edilemeyen ve bağımsız sanal bir para birimi olmakdan dolayı, şimdiye kadar yapılan her yasayı atlatıyor ve "yasal gri alan" da yerini alır. Bitcoin'ın yasal statüsü, ülkeden ülkeye büyük ölçüde farklılık gösterir ve bunların bazıları halen tanımlanmamış ve bazılar ise değişmektedir. devletlerin birçoğu, aynı şekilde, çeşitli devlet kurumları ve mahkemeler Bitcoini farklı şekilde sınıflandırılmıştır. Ama, Bitcoini tam kontrol altına alacak kadar yeterli değil. çalışmamızda, Bitcoin'ın yasal statüsü ve Bitcoin'in para birimi olarak yada bir teminat olarak sınıflandırılmasını destekleyen kararlar ve görüşler tartışılacaktır; bu konuda, özellikle ABD, Çin, AB, İngiltere, Türkiye ve İran gibi ülkelerin uygulamalarında mevcut yasal düzenlemeler incelenecektir.

Anahtar Kelimeler: Dijital Para Birimi, Kripto Para Birimi, Bitcoin, Merkezi Olmayan Sistem,Mining, Blok Zinciri

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[2] Bitcoin can mean several things:The **protocol**. The protocol is the specification of how to construct the distributed database (the blockchain), how to parse it, how transactions should be assembled, what constitutes a valid transaction, and so on. The **network**. This is the peer-to-peer network to which nodes connect. Nodes in this peer-to-peer network exchange messages containing new blocks being added to the blockchain and new transactions being published. The **currency**. A bitcoin, usually spelled with lower case "b", is a unit of the native currency of the Bitcoin network. There will be a total of roughly 21 million bitcoins issued. Although bitcoin is the main unit of account, each bitcoin is divisible to 100,000,000 pieces, called **satoshis**. The **open source implementation**. This is the original open source project, written in C++, implementing the protocol. The project was recently re-branded to **BitcoinCore**, in part to avoid confusion between the different meanings of Bitcoin. Both the source code and complied binaries can be freely downloaded from bitcoin.org/en/

Introduction

Revolution and evolution are often two sides of the same coin. Since the industrial revolution, law and technology are in constant chase of each other like a statue and its shadow.Today, virtual currencies transform the world economy and aid to expand the venues available to consumers to access goods and services.[4] Indeed, unlike traditional currencies, virtual currencies offer a peer-to-peer exchange mechanism, eliminating the need for intermediaries and central clearinghouses.[5]

download. Bitcoin Core is a single computer program but it includes two different services: **Bitcoin Core Wallet**, also known as **bitcoin-qt**, is the default implementation for a wallet. The wallet is a full node wallet as it requires a full node to run. Bitcoin Core Wallet presents a GUI to the user using the qt framework, hence the name bitcoin-qt. **Bitcoin Core Server**, also known as **bitcoind**, implements a network node. It can be run in headless mode, i.e. without a graphical user interface, as a daemon, hence the name bitcoind. Bitcoin Core Server is used to connect to the Bitcoin network, interchange messages with it, interpret the blockchain, handle new transactions in the network, and so on. There has recently been some interest in the community in dividing the Bitcoin Core project into two separate standalone programs, as the target users for the wallet and the node software have been diverging. For more information see: Pedro Franco, *Understanding Bitcoin: Cryptography, engineering, and economic,* John Wiley & Sons Ltd, 2015, West Sussex, pp. 18-19.

3 "Assessing The Differences In Bitcoin & Other Cryptocurrency Legality Across National Jurisdictions" *Information Systems & Economics Ejournal.* Social Science Research Network (SSRN). Accessed 25 September 2017.

4 Internatıonal Monetary Fund, *Virtual Currencies And Beyond: Initial Considerations,* Monetary And Capital Markets, Legal, And Strategy And Policy Review Departments, January 2016, available at: https://www.imf.org/external/pubs/ft/sdn/2016/sdn1603.pdf (last visited 10. 2, 2018).

5 Fiammetta S. Piazza, Bitcoin And The Blockchain As Possible Corporate Governance Tools: Strengths And Weaknesses, ***Penn State Journal of Law & International Affairs***, 2017, Volume 5, No. 2, p.264.

The recent development of Bitcoin[6] as a form of virtual currency[7] in conjunction with authorities' ineffective attempts to regulate the virtual currency industry, allow criminals to exploit the market and conduct illegal activities, such as money laundering and financing drug trade and terrorism.[8] This article will argue that there is a strong need for international regulations of virtual currencies in order to deter crime and fraud. It will give background information on why regulation of virtual currencies, specifically international regulation, is important.

Bitcoin is the first virtual currency formed on a decentralized banking system with guaranteed anonymity for users. Bitcoin users can exchange virtual currency for real money without detection, quickly and easily around the world. The fast-paced nature and complex infrastructure of virtual currency-exchanges poses a challenge for anti-money laundering and compliance regulators as the responsibility of supervision and enforcement remains unclear

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6 Bitcoin was developed during a time in which the Federal Reserve plunged into an unprecedented period of monetary intervention to stave off a financial crisis that many argue was brought about by risky, unregulated investments; a world in which the Cyprus banking crisis propelled that country into a deep recession; and a world where Greece, Spain, and Italy have fallen into economic misery. It is this mistrust of governmental authorities during these unprecedented times that has spurred interest in Bitcoin. Bitcoin has essentially turned the mistrust of existing financial institutions into a philosophy. It is the first decentralized digital currency (meaning it has no central regulatory entity). Hailed the ultimate alternative to the global banking system, Bitcoin is a payment system that allows international transactions to take place at any hour, in any place, at a very low cost.' Politically, Bitcoin seeks to separate money from the state's regulatory power. Elizabeth Ploshay, a writer for *Bitcoin Magazine* describes it as "' [A] movement'-a crusade in the costume of a currency. Depending on whom you talk to, the goal is to unleash repressed economies, to take down global banking or to wage a war against the Federal Reserve." Others have described Bitcoin as a victory for individuals who seek payment transactions without barriers and surveillance. Bitcoin represents an opportunity for countries without a developed financial sector to send and receive payments without barriers and excessive remittance fees. These reduced transaction costs can encourage small value transactions that will aid in the development of small businesses and can provide financial access to nations with underdeveloped financial sectors. For more information see: Daniela Sonderegger, A Regulatory and Economic Perplexity: Bitcoin Needs Just a Bit of Regulation, 47 ***Wash. U. J. L. & Pol'y***, (2015), pp. 176-177.

7 The history of Bitcoin is cloaked in mystery-the creator (or creators) purportedly used a pseudonym in his communications and was rumored to have left the project in 2010-but it is hardly novel. Since the late 1990s, many attempts at popularizing virtual money have been made including Flooz, Litcoin, GeistGeld, SolidCoin, BBQcoin, and most recently, Ripple or "Bitcoin". However, none of these has achieved the mainstream acceptance of Bitcoin. For more information see: Di Ma, Taking a Byte out of Bitcoin Regulation, 27 ***Alb. L.J. Sci. & Tech***. 1 (2017), p. 2.

8 Fiammetta S. Piazza, Bitcoin In The Dark Web: A Shadow Over Banking Secrecy And A Call For Global Response, ***Southern California Interdisciplinary Law Journal***, Vol. 26. P. 521.

for this emerging market.[9]

The time has come to regulate the transfer of cryptocurrencies such as Bitcoin by intermediaries facilitating these transfers, including operators of online wallets, exchanges, and gateways. Transaction-execution rules for cryptocurrency payments are the missing link in the regulation of cryptocurrency transactions in international regulations.Virtual or cyber-currencies present particularly difficult transactional, regulatory, and law enforcement challenges because of its anonymity due to encryption,its ability to transcend national borders in the fraction of a second, and its unique jurisdictional issues. Moreover, in contrast to negotiable instruments, a virtual or cybercurrency is intangible and potentially ephemeral. Thus, unsurprisingly, with the recent, rapid pace in the innovation and development of new currencies and technologies, such as mobile payment systems, There are also ongoing challenges for users and regulators of the new technology.[10]

Because people are turning to Bitcoin as an alternative form of currency, its value has surged. Despite their increasing use, Bitcoin has reigned largely free of regulations. Regulators have been slow to respond partly because of their unpreparedness in tackling Bitcoin's distinct features. But as Bitcoin's risks grow with its importance, regulators are at a critical juncture of having to scurry to create a regulatory framework.[11]

Since laws are always one step behind technological developments, governments are just starting to react to the challenges that new digital currencies pose. Important features of the Bitcoin-system are the decentralized structure that is free of any governmental influence and the possibility to pseudonymously use the currency. Bitcoin transactions are relatively easy to verify when using the publicly available blockchain and, in contrast to other online payment services, transactions costs are almost zero. These characteristics are exploited in different ways. On the one hand, online shops, companies and private users profit from the fast and transparent way to sell and purchase goods; on the other hand, criminals make use of the pseudonymous and decentralized features. Offences such as money laundering, blackmail, theft or offences related to data are of great significance in criminal law. As a consequence, Bitcoins serve as a quasi-anonymous substitute for money in

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9 Samantha J. Syska, Eight-Years-Young: How The New York Bitlicense Stifles Bitcoin Innovation And Expansion With Its Premature Attempt To Regulate The Virtual Currency Industry, ***Journal Of High Technology Law***, 2017 Vol. X Vİİ: No. 2, P. 314

10 Lawrence J. Trautman & Alvin C. Harrel, Bitcoin Versus Regulated Payment Systems: What Gives?,***Cardozo Law Review,*** Vol. 38, p. 1050.

11 MJIL Online, Bitcoin: *A Commodity Requiring International Regulation*, October 2, 2015Avalaible At: http://www.mjilonline.org/bitcoin-a-commodity-requiring-international-regulation/ (last visited 10. 2, 2018)

illegal activities. This development raises various legal questions. If Bitcoins are used in e-commerce, questions relating to the legal nature ofBitcoins(currency, security or commodity) are essential to prevent the use of digital currencies for money laundering, financing terrorism, and other illegal activities. Therefore, this work aims is to give an overview of the different legal issues concerning Bitcoins under practice of some countries.Thereby illustrating the immense need for legal research.

This article will discuss the legal status of Bitcoin and further identifies the cases that support classification of Bitcoin as currency and those that support its classification as a security. This Article proceeds in five parts. Part **I&II** explains what is Bitcoin technology and how Bitcoin works. Part **III** describes its legal nature and discusses Bitcoin's development and legal and regulatory complications. Following this discus part **IV** explores a few of the many national and international attempts to regulate Bitcoin and analyzes current regulatory perplexity in the practice of countries specially the United States, China, the European Union, the United Kingdom, Turkey and Iran. Finally, part **V** briefly concludes with some closing thoughts.

I. What is Bitcoin Technology?

Conceptually, Bitcoin is two things in one. First, it is a digital currency, meaning that the unit of account it employs has no physical counterpart with legal tender status. Second, Bitcoin is a "private currency": a currency provided by private enterprise aimed at combatting government monopolies on the supply of money.[12] Traditional financial actors, such as central banks or government institutions, are not involved with Bitcoin transactions. Consequently, there is little legal regulation or supervision of Bitcoin usage.' The interaction between Bitcoin and traditional currencies is not regulated by law, and all aspects of Bitcoin, from its supply to the means by which it is generated, are controlled solely by its users."[13]Some experts supporting Bitcoin argued that traditional government-backed currencies are prone to a number of weaknesses, particularly susceptibility to inflation and political corruption. Private currencies, they suggested, are more stable than traditional currencies because they do not share these weaknesses.[14]

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12 Plassaras, Nicholas A. (2013), Regulating Digital Currencies: Bringing Bitcoin within the Reach of the IMF, ***Chicago Journal of International Law***, Vol. 14: No. 1, Article 12. p. 382

13 *İbid*. p. 382.

14 *İbid*. p. 382.

Satoshi Nakamoto[15] is the creator (or creators) of Bitcoin. He (or she or they) published the Bitcoin paper in 2008, writing to the metzdowd cryptography mailing list in November 2008.[16] The protocol was first implemented in 2009 and since then several versions of the cryptocurrency have been created and are easily available for download.[17]

II. How Does Bitcoin Work?

Bitcoin is a decentralized peer-to-peer networkand payments made by Bitcoin users to other Bitcoin users do not require an intermediary third-party (such as a bank or a credit card company).[18] One of the most important aspects of Bitcoin involves the usage of the Blockchain. According to the authors of the Blockchain Revolution, Don, and AlexTapscott, the blockchain "is an incorruptible digital ledger of economictransactions that can be programmed to record not just financialtransactions but virtually everything of value."[19]This system is visible to all persons with access to a computer and the internet. The Blockchain is the entire record of all transactions since the creation of Bitcoin and it is available to all persons who download the program.[20]

This decentralized[21] management of the public ledger is the distinguishing

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15 When Bitcoin has developed since Nakamoto first published its protocol, the true identity of its creator or creators is still unknown. After posting the protocol, Nakamoto, has disappeared and, in his words, "[has] moved on to other things." Thus wrote the mysterious creator of bitcoin, who calls himself Satoshi Nakamoto, in an e-mail in April 2011. Except for a few messages, most of which are believed to be hoaxes, he has not been heard from since. For more information see:The Economist explains, *Who is Satoshi Nakamoto?*, (Nov 2nd 2015), at:https://www.economist.com/blogs/economist-explains/2015/11/economist-explains-1(last visited 10. 2, 2018) and see: Satoshi Nakamoto, *Bitcoin: APeer To Peer Electronic CashSystem* 1, *available at* http://bitcoin.org/bitcoin.pdf (last visited 10. 2, 2018)

16 Pedro Franco, 'Understanding Bitcoin Cryptography, Engineering, And Economics', Wiley, West Sussex, 2015, P. 168.

17 P. Carl Mullan, *The Digital Currency Challenge - Shaping Online Payment Systems Through U.S. Financial Regulations,* Palgrave Macmillan Eds., Ist Ed.,2014, p. 86.

18 Sean Mcleod, *Bitcoin: The Utopia or Nightmare ofRegulation, The Elon Law Review, 2017,* VOL. 9:2, p. 555

19 Richard Ozer, Bitcoin: The Insider Guide to Blockchain Technology, Cryptocurrency, and Mining Bitcoin, Jon Turner, 2017, p. 3.

20 MCLEOD, *op. cit.*, p. 556

21 The concept of decentralization can be applied to more areas than just money. One complementary technology being built alongside Bitcoin is called "Open Bazaar," and it applies decentralization to an online marketplace. The idea is to create a peer-to-peer marketplace to use alongside our peer-to-peer currency, connecting buyer and seller directly, without middle men, fees, or overseers controlling who trades with whom. A farmer in China could set up an online store with Open Bazaar and be connected directlywith his customers all over the world, and because the technology would be decentralized – without a central point of failure – overreaching governments could do little to shut his store down. This could be particularly powerful in countries with strict, stifling economic regulations

technological attribute of Bitcoin (and other decentralized cryptocurrencies) because it solves the so-called double *spending* problem (i.e., spending money you do not own by use of forgery or counterfeiting) and the attendant need for a trusted thirdparty (such as a bank or credit card company) to verify the integrity of electronic transactions between a buyer and a seller. Public ledger technology could have implications not just for the traditional payments system but also for a wide spectrum of transactions (e.g., stocks, bonds, and other financial assets) in which records are stored digitally.[22]

Mathematical problems are attached to small virtual boxes, and these boxes can further be sub-divided into other smaller boxes.[23] At the smallest version of the box, there is a recorded transaction between a buyer and a seller.[24] When a computer solves the mathematical problem assigned to the box, it confirms that a transaction occurred between a buyer and a seller. Once a user finds the solution to the mathematicalproblem, the user is rewarded the prize: Bitcoin.[25] This is known ascryptographyand this network of boxes is referred to as theBlockchain.[26]The essential items needed to start investing in Bitcoin

that prevent people from freely trading with each other. The blockchain might even be applied to the functioning of government. One idea is to bring votingonto the blockchain, to benefit from the openness, security, and transparency of decentralized record-keeping. Imagine votes were cast by moving specific tokens along the public ledger. Each voter would have his own secure digital signature that would be used to cast a vote, and he could personally verify it was tallied correctly. Voter fraud could be seriously diminished. If implemented correctly, the level of transparency would be exponentially greater than modern voting systems. For more information see: Steve Patterson, *What's the Big Deal About Bitcoin?,* 2015, Creetespace İndependent Publishing Platform,pp.38-39.

22 Edward V. Murphy, M. Maureen Murphy, Michael V. Seitzinger, '*Bitcoin: Questions, Answers, and Analysis of Legal Issues'*, Congressional Research Service, October 13, 2015, p. 2

23 MCLEOD, *op. cit.*, p. 556

24 *İbid*. p. 556.

25 *İbid*. p. 556.

26 *İbid*. p. 556.

are a "virtual wallet,"[27] miningsoftware,[28] and a computer to store these items. Mining is the process by which computers, and the processing units inside them, perform complex mathematical calculations that solve a problem on the Blockchains' area.[29] Mining serves two purposes: it confirms the previous transactions in that 'block' and it issues the new Bitcoins at the completion of a block. Generally, the speed of a user's computer processor determines how quickly the computer solves the problems. Users can also purchase a dedicated mining unit that puts less strain on their personal computers.[30]

A. Obtaining Bitcoins

There are three ways to obtain Bitcoins. First, a user can exchange conventional money (e.g., dollars, yen, and euros) for a fee on an online exchange

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27 A cryptographic algorithm is used to generate a private key and, from it, a public address. We can share the public address to receive bitcoins, and, with the private key, spend the funds sent to the address. Generally, we rely on our Bitcoin wallet software to handle the creation and management of our private keys and public addresses. As these keys are stored on our computers and networks, they are vulnerable to hacking, hardware failures, and accidental loss. Private keys and public addresses are, in fact, just strings of letters and numbers. This format makes it easy to move the keys offline for physical storage. Keys printed on paper are called "paper wallet" and are highly portable and convenient to store in a physical safe or a bank safety deposit box. With the private key generated and stored offline, we can safely send bitcoin to its public address. A paper wallet must include at least one private key and its computed public address. Additionally, the paper wallet can include a QR code to make it convenient to retrieve the key and address. The paper wallet includes both the public address (labeled *Public key*) and the private key, both with QR codes to easily transfer them back to your online wallet. Also included on the paper wallet is a place for notes. This type of wallet is easy to print for safe storage. It is recommended that copies are stored securely in multiple locations in case the paper is destroyed. As the private key, anyone who has access to this wallet has access to the funds. For more information see:Richard Caetano, *Learning Bitcoin*, Packt Publishing Ltd., 2015, Birmingham, pp. 53-54.

28 In the case of bitcoin, the method for reaching consensus is referred to as *mining,* a process of solving complex mathematical problems to validate the block. Mining is an example of a proof-of-work consensus model. A proof-of-work consensus model "require[s] the client requesting the service prove that some work has been done" in order to process the request. Other decentralized ledger technologies employ different consensus models. For example, the Ripple protocol, a shared, public, distributed database, validates transactions by creating a candidate list of transactions that is distributed to and voted on by a subset of trusted nodes, called the "unique node list." The candidate set of transactions is validated and becomes part of the permanent, authoritative ledger once the "voting of server nodes reaches a consensus of 80% .... In a third consensus model, "voting rights depend on the amount of resources (e.g., a virtual currency) held by every computer connected to the network." Researchers are presently pursuing the development of other consensus models as well. For more information see:Carla L. Reyes, Moving beyond Bitcoin to an Endogenous Theory of Decentralized Ledger Technology Regulation: An Initial Proposal, 61 ***Vill. L. Rev.*** 191 (2016), pp. 198-199.

29 MCLEOD, *op. cit.*, p. 556

30 *İbid*. p. 556.

(e.g., Okcoin, Coinbase, and Kraken).[31] Second, a user can obtain Bitcoins in exchange for the sale of goods or services, as when a merchant accepts Bitcoin from a buyer for the sale of his product. Third, a user can acquire new Bitcoins by serving as miner and applying his or her computer's processing power to successfully verify the validity of new network transactions. The probability of an individual discovering Bitcoins through mining is proportional to the amount of computer processing power that can be applied. This prospect is likely to be very small for the typical office or home computer. The difficulty of the verification problem increases so that Bitcoins will be discovered at a limited and predictable rate system-wide. But the increased difficulty of verification means that the computational cost of that service also rises.[32]

B. Bitcoin's Decentralized System

As we said before, the supply of Bitcoins does not depend on the monetary policy of a virtual central bank. In this regard, despite being a currency with no intrinsic value, the Bitcoin system's operation is similar to the growth of money under a gold standard, although historically the amount of gold mined was more erratic than the growth of the supply of Bitcoins is purported to be. Depending on one's perspective, this attribute of the Bitcoin network can be a virtue or a vice. Even in the developing stages of cryptocurrency, Nakamoto enforced an "electronic payment system based on cryptographic proof instead of trust."[33] Thus, his invention of Bitcoin is the world's first completely decentralized virtual currency and operates on a completely public, distributed ledger. The groundbreaking technology carries the potential to integrate the global economy byradically changing the way we conduct banking and commerce.[34] Monetary systems were traditionally built on a centralized system whereby the ledger was maintained byan agency, such as a bank. Individuals entrusted their funds to banks in exchange for the bank's promise that transactions would be protected. Although this centralized model is widely followed, it is criticized due to the significant power and profits the banks are automatically granted as the centralized record-keepers.[35]

III. The Legal Nature of the Bitcoin

Due to its economic behaviour,the uncontrollable, independent virtual currency bypasses every law and is located in a so-called 'legal grey

31 Murphy, Seitzinger, *op. cit.*, p. 2.
32 *İbid.* p. 2.
33 Syska, *op. cit.*, p. 316
34 *İbid*., p. 316
35 *İbid*., p. 317

area'.[36]Bitcoin's status as a security, currency or commodity remains unclear. This proposal assumes Bitcoin will continue to be used as something like a currency or commodity rather than as a purely speculative instrument. Cryptocurrencies such as bitcoin are rightly subject to laws against counterfeiting andlaws against stock fraud because of their dual nature as a medium of exchange and as a speculative instrument.

a. Bitcoin as Currency

Currency is described as a coin, government note, or bank note that circulates as a medium of exchange, unit of account, and store of value."[37]Bitcoins are a self-described currency.[38]A critical question here is whether countries will ban Bitcoin as money. In most countries the exclusive right to issue money belongs to the central bank of the state. To illustrate, in the USA, between 1837 and 1866,in a period known asthe 'Free Banking Era', almost anyone could issue their own money and more than 8,000 types of currency were traded on the market. If an issuer went bankrupt,closed, moved, or suspended activity, the issued money simply becameworthless. The National Bank Act ended this practice in 1863 as it bannedissuing private money.[39] Many countries use such regulations to limitcompetition between the private sector and the government. For example, inİran, the exclusive right to issue money belongs to the İranian NationalBank.[40]As we said before, the supply of Bitcoins does not depend on the monetary policy of a virtual central bank. Bitcoin has no central issuer, but the coins are generated in the nodes ofthe network by the users' computers. Anyone who runs mining software or is amember of a mining pool counts as a Bitcoin issuer. As Bitcoin is generated byvarious users around the world, it would be impossible for a state to ban them inthe absence of international action against mining.

To illustrate he stak's pawer to ban currency, the Liberty Dolar (ALD) was once aprivate currencyproduced in the United States. İt fell victim to such banning action. The currency was issued in minted metal rounds (similar to coins), gold and silver certificates and electronic currency (eLD). ALD certificates were "warehouse receipts" for real gold and silver owned by the bearer. The metal was warehoused at Sunshine MintinginCoeur d'Alene, Idaho,

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36 Daniel Eszteri, Bitcoin: Anarchist Money or the Currency of the Future, 151 ***Studia Iuridica Auctoritate***
Universitatis Pecs Publicata 23 (2013), p. 37.

