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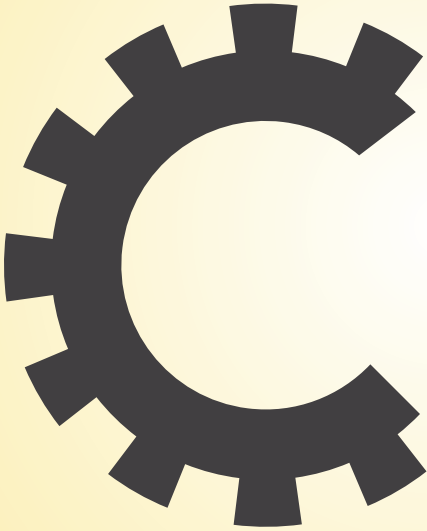
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# CURRENT DEBATES IN INTERNATIONAL RELATIONS & LAW

## VOLUME 4



Övgü Kalkan Küçüksolak

CURRENT DEBATES IN  
**INTERNATIONAL RELATIONS**  
**&**  
**LAW**

VOLUME 4

**Edited By**

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## CURRENT DEBATES IN **INTERNATIONAL RELATIONS & LAW**

(Edited by: Övgü Kalkan Küçüksolak)



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## CURRENT DEBATES IN INTERNATIONAL RELATIONS & LAW

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## PREFACE

In this collection of CUDES 2017, wide spectrum of topics that occupy primary place in the current debates of International Relations and Law were addressed by the papers presented at the Current Debates in Social Sciences Conference which was held in İstanbul, December 14-16, 2017. The purpose of this Conference was to provide a forum for scholars, researchers and students to foster discussion and expand understanding on the current themes of Social Sciences. In parallel to changing and multiplying dynamics of world politics, papers reflect diversity of issues in International Relations and Law agenda ranging from the impact of Syrian refugee crisis to the regulation of bio-printing technology.

In the first article, Canan Uzuntaş evaluated on the impacts of the Syrian refugee crisis on the deteriorating bilateral relations between the EU and Turkey. Uzuntaş discussed on how Syrian refugee crisis has once more proven the importance of EU-Turkey relations as strategic partners and presented the contributions of the solution -mutually found by the EU and Turkey - on bilateral relations.

In her article, Övgü Kalkan Küçüksolak discussed on one of the most pressing issues of global security, which is lone wolf terrorism. She discussed the challenges posed by lone wolf terrorism and evaluated on the political and social context that the phenomena is constructed. Küçüksolak presented a variety of ideological sources of lone wolf terrorism and pointed on the danger to restrict the term into a specific ideology, since it carries the risk of not only distracting attentions from the rise of other ideological/political sources of extremism but also disrupting capacities of prevention and eradication in countering this unpredictable threat.

Iana Shchetinskaia analyzed Russia's domestic factors in its foreign policy in her paper. Shchetinskaia focused on domestic economic, demographic, and political limitations to Russian foreign policy decision-making, and argued that all these factors have been influential in the process. Not only this but Shchetinskaia also argued on the formal and informal power relations (interest groups and "state-private partnerships") in Russia that constrain Putin's ability to make foreign policy decisions unilaterally.

Fatemeh Atri Sangari and Zahra Atri Sangari addressed foreign policy of Iran and Russia in the Middle East with a special focus on the concept of identity. Authors presented the

importance of Middle East for these two countries in their paper and elaborated on the consequences of different definition of the concept in the approaches of the two countries.

Gülşen Aydın investigated Mirziyoyev's first year in Presidency and examined the changes taking place in the country after he assumed power. Aydın analyzed the changes introduced by Mirziyoyev in the politics, economy and foreign policy of Uzbekistan and concluded that the changes introduced by Mirziyoyev raise hope for political and economic development of the country as well as peace and cooperation in the region. However still, Aydın noted that it will take time to see whether these changes will be enduring.

Fatih Çağatay Cengiz analyzed Turkish foreign aid under the Justice and Development Party with the aim of understanding the material factors underlying the Turkish State's generosity in the context of both pragmatic domestic policy-making processes and the escalation of the refugee crisis in Europe. Cengiz asserted that foreign aid under the Justice and Development Party is used as an instrument of Turkish foreign policy by advancing Turkey's soft power, especially in the Middle East, and increased its bargaining power vis-à-vis central powers.

Sibel Bilkay and Mustafa Kemal Yılmaz also evaluated on soft power by questioning the place of civil aviation in Turkish foreign policy as a soft power instrument with a focus on Turkish Airlines as a case study. In the framework of their hypothesis which assert that there is a meaningful relation between the new destinations opened by Turkish Airlines and Turkish foreign policy, they analyzed the structure and the history of civil aviation in Turkey and components of Turkish foreign policy.

Burak Şakir Şeker, investigated emerging energy security issues during the 21st century by focusing on maritime transport and alternative modes of liquefied natural gas bunkering. Şeker underlined the importance of growing global trade in Liquefied Natural Gas and discussed on the strategic significance of the energy considerations and energy security.

In their paper, Volkan Tatar and Serda Güzel evaluated on the UN and gender politics. They examined the support and the importance given to "gender equality" and related policies within the UN. They emphasized the significance of economic and social empowerment of women, inclusion of women in the decision-making process and non-discrimination policies and strategies for women in the context of the UN.

In her study, Zeynep Arıöz discussed on the Kosovo intervention in the context of UN's human security discourse. Throughout the paper, Arıöz discussed the military intervention in the absence of the United Nations Security Council approval within the framework of the concept of securitization. She approached the military intervention, as a consequence of securitization process of the Kosovo problem by the UN and international community under the name of humanitarian values and principles.

Ahmet Yavuz Gürlü and Fatma Aybike Bostancı explained mediation in international law and Turkey. In their study, they examined the context of mediation in international law and by presenting Turkey's mediation activities they further elaborated on the perspectives for the future.

Hatice Kübra Kandemir explained the development of good corporate governance in Turkey. She examined the relationship between the legal environment and the development of good corporate governance of corporations in particular to Turkey. In her paper Kandemir evaluated the availability and the functionality of alternative enforcement mechanisms as means of private legal rules, such as arbitration and dispute resolution, in terms of enhancing good corporate governance in Turkey.

Selda Çağlar investigated the legal causes and the solutions that reduce the efficiency of Ombudsman institution in Turkey. Çağlar studied the Ombudsman institution and elaborated on the legal and political reasons for the insufficiencies and made recommendations on the institutional structure and the functions of the Ombudsman.

Senar Çağırğan Tuncer evaluated on the status of surviving spouse in terms of law of succession and the regime of participation in acquired property in Turkey. Tuncer examined the rights of surviving spouse by addressing the regime of participation in acquired property and the rights granted by the succession law since he/she is the legitimate heir of the deceased spouse's.

Sezai Çağlayan and Mustafa Çakır questioned the legitimacy of censorship in the West from the perspective of human rights. Çağlayan and Çakır investigated the extent censorship employed by the Western democracies on variety of issues such as; national security, territorial integrity, public safety, prevention of hate speech, protecting women and children from pornography. They concluded that censorship should only be allowed for

the protection of public interests and this usage of censorship must be proportional and necessary in western liberal democracies.

In her paper, Tugba Güles examined intellectual property protection for plant innovation with a comparative analysis. She analyzed technological advances in plant innovation and the changing aspects of intellectual property law frameworks. By providing a comparative analysis of the key legal challenges and the resulting implications, Güles revealed not only the challenges of plant innovation but also displayed the widening gap between evolving technology and traditional concepts of patent law.

Lau Pin Lean discussed on the legal framework of ‘autonomy in modern liberal eugenics’ by considering from the perspective of non-therapeutic uses of gene editing technologies. The paper hypothesized that notwithstanding the autonomy, the legality of the concept in itself continues to raise the more discursive issues relating to gene modification/enhancement debates, germ-line modification, the savior sibling dilemma, distributive justice/access, disability, and considerations of primary/personhood of a human being, amongst others. The study asserted that the autonomous element in liberal eugenics may be an illusory disguise to escape the shackles of past negativities, and may still require a more holistic and reflected discourse as part of a regulatory or governance framework.

Mirko Djukovic evaluated on the impact of the new technologies on the law by focusing on the regulation in the bio-printing technology. By emphasizing the ethical, legal and social implications of new biotechnological achievement, Djukovic examined the pressing issues in regulating the technology.



# 1

## THE IMPACTS OF THE SYRIAN REFUGEE CRISIS ON THE DETERIORATING BILATERAL RELATIONS BETWEEN THE EU AND TURKEY

Canan Uzuntaş

### ***Abstract***

*The bilateral relations between the European Union (EU) and Turkey have been deteriorating in recent years. While the EU is blaming Turkey for moving away from the European values, Turkey claims that the EU has been deceiving Turkey about full membership for years despite several arrangements made by Turkey in accordance with harmonization with the EU legislation, and the economic achievements and other developments in various areas Turkey has achieved. However, the Syrian Refugee Crisis has once more proven how important the EU and Turkey are for each other as strategic partners. Seen as the center of progress, civilization, democracy and human rights, Western world -especially Europe- was the center of the First and Second World Wars, causes of the indefinable pains and tragedies. During these wars, millions of people lost their lives and mass migration movements occurred. About 70 years after the World War II, another mass migration movement in another region, in the Middle East, has severely affected the EU -the fact that also shows that there are no regional problems in the globalized world. Although the EU has made various legal arrangements to solve the refugee crisis within its own structure, it could not achieve the desired result and finally decided to cooperate with Turkey which has been hosting more than 2.7 million refugees and signed the Refugee Deal with Turkey. As a result of this agreement with Turkey, the EU managed to resolve the problem -for which it could not find any effective solutions with its 28 member states- in a very short time. As a result, the EU has once more understood that Turkey is an indispensable strategic partner for the EU. In this study, the contributions of the solution -mutually found by the EU and Turkey for the Syrian Refugee Crisis- on EU-Turkey bilateral relations and the impacts of the mutual solution on EU's viewpoint of Turkey will be examined in depth. Beside these, the historical background of the Syrian civil war, the cause of the refugee crisis, will be briefly mentioned.*

**Key Words:** Migration, Refugee, Syrian Refugee Crisis, EU-Turkey Relations

## Introduction

Starting in 2011 as a revolt against the President Bashar al-Assad, the riot of the Syrian people was applauded as a continuation of the Arab Spring and expected to bring democracy and freedom to Syria; yet the riot turned into a cruel traumatic civil war with drastic impacts not only in the Middle Eastern region but all around the world. Most of the international actors, mainly the United Nations of America (the USA) as well as Turkey, supposed that the Bashar al-Assad regime would be replaced with a more democratic government in a short while, but the President Bashar al-Assad has managed to survive the civil war as his regime has been supported by Russia and Iran. The political aim of the civil war –overthrowing the cruel undemocratic Assad regime- has almost failed. All the actors –including the USA, Turkey and the European Union (EU) - have been obliged to reassess their miscalculated political approach to the Syrian civil war (Rodgers et al, 2016).

In addition to the thousands of civil and military casualties, millions of people have lost their houses and jobs as a consequence of the civil war; hence, mass migration movement started. At the beginning, Syrian people mainly preferred to move to the neighboring countries like Turkey, Jordan, Lebanon, Egypt, or Iraq. However, as the civil war got more and more brutal, more deadly weapons such as chemical weapons are used by the Syrian regime (Assad regime rejects it, though), and the savagery and slaughters of the Islamic State of Iraq and the Syria Islamic State (ISIS) reached an inconceivable extent, the rate of refugee outflow rose in parallel. The immediate impacts of the massive refugee flow are experienced mostly by the neighboring countries hosting the refugees such as Turkey. The EU, which regarded the civil war in Syria as a regional problem that can be solved with minimum economic, military or political involvement of the EU, realized the fact that in such a globalized world, no problem is just a regional issue but a global issue (AL JAZEERA NEWS, 2017).

The impacts of the Syrian civil war have been experienced by the neighboring countries of the Syria right after its outbreak. However, the EU realized how serious the situation is mainly after the war consequences –thousands of refugees in this case- in front of its door, which most of the EU member states are against to open for the refugees. As a matter of the fact, Western world, especially Europe, -regarded as the center of progress, civilization, democracy and human rights- was the main battleground of the First and Second World Wars, which were the causes of the indefinable pains and tragedies. While

approximately 9 million people, of whom ninety percent consisted of military personnel, died in the First World War, more than 65 million people, of whom 65 percent consisted of civilians, lost their lives in the Second World War, in which more technologically developed deadly weapons were used. In addition to the millions of civil and military casualties during these wars, millions of people lost their jobs and houses; hence, they had to move to other lands. In other words, the EU member states actually know by heart what it means to be a refugee. Despite that, the EU could not solve the problem on its own by taking its own experiences into consideration. The president of the European Commission, Jean Claude Juncker, described the massive refugee outflow in 2015 as an *existential crisis* (Juncker, 2016).

The EU authorities that cannot find a common solution as a unity within the EU system decided to cooperate with other countries to find a way out of that crisis. Turkey, the country that has been hosting about three million of Syrian refugees and used by most of the refugees as the transit country to go to the EU countries, mainly to Greece, is seen as the most significant country that can put an end to the flow of the refugees. In March 2016, Turkey and the EU signed the Refugee Deal which stopped the refugee crisis that turned into an existential crisis for the EU. Even though this deal is severely criticized by some international organizations such as Amnesty International as it is claimed to violate human rights and create some legal problems in terms of the EU and Greek laws, it is regarded as a success by the EU authorities and some EU member states, especially by Germany, the leading country that shaped the deal and worked hard to persuade Turkey to sign the deal. Turkey also sees the deal as a success story of which protagonist is Turkey (Apostolou, 2017).

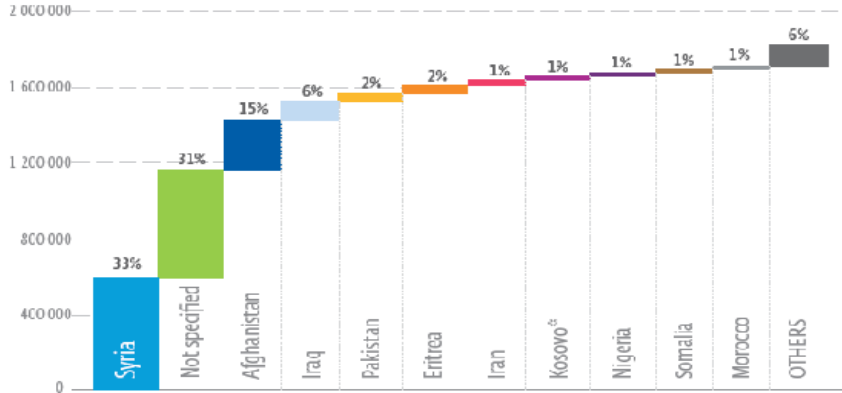
This research study aims at answering the questions “How has the Syrian Refugee Crisis affected the EU-Turkey bilateral relations and how has it changed the viewpoint of the EU about Turkey?” by reviewing the Syrian Refugee Crisis historical development, and the Refugee Deal signed by the EU and Turkey to solve it. The initial reactions as well as the current debates by the signatories about the deal will be scrutinized and the impacts of the Refugee Crisis on the EU-Turkey bilateral relations will be discussed in depth. In addition to the Refugee Crisis, other parameters that are shaping their relations will be briefly included to clarify the picture. The research method used during the study is secondary data analysis and qualitative content analysis.