37 Nicole D. Swartz, Bursting the Bitcoin Bubble: The Case to Regulate Digital Currency as a Security or
Commodity, 17 ***Tul. J. Tech. & Intell. Prop***. 319 (2014), p. 329

38 *İbid*. p. 329

39 Eszteri, *op. cit.*, p. 37

40 Eszteri, *op. cit.*, p. 38

prior to a November 2007 raid by theFederal Bureau of Investigation(FBI) and theU.S. Secret Service(USSS).Until July 2009, the Liberty Dollar was distributed by Liberty Services (formerly known as "National Organization for the Repeal of the Federal Reserve and the Internal Revenue Code" or NORFED), based in Evansville, Indiana. It was created by Bernard von NotHaus, the creator of the Free Marijuana Church of Honolulu and the co-founder of the Royal Hawaiian Mint Company.[41]Once the goverment noted the currency's popularity, it banned it as a 'false currency'. Unlike Bitcoin, Liberty Dollars were backed by gold, silver and other commodities and appeared on the market in banknote and coin form.[42]

In May 2009, von NotHaus and others were charged with federal crimes in connection with the Liberty Dollar and on July 31, 2009, von NotHaus announced that he had closed the Liberty Dollar operation, pending resolution of the criminal charges.On March 18, 2011, von NotHaus was pronounced guilty of "making coins resembling and similar to United States coins".[43]According to the judgment, the action was not to be interpreted as an attack on private currencies, but to prevent fraud and counterfeiting. In late 2014, a U.S. District Court judge ruled that Liberty Dollars seized in the 2007 FBI/ USSS operation should be returned to their owners.[44]

Notably and control of Bitcoin's status, on August 6,2013, United States District Judge Amos Mazzant of the Eastern District of Texas ruled in *SEC v. Shavers &Bitcoin Trust*, that Coins are "a currency or form of money," and therefore, fall within the scope of regulation by the Securities and Exchange Commission (SEC).[45]With respect to the use of Coins, which the Court refers to as "Bitcoin," the Court held:

> *"First, the Court must determine whether the Bitcoin Savings and Trust (BTCST) investments constitute an investment of money. It is clear that Bitcoin can be used as money. It can be used to purchase goods or services, and as [the defendant] stated, used to*

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41 Wikipedia,*Liberty dollar (private currency)*, *avilaibleat:*https://en.wikipedia.org/wiki/Liberty_dollar_(private_currency)#cite_note-7(last visited 10. 2, 2018)

42 Daniel Eszteri, İbid, p. 38

43 *Defendant Convicted of Minting His Own Currency"*(Press release).United States District Court for the Western District of North Carolina:U.S. Attorney›s Office. March 18, 2011. *avilaible at:*https://www.webcitation.org/6CygqRiVv?url=http://www.fbi.gov/charlotte/press-releases/2011/defendant-convicted-of-minting-his-own-currency(last visited 10. 2, 2018)

44 *Paul, Gilkes, Federal Government To Return Millions Of Dollars İn Liberty Dollars Seized By Authorities İn 2007, (August 19, 2015), avilaible at:* https://www.coinworld.com/news/precious-metals/2015/08/federal-government-to-return-millions-in-liberty-dollars-.html/ (last visited 10. 2, 2018)

45 Shahla Hazratjee, Bitcoin: The Trade of Digital Signatures, 41 T. ***Thurgood Marshall Law Review*** 55 (2015), p. 64

> *pay for individual living expenses. The only limitation of Bitcoin is that it is limited to those places that accept it as currency. However, it can also be exchanged for conventional currencies, such as the U.S. dollar, Euro, Yen, and Yuan. Therefore, Bitcoin is a currency or form of money, and investors wishing to invest in BTCST provided an investment of money*."[46]

The Shavers Court also noted that the use of coins is limited only so far as "it is limited to those places that accept it as currency."[47]

The use of Coins as currency isappealing to the parties of any financial transactionFor practical reasons.First, it removes theuse of the 'middle-man' banking agency and reduces or eradicatestransaction costs. Second, the Bitcoin System allows pseudonymoustransactions. For example charities and political campaigns have begun to acceptdonations in Coins, so as to allow their contributors to make pseudonymousdonations.The pseudonymous nature of Bitcoin transactions has alsoattracted drug dealersand gambling forums, as well as consumers andemployers that are on the legitimate political pursuit to disengage the auspiceof the government.[48]

However, there is doubt regarding the Bitcoin's ability to function as a reliable medium of exchange, unit of account, or store of value. As such, Bitcoins should not be regulated as currency. The Bitcoin is a poor medium of exchange for several reasons. First, the daily volume of Bitcoin transactions is minimal compared to traditional currencies. Second, the process of acquiring and spending Bitcoins makes it difficult to use as a source of payment. The mining process to acquire a Bitcoin requires significant computing effort, and few merchants accept Bitcoins as payment. Third, the Bitcoin's high volatility and decreasing supply may encourage hoarding rather than exchanging. Fourth, the decentralized nature of Bitcoin means that it lacks connection to a banking system to insure transactions. This ensures that Bitcoins will not be used as a source of payment in credit transactions or contracts. All of these factors may prevent Bitcoins from becoming a stable medium of exchange.[49]In addition the Bitcoin is a poor unit of account because it cannot be used to compare the value of other goods. First, Bitcoin exchanges have simultaneously listed different values for the digital currency. This leads to unreliable price information and makes it difficult for users to compare the value of relevant goods. Second, the large size of one Bitcoin is too large for practical use. Bitcoin proponents

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46 Securities and Exchange Commission v. Trendon T. Shavers and Bitcoin Savings and Trust, Civil Action No. 4:13-CV-416, 2013 U.S. Dist. LEXIS 110018, at *1 (E.D. Tex. Aug. 6, 2013).

47 *Shavers,* 2013 WL 4028182, at *2.

48 Hazratjee, *op. cit.*, p. 66.

49 Swartz, *op. cit.*, p. 329.

argue that individual Bitcoins may be divisiblehowever, determining the value of goods and services priced in decimal increments of Bitcoins may prove difficult for consumers, as such increments are not ordinary reference points for ordinary consumers.[50]Therfore,Bitcoin cannot be classified as a traditional currency,since legal regulations cannot be applied.

b. Bitcoin as Security

Although cryptocurrencies are subject to counterfeiting laws, their purchase or sale can also be a violation of the rules and regulations of the Securities and Exchange Commission.[51] The Securities and Exchange Actof 1933 defines security as *"any note, stock, treasury stock, security future, security-based swap, bond ... [or] investment contract"* and subjects securities to regulation for issuance and compliance.[52]

Eszteri argues that a security is a document containing the requisites prescribed by legal regulation, or data recorded, registered, and forwarded in some other way, as specified by legal regulation, and the printing and issuing of which, or publication in such form, is permitted by legal regulation.[53] Because a security can also be data, the question is whether Bitcoin could be counted as a type of security.[54]

In one judgment, the United States Supreme Court established the definition of an investment contract.[55]An investment contract is any contract, transaction, or scheme involving an investment of money in a common enterprise, with theexpectation that profits will be derived from the efforts of anotherperson.[56]Investment of money is defined broadly to include virtually every contribution of capital or services. Courts look to whether investors subjected themselves to financial loss by committing assets to the enterprise. One court recently ruled that Bitcoins are an investment of money because they can be used to buy goods and services.[57]

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50 Swartz, *op. cit.*, p. 330.

51 Peter, Followill, *Counterfieting Laws and Penalties,* Criminal Defense Lawyer (2016),archivedathttp://perma.cc/P373-J3PY (last visited 10. 2, 2018)

52 Securities Act of 1933: as Amended Through P.L. 112-106, Approved April 5, 2012, *archived at* https://www.sec.gov/about/laws/sa33.pdf

53 Eszteri, *op. cit.*, p. 38.

54 *İbid*. p. 38.

55 SEC v. WJ Howey Co., *op. cit.* p. 38.

56 *İbid*. p. 38.

57 SEC v. Trendon T. Shavers & Bitcoin Savings & Trust, No. 4:13-CV-416, 2013 WL 4028182, at *2 (E.D. Tex. Aug. 6, 2013).

Engle arguesthat cryptocurrency can be both a currency and a security.[58] Cryptocurrenciessuch as Bitcoin are rightly subject to laws against counterfeiting*and* laws against stock fraud because of their dual nature as amedium of exchange and as a speculative instrument: the federal casewhich held Bitcoin to be currency is *not* inconsistent with federal casewhich found Bitcoin to be a security.[59] Cryptocurrencies are currencies, and yet may *also* be subject to SECjurisdiction as a security,depending on the specific facts of the case at bar.[60]Engle believes that Bitcoin is not commercial paper because it is not a promise to pay a sum certain by a determinable date and has already been determined in court not to be a stock, because it does not have characteristics associated with stocks such as theright to vote and a claim to dividend payments.[61]Bitcoin is also nopromise to pay on occurrence of a given contingency and thus is not a future. Bitcoin is not a promise to repay a principal with interestand so Bitcoin is not a bond.[62]

However, investment contracts are also subject to SEC regulations as a "security."[63] Cryptocurrencies have been found to be "investment contract[s]"[64] under the Howey[65] testand thus subject to regulation, under the Securities and Exchange Acts,[66] including listing and compliance requirements as well as the risk of liability for fraudulent trades.[67]

The common definition of "investment contract" subject to regulation by the SEC is *SECv. Howey.*[68]According to Howey's definition of "investment contract" an investment contract is a "contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or third party".[69]*Howey* distinguishes

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58 Eric Engle, Is Bitcoin Rat Poison: Cryptocurrency, Crime, and Counterfeiting (CCC), 16 ***J. High Tech. L.*** 340, 2016, p. 373

59 *İbid*. p. 373.

60 *İbid*., p. 374.

61 *İbid*., p. 376, Engle outlining factors used to determine whether an investment is a stock). Factors include: "(i) the right to receive dividends contingent upon an apportionment of profits; (ii) negotiability; (iii) the ability to be pledged or hypothecated; (iv) the conferring of voting rights in proportion to the number of shares owned; and (v) the capacity to appreciate in value."

62 *İbid*. p. 376.

63 *İbid.*, p. 377.

64 *Shavers,* No 4:13-CV-416, *op. cit.*, at *20 (discribing a court decision holding that Bitcoin investments meet the definition of securities).

65 SEC. v. WJ Howey Co., 328 U.S. at 298 (1946). (accordding to that profit sharing in farm worked byothers held to be an investment contract and thus subject to the SEA**).**

66 *Securities Act of 1933*: as Amended Through P.L. 112-106, Approved April 5, 2012,archived at: https://www.sec.gov/about/laws/sa33.pdf (last visited 10. 2, 2018)

67 *İbid*.

68 Engle, *op. cit.*, p. 377.

69 *İbid*. p. 377.

use for investment, which is a security, and use for consumption, which is not a security."[70] Thus, Bitcoins purchased as a speculative investment would be an investment of money, whereas Bitcoins used to purchase a good would not be.[71]An investment of money in Bitcoins could have commonality.[72] The profits of Bitcoin investors are directly tied to the appreciation or depreciation of the Bitcoin's value, which is a direct result of the efforts and success of the miners.[73] The miners maintain the block chain, which isessential to the operation of Bitcoin.Some opponents argue that Bitcoins have inherent value and believes that the value of the Bitcoin comes from initial design, and not the ongoing efforts of promoters.[74] However, if miners stopped verifying the block chain, Bitcoins would not be generated or secure, and their value would decline.[75]This leads to the conclusion that the Bitcoin's value lies in the ongoing efforts of the miners, who promote its existence and integrity.[76]Consequently, Bitcoin's status as a security remains unclear, but will likely continue to be a source of potential regulation depending on Bitcoin's further development.

c. Bitcoin as a Commodity

Treating Bitcoin as a commodity owned bysomeone else could be a point of view also. A commodity is defined as being a basic good used in commerce that is interchangeable with other goods of the same type.[77] Commodities are typically traded to hedge against economic risk.Traditional commodities include tangible goods like grains, oil, and beef.Technological advances have expanded the definition to include interest rates, foreign currencies, and cell phone bandwidth. Foodstuffs, livestock, metals, and energies are examples of commodities. Bitcoins appear to fit the definition of a commodity: they can be used in commerce, are interchangeable with other goods of the same type, and can be traded to hedge against economic risk.[78]

The United States Commodities Futures Trading Commission (CFTC) in 2015 settled charges against a small and now-defunct operation in San Francisco called Coinflip, which marketed Bitcoin derivatives. In the process, the CFTC asserted for the first time that Bitcoin is a "commodity".[79]

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70 Swartz, *op. cit.*, p. 331.
71 *İbid*. p. 331.
72 *İbid*. p. 331.
73 *İbid*. p. 331.
74 *İbid.* p. 331.
75 *İbid.* p. 331.
76 *İbid.* p. 331.
77 Daniels Trading, *Bitcoin: Commodity or Currency?,* (December 12, 2017), avilaible at:https://www.danielstrading.com/futures-trading-education/2017/12/12/bitcoin-commodity-currency (last visited 10. 2, 2018
78 Swartz, *op. cit.*, p. 333.
79 Jared Paul Marx, *Bitcoin as a Commodity: What the CFTC's Ruling Means*, (Sep 21, 2015),

"In [the] First Action against an Unregistered Bitcoin Options Trading Platform, CFTC Holds that Bitcoin and Other Virtual Currencies Are a Commodity Covered by the Commodity Exchange Act."[80]

The CFTC has authority over commodities traded for futuredelivery. Although Bitcoins may fall within the definition of commodities,ordinary Bitcoin transactions are not subject to the authority of the CFTC because they are traded instantly. However, Bitcoins traded forfuture delivery, including swaps and Exchange Traded Funds, may besubject to CFTC regulations.[81] Bitcoins may also be subject to the futures requirements prohibiting their use in retirement, insurance, orpension funds.The CFTC has not issued any official guidance concerning digitalcurrencies. However, CFTC Commissioner Bart Chilton announcedhis belief that, if traded for future delivery, Bitcoins would come under CFTC supervision.[82]

Engle believes that Commodities are defined as tangible items and are not securities.[83] Bitcoin is not a commodity because it is intangible.[84] A future is a promise of a future payment price for a given commodity at or before a given time.[85] Bitcoin is not a future because it is not a promised possibility to purchase a product at a particular price.[86] However, trading in options based on the speculated future value of a cryptocurrency would be subject to the CFTC regulations.[87]

Given the use of electricity and the computer's computing capabilities, it emerges as a special commodity which can be traded rather than as goods or services on the virtual market. This theory is false since Bitcoin behaves more like money on the market and not as some other commodity.[88] We cannot classify this new virtual currency under existing law, however, due to its nature, Bitcoin is more akin to money than any of the possibilities mentioned above.[89]According to civil law, money is considered as an asset and is capable

avilaible at: https://www.coindesk.com/bitcoin-as-a-commodity-what-the-cftcs-ruling-means/ (last visited 10. 2, 2018)

80 Luke Parker**,** *Bitcoin is Officially a Currency, Property, Money, and Now a Commodity*, (19 Sep 2015), at: https://bravenewcoin.com/news/bitcoin-is-officially-a-commodity-first-cftc-ruling-against-a-bitcoin-options-trading-platform/ (last visited 10. 2, 2018)

81 Swartz, *op. cit.*, p. 334.

82 Swartz, *op. cit.*, p. 335.

83 Engle, *op. cit.*, p. 378.

84 *İbid*. p. 378.

85 *İbid*. p. 378.

86 *İbid*. p. 378.

87 *İbid*. p. 378.

88 Eszteri, *op. cit.*, p. 39.

89 *İbid*. p. 39.

of appropriation.[90] Since users treat Bitcoin as currency, we can regard it as a 'thing'. 'Custom and Practice' also shape the behaviour with which users treat Bitcoin and aid to classify it as valid medium of exchange on the market. Unfortunately the law was not prepared for such an invention and so Bitcoin's legal status is not yet regulated.[91]

IV. National and International Attempts To Regulate Bitcoin

One factor that has historically laid big blows on Bitcoin has been regulatory stirrings.[92]There has been increasedregulatorypressureon Bitcoin and the entire cryptocurrency market recently, which has been felt across the board.[93] The confusion that startedin Korea caused a major dip and even the retraction of those statementshelped the market grow.[94]Within these regulatory moves, from individual national countries, there are often powerful moves seen across the entire global cryptocurrency market. However, they are never really big enough tobring it under full control.[95]These are case-by-case regulations, and are not strong enough on their own for the free running cryptomarket to be constrained.[96]Any attempt to regulate cryptocurrencies such as Bitcoin must be on a global scale as national or regional rules would be hard to enforce on a virtual, borderless community.[97]National authorities across the globe, and particularly in Asia, have attempted to put the brakes on a global boom in the trading of Bitcoin and other cryptocurrencies.[98] Wuermeling believes that "] e[ffective regulation of virtual currencies would therefore only be achievable through the greatest possible international cooperation because the regulatory power of nation states is obviously limited".[99]

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90 *İbid*. p. 39.

91 *İbid*. p. 39.

92 *Darryn Pollock, Bitcoin Halts Week-Long Slide But Battles With Regulatory Pressure, (JAN. 14, 2018), at:*https://cointelegraph.com/news/bitcoin-halts-week-long-slide-but-battles-with-regulatory-pressure (last visited 10. 2, 2018)

93 *Darryn Pollock, Is Global Front on Bitcoin Regulation Possible?, (JAN. 16, 2018), at:* https://cointelegraph.com/news/is-global-front-on-bitcoin-regulation-possible (last visited 10. 2, 2018)

94 *İbid*.

95 *İbid*.

96 *İbid*.

97 *Any rule on bitcoin must be global, germany's central bank says,(JAN 15, 2018), at:*http://ewn.co.za/2018/01/15/any-rule-on-bitcoin-must-be-global-germany-s-central-bank-says(last visited 10. 2, 2018)

98 *İbid*.

99 Pollock, Is Global Front on Bitcoin Regulation Possible?, *(JAN 16, 2018), at*: https://cointelegraph.com/news/is-global-front-on-bitcoin-regulation-possible*(last seen 20/1/2018)*

Regulation of virtual currencies varies substantially from country to country and is still changing in many of them. Whilst the majority of countriesdo notmake the usage of Bitcoin itself illegal, its status as money (or a commodity) varies, with differing regulatory implications. While some countries haveexplicitlyallowed its use and trade, others have banned or restricted it.[100] Likewise, various government agencies, departments, and courts have classified Bitcoins differently.[101]Outside of the U.S.,virtual currency laws, regulations, and policies are emerging globally. While this survey is byno means comprehensive, only a handful of countries have specific regulations applicable to virtual currency use. Topics covered include whether bitcoins are recognized as legal tender, the possibility of negative impacts on the national currency, concerns about fraud and terrorism, specially about İran.

Next, this study looks toregulation of virtual currencies from country to country,adopting a region-by-region approach to delineating the responses of national (and supranational) governments on regulation of Bitcoin and other cryptocurrencies.The primary public policy objectives that impact the regulation of virtual currencies are: (i) providing consumer protection, (ii) preventing money laundering, (iii) maintaining the safety and soundness of the financial system, and (iv) preventing tax evasion.[102] The following is an overview of the existing legal and regulatory framework relevant to virtual currencies.

1. U.S.Efforts to Regulate Bitcoin

Bitcoin appears to promise additional benefits to users while also raising new regulatory challenges. The innovative nature of Bitcoin, however, does not fit neatly into existing models of regulation.[103] To date, the global regulatory response has been varied and most jurisdictions have yet to affirmatively enact virtual currency specific regulation. Some jurisdictions seem amenable to the continued acceptance of virtual currency while others appear averse to the idea. Foreign jurisdictions have dealt with the unique characteristics and distinct risks of virtual currency in different ways. In analyzing the various approaches, one thing is certain: Foreign jurisdictions appear to be split when it comes to their willingness to accept the possibility of virtual currency serving as an

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100 "Assessing The Differences In Bitcoin & Other Cryptocurrency Legality Across National Jurisdictions"*Information Systems & Economics Ejournal,* Social Science Research Network (SSRN). Accessed 25 September 2017.

101 *İbid*.

102 James Gatto; Elsa S. Broeker, Bitcoin and beyond: Current and Future Regulation of Virtual Currencies, 9 ***Ohio St. Entrepren. Bus. L.J.***, 2015, p. 430.

103 Bitcoinhas received increasing regulatory scrutiny with many jurisdictions tackling the questions of whether to regulate virtual currencies, and if so, how to implement an appropriate regulatory framework.

alternative payment method.

The United States has made great efforts to understand the functionality and risks of virtual currency. In the United State, regulatory bodies[104], courts and state legislatures have acted independently resulting in a regulatory 'mishmash' of guidance, clarification, extension and ongoing discussion.[105]As various bodies have provided limited guidance to clarify the treatment of virtual currency under existing laws.[106]Though this approach may be lacking, the regulatory response

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104 Anita, Ramasastry, *Bitcoin: If You Can't Ban It, Should You Regulate It? The Merits of Legalization*, (Feb. 25, 2014), *at*: https://verdict.justia.com/2014/02/25/bitcoin-cant-ban-regulate#sthash.4oUpDzhi.dpuf(last visited 10. 2, 2018) There are two legislation levels – federal and state. On the federal level, FinCEN (Financial Crimes Enforcement Network) is the main authority to look up to. Bitcoin seems to have drawn its attention in 2016, right about the time when the price increased significantly, and it has made a statement that Bitcoin is a payment system. According to FinCEN, every business dealing with cryptocurrencies, should have an MSB status (money service business). It is the necessary condition for any exchange or a payment processor to operate legally on the US territory. This status means that a company complies with AML and KYC policies, so that the risks of illegal activities are reduced to the minimum. AML and KYC are also partly covered by the PATRIOT Act that was signed in 2001 to prevent terrorism. For more information see: Robert Courtneidge, Clarence-Smith, Charlie, Bitcoin and Blockchain Technology Update: Research Paper, ***Locke Lord (UK) LLP,*** London, (2017).

105 In USA there is a different picture in every State. The authorities' attitude towards Bitcoin varies significantly, especially when it concerns the Money Transmitter License – every State has its own requirements for obtaining it. There are currently 3 States, in which businesses that operate digital currencies do not need an MTL for sure: Montana, South Carolina, and New Mexico. Others either require businesses (exchanges and payment processors) to be registered as money transmitters or do not have a definite view on this matter. New York - New York is the only State to have comprehensive regulations aimed specifically at digital currency. These rules were adopted by the New York Department of Financial Services (NYDFS) in June 2015. Under the rules, a license is required to engage in any Digital Currency Business Activity, defined as any of the following activities involving New York or a New York resident:

- Receiving digital currency for transmission or transmitting digital currency, except where the transaction is undertaken for non-financial purposes and does not involve the transfer of more than a nominal amount of digital currency;
- Storing, holding or maintaining custody or control of digital currency on behalf of others;
- Buying and selling digital currency as a customer business;
- Performing exchange services as a customer business; or
- Controlling, administering or issuing a digital currency.

106 According to a report dated August 2016, the state of California is moving forward with legislation that would update its money transmitter rules to capture businesses engaged in digital currency activities. Most notably, the bill no longer proposes to license businesses engaged in financial applications of the technology, but would instead create a new Digital Currency Business Enrollment Program. Lasting five years, the proposed program appears focused on helping the state learn more about the emerging technology. In addition,

thus far suggests that the United States is willing to accommodate the continued use of virtual currency so long as the risks associated with it can be mitigated to an appropriate degree.[107] In such an ettempt, the Law Library of the U.S. Congress surveyed the regulation of Bitcoin in forty foreign jurisdictions.[108] Despite variances in regulatory treatment, the survey showed that country-specific responses generally fell into one of the following broad categories: (1) no action to implement regulation of virtual currency, (2) clarification of tax treatment of virtual currency without further regulation, (3) prohibition or other limitations on the use of virtual currency, and (4) recognition of virtual currency as a form of currency that will be regulated as such.[109]

The United States has not taken any affirmative action to ban virtual currency.[110] Instead, the regulatory landscape in the United States evidences a number of differing approaches to clarify the regulatory requirements applicable to virtual currencies with each of the following contributing to the incremental development of a regulatory framework: (1) uncertainty as to the scope of existing laws and their application to virtual currencies in the absence of definitive guidance;[111] (2) the provision of definitive guidance from federal

there is a continuing cost of $2,500 annually, and the text proposes giving the program commissioner the authority to impose "a claim for civil penalties" of up to $25,000. The bill states that, companies that store, transmit, exchange or issue digital currency qualify as digital currency businesses and would be required to pay a non-refundable $5,000 fee to participate in the program, a cost equal to the New York BitLicense application fee. For more information see: Courtneidge, *op. cit.*, pp. 8-10.

Kevin V. Tu & Michael W. Meredith, Rethinkıng Virtual Currency Regulation In The Bitcoin Age, ***Washington Law Revıew***, 2015, Vol. 90, p. 301.

107 *İbid*. p. 301.

108 Ramasastry, *op. cit.* not 103.

109 Tu & Meredith, *op. cit.*, p. 301.

110 *İbid*. p. 5.

111 Henning believes that in the absence of clear guidance, the presence of existing state and federal laws may obviate the need for virtual currency specific legislation. That is to say, the scope of existing law may be interpreted broadly as applying to virtual currencies even if virtual currencies were not contemplated at the time of adoption or do not fit neatly within the statutory framework.According to Henning, For example, "modern theft statutes allow for prosecution for the taking of intangible property." As such, virtual currency could be construed as intangible property under the statute. However, the majority of these statutes exist only at the state level and "state authorities often do not have the resources to pursue crimes on the Internet [or]… outside the United States." Accordingly, these state statutes may not be particularly effective to deter Bitcoin theft or provide a meaningful remedy to victims. Federal authorities, although better equipped to prosecute cyber-crime may not have the statutory authority to do so. Commentators have noted that "there is a federal law used to prosecute the interstate transportation of stolen property, but it only applies … to the theft of physical items and not intangible properties like virtual currency."Other more applicable federal statutes do exist, such as federal anti-wire fraud statutes or the Computer Fraud and Abuse Act, which "makes it a crime to use a computer with the intent to defraud

and state regulatory bodies as well as courts regarding the treatment of virtual currency within the context of existing laws, including the extension of such laws to govern virtual currency;[112] and (3) ongoing discussions and progress towards the enactment of virtual currency specific regulation at the state level. Ultimately, the U.S. regulatory response has provided increased clarity, but may fall short of creating an effective legal and regulatory framework for virtual currency.[113]

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in obtaining anything of value from the victim." This may provide alternative mechanisms for federal authorities to prosecute online theft. However, the applicability of these statutes to virtual currency is unsettled because neither statute explicitly applies to Bitcoin and no steps have been taken to clarify or amend the statutes. As such, the question of "whether stealing Bitcoins from an owner's account would constitute fraud [within the meaning of these statutes] is [still] unclear." For more information see: V. Tu & W. Meredith, *op. cit.*, p. 306.And also see: Peter J. Henning, *For Bitcoin Square Peg Meets Round Hole Under the Law*, N.Y. TIMES (Dec. 9, 2013) at: https://dealbook.nytimes.com/2013/12/09/for-bitcoin-square-peg-meets-round-hole-under-the-law/?_php=true&_type=blogs&_php=true&_type=blogs&_php=true&_type=%20blogs&_r=2& (last visited 10. 2, 2018)

112 In March 2013, the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) announced that "companies or individuals that serve as sellers or exchangers for Bitcoin," but not Bitcoin investors or miners "may be regulated as money transmitters." In doing so, FinCEN unambiguously clarified the applicability of the existing federal anti-money laundering regulatory regime to virtual currency. FinCEN's regulation requires that money transmitters register and report their transactions to the federal government. "Federal law . . . does not create large . . . burdens [such as] . . . large licensing fees, minimum capital requirements or restrictions on how money held by sellers or exchanges is invested," which are common under state money transmitter laws aimed at consumer protection. What may create more severe regulatory burdens for Bitcoin firms, however, is the potential for further and often unpredictable state-based regulation of virtual currencies. In order to be in compliance with federal guidelines, money transmitters also need to "obtain state money licenses" in order to avoid "being prosecuted as unlicensed money transmitters." Accordingly, some commentators note that the FinCEN announcement "may set off a race among states . . . to determine if and how their laws apply." For more information see: V. Tu & W. Meredith, *op. cit.*, p. 306.And also see: J. Henning, *op. cit.*

113 Some states of US have opted to consider amending existing statutes to specifically account for virtual currencies or to enact new virtual currency specific legislation as a means of accounting for virtual currency's unique characteristics and potential regulatory risks. In doing so, these states would be attempting to develop a regime specifically designed for virtual currency instead of either remaining silent as to the applicability of existing laws or simply attempting to clarify how virtual currency fits into existing regulatory frameworks. For some time, it was presumed that California's law regarding the issuance of currency, section 107 of California's Corporations Code, would prohibit the use or acceptance of virtual currencies not issued by a government entity. However, in order to "accommodate the growing use of alternative payment methods such as bitcoin," Governor Jerry Brown signed into law "AB-129 Lawful Money: Alternative Currency" which repealed section 107.227 In doing so, California clearly and unambiguously sought to accommodate virtual currency and clarify that the issuance and use of virtual currency is not banned under California law, an act that is "likely to boost confidence around bitcoin" and other virtual

The United States District Court for the Eastern District of Texas attempted to define virtual currency for the purposes of regulation under the existing provisions of the Securities Act of 1933 and the Securities and Exchange Act of 1934.[114] The case stems from a Securities and Exchange Commission (SEC) complaint charging a Texas man with defrauding investors in a Ponzi scheme involving Bitcoin.[115] The SEC charged Trendon T. Shavers, the founder and operator ofBitcoin Savings and Trust (BTCST), with offering and selling Bitcoin-denominated investments in violation of the anti-fraud and registration provisions of Sections 5(a), 5(c) and 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Exchange Act Rule 10b-5.[116]The defendants moved to dismiss the complaint on the grounds that Bitcoins are not money and therefore any investments solicited and accepted by the defendants were not investments of money under the federal securities laws.[117] In short, the defendants argued that no money ever exchanged hands.[118] The SEC argued that the Bitcoininvestments at issue constituted "both investment contracts and notes, and, thus, are securities" subject to regulation under existing federal securities laws.[119] Ultimately, the court agreed with the SEC in determining that "Bitcoin is a currency or form of money" and that the investors "provided an investment of money."[120] The court reasoned that:

currencies. Instead of modifying existing law, New York is actively developing Bitcoin-specific regulation. In February 2014, the New York State Department of Financial Services (DFS) held a hearing to assess whether the state should "establish what has been called a 'BitLicense' . . . . [a unique license for virtual currency that would] keep sellers on a regulator's radar screen, not only for purposes of law enforcement, but also for consumer-protection purposes." Following the hearing, the DFS issued an order announcing that it "will consider proposals and applications in connection with the establishment of virtual currency exchanges located in the State of New York." Approved virtual currency exchanges will be required to comport with the virtual currency regulatory framework to be proposed by DFS. DFS has indicated its intent to propose its regulatory framework, including a specifically tailored BitLicense, no later than the end of the second quarter of 2014. A press release from DFS also notes that DFS expects to start considering proposals and applications for virtual currency firms other than exchanges in the near future. In creating a virtual currency regulatory framework, DFS has stated that its goal is to: "balance creating appropriate regulatory protections without stifling beneficial innovation in the development of new payments platforms." see: Anita Ramasastry, *op. cit.*, see: J. Henning, *op. cit.*, also see *NYDFS İssues Public Order On Virtual Currency Exchanges,* N.Y. State Dep't Of Fin. Servs., http://www.dfs.ny.gov/about/po_vc_03112014.htm (last visited 5. 2, 2018)

114 *Shavers,* 2013 WL 4028182, at *2.

115 *İbid*. at *2.

116 Complaint at 1–2, SEC v. Shavers, No. 4:13-cv-00416 (E.D. Tex. July 23, 2013).

117 *Shavers,* 2013 WL 4028182, at *2.

118 *İbid*. at *2.

119 *İbid*. at *2.

120 *İbid*. at *2.

> "The term "security" is defined as "any note, stock, treasury stock, security future, security-based swap, bond. . .[or] investment contract. . ." An investment contract is any contract, transaction, or scheme involving (1) an investment of money, (2) in a common enterprise, (3) with the expectation that profits will be derived from the efforts of the promoter or a third-party. First, the Court must determine whether the Bitcoin Savings and Trust (BTCST) investments constitute an investment of money. It is clear thatBitcoin can be used as money. It can be used to purchase goods or services, and as Shavers stated, used to pay for individual living expenses. The only limitation of Bitcoin is that it is limited to those places that accept it as currency. However, it can also be exchanged for conventional currencies, such as the U.S. dollar, Euro, ... Therefore, Bitcoin is a currency or form of money, and investors wishing to invest in Bitcoin Savings and Trust (BTCST) provided an investment of money.[121]"

a. Commodity Futures Trading Commission (CFTC) Actions

In the United States, three enforcement actions illustrate the CFTC's[122]

[121] There is a wide variety of functionality and uses cases for digital assets which, in the U.S., can implicate different U.S. federal and state regulations. In other words, the blockchain and digital assets have potential applications in many industries, sectors and other areas. As a result, the laws applying to particular digital assets will depend in large part on their design, the rights they represent, the function(s) they perform and their intended use cases. For example, if a token is used for gambling, then U.S. federal and state gambling laws need to be considered. It can also require significant effort to determine the jurisdiction(s) that apply to a digital asset transaction. The parties may be located in multiple jurisdictions and a number of intermediaries may be involved. Digital asset transactions tend to implicate not only U.S. federal and state law considerations but also non-U.S. laws. For instance, following the lead of the SEC in the U.S., regulators in non-U.S. jurisdictions such as Canada and Singapore have also issued warnings concerning ICOs which do not comply with local law; and other jurisdictions are considering taking action to limit ICOs. For more information see: Winstead Attorneys, *Bitcoin and Blockchain: Certain U.S. Regulatory Considerations for Investment Managers*, (August 31, 2017) *at*: https://www.winstead.com/portalresource/lookup/poid/Z1tOl9NPluKPtDNIqLMRVPMQiLsSwKpDm83!/document.name=/NEWS%20ALERT%20-%20Bitcoin%20and%20Blockchain%20August%2031%202017.pdf (last visited 5. 2, 2018).

[122] In summary, the CFTC squarely has jurisdiction over markets trading "commodity interests." Among other things, these include: futures and options on futures; swaps (which include options on commodities, as well as options on swaps); retail commodity transactions (i.e., leveraged, margined or financed transactions in commodities in which at least one party is not an ECP); and retail foreign exchange transactions (i.e., leveraged, margined or financed transactions in foreign exchange currency in which at least one party is not an ECP). In fact, off-exchange transactions in precious metals and foreign exchange currency are illegal in the U.S. if one party is not an ECP unless conducted with an entity regulated by the CFTC

approach. The first enforcement action against Coinflip[123], Inc. involved Derivabit, then a U.S.-based trading platform for Bitcoin options and futures. The CFTC asserted that virtual currencies such as Bitcoin are commodities and, therefore, options on Bitcoin are commodity interests subject to CFTC jurisdiction.[124] One week later, a second enforcement action involved Teraexchange, which had applied for registration with the CFTC as a swap execution facility. The CFTC noted that swaps on Bitcoin are commodity interests subject to CFTC jurisdiction and enforced its rules against wash trading and pre-arranged trading.[125] The third enforcement action by the CFTC involved Bitfinex, a significant Bitcoin exchange in Hong Kong. The CFTC asserted that certain off-exchange Bitcoin spot and forward transactions were "retail commodity transactions" subject to CFTC jurisdiction because they (1) involved a commodity, (2) were leveraged, margined or financed, (3) at least one party to each trade was not an eligible contract participant and (4) the Bitcoin was not actually delivered within 28 days.[126]

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or, in the case of foreign exchange currency, a U.S. bank. Anyone seeking to trade or make a market in spot Bitcoin or Bitcoin forwards must be sensitive to the fact that a proposed transaction could fall outside being a spot/forward and instead fall within the purview of the CFTC as a commodity interest -- for example, as a retail commodity transaction (such as a leveraged Bitcoin transaction), a swap (such as an option on Bitcoin) or a futures contract. For more information see:Winstead Attorneys, *op. cit.*

123 In January 2015, the first regulated US Bitcoin exchange, Coinbase, opened. The exchange is licensed to do business in 25 states-including New York and California. While accounts at Coinbase and other Bitcoin exchanges are not backed by any Government of the Federal Deposit Insurance Corp., Coinbase has insurance, which should offer traders some assurance against loss.

124 Coinflip, Inc., d/b/a Derivabit, and Francisco Riordan, CFTC No. 15-29 (Sept. 17, 2015), at: http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfcoinfliprorder09172015.pdf (last visited 5. 2, 2018).

125 TeraExchange LLC, CFTC No. 15-33 (Sept. 24, 2015), at: http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfteraexchangeorder92415.pdf (last visited 5. 2, 2018).

126 BFXNA Inc., d/b/a Bitfinex, CFTC No. 16-19 (June 2, 2016), aviliable at: http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfbfxnaorder060216.pdf (last visited 5. 2, 2018) A number of lessons can be learned from the way the CFTC has already dealt with regulation of precious metals. The concept of "actual delivery" versus constructive delivery is a critical distinction between a spot/forward (which are generally outside the CFTC's jurisdiction except for fraud and price manipulation) and a retail commodity transaction (which is generally within the CFTC's jurisdiction). In the Bitfinex enforcement action, the CFTC tackled this issue squarely even though with a Bitcoin transaction there is unlikely to be anything physical to deliver. It concluded that actual delivery could only occur if the Bitcoin wallet was transferred to the buyer or the buyer's agent and the buyer maintained possession of the private keys. This has implications for how Bitcoin spot/forward transactions are structured. However, it must also be understood that no one factor determines "actual delivery" because the CFTC applies a "whole picture" approach to determine actual delivery. Essentially, the CFTC

b. The Securities and Exchange Commission (*SEC*)Actions

The SEC's mission is "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.[127]As part of this mission, the SEC periodically issues alerts to warn investors about fraudulent investment schemes and other investment risks.[128] In response to the rising use of virtual currencies, the SEC issued several alerts to inform investors of the potential risks of investing in Bitcoin and other virtual currency enterprises.[129] The SEC described Bitcoin as "a decentralized, peer to peer virtual currency," a "new product, technology, or innovation," and a "high-risk investment opportunity," and also noted that the IRS treats Bitcoin as property for federal tax purposes. Regardless of how Bitcoinand other virtual currencies are characterized, the SEC emphasized that Bitcoin and other virtual currency investment schemes may present uniqueand heightened risks for fraud.[130]

The Securities and Exchange Commission ("*SEC*") issued a stark warning on July 25, 2017 illustrating the significant regulatory risks of investment in 'internet token offerings' or ICOs, as well as resales of tokens and coins issued in ICOs. The SEC's press release that day bore the unambiguous title '*U.S.Securities Laws May Apply to Offers, Sales, and Trading of Interests in Virtual Organizations*.[131] The press release cautions "market participants that offers and sales of digital assets by 'virtual' organizations are subject to the requirements of the federal securities." The SEC's warning was accompanied by an 18-page investigation report which, after performing a detailed analysis of DAO tokens under *SEC v. W.J. Howey Co*., concluded that DAO tokens

can be expected to bring enforcement actions to police for fraud and manipulation in spot and forward markets in Bitcoin and other virtual currencies. The CFTC was very active in doing this in high profile LIBOR manipulation cases, resulting in several billions of dollars in fines paid by large institutions. For example, once a Bitcoin transaction has an element of optionality (e.g., an embedded right to cancel) or is leveraged, margined or financed (assuming one party is not an Eligible Contract Participant and actual delivery will not occur within 28 days), the CFTC has demonstrated it is more than willing to exercise its jurisdiction. As the SEC noted "Although the CFTC can bring enforcement actions against manipulative conduct in spot markets for a commodity, spot markets are not required to register with the CFTC, unless they offer leveraged, margined, or financed trading to retail customers. In all other cases, including the relevant Bitcoin exchange, the CFTC does not set standards for, approve the rules of, examine, or otherwise regulate Bitcoin spot markets." For more information see:Winstead Attorneys, *op. cit.*

127 James Gatto; Elsa S. Broeker, Bitcoin and beyond: Current and Future Regulation of Virtual Currencies, 9 ***Ohio St. Entrepren. Bus. L.J.***, 2015, p. 445.

128 *İbid*. p. 445.

129 *İbid*. p. 445.

130 *İbid*. p. 445.

131 SEC. & Exchange Comm'n, Investor Alert: Public Companıes Making ICO-Related Claims (August 28, 2017), At: https://www.sec.gov/oiea/investor-alerts-and-bulletins/ia_icorelatedclaims(last visited 6. 2, 2018).

are securities. Depending on the facts and circumstances, offers and sales of digital tokens may be subject to U.S. federal securities laws regardless whether (1) the offering purports to be for a virtual organization, (2) payment for a token or coin is made in virtual currency, U.S. Dollars or another government currency or (3) the terminology or technology used. The SEC has already taken a number of actions to follow up on its warning. For example, the SEC issued trading suspensions for several stocks making claims about ICO investments or tokens or coins.[132]

Specifically, the SEC warns investors to consider the followingrisks when evaluating investments involving Bitcoin: (i) such investmentsare not insured like many securities accounts and bank accounts that areoften insured by the Securities Investor Protection Corporation and theFederal Deposit Insurance Corporation (FDIC), respectively; (ii) suchinvestments have a history of volatility; (iii) federal, state, or foreigngovernments may restrict the use and exchange of Bitcoin; (iv) Bitcoin maybe stolen by hackers and Bitcoin exchanges may stop operating orpermanently shut down due to fraud, technical glitches, hackers, ormalware; and (v) Bitcoin does not have an established track record ofcredibility and trust.[133]

In sum, the creation of a regulatory framework appears to be occurring incrementally as guidance as to the applicability of existing laws to virtual currency is provided and/or steps are taken to pass legislation tailored specifically towards virtual currency.[134]In the absence of such guidance or legislative action, uncertainty as to the scope and applicability of existing laws remains. As a whole, however, the regulatory response in the United States can be described as generally open to the continued growth and use of virtual currency as a viable payment alternative so long as appropriate regulations can be implemented to address the risks associated with increasingly mainstream virtual currency usage and business models.[135]

Specifically, the United States' response seems to be focused on trying to accommodate virtual currency with California and New York, or perhaps Silicon Valley and Wall Street, leading the discussion on the development of

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132 *İbid*.

133 James Gatto; Elsa S. Broeker, Bitcoin and beyond: Current and Future Regulation of Virtual Currencies, 9 Ohio St. Entrepren. Bus. L.J. (2015), p. 446. A recent case, *SEC v. Shavers,* highlights in its complaint some of the risks of buying Bitcoin-denominated investments. In *Shavers,* the SEC charged the organizer of an alleged Ponzi scheme involving Bitcoin with defrauding investors. While the SEC investigates and prosecutes many Ponzi scheme cases each year, this case is notable for the use of Bitcoin as the investment vehicle. According to the SEC, Ponzi scheme operators often lure potential investors by claiming to have a tie to a new and emerging technology.

134 Tu & Meredith, *op. cit.*, *İbid*. p. 301.

135 *İbid*. p. 301.

virtual currency regulatory frameworks at the state level.[136] Moreover, other federal and state responses appear focused on extending existing regulation to virtual currency where the potential risk from virtual currency aligns with the goals of existing laws.[137] While this process has resulted in some additional clarity, the efforts appear to be occurring independently with different agencies or courts focusing narrowly upon a discrete set of regulatory concerns or the extension of a particular regulatory framework.[138] As a result, it is possible that continuing on this path for developing virtual currency regulation may lead to a confusing and complex, or even incoherent regulatory environment, resulting in unforeseen problems requiring harmonization in the future.

2. The European Union: The European Bank Authority

In the wake of the 2008 global financial crisis, the EU established the European Banking Authority ("EBA") as an independent authority designed to, among other things, ensure effective and consolidated prudential regulation and provide supervision across the EU banking sector. The purpose of the EBA "is to contribute to the creation of the European Single Rulebook in banking whose objective is to provide a single set of harmonized prudential rules for financial institutions throughout the EU."[139] Further, the EBA is charged with promoting the "convergence of regulatory practices and assessing the risks and vulnerabilities in the EU banking sector" theworld's first supranational financial services regulator.[140] In its shorttime in existence, the EBA has weighed in heavily on virtualcurrencies.[141] First, in December 2013, the EBA issued its *Warning toConsumers on Virtual Currencies* to issue a "warning to highlight the possible risks ...[associated with] buying, holding or trading virtual currencies such asBitcoin."[142]The publication highlighted the potential risks includingthe possibility of "losing your money" in the context of the fact that"no specific regulatory protections exist that would ... cover losses ifa platform that exchanges or holds ... virtual currencies fails or goes out of business."[143]

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136 *İbid*. p. 301.
137 *İbid*. p. 301.
138 *İbid*. p. 301.
139 Regulation 1093/2010 of the European Parliament and of the council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, 2010 O.J. (L 331) 12.
140 *İbid*.
141 *Report of the European Banking Authority, Warning to Consumers on Virtual Currencies,* EBA/WRG/2013/01,European Bankıng Auth. *(Dec.* 12, 2013), at: https://www.eba.europa.eu/documents/10180/598344/EBA+Warning+on+Virtual+Currencies.pdf (last visited 6. 2, 2018)
142 Regulation 1093/2010 of the European Parliament and of the council, *op. cit.*
143 For more information see: *Report of the European Banking Authority, Warning to*

The EBA made two recommendations for mitigating "some of the more pressing risks."[144] First, the EBArecommended that all EU national regulatory authorities advise credit and financial institutions, payments institutions and e-money institutions against buying, selling, or holding VCs for their own account.[145] In addition, the EBA"also recommends that EUlegislators consider declaring market participants at the direct interface between conventional and virtual currencies, such as virtual currency exchanges, 'obliged entities' under the EU Directive and thus subject to its counter terrorist financing requirements.[146]

Following the terrorist attacks in france in 2015, the European Commission, adopted proposals in response to the EU Council's conclusions of February 2016 regarding the fight against financing terrorism and underlined the importance of achieving rapid progress of legislative actions, including in the field of virtual currencies, and called on the Commission to submit targeted amendments to EU Law.[147] Then the European Parliament published a parallel resolution and report in May 2016, in which the (EP) proposed, inter alia, that the Commission develop recommendations for any legislation needed to regulate the VC sector.[148]

In July 2016, the European Commissionpublished a draft directive, proposing to extend strict anti-money laundering (AML) regulations and "countering the financing of terrorism" (CFT) measures to Bitcoin service providers. Specifically, the directive would apply to virtual currency exchange services and custodial wallet providers.[149]The draft directive also hinted that further regulation may be required in the future to perhaps include Bitcoin address-ownership.[150] The EBA's response indicates agreement with that assessment and suggests that mining should be subject to oversight as well, stating:

Consumers on Virtual Currencies, op. cit.

144 V. Gerard Comizio, *Virtual Currencies: Growing Regulatory Framework and Challenges in the Emerging Fintech Ecosystem*, 21 N.C. Banking Inst. 131, (2017),p. 162.

145 *İbid*. p. 163

146 *İbid*. p. 163

147 *İbid*. p. 163

148 *İbid*. In aresponse to the commissionpublished by the EBA in August 2016, the banking authority suggests that the existing anti-money laundering directive is "currently not suitable for mitigating all the risks arising from [virtual currency] transactions. Instead, a separate regulatory regime, or more far-reaching amendments [...] would be required." For more information see: Aaron van Wirdum, *European Banking Authority Proposes Virtual Currency-Specific Regulatory Body*, (Sep 15, 2016), at: https://bitcoinmagazine.com/articles/european-banking-authority-proposes-virtual-currency-specific-regulatory-body-1473969820/(last visited 6. 2, 2018).

149 Courtneidge, *op. cit.*, p. 3.

150 *İbid*. p. 3.

> "[Virtual currencies] incur additional, technology-specific risks that make them distinct from conventional fiat currencies that are in the scope of [the existing anti-money laundering directive]. So-called '51 percent attacks,' for example, are one such risk, [constituting] a scenario in which a pool of miners attains 51 percent of the computational power with which units of a particular [virtual currency] scheme are mined, which in turn allows that pool to block transactions."[151]

The EU, as a whole, supports the use of crypto-currencies however attitudes in relation to regulation vary across the Member States.[152]

3. Chinese Regulation

China, home to the world's biggest community of Bitcoin miners, is cracking down on cryptocurrency activity.[153] In addition, most mining pools are based in China (for example, F2Pool, AntPool, BTCC, etc.) and the number of Bitcoin businesses incorporated in China is growing every year.[154] However, the government in China has not yet worked out an approach to regulate cryptocurrencies.[155] The regulator treats cryptocurrency as a commodity, and cryptocurrency exchanges (and other cryptocurrency-related websites) must be registered with the Telecommunications Bureau.[156]Taxes are levied in accordance with general rules for commodities: cryptocurrency transactions are subject to corporate tax, individual income tax, and capital gains tax. When

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151 *İbid*. p. 3.

152 *İbid*. In the Presidency Compromise text revising the MLD4 published on 14 November 2016 there is a proposition that allows member States to create a register for crypto account holders to register their accounts and be verified; namely:
"(7) The anonymity of virtual currencies allows their potential misuse for criminal purposes. The inclusion of providers engaged in exchange services between virtual currencies and fiat currencies and custodian wallet providers will not entirely address the issue of anonymity attached to virtual currency transactions, as a large part of the virtual currency environment will remain anonymous because users can also transact without these providers. To combat the risks related to the anonymity, national Financial Intelligence Units (FIUs) should be able to obtain information allowing to associate virtual currency addresses to the identity of theowner of virtual c urrencies. In addition, the possibility to allow users to self-declare to designated authorities on a voluntary basis should be further assessed."
This represents a real opportunity for cryptocurrency users to gain credibility and hence greater global acceptance.

153 Bloomberg,*This Is How China Is Stifling Bitcoin And Cryptocurrencies,* fortune,(January 17, 2018), at: http://fortune.com/2018/01/17/china-bitcoin-cryptocurrency-crackdown/(last visited 9. 2, 2018).

154 Vlad Likhuta And Others, *Bitcoin Regulation: Global Impact, National Lawmaking*, ForkLog Research and Axon Partners associate*,* (2017), p. 48.

155 *İbid*. p. 48.

156 *İbid*. p. 48.

cryptocurrency is sold, value-added tax is due.[157]

The official attitude towards Bitcoin in China is ambiguous. There are currently no laws, rulings, or announcements from regulatory bodies such as the People's Bank of China (PBoC) or the Ministry of Industry and Information Technology (MIIT) on the legality of Bitcoin and its trading.[158] The circumstances under which Chinese exchanges were shut down and forced out of the country are unknown, and none of the exchanges' executives have publicly spoken out about their conversations with regulators.[159]Its legal status is far from being equal with that of fiat currency because financial companies are directly forbidden to own it. BTCC in China is the longest running exchange in the world, and has always adhered to strict AML/KYC policies and is compliant with all current regulations in China and meets regularly with the People's Bank of China to ensure that it is operating in accordance with the laws and regulations of China.[160]

A press release from the PBOC in January 2017 outlined significant volatility in Bitcoin trading and also quoted a notice released in 2013 saying that Bitcoin is a virtual good and doesnot have legal tender status.[161] In July 2016, China started developing a law that would reportedly give Bitcoin the status of a "civil rights object" equalling it to personal belongings, property, bank deposits and other objects of private property, and therefore, will provide owners of Bitcoin legal protection in case of theft.[162] However, these reports have not been officially confirmed. Presently, Bitcoin is not recognised as a means of payment by the official structures. Banks do not accept it and the Chinese financial system does not protect Bitcoin owners in the case of a stock exchange crisis.[163]However, Chinese citizens may sell and buy Bitcoins and make deals with foreigners.Further, they are allowed to pay with digital currencies to merchants who accept them. It was announced in January 2016 that China's central bank planed to issue its own digital currency "as soon

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157 *İbid*. p. 48.