## Definition of Key Terms: Refugee and Migrant According to International Laws

To explain what the refugee crisis is, some of the key concepts must be defined clearly at the beginning. The first term that must be defined is *refugee*: According to the United Nations 1951 Convention, the basic document describing “the Status of Refugees,” the term *refugee* is defined as “someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion” (UNHCR, 2010). In the 7<sup>th</sup> report of the House of Commons Home Affairs Committee, it is pointed out that all the countries or the organizations such as the European Union which have signed the Geneva Convention have to accept the refugees according to the international law that prohibits the signatory countries to send the refugees back.

The next term that must be clarified is the *migrant*, which is thought as the synonym of the term *refugee* but has a distinct meaning. A *refugee* is a person who has to leave his/her mother country as a result of the danger of being persecuted and not being protected by the authorities or by the laws in his/her mother country. In contrast to this, “a migrant [...] may leave his or her country for many reasons that are not related to persecution, such as for the purposes of employment, family reunification or study. A migrant continues to enjoy the protection of his or her own government, even when abroad” (UNHCR, 2011). In fact, the flow of the *refugees* and *migrants* may lead to a crisis in the host- ing countries; yet, a sudden dramatic increase in the number of refugees in the last two years has had the crisis turned into an *existential* crisis.

The distinction between a migrant and a refugee is significant to have a clear understanding that the migration crisis that the EU suffered is mainly a refugee crisis rather than a migrant crisis. According to the OECD report published by Angel Gurría in September 2015, the present migration crisis is unlike the previous ones in terms of “the diversity of nationalities, motives for migration and individual profiles” of the asylum seekers, which makes the situation more complicated for the European countries to handle the problem rapidly and effectively. Even if the European countries can send back the migrants who come to Europe with the hope of better life standards, it is impossible to send back the refugees who come from Syria, Afghanistan, Iraq and some African countries where civil wars are ongoing (Gurría, 2015).

**Figure 1. Detections of illegal border-crossing, by main nationalities in 2015**

Source: Risk Analysis for 2016, by FRONTEX

After defining two important terms which are interrelated but distinct from each other, *the 1951 Refugee Convention* which provides us with the current definitions of main concepts related to refugees and rights of the refugees must be reviewed briefly. In the 20<sup>th</sup> century, the world experienced First and Second World Wars, which caused millions of people to die or to leave their homeland. Mass migration of millions of victims in the First and Second World Wars made it obvious that some regulations had to be made to ensure the survival, safety and welfare of the migrants. As a result of the rising importance given to human rights in the mid-twentieth century, the rights of the war victims started to be discussed as well. Since WWII, governments have been trying to find solutions for the war victims' problems and signed a number of agreements to help the refugees "forcibly displaced, deported and/or resettled" (UNHCR, 2010). The first time refugee rights are officially stated in a legal document is 1951 Refugee Convention, which was initially prepared for the resettlement of the European refugees, who were the victims of WWII and amended with 1967 Protocol to include all the refugees who fall into the category of people defined as a refugee regardless of their nation, race, religion or so on (UNHCR, 2011).

The 1951 Refugee Convention is an agreement bounding all the European and non-European signatories; yet, the first time that the right to seek asylum at European level comes into ground with the Charter of Fundamental Rights of the European Union, that was formally announced on December 7<sup>th</sup>, 2000 by the European Union (EU) institutions “on the fringe of a meeting of the European Council in Nice” (Gil-Bazo, 2008). The Charter turned into a law for EU member states after the Lisbon Treaty was signed in 2009. The articles in the Charter that give the refugees asylum right are stated below:

**“Article 18:** Right to asylum. The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

**Article 19:** Protection in the event of removal, expulsion or extradition.

1. Collective expulsions are prohibited. 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”

18<sup>th</sup> and 19<sup>th</sup> articles of the EU Charter of Fundamental Rights are the two principles that constitute the basis of the refugee policies of the European Union that it adopted in 2015 and 2016. Yet, the regulations on the asylum procedures are made in accordance with the Common European Asylum System, the so called Dublin regulation, which obliges “the first country where the asylum seeker is registered [to be] responsible for processing the asylum application, with a few exceptions such as family cases” (Aiyar and et al, 2016).

When the refugee outflow started in 2011, Turkey’s asylum system did not allow the refugees to ask for asylum in Turkey, so Turkey adopted “Law on Foreigners and International Protection (LFIP) [which] instituted major changes in the country’s asylum system” in 2013 and it was amended with the Temporary Protection Regulation in 2014 in order to harmonize with the European Laws. The application of the asylum seekers is currently evaluated according to this Temporary Protection Regulation which means that the asylum seekers are taken under *temporary protection* until they settle in another country, not granted the status of the refugee that allows them to settle in Turkey. Despite the fact that Turkish asylum system does not accept the people from Syria as refugees, the EU had

to cooperate with Turkey, the transit country for the refugees, to stop the asylum seekers to move to Europe. The Readmission Agreement was signed in 2013 and the Joint Action Plan was adopted in 2015 by two parties to prevent a refugee flow from Turkey to the EU (Çetin, 2017). According to this Joint Action Plan, the EU was supposed to give Turkey €3 billion to keep the refugees (consisting of around 2.2 million Syrian and about 300.000 Iraqis at that time) within the borders of Turkey, to prevent human trafficking, passport forgery and to send back the refugees who do not fulfill the criteria to be accepted as a refugee (Zeldin, 2016). As Zeldin (2016) describes the situation perfectly, the EU asked Turkey to be the “wall of defence” against the refugee flow while Turkey was turning into an open prison for the refugees as they are stuck between Syria where the civil war is ongoing and Europe where some of the European Union member states have erected a real wall and also created a psychological barrier by signing certain agreements with Turkey to keep them away.

Despite the Readmission Agreement and Joint Action Plan, the EU and Turkey did not manage to prevent the refugee outflow to the EU. According to the Annual Risk Analysis for 2016, the unparalleled illegal flow of refugees and migrants at the borders of the EU since the Second World War amount to approximately 1.820.000 people in 2015, and it resulted in unexampled chaos and tragedies of the refugees who tried to arrive at the EU through various illegal routes, mostly by sea (FRONTEX, 2016). The European Union, which didn't expect such a big legal or illegal migration rate, tried to handle with the problem urgently. The Union authorities adopted various policies to solve the problem in the most efficient and rapid way. The EU, which adopted certain asylum policies and set priorities about the solutions, constantly revised its policies related to the problem and tried to develop new approaches. However, they could not develop a policy that can satisfy all of its member states. It forced the EU authorities to negotiate with Turkey once more to decide “how to share the burden of current and future refugees” by taking more effective precautions in order to stop illegal migration, so the EU decided to sign a more comprehensive agreement with Turkey in March 2016, *the EU-Turkey Refugee Deal* that achieved in stopping the flow of refugees at a considerable amount (Toygür and Özsöz 2016). The Refugee Deal was seen as the key to solve to the refugee crisis. The basic conditions of the deal were that: The visa free travel will start in a short while after Turkey fulfills the 72 benchmarks and 6 billion Euros will be given to Turkey in return for the blockage of the illegal refugee or migrant passage to the land of the EU member states.

## **General Background of the Syrian Civil War**

The violent deadly civil war in Syria was triggered in March 2011 after some children and teenagers -most probably inspired by the Arab Spring (a movement promoted by some groups as something bringing democracy and its concomitants human rights, equality, prosperity) wrote some revolutionary slogans on the walls; as a result, they were arrested and tortured by the Syrian regime. Thousands of people demonstrated against the Bashar al-Assad regime's violent and cruel attitude. Instead of easing the tension, security forces fired into the crowd, killed many demonstrators, which caused more and more demonstrations (CNN Library, 2017). Peaceful rallies turned into armed conflicts as the opposition supporters started to fight against the state security forces. The source of the most traumatic humanitarian crisis of the 21st century, the Refugee Crisis, started after the Syrian citizens started to revolt against the Bashar al-Assad regime, which has been ruling in Syria since 2000 (Rodgers et al, 2016).

The opposition groups united against the Syrian regime under different names at the beginning. However, more and more divergences came out among the opposing groups about various subjects, mainly about being the leader of the opposing groups, so the unity against the Syrian regime dissolved and the opposing parties started to fight against each other as well. The United Nations (UN) harshly criticized the Syrian regime for the disproportionate use of force against the opposition supporters and attempted to find a resolution for the ongoing armed conflict in Syria a few times, but Russia and China opposed to all resolution options excluding or aiming at overthrowing the Bashar al-Assad regime. While the USA led countries are insisting on Assad's removal from the government, he has been supported by Russia and Iran. The emergence of bloody savage radical jihadist group ISIS in Syria and Iraq worsened the troublesome situation for the region and for the rest of the world (AL JAZEERA NEWS, 2017).

As the years passed, the armed conflict in Syria first turned into a civil war, then converted into "an internationalized proxy war, with the involvement of France, Iran, Russia, Turkey, the United States, and other actors, as well as the rise of a transnational terrorist movement, the self-proclaimed Islamic State (ISIS)" (Pierini, 2016). Years by years it became a more bloody, traumatic and devastating disaster. The consequences of this civil war is shocking; more than 400,000 civilians have been killed according to the UN records, around 5 million people abandoned Syria and fled to other neighboring countries



or to the EU, and more than 6,5 million Syrian changed their places within the borders of Syria. Syrians remaining in Syria have had great difficulty in having access to clean water, to enough food or in finding proper housing facilities while the millions of Syrians seeking asylum in other countries also have to survive in unsatisfying conditions as their number is over the capacity of the hosting countries and the international organizations such as the EU or the UN are proven to be unprepared for such a big mass migration movement. Currently, the ISIS seems to be defeated and war seems to end in a few months; yet, Pierini (2016) reminds that the end of war does not guarantee that the Syrian issue or its concomitant problems will occupy the international agenda at least for a decade because it would take years to rebuild the political system that may ensure peace in the region, or to rebuilt security or infrastructure, in brief, to restore the previous state in all fields from politics to education.

### **Summary of the Impacts of the Syrian Civil War on Turkey and the EU**

When the Syrian civil war started, none of the international actors expected it to last for so long as they accepted it as an extension of the Arab Spring movement that ended with the overthrow of the existing governments in some countries such as in Yemen, Egypt, Libya and some other countries, in which the governments were not overthrown but some radical reforms were made in various areas. The Syrian civil war was counted as a continuation of this movement but the developments proved that the case in Syria is totally different, mainly because of the involvement of the international actors. As the case turned into a civil war, the consequences have been much more devastating than it was in other countries where the Arab Spring movement has been successful (in the eyes of the certain countries). The civil war had drastic impacts in Syria itself together with the Middle East region as a whole. However, the war became a global issue when the international actors involved in the war, evolving into “a multi-proxy war in which international, competing interests carry out their battles in Syria, demolishing the country’s hope of establishing a democratic state free of dictatorship” (al-Masri, 2015).

Turkey and other neighboring countries which accepted to host refugees from Syria have been affected economically, politically, socially and in terms of security. As the number of the refugees has increased, the responsibilities and expenses of the hosting countries have simultaneously increased. More and more money is spared to take care of the refugees in

refugee camps. As their numbers increase and the length of time they stay in the hosting countries extends, the governments that adopt a welcoming policy for the refugees are held responsible for the economic burden, the security problems that the refugees create, and stuff like that. Encountering with a group of people with different traditions, distinct way of life -despite some similarities- has sometimes created some social problems between two groups. The neighboring countries are also subject to internal and external security problems. Some parts of the Iraq were occupied by the ISIS, the terrorist group originated in Syria and spread into the other regions such as Iraq. In the case of Turkey, they had to intervene into civil war militarily a few times, which cost the lives of several Turkish soldiers. However, Turkey achieved its goal to generate a safe gun-free zone in certain part of Syria. Beside active military involvement of Turkey in Syria to protect both its borders and the Syrian civilians within the borders of Syria, the terrorist groups coming from Syria bombed various places in Turkey at different times and killed hundreds of civilians. To sum up, the neighboring countries have been suffering from the Syrian civil war quite badly.

One of the facts that make the Syrian civil war a global issue is the long term direct involvement of the international actors such as France, the USA, Russia, Iran, or Turkey in the war. As most of the international actors assumed that the war would not last so long, the EU also expected the Assad regime to be overthrown in a short while. The EU developed a miscalculated Syrian foreign policy that “left [it] in a second-tier position among international actors” (Pierini, 2016). Even if the EU does not have a strong role in the decision making process about the future of the Syrian civil war, and in a way, the future of the Middle East in general, “humanitarian effects of the crisis, with massive social, political, and security consequences for European societies” have fallen to the EU’s share (Pierini, 2016). When the tremendous refugee outflow from Syria -mostly through Turkey- to the EU began in 2015, the EU got shocked and encountered with the real face of the civil war in Syria.

At the beginning, the EU did not know how to cope with such an unprecedented refugee flow. The EU organs and some EU member states, mainly Germany, suggested adopting a welcoming policy for the refugees, but most of the other member states argued against hugging all asylum seekers with warm heart, even some of them started to build walls or put fences along their borders. The EU member states have several worries about the

possible impacts of accepting refugees to their countries. The biggest fear is about security issues, especially after the Paris attack and some other attacks made by the ISIS terrorists. Economic concerns such as rise in unemployment rates are another reason for the rejection of the refugees. The EU, which had to deal with Euro crisis for so long, in 2014 with Ukraine crisis, in 2016 with Brexit, and some other internal or external problems over that period, had a new, even the most troublesome crisis in front of its door. The president of the European Commission even defined it as an *existential crisis*. It cannot be known what would be the reaction of the EU if it hadn't been surviving through a bulk of other crises when the refugee crisis broke out in 2015. What is obvious is that the EU could not solve its problems within its own structure as a unity and had to look for a solution outside its borders. As the transit country for the refugees to arrive Greece or Greek Islands, Turkey would be the main actor in solving this crisis for the EU. The EU knocked the door of Turkey and decided to sign a number of deals with Turkey to overcome the crisis.

### **Prospective Contributions of the Refugee Deal to EU-Turkey Bilateral Relations**

Currently, more than 5 million Syrian civilians, most of which are children, women and old people, abandoned Syria to survive while around 6.5 million Syrians left their hometowns and moved to different towns or cities within Syrian borders. Out of these above 5 million civilians, more than 2.7 million asylum seekers have been hosted in Turkey (Toygür and Özsöz, 2016). "That number is higher than the entire population of six of the EU's 28 member states" (Erdemir, 2016). Even if the EU seems to have solved its refugee problem thanks to the Refugee Deal, Turkey seems to be at the center of refugee crisis as the country hosting the biggest refugee group at present. The reactions against the refugee deal are ranging from absolute support to strong opposition due to various reasons.

To start with, the positive impacts of the Refugee Deal for the EU can be analyzed. Before the Refugee Deal was signed with Turkey in March 2016, around 2200 illegal daily passages from external borders were detected, mainly to Greece and Italy and it made it really difficult to register all the immigrants as their applications could not be processed appropriately (FRONTEX, 2016). The biggest contribution of the Refugee Deal is the cessation of the incredible troublesome illegal border-crossing thanks to the strict control that

Turkey started to apply in Aegean Sea. Currently only about 30 immigrants can reach the shores of the EU (Apostolou, 2017).. It is definitely not only because of extra precautions taken by Turkey along the Aegean Sea, but also because of the psychological impact of the Deal on the Refugees: The refugees know that they will be caught by Turkish security forces and will be brought back to Turkey or sent back to their hometown if they do not meet the requirements of a refugee. Therefore, most of them prefer to stay in Turkey rather than trying to cross the sea illegally.