158 Leonhard Weese*, Bitcoin Regulation In China Still Unclear, But Chinese Exchanges Thrive Overseas,* (NOV 29, 2017), at: https://www.forbes.com/sites/leonhardweese/2017/11/29/bitcoin-regulation-in-china-still-unclear-but-chinese-exchanges-thrive-overseas/(last visited 9. 2, 2018).

159 *İbid*.

160 Comizio, *op. cit.*, pp. 170-171.

161 *İbid*. pp. 170-171.

162 *İbid*. pp. 170-171.

163 For example , Alibaba, China's top internet retailer, announced on January 9,2014, that it was prohibiting the use of bitcoin on its online shopping platforms, thereby rendering the practical use of bitcoin even more challenging in China, despite massive investor interest in virtual currencies within the country. For more information see: Comizio, *op. cit.*, pp. 170-171.

as possible".[164] China is pro-digital currencies. Despite the fact that there is no direct ban on cryptocurrencies, financial institutions and payment processors are not allowed to deal with Bitcoins. Bitcoin itself, just as any other cryptocurrency, is a 'digital commodity' and that means that people can own and trade it privately.[165] Thus, China provides a moderately favourable environment for many companies which are neither financial institutions, nor payment processors.[166]

4. Turkey's Regulation

Depending on their desined purpose, Bitcoins are legal in many jurisdictions. Turkey is one of the many countries Bitcoin does not have a particular legal status. Thus, this void opens up and this opportunities for entrepreneurs to start cryptocurrencybusinesses.[167] On November 25, 2013 the Turkish Banking Regulation and Supervision Agency published a press release stating:a Bitcoins, known as virtual money units,have no guarantees for its collateral and are not issued by any official or private institution, is not considered electronic money within the scope of Turkish legislation by its present structure and functioning, (thus, its surveillance and supervision are not possible within the frame of the Turkish Law And Agency) warned Bitcoin users thatit creates a suitable environment for virtual currencies to be used in illegal activities and a, it contains risks due to its volatile market value, and e,they may be stolen from digital wallets or operational errors due to irreversibility of the transactions made or from the abuse of malignant[168] vendors.[169] Also due to its independent nature, it not possible to freeze or seize the Bitcoin accounts.[170]

It was announced in August 2016 that Turkish Bitcoin exchange BTCTürk had been forced to cease its operations in Turkey after failing to find support

164 *İbid*. pp. 170-171.
165 Courtneidge, *op. cit.*, p. 22.
166 *İbid*. p. 22.
167 JP Buntinx, *Turkish Bitcoin Exchange BTCTurk Shuts Down For Good*, (August 25, 2016), at: https://themerkle.com/turkish-bitcoin-exchange-btcturk-shuts-down-for-good/ (last visited 9. 2, 2018).
168 Turkish police captured a gang who had extorted 450 bitcoins, worth around $3.3 million at the time, from a wealthy businessman, forcing him to transfer them from his laptop and hand over his online banking passwords. The gang targeted him because he showed off his flashy lifestyle on social media. For more information see: Jack Moore, *Bitcoin Is Un-Islamic, Says Turkey, As Price Soars Above $10,000*, (11/29/2017), at: http://www.newsweek.com/turkey-says-bitcoin-soaring-above-10000-not-accordant-islam-725350 (last visited 9. 2, 2018).
169 Herdem attorneys at law, *Bitcoin and Taxation under Turkish Legislation*,(9, dec, 2017) at: http://herdem.av.tr/bitcoin-taxation-turkish-legislation/ (last visited 9. 2, 2018).
170 *İbid*.

from local banks, the last of whom terminated BTCTürk's banking account.[171] However, Bitcoin operations and balances seem to remain unaffected, allowing users to retain their BTC with the exchange or transfer it elsewhere.[172]

Turkey recently denied Paypal a renewed licence to operate in the country because Paypal does not localise all of its IT infrastructure inside the country.[173] The ceasing of operations took effect in June 2016. A opportunity for other peer-to-peer transaction and merchant payment solution methods, BTCTurk (Turkey's largest Bitcoin exchange) has since witnessed a huge increase in volume following the announcement.[174]

5. The United Kingdom's Action

Great Britain is a leader of cryptocurrency integration and one ofthe most favorable andconvenient jurisdictions for Bitcoin businesses.[175] In addition, the British government provides support to cryptocurrency startups.[176]However, the government has a well-established tradition of self-regulation[177] and has

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171 Courtneidge, *op. cit.*,p. 34. At that time, the European Bitcoin startup Bitwalaexpressed their optimismtowards the Turkish cryptocurrency market which has lost one of its strongest competitors. However, BTCTurk's termination of services has proven that the Turkish financial market isn't necessarily friendly towards digital currency-based startups, which is hindering the operations of the remaining Bitcoin startups in the region. While it may be beneficial for startups like Bitwala who are based outside of Turkey, cryptocurrency and fintech startups who maintain their operations with Turkish bank accounts could very possibly face serious conflicts regarding their financial support in the near future. For more information see: Joseph Young, *Bitcoin Exchange BTCTurk Terminates Operations in Turkey, Right After PayPal,* (AUG 24, 2016), at: https://cointelegraph.com/news/bitcoin-exchange-btcturk-terminates-operations-in-turkey-right-after-paypal(last visited 9. 2, 2018).

172 *İbid*.

173 .Joseph Young, *op. cit.*

174 *İbid*.

175 The United Kingdom is not the first country that wants to regulate cryptocurrencies. Earlier this year, China has decided to close and ban all cryptocurrency exchanges and ICOs. South Korea has also forbidden ICOs to spread in the country.Singapore, for example, has also regulated the cryptocurrency market. While Bitcoin and other cryptocurrencies are still allowed, the government is closely following the activities around them.

176 In November 2016, it was confirmed that London based blockchain remittance specialist Epiphyte will be working with the UK regulator, the Financial Conduct Authority (FCA), to test cryptocurrency. Epiphyte will be working within the FCA's sandbox, exploring ways to provide cheaper and more efficient cross-border payment services using blockchain systems such as Bitcoin. Under the sandbox testing, Epiphyte will be providing an alternative clearing and settlement mechanism to banking systems such as SWIFT, according to a statement. For more information see: *The Bit Forum, Treasury of the United Kingdom Ready to Regulate Cryptocurrencies,*December 5, 2017, at: https://www.thebitforum.com/blogs/entry/9-treasury-of-the-united-kingdom-ready-to-regulate-cryptocurrencies/ (last visited 9. 2, 2018).

177 Eitan Jankelewitz, *Bitcoin regulation in the UK*, Feb 17, 2014, at: https://www.coindesk.

not yet worked out a clear-cut regulatory framework for crypto activities. In fact, cryptocurrencies are in a gray zone (legal vacuum).[178] At the same time, the government intends to regulate cryptocurrencies in order to prevent the use of digital currencies for money laundering, financing terrorism, and other illegal activities, and as well to support innovations in this sphere.[179] The revenues of Bitcoin businesses are subject to capital gains tax, corporation tax, and income tax.[180]

The European Commission has proposed that draft amendments to the Fourth AntiMoney Laundering Directive be agreed and implemented by December 2016 requiring that digital currency exchanges and electronic wallet providers carry out customer due diligence and have a compliance regime in place.[181] After that, on september 5, 2016, the UK Treasury reported that a large number of Member States have concerns about this timetable and it seems likely that implementation will be delayed andthe U.K. regards Bitcoin as a personal asset.[182] Goods and services purchased for Bitcoins are subject to value added tax and the cost of goods or services subject to VAT must comply with the value of Bitcoin in pounds sterling at the time of purchase.[183]VAT will not be charged on digital currency transactions and margins will not be taxed.[184] Other taxes, including corporation tax, will apply, although each case will be considered on the basis of its own individual facts and circumstances. In the future, digital currency exchanges must to comply with new stricter cybersecurity standards (which will apply to service providers such as those supporting banking and financial market infrastructures) when the Network and Information Security Directive is introduced.[185]

The United Kingdom's financial regulatory system consists of the U.K.'s Financial Conduct Authority (FCA), Prudential Regulation Authority (PRA) and HM Treasury. In May 2016, the Financial Conduct Authority (FCA), launched *Project Innovate,* a regulatory sandbox for market entrants and

com/bitcoin-regulation-uk/(last visited 9. 2, 2018).

178 Likhuta And Others, *op. cit.*, p. 19

179 *İbid*. p. 19

180 *İbid*. p. 19

181 Courtneidge, *op. cit.*, p. 3. As companies located in the UK knew that regulations could soon be a reality, they have taken different measures in the past that now will make the task easier for them and their customers."These new forms of exchange are expanding rapidly and we've got to make sure we don't get left behind - that's particularly important in terms of money-laundering, terrorism or pure theft," explained John Mann Labor Party Minister of Parliament.For more information see: The Bit Forum, *op. cit.*,

182 *İbid*. p. 19.

183 *İbid*. p. 19.

184 *İbid*. p. 19.

185 *İbid*. p. 19.

incumbent financial institutions for the purpose of promoting competition through disruptive innovation to foster innovation in the U.K. financial services market.[186] As a result of the U.K.'s principle-based approach to regulating payment innovations, it has experienced burgeoning success with payments experimentation and is "lightyears ahead" of the United States in providing licensing options.[187]

In contrast with the United States' state-by-state licensing regime, the European Union provides members with "passport regulation" which provides FinTech firms with licenses to make digital transfers across borders.[188] The eligibility criteria include the firm's activity intent to be within the scope of Financial Conduct Authority (FCA), regulations, genuinely innovative product or service that provides a consumer benefit, genuine need for the sandbox, and preparedness for testing in a live environment and recognizing that if a FinTech firm is regulated in the United Kingdom's Financial Conduct Authority (FCA),it is regulated across the European Union.[189]The U.K. has four levels of licensing for nonbank payments providers which adapt to the characteristics and business models of the requesting entity: (1) E-Money Institutions (EMI), (2) small EMI licenses, (3) Authorized Payment Institutions (API), and (4) small API licenses.[190]

The UK Treasury plans to introduce new Bitcoin-related regulations. It is a bit unclear whatthey will entail, though the goal is to require users and traders to disclose their identities and report suspicious activity.[191] Despite some initial struggles,there is nowa booming Bitcoin community all over the United Kingdom, and many people are paying attention to Bitcoin thanks to the recent price gains.[192]It is certainly true one could purchase small amounts of Bitcoin through an ATM without verifying his or heridentity. However, when it comes to making large purchases, anonymity is imposible, unless one uses LocalBitcoins and never completes any peer-to-peer trades in person.[193] The new ruleswill reportedly apply to the rest of the European Union as well.[194]Courtneidge believes that whilst the position in the United Kingdom

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186 Elizabeth Sara Ross, Nobody Puts Blockchain in a Corner: The Disruptive Role of Blockchain Technology in the Financial Services Industry and Current Regulatory Issues, 25 ***Cath. U. J. L. & Tech*** 353, (2017), p. 382.

187 *İbid*. p. 382.

188 *İbid*. p. 382.

189 *İbid*. p. 382.

190 *İbid*. p. 382.

191 JP Buntinx, *op. cit.*,

192 *İbid*.

193 *İbid*.

194 For the time being, in UK, most of the specifics regarding this legislation remain shrouded in mystery. According to a UK Treasury spokesperson, this new regulation will go into place

will be subject to the outcome of negotiations over Brexit, the reality is that certainly in the 'medium term', the U.K. will continue fully to implement and be subject to EU legislation.[195]

6. IRAN's Welcome to Bitcoin

Post-sanctions integration in the international financial sector has been one of the main challenges in the Iranian economy since the implementation of theJoint Comprehensive Plan of Actionin January 2016.[196]As such, one could anticipate that Iranian officials would welcome the emergence of cryptocurrencies as a platform for international payments.[197]Iran has been allowing Bitcoin into the country, but not without managing it.[198]The High Council of Cyberspace (HCC) is the authority deciding on the entry of Bitcoin into the country, and so far, they have welcomed it, so long as it is controlled.[199] HCC secretary Abolhassan Firouzabadi explains "We [at the HCC] welcome Bitcoin, but we must have regulations for Bitcoin and any other digital currency […] our view regarding Bitcoin is positive, but it does not mean that we will not require regulations in this regard because following the rules is a must."[200]

In Iran, Bitcoin has been used as payment methods in both financial services and startup companies. The secretary also acknowledged thatwithout the government's stated approve, already "many in Iran are dealing with Bitcoin, be it purchasing, selling or mining it, and even dealing with it in exchange shops, creating content and establishing startups."[201] Due to this, the HCC, as well as the Central Bank of Iran, have begun to study cryptocurrencies to better understand the benefits and drawbacks of them.[202] Such studies are currently underway as a joint effort by both theHigh Council of Cyberspace and the Central Bank of the Islamic Republic of Iran as the authorities arepreparingfor

by the end of 2018, although that date has yet to be officially confirmed. In hindsight, it was only a matter of time until wesaw more Bitcoin-related regulation across the European Union. See: JP Buntinx, *op. cit.*

195 Courtneidge, *op. cit.*, p. 20.

196 Bijan Khajehpour,*Cryptocurrencies could offer Iran way around sanctions*, December 28, 2017,at: https://www.al-monitor.com/pulse/originals/2017/12/iran-crypto-currency-bitcoin-sanctions-financial-system.html(last visited 9. 2, 2018).

197 *İbid*.

198 Samara Malkin, *Iran Welcomes the Use of Bitcoin Through Regulation*, (Nov 27, 2017), at: https://cryptocurrencynews.com/daily-news/bitcoin-news/iran-welcomes-the-use-of-bitcoin-through-regulation/(last visited 9. 2, 2018).

199 . *İbid*.

200 Avi Mizrahi, *Bitcoin Use in Iran Welcomed by Nation's High Council of Cyberspace*, Nov 28, 2017, at: https://news.bitcoin.com/bitcoin-use-iran-welcomed-nations-high-council-cyberspace/(last visited 9. 2, 2018).

201 Malkin, *op. cit.*

202 *İbid*.

Bitcoin use inside the country and an official document detailing what the regulators have learned about the virtual currency is expected by September 2018 according to the Iranian daily Financial Tribune.[203]

Residents of Iran rely on LocalBitcoins as well as Australian-based peer-to-peer marketplace Coinava which connects buyers and sellers in Iran without directly buying or selling Bitcoins and additionally, Iran's Bitcoin group on Facebook is active with over 29,000 members at present.[204]Imani-Rad Believes that Bitcoin is ongoing and may become more common. If this happens, then the government may be forced to use this money, especially as the money transfer through banks for Iran, if it remains a part of the sanctions.[205]

One of the main reasons behind Iran's welcoming stance on cryptocurrency is a result from when, in 2012, Iranian banks were removed from the SWIFT payments network, subsequently removing Iran from the global banking system. It is thus possible that Iran is trying to get ahead of the curve on cryptocurrencies, and by regulating them, they hold better control.[206]The Islamic republic is still suffering from international sanctions affecting several of its economic sectors, including finance, energy, and the shipping industry.[207] International sanctions have also hindered Iranian citizens' ability to use online payment platforms likePayPal, Venmo and Braintree.[208]After the economy of Iran greatly suffered from sanctions, experts believed thatBitcoinand otherdigital currencieswould greatly help Iran's economy to get back on track.[209]

Conclusion

One factor that has historically laid big blows on Bitcoin has been regulatory stirrings.While a few nations have been working against cybercrime facilitated through the use of virtual currencies, other nations have done little if anything to regulate virtual currencies. For example, in Turkey and China, Bitcoin does not have a particular legal status.In the United State,the development of a

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203 Mizrahi, *op. cit.*

204 Kevin Helms,*Iranian Government Preparing for Bitcoin Use Inside the Country,* Oct 31, 2017, at: https://news.bitcoin.com/iranian-government-bitcoin-use/(last visited 9. 2, 2018).

205 *İbid*.

206 Malkin, *op. cit.*

207 Lisa Froelings, *Iranian Government Plans New Infrastructure for Bitcoin Users*, NOV 04, 2017, at: https://cointelegraph.com/news/iranian-government-plans-new-infrastructure-for-bitcoin-users(last visited 9. 2, 2018).

208 *İbid*.

209 *İbid*. With the sanction, the Iranian government has come up with a way to go around and that is through theimplementation of Bitcoinas the main form of online payment. One of the advantages of Bitcoin is the fact that it is a decentralized currency which cannot be controlled by a central identity like a corporation or government; thus countries are not able to sanction payments. With Bitcoin, Iranian citizen could easily bypass economic sanctions and be able to conduct international trades.

regulatory framework appears to be somewhat fragmented as various bodies have provided limited guidance to clarify the treatment of virtual currency under existing laws. The regulatory response in the United States can be described as generally open to the continued growth and use of virtual currency as a viable payment alternative so long as appropriate regulations can be implemented to address the risks associated with increasingly mainstream virtual currency usage and business models.

To compare, the EU, as a whole, supports the use of crypto-currencies however attitudes in relation to regulation vary across the Member States. Recent regulatory decisions in the United Kingdom reflect a broad international trend which allows companies to leverage Bitcoin's potential as a rapid cross-border payment system. Defining Bitcoin as a currency allows individuals and companies to fully leverage the potentially market changing transfer technology, extending the innovations of the digital era to financial transactions.

The only certain thing that we can say about the legal status of Bitcoin, isthat it is legally regulated nowhere in the world.Whilst the majority of countriesdo notmake the usage of Bitcoin itself illegal, its status as money or a commodity varies, with differing regulatory implications and will likely continue to be a source of potential regulation depending on Bitcoin's further development. This paper beleives that cryptocurrency can be both a currency anda security and are rightly subject to laws against counterfeiting andlaws against stock fraud because of their dual nature as a medium of exchange and as a speculative instrument.It's important to know, Bitcoin is a truly global phenomena. Its development and regulation will not take place domestically but will be fully realized only when the world comes together to define its status.

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A NECESSARY EVIL? TO CREATE NEW EVIL! TORTURE AGAINST SUSPECTED TERRORISTS

Gerekli Kötülük? Yeni Kötülük Yaratmak İçin! Şüpheli Teröristlere İşkence Uygulanması

Nurullah GÖRGEN[1]

Abstract

The rise of the threat of terrorism by a number of non-state actors such as DAESH and Boko Haram is increasing across the globe, resulting in the deaths and injury of thousands of civilians as well as in significant economic loss and damage to property. In view of this threat, are there any circumstances in which it can ever be lawful and/or morally justifiable to carry out acts of torture against suspected terrorists in order to safeguard civilians from an imminent attack? The aim of this article is to find the answer to this question. The article will demonstrate that torture cannot be accepted under any circumstances and explain why torture does not work by examining different perspectives in literature. On the contrary, the efforts to justify mistreatment and torture adversely affect the legal order both in terms of the legal and moral aspects. In addition, the arguments justifying torture in emergency situations will be criticized and it will be shown why they are not functional. As a consequence, torture should not be allowed even in exceptional and emergency situations.

Keywords: Torture, Human Dignity, Rules of Law and Morality, Imminent Attack, Terrorism, International Law, the Right to Life, Necessity.

Özet

Dünya genelinde DEAŞ ve Boko Haram gibi devlet dışı bir takım aktörlerin sebep olduğu ve binlerce masum sivilin yaralanması veya ölümü ve önemli ekonomik kayıp ve mal zararı ile sonuçlanan terörizm tehdidi yükseliyor. Bu tehdit göz önüne alındığında, yakın ve muhtemel saldırılarda sivilleri korumak amacıyla şüpheli teröriste işkence edilmesini mazur gösterecek hukuki ve/veya ahlaki herhangi bir durum söz konusu mudur? Bu makalenin amacı bu sorunun cevabını bulmaktır. Bu makalede işkencenin hiçbir koşulda kabul edilemeyeceği ve işe yaramadığı, literatürdeki farklı görüşler ele alınarak ifade edilecektir. Tam tersine, işkenceyi yasallaştırma çabasının yasal düzeni hukuki ve ahlaki açıdan nasıl kötü etkilediği ele alınacaktır. Ek olarak, acil durumlarda işkenceyi yasallaştırabilen görüşler eleştirilecek ve onların neden işlevsel olmadığı gösterilecektir. Sonuç olarak, işkenceye acil durumlarda ve istisnai durumlarda olsa bile izin verilemeyeceği vurgulanacaktır.

Anahtar Kelimeler: İşkence, İnsanlık Onuru, Hukuk ve Ahlak kuralları, Muhtemel ve Yakın Saldırı, Terörizm, Uluslararası Hukuk, Yaşama Hakkı, Zorunluluk.

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1. The Fundamental Concepts and Their Role in the Scenarios of Imminent Attacks

The origin of ticking-time bomb case is old and different variations of it exist.[2] One of the earliest examples belongs to Shue, which suggests a scenario in which a nuclear device is placed by a fanatic in Paris. After being captured by authorities, the fanatic is willing to die instead of cooperating. There is not enough time to evacuate innocent people or find the device. The only resort is to torture the criminal in order to make him tell about, and disarm, the device.[3] Most individuals agree that torture is a justified means in such scenarios because events and factors are established very well to show that the only hope is to resort to torture in order to protect innocent people.[4] However, when it is looked closely at the scenario, which seems to be perfect, it will be understood that the concepts and events are not that precise, certain and correct all the time. Before that, a number of concepts will be briefly illustrated in order to understand the next events in a better way.

Torture- According to Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (CAT) 'torture' means 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person,' for the purpose of 'obtaining information.'[5]The action of torture should include four constitutive elements: a) infliction of severe mental or physical pain or suffering b)Intent c) Purpose d) Official involvement.[6]Article 2 of the Inter-American Convention to Prevent and Punish Torture has a similar definition but it includes 'any purpose' and 'methods upon a person'.[7]

Terrorism, Terrorist -Terrorism is the action and terrorist refers to the individuals or groups that use force or violence against innocent individuals or properties to kill, intimidate or coerce people, governments or other organisations unlawfully and deliberately.[8] UN General Assembly (UNGA) 1994 defines 'Criminal acts intended … a group of persons or particular

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2 Ibid 88.

3 Henry Shue, 'Torture' [1978] 7(2) Philosophy and Public Affairs 141.

4 Bob Brecher, Torture and The Ticking Bomb (1st edn, Blackwell Publishing 2007) 8-9.

5 UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

6 IliasBantekas and Lutz Oette, International Human Rights Law and Practice (2nd edn, Cambridge University Press 2016) 358.

7 Organization of American States (OAS), Inter-American Convention to Prevent and Punish Torture, 9 December 1985, OAS Treaty Series, No. 67

8 Yuval Ginbar, Why Not Torture Terrorists? (1st edn, Oxford University Press 2010) 4-5. Also 'Terrorism 2002/2005' (Federal Bureau of Investigation, 2017) <https://www.fbi.gov/stats-services/publications/terrorism-2002-2005> accessed 13 November 2017.

persons for political purposes… whatever the considerations of a political, philosophical, … religious or any other nature that may be invoked to justify them.'[9] There are three constitutive elements a) commit a serious crime b) the aim to spread terror amongst civilians c)to compel governments to do or abstain from doing, any act.[10]

Imminent Attack- It refers to an attack that will take place very soon, but the time is uncertain, which consequently causes more problems to arise. Because there is no time to evacuate people, no time to find the bomb, but according to torture supporters, there is time to torture the suspect terrorist, find the location of the bomb and disarm it. In an incident similar to the above scenario, it is doubtful why authorities consider torture as the only solution, although there is time constraints for stopping the attack. How much time is needed for an alternative solution instead of torture? Such questions highlight the importance of the concept of imminent attack.

2. The Legal Framework

2.1. International Instruments

In the wake of terrorist attacks against the United States on 11 September 2001(9/11), people and governments faced terrorism by non-state actors such as Boko Haram and Al-Qaida that caused deaths, injuries and damage to property worldwide.[11] After 9/11, various measures were taken for counter-terrorism.[12] International terrorism was acknowledged by UN Security Council as a threat to peace and security, and Resolution 1373, which gives states a number of binding responsibilities, was adopted. Also, a new subsidiary body, the Counter-Terrorism Committee, was adopted.[13]Although fundamental human rights and freedoms are accepted as not limitless, the measures taken under the name of combating terrorism have caused great controversy in terms of contexts, limits and practices. In particular, in situations like the above scenario, the question of whether torturing the suspected terrorist would be legally and morally legitimate has arisen.

Although the prohibition of torture is laid down in international and domestic law worldwide, torture continues in many parts of the world

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9 UNGA resolution 49/60 (9 December 1994)

10 UNSC resolution 1566 (8 October 2004)

11 Bantekas (n 7) 715-716.

12 Martin Scheinin, 'Terrorism' in D. Moeckli and S. Shah (eds), *International human rights law* (Oxford University Press 2014) 550.