According the optimists about the Refugee Deal, the deal is a success story that could bring an end to the deadlock between Turkey-EU relations by initiating a new period of cooperation and dialogue (Şenyuva and Üstün, 2016). As stated by Şenyuva and Üstün (2016), the optimists stated two main arguments to favor the deal: First reason is that the refugee crisis that turned into tragedies ending in death of several refugees in the Aegean Sea or in rejection, humiliation, sometimes even torture on their journey to the EU border countries came to an end. At least, the deal remarks the most effective precautions against such tragedies within the shortest period of time. The second point highlighted by the supporters of the deal is that the deadlock between the EU-Turkey bilateral relations is over after several years. The EU and Turkey found a common ground that they can cooperate and need each other for a beneficial solution. The optimists hope that this cooperation would have spillover effect in other fields and the EU-Turkey relations would develop once more. The accession negotiations that had slowed down would gain momentum. The most important point can be the fact that the EU remembers one more time that Turkey has always been the key partner of the EU in several fields, especially in terms of the security issues. However, the EU has to cooperate with Turkey in other fields such as economy, energy, agriculture, and others if it is eager to actively cooperate with Turkey in the field of security.

In terms of Turkey, the Refugee Deal has some promises that can be really beneficial for Turkey. The most important of these promises that was emphasized most by the Turkish government when the negotiations for the Deal were held was *visa liberalization* for Turkish citizens. The Turkish government tried to convince its citizens for the rationale of the Refugee Deal by stressing this promise. In fact, all the candidate countries except Turkey have the visa free access to the Schengen Area (The Guardian, 2012). As a matter of the fact, the EU and Turkey had been negotiating about the visa liberalization before

the Refugee Deal. What happened was to accelerate the process by including this objective within the promises of the deal. If the visa liberalization promise is kept when Turkey meets the 72 benchmarks, it is expected that Turkish people and the European people will be able to meet more often as an unnecessary barrier that keeps them away from each other will be eliminated and will be able to know each other better. They will have the chance to get rid of the prejudices they have against each other. Turkish citizens, who have been getting pessimistic about the EU membership, will raise their hope again. In addition to psychological contribution of the visa liberalization, it will have financial contribution for Turkey. Turkish people such as academicians, business men and women, or common Turkish citizens who go to the EU countries for a short period of time have to pay money for Schengen visa (the commission taken by visa application centers are not included). Turkey is the 4<sup>th</sup> biggest Schengen visa applicant with almost one million people (Schengen Visa Info, 2016). It shows how much money is wasted for Schengen visa. Since more Turkish people will go to Europe as tourists, it will have a positive impact on the EU's economy as well.

The economic cooperation between the EU and Turkey is also really important for both parties. As it is stated in a report published by Kirişçi and Ekim in 2016, Syrian civil war affected Turkish economy severely in several aspects: First of all, hosting more than 2.7 million refugees in Turkey has cost Turkey \$ 30 billion (the foreign aids are not included in this amount) as stated by the President Recep Tayyip Erdoğan (Yenicag Gazetesi, 2017). It is a great burden for Turkish economy. The second factor that has negative impact on Turkish economy is the terrorist attacks made by the terrorist groups ISIS and the Kurdistan Workers' Party (PKK) as well as its splinter factions such as the Kurdistan Freedom Falcons. They bombed several cities and killed and wounded hundreds of civilians and military officers. Tourism, which has been one of the most significant sources of national income for Turkey, has been affected quite adversely. The countries started to warn their citizens about the danger of possible terrorist attacks in Turkey and suggested them not to go to Turkey for holiday. However, Turkey, of which economy does not rest on "oil or gas sales, [...] needs to export its goods and services to sustain a lively economy and maintain low levels of unemployment and political dissatisfaction" (Kirişçi and Ekim, 2016). The revitalized dialogue and cooperation with the EU has arisen the expectation in Turkey that the EU would give up showing Turkey as a center of terrorist attacks where the lives of the foreigners are frequently in danger.

### Negative Reactions to the Refugee Deal

While some of the critics regarded the Refugee Deal signed between the EU and Turkey as a promising development for the bilateral relations between the signatories, some others harshly criticized, even certain groups condemned, the Deal for various reasons. Some of the criticisms were about the humanitarian aspects of the Deal whilst some others were based on political concerns. To be able to evaluate the Refugee Deal more comprehensively and objectively, the studies on the subject have to point out the negative opinions concerning the Refugee Deal and its possible impacts in general.

The Refugee Deal was depicted as a solution for the tragedies of the refugees trying to reach at the EU countries. That Deal was signed to stop human trafficking, to prevent more deaths in the Aegean Seas, to provide a safe place for the refugees in Turkey and to support them financially. However, the real goal of the EU was masked behind these humanitarian aims: The EU wanted to achieve all these goals and solve the migration crisis outside of its borders with little direct involvement - regardless of all the costs of it for the refugees or the other parties. Even if Donald Tusk, the President of the European Council at the time of the summit with Turkey in November 2015, explicitly asserted that the security of the external borders of the EU cannot be maintained by a third country, the EU bureaucrats supporting the Deal claimed that it was the only reasonable alternative at hand and they criticized the opposing groups with the explanation that those critics had not presented a better alternative that they could adopt to solve the crisis (Karnitschnig, 2016).

The promises of the Refugee Deal such as visa liberalization or re-energizing the stalled accession negotiation are also counted as a political failure for the EU by certain groups because the EU was expected to take an action against the Turkish government which is blamed for “drifting away from the European values and democratic governance” due to reasons such as pressure on independent media of businessmen, prohibition of peaceful demonstrations and things like that (Erdemir, 2016). According to Erdemir (2016), by ignoring the violation of the so-called undemocratic developments in Turkey, even rewarding Turkey by granting visa free travel and accelerating the accession negotiations, the EU has betrayed its own European values. While the EU is harshly criticized for acting against its core values, Turkey also described the acts of the EU against the refugees such as closing their doors to the refugees as *cruelty* (Loveluck, 2016). Amnesty International and some other international organizations also expressed their views on the subject that

the Deal is against humanitarian values and it violates the EU and Greek laws. To illustrate, normally Turkey has not been accepted as a safe third country by the EU for certain reasons (Elman, 2015). Not to create an EU wide violation of the laws, Greece adopted a law that accepted Turkey in the list of safe third countries, a tricky approach that was developed with the approval of the EU. By donating money for the refugees and not taking any other responsibility, the EU failed in terms of the humanitarian approach that is expected from it as a significant representative and promoter of the human rights worldwide (Karnitschnig, 2016).

Another point that is criticized about the Refugee Deal is that the Deal is only a temporary resolution that cannot provide a long term solution as “Brussels has done too little to address the root causes of the refugee and migration crisis at its doorstep” (Apostolou, 2017). How fragile the Deal is has been proven whenever the Turkish President Recep Tayyip Erdoğan, who is aware of the desperate situation of the EU authorities, threatened the EU with cancelling the agreement and opening the borders for the refugees as the EU did not keep its promises about the financial aid and visa free travel (Karnitschnig, 2016). It is obvious that the EU only saved the day for the EU instead of developing a solution that would help it to confront the migration and asylum realities within the EU and would save its future in a long run. The situations that the refugees are living in Turkey are criticized harshly by some critics. These critics claim that Turkey, which accepts the asylum seekers as *guests* rather than refugees, cannot provide the refugees with appropriate access to the labor market, education and health services (Haferlach, 2017). The EU forced these asylum seekers to live under these conditions by signing this Refugee Deal and Readmission Agreement instead of developing a better asylum system from which the refugees can benefit more.

## **Conclusion**

When the positive and negative reactions are taken into consideration, there are some inferences that the researcher can make about the reflections of all the developments to the EU-Turkey bilateral relations since the outbreak of the Syrian Civil War and the Refugee Crisis that civil war caused. Turkey, which adopted an open door policy since the beginning of the refugee crisis, has been praised and applauded by the whole world (Calamur, 2015). The extent of hospitality in Turkey for the Syrian people under temporary

protection (they are not accepted as refugees but guests according to current asylum laws in Turkey) has gained the respect of each country all over the world and Turkey has given a lesson of humanity to the countries and international organizations such as the EU itself that is proud of being the representative of the human rights. When the EU organs and some member states, mainly Germany, tried to convince the other member states for developing an open door policy towards the refugees, they failed. The humane attitude expected from the EU member states have been achieved by Turkey, the country which has been criticized severely by these countries for the violation of human rights. Even though the EU and some other countries criticize Turkey for violating some basic human rights such as freedom of speech, freedom of press and some other things, Turkey has proven that Turkey is ready to save people whose lives are in danger and whoever needs support. That does not excuse the violation of any other human rights but still shows that Turkey respects to the most significant human right that has been violated by the others in the case of refugee crisis: right to live. This positive attitude of Turkey has a really positive impact on the EU-Turkey relations (Elman, 2015).

As well as the perception of Turkey has changed positively, the political influence of the refugee crisis is worth to take into consideration. The accession negotiations had slowed down before the crisis broke out. At that period, the EU-Turkey relations got worse for some reasons briefly mentioned before. When the refugee crisis started to affect the EU in 2015, the EU authorities did their best but could not manage to develop an effective, satisfactory policy to solve the unprecedented refugee flow problem. Turkey, which was hosting around 2.2 million refugees and migrants at that time, has already worked on the problem for four years and managed to overcome the chaotic situation successfully. Besides, Turkey has been the transit country, so the EU has to cooperate with Turkey to solve the problem. Final agreement signed by the EU and Turkey has achieved the goal of blocking the refugees cross over the EU territories. Despite the negative comments on the Refugee Deal as not being humane and against the EU and Greek laws, each member state of the EU was happy with the result: The existential crisis is over, for now at least. Even if some critics did not believe that a single country can solve the problem that the EU cannot solve with its 28 member states, but it is obvious that Turkey managed to stop the refugee flow to a great extent on its own. So, Turkey is regarded as a security door for the EU and it is an indispensable strategic partner for the EU.



Some criticisms by the people that do not appreciate the Refugee Deal are based on the claim that Turkey is using this refugee crisis as leverage for its political aims such as visa free travel or acceleration in accession negotiations, in other words, as a tool for bargaining. However, it should always be kept in mind that the international relations have always been an arena where the bargaining power of a country can provide it an advantage. In any case, Turkey does not ask for a completely new favor. The visa free travel for Turkish citizens had started to be negotiated with the EU a few years ago. Besides, no citizen of other candidate countries but only Turkish citizens have to get short term visa to access the Schengen Area. Similar to that, no other country but Turkey has been waiting in front of the door of the EU for so long; therefore, asking for some acceleration in accession negotiations is not a favor that should be granted by the EU, but a right that should already be given to Turkey. In other words, the promises of the Refugee Deal consist of the rights that Turkey has already deserved but prevented to have. Thanks to this Refugee Deal, discrimination against Turkey in some fields can be resolved and it can be explained to the European public as a reward for salvation from the refugee crisis.

The economic and financial impacts of the Refugee Crisis and the Deal are hard to discuss in detail in a study aiming at briefly explain the Refugee Crisis economic impact on the EU-Turkey relations. If the economic and financial impacts of the refugee crisis on two parties are taken into consideration separately, it is clear that Turkey is a real victim of the Syrian civil war in various terms: incredible cost of taking care of the Syrian people living within Turkey's borders (around 30 billion dollars), fall in European tourists due to the fear of terrorist attacks, rising unemployment,...etc. The EU promised to give 6 billion Euros to Turkey to keep the refugees within its borders. When the amount of money spent by Turkey itself (30 billion dollars) is considered, the financial contribution of the EU is really absurd. It is also stated by Turkish authorities that the EU has not given the promised amount of 3 billion Euros yet. When President Erdoğan threatens the EU with opening the doors for the refugees, the EU acts as if Turkey is the party that is violating the Deal conditions, but it is clear that Turkey has successfully done whatever it promised to do while the EU has been alleging several excuses for breaking its promises. The EU was not affected substantially in terms of economic or financial costs of the refugee crisis when it is compared to Turkey's case. However, 6 billion Euros is still valuable contribution that will improve EU-Turkey bilateral relations in one more area.

The security is the last field that the EU-Turkey bilateral relations have been developed. The refugee crisis has proved how vulnerable the EU borders are for illegal passages. The EU has been working on more comprehensive security and defence policy recently. However, the EU has had to understand that it has to cooperate with its neighbors to guarantee the security of its borders. Thanks to the Turkish security forces in the Aegean Sea, the refugee flow stopped. The EU is now aware that the peace in its neighboring countries is as important as peace in the EU member states. Turkey is one of the key partners of the EU that it has to cooperate in many fields. Ostracizing Turkey or breaking the relations with Turkey as a result of political concerns will never have a positive impact on the EU.

After the traumatic coup attempt in July 15<sup>th</sup> 2016, the bilateral relations that started to develop between the EU and Turkey once more deteriorated. The state of emergency has been applied in Turkey since the coup attempt and several developments that were not supported by the EU have been witnessed. The first year after the coup attempt has had a frightening impact on the EU-Turkey relations that seemed to be promising after the Refugee Deal. However, in the last days of November 2017, a remark made by the Commissioner Dimitris Avramopoulos at the 8<sup>th</sup> Bosphorus Summit that visa-free travel for Turkish citizens with a biometric passport to the EU is about to be achieved, has just revived the positive expectations for the future of the EU-Turkey bilateral relations. He announced that the EU is “working closely with Turkey to complete all requirements” (European Commission, 2017). This news has proven that the positive impacts of the Refugee Deal are still observable despite all the accusations of each others for distinct subjects, the EU and Turkey manage to develop their relationships. The EU should not wait for another crisis to cooperate with Turkey as Turkey has always been and will always be among the most significant partners of the EU in several fields. The EU should keep it in its mind that Turkey is the key actor in the region it is located. If the order in Turkey is disturbed, if Turkey’s economy turns down, or some other negative things happen in Turkey, not only one country suffers from it but the neighboring countries will also suffer from it. The Syrian civil war has proven that no war is regional in the globalized world. Its impact has reached to the other parts of the world. So, Turkey and the EU should cooperate all the time for peace and prosperity in the region, even in the whole world.

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## 2

# LONE WOLF TERRORISM: DISCUSSIONS ON DEFINITIONS AND CONSTRUCTIONS

Övgü Kalkan Küçüksolak

### **Abstract**

*In recent years, attacks by lone wolf terrorists increasingly become a challenging and a pressing issue for global security environment. Similar to terrorism, with its contested and multifaceted structure, there is no consensus on its definition and this fact makes it harder for detection, prevention and disruption of terrorist plots. Despite its newly rising popularity, the phenomena has a long past deriving from a wide variety of political, religious and ideological backgrounds such as right-wing, separatists, radical Islamists, anarchists and etc. As it is depicted in the cases of Nidal Malik Hasan's and Anders Behring Breivik's murderous rampages in the US and Norway respectively, lone wolf terrorism adopted as a tactic under diverse ideologies. However, construction of the phenomena under the fabric of Islamic radicalism in a growing number of sources not only contributes to blurring of the phenomena but also distract attentions from its usage and rising violent assaults by lone wolf terrorists with diverse ideological sources such as right-wing extremists and etc. Therefore, with the aim of contributing to the understanding of the issue this study attempts to shed light on key definitional elements, conceptual discussions and construction of the phenomena.*

**Key words:** terrorism, lone wolf terrorism, constructivism

### **Historical Roots and Evolution of Lone Wolf Terrorism**

Lone wolf terrorism has a long history dating back to 19th century anarchism according to Edwin Bakker and Beatrice de Graaf (2010, p.3). They suggest that Mikhail Bakunin's "propaganda of the deed" inspired terrorist attacks in the Western world. Individual anarchists' extensive series of assassinations and attacks targeted both the values of bourgeois society and even heads of state, including the French president Carnot in 1894 and King

Umberto I of Italy in 1900 (Bakker and Graaf, 2010, p.3). According to David Rapoport (2004) this anarchist wave constitutes the first wave of terrorism. Since transformation in communication and transportation patterns are crucial for development of waves of terrorism, developments of 19th century facilitated to extend anarchist influences and tactics (Rapoport, 2004, p.49) which looks similar to today's digital propaganda.

With the wane of anarchism and the change and development in tactics in the following decades, the first phase of "proto-lone wolf terrorism" also waned but later revived by far right with the publication of *Hunter*<sup>1</sup> in 1989 as it is mentioned by Matthew Feldman (2013, p.273). White supremacists and anti-governments in the US embraced lone wolf activism as a method which has been further conceptualized under Louis Beam's essay "Leaderless Resistance" (1992). Louis Beam, a former Ku Klux Klan and Aryan Nations member, argued that since pyramid type of organization proved easier for government infiltration and destruction, then Phantom Cell mode of organization<sup>2</sup> which is described under the context of Leaderless Resistance is left as a solution (1992, pp.4-5). According to Beam, participants to Leaderless Resistance through phantom cells or individuals operate independently of each other, and never report to a central headquarters or single leader for direction or instruction, as would those who belong to a typical pyramid organization. He concluded that leaderless resistance leads to very small or even one man cells of resistance (1992, p. 5). In 1990's white supremacists Tom Metzger and Alex Curtis further popularised the strategy by spreading their ideas and encouraging fellow extremists for violent act.<sup>3</sup> Curtis thought of a revolutionary movement which combined overt propaganda with covert violent attacks (Borum, Fein and Vossekuil, 2012, p. 390)<sup>4</sup>.

- 1 Hunter is a right-wing novel written by William Pierce who was a founder and head of National Alliance. His other novel "The Turner Diaries" was credited by Timothy J. McVeigh with inspiring the Oklahoma City bombing (Johnston, 2002).
- 2 Louis Beam mentioned that the Phantom Cell mode of organization firstly proposed by Col. Ulius Luis Amoss. As an intelligence officer Col. Amoss proposed the concept of Leaderless Resistance against the threat of Communist take-over in the US in 1962. Beam described the "Phantom Cell" as a system of organization that is based upon the cell organization, but does not have any central control or direction, that is almost identical to the methods used by Committees of Correspondence during the American Revolution (1992, pp.1-5).
- 3 As a founder of the WAR (White Aryan Resistance), Metzger was hosting a local access cable television show called "Race and Reason" that at one time aired in 62 cities in 21 states. WAR began publishing a monthly newspaper that proclaimed itself "the most racist newspaper on earth" ("Tom Metzger", n.d.).
- 4 The U.S. Federal Bureau of Investigation's (FBI) 1998 investigation of Curtis was named "Operation Lone Wolf" (FBI, n.d.).



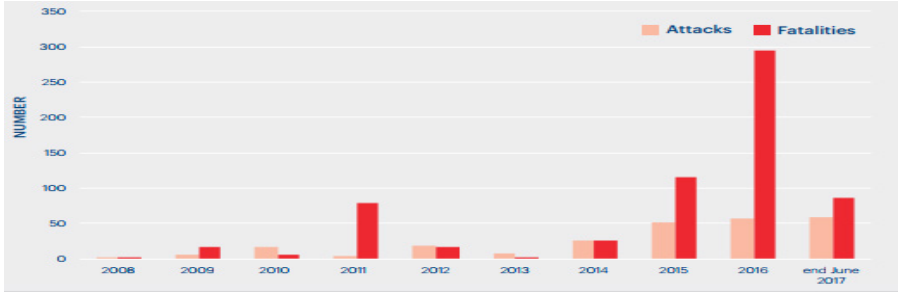
From the mid-1990s onwards, as their ideas began to spread, the number of hate crimes committed by self-styled “leaderless” rightwing extremists rose in the US (Burke, 2017).

Findings show that, lone wolf terrorism accounted for roughly 1.8 % of all terrorist incidents (198 of a total of 11,235) in 15 countries from 1968 and 2010 (Spaaij, 2012, p.27). Despite relatively low number of attacks, frequency of attacks increased sharply to the point that Department of Homeland Security (DHS, 2009) warned that “lone wolves and smaller terrorist cells embracing violent rightwing ideology is the most dangerous domestic threat in the US”. Ramon Spaaij’s data showed that between the 1970s and 2000s, the total number of lone wolf attacks per decade rose by 45 % (from 22 to 32 attacks) in the US and by a massive 412 % (from 8 to 41 attacks) in all other 14 countries (Spaaij, 2012, p.32). According to the findings, between 1968 and 2010, across the US and 14 other predominantly western countries<sup>5</sup>, of 198 lone wolf attacks 113 occurred in the United States by making up 57% of all attacks (Spaaij, 2012, p.30).

Global Terrorism Index 2017, which has used a database of 250 lone actor terrorist attacks that took place between 2008 and the end of June 2017 in OECD member countries (excluding Israel and Turkey), also indicated an increasing number of lone actor terrorist attacks in the last ten years among the OECD countries, as seen in the Figure 1. While there was only one such attack in 2008, during the first half of 2017 alone there were 58 attacks. In that period, with 81 attacks US witnessed the majority of lone actor terrorist attacks, comprising 32% of all attacks within the OECD countries. These attacks resulted in 177 deaths in the US, which accounted for 28% of total fatalities among the OECD countries. In 2017 DHS Report “unaffiliated lone offenders” listed among the “most significant near-term threat” to mass gatherings in the US (Zamost, 2017). The United Kingdom witnessed the second highest number of attacks with 47 attacks and 69 fatalities (Institute for Economics and Peace, 2017).

5 Other countries with the highest number of lone wolves during the period 1968-2010 are Germany (nine), France (seven), Spain (six), Italy (six) and the United Kingdom (five) (Spaaij, 2012, p.30).

Figure 1. Lone Actor Terrorist Attacks and Fatalities, 2008-2017



Note. Reprinted from Institute for Economics and Peace (2017), *Global Terrorism Index*, Retrieved December 1, 2017 from <https://reliefweb.int/sites/reliefweb.int/files/resources/Global%20Terrorism%20Index%202017%20%284%29.pdf>

Since lone wolf terrorism seems to be more prevalent in the US, numbers indicate the rising threat of lone wolf terrorist attacks for other geographies as well. Lone wolf terrorists present acute challenges especially on the issues of difficulty of detection, ability to launch attacks with any kind of instrument and the potential to cause high casualties, as seen in the Nice and Orlando attacks in 2016. These figures and facts clearly demonstrate not only the growing security challenge but also the necessity to address the phenomena with a deeper perspective.

## Defining Lone Wolf Terrorism

Lone wolf terrorism is a contested phenomenon lacking a clear, common definition. Similar to terrorism, its intense political nature further contributes to controversies on its definition. Not only its complex nature, but also relatively few academic studies on the phenomena make it difficult to develop a robust framework which is especially vital for both academic discussion and policy formation. In this vein, main features and attributes of the definitional discussions will be addressed in this part.

In his 1998 study, Bruce Hoffman suggested that “to qualify as terrorism, violence must be perpetrated by some organizational entity with at least some conspiratorial structure and identifiable chain of command beyond a single individual acting on his or her own” (Hoffman, 1998, pp. 42–43). However, in the present security environment it is visible

that not only collective structures but also micro-actors in an individualized form of terrorism (Spaaij, 2010, p.855) pose a growing security threat in the form of lone wolf terrorism. In order to understand this transformation, number of studies attempted to define lone wolf terrorism without reaching a consensus. Key features of lone wolf terrorism can be listed as: a) operating individually, b) operating without direct outside control or command of hierarchy (Spaaij, 2012, p.16), c) acting with ideological or political motivations (beyond personal frustration). One of a vital issue regarding the definition of the phenomena focus on the question of: how lone is the lone wolf terrorists? The differences between the responses center on the issues of; number of perpetrators engage in lone wolf attacks and the degree of external influences.

### **Number of Perpetrators**

While some of the scholars define attackers as acting alone, some others include small cells, dyads or triads in their definition of lone wolves. One of the definitions laid by Countering Lone Actor Terrorism (CLAT) project as the main outcome of the definitional workshop is (Bakker and Zuijdewijn, 2015, p.1):

Lone-actor Terrorism: The threat or use of violence by a single perpetrator (or small cell), not acting out of purely personal-material reasons, with the aim of influencing a wider audience, and who acts without any direct support in the planning, preparation and execution of the attack, and whose decision to act is not directed by any group or other individuals (although possibly inspired by others).

Consistent with CLAT's definition, Jessica Stern also includes "small groups who commit terrorist crimes, inspired by a terrorist ideology, but [do] not belong to established groups (Pantucci, Ellis, Chaplains, 2015). Van der Heide defines lone wolf terrorists as "lone operator terrorist" which includes both "the traditional individual 'lone wolf', and the smallest networks (e.g., two persons, autonomous cells, leaderless jihadism) almost undetectable by intelligence agencies; individuals part of a larger network but who solely decide, plan and perform their act, inspired rather than instructed" (van der Heide, 2011, p.7). As an example to this, 1995 Oklahoma City bombing which was carried out by Timothy McVeigh, with a logistical assistance of Terry Nichols in the preparation stage can be given. Not only this but also, the presence of evidence showing McVeigh's connection to Aryan Republican Army did not preclude the attack to be ascribed to lone wolves (Spaaij, 2012, p.18).

While inclusion of small cells or couples represents a wider interpretation of the phenomena which in some cases - such as CLAT project - aim to include broader cases for studying<sup>6</sup>, some other studies strictly exclude involvement of other actors within the definition. Mark S. Hamm and Ramon Spaaij define lone wolf terrorist as “someone who act totally alone in the commission of political violence without the aid of a second party or more, although he or she may be influenced by outside sources, including books, propaganda and media coverage of terrorists” (Hamm and Spaaij, 2017, p.24). Spaaij’s criterion excludes small group of individuals who jointly radicalize (Spaaij, 2012, p.17).

According to the discussions on CLAT Project, the number of actors is also important from the perspective of radicalization process. On the one hand “only-one” school of thought see group process as being a significant part of radicalization and mobilisation. Therefore without peers, these processes assumed to be intrinsically differently (Bakker and Zuijdewijn, 2015, p.5). However this interpretation seem to underestimate the changing nature of radicalization. For instance Hamm and Spaaij argue that for post-9/11 lone wolves, traditional loci of radicalization have been replaced by informal social networks, the civilian workplace and mass media (Hamm and Spaaij, 2017, p.63). Therefore, the extent of the impact of online community on covering part of these socialization and radicalization processes need further study. On the other hand, supporters of “more-than-one” perspective of the CLAT project discuss the issue from the perspective of detection/prevention dimension and ask for the chances that the plot can be detected by authorities. They also argue that a small cell can still be defined as lone actor terrorist if it is radicalizing on its own (Bakker and Zuijdewijn, 2015, p.5).

## **Degree of External Connection / Direction**

Another feature of the phenomena centers on the degree of connection/direction of lone wolf terrorists. In here, the question focuses on the issue of individual initiative vs. external directives (Feldman, 2013, p.276). The proponents of the “lone wolf pack” (multiple individuals forming the wolf pack) argues that this need not preclude “contact with operational extremists,” but it does exclude “a formal connection” with an established organization (Feldman, 2013, p.276). In the absence of a hierarchical organizational structure

<sup>6</sup> In CLAT Project, while consensus definition concentrate on a single perpetrator as the subject, working definition adopts a wider framework to include small cells which is found useful in data collection (Bakker and Zuijdewijn, 2015, p.9).

with command and control features, connections with other individuals are admissible under lone wolf packs. However, Spaaij defines lone wolves as operating individually; do not belong to an organized terrorist group or network and their *modi operandi* directed by the individual without any direct outside command or hierarchy (Spaaij, 2012, p.17). Since it is difficult to trace the degree of direction, extent, group dynamics and links of small cells<sup>7</sup>, then it becomes more complicated to classify them under lone wolves. Even it is getting more difficult to identify an individual as lone wolf since it carries the risk of disguising the links with a larger group. It is a fact that, under solo terrorism terrorist networks employ a strategy of “acting alone” in order to prevent detection.<sup>8</sup> Umar Farouk Abdulmutallab (the “underwear bomber”) alleged connection with Al-Qaeda networks provides an example in that case.

In considering the perpetrators operational independence from a group or network, some scholars disqualify a case as ‘lone wolf’ if the perpetrator has a previous connection to an organization /network even though the attack is planned and carried alone. In this definition, lone wolf perpetrator has no contact to terror groups in his/her entire life and therefore the individual completely acts alone. According to the Report by Danish Security and Intelligence Service which discusses the differences between solo terrorism and lone wolf terrorism, individuals can be characterized as solo terrorists simply because they have previously been in contact with other terror-related or radicalized individuals who may have affected the perpetrator, even though the attack is carried alone.<sup>9</sup> For instance how to evaluate a returning foreign fighter which once has been part of a terrorist organization, but returns alone and plans an attack is an issue of discussion (Bakker and Zuijdewijn, 2015, p.5). On the other side, some argue that despite his / her previous connections with a

7 For instance as Spaaij has mentioned in his research, homegrown terrorism involves self-radicalized and self-activated groups - often autonomous cliques- who are inspired by but have no direct contact with the terrorist networks. If a lone wolf joins an established clique or cell, then it would not be possible to classify him/her as lone wolf any more (Spaaij, 2012, p.17).

8 According to the Report on ‘Solo Terrorism and Lone Wolf Terrorism’ by Danish Security and Intelligence Service both solo terrorists and lone wolves act alone however, solo terrorists can act either under instructions from other people or on his own initiative. The individual has in varying degree contact to terror groups and/or radical environments and he/she might have participated in training camps or been in areas of conflict (Danish Security and Intelligence Service, 2011, pp.2-3).

9 In this report lone wolf terrorist is defined as having no contact to terror groups (not even historically) or any other radicalised individuals and consequently the acts are completely isolated and without instruction from any other militant individual (Danish Security and Intelligence Service, 2011, p.3).

terrorist network or organizations, it can still be considered as a lone wolf attack in the absence of any direct support on planning, preparation and execution stages.