13 UN Security Council, Security Council resolution 1373 (2001) [on threats to international peace and security caused by terrorist acts], 28 September 2001, S/RES/1373 (2001), available at: http://www.refworld.org/docid/3c4e94552a.html [accessed 12 November 2017]

including democratic and non-democratic countries. Politics or government's overlooking the issue ultimately result in security forces' using torture for various purposes and sanctions.[14]

There are a number of regulations on the prohibition of torture in international law. Firstly, Article 7 of the International Covenant on Civil and Political Rights (ICCPR) states that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'[15] Secondly, Article 3 of the European Convention on Human Rights (ECHR) provides that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'[16] There is also a similar ban in Article 5/2 of the American Convention on Human Rights(ACHR).[17]Article 2 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) provides that 'No exceptional circumstances whatsoever… may be invoked as a justification of torture.'[18]While Article 1 is referring to the definition of a torture, Article 2 and 4 refers to state responsibility for prohibiting torture and they clearly state that torture is prohibited under all conditions. Aforementioned regulations and articles clearly show that there is no possibility of resorting to torture even in any emergency, including our case, for the states parties. Indeed, Art 2 of CAT confirms and approves that each State Party is obliged to take the necessary measures to prevent torture.[19]

In addition, according toArt.7 of Rome Statute of the International Criminal Court torture is considered as a 'crime against humanity' when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.[20]

Most importantly, article 5 of the Universal Declaration of Human Rights states 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'[21] In addition, all four Geneva Conventions of 1949

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14 Philip Alston and Ryan Goodman, International Human Rights (1st edn, Oxford University Press 2013) 238-239.

15 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966.

16 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

17 Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969,

18 UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465

19 Ibid.

20 UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6

21 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)

prohibit torture, and Common Article 3 emphasizes that'Persons taking no active part in the hostilities, including members of armed forces … sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely...'To this end, the following acts do and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture. Articles 129 and 130 also contain regulations on torture.[22]

Apart from the above basic international instruments there are other similar international instruments such as UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Articles 1 and 2), African Charter on Human and Peoples' Rights (Article 5) and Inter-American Convention to Prevent and Punish Torture (Article 2 and 5). Thus, we can conclude that according to international agreements, the prohibition of torture is absolute and non-derogable, and there is no legal basis for resorting to torture for state parties.

2.2. State Responsibility and Challenges

On the one hand there is a torture prohibition, on the other side the states' obligation to protect their citizens from terrorist acts.[23]These two responsibilities conflict with each other, so it becomes a problem. This active protection obligation includes protecting citizens from serious crimes including terrorist acts and imminent danger. In addition, the government is burdened with a responsibility for investigating, prosecuting, and finding solutions in order to prevent terrorist attacks.[24] It is clear that governments gather intelligence and take legal measures unilaterally or collectively to safeguard their own citizens.[25]For this obligation, the states have been given some extraordinary powers to be used in special situations.[26]If the state has the responsibility of protect its own population from terrorist acts, it is assumed that sufficient and effective authority and power should be given to the state.[27]

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22 International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949.

23 Bantekas (n 7) 723. See Osman v. United Kingdom, (ECtHR) (1998), Neria Alegria v. Peru, (IACtHR) (1996), UN Doc. CCPR/C/21/Rev.1/Add. 13, para.8

24 See Oliveira v. Brazil (IACHR) (2010), para 82 ff.

25 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/64/211, para. 36.

26 Council of Europe 'Guidelines on human rights and the fight against terrorism' (11 July 2002), Guideline I.

27 Bantekas (n 7) 726.

At the same token, a number of treaties compel states to protect the right to life of citizens.[28]This obligation includes taking necessary precautions during acts of terrorism, minimizing pre-terror danger, and providing protection against threats to life.[29] However, being responsible for protecting citizens of the state does not mean that governments can act in a limitless way and through a unilateral system and strategy. Although states have the competence to limit certain rights in case of emergency, it is not possible, according to international conventions and customary, to limit some fundamental rights, including the prohibition of torture.[30]This prohibition applies not only for terrorist activities but also for imminent dangers.[31]

After 9/11,themain challenge concerning the ban on the torture has been the 'War on Terror'. The rights of the 'suspected' terrorists have been violated in two ways: undercover acts (torturing the suspected terrorist confidentially) and interpretation of international law in accordance with its own purposes.[32]The case of US' attitude towards Guantanamo detainees and during invasions of Afghanistan and Iraq provide for good examples, as they show that when the US fights against terrorism, it interprets and violates international law about torture on suspected terrorist in line with its own purposes. After the revelation of those cases, UNSC adopted Resolutions 1456[33] and 1624[34]in order to prevent this and confirm that the US should act in accordance with international human law while fighting against terrorism.[35]

As a result, although the state has the right to protect the right to life of its own citizens and to provide security, even if the only way to achieve this is to torture suspected terrorist, torture cannot be justified in any way in accordance with the rules of law.[36] On the contrary, states are responsible for preventing acts of torture and similar acts in line with Article 2 of CAT, which mentions that states are to take 'effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'.[37]Moreover, states should also regulate the prohibition of torture in domestic law.[38]

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28 Art. 6 (1) ICCPR, art 2(1) ECHR
29 Öneryildiz v. Turkey paras 89-90.
30 Article 4(2) ICCPR and Article 15(2) ECHR.
31 A and Others v. United Kingdom (ECtHR) (2009), para.176-7.
32 Bantekas (n 7) 726.
33 UNSC resolution 1456 (20 January 2003)
34 UNSC resolution 1624 (14 September 2015)
35 UNSC resolution 1452 (20 December 2002)
36 Article 15 of CAT
37 Article 2 of CAT
38 Cestaro v. Italy, Article 4 of CAT, Implementing the prohibition of torture: the contribution and limits of national legislation and jurisprudence (2002).

3. Analyses of Approaches that Support Legalising Torture

According to Dershowitz, one of the most prominent advocates of legalization of torture, torture of suspected terrorists by the interrogators should be legalized in order to obtain the necessary information, when innocent livesare in danger.[39] He also suggests that in exceptional emergencies, torture warrants should be given to interrogators by judges, so that torture can be performed in line with the rules of law.[40] The origin of his ideas is based on the approach of the government of Israel, which claims that use of torture is a realistic way to prevent terror.[41]Dershowitz is not the only one that campaigns for legitimizing torture. Another supporter of this approach, F. Bacon claims that the most important thing for justice is truth, and torture can be legalized even if it is contrary to human dignity in order to obtain the truthful information to protect innocent people from imminent terrorist attacks.[42]In the next section, theories of legalization and their critics will be discussed.

3.1. The Landau Model (Defence of Necessity)

This model was created by the Landau commission in Israel and was implemented by Israel government between 1987 and 1999 and is also known as defence of necessity.[43] According to the model, in advance, the interrogators should be given the authority to torture during interrogation in cases where this is required to save the lives of the innocent.[44] In other words, if interrogators (Israel's General Security Service - GSS) believe that there is sufficient doubt, they can use physical violence against suspected terrorists to obtain information from them in the name of the defence of necessity, without requiring any permission.[45] The model claims that between the two evils, the devil that is

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39 Alan M Dershowitz, Why Terrorism Works (1st edn, Yale University Press 2002). See also Alan M Dershowitz, Shouting Fire: Civil Liberties in A Turbulent Age (1st edn, Little, Brown 2002) 470-477.

40 Ibid

41 AnatBiletzi, The judicial rhetoric of morality: Israel's High Court of Justice on the legality of torture (2001) [Electronic version]. Unpublished paper available at https://www.sss.ias.edu/files/papers/papernine.pdf. Accessed 13 November 2017

42 Chanterelle Sung, 'Torturing The Ticking Bomb Terrorist: An Analysis Of Judicially Sanctioned Torture In The Context Of Terrorism' (2003) 23 Boston College Third World Law Journal 196. <http://lawdigitalcommons.bc.edu/twlj/?utm_source=lawdigitalcommons.bc.edu%2Ftwlj%2Fvol23%2Fiss1%2F6&utm_medium=PDF&utm_campaign=PDFCoverPages> accessed 13 November 2017.

43 Ginbar (n 9) 171.

44 Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile TerroristActivity (1987), excerpted in 23 ISR. L REV. 146, 174 (1989). (henceforth : Landau report)

45 Ibid.

less harmful is chosen, in order to prevent imminent attack.[46]In the case of *Public Committee against Torture v. The State of Israel,* the Israel Supreme Court made an interpretation and stated, although international and domestic law prohibit brutal and inhuman methods in all cases, they do not explicitly include ticking bomb scenarios,[47]and claim that there is an uncertainty for ticking bomb scenarios.

Between 1987 and 1999, tens of thousands of Palestinians were interrogated by GSS on the basis of the defence of necessity.[48] They used physical force and psychological pressure including beating, kicking, shaking, slapping, pulling hair, sleep deprivation, threats, insults and cold showers against the suspected terrorists during interrogations.[49]According to B'Tselem, approximately 1000 to 1500 Palestinian per year were taken into custody and 85% of them were being tortured.[50]

There are a number of reproaches for this model. Firstly, according to the presumption of innocence, every individual is innocent unless the opposite is proved.[51]Also, it is a very unlikely situation that there exist tens of thousands of detainees that aim to commit an imminent terrorist act which intends to kill innocent people. In addition, during this period, continuing attacks proved that the model is not effective and useful in preventing them.[52]Therefore, thousands of innocent people were tortured by violating legal and moral rules in the name of saving innocent people. On the contrary, it causes the authorities to misuse torture for various other reasons. In ticking bomb scenario, the purpose is to eliminate the imminent threat that exists, so arresting and torturing suspected terrorists for a long time cannot be explained in the framework of necessity. On the other hand, suspects may not have the necessary information, or information can be ineffective. In practice, it can be said that Israel has been abusing this model in order to persecute and torture Palestinian suspects for a long time. During 12 years, considerably increased torture made by GSS under colour of preventing immediate danger was incompatible with the legal and ethical rules.[53]

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46 Ibid. Also Dershowitz (n 40).

47 *Public Committee against Torture v. The State of Israel, (Israel) (1999).*

48 Ginbar (n 9) 181.

49 Landau Report para 2.1.

50 Yuval Ginbar, Routine Torture: Interrogation Methods Of The General Security Service (B'Tselem 1998).

51 Paola Gaeta, 'May Necessity Be Available As A Defence For Torture In The Interrogation Of Suspected Terrorists?' (2004) 2 Journal of International Criminal Justice 785-794.

52 Ibid.

53 Richard Jackson and Samuel Justin Sinclair, Contemporary Debates on Terrorism (1st edn, Routledge 2012) 162.

In the above case, the Court stated that, the necessity defence does not give investigators the right to use physical violence during the investigation process.[54]All court members decided that Israel had no right to use physical force and was acting unlawfully.[55] It shows that in the name of legalizating torture, torture is becoming generalized and routine under cover of many different reasons. In brief, this model has not succeeded in justifying torture in the case of ticking bomb scenarios.[56]

3.2. Torture Warrants

Although legitimization of torture is attributed to the name of Dershowitz, the origin of this model extends to the 16th century England[57]and is based on receiving guarantees from the judicial authorities before interrogators torture suspected persons.[58] Thus, it is claimed that state can control torture better in 'a formal, visible, accountable, and centralized system, which is somewhat easier to control than *ad hoc*, off-the-books, and under-the-radar-screen non-system.'[59]This approach claims that torture becomes legal, transparent and less evil when torture is necessary in an emergency. Israel and the USA are the most interested countries in this model.[60] The difference of this model from the defence of necessity is the need to obtain approval from the judicial authorities for each torture case.

Torture Warrants module has been criticized for various reasons. One of the most important criticisms is how the judge who is supposed to give the warrant will be trained for this and how s/he will make the right decision in such a short time.[61] It is clear that there is not a training program for judges specifically for this issue. Even if it exists, it is very unlikely that these judges would be at the scene. Secondly, interrogators who receive warrants from the judge will no longer feel like they bear any responsibility. If interrogators make a vital mistake, they will have legal grounds to escape from responsibility, which makes this situation very suitable for abuse.[62] Thirdly, torture warrants damage the integrity of the judiciary, which is crucial for its reliability and neutrality.[63] In addition, this model is believed to result with more torture,

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54 *Public Committee against Torture v. The State of Israel para 36.*
55 Ibid 39.
56 Ginbar (n 9) 182.
57 John H Langbein, Torture and The Law of Proof (1st edn, University of Chicago Press 2006) 81-128.
58 Dershowitz (n 40) 470-477.
59 Ibid.
60 Ginbar (n 9) 184.
61 Allhoff (n 2) 182.
62 Ibid.
63 J. Jeremy Wisnewski, 'Unwarranted Torture Warrants: A Critique of The Dershowitz

which is incompatible with the values of liberal democracy.[64] These and other reasons will be discussed in detail below.

3.3. High Value Detainees' Model

High Value Detainees' (HVD) model was created by the US after 9/11.[65] According to this model, there are four basic arguments that allow torture. First one is the limited scope of torture (includes only extreme acts). Second, torture can be applied when extraordinary circumstances arise such as necessity, self-defence or superior orders. Third, torture is possible with the unlimited authority of the president in the war. Lastly, terrorists are not protected by law, neither domestic nor international.[66] In this model, High Value Detainee concept is very important. It means a detainee, who has significant and high level information to be used in strategic intelligence or important operations.[67] According to HVD model, when the above conditions are met, the necessary legal criteria for legitimizing the use torture are established in order to protect innocent people from imminent attack.

This module has been criticized for various reasons. Firstly, the argument that terrorists are not protected by law is quite open to debate. Even if a person is a terrorist, he or she has rights according to domestic law, international treaties and international customary law.[68] For instance, according to interpreters, even if it is not expressly stated, Articles 5, 8 and 14 of US Constitution prohibit torture.[69] In addition, the US is party to international treaties that prohibit torture such as the International Covenant on Civil and Political Rights, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Finally, there are international customary law rules that prohibit torture. Another criticism is that torture is ineffective against imminent attacks or acts of terrorism and the US authorities (Bush Administration) abused this model by using force and violating human rights.[70] The prominent example in

Proposal' (2008) 39 Journal of Social Philosophy 308-321<http://onlinelibrary.wiley.com/store/10.1111/j.1467-9833.2008.00426.x/asset/j.1467-9833.2008.00426.x.pdf?v=1&t=ja0533fr&s=183432a0745c9f89d1090136fb0493f97ad103b7> accessed 14 November 2017.

64 Ibid.

65 Ginbar (n 9) 223.

66 Ibid 228. Also in Amnesty International, UNITED STATES OF AMERICA Human dignity denied Torture and accountability in the 'war on terror', 'Document' (Amnesty.org, 2017) <https://www.amnesty.org/en/documents/amr51/145/2004/en/> accessed 15 November 2017.

67 Joint Chiefs of Staff, Joint Doctrine for Detainee Operations, Joint Publication 3-63 <http://www.bits.de/NRANEU/others/jp-doctrine/jp3-63draft.pdf> accessed 15 November 2017.

68 Ginbar (n 9) 228.

69 John T. Parry & Welsh S. White, Interrogating Suspected Terrorists: Should Torture Be An Option? 63 U. PITT. L. REV. 74 (2002) 747.

70 UN Human Rights Council, Report of the Special Rapporteur on the promotion and

this sense is the Abu Ghraib Scandal, which will be discussed below.

3.4. Self-Defence

When a person is attacked or is likely to be attacked by another person or group, s/he can use force against them in order to protect himself.[71]If a person kills an attacker in order to protect himself, his action is considered legal under the name of self-defence.[72] Although self-defence is a legal justification, its implementation in the above-mentioned emergencies has created controversy. The main point is that suspected terrorists do not threaten the life of the torturer, so he cannot use self-defence as a justification. In addition, although suspected terrorist contributes to the formation of the threat, he is not the real threat. Threat is the bomb, which will soon explode.[73] Therefore, it is not right to directly use self-defence as a justification. There are a number of similarities between self-defence and the defence of necessity. Therefore, the above criticisms made for the defence of necessity are also valid for self-defence.

3.5.Utilitarianism

J. Bentham states that torture can be justified in the name of utility. The benefit of majority is more important than the benefit of the individual, so suspected terrorist can be tortured for the interest of society.[74] In other words, if the torture is useful to save many innocent people, torture can be accepted as legitimate, irrespective of the legal and moral rights of the suspected terrorist. Utilitarianism prefers torturing a suspected terrorist in order to prevent harm on thousands of innocent people.[75]

Many criticisms have been made on the approach of utilitarianism. First, if only the number of saved people is important, then this can lead to another issue: can other innocents be tortured to save more people's lives, for instance, suspected terrorist's close relatives in order to obtain information from the terrorist?[76]In addition, how many people's life should be at stake in order to

protection of human rights and fundamental freedoms while countering terrorism, 16 June 2015, A/HRC/29/51, available at: http://www.refworld.org/docid/558982fc4.html [accessed 15 November 2017]

71 Model Penal Code, 3.04. The Institute, 'Shop ALI Publications | American Law Institute' (American Law Institute, 2017) <https://www.ali.org/publications/show/model-penal-code/> accessed 15 November 2017.

72 Allhoff (n 2) 186.

73 Ibid.

74 The collected works of Jeremy Bentham: an introduction to the principles of morals and legislation 12, J.H. Burns & H.L.A. Hart (eds.), (1996).

75 Allhoff (n 2) 187.

76 Andrew C Mccarthy, Torture: Thinking About the Unthinkable, in Karen J Greenberg (ed), The Torture Debate in America (Cambridge University Press 2006) 107.

torture a suspected terrorist? Or what will be the content of the torture? Will it be unlimited to get information from the terrorist? To sum up, this approach is mostly criticised as utilitarian model completely excludes legal and ethical rules.

As a result, the above discussion about the most controversial and debated arguments shows that, despite the fact that there are justifications for legalizing torture, none of them is fully satisfactory, neither in terms of solving the problem nor protecting individuals' rights.

4. The Arguments Suggesting Why Torture is Wrong

Sartre states 'Torture is senseless violence, born in fear... torture costs human lives but does not save them. We would almost be too lucky if these crimes were the work of savages: the truth is that torture makes torturers.'[77]Although there are ideas that advocate torture on terrorists for legal and moral justifications in order to safeguard civilians from imminent attack, there are arguments that oppose torture under any circumstances. A wide variety of arguments for the complete prohibition of torture were stated in all circumstances including the above-mentioned scenarios. According to these supporters, which is also underpinned by this paper, torture is ineffective in solving problems such as the ticking bomb scenario[78], on the contrary, torture causes terrorist acts to increase, and is a violation of legal and moral rules. Moreover, it results in irrecoverable consequences. In the next section, arguments against torture will be explained.

4.1. Torture Requires Institutions

It is clear that if authorities legalize torture, some institutionalization problems will arise. In the above scenario, the issues of who, how and where to perform torture is problematic.[79]Firstly, it is apparent that not anyone can resort to torture, so professional torturers are required. If torture is legally accepted, will governments train professional torturers for such exceptional circumstances? Professionalism requires training, exercise and practicality. Another problematic in this case is who will be exposed to torture during trainings.[80]In addition, if one state applies this, it is likely to be adopted by other countries in the world; so countless people around the world will be trained. Furthermore, torture does not only require a torturer, but also

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77 Sartre Jean-Paul 'Preface' in Henri Alleg, The Question, (J. Calder (trans) Braziller New York 1958) 23.

78 Jackson (n 54) 160.

79 Allhoff (n 2) 147.

80 Defusing the Ticking Bomb Scenario (1st edn, Association for the Prevention of Torture 2007) 21.

medical specialists, such as doctors and nurses.[81]How and where to find and educate so many people and even if done, how to protect the psychology and physical health of these people? Is it logical to risk all those people's lives for rare ticking bomb scenarios? Furthermore, it is also clear that education and equipment require a huge economic expense.[82]In short, torture is a great institution that requires special techniques, trained people, cutting edge technology, investment, medical equipment and personnel, and a strong transportation network.[83]Furthermore, such institutionalization paves the way for the development and spread of torture.[84] My argument is that, torturer training is worse than torture itself and highly likely to harm persons who will be trained, no need to mention democratic values and society. It would be degrading in terms of civilization and democracy. At the beginning of the 20th century, police forces were hiring torturers to obtain information from criminal suspects.[85]This was considered ordinary and casual. A long way has been made until 21th century democracy. Legitimization of torture would waste all the efforts. Torture should be prohibited on all conditions in order to avoid this situation.

4.2. Torture does not work and is not effective

Despite the expectation that torture always works to get the necessary information in imminent danger situations, it cannot be said that this is the reality in practice.[86] This allegation was supported by various arguments. Firstly, there is an assumption that the suspected terrorist will give the "right information" to disarm the bomb before it goes off. However, it is a high probability that suspected terrorist can lie to authorities in order to distract them until the bomb explodes or to stop torture.[87] The only way to find out whether suspected terrorist lies is to check the location. However, in a scenario where time is already very limited and the terrorist knowsthat, it is not possible to protect people.[88]In addition, the likelihood of information being reliable is very low; it can lead to unwanted results by giving false information. Another

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81 John Gray. 2003. A modest proposal: for preventing torturers in liberal democracies from being abused, and for recognizing their benefit to the public. New Statesman, 17 February, 22-25.

82 Allhoff (n 2) 147.

83 Jean Maria Arrigo, A Utilitarian Argument Against Torture Interrogation of Terrorists,10 Science &Engineering Ethics (2004).

84 Defusing the Ticking Bomb Scenario (n 82).

85 Welsh S. White, Miranda's Waning Protections: Police Interrogation Practices After Dickerson 18 (2001).

86 Ginbar (n 9) 125.

87 Defusing the Ticking Bomb Scenario (n 82) 8.

88 Brecher (n 5) 28.

problem regarding this issue is that if the suspect is not the terrorist, he can tell what the torturers want to hear in order to stop the torture.[89] The case *Al-Rabiah v. USA*is a good example of this point.[90]Al-Rabiah, 43 year-old Kuwaiti, was arrested by US forces in 2001, and was brought to Guantanamo in 2002. He was accused of being the logistics advisor of Bin Laden and Al-Qaida. Although he was innocent he accepted many accusations in order to get rid of deprivation, threats and similar torture acts. For example, he confessed that he was under the command of Bin Laden in the Tora Bora Mountains, although it was impossible to be physically there. Even the investigators did not believe in his confessions.[91]This case shows that torture does not always work right.

Another point is that it is not certain that the terrorist will break under torture and give information in a short time.[92]What if it takes a long time for the terrorist to give information and it gets clear that it is impossible to disarm the bomb, what will happen then? Will the torturer continue, or let him go? Another example is from Philippines, where the authorities tortured a suspected terrorist for 75 days in 1995. The suspected person spoke 75 days later and told that a commercial aircraft carrying four thousand passengers would be downed, and an assassination towards the Pope was being planned, both allegations turned out to be incorrect.[93]It is clear that there is no legal or ethical ground for torturing for 75 days. This incident proves that torture does not work to protect people from imminent attacks and shows that it does not work in an emergency and how vulnerable it is to abuse. US Government experience indicates that coercive methods should be banned because they provide very low-quality information and 'the use of force is a poor technique, as it yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear.'[94]Based on all these explanations, it is quite difficult to say that torture works.

4.3. The Danger of Slippery Slope

One of the most dangerous consequences of torture, even in extraordinary cases, is the slippery slope effect. It means torture becomes widespread, arbitrary, unpunished or systematic.[95]According to this approach, if the act of torture against suspected terrorists is justified legally or morally to protect civilians from imminent attack, torture will inevitably become widespread.

89 Ibid 28.
90 *Al-Rabiah v. USA, (US) (2009).*
91 Ibid 42.
92 Ginbar (n 9) 129.
93 Dershowitz (n 40) 137.
94 David Rose, Guantanamo-America's War on Human Rights (1st edn, Faber and Faber 2004).
95 Defusing the Ticking Bomb Scenario (n 82) 13.

In other words, torture will not be limited to ticking bomb scenarios only, it will become widespread and arbitrary and unavoidable, and undesirable consequences will arise.[96] One of the most impressive examples is the scandal of Abu Ghraib prison.[97]In the wake of 9/11, as mentioned above, the United States allowed torture and the use of force against terrorists to safeguard people in extraordinary cases. However, in 2004, the scandal of Abu Ghraib revealed in Iraq that hundreds of Iraqi detainees were harassed, beaten and sexually exploited in various naked poses by American soldiers. American soldiers were enjoying themselves, laughing, and taking photographs while doing these things. When the pictures first appeared, the American administration announced that it was a very exceptional and unacceptable case.[98] However, more information revealed in the following days proved that it was not. It was not an action that one person or group did on their own. It was the result of the policy of the American government to legalize torture. It is impossible to say that this situation, which is incompatible with law and moral values, protects innocent people from immediate danger. Abu Ghraib case is not an exception, there are also similar examples in Afghanistan and Guatemala, and these unlawful and immoral acts were determined by international organizations.[99]

In addition, if torture is deemed legitimate to protect innocent people from imminent attack, it may also be brought about for other serious crimes such as serial killers, drug sales, and espionage.[100]One can claim that these crimes also kill innocent people, so torture is supposed to be performed in order to prevent these crimes and protect innocents. However, aforementioned cases show that torture is a virus that is always ready to spread, and the only solution is to completely forbid it.