Lone wolves act outside of the borders of command and hierarchy structures; however this does not mean that they are not influenced by external actors or extremist ideas. At the level of ideological formation, external influence employed through online and/or offline communication with outsiders, including engagement with extremist materials or “terrorist PR (Spaaij and Hamm, 2015, p.170). By providing moral and sometimes tactical support through their actions, speeches, books and Internet postings, *enablers* can indirectly influence political or ideological motivation of a lone wolf (Hamm and Spaaij, 2017, p.26). Since strategic communication<sup>10</sup> is vital for terrorist organizations to gain support of audience and recruits, then the legitimizing narrative can be influential not only in changing the belief but also the behavior of a potential lone wolf (Fink and Barclay, 2013, p.13). For Al Qaeda– inspired lone wolf terrorists, Anwar al-Awlaki, and for anti-government extremists of the post-9/11 period William Pierce, National Alliance founder and author of *The Turner Diaries*, can be listed as examples of indirect enablers (Spaaij and Hamm, 2015, p.170).

## Psychological Background

The rate of psychological disturbance among the lone wolf terrorists is one of an issue of discussion. Despite there is no unified, consistent profile of a lone wolf terrorist, it is widely argued that lone wolf terrorists suffer greater degrees of mental illness. On the issue of mental health variety of researches show different results. For instance, CLAT Project

10 Tatham defines Strategic Communication as “systematic series of sustained and coherent activities, conducted across strategic, operational, and tactical levels, that enables understanding of target audiences, identifies effective conduits, and develops and promotes ideas and opinions through those conduits to promote and sustain particular types of behavior”. In his definition Tatham emphasizes strategic communication as a way to change behavior (Tatham, 2008). In their reports, Fink and Barclay study how terrorist organizations utilize strategic communication and mention that terrorist organizations such as Al-Qaida seek to create and spread a legitimizing narrative to strengthen not only their presence but also to spur individuals or groups, so-called lone wolf terrorists or self-starter cells, to independent action. Messages delivered through strategic communication ultimately target mobilizing an audience in support of the movement’s ideology and objectives, wherever that audience may be located (Fink and Barclay, 2013, p.13). Therefore, these messages can play significant role in indirectly influencing and enabling an independent audience to act by his/her own.

found mental health disorders<sup>11</sup> in 35% of cases with variations between ideological sub-groups listed as, religiously-inspired 24%, right-wing 28% and single issue 33% (Ellis et al., 2016, p.8). It is also noted by the Institute of Medicine that “most patients with stable mental illness do not present an increased risk of violence” and “mental illness may increase the likelihood of committing violence in some individuals, but only a small part of the violence in society can be ascribed to mental health patients”. Under this information, the importance of refraining from making any causal claims about the relation between mental health disorders and violence is underlined by the Project (Zuijdewijn and Bakker, 2016, pp.7-8).

While findings on the mental health disorder of CLAT Project is interpreted as not representing a substantial deviation from the World Health Organization’s (WHO) finding that 27 % of the general adult population had experienced some form of mental disorder (Ellis et al., 2016, p.8), findings by other studies show relatively higher rate of psychological disturbance and social ineptitude among lone wolves (Hewitt, 2003, p.80). Pantucci mentions that mental problems or general social inability underlie the histories of relatively many lone wolf terrorists (Pantucci, 2011, p.34). Spaaij’s findings also support the conclusion that lone wolf terrorists seem likely to suffer from some form of psychological disturbance<sup>12</sup>. Spaaij provides five case studies regarding lone wolves’ mental state, and four of the five were diagnosed with personality disorders; four of the five case studies have experienced depression during at least one stages of their lives (Spaaij, 2012, p.50). In their study, Gruenewald, Chermak and Freilich also found that 40 % of the lone actors experienced mental illness, which was significantly higher than the 7.6 % among the group-based actors (Gruenewald, Chermak, and Freilich, 2013).

The existence of mental illness among portion of lone wolf terrorists does not mean violence perpetrated by irrational actors or “emotional” mass murderers. Rather these acts of violence launched by determined and rational individuals (Feldman, 2013, p. 281). In their definition, Edwin Bakker and Beatrice de Graaf define lone wolf terrorists through

11 According to the definition of the CLAT Project, mental health disorders include a wide range of disorders, from depression to paranoid schizophrenia (Zuijdewijn and Bakker, 2016, pp.7-8).

12 Spaaij argued that even though lone wolf terrorists are not members of terrorist organizations, they may sympathize with these movements. By referring to Post, Spaaij mentioned that these movements provide ideologies of validation and play an important role in the psychological mechanism of externalization by channeling personal frustrations and attributing responsibility for all problems to the Other (Spaaij, 2010, p.863).

rational actions targeting the whole or part of the society, despite relatively high rate of psychological disturbance (Bakker and de Graaf, 2010, pp.2-5). In his conceptualization Ramon Spaaij also excludes those violent individuals without any ideological reasoning to be considered as lone-wolves (Spaaij, 2012). Therefore, in the context of lone wolf terrorism it is necessary to focus on determined, rational actors who undertake actions with a motivation.

### **Motivations**

Complexity of different cases reveals the difficulty of clarifying motivations for lone wolf terrorists. As Spaaij mentioned, assigning purposes and motivations to individual acts of terrorists is inherently subjective and open to interpretation, especially when terrorists do not claim responsibility for the attack (Spaaij, 2010, p.857). On the other side, as it is shown by some studies, in order to legitimize their causes some terrorists can also construct political rhetoric and upgrade their violence by using a political narrative despite they are driven by personal motives (Liem et al., 2017, pp.2-3). Under these inherent difficulties, it is still necessary to discuss the extent of personal motivations and the categories of ideological / political sources within the motivations of lone wolf terrorism.

Under motivational patterns of lone wolf terrorism while some scholars discuss the role of ideological and political underpinnings, some others' identification include "purely personal matters". For instance Simon includes violence that is "not ideologically or politically motivated and classifies those who perpetrate their violence for purely personal or financial gain" as lone wolves (Simon, 2016, p. 67). Swedish Security Services also characterize some lone wolves acting out of purely personal motives, whereas some others consider themselves as part of a larger context (Swedish Security Services, n.d.). Spaaij criticizes this classification by arguing that some individuals are incorrectly classified as lone wolf terrorists when in fact their attacks were violent acts by stand-alone individuals that were carried out for reasons of personal motivation or simply with criminal intent<sup>13</sup> (Spaaij, 2012, p. 11).

<sup>13</sup> Spaaij mentions that, violence motivated exclusively by financial gain or personal vengeance should not be defined as terrorism, since tactic of terrorism has a political rather than a merely personal or criminal orientation (Spaaij, 2010, p.857).



Categorization on “political sources” also stands as a controversial issue by the nature of the phenomena. The phenomenon of lone-wolf terrorism is not restricted to a specific ideology and as Stern also argues that lone wolf terrorists form their own ideologies by combining the elements of extremist movements and personal frustrations (Stern, 2003, p.172). Those lone wolf terrorists who have a vague ideological background and often motivated by personal frustration are referred as having a “highly personalised quest for justice” by the researchers from the Fixated Threat Assessment Centre (Zuijdewijn and Bakker, 2016, s.9). On the other side, Van Buuren and de Graaf discuss about the nature of changes in manifestations of political violence as a change from ideologically motivated violence to “performative violence”. According to van Buuren and de Graaf, lone wolf violence represent “performative violence” which provides instrument for making sense of his/her existence and finding meaning in a complex world (Van Buuren and de Graaf, 2014). Through active expression, performative violence promotes construction of identity (Liem, et. al. 2017, p.3). In *Psychiatric Times* a group of psychologist also argued that Daesh has managed to successfully market violent extremism in the West by providing “existential fast food” to those young people in social transition, on the margins of society, or amidst a crisis of identity (Haqae et.al., 2015). In order to take advantage of this element, extremist movements such as Daesh both to try inspire and offer means of training for radicalised individuals through the instruments of publications, speeches, social media and propaganda videos (Pantucci, Ellis, Chaplais, 2015, p.5).

Despite the difficulty of distinguishing the boundaries between personal grievances and ideological/political sources, it is still necessary to identify ideological sources of lone wolf terrorism in order to provide a deeper insight on the issue. Motivational patterns of lone wolf terrorists include variety of ideological sources such as White supremacy, Islamism, Nationalism/separatism and Anti-abortion activism. By looking at this variety, it becomes possible to interpret on lone wolf terrorism as a tactic used by diverse ideologies (Feldman, 2013, p.281). According to the data Spaaij compiled in his research, between 1968 and 2010 main ideological sources of lone wolf terrorism in 15 countries were listed as (Spaaij, 2012, p.37):

- Right-wing extremism/White supremacy (17%)
- Islamism (15%)

- Anti-abortion (8%)
- Nationalism/separatism (7%)

In his research, Spaaij showed the increase in number of lone wolf terrorist attacks inspired by radical Islamism in recent years. He explained part of the reason for this increase as a response “to the call by al-Qaeda ideologues for individual jihad” (Spaaij, 2012, p.37). In 2014, Paul Gill, John Horgan and Paige Deckert analyzed the motivations and the antecedent behaviors of 119 lone wolves in Europe and the United States and listed ideological motivations as (Gill, Horgan, Deckert, 2014, p.429):

- Al-Qaeda (43%)
- Right-wing ideology (34% )
- Single issue (such as anti-abortion or environmental campaign) (18%)
- other (5% )

The study also showed the changing balance between these groups over time. For instance, before 2001 only 7.8% of religiously oriented lone actors engaged in terrorist actions, whereas it was 32.5% for right-wing extremists and 47.6% for single-issue offenders (Gill, Horgan, Deckert, 2014, p.429). CLAT Project which analyzed 98 lone-actor terrorist plots in Europe between 2000 and 2014 also highlighted the increase in both religiously inspired attacks and the right-wing attacks. It has underlined the significance of threat stemming from far-right lone actors and indicated that right-wing ideologies have motivated one third of lone-actor attacks across Europe since 2000.<sup>14</sup> The data set verified that 2000 to 2014, right-wing attacks caused 260 injuries and 94 fatalities, while religiously-inspired attacks killed sixteen and injured 65 people (Ellis, et.al. 2016, s.9).

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<sup>14</sup> It is also noted that, there are substantial under-reporting of far-right violence perpetrated by lone actors in several European countries. Numerous countries in the database which exhibit a strong cultural or political presence of extreme right-wing elements have ostensibly produced very few cases of attacks motivated by right-wing ideology. The manner of reporting right-wing crime in national media is offered as one possible explanation of this situation. (Smith, Barton and Birdwell, 2016, pp. 2-3)

*Table 1. Casualties from Lone-Actor Terrorism Plots*

<b>Ideology</b>	<b>Plots</b>	<b>Attacks</b>	<b>Injured</b>	<b>Fatalities</b>
<b>Ethno-National and Separatist</b>	2	2	1	0
<b>Left Wing and Anarchist</b>	3	3	29	8
<b>Religiously Inspired</b>	36	27	65	16
<b>Right Wing</b>	31	17	260	94
<b>Single Issue</b>	5	5	18	19
<b>Other</b>	21	18	76	58
<b>Total</b>	<b>98</b>	<b>72</b>	<b>449</b>	<b>195</b>

*Note. Reprinted from Clare Ellis et. al. (2016), "Lone-Actor Terrorism Final Report", Countering Lone-Actor Terrorism Series No. 11*

The CLAT database listed the motivations of the religiously inspired attacks as; taking revenge for political action, such as Western Europe's foreign policy in the Middle East in the aftermath of 9/11, the national government's support for Israel, the treatment of terror suspects imprisoned in Abu Ghraib or retribution for cartoons that depicted the Prophet Muhammad (Ellis, et. al. 2016a, p12). On the other side, the majority of the right-wing perpetrators motivations suggested as anti-immigration or Islamophobic beliefs, which are supported by the notions of white supremacy as it is seen in the attack by Anders Breivik. The severe threat of a violent far-right attack require more scientific research and responsive policies especially, in a current state of refugee crisis which has affected all European countries (Smith, Barton and Birdwell, 2016, p.2). Despite the lethality and the danger of rising right-wing violence which is indicated by various researches, more attention has been paid to religiously-inspired violence especially under Islamic fundamentalism. As it is also mentioned in CLAT project the media devotes significant coverage to a rise in threat levels relating to the threat of Islamist attacks, but rarely for far-right attacks (Smith, Barton and Birdwell, 2016, p.2).

EU Terrorism Situation and Trend Report 2017 (TE-SAT) by Europol, which provided an annual review of trends in terrorism, verified that EU faces a range of terrorist threats and attacks of a violent jihadist nature, from both networked groups and lone actors (EUROPOL, 2017, p.6). In a total of 142 attacks as reported by eight Member States, 142

victims died and 379 people were injured. According to the Report, nearly all reported fatalities and most of the casualties were the result of jihadist terrorist attacks (EUROPOL, 2017, p.6). On the other side, attacks carried out by left-wing violent extremists have been on the rise since 2014 and the largest number of attacks in which the terrorist affiliation could be identified were carried out by ethno-nationalists and separatist extremists (99) and the number of jihadist terrorist attacks decreased from 17 in 2015 to 13 in 2016, of which 6 were linked to the so-called Islamic State (EUROPOL, 2017, p.10). In outlining general trends in the first pages, despite the decrease in number of attacks by jihadist terrorists and increasing number of attacks by ethno-nationalist and separatist extremists, disproportionately vast place has been dedicated to underline jihadi terrorists where as only final parts left to note increasing stream of violent assaults by right-wing extremist individuals and groups targeting asylum seekers and ethnic minorities in Europe (EUROPOL, 2017, pp.5-8). According to the Report, these assaults however do not generally qualify as terrorism and are therefore not included in the numbers of terrorist attacks being reported by Member States, with only one exception in 2016, reported by the Netherlands. As Anthony Cordesman also criticized, the TE-SAT Report understates the broader threat posed by other extremists acting out of racism or religious motives like antisemitism, by not counting most hate crimes as forms of terrorism (Cordesman, 2017).

Despite the fact that lone wolf terrorism not only motivated by religious extremism (in jihadist nature as it is specified in the Report) and includes various ideologies, in TE-SAT Report lone actor attacks studied “only” under the subtitle of Jihadist Terrorism (EUROPOL, 2017, pp.25-26). In the following parts of the Report, Ethno-Nationalist and Separatist Terrorism, Left Wing and Anarchist Terrorism, Right-Wing Terrorism, Single Issue terrorism are all studied under the acts of groups and individuals rather than being studied on the issue of lone wolf terrorism. In these parts, only few references given to lone actors and the discourse mostly centred upon “groups” and “individuals.” By looking at the Report, it is possible to say the issue of lone wolf terrorism only concentrated on the part of Jihadist Terrorism, which helps to construct the image of lone wolve as an instrument/tactic of only al-Qaeda, ISIS or Jihadist terrorism.

It is possible to see reflection of this approach also in academic circles. For instance, Pantucci explore the phenomena as a sub-set of violent Islamist terrorism and categorizes lone wolf terrorists as “individuals pursuing Islamist terrorist goals alone, either driven

by personal reasons or their belief that they are part of an ideological group (meaning a group of individuals who all claim to believe or follow a similar ideology: in this context, those who might be described as either members or followers of Al Qaeda or adherents to Al Qaedaism)”(Pantucci, 2011, pp.4-9). Rather than projecting a complete overview of the issue, this view contributes to construct lone wolf terrorism within a certain framework and thus withhold global society from understanding the collective threat posed by lone wolves with diverse ideologies and motivations.

### **Constructing a Phenomena of Lone Wolf Terrorism**

As Spaaij and Hamm have mentioned, the label “lone wolf” is a construct of the media and of radical political actors themselves, rather than a social science concept or legal terminology (Spaaij and Hamm, 2015, p.169). Interpretation occupies vital role in the construction of this discursive phenomena. Such interpretation is not unbiased but rather, consciously functions with an aim of manipulating perceptions to promote certain interests and policy implications (Turk, 2008, p.491). In this process political actors/policies and media play significant roles in meaningfully framing the phenomena.

### **Political Actors and Policies**

On the role of political actors and policies, some argues that the language used by politicians frame the phenomena in such a way to legitimize the narratives of internal enemy or to obscure other ideological sources - such as right-wing extremism - of the lone wolf terrorism. For instance, Jean Pierre Filiu mentioned that lone wolf terrorism is “an intellectual creation that appeared in the United States as part of the Bush Administration’s global war on terror’ in 2001.” Filiu pointed the instrumental role of the concept in generating a portrayal of an internal enemy, who is elusive and justifying draconian policies like the Patriot Act (Moutot, 2015). On the other side, Caschetta criticized this view by claiming that, the term predates the Bush administration and became a cliché when the Obama administration launched the “Lone Wolf Initiative.” According to Caschetta the term has flourished under Obama, partly because it offers a way to discuss Islamist terrorism without mentioning Islam (a priority) (Cascetta, 2016).

Constructing terrorism requires not only an examination of terrorists, but also what is done to them before and after they decide to act (Englund, Stohl, and Burchill, 2016, p.5). As

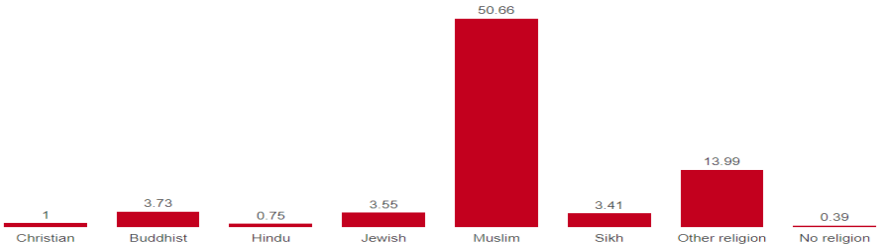
Lisa Stampnitzky suggests, there would be no definition of terrorism without counter-terrorism (Englund, Stohl, and Burchill, 2016, p.5). Therefore it is important to understand the language used to frame narrative of politicians and counter-terrorism policies to be able to explore the ways lone wolf terrorism is constructed. In most of the cases, the usages of the phenomena by politicians reflect double standards on social identities. Discriminative narratives not only serve to alienate people but also contribute to a radicalizing environment. As Lewis W. Dickson mentioned in his study, in counteracting lone wolf terrorism counter-extremism measures with assistance from society, religious communities and the authorities occupy vital place (Dickson, 2015, p.37). Societal response is important especially for detection since it increases the possibility of behavior being reported and the potential attack disrupted (Pantucci, Ellis, Chaplais, 2015, s.15). For instance, David Cameron's offensive narrative on the dangers posed by those in the UK who "quietly condone" ISIS militants' extremist ideology not only weakened the ground for "Counter-Extremism Strategy" but also raised further questions regarding the target of the strategy ("Cameron Warns", 2015). In UK's Counter-Extremism Strategy, the government vaguely described extremism as "the vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty and the mutual respect and tolerance of different faiths and beliefs. Calls for the death of members of British armed forces also included in the definition" (Travis, 2015). The plan included banning orders for non-violent individuals and organizations whose politics are considered unacceptable; physical restriction orders for non-violent individuals deemed "harmful"; powers to close mosques; and vetting controls on broadcasters accused of airing extremist material (Milne, 2015).

Stampnitzky suggests that the best definition of terrorism is how it is defined in practice; thus, counter-terrorism "defines" terrorism (Englund, Stohl, and Burchill, 2016, p.5). In the case of UK, restriction of rights and liberties legitimized by both an existential threat of Islamist ideology and under the narrative of British values which is vaguely drawn. With its own perception of British values, the threat of Islamic extremism is constructed and through its representation security discourse is formed. However, these restrictions not only faced criticisms from Muslim society but also questioned by National Secular Society and the Christian Institute which have launched the Defend Freedom Campaign that is backed by English PEN, Big Brother Watch, the Peter Tatchell Foundation and the Manifesto Club (Tarbush, 2015). Another controversial element of the strategy is the "Prevent Duty" under which schools, universities, further education institutions, local authorities,

prisons and the National Health Service (NHS) have a legal obligation to prevent people from being drawn into terrorism. In order to take action, authorities are entitled to identify and report individuals seen as “vulnerable to radicalization”, or engaging in extremism (Department of Education, 2015) which is perceived as a way of spying on students, schoolchildren and individuals in the Muslim community (“State of Emergency”, 2016.) and therefore criticized with its adverse effect of alienating part of the society.

On the other side, the extent of counter-extremism measures to involve right-wing extremism becomes an issue of concern, since right-wing extremism constitutes one of a significant ideological source of lone wolf terrorism. According to the data obtained from National Police Chiefs Council (NPCC) of the UK, under deradicalization programme called Channel which deals with those people suspected of being drawn into extremism, Muslims aged under 18 referred to Channel 50 times as likely as Christians to be referred to Channel between March 2014 and March 2016. Numbers show that off the 1,747 under-18s referred to Channel between March 2014 and March 2016, 1,194 of them (68%) were Muslim (“Far Right Threat”, 2016).

*Figure 2: Under-18s Referred to Channel, by Religion*

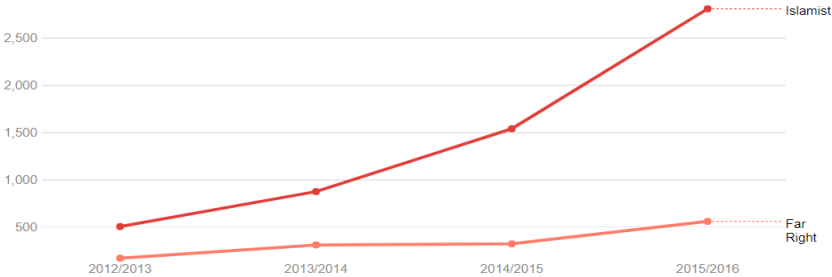


*Note. Reprinted from the Conversation, 2016, Retrieved October 29, 2017 <https://theconversation.com/far-right-threat-has-slipped-under-the-radar-of-a-counter-extremism-strategy-targeting-muslims-69605>*

Another NPCC data shows that between March 2012 and March 2016, the vast majority of referrals were for “Islamist” extremists. During this period, the number of “Islamists” referred to the Channel increased at a much higher rate than referrals for the “far right”. In 2015-16, the first financial year in which the Prevent Duty applied – there was an 82% increase in referrals for “Islamists” and a 74% increase in referrals for the “far right”. But still the gap between the two is visible as the graph below shows. By looking at these findings,

it is possible to say that policies under counter-extremism strategy which is launched to address radicalization disproportionately focus on individuals with Muslim backgrounds.

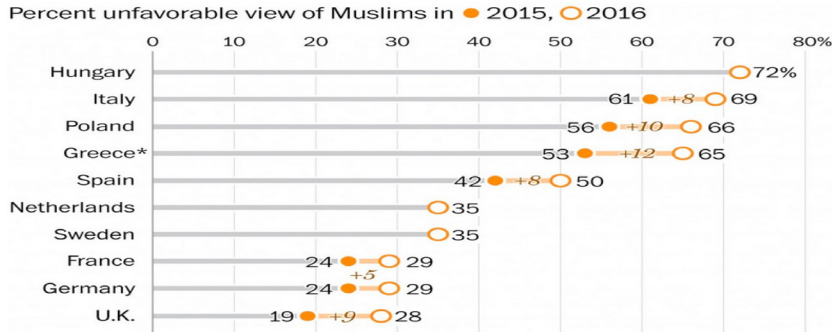
Figure 3: Islamist and Far-Right Referrals to the Channel Programme



Note. Reprinted from the Conversation, 2016 Retrieved October 29, 2017 <https://theconversation.com/far-right-threat-has-slipped-under-the-radar-of-a-counter-extremism-strategy-targeting-muslims-69605>

While state policies heavily target Muslim communities on the fight against extremism, data indicate a crucial rise of unfavorable view of Muslims in Europe and increasing number of hate crimes against the Muslims in the U.S.

Figure 4: Unfavorable Views of Muslims in Europe



Note: Greece was not surveyed in 2015, so the figure used here comes from 2014.

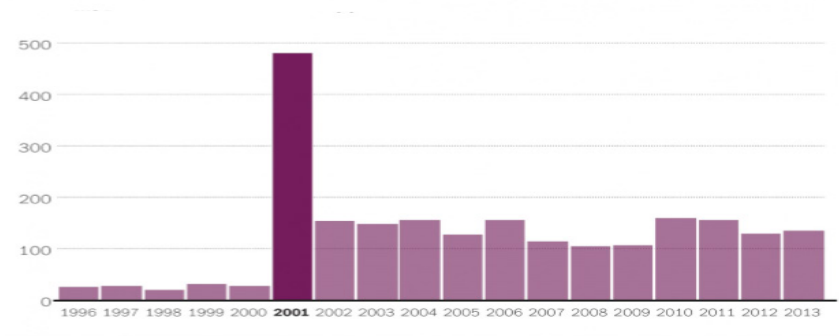
Note. Reprinted from Noack and Amur (2016), A Year After Paris Attacks Europe's Extremism Problem Shows No Sign of Going Away, the Washington Post, Retrieved November 20, 2017 <https://www.washingtonpost.com/>



*news/worldviews/wp/2016/11/13/a-year-after-paris-attacks-europes-extremism-problem-shows-no-signs-of-going-away/?utm\_term=.957919c6384b*

According to the data by FBI, the number of reported hate crimes<sup>15</sup> in 2016 increased by nearly 5% to more than 6,100,<sup>16</sup> and hate crimes against Muslims show dramatic increase with a five times higher than the pre-9/11 rate (Lopez, 2017). In the US, hate crimes based on race were by far the biggest category (nearly half were anti-black crimes) and hate crimes motivated by religion were the second biggest category, making up more than 20% of reported incidents (Lopez, 2017).

*Figure 5: Hate Crimes Incidents against Muslims in the US, by year*



*Note. Reprinted from Ingraham (2016), Anti-Muslim hate crimes are still five times more common today than before 9/11, the Washington Post, Retrieved June 18, 2017 [https://www.washingtonpost.com/news/worldviews/wp/2016/11/13/a-year-after-paris-attacks-europes-extremism-problem-shows-no-signs-of-going-away/?utm\\_term=.957919c6384b](https://www.washingtonpost.com/news/worldviews/wp/2016/11/13/a-year-after-paris-attacks-europes-extremism-problem-shows-no-signs-of-going-away/?utm_term=.957919c6384b)*

The US, who has witnessed an estimated 40 % of the world's lone wolf terrorism attack (Hamm and Spaaij, 2017, p.261), not only faces the challenges of attacks but also the issue of how to identify these attacks. Definition and construction of the phenomena is

<sup>15</sup> In its official website FBI defines hate crime as a traditional offense like murder, arson, or vandalism with an added element of bias. For the purposes of collecting statistics, the FBI has defined a hate crime as a "criminal offense against a person or property motivated in whole or in part by an offender's bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity (FBI, n.d.)

<sup>16</sup> The difference between hate crimes and terrorist is principally that hate crimes focus on the target of the attack, and terrorism on the motive, which is to cause fear, pressure, intimidation and influence changes (Karadima, 2016, p.103).

vital not only for normative implications but also for diverging legal consequences which stem from different classifications under the acts of hate crimes or terror. When the issue is categorized under terrorism, its goals are delegitimized. The issue is heightened to a level that needs to be destroyed rather than to be managed and terrorists are to be hunted, rather than negotiated with (Hodges, 2011). In the US, the debates center upon the double standards that the attacks more likely to be framed as being linked to Islamic terror when the perpetrator is Muslim, and more likely to emphasize the attacker's personal life and mental instability if the perpetrator is not Muslim (Powell, 2011).

The double standard in labeling perpetrators surfaced within the discourses of politicians. For instance, for Charleston Church shooting by Dylan Roof, a white supremacist<sup>17</sup>, which was codified as a hate crime by the police, South Carolina Senator Lindsey Graham described the perpetrator as “one of these wacked out kids” and mentioned that he does not think the issue is anything broader than that (Chong, 2015). On the other side, when asked about Las Vegas shooting Clark County Sheriff Joe Lombardo replied that this was not an act of terrorism, it was a local individual, however he labeled Stephen Paddock, the perpetrator, as a lone wolf by stating that a motive for the shooting had not been determined (Bayoumi, 2017, Bacon and James, 2017). In his interpretation, Lombardo not only labeled the perpetrator as lone wolf in the absence of information regarding the motive but also constructed the lone wolf phenomena as something outside the framework of terrorism by mentioning that the act was not a terrorist one. Diverging statements on the Minnesota Mosque bombing also provided another example of the usage of language and representations by politicians. While Minnesota governor Mark Dayton called it “an act of terrorism”, Sebastian Gorka, a White House adviser has chosen to interpret on the attack as fake. Sebastian Gorka represented the crime as one of these traditional offenses as hate crimes, by ‘right wing individuals’ and went further to emphasize that the issue was propagated by the left. (Bayoumi, 2017). Gorka's interpretation of the phenomena not only served to frame the phenomena but also served to marginalize alternative accounts and the critics against his narrative (Jackson and McDonald, 2014, p.3).

Construction of the phenomena is instrumental for politicians, since they represent the issue with the aim of gaining approval of the audience/the public in order to legitimize

17 Nine people have been shot dead at a historic African-American church in Charleston, South Carolina, by a white-extremist lone wolf terrorist. Charleston shooting: nine die in south Caroline hate crime (Charleston Church Shooting, 2017).

certain policies. Donald Trump's diverging statements on a number of attacks offer examples of the case by reflecting a deterministic approach on labeling a perpetrator (even without sufficient evidences) in parallel to his/her identities. While Trump only expressed his "warmest condolences and sympathies to the victims and families of the terrible Las Vegas shooting" (King, 2017) without giving any reference to the perpetrator and the act in his initial tweets, his narrative impatiently focused on the 'threat' and the perpetrators even before any suspect publicly identified on the London subway attack. In his tweets regarding the London subway attack, Trump immediately labeled the attackers as "loser terrorists" and renewed his call for a travel ban on six Muslim majority countries (Lavender and Herreria, 2017). However, in his subsequent speeches on the Las Vegas attack, Trump has chosen to evaluate on the issue outside the framework of terrorism and humanized the perpetrator by characterizing him as a sick and demented man (Las Vegas Shooting, 2017). Just after the Louvre attack in where a man armed with two knives and a suitcase lunged at a French soldier, Trump was again impatient to tweet and centered his narrative on terrorism and US response. In his tweet he identified the attack as a new radical Islamic terrorist attack and the necessity of being smart in response. Trump continued his tweets the next day by focusing on the issue of travel ban and further securitized the issue by declaring that the US needed to keep the 'evil' out of the country (Revesz, 2017). Despite his impatience to tweet and comment on the attacks in the West, especially if those are perpetrated by Muslim or non-white perpetrators, Trump's failure to make any statement in one week about Quebec Mosque shooting in where the white man, who supported Trump and far-right French politician Marine Le Pen, shot dead six Muslims, sparked criticisms regarding his approach to the issue.