4.4. Hate and Other Problems

Although the above-mentioned scenarios are seen as exceptions, if torture is legalized, it will expand to other crimes as well. When people see torture spread, they will begin to become desensitized. It is inevitable that it will lead to the normalization of immoral acts and hatred among people.[101]Although torture is presented as a remedy against terrorism, it results from the hatred of certain groups and institutions, such as a certain ethnic group, religion, nationality and

96 Ginbar (n 9) 113.

97 Reed Brody, The road to Abu Ghraib: Torture and Impunity in US Detention. in Roth and others (eds), Torture: Does it Make Us Safer? is it Ever OK? : a Human Rights Perspective (The New Press 2005) 145.

98 Ibid 145-146.

99 Ibid 146.

100 Economist, Editorial, Is torture ever Justified? 9 January, (2003) 10-11.

101 Allhoff (n 2) 154.

others.[102] Therefore, it will never help to achieve peace between individuals; on the contrary it will result with increased hatred and terror. In history, in the case of Nazi Germany, it was claimed that legitimization of torture in a legal and moral way will help to protect individuals from emergency and dangerous situations.[103]This gave rise to extraordinarily bad results in the name of all humanity. Modern Germany and whole world regrets it.

Finally, it should be noted that international law and customs have been formed as a result of experience, accumulation and work that have been experienced throughout human history. These values prohibit torture in all conditions due to the respect of humanity, the interests of people and states. Therefore, these benefits cannot be waived for exceptional scenarios.

Conclusion

It is a fact that the threat of terrorism by non-state actors has increased in the world. On the other hand, when fighting against terrorism, we have to comply with international law and moral values. One of the most important challenges is whether suspected terrorists can be tortured in order to protect innocents from imminent attack. Even if it is in the name of protecting people, for the reasons mentioned above there is no acceptable argument, lawfully and morally, to legitimize torture. Instead of torture, there are many alternatives to reduce or prevent acts of terrorism. Examples are increased security measures, efficient operation of the intelligence agency, and investments for prevention before attack.

Torture should not be allowed even in exceptional and emergency situations. It is known from the experiences of human history that if permitted, these exceptions will expand and become normal. Thus, some groups and states will inevitably abuse this situation. This paper contends that, in the name of protecting individuals, there is no rationale and benefit in legalizing torture, and such legalization is also contrary to international law and violates human dignity.

[102] Ginbar (n 9) 158.

[103] Karen J Greenberg (ed), The Torture Debate in America (Cambridge University Press 2006) 13.

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WHAT PROCESS IS DUE FOR PRISONERS SEEKING PAROLE? AN EXAMINATION OF ENGLISH AND AMERICAN LAW

Denetimli Serbestlik Talep Eden Hükümlülere Hangi Usuli Haklar Tanınmalıdır? İngiliz ve Amerikan Hukukuna Dair Bir İnceleme

Halil CESUR[1]

Abstract

This article has pondered critically on whether there should be procedural rights afforded to the offender in consideration of conditional release with reference to English and American judicial decisions and European standards. It has been maintained that the parole board directly affects the freedom of the prisoner in the parole decision-making process, so one should hold the view that there is a liberty interest, as articulated in the decisions of the European Court of Human Rights. Thus, due process safeguards should be granted to the prisoner, as clearly regulated in the European Recommendation, regardless of whether decision making authorities have a judicial or administrative character. Although it is difficult to define exhaustively, the following rights should come into play: the right to a court trial, the right to have an oral hearing, the right to access to a lawyer, the right to access to the dossier and the right to challenge the decision.

Keywords: Procedural rights, parole, conditional release, prison law.

Özet

Bu makalede İngiliz ve Amerikan ulusal yargı kararları ve Avrupa standartları gözetilerek denetimli serbestlik talep eden hükümlülerin usuli haklara sahip olup olmadığına ilişkin değerlendirme yapılmıştır. Denetimli serbestliğin hükümlülerin özgürlüğüne müteaalik şartları düzenlediği ve bu nedenle hükümlülerin Avrupa İnsan Hakları Mahkemesi'nce de kabul edilen "özgürlük menfaati"ni haiz olduğu tespiti yapılmıştır. Denetimli serbestlik kararını veren merciinin idari ya da yargısal niteliklere sahip olup olmadığına bakılmaksızın hükümlülere Koşullu Salıverilmeye İlişkin Avrupa Önerisi'nde de düzenlendiği gibi belirli usuli haklar tanınması gerektiği ifade edilmiştir. Tahdidi olmayan bu haklar aşağıdaki gibi sıralanmıştır: Bir mahkeme önünde yargılanma hakkı, sözlü bir duruşmaya katılma hakkı, hukuki yardım alma hakkı, dosyaya erişim hakkı ve temyiz hakkı.

Anahtar Kelimeler: Usuli haklar, denetimli serbestlik, koşullu salıverilme, infaz hukuku.

Introduction

It is generally argued that the scope of procedural justice should not be seen as broad sufficient to the extent that all decisions made by administrative and judicial bodies are taken with due regard to procedural rules. Although it has been deemed as one of the pillars of the criminal justice system by granting substantial procedural safeguards to the defendant in the criminal process, not much emphasis has been placed on due process protections of the defendant after sentencing when he/she becomes a prisoner.

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Parole boards are at the heart of the criminal justice process in determining the release date of prisoners or in keeping them under surveillance after their release. Albeit exercising somewhat fettered discretion in most countries with the adoption of guidelines on risk assessment, parole boards still have considerable authority over which prisoners should be granted parole. It is simply because there always exists an element of subjectivity with a margin of error in assessing the risk of harm posed by prisoners and in identifying how likely an offender is to re-offender. Accordingly, it would be fair to say that prisoners seeking early release need the "blessing" of parole boards, particularly at hearings where release decisions are given.

The question of whether (or which) procedural protections should be attached to parole decision-making, which is directly related to the deprivation of liberty, therefore, ought to be handled in a rigorous way, just as done in the sentencing process. As will be mentioned below, drawing a threshold or specifying a liberty interest in the determination of whether due process safeguards should be applied in the parole process has generally been an accepted approach. Having accepted a procedural safeguard for the prisoner, the next question would arise: what process is due? For the purpose of this article, the following procedural rights will be examined: the right to a court trial, the right to a hearing involving legal representation, the right to access the case material, the right to appeal against the decision to refuse to grant parole.

The aim of this paper is first to elucidate how parole boards have evolved and exercised their release discretion over offenders seeking release. Then, it aims to analyse whether due process protections should be granted to prisoners at the stage of parole by examining the case laws of the United States and Europe. Finally, it will set out the procedural rights that should be afforded to prisoners in consideration of their conditional release.

1. The Emergence of Parole Boards as Quasi-Judicial Entities

Until the establishment of parole boards in modern criminal justice systems, offenders were being sentenced to a fixed term of imprisonment which can be brought forward only by an executive clemency in the implementation of prison punishment.[2] In order for inmates to earn their way to freedom, indeterminate sentencing was permitted in some countries with new regulations that allowed parole boards to determine the time period that inmates actually serve in prison.[3] To that end, some reward structures, such as good-time or disciplinary credits,

[2] Paul J. Larkin Jr., 'Revitalizing the Clemency Process' *Harvard J. L. & Pub. Pol*. (2016) 39 833, p.851-852.

[3] Frank O. Bowman, 'The Failure of the Federal Sentencing Guidelines: A Structural Analysis' *Col Law Rev.* (2005) 105 1315, p.1321–22.

have been used to determine the time to be spent in prison.[4]Sure enough, the most striking, innovative and effective one among the rewards given to the prisoner is the opportunity of early release on parole.[5] Yet, before focusing on early release, I shall look briefly at the historical story of parole boards.

Historically, parole boards took functionally distinct roles in different legal systems. In the United Kingdom, for example, the parole board was an advisory body in its infancy stage which makes recommendations to the Secretary of State who was responsible for the final decisions on release'.[6]Over time, however, they have become independent bodies which can reach binding release decisions according to their own guidance on release conditions.[7] In the United States, though differing from jurisdiction to jurisdiction,[8] parole boards were mainly exercising broad discretion over sentencing without any restriction on release decisions until 1970s and early 1980s.[9] Since then, whereas in some states the discretionary role of parole boards has considerably faded with the enactment of truth-in-sentencing laws, eight states abolished completely parole board release during the same year when the truth-in-sentencing act came into force.[10] Nevertheless, parole boards both in the US and UK have retained their "quasi-judicial" powers by either establishing the date of release or supervising offenders after their release from the prison.[11] On the other hand, in contrast to the Anglo-American counterparts, parole boards in Continental Europe have been those playing only a supervisory role by imposing the sanctions attached to the conditional early release judgement of criminal court. It should be noted here that within the confines of this article much of the attention will be given to the Anglo-American American regulations and literature with the blueprint of European Court of Human Rights (ECtHR), so what is meant by the term "parole board" in this article is an institution that has a decisive and exclusive power over the release decision.

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4 Alan M. Dershowitz, 'Indeterminate Confinement: Letting the Therapy Fit the Harm' *University of Pennsylvania Law Review* (1974) 123 297, p.302.

5 A. Mitchell Polinsky, 'Deterrence and the Optimality of Rewarding Prisoners for Good Behavior' *International Rev. Law and Economy* (2015) 44 1, p.1.

6 Hamish Arnott, Simon Creighton, *Parole Board Hearings: Law and Practice* (Lag Education and Service Trust Limited London 3th Edition 2014) p.39-40.

7 *Ibid*.

8 Robert Anthony Forde, 'Risk Assessment in Parole Decisions: A study of Life Sentence Prisoners in England and Wales' (The PhD Thesis, Birmingham 2014) p.9.

9 Stefan J. Bing, 'Reconsidering State Parole Board Membership Requirements in Light of Model Penal Code Sentencing Revisions' *Ky. Law Journal* 871 (2011) 100 871, p.874.

10 Truth in Sentencing in State Prisons (1999), available at http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=820 (accessed 22 Dec 2018)

11 Victoria J. Palacios, 'Go and Sin No More: Rationality and Release Decisions by Parole Boards' *S.C.L. Rev.* (1994) 45 567, p.574.

Modern parole boards serve multiple functions, including reviewing commutation petitions, making release decisions, determining terms of release, and deciding on parole revocations. In many countries, they are authorised with saying the final word on the time served by offenders and seen as the last ring of sentencing chain. How parole boards make release decisions in this regard is of paramount importance for the reason that the length of sentence is still commonly determined by parole boards. Under modern practice, decision-making instruments, such as parole guidelines, are designed to curb the unfettered discretion of parole boards by setting out certain criteria to direct them when deciding whom to release.[12] Parole guidelines generally oblige decision-makers to access necessary information regarding the decision to release, for example, the crimes committed by and background of offenders, in order to predict the risk of recidivism while producing "seriousness" or "dangerousness" scores for each individual.[13] Nonetheless, it can easily be argued that there are still discretionary powers of parole boards on decision making. Even if we cannot describe it as "little better than flipping a coin",[14] as Fazel did before, the prediction of human behaviour can never be "100 percent"[15]. Moreover, it would not be misleading to say that this kind of prediction can sometimes be hinged inevitably on the subjective feelings of the decision-maker. The reliability or neutrality of the predictions especially made about the future conduct of individuals, in turn, would need a meticulous scrutiny.[16] In such significant decisions that concern human liberty, determining whether prisoners should be protected with due process guarantees would gain specific importance.

2. Procedural Rights in the Prison

In reflecting on procedural law, due process is commonly perceived in a narrow sense and thought to be limited to the criminal justice process consisting of a number of distinct steps-investigation, questioning, charging, and negotiating over pleas, the trial, and finally sentencing.[17] Whether the

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12 Paul D. Reingold, Kimberly A. Thomas, 'From Grace to Grids: Rethinking Due Process Protections for Parole' *J. Crim. L. & Criminology* (2017) 107/2 213, p.238-242.

13 Joan Petersilia, 'Parole and Prisoner Re-entry in the United States' *Crim. & Just.* (1999) 26 479, p.497-498.

14 SeenaFazel, 'Coin-flip Judgment of Psychopathic Prisoners Risk' *New Scientist* (Dec. 4, 2013) available at https://www.newscientist.com/article/mg22029464-800-coin-flip-judgement-of-psychopathic-prisoners-risk/ accessed 25 Dec 2018.

15 Yvonne Jewkes, Jamie Bennett (Eds.) *Dictionary of Prisons and Punishment* (Willian Publishing Devon 2008) p.56.

16 Frieder Dunkel, Dirk van Zyl Smit, Nicola Padfield 'Concluding thoughts' in Nicola Padfield, Dirk Van Zyl Smit, Frieder Dünkel, *Release from Prison: European Policy and Practice* (Willian Publishing 2010) p.431.

17 D. J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford University Press Oxford 1997) p.9.

process taking place after sentencing should be included in the criminal process depends to a large extent upon how legal traditions have shaped the relationship of prisons and parole boards to the criminal justice system. In a legal system where sentencing and parole are regarded as "two sides of the same coin" and 'both involve figuring how much risk the individual poses to the public, and then deciding how much time the person should serve',[18] it stands to reason to claim that the process in which a release decision is taken would be located within the criminal process.[19] A parole decision in this sense by affecting a liberty interest is 'an established variation on imprisonment', thereby 'an integral part of the penological system.'[20] In other words, the parole process is not something separable from the criminal process; rather, it is a vital part thereof. Nevertheless, acknowledging the nexus between criminal procedure and parole release decisions may not always culminate in providing due process protections for the prisoner.

On the other hand, there are also some jurisdiction where extending the procedural rights to prison law or parole board decisions was not initially considered to be necessary since it was characterized as managerial discretion or as incidental to maintaining good order.[21]That said, it is observed that the attitude to prisons has changed in recent years, and as the attitude has changed, the conceptions of fair treatment and fair procedures have changed too.[22] At that point, accordingly, whether parole is a component of the criminal process may not be of paramount importance in any case, for due process protections do not necessarily crystallise in criminal procedure. The good management of prisons should also be arranged in such a way so as to incorporate elements of procedural fairness within the realm of administrative law.[23]

A constitutional case in the US, which deals primarily with a decision to segregate prisoners in order to maintain order in the prison, might be clarifying to better grasp the question in what circumstances procedural rights should be granted to prisoners. In order for a prisoner to be entitled to have due process rights, the Supreme Court in Hewitt v. Helms took into consideration firstly, the severity of the deprivation; secondly, whether it affects fundamental rights of prisoners, or it is a daily operation of confinement and finally the status of

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18 Paul D. Reingold, Kimberly A. Thomas, 'From Grace to Grids: Rethinking Due Process Protections for Parole' in J. Crim. L. & Criminology (2017) 107/2 213, p.214.

19 Anne M. Heinz et al., 'Sentencing by Parole Board: An Evaluation' in J. Crim. L. & Criminology (1976) 67 1, p.1.

20 *Morrissey v. Brewer* 408 U.S. 471 (1972) at [477].

21 M. Loughlin, P. Quinn, 'Prisons, Rules and Courts' *Modern Law Review* (1993) 56/4 497, p.521.

22 Genevra Richardson, *Law, Process and Custody: Prisoners and Patients* (Orion Publishing Group London 1993) p.150.

23 D. J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford University Press Oxford 1997) 319, p.327-328.

the inmate namely whether he had already been convicted or was only a pre-trial detainee.[24] The factors assessed by the Court have constituted the basic part of "the liberty interest test" which was going to be applied in subsequent decisions. The court also stipulated in its ruling that a legitimate entitlement to a liberty interest requiring minimal due process protections comes into play where the language used in the state law must manifestly require certain procedures.[25] In other words, in the view of the Court, there must be a specific procedural right with the laws of the state that the prisoner is able to enjoy. Despite the fact that it created the concept of "liberty interest", it can be seen that the Supreme Court did not touch directly upon the fairness of the lack of a procedural right.

In considering the release of offenders, factors that are likely to lead to a possible increase or decrease in the time served, for instance good conduct time, would affect the liberty of prisoner. In Wolff v. McDonnell, though it rejected the argument that prisoners have inherently the right to good time credit under the Constitution, the US Supreme Court found a liberty interest on the basis that the deprivation of credits is a disciplinary sanction under the state statute.[26] That being the case, the entitlement to due process safeguards is not regarded as a fundamental requirement for every single parole board decision; rather, there is a considerable distinction between inmates seeking their initial release from prison at the parole eligibility and inmates whose recall to prison is being considered by the Parole Board.[27] In Morrissey v. Brewer, the Court was of the view that a parolee is free; though having some restrictions on his freedom, he is able to hold a job or socialise or found a family. What should be followed, in turn, is that a liberty interest does exist in avoiding parole revocation.[28]The same approach was taken by the House of Lords in the UK, holding that 'a prisoner's recall for breach of licence conditions does raise new issues affecting the lawfulness of the detention.'[29] Similar to the enquiry for a "liberty interest" of the US Supreme Court, in Weeks v. United Kingdom, the European Court of Human Rights recognised the freedom enjoyed by a discretionary life sentence offender on licence as 'more circumscribed in law and more precarious than the freedom enjoyed by the ordinary citizen' but it is definitely regarded as a state of liberty for the purposes of article 5 of the Convention.[30] The House of Lords also drew attention to the significance

24 *Hewitt v. Helms* 459 U.S. 460 (1983) at [474-476].
25 *Ibid*, at [459].
26 *Wolff v. McDonnell* 418 U.S. 539 (1974) at [557-562].
27 Hamish Arnott, Simon Creighton, *Parole Board Hearings: Law and Practice* (Lag Education and Service Trust Limited London 3th Edition 2014) p.35.
28 *Morrissey v. Brewer* 408 U.S. 471 (1972) at [482].
29 *R (Black) v Secretary of State for Justice* [2009] UKHL 1 at [74].
30 *Weeks v. United Kingdom* (1987) 10 EHRR 293 at [40].

of fundamental procedural guarantees in matters of the deprivation of liberty despite the fact it had also regard to 'the safety of the public', as opposed to the prisoner's freedom, 'with which the Parole Board cannot gamble.'[31]

On the other hand, in cases in which the freedom of the prisoner is affected immediately or directly judicial standpoints of the countries are different. In the case of Greenholtz v. Inmates of the Nebraska Penal & Corr. Complex 442[32], addressing the issue of whether the right to due process is required in the decision to grant parole, the Court described the decision to grant parole as a discretionary assessment and emphasised the subjective nature of the assessment in contrast to the parole revocation which is "evidence based" and "fact-bound".[33] Though acknowledging the fact that 'parole is a privilege, not a right', thereby not conferring prisoners with an inherent or fundamental liberty interest in parole, the Court maintained that a liberty interest in parole created by the Nebraska statute would lead to due process safeguards.[34]This conclusion was similar to that of the ruling of Hewitt v. Helms where there was also a reference to the state law. Albeit on different legal grounds, the House of Lords in R (Black) v Secretary of State for Justice, having stipulating that 'early release mechanisms can be left wholly to the executive', ruled that whilst the initial release of prisoners sentenced to a determinate term does not engage article 5(4) of the European Convention on Human Rights, the decision when to release an indeterminate sentenced prisoner should engage the right to a fair trial.[35]

It is worth to note that the US Supreme Court changed its position dramatically regarding the test for due process, by shifting away from "a state-created law" enabling prisoners the right to due process to the test of "typical-atypical" hardship on inmates.[36] In Sandin and Conner, the Court held that the hardship on inmates should be 'atypical and significant…in relation to the ordinary incidents of prison life' so that a protected liberty interest comes into play.[37] Accordingly, the emphasis on the state-created law which widens the scope of procedural rights by making almost anything subject to due process protections, has been abandoned.[38] Since a description of 'the

31 *Regina v. Parole Board (Respondents) ex parte Smith* (FC) [2005] UKHL 1 at [30].
32 *Greenholtz v. Inmates of the Nebraska Penal & Corr. Complex* 442 U.S. (1979) at [10].
33 Sanford H. Kadish, 'The Advocate and the Expert—Counsel in the Peno-Correctional Process' *Min. L. Rev* (1961) 45 803, p.813.
34 *Greenholtz v. Inmates of the Nebraska Penal & Corr. Complex* 442 U.S. (1979) at [376-377].
35 *R (Black) v. Secretary of State for Justice* [2009] UKHL 1, at [82–83].
36 Margo Schlanger, 'Inmate Litigation' 116 *Harv. L. Rev.* (2003) 1555, p.1557.
37 *Sandin v. Conner* 515 U.S. 472 (1995) at [484].
38 *Ibid*, at [481-483].

ordinary incidents of prison' would not be an easy task[39] and varies between penitentiary institutions, it has given rise to vagueness in determination of the proper baseline for the test. Worryingly, the Court has subsequently entrenched the view in Swarthout v. Cooke that some evidence which is to support the parole board's denial of parole is sufficient to revoke the challenge that there is a violation of due process rights.[40] What the critique of the case law reveals that the only consistent interest used by the courts to grant prisoners procedural rights is their liberty, but no consistency can be found at all when it comes to drawing the boundaries of that liberty. It is understandable that almost every case affecting reversely the prisoner would concern the freedom of the prisoner in any way, so the notion of freedom or liberty might become somewhat blurry. Yet, it should not impede us from claiming that a core area exists in relation to the freedom of the prisoner which must be protected with procedural safeguards.

3. What Process is Due?

Once we establish a liberty interest in conditional release, the next question would be then what procedures should be incorporated in due process of law. If the primary duty of the parole board is to be specified as to the protection of the public[41], it would not be so surprising to face a great degree of flexibility in regulating necessary procedures that ought to be granted to inmates.[42] Let me oversimplify the issue a little, it can be argued that in a system where too much emphasis is placed on public protection considerations, procedural rights would tend to be diminished. But I would say that an examination of each prospective right that is likely to arise from the parole board process helps us to take the debate more seriously.

First and foremost, the right to a court trial, which entitles prisoners to 'take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful',[43] ought to be granted to the prisoner seeking early release. The requirement of Article 5(4) of the ECHR, adopting the principle of a right to "renewed liberty"[44] in the

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39 Rachel, Meeropol, 'Communication Management Units: The Role of Duration and Selectivity in the Sandin v. Conner Liberty Interest Test' UCLA *Criminal Justice Law Review* (2017) 1/1 p.56.

40 *Swarthout v. Cooke* 562 U.S. 216 (2011) at [220-222].

41 *R (Roberts) v Parole Board* [2005] UKHL 45 37 Tex. Admin. Code §145.3(1)(B).

42 Hamish Arnott, Simon Creighton, *Parole Board Hearings: Law and Practice* (Lag Education and Service Trust Limited London 3th Edition 2014) p.50.

43 The European Convention of Human Rights, Article 5/4.

44 Dirk Van ZylSmit, John R. Spencer, 'The European dimension to the release of sentenced prisoners' in Nicola Padfield, Dirk Van Zyl Smit, Frieder Dünkel, *Release from Prison: European Policy and Practice* (Willian Publishing 2014) p.15.

conditional release context, can be met only by a judicial body after a term of imprisonment has been served. A specialised court-like body having judicial functions, such as the parole board, was also considered as a court in the case of Weeks v. UK where the ECtHR held that' the court does not necessarily have to be a court of law of the classic kind integrated within the standard judicial machinery of the country'; but must be 'independent of the executive and any parties to the case' and guarantees to provide a judicial procedure' appropriate to the kind of deprivation of liberty in question' and must have the power to order, not only advise on, release."[45] This is a clear affirmation of the view that any decision that concerns human liberty must be taken by an institution holding judicial characteristics.

In contrast to the European perspective, parole boards in the US are bodies exercising executive discretion while setting release.[46] Notably after the case of Greenholtz where it is held that state statutes must create a liberty interest in release in order for inmates to have procedural protections in parole decision-making, many states have preferred to avoid constitutional constraints by establishing purely discretionary parole regimes.[47] Nevertheless, it should also be noticed that some exceptions have been made for children offenders. The Supreme Court in Graham v. Florida[48] placed the duty of review on state parole boards in order for juveniles not to be subject to utterly discretionary decisions. It was claimed that the entitlement to a realistic chance of release for juveniles does include a liberty interest, thereby containing procedural due process.[49] That said, in contrast to juvenile offenders, in ordinary adult cases, parole boards have consistently acted as an administrative agency with broad discretion and free from constitutional procedural requirements.

Pertinent to the right to a court trial, the second requirement of procedural fairness is the right to an oral hearing. In matters of crucial significance for prisoners where an assessment of prisoners' character or mental state is made and a determination on whether they pose a risk to the society is made, being present during hearings and presenting the facts in dispute from the point of the prisoner is essential for a fair proceeding.[50]Especially in cases where issues having impact on the decision to conditionally release are contested, procedural fairness should require holding an oral hearing.[51] Having regard to the judicial

45 *Weeks v. UK* (1988) 10 EHRR 293 at [61].

46 Victoria J. Palacios, 'Go and Sin No More: Rationality and Release Decisions by Parole Boards' *S. C. L. Rev.* (1994) 45 567, 588.

47 Sarah French Russel, 'Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment' *Indiana Law Journal* (2014) 89 373, p.417.

48 *Graham v. Florida* 560 US 48 (2010).

49 Russel (2014), p. 417.

50 *Hussain and Singh v UK* (1996) 22 EHRR 1, at [60].