## **Media**

The reality created by media results in lasting images and stereotypes about groups, religions, and people (Maslog, 1971). How media choose to frame the event is important since it has the ability to alter public opinion and its perception of the world. In US, there is a discussion that the media represented the lone wolf as a person acting outside the framework of terror cycle and the language intentionally used to describe white supremacists in order to escape calling them terrorists. With this construction the perpetrator is humanized and called sick and represented as a victim of mistreatment or inadequate mental health resources (Butler, 2015). Therefore rather than being depicted as a threat to the

society /values or part of an existential threat - such as Islamic extremism- which need to be destroyed, the act is normalized and the perpetrator is socially constructed as a part of society that needs to be managed.

In their study Connor Huff and Joshua Kertzer examined how public defines terrorism and they suggested that when the perpetrator described as Muslim, it increased the likelihood that an incident will be classified as terrorism (Huff and Kertzer, 2016, p.21). According to a study by Quartz, which reviewed the language used to describe the attackers of 27 mass shooting in US between 2012 and 2017<sup>18</sup>, the term “lone wolf” was 10 times more likely to be used about a white mass shooter than a non-white mass shooter (Zhou, 2017). In the same study, it is also suggested that “terrorism” was mentioned four times more frequently in mass shootings involved non-white killers than those with white killers. In their research regarding why some terrorist attacks receive more media coverage than others, Kearns, Betius and Lemix found that social identity is the largest predictor of news coverage. They suggested that attacks by Muslim perpetrators received, on average, 449% more coverage than other attacks. Their data show that while, Muslims perpetrated 12.4% of the attacks yet received 41.4% of the news coverage (Kearns, Betus and Lemieux, 2017). Disproportional media coverage serve to strengthen stereotyping which reinforces cultural narratives about what and who should be feared in society, despite the figures show more Americans killed by right-wing lone wolf terrorists (Kearns, Betus and Lemieux, 2017, p.11).

Examples of several media coverage of the attacks show that, in describing the attacks the language centered on the stereotypes which is supported by the narratives of politicians and accepted by the public (or most of the public). Therefore the process of communication served to construct and reproduce the phenomena in each cases. For instance, the USA Today declared the Las Vegas shooting as one of a lone wolf attack with its headline in its Twitter account (USA Today, 2017). However, within the news in its official website rather than giving reference to terrorism, Paddock was identified as a gunman, the act was characterized as a mass shooting and the language centered around the official statements such as President Trump’s calling of “an act of pure evil” and Las Vegas Mayor Carolyn Goodman’s characterization of “a crazed lunatic full of hate.” In their study Huff and Kertzer showed that incidents perpetrated by individuals with mental illness are

18 Regarding the usage of the term lone wolf, it is also mentioned that the media often adopted a more liberal definition of the term when calling a mass killer a lone wolf (Fallman, Aronsen, Pan, 2017).

significantly less likely to be perceived as terrorism (Huff and Kertzer, 2016, p.22). Therefore attaching mental illness and describing white lone wolves as “lunatics” not only humanize them but also detach “crazies” from acceptable right-wing and racist currents in the public discourse (Chen, n.d.). As Kimberly Powell mentioned in her study, the act is narrated as a lone act of a troubled individual versus part of the actions of a terror cell, thus not a future threat to safety in the United States (Powell, 2011, pp.105-106). With this rhetoric, a safe zone promoted for the right wing extremism in order to escape from being categorized under the conceptualization of a “threat”.

As Ramon Spaaij has mentioned, media coverage not only influence construction of a phenomena but also have an enabling effect across all categories of terrorism, be it committed by large groups or loners (Hamm and Spaaij, 2017, p.152). For instance, Yassiene Salhi, the French lorry driver who had decapitated his boss, told interrogators that he was interested in provoking a “media coup” making a name for himself in front of an audience of millions (Ramdani, 2015). Therefore, in addition to copycat effect, media can serve to publicize and disseminate the messages of the lone wolves and bring fame for them and their causes. In order to limit this effect of media and the fame-seeking attackers’ competition in maximizing victim fatalities, number of scholars and law enforcement professionals jointly published an open letter in the aftermath of Las Vegas shooting and asked media to stop publishing the image and the name of the attacker (Don’t Name Them, 2017).

## **Conclusion**

In recent years, the incidence of lone wolf terrorism has shown a steady increase and became an issue of growing concern. Despite the fact that the phenomena is not a new one, its complex and political nature further complicated the disagreements on which basis to define lone wolf terrorists. While discussions focus on a variety of factors such as number of perpetrators, psychological and motivational patterns, the hybrid nature and the societal repercussions of the issue seem to arise as the common factors.

In the age of growing challenge of micro-actors, lone wolf terrorists pose a security threat that transcends their direct impacts. Repercussions of these attacks become more visible in the long run by influencing societal and political dynamics. Politicians and media occupy significant parts in this process through their usage and construction of the phenomena by labelling and delegitimizing the actors and the acts. The context and the narrative

used to interpret these actors not only serve for definitional purposes but also instrumental in implementation of certain policies. Restricting lone wolf terrorism to specific ideology such as radical Islamism, not only distract attentions from the rise of other ideological/political sources of extremism such as right-wing ideology but also disrupt capacities of prevention and eradication in countering this unpredictable threat. Since success of counter-extremism measures depends on cooperation of society, narratives and stereotypes targeting part of the society is likely to contribute to further alienation and divisions within the society. While selective usage of the term that focus on the identities of perpetrators falls short of understanding and responding to the threat, stereotypes or counter-extremism measures that offend part of the society further contributes to the narrative of those enablers who can provide inspiration to lone wolf terrorists in the process of radicalization. As a result, the success of the counter-measures will likely to depend on the context of a broadened, inclusive and multi-faceted security understanding in the light of these factors of transforming security environment.

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# 3

## RUSSIA'S DOMESTIC FACTORS IN ITS FOREIGN POLICY

*Iana Shchetinskaia*

### ***Abstract***

*A growing number of research works on international relations and political science argue that domestic politics is typically an important part of the explanation for states' foreign policy decisions, and seeks to understand its influence more precisely (Fearon, 1998). The question of the interplay between the domestic influences on foreign policy emerges in the various analyses of specific countries. However, one might notice that often when it comes down to analyzing Russia's foreign policy, a number of think tank experts and journalists draw conclusions about the scope of the "Russian threat" focusing on the personality of the Russian President and leaving other domestic factors almost completely out of the picture. This research focuses on a few domestic economic, demographic, and political limitations to Russian foreign policy decision-making, and argues that all these factors have been affecting each other. It looks in particular at national economic (structural and institutional constraints, foreign policy expenditures, indicators from the federal budget) and demographic (demographic structure, employment and income patterns, pensions, data on public opinion and the recent protest activity) trends as limitations to some ambitions V. Putin might have. It also argues that the formal and informal power relations (interest groups and "state-private partnerships") in Russia constrain Putin's ability to make foreign policy decisions unilaterally. As a result of this analysis, I outline policy recommendations that might be considered by international actors in the future. Thus, this interdisciplinary analysis attempts to dive deep into a country's domestic policy to better understand what its preferences and likely actions are.*

### **Introduction**

In 2013 the Brookings Institution Press released a publication later named one of the best "Financial Times" books. The publication under the title "Mr. Putin: Operative in the Kremlin", written by a former policy advisor Fiona Hill and an economist specializing in Russia, Clifford Gaddy, has gone a long way in describing six different identities of Putin,

and analyzing the ways the former KGB agent perceives the world around him (Hill & Gaddy, 2013). This work was expanded into a new edition in 2015, featuring five new chapters and reiterating the narrow focus on the personality of the Russian President. On December 30, 2016 The Heritage Foundation blamed President Obama on Twitter for his foreign policy course with Russia, saying that: “Vladimir Putin likes strength and consistency”. The same year a policy adviser and the director of the Allison Center for Foreign Policy Studies at The Heritage Foundation, Luke Coffey, asserted that the U.S. needs to have a comprehensive strategy with Russia (Coffey, 2016). The rest of his analysis, however, was almost exclusively devoted to the “czarist” ambitions of Putin.

A large number of think tanks analyses and media articles under catchy titles with pictures of a shirtless Russian president inevitably make the reader think that Russia's domestic and foreign policy is all about Putin's thoughts, likes, and dislikes. When it comes down to analyzing Russian foreign policy, think tank experts and journalists often draw conclusions about the scope of the “Russian threat” focusing on the personality of the Russian President and leaving other domestic factors mostly out of the picture. Arguably, President V. Putin's domination of Russia's politics, in combination with the long-term stability of the regime, has contributed to the conceptual gap in analyzing the domestic politics variable in Russia's foreign policy. However, despite of Russia's hyper-personalized leadership system, its domestic politics is a pluralist arrangement (Hill, 2016). This pluralism remains limited to actors with concentrated political and economic resources (Kaczmarek, 2014). This research will analyze domestic political and economic constraints that affect Russia's foreign policy course, specifically its willingness to pursue expansionist politics in Europe and its possible implications for the US and the EU foreign policies.

There are a few scholars and journalists who had actually looked into the issue of the interplay between the domestic politics and foreign policy in Russia. The important problem here though is that the majority of works dedicated to internal factors in Russian foreign policy were written and published before the annexation of Crimea, crisis in Eastern Ukraine, and the “new Cold War” between the US and Russia (e.g. McFaul, 1997; Monaghan, 2008; Bukkvoll, 2003; Charap, 2007; McFaul & Stoner-Weiss, 2008; Malcolm, Pravda, Allison & Light, 1996). Therefore, there is a conceptual gap in understanding the role of domestic politics in Russia's foreign policy decisions and the possible implications of this relationship.



## **Literature Overview**

According to Robert D. Putnam: “Domestic politics and international relations are often somehow entangled, but our theories have not yet sorted out the puzzling tangle” (Putnam, 2006). Yet, theories serve as important lenses that help us look at domestic and foreign policies and understand what exactly is missing in each of those theories. Frieden and Rogowski (1996), for example, talk about the impact of the international economy on domestic policies, which in turn, might affect international relations. They focus on how globalization and integration affect domestic policies, politics, and institutions. Garrett and Lange (1996) address the so-called basic understanding of the relationship between the changes in the international economy, domestic institutions, and political outcomes. These changes in preferences, in turn, create changes in constraints on macroeconomic performance and change in distributional pressures for policy.

A number of authors talk about how international relations and geopolitics. Coming from the neorealist perspective, Waltz (1979) asserts that the anarchical international relations make states pursue security more than anything else. Mearsheimer’s (2001) perspective is similar to the one of Waltz. However, in his analysis of the international relations he puts more emphasis on the notions of competition and hegemonic ambitions of the states. Fearon (1998) finds Waltz’s argument about the anarchical condition of the international relations that inevitably forces states to put a high premium on survival, to be highly problematic. He asserts that the assumption that states typically seek to survive as independent political units is a reasonable assumption on which to build an IR theory, but it is not a consequence of anarchy or international structure. Bueno de Mesquita & Lalman (2002) find the continued dominance of Waltzian realism “odd.” They argue that long before realist views came to dominate debate there were ample instances of states that died, their leaders having committed “national suicide”. To them, leaders are the ones who choose actions. Fearon (1994) looks into how the “audience costs” might change the calculus of the domestic actors. According to him, democracies are more likely to communicate their intentions and to make international commitments. Consequently, the security dilemma may be somewhat moderated between them.

## **Russia's Motivations in the Foreign Policy Decision-Making: the Debate**

The link between domestic factors on Russian foreign policy is often overlooked. A lot of research is devoted to selectively analyzing Russian domestic phenomena (like the economic development or political system) without looking into the possible foreign policy implications of it (e.g. Rapoza, 2014; Inozemtsev, 2016; Kolesnikov, 2017; Smith, 2016). Others focus on the power and personality of V. Putin and argue that Russia is essentially a “deadly and dysfunctional empire” characterized by his unchecked power (Evans, 2008; Dejevsky, 2017; Hill & Gaddy, 2013; Rose, 2016; Hill, 2016; McNabb, 2016; Lee Myers, 2015; Nalbandov, 2016; etc.). While these pieces make valid points about the fact that Vladimir Putin is a key political figure in Russia, they tend to overlook the complexity of competing interests within the country, and their impact on the decision making process. For example, Steven Lee Myers in his book “The New Tsar: the Rise and Reign of Vladimir Putin” argues that Putin has consolidated power within his own hands to become “the living embodiment of Russia’s stability”. He talks about how Putin brought down the oligarchs in the 1990-2000s. However, if Putin did eradicate the oligarchs and started ruling the country singlehandedly, how do we explain the political and economic power of the cronies around him nowadays? Dawisha (2014) talks about kleptocracy in Russia, emphasizing the corrupt networks around Putin, where he is a primary beneficiary. She concentrates more on the domestic aspect of the power-property relationships in Russia, and not on their influence on Russia’s foreign policy. Others (e.g. Noel, 2009; Kanter, 2016; Maio, 2016) touch upon the domestic factors in Russia’s foreign policy by analyzing energy trade between Russia and the EU. For the purposes of this paper I did not focus too much specifically on the influence of oligarchs on Russia’s domestic and foreign policy. Instead, I provide a few examples of how the state monopolies shareholders affect domestic and foreign policy through their contracts and lobbying activity.

Often the argument that Putin is in the free reign is reinforced by the argument that Russian population has been notoriously passive and willing to put up with a lot of misfortunes rather than challenge the existing political culture (Morozov, 2012; Smith, 1999). While it is true that such concepts as freedom of speech and representation in the parliament have been quite abstract for the majority of the Soviet and later Russian population, this research argues that this situation is and will be changing, and it looks on the recent demographic trends and popular dynamics in Russia.

The other two most widespread theoretical lenses used for looking at Russia's policy choices are the constructivist and the realist ones. While they focus on very important aspects of Russia's policies like its ideology, historical context, and geopolitical interests, they tend to overlook the dynamics of domestic economic and demographical trends in Russia that potentially shed light on its domestic and foreign policy choices (Urnov, 2014; Hermes, 2014; Tsygankov, 2005). Thus this research can contribute to the existing conceptual gap in the academic literature.

### **Russia's Power Structures: the Analysis**

Since the collapse of the Soviet Union, Russia has undergone substantial political transition. The early post-Soviet period was a time of relative political openness. Over the years, however, rather than building on the late-Mikhail Gorbachev's and early Boris Yeltsin's achievements, Russia's democratic development started faltering. Yeltsin's political choices and weak leadership played an important role in this process, as did the adoption of a "super-presidential" constitution, which put in place the inauspicious political structure for a President and a relatively ineffective legislature. This framework, along with a rather weak federal system, paved the way for Vladimir Putin to centralize power. Petrone (2011) suggests that in sharp contrast with the Yeltsin presidency, Putin launched a process of "state-ness recovery", meaning reviving the ability of the central authority to exercise command over the social and economic realms. Some scholars (e.g. Olikar, 2009; Ledeneva, 2013; Hill, 2005; Monaghan, 2012) use the term "*vertikal vlasti*" ("the power vertical") to describe the concept Putin introduced to restore the centralization of the power of the presidency and the federal central institutions. While Putin, unlike Yeltsin, managed to achieve a relatively high level of centralization of the executive power, it would not be accurate to assume that Russia's current domestic and foreign policy have been and will remain pre-determined by one person. Some experts even question the existence of the power vertical in Russia in its pure form and argue that Putin's domestic policies failed to retain his monopoly over resources and institutions (Capelli, 2008, Kononenko & Moshes, 2011).