51 *Regina v. Parole Board (Respondents)* at [1].

role of parole boards, oral hearing should be accepted on the basis that the assessment of risk requires live evidence.[52] Stressing the impossibility of defining exhaustively the circumstances in which an oral hearing is necessary, in Osborn and Booth v. Parole Board, the Supreme Court has illustrated cases where there must be presumption in favour of an oral hearing:

1. where facts which appear to the board to be important are in dispute, or a significant explanation or mitigation is advanced which needs to be heard orally in order fairly to determine its credibility.
2. where the board cannot otherwise properly or fairly make an independent assessment of risk, or of the means by which it should be managed and addressed.
3. where a face to face encounter with the board, or the questioning of those who have dealt with the prisoner, is necessary in order to enable him or his representatives to put their case effectively or to test the views of those who have dealt with him.
4. where, in the light of the representations made by or on behalf of the prisoner, it would be unfair for a 'paper' decision made by a single member panel of the board to become final without allowing an oral hearing.[53]

These are examples rendering an oral hearing mandatory to achieve a just decision especially in situations that might affect the outcome. On the other hand, 'there is no absolute rule that there must be an oral hearing automatically in every case'.[54] In a case, for instance, where the matter can fairly be dealt with on paper, fairness may not require that there should be an oral hearing. If there is doubt on whether the issue can be dealt with on paper, 'the Board should be predisposed in favour of an oral hearing' and the prisoner 'should be told that an oral hearing may be possible though it is not automatic'.[55]

It is important to remember that oral hearings in the context of adversarial proceedings should also involve legal representation and the possibility of calling and questioning witnesses.[56] In fact, these procedural guarantees strike inherently at the root of the prisoner's fundamental right to a fair procedure which should come up with a criminal-like hearing. Despite that parole board hearings have a less complicated procedure compared to ordinary criminal trials, it is not justifiable to come to the conclusion that hearings are

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52 Parole Board practice guidance for oral hearings January 2011 available at: www.justice.gov.uk/offenders/parole-board/oral-hearings.

53 *Osborn and Booth v Parole Board* [2013] UKSC 61 at [2].

54 *Regina v. Parole Board (Respondents)* at [50].

55 *Ibid.*

56 *Hussain and Singh v. UK* [1996] 22 EHRR 1 at [60].

only "phantom".[57] Because legal representatives, by cross-examination and submissions, are likely to identify the unsupported allegations made against a prisoner and check the evidence for inconsistencies,[58] it is a fundamental right that would contribute to reaching a fair decision. The adoption of an advocate should therefore be entitled to prisoners in parole hearings and reviews where prisoners' fundamental rights are concerned.

The right to have adequate access to the case file, which enables prisoners seeking parole to examine the documents and prepare for oral hearings and allow the effective exercise of the rights, is another significant safeguard.[59] It is also seen as a standard procedural right in the Committee of Ministers of the Council of Europe to member states on conditional release (the European Recommendation).[60] Due partly to the flexible nature of proceedings in parole applications, the right to access to the contents of the case file prepared for hearings might sometimes be sufficiently fragile in order to be easily restricted on the ground that the disclosure of information or report regarding prisoners can adversely affect national security, the prevention of disorder or crime and the health or welfare of prisoners.[61] Lord Brown's stance on the limitation of the right to access to the case file is quintessential. He accepted that article 5(4) requires making the basic dossier available to the prisoner since the parole board simply cannot function without doing this. However, he emphasised, 'article 5(4) requires no more than that "a court" (the Parole Board) shall speedily decide whether the prisoner continues to be lawfully detained, and this will indeed be the case unless and until the Board is satisfied of his safety for release'. He comes to the view therefore that 'article 5(4) requires anything more in the way of enabling the Board to form its judgment.'[62] Needless to say that such an evaluation of the parole board (treating it as if it were a body deciding only the question of release) would strip the board's judicial functions away and make it prone to arbitrary administrative decisions. However, we should point insistently to the fact that it is not a right that might be regarded as a mere formality or an "empty exercise"; rather, it is an integral part of the right to defence.

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57 *R (Roberts) v. Parole Board* [2005] UKHL at [80] [93].

58 House of Commons Constitutional Affairs Committee, The operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates, Seventh Report of Session 2004–05, Volume II, Oral and written evidence, Ev.55, at [10].

59 Opinion of Advocate General Bot 4 April 2017 (1) Case C-612/15, ECLI:EU:C:2017:257 at [48].

60 Recommendation of the Committee of Ministers of the Council of Europe to member states on conditional release.

61 The Parole Board Rules, No. 2947, 2011, Article 8.

62 *R (James, Lee, Wells) v Parole Board* [2009] UKHL 22, at [60].

If the evidence submitted by an executive body has been excluded without disclosing it to the prisoner from the dossier that the parole board takes into account in deciding whether to release a prisoner on licence,[63] we cannot talk of procedural fairness required by article 5(4) in the European Convention, for the simple reason that neither the prisoner nor his/her legal representative are able to challenge or rebut the evidence in question.[64] A feasible solution in cases where sensitive materials are in question might be that the case file is submitted to a specially appointed advocate as a legal representative of the prisoner. By doing so, the requirement of giving an opportunity the defendant 'to have knowledge of and comment on the observations filed and the evidence adduced by the other party'[65] would be met for a fair trial. Otherwise, withholding the documents completely from the prisoner would be equivalent to disregarding the substance of the right to be informed, thereby amounting to blighting the essence of the right.

One further issue in relation to the parole process is the burden of proof and assessing the risk posed by the offender to the community. In the criminal justice process, as enshrined in regional and international treaties, individuals accused of crimes enjoy a presumption of innocence and the burden of proof is in principle placed on the prosecution service.[66] Besides, the standard of proof that the prosecution service must meet in order to obtain conviction is typically called as "beyond reasonable doubt".[67] Yet, in making the assessment of the risk of recidivism and harm posed by an individual, what is generally done is to lower the burden of proof that is placed on the parole board. It cannot be said however that there is a deep-seated consensus on the question of which standard of proof should be used; nor can it be stated that there is a judicial stability on to whom the burden of proof belongs.[68] In R v. Parole Board ex p Lodomez, it was held that the Board 'must be satisfied that it is not necessary that he should be kept in prison and not that there would be a substantial risk if he were released.' With a more precise statement, 'it must be shown that the risk is low enough to release him, not high enough to keep him in prison.'[69] What is presupposed with these arguments is that there is no duty on the parole

63 *R (McGetrick) v Parole Board* [2013] EWCA Civ at [182].

64 Opinions of the Lords of Appeal for Judgment in the Cause *Roberts (FC) (Appellant) v. Parole Board* (Respondents) Appellate Committee at [19]; see also *R (AT0 v Parole Board* [2004] EWHC 515.

65 *Garcia Alva v Germany* (2001) 37 EHRR 335 at [39].

66 The International Covenant on Civil and Political Rights, Article 14(1), The European Convention on Human Rights, Article 6(1).

67 Richard L. Lippke, *Taming the Presumption of Innocence* (Oxford University Press 2016) p.106.

68 Hamish Arnott, Simon Creighton, *Parole Board Hearings: Law and Practice* (Lag Education and Service Trust Limited London 3th Edition 2014) p.58.

69 *R v Parole Board ex p Lodomez* (1994) 26 BMLR 162 at [18].

board to 'prove' that the prisoner would pose a risk if released.[70] Interestingly, the concept of burden of proof is sometimes seen as having nearly no meaning in assessing the risk of offender, with the view that it 'is inappropriate'[71] or 'has no real part to play'.[72] But we need to recall that the decision to conditionally release is taken with regard to the material which is completely available to the board, so 'it should not be expected from prisoners to persuade parole boards that it is safe to recommend release.'[73] One can put a counterargument by claiming that someone sentenced to life imprisonment because of a murder case would naturally be dangerous to the society. Nevertheless, there should be 'a balance to be struck between the interest of individuals and the interest of the society.'[74] In a nutshell, it should be accepted that in cases where significant decisions are made in either parole-release hearing (or even disciplinary hearing), the burden of proof should not be replaced. As laid down frankly in the European Recommendation, 'it should be incumbent on the authorities to show that a prisoner has not fulfilled the criteria'[75] for conditional release.

Finally, and perhaps most importantly, after the decision to refuse to grant parole reached by the parole board, the right to appeal ought to come into play for the prisoner. Though parole boards are termed as "quasi-judicial" bodies, not all judicial features thereof have shaped the procedural rules that are to be followed. For instance, prisoners in the UK have not been afforded to the right to challenge any parole board decision including the refusal to grant parole.[76] The present policy only allows a procedure 'to reconsider cases where there has been a substantial procedural irregularity or if significant new information is made available.'[77]The duty on the parole board before the reconsideration process should be to provide the underlying reasons for the decision, which is to enable the prisoner to challenge effectively the decision not to release, although there is no specific guidance on what the reasons should cover. It was decreed judicially that the Board should at least 'identify in broad terms the matters judged by the Board as pointing towards and against a continuing risk of offending'.[78] If the parole board refuses to reconsider a decision, there is also a judicial review mechanism as an external legal remedy for the prisoner. In

70 Arnott, Creighton (2014), p.57.
71 *R oao Sim v Parole Board* [2004] QB 1288 at [42].
72 *R oao Brooks v The Parole Board* [2004] EWCA Civ 80 at [28].
73 R v Lichniak and Pyrah [2002] UKHL 47 at [16].
74 *Ibid*.
75 Recommendation (Rec (2003)22) of the Committee of Ministers of the Council of Europe to member states on conditional release (parole).
76 Simon Creighton, Vicky King, Hamish Arnott, *Prisoners and the Law* (Tottel Publishing, 3rd ed. 2005) p.252.
77 *Ibid*.
78 *R v Parole Board and Home Secretary, ex p Oyston* (2000) 1 March CA QBCOF 1999/1107/C at [47].

the case of GCHQ v. Minister for the Civil Service,[79] Lord Diplock classified the main grounds for judicial review as "illegality, irrationality and procedural impropriety". Once a challenge is raised against the decision to refuse parole, the case is often remitted back from the Administrative Court to the parole board to reconsider the decision afresh; but, this does not mean that the Board cannot make the same decision again with a more detailed and convincing rationale.[80] Note that this is a judicial review that a prisoner can use in seeking the re-examination of the decision to refuse to grant parole, rather than an appeal allowing a challenge to the outcome of the refusal of parole.

What has been elucidated so far leads us to come to the conclusion that the parole board in practice is generally seen as a public institution rather than a judicial body in the parole decision-making process. However, it has been repeatedly argued in this article that in cases where there is a "liberty interest" for the prisoner, such as the consideration of conditional release, the parole board ought to be treated as a court which has the power to determine the length of sentence.

Conclusion

This article has pondered critically on whether there should be procedural rights afforded to the offender in the consideration of conditional release with reference to some judicial decisions and European standards. It has been maintained that the parole board directly affects the freedom of the prisoner in the parole decision-making process, so one should hold the view that there is a liberty interest, as articulated in the decision of both the US Supreme Court and the ECtHR. Thus, due process safeguards should be granted to the prisoner, as clearly regulated in the European Recommendation, regardless of whether decision making authorities have a judicial or administrative character. Significant in this sense is the right to a court trial, which enables the prisoner to present his or her own facts and evidence in cases especially where there is a dispute over the facts based on the decision taken by the parole board. The process should also include an oral hearing that would give the prisoner an opportunity to examine or call witnesses, and in which the prisoner can be represented by a lawyer. Access to the dossier is a further right that should be used by the prisoner in order to meet the requirements of fair trial. In cases where sensitive materials affect national security, a special advocate should be appointed to question the disclosed evidence. As for the burden of proof, it should be dealt with from the perspective of the right to be presumed innocent, meaning that no prisoner should be deemed dangerous to the society until the time when the parole board proves clearly that there is a risk posed

[79] *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374.
[80] Margaret Obi, *Prison Law a Practical Guide* (Law Society 2008) p.201.

to the community. Lastly, alongside internal legal remedies or judicial review mechanisms, the entitlement to appeal against the refusal of parole would be an appropriate solution to correct any legal or substantive error made by the parole board.

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EVOLUTION OF THE *LOTUS* DICTUM: AN INQUIRY FOR ASSESSING THE CONTINUING VALIDITY

Lotus Görüşü'nün Gelişimi ve Geçerliliğini Sürdürmesi Üzerine Bir İnceleme

Selman AKSÜNGER*

Abstract

In its landmark 'Lotus'case of 1927[1], the Permanent Court of International Justice (PCIJ) considered the issues related to the subjects, sources, and foundation of the obligation under the international law from a positivist approach. After almost a century later, the Lotus dictum remains as one of the most controversial quotation of international law. This paper presents examples to explore the validity of the Lotus dictum and the principle derived from the judgment in the light of the discussion of state-centrism in international law. The paper will follow a bottom-up approach to reach its point; to assess whether there are any change or continuity in international legal order described in the *Lotus* case. To examine the relevance of the Lotus in modern day, the paper draws a distinction between the Lotus principle and the Lotus dictum. The latter one refers to the positivist-voluntarist approach to international law as the actual text of the majority decision points out, and the former one refers to permissiveness in legal lacuna, as it is commonly articulated and applied. The paper claims although the Lotus principle may be characterized as outdated, the ideas expressed in the Lotus dictum are still relevant in the contemporary international law as it is reflecting the conceptual underpinning of the international legal order and as well as shaping the international legal thought. To demonstrate this, the paper first explores two issues, namely: international legal personality and reservation regime to treaties with three illustrative arguments re-affirming the validity of the Lotus dictum. It then uses the same examples to present the practical applicability of the Lotus principle is decreasing. Notably, the focus of the paper is limited to the sources of obligation under the international law and subjects of it and will not engage in the merits and judgment of the case. The arguments will be made with illustration of functional and practical examples, and the normative and methodological assessment of the judgment is beyond this paper as it is highly examined in literature.

Key words: Lotus dictum, Lotus principle, state centrism, positivist-voluntarist view, subject of international law, source of obligation, change and continuity in international law

Özet

Uluslararası Daimi Adalet Divanı (PCIJ), 1927 tarihli Bozkurt-Lotus kararında, uluslararası hukukta kişiler ve uluslararası hukukta sorumluluğun kaynağı ile ilgili meseleleri pozitivist bir yaklaşımla ele aldı. Davanın ardından yaklaşık bir asır sonra, kararda geçen Lotus "görüşü" uluslararası hukukun en tartışmalı ifadelerinden biri olmaya devam ediyor. Bu makale, "Lotus görüşü" ve "Lotus prensibi" arasındaki ayrımı dikkate alarak bu iki kavramın uluslararası hukuktaki geçerliliğini "uluslararası sistemde değişim ve devamlılık" tartışmaları çerçevesinde ele alacaktır. Lotus görüşü, uluslararası hukuktaki pozitivist-gönüllülük esaslı yaklaşımı yansıtırken, Lotus prensibi ise kısıtlayıcı bir kural ihdas edilmedikçe uluslararası hukukta devletlerin serbestliği prensibini ifade eder. Bu makale Lotus prensibinin geçerliliğini yitirdiğini iddia ederken, Lotus görüşünün mevcut uluslararası hukukun temelini ve düzenini yansıtmaya devam ettiğini ortaya koyuyor. Kararın normatif ve yöntem bakımından incelenmesi literatürde yaygın bir şekilde bulunduğundan bu makale Lotus Davası'nın karar metnine ve esasına girmeyip, yalnızca uluslararası hukukta sorumululuğun kaynağı ve uluslararası hukukta kişiler meselelerine odaklanacaktır. Makale uluslararası hukuk düzenindeki pratik örnekler üzerinden tezlerini ispatlayacaktır. Bu amaçla öncelikle uluslararası hukukun kişileri ve anlaşmalara çekince koyma konularında üç ayrı örnek üzerinden görüşün geçerliliğini koruduğunu açıklarken yine aynı örneklerin prensibin güncel uluslararası hukuk düzeninin gerekliliklerini karşılayamadığını anlatacaktır.

Anahtar kelimeler: Lotus kararı, devlet-merkezci yapı, uluslararası hukukun kişileri, uluslararası hukukta sorumluluğun kaynakları, uluslararası hukukta değişim ve devamlılık

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Introduction

One of the important events of twentieth-century international law was the collision that occurred on the high seas between a French vessel Lotus, which gave its name to the case, and a sank Turkish vessel Bozkurt. Eight Turkish crew members have died as a result of the crash and rest of the people on Bozkurt were taken to Turkey by Lotus. In Turkey, Mr Demons the officer on watch of the Lotus, and Hasan Bey the Turkish captain of the Bozkurt were taken to trial. Mr Demons was sentenced to thirty-nine days imprisonment and monetary fine.[2] The French government demanded the release of its national and challenged to the jurisdiction of Turkey for this event. France alleged that as the flag state of the Lotus, it has exclusive jurisdiction over offences committed on Lotus in high seas. On contrast Turkey asserted that it also has jurisdiction as the incidence occurred on the Turkish vessel as well.

Turkey and France agreed to refer the dispute to the PCIJ to decide whether Turkey violated international law when Turkish courts exercised jurisdiction over the crime of causing the death of Bozkurt crew committed by a French national, outside Turkish territories.[3] The Court decided that France did not enjoy exclusive territorial jurisdiction in the high seas in respect of a collision with a vessel carrying the flag of another state, Turkey. According to the Court both Turkey and France have concurrent jurisdiction with regards the entire event that had taken place on the high seas.[4]

1. The Essence of Lotus dictum

The issue referred to the court was whether Turkey has acted against the international law by initiating proceedings against Lieutenant Demons and if so which principles of international law are violated.[5] The French government contended that Turkey should identify its basis for jurisdiction. However, the wording of the question in the special agreement referring the case to the PCIJ puts the burden to French government: which rule of international law prohibits Turkey for exercising its jurisdiction over Mr Demons?[6]

The Case of the SS "Lotus" (France v Turkey) (Judgment) [1927] PCIJ Series A No 10, at 6. Available at https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf (accessed 8 May 2019).

2 Ibid, at 8.

3 Article 2 of the Special agreement between Turkey and France dated 12 October 1926 cited in Mustafa Balcıoğlu et al., (ed) *Bozkurt Lotus Davası*, (Ankara 2003) at 11.

4 *Lotus* (n 1) at 27.

5 Ibid at 9.

6 Durmuş Tezcan, 'Bozkurt Lotus Davasının Uluslararası Hukuktaki Önemi ve Yeri', Çağdaş *Türkiye Tarihi Araştırmaları Dergisi*, V: 4-5, 1994-1995, at 268. See also, Balcıoğlu et al. (n 3).

The PCIJ ruled by interpreting the wording of the Article 15 of the Treaty of Lausanne.[7] The article refers the delimitation of the jurisdiction of the contracting parties and French government argues that Turkey, as a result of its obligation under the treaty, has no jurisdiction. The article reads that all matters of jurisdiction shall be decided between Turkey and other contracting parties. Consequently, the *Lotus* case had a great impact on legal recourse and practice in making treaties concerning jurisdiction on high seas, particularly issues of extraterritorial jurisdiction.[8] The treaty-making practice followed different approach from the court and subsequent treaties give exclusive jurisdiction to the flag states.[9]

Generally, the cases before the PCIJ subjected to vibrant discussion.[10] Nonetheless, the PCIJ not only dealt with the issue of criminal jurisdiction of persons but also considered issues related to the subjects, sources, and foundation of the obligations under international law.[11] This marked the *Lotus* as a reference point for the discussions related to these matters. The *Lotus* case is mostly characterised as the classic expression of the positivist-voluntarist view on the foundation of legal obligations in international law.[12] The voluntarist aspect of the court can clearly be seen in this expression:

> *"International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims."*[13]

The judgment soon became an oft-quoted decision of international law. The majority view in the dictum has been perceived as a classic articulation of international legal positivism, which considers law as a unified system of rules that emanates from states' will.[14] Positivism in this sense denotes to the idea of

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7 *Lotus* (n 1) at 16.

8 Armin von Bogdany and Markus Rau, 'The Lotus' in Rüdiger Wolfrum (ed), Max Planck Enclopedia of Public International Law, para 15. http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e162?prd=EPIL (accessed 8 May 2019).

9 Ibid, para 20. See also Kerem Batır, *Yirmibirinci Yüzyılda Deniz Haydutluğu ve Uluslararası Hukuk*, (USAK publishing 2011).

10 Armin von Bogdany and Markus Rau, (n 8) para 15.

11 *Lotus* (n 1) at 18.

12 Bruno Simma and Andreas L. Paulus 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 AJIL 302, at 304.

13 *Lotus* (n 1) at 18.

14 *Simma and Paulus* (n 12) at 304. See also Anne-Marie Slaughter and William Burke-White, 'The Future of International Law Is Domestic (or, The European Way of Law)' (2006), 47:2

law as consisting of black-letter law created by states, separated from morals and ethics.[15] The division of the international law into prohibited and non-prohibited acts reflects the positivist approach of the court to the international legal system. Voluntarist conception of law, on the other hand, lays the idea that the law is equated with the 'free will of the state', as it decides upon the content and legal character of a norm.[16]

The dictum emphasises on the dependency of international law on consent of states for its creation and function. This reflects the state-centric approach to the international legal system, consisting only of state-constructed prohibitions. The perception of the PCIJ on the actors of international law was considered to be an extremely Westphalian notion as it highly upheld state sovereignty without mentioning any other entity than state.[17]

2. The Necessary Distinction in Assessing the *Lotus* judgment

The quote most frequently associated with the Lotus principle 'everything which is not prohibited is permitted' does not exist in the Lotus dictum. In fact, this quote comes from the dissenting opinion of Judge Loder.[18] Loder's interpretation arguably creates a false dichotomy between, on the one hand, the idea that a State can do whatever it wants unless there is a rule to the contrary, and on the other hand, the idea that a State can only act if there is a rule permitting it to do so.

An Hertegon has made these claims as she notes that the well-known 'Lotus principle' reflects a misreading of the majority opinion.[19] As Judge Simmer has noted, this strict binary fails to consider 'the possibility that international law can be neutral or deliberately silent on the international lawfulness of certain acts'.[20] According to him, modern international law requires legality to be assessed on a spectrum, which can accommodate less certain concepts

Harvard ILJ 326, at 328; Winston P. Nagan, 'The Changing Character of Sovereignty in International Law and International Relations' (2004) 43:141, Columbia J Transnational L, at 159.

15 Hans J Morgenthau, 'Positivism, Functionalism, and International Law' (1940) 34 AJIL 260, at 261.

16 Ulrich Fastenrath, 'Relative Normativity in International Law' (1993) 4 EJIL 305, at 324.

17 Stephane Beaulac, 'The Westphalian Model in Defining International Law: Challenging the Myth' (2004) 8 Australian J of Legal History 181, at 185.

18 *Lotus* (n 1) Dissenting Opinion of Judge Loder. See also Yasin Poyraz, (ed) *Lotus Meselesi*, (Ankara 2011) 42.

19 An Hertogen, 'Letting Lotus Bloom' (2015) 26 EJIL 901, at 915.

20 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)* [2010] 22 July 2010, Decleration of Judge Simma, ICJ Rep. 403, at 5.

such as 'tolerable', 'permissible' and 'desirable'.[21] He argues that the majority opinion make constant references to 'co-existing independent communities', and therefore argues that the judgment did not aim to ensure freedom to act, but rather to 'facilitate the achievement of common aims'.[22]

Overall, if the Lotus principle as it is frequently cited is out-dated in the modern day, an inaccurate reflection of what the majority judgment actually said in the first place, 'what is the real value of the *Lotus* case?' becomes a valid question. In order to determine this, one must return to the text of the dictum, and examine the key concepts articulated therein then look beyond the principle how it has been practically applied.

3. State Primacy and Subjects in International Law

Despite repeated discussion of the sources of obligations under international law, forming part of Lotus dictum, in subsequent cases of the ICJ, such as the *Kosovo* Advisory Opinion[23], the *Arrest Warrant* Case[24], the *Nuclear Weapons* Advisory Opinion[25], and the *Genocide Convention* Advisory Opinion[26], the prevailing narratives were increasingly questionable.[27] It has been argued, however, that the *domaine réservé* of states in contemporary international legal order has been significantly reduced.[28] The emergence of, among others, human rights law, international criminal law, and the law of non-international armed conflicts, has significantly changed the setting on the source of obligation as the international law governs not only relations between independent states but also non-state actors. Human rights law has located upon states duties owed to individuals by the state. The scope of international law has come to encompass individuals, as they can come under international criminal liability in international criminal law. Regarding the subjects of international law, Anne Peters suggests that the constitutionalized transformation of international law entitled non-state actors to be active agents of international law and for the state to no longer be the primary actor of the international legal order.[29]

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21 Ibid at 8.

22 *Hertogen* (n 19) at 912.

23 *Kosovo Advisory Opinion* (n 20).

24 *Arrest Warrant of 14 February 2002*, Judgment [2002] ICJ Rep 63.

25 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion* [1996] ICJ Rep 66.

26 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide Advisory Opinion* [1951] ICJ Rep 15.

27 Hugh Handeyside, 'The Lotus Principle in the ICJ Jurisprudence: Was the Ship Ever Afloat?' (2007) 29(1) Michigan JIL 71, at 90.

28 Thomas Kleinlein, 'Constitutionalization in International Law', (2012) 231 Max-Planck-Gesellschaft zur Förderung der Wissenschaften 703, available at http://www.mpil.de/files/pdf2/beitr231.pdf (accessed 9 May 2019) at 706.

29 Anne Peters, Geir Ulfstein and Jan Klabbers, *The Constitutionalization of International Law*

In her monograph Kate Parlett examined how the international legal system changed from a system focused exclusively on inter-state relations to a system in which individuals have a certain status in international law.[30] The Brexit, withdrawals from the Rome Statue of the International Criminal Court (ICC)[31], deadlock of the international society in Syria due to the upholding of state sovereignty as a panacea, non-compliance with the decisions of the international courts seem to confirm the voluntarist approach and therefore confirms the validity of the dictum.

The raising question of whether the contemporary legal order is in a transformation or in continuity has been examined by many.[32] The present state of international law has empirical evidences to support the both change and continuity of state-centrism in international legal order. The blurred lines between terrorism and war, the criminal liability of corporations, the reducing difference between soft law and hard law in international environmental law supports the process of change in state-centrism.[33]

On the other hand, it should not be dismissed that whenever the international law engages with the individual, the state consent and the state involvement is always required. For instance the international humanitarian law treaties are aiming to protect individuals and minimise the harm of war on them but these treaties concluded exclusively between states and creates obligations on states. On the other side, the international criminal law is aiming to punish individuals who committed international crimes, yet it is based on the domestic criminalisation of international crimes, listed in the Rome Statute or requires state parties to ratify.

(OUP, 2009) at 161. See also, John Howley, 'The Non-State Actor and International Law: A Challenge to State Primacy?' (2009) 7 (1) Dialogue: Academy of the Social Sciences in Australia 1, at 2; Duncan B. Hollis, 'Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty', (2002) 25 Boston College International and Comparative LR 235, at 236; Farida Lakhany, 'How Important Are Non-State Actors' (2006) 59(3) Pakistan Horizon 37, at 39; Phillip Trimble, 'Globalization, International Institutions and the Erosion of National Sovereignty', (1997) 95 Michigan Law Review 1944, at 1945 (claiming diminishing importance of state primacy).

30 Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law*. (CUP, 2011).

31 In accordance with article 127 (1) of the Rome Statute of the ICC, withdrawal of the Governments of Burundi and Philipinnes come into force respectively as of 27 October 2017 and 17 March 2019. Malaysia notified the Secretary-General of their decision to withdraw. Gambia and South Africa other states notified their decision to withdraw but both states choice to remain in the ICC.

32 Andrew Halpin and Volker Roeben, Theorising the Global Legal Order, (Hart Publishing, 2009); Ulrich Sieber, 'Legal Order in a Global World – The Development of a Fragmented System of National, International, and Private Norms', (2010) 14 Max Planck Yearbook of United Nations Law 1-49.

33 See also Nico Kirsch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108 AJIL at 34.

States play the main role in the international legal structure and its transformation. The continuous changes in the international law, always includes the consent of states if these changes brings new commitments to the respective states. One may doubt, whether a paradigmatic change that took place in the last century flips the *Lotus* dictum, or instead, the Lotus dictum still preserves its validity since the states are in the centre of international legal domain around which international law revolves. Hence, an inquiry to the operators of international legal processes is due in light of the developments in the international legal practice and doctrine over the years.

3.1 The Legal Implications of the Lotus

The Lotus dictum is based on two key assumptions about the international legal order. At first it makes reference to the state-centric structure of international law, and secondly, that states cannot be bound without their consent.[34] The following part of this paper will revisit the two areas where we can examine both continuity and change paradigm of the dictum: treaty reservation and subjects of international law.

Shabtai claims that the subjectivity of international law depends on capability to enter into treaty relationship and assuming international responsibility.[35] The power of being a party to international agreements or constitutive documents of IOs is exclusively given to states.[36] Although few treaties are open to the ratification of intergovernmental organizations, such ratifications do not count the ratification of IOs to put the treaty into force.[37] It can be clearly seen that the majority of IOs only exercise a limited power that is attributed to them by the member states.[38]

Furthermore, states are the only subject of international law that are entitled to exercise diplomatic protection of persons. The states have the full power and discretion to bring a claim before the ICJ and this proves that the other entities

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34 Robert Kolb, *Theory of International Law* (Hart Publishing, 2016) at 217.

35 Rosenne Shabtai, *Perplexities of Modern International Law*, (Martinus Nijhoff, 2004) at 237.

36 See, the list of the treaty, available at https://treaties.un.org/doc/source/events/2016/Treaties/list_global_english.pdf **(**accessed 9 May 2019).

37 The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations VCLTIO (1986) received ratification of 32 states and 12 IOs. The treaty requires the ratification of 35 states to come into enforce. Even though the number of the ratification provided by states and IOs in total is more than 35, the treaty has not entered into force. The treaty does not count the ratification of IOs to come into force pursuant to article 85 of the VCLTIO. See the current ratification figures available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&lang=en (accessed 9 May 2019).

38 *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt*, (Advisory Opinion) Separate Opinion of Judge Gros, (1980) ICJ Rep 1980, at 103; See, Henry Shermers and Niels Blokker, *International Institutional Law* (Brills, 2011) para. 150-3.

in international law can acquire their rights by means of state action.[39] Although bilateral and multilateral investment in treaties reduced the necessity and practice of diplomatic protection with respect to legal persons, the investment treaty regime also revolves around states.

All other entities possessing legal personality obtain their personality ultimately from the will of the states that created them. Moreover, they can only exercise their personality to the extent that their object and functions, which are also determined by states, determined by the constitutive documents. In the landmark *Reparation for Injuries* Advisory Opinion of the ICJ has long been considered as a contradiction to the Lotus dictum. In this particular case, the Court accepted that the UN might possess international legal personality, as it is necessary to fulfill its mandate and function. In this regard, the actual opinion does not state that international organization (IOs) is subjects of international law as states and is misinterpreted in this sense.[40] The majority reasoning refers to the implied power in the Charter of the UN that is attributed by its member states.[41] The ICJ in this opinion rests on the functional necessity of legal personality and did not bring a structural change on the subjects of international law.[42] The court rather allowed some certain rights; among others, to bring a claim against a state as well as non-member states of the UN and to be exercised by IOs if these rights are necessary to fulfil its function.[43] In no case does asserting these rights grant full legal personality to the IOs under the current international law. In other words, the *Reparation for Injuries* opinion confirms that the member states of UN can create a separate objective legal personality, yet this opinion does support the out-dated character of the Lotus dictum and even reaffirms its continuing validity.

The Court further demonstrated the same rational in the *1996 Nuclear Weapons Advisory Opinion*. In this case World Health Organization asked to the Court an opinion on the legality of the use of nuclear weapons under international law. The ICJ refused to give an opinion on the basis that as it did not fall 'within the scope of its activities, the WHO was not a competent organ of the UN to ask the question.[44] It highlighted that the powers of IOs are limited by the 'principle of speciality', meaning that they can only exercise

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39 ILC, 'First Report on Diplomatic Protection' (7 March 2000) UN Doc A/CN4/506. Art 4(1) at 223. The proposal of John R Dugard, to oblige states to provide diplomatic protection to individuals in case of a violation of jus cogens has been rejected.

40 Gleider Hernández, *The International Court of Justice and the Judicial Function* (OUP, 2014) at 208.

41 *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion [1949] ICJ Rep 174, at 180.

42 Ibid.

43 Ibid at 179.

44 *Nuclear Weapons Advisory Opinion* (n 25) at 26.

their powers to promote the common interests of the member States.[45]

The Court followed the same logic in the *Tehran Hostage* Advisory Opinion with the reasoning made on the 'functional interest of states', which is not a legal notion that attributes legal personality to non-state entities.[46] This reasoning shows that international legal society is still structured around the concept of statehood, the notion that States are sovereign, and the idea that no binding law (or legal entity with the power to bind) can exist unless created by States. All the other subjects of international law acquired their subjectivity through the state's approval and can only revolve their subjectivity around a state.[47] These are the ultimate idea that lies at the heart of the Lotus dictum.

3.2 Reservation to Treaties

Turning to the reservation system to treaties, the definition of 'reservation' under article 2(d) of Vienna Convention on the Law of Treaties (VCLT) reads as "… to exclude or to modify the legal effects of certain provisions of the treaty in their application to that state …" is strongly guaranteed. Under this regime, a states' will in submitting their reservations has not been adequately limited, despite the fact that article 19 of VCLT has sought to impose limitations through the requirement of compatibility tests against the object and the purpose of the treaty.[48] It remains to be seen whether this test is capable in maintaining "the balance between the integrity and the effectiveness of multilateral conventions in terms of a firm level of obligation".[49] In addition, the fact that the application of this test is left to individual states is also considered impractical, bearing in mind that such test may not be applicable in the case of dispute settlements. Furthermore, it is also questionable whether the test would be relevant against unlawful reservations.[50]

More fundamentally, states' will in putting forward their reservations continues to maintain its primacy in the context of human rights treaties, regardless of the continued arguments of the UN Human Rights Council which views the incompatibility of VCLT reservations regime with human rights treaties on the basis that human rights treaties are not "a web of inter-state

45 Ibid at 25.

46 *United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran) (1980) ICJ Rep 3, at 43.

47 Philip Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in Philip Alston (eds), *Non-State Actors and Human Rights* (OUP, 2005) at 3.

48 James Crawford, *Brownlie's Principles of Public International Law* (OUP, 2013), at 376; Derek Bowett, 'Reservations to Non-Restricted Multilateral Treaties' (1976) 48 British YBIL at 67.

49 Ibid Crawford.

50 Ibid.

reciprocal exchanges of mutual obligations but are concerned with endowing individual rights".[51] This is particularly evident in the context of severability controversy, debating whether inessential and incompatible reservation from states' instruments of ratification could be severed. At the 2007 meeting between the International Law Commission (ILC) with human rights bodies, this controversy was not resolved.[52] The opponents of severability upheld the principle of states' consent, whereby they contended that state sovereignty shall prevail in a sense that a state cannot be bound by treaty terms that it particularly refused to accept.[53] Contrary, human rights bodies viewed the need to severe inessential and incompatible reservations to ensure the integrity and universality of human rights treaties.[54]

The European Court of the Human Rights (ECtHR) in the case of *Louzidou v Turkey* shows that despite the restrictive tendencies that have emerged in human rights jurisprudence since the *Genocide Convention* Advisory Opinion, the idea of state consent continues to form the basis of a court's reasoning.[55] In the *Louzidou* case, Turkey had accepted the jurisdiction of the Court under former Articles 25 and 46 of the ECHR. However, both declarations contained a limitation clause restricting the scope of these articles to complaints taking place within Turkey's territorial boundaries. The Court held that those limitation clauses were not only invalid, but also severable from the declarations in which they were contained, meaning Turkey was bound by Articles 25 and 46 notwithstanding that they had clearly expressed a lack of consent to be bound in certain circumstances.[56]

Prima facie, the *Louzidou* case appears to be a clear example showing that the Lotus dictum is diminishing, but this conclusion ignores the nuances of the judgment. The Court strained to justify their decision on the basis that, to some extent, Turkey consented to be bound by Articles 25 and 46. They emphasized Turkey's 'awareness of the legal position', and found that Turkey had been

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51 Malgosia Fitzmaurice, *'The Practical Working of the Law of Treaties'* in Malcolm D Evans (ed), *International Law* (OUP 2014) 188-191; Ryan Goodman, 'Human Rights Treaties, Invalid Reservations and State Consent' (2002) 96 AJIL at 531.

52 Alain Pellet, 'ILC Meeting with Human Rights Bodies' ILC(LIX)/RT/CRP.1 26 July 2007, http://legal.un.org/ilc/documentation/english/ilc_lix_rt_crp1.pdf (accessed 10 May 2019) para 15.

53 Ibid para 37.

54 Alain Pellet, 'Eighth report on reservations to treaties' (2003) 2(1) Yearbook of International Law Commission UN Doc A/CN.4/535 available at http://legal.un.org/ilc/publications/yearbooks/english/ilc_2003_v2_p1.pdf (accessed 10 May 2019) paras 17-27; Roslyn Moloney, 'Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent' (2014) 51 Michigan JIL at 155-168; Ryan Goodman, 'Human Rights Treaties, Invalid Reservations and State Consent' (2002) 96 AJIL at 531.

55 *Loudizou v Turkey* (Preliminary Objections) (1995) 20 EHRR 99.

56 Ibid para 98.

willing 'to run the risk that the limitation clauses at issue would be declared invalid […] without affecting the validity of the declarations themselves.'[57] As such, they found that Turkey had a 'basic - albeit qualified - intention' to accept the Court's jurisdiction. It could easily be argued that Turkey's 'consent' to be bound in this case assumed to be given or interpreted as Turkish aspiration to the ECtHR' jurisdiction. But the fact that the Court felt it necessary to create this legal assumption for the purpose of their judgment is crucial that it already confirms the necessity of the consent of the respective states concerned.

Nevertheless, these human rights jurisprudence only applies to one field of international law, while the general practise on treaty reservation very much supports state sovereignty.[58] Genocide Convention establishes States to monitor the incompatible treaty reservations.[59] And generally speaking this is still the case. It is notable that despite attempts no reservation assessment mechanism was ever established for the VCLT.[60] It shows that the voluntarist notion of 'state will' expressed in the Lotus dictum is inherent in the structure of international law – since when the tribunals are in fact binding a state against its will, the language they uses to justify their decisions is still favour the notion of state consent.

3.3 Persistent Objector Doctrine

The last example backing the accuracy of the Lotus dictum, with regards to the source of the obligation under international law, emanates from the regime of the persistent objector. The ICJ established the ground of the doctrine in *Anglo-Norwegian Fisheries* case. The Court found that an existing customary rule shall not apply if the state in question is; (i) objected to the rule itself, (ii) consistently, (iii) from the initial stage.[61] The Court stated that if a customary rule had existed, such a rule would not be binding against Norway because of its constant rejection.[62]

The doctrine is confirmed in *Asylum* case by ICJ, concluding that the existing regional customs are not binding upon Peru due to its repeated abstention from

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57 Ibid para 95.

58 Marcellus R. Meek, 'International Law: Reservations to Multilateral Agreements' (1955), 5 De Paul Law Review 40, at 69; Belinda Clark, 'The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women', (1991) 85 AJIL 281, at 304-5; Anthony Aust, *Modern Treaty Law and Practice* (CUP, 2000) at 121.

59 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide Advisory Opinion* [1951] ICJ Rep 15, at 26

60 ILC Report of te ILC on the work of its 63rd session 26 April – 3 June and 4 July -12 August 2011 UN Doc A/66/70 at 3.2.3

61 *Fisheries Case (The United Kingdom v. Norway)* (Judgment) (1951) ICJ Rep 1951, at 126-9.

62 Ibid 131.

ratifying to certain conventions.[63] The ability of states to support or opt out an emerging customary rule confirms the existence of a CIL depends on state consent, or otherwise, not applied against a persistent objector.[64]

Despite the critics claiming the lack of state practices[65], there are certain states that successfully invoked persistent objector claim not to apply a given customary rule.[66] The juvenile death penalty in the USA has been determined as an example of persistent objector for a long time.[67] Although death sentence to juvenile is prohibited under CIL, the US Supreme Court did not find the exercise of the death penalty unconstitutional.[68] Alternatively, Turkey has long objected to 12-mile customary rule of territorial waters limits in the Aegean Sea and is exempt pursuant to persistent objector claim.[69] Turkey is still sticking to the 6-mile limit and consistently applying it in its relations with the other states along the Aegean Sea.[70]

The *persistent objector* doctrine supports the claim that international law is still dominated by the principle that no obligation applies against the will of a state.[71] Similar to putting reservation on multilateral treaties[72] being a persistent objector to the establishment of a customary law prevents the application of the customary rule to relevant states.[73] Today, the persistent objector rule and the state practices endorse the validity of the Lotus dictum.

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63 *Asylum Case (Colombia v Peru),* (Judgment) (1950) ICJ Rep 1950, at 273-4.

64 Michael Akehurst, 'Customs as a Source of International Law' (1974-75) 47, British Yearbook of IL 1, at 24. Crawford, (n 48), at 28.

65 Patrick Dumberry, 'Incoherent And Ineffective: The Concept Of Persistent Objector Revisited' (2010) 59 International and Comparative Law Quarterly 779, at 780.

66 *Crawford* (n 48) at 28, note 45 in particular.

67 Lynn Loschin, 'The Persistent Objector, and Customary Human Rights Law: A Proposed Analytical Framework' (1996) 2 UC Davis JIL & Policy 148. Available at http://loschin.com/jilp.html (accessed 10 May 2019).

68 Ibid; See also, *Dominguez v United States*, Inter-American Commission on Human Rights, Rep No 62/02, (Merits) Case-12.285 (2002), available online at http://hrlibrary.umn.edu/cases/62-02.html (accessed 10 May 2019). The Commission did not accept the persistent objector defense of the claimant state but recognized the legitimacy of the doctrine as a matter of law.

69 Yücel Acer, *The Aegean Maritime Dispute, and International Law* (Ashgate, 2003) at 106-9

70 See the statement of Turkish Ministry of Foreign Affairs, available at http://www.mfa.gov.tr/maritime-issues---aegean-sea---the-outstanding-aegean-issues.en.mfa (accessed 10 May 2019).

71 Jonathan Charney, 'Universal International Law' (1993) 87(4) AJIL 529, at 537.

72 Wolfgang Friedman, *The Changing Structure of International Law*, (Columbia University Press, 1966) at 127-8.

73 Curtis Bradley and Mitu Gulati, 'Withdrawing from International Custom' (2010) 120(2) Yale LJ 202, at 205.

4. The Permissive Silence

Turning from dictum to the principle, the Lotus principle derived is mainly summarised, as 'everything which is not prohibited is permissible under international law'.[74] Nevertheless, the subsequent developments in international law demonstrated increasing redundancy of this notion, at least in practical terms. In the *Arrest Warrant* case[75] Judges Higgins, Kooijmans and Buergenthal have stated that the Lotus principle '... represents the high water mark of laissez-faire in international relations, and an era that has been significantly overtaken by other tendencies'. The following part of the paper will explore the validity of the Lotus principle.

4.1 International Legal Personality

The first stumbling block for the Lotus principle is the fact that States are no longer considered as the sole subjects of international law. While it is still the case that States are the only entities possessing full international legal personality,[76] there are now several other types of actors that have the capacity to shape legal obligations at the international level, at least to some extent.

The most established of these new actors are international organizations (IOs), which possess 'functional' legal personality to fulfil their objectives. Most IOs acquire a separate personality to the States, which creates them as a separate legal entity.[77] The implications of this independent existence can be seen in the *Reparations for Injuries* Advisory Opinion, which sets as; 'a subject of international law capable of possessing international rights and duties, and that it has the capacity to obtain and protect its rights by pursuing international claims from a state'.[78]

The fact that the UN as an organization can possess international legal personality - despite the fact that such personality was not provided for in the founding document, UN Charter[79] - is a clear illustration of the Lotus principle being obliterated by other concerns, namely the need for international cooperation. As the ICJ has noted:

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74 *Lotus*, (n 1) at 34, Dissenting Opinion of M. Loder. "the Lotus principle [is] that states have the right to do whatever is not prohibited by international law", as is stated in the Max Planck Encyclopaedia of Public International Law, in its discussion of the case. See also Julius Stone, 'Non Liquet and the Function of Law in the International Community' (1959) 35 British Yearbook of IL 124, at 135.

75 *Arrest Warrant* case (n 24) para 51.

76 *Reparation for Injuries* (n 41), at 180.

77 *Crawford* (n 48) at 167.

78 *Reparation for Injuries* (n 41), at 179.

79 Ibid, at 178. The Article 104 of the Charter of the UN provides legal personality to the Organization on the domestic level but not on the international level.

"... the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities".[80]

The objectivity of this legal personality cannot be accommodated with the Lotus principle. A state could not be forced to recognise the legal existence of an IO that it is not a member of, nor could it be subject to legal proceedings for acting against the interests of that organization according to the *Lotus* case. Nonetheless, the *Reparations for Injuries* Advisory Opinion held that IOs with objective legal personality could exercise its powers over non-member states just as it does over its members and therefore non-member states to the UN must also recognize its personality.[81]

4.2 Treaty Reservations Regime

The second example showing the decreasing gravity of the Lotus principle is the law on treaty reservations. In the *Genocide Convention* Advisory Opinion, the ICJ ruled on the permissibility of reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.[82] There was neither an article nor another way of implication that prohibits making a reservation to the Convention.[83] According with the traditional Lotus approach, it is usual for the state parties to freely make reservations to treaties that they consider appropriate. Yet, while the Court held that reservations to the Genocide Convention were possible, it also stated that only those which were 'compatible with the object and purpose' of the convention would be upheld.[84] In case of a reservation going against the object and purpose of the convention, either the reservation is not valid or the state in question is considered as not a party to the convention depend on the severity of the article for the state in its decision to become a party.[85] This inability restricts states to make reservations, despite the lack of any rule preventing them from doing so at that time. Besides, this 'object and purpose' requirement represented a development in customary international law and has since been codified in the VCLT, and now applies to all treaties.

A more restrictive approach to treaty reservations can be seen in human rights courts and commissions including the ECtHR, the Inter-American Court of Human Rights and the Human Rights Commission (HRC). These bodies directly ruled on the validity of reservations, instead of allowing

80 *Nuclear Weapons Advisory Opinion* (n 25), at 25.
81 Ibid at 185.
82 *Genocide Convention Advisory Opinion* (n 59), at 29.
83 Ibid at 22.
84 Ibid 29.
85 Ibid.

states to determine the matter themselves.[86] Essentially the rationale behind this approach is that states cannot be given the wide discretion to determine whether a reservation is compatible with the object and purpose of a treaty, especially when the treaty in question concerns human rights. The HRC in its General Comment 24 noted that human rights treaties are not the web of inter-state exchanges of mutual obligations. They tend to prefer the individuals exercise their rights hence the principle of inter-state reciprocity has no stake.[87]

This development in human rights law is yet another demonstration of 'other concerns' overtaking the notion of freedom to act in legal lacuna. According to the ICJ, as they have determined in the *Genocide Convention* Advisory Opinion, the practice of these tribunals is not an exception to the law, but rather a development to address new issues.[88] In light of these two examples, it can be seen that a principle premised on such inflexible deference to state sovereignty is ill suited to the increasing complexities of the international legal order. It is notable that at the current stage the behaviour of states is regulated by the interplay of a number of sources, not all of them containing explicit limitations.

Conclusion

The conclusion that can be drawn from this article is that the Lotus dictum is as strong as when it was first developed by the PCIJ, as it still retains a great deal of relevance. While we are witnessing a more inclusive system of international law than it was before, it should be highlighted that the distinction of the dictum from the principle is more helpful to understand the implications of the *Lotus* -dictum and principle- and their contribution to change and continuity discussion. An in-depth inquiry to positivist-voluntarist approach of the Lotus dictum helps to clarify and advance debates over international legal order associated with it. It bears the potential to produce a better approach on how to reach higher standard of respect for human rights and rule of law and increasing the commitment and consent of states for a treaty or customary obligation under international law. Nonetheless, the outcome of the inquiry on the positivist view does not necessarily lead to the conclusion that the Lotus based position automatically leads to decreasing complicity, peaceful settlement of disputes, legitimacy, or respect for human rights.

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86 *Armed Activities on the Territory of Congo (Democratic Republic of Congo v Rwanda*) [2002] (Jurisdiction and Admissibility) Joint Separate Opinion by judges Higgins Kooijmans, Elaraby, Owada And Simma 2006 ICJ Rep 6, at 12.

87 UNHRC 'General Comment 24' in Note by the Secretariat Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies [2008] UN Doc HRI/GEN/1/Rev.9. para 17.

88 *Armed Activities on the Territory of Congo,* (n 86) Joint separate opinion by Judge Higgins Kooijmans, Elaraby, Owada and Simma at 16.

The debate on the validity of the Lotus dictum partially mirrors the debates of the change and continuity of state-centrism in international law. For subjectivity in international law, the Westphalian perspective provides arguments that the states remain the main actor of international law and the others can only enter into relations to the extent of the power attributed to them by states. Regarding the source of obligation, the positivist approach has compelling arguments about its validity, which is exemplified with the doctrine of the persistent objector.

In the end there is no clear and definitive answer to the question of whether the Lotus approach to international law is still valid under international law. There are sufficient reasons for being passionate about pursuing the answer. The evolution of the international law during 21st century was a witnessed some limitations made by non-state actors against the state. Nevertheless the limitations itself happened by the consent and involvement of the states itself such as acceding to the founding documents of international courts and tribunals, becoming members of unions and IOs, interventions by the UN Security Council.

What could be expected from the international law in the future is that it is still premature to claim that the international legal order reached the autonomous law-making power that goes against the will of state.[89] This brings us to conclusion that international law is in some aspects different from and in other aspects – similar to what it was in 1920s. No matter of being puzzled about the change and continuity in the international legal order, this paper achieves its aim if the reader at least has developed a better understanding of contemporary validity of the Lotus principle and dictum.

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[89] cf. Aurel Sari and Agnieszka Jachec-Neale, 'International Law in 2050' (2018) ECIL Occasional Paper 2018/1, at 7. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3180686 (The research suggests that the classical international law will be drawing to a close)

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