As of 2017, one can observe that Russian domestic politics is of a pluralistic nature. Partial liberalization of prices and trade that dates back to 1992, and weak checks and balances triggered the situation where instead of having parties with multiple agendas representing different social strata, Russia has got informal interest groups that essentially have

consolidated both political and economic power in their hands. These interest groups include big business, the energy sector, state-owned enterprises, the military and the security services. All these actors have made Russia's domestic and foreign policy goals more diversified. While it does not seem possible to examine all of the power relations that exist in Russia and affect its policies, this paper focuses on Russian energy monopolies that arguably constitute one of the most vivid examples of involvement in formulating domestic and foreign policy decisions.

Russian energy, transportation, and technology monopolies are tightly interconnected with Russian state authorities. For example, Rosneft, a company that manages 259 of 301 oil enterprises operating in Russia, is essentially a state-run company, but it has a lot of autonomy. The state-owned corporations like Gazprom, Rosneft, and others formally operate without government control, pursuing their own interests, but they still can be considered, using Matthews' (1997) term, "non-institutional, shifting networks" that assume some of the state power. For example, the Chairman of Rosneft's Board of Directors, Igor Sechin, has a close relationship with the Russian President. Just like at Rosneft, the head of Gazprom is seen as a political appointment. Alexei Miller, the Gazprom CEO (since 2001), Deputy Chairman of the Board of Directors (since 2005) and Dmitri Medvedev, Chairman of Gazprom's Board of Directors (since 2000) are both seen as some of Putin's most trusted people, and this list goes on (Olsen, 2013). Their actions are often driven by material assets, rather than beliefs and ideologies. One of the examples of Russia's power structures influencing foreign policy decisions was the lobbying activity of energy and business institutions, which temporarily blocked Russia's economic integration with the rest of the world and opposed World Trade Organization (WTO) membership (Kaczmarek, 2014). It is evident that their activities were motivated by the fact that at the time Russian companies were uncompetitive, and not by their ideological hostility to the market or capitalism in general, since they gained a lot from the free market.

Another example of Rosneft altering Russia's foreign policy plans deals with Russia's energy diversification to Asia. The idea of Russia's energy export diversification to Asia as one of the major goals of the national energy policy has been in place since the early 2000s. This goal was reemphasized more clearly in the Energy Strategy 2035 that has been endorsed since the early 2000s as well (Shadrina, 2016). According to this strategy, Russia is taking steps towards the desirable result of diversification of its energy exports to Central

Asia, East Asia, and Southeast Asia (The Ministry of Energy of the Russian Federation, 2017). In reality, however, Russia has been moving towards solely depending on only one Asian customer – China. The oil giant Rosneft has been a major factor of deepening the Russian-Chinese economic ties at the expense of the national energy diversification strategy goals. Rosneft has been working on the East Siberia–Pacific Ocean (ESPO) pipeline's branch to China. Rosneft and Transneft signed a contract with the China National Petroleum Corporation (CNPC) and Russian companies committed to deliver 300 million tons of oil over a period of twenty years. In return, the Chinese side credited Russian companies with loans of US \$15 and US \$10 billion (Kaczmarek, 2014). Russian–Chinese energy cooperation has been only intensifying. In 2013, Rosneft signed a series of new multi-billion dollar contracts with CNPC and Sinopec. In May 2016, shipments of Russian crude to China increased 34 percent from 2015 to 5.25 million metric tons, aided by spot deliveries to smaller private refineries. Rosneft continues negotiations to sell as much as 49 percent of two of its fields to Sinopec with a binding agreement (Khrennikova, Mazneva, Biermann, 2016). Rosneft is also luring Western oil giants into partnerships on the Arctic shelf – a move that environmentalists all over the world are deeply worried about since it could actually impact world climate in case of a major spill.

The Russian government has also been benefiting from profits of a gas giant Gazprom (former the Soviet Ministry of Gas) for years now. The European Union also heavily relies on Gazprom: for about a third of its natural gas supply. With the Russian government struggling with the economic recession and budget deficit, financial contributions from Gazprom are more important than ever. This makes it necessary for Gazprom to keep increasing its market share in Europe, which is a costly project, given the development of LNG (liquefied natural gas) projects and new technologies in Europe and elsewhere. According to Leon Aron (2013), Russia's ability to meet current political economic challenges in the energy markets will likely affect not only Russia's its preeminence as an energy supplier but also its ability to use oil and gas as a geostrategic leverage. With a significant thinning of oil and gas rents, the stability and the survival of the regime might be at stake.

In sum, Russia's political system is pluralist, and domestic power relationships between different political and economic sectors do affect domestic and foreign policy decision-making. While president Putin is responsible for a lot of final foreign policy decisions, there is a precedent of other domestic actors in Russia (e.g. energy and transportation companies)

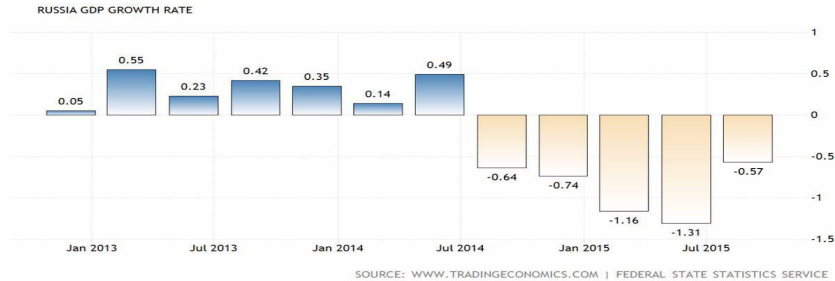
altering and modifying the existing foreign policy strategies. This suggests that a more sophisticated analysis is needed for understanding Russia's motivations and to what extent they threaten international security.

**The Analysis of Socioeconomic Factors in Russian Domestic and Foreign Politics**

From analyzing the Russian nexus between power and property stems the socioeconomic variable in my research. Russia's government-funded media and a few foreign sources are filled with stories suggesting that Russia is preparing for war, but a more detailed analysis of the economic situation in this country suggests different conclusions.

One of the indicators that Russia simply cannot afford going into another war is the way its economy itself works, and the way it affects the country's GDP. Never in its history has Russia been more integrated into the global economy than it is now. However, there has been one persistent problem with the Russian economy: it has always relied nearly entirely on energy exports and, therefore, it has heavily relied on world oil prices as well. Revenues from oil and gas, which by 2008 accounted for a third of all government revenues (approximately \$200 billion), were used to repay external debt and build up assets in a stabilization fund, which was recently used as a fiscal stimulus. However, in December 2014 world oil prices reached the level of \$55 per barrel (compared to May 2008, when the approximate price was \$142 per barrel), creating an enormously slippery slope for the Russian economy, that is highly dependent on its energy exports. As a result, the level Russian GDP annual growth declined as well, reaching negative percentage in 2014. (Graph 1.1)

*Graph 1. Russia's GDP Growth Annual*



Source: <http://www.tradingeconomics.com/russia/gdp>

According to the 2017 Index of the Economic Freedom conducted by the Heritage Foundation, structural and institutional constraints in the Russian economy remain a significant burden for the private sector. State-owned institutions achieved the domination in the financial sector at the expense of private domestic and foreign banks. Corruption in government and the business world is pervasive, and a growing lack of accountability enables bureaucrats to act with impunity (Index of Economic Freedom, 2017).

The economic trends in Russia mentioned above are exacerbated by the fact that Russia keeps spending a lot of its financial resources abroad. Exciting foreign policy adventures gave the Russian President a big political credit, yet they turned out to be too costly for the Russian economy. One of a few examples is Russia's military campaign in Syria started September 30, 2015. Within one year, Russia spent no less than RUB 58 billion (about \$892 million) (Baev, 2016). While V. Putin stated he did not want to have to escalate Russia's involvement in the conflict again after the draw-down, he made clear Russia could easily scale up its forces again if necessary (Osborn & Dyomkin, 2016). Regardless of the level of Russia's presence in Syria in the future, it is not going anywhere, and the operation in Syria will continue to be a serious burden on Russia's stagnant resource-based economy.

Unfortunately, Syria has not been the only costly project on the current Russian foreign policy agenda. There is still a debate around the exact cost of Russia's meddling in Eastern Ukraine. As of December 2016, some experts estimate that the current cost of maintaining the separatists' regime is \$1 billion to \$1.5 billion per year, which amounts to 0.35–0.5 percent of the annual expenditures of the Russian federal budget (Aleksashenko, 2016). From the outset, it was clear that annexation of the Crimean Peninsula would need to be accompanied by major capital investments from the government. Early estimates of how much it would cost Russia to maintain and modernize Crimea showed that Russia was going to spend about \$3 billion a year (Pismennaya & Tanas, 2014). Federal subsidies, added social benefits, improved infrastructure, and increased pensions to citizens would end up costing Moscow enough than other major projects - including a new port on the Black Sea and a bridge in Siberia (Berman, 2015). The real sum spent on Crimea has already turned out to be considerably larger: approximately \$4.5 billion according to Russia's economic development minister, given the fact that Ukraine is obviously no longer willing to support the peninsula and the region is highly dependent on a well-developed transportation infrastructure (Hanauer, 2014). Moscow has proposed making Crimea a

special economic zone that would enable businesses to receive favorable investment terms, lower tax rates, and other incentives. However, with the lack of infrastructure, high level of economic risk and Western sanctions in place, businesses still do not seem to be willing to invest in the region. Moreover, tax exemptions introduced with the special economic zone status are going to deprive the regional and central governments of the revenues. In 2017, the Russian State Duma decided to allocate about RUB 195 billion (about \$3.3 billion) for the needs of the peninsula, which is less than in 2015. Yet it is still about 2.5 times higher than the Russian government's expenditure on environmental protection (RUB 77 billion), or more than a half of the budget spending on healthcare (RUB 379 billion) (Kolodiychuk, 2017).

One of the indirect pieces of evidence that Russian forces have already gone too far beyond their sources, are the recent political maneuvers by Russian political establishment that took place in 2016. Russian President Vladimir Putin has taken complete political control of the separatist forces by sending veteran troubleshooter Deputy Minister Dmitry Kozak to take over Russia's relations with the so-called Donetsk People's Republic and the Luhansk People's Republic. He also sent another confidant, Boris Gryzlov, former chairman of the Duma, to negotiate with Ukrainian President Petro Poroshenko in Kiev. At the same time the former deputy of the presidential administration Vladislav Surkov, has met with U.S. Assistant Secretary of State Victoria Nuland in Kaliningrad to talk about the crisis in Ukraine. Although the ongoing discussions will most probably not lead to pulling Russian troops out of the region, they represent an effort to achieve some sort of diplomatic solution which details will gradually unfold (Blank, 2016). Given the deepening economic crisis, Russia cannot sustain a protracted war against Ukraine — although it can preserve the current “frozen conflict.”

## **Pressure in Numbers: What Does This All Mean for the Population of Russia?**

### **A snapshot of Russia's demographic situation**

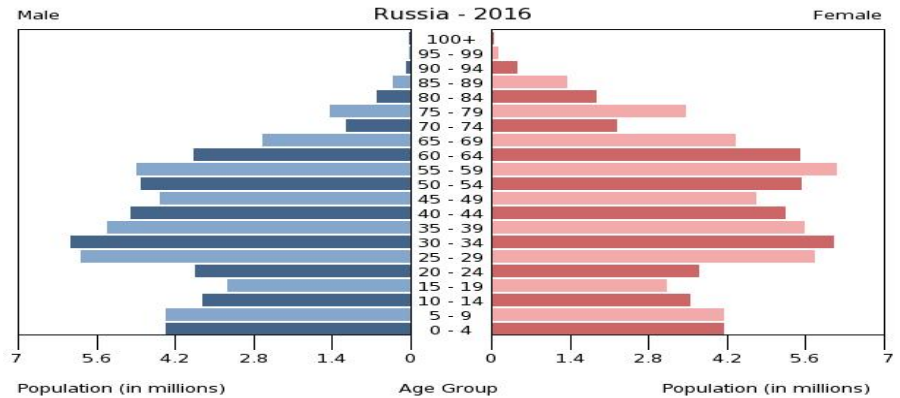
The trends of population growth and aging in Russia have been profoundly affected by the events over the XXth century, such as the Russo-Japanese war, the Civil war of 1917-1922, the two World Wars, the famines in the early 1920s and '30s, and the autocratic government's policies of killing its own citizens in prison camps. These events have distorted



the population pyramid -- the typical age distribution and balance between male and female in the population (DaVanzo & Grammich, 2001).

Recently, the catastrophic demographical situation has got exacerbated by the economic recession that puts more pressure on its citizens. The state's allocation of resources mentioned above also does not seem sustainable if we look at Russia's demographic structure. Regardless of some recent modest improvements in the fertility rates and life expectancy, Russia's demographic prospects are profoundly negative. The Russian population is aging rapidly, and the majority of the Russian population consists of women (Figure 1).

*Figure 1. The population pyramid of Russia*



*Source: CIA World Factbook, 2017*

All these negative characteristics of Russia's population combined arguably present a challenging picture for the Russian policymakers. A shrinking working age population has been struggling to support a growing number of elderly citizens over the years. Russia's inefficient and obsolete social payments system discussed further in this research puts pressure on the Federal budget and the population. Furthermore, from a social behaviorist perspective, the majority of Russian citizens, namely aging women, care about foreign policy intrigues significantly less than they do about sending their children to schools and taking care of their elderly parents. This potentially makes it harder for the Russian propaganda

to convince its population that cutting expenditures on healthcare and education for the sake of financing more troops abroad is “absolutely necessary”.

### **Employment, Incomes, and Pensions**

Interestingly, despite deepening crises in Russia's economy and demographics, Russia does not have a high level of unemployment. According to Eurostat, the unemployment rate in Russia remained unchanged at 5.6 percent in February of 2017 from the previous month and in line with market expectations. This number is significantly lower than in the European Union (about 9.5 percent as of February 2017). Fewer and fewer people every year work for state and municipal authorities (Smolinski, 2013).

This research argues, however, that the fact that Russia is experiencing a somewhat mysterious phenomenon of a recession without unemployment is alarming. A 2015 Bloomberg publication suggests why that might be. Companies in Russia, they write, are under pressure from the state authorities not to reduce staff headcount, making it almost impossible to fire people. Instead, employers would cut salaries, reduce working hours and give staff unpaid (and often undesirable) holidays. Russian businesses are also trying to reduce their expenses by implementing part-time employment. This questionable Soviet-era tactics leads to masking the true state of the labor market, and, as a result, people get poorer, but “on paper” things look good, since people still have their jobs. As an example, in 2015, AvtoVAZ, the largest car producer in Russia which employs about 2 million people, tried to lay off a third of its workforce. The Russian Federal government pushed back, especially since the company's Togliatti plant employs most of the city's population. As a result, AvtoVAZ ended up cutting salaries by 20 percent and shortened the workweek from five days to four (Goodrich, 2016).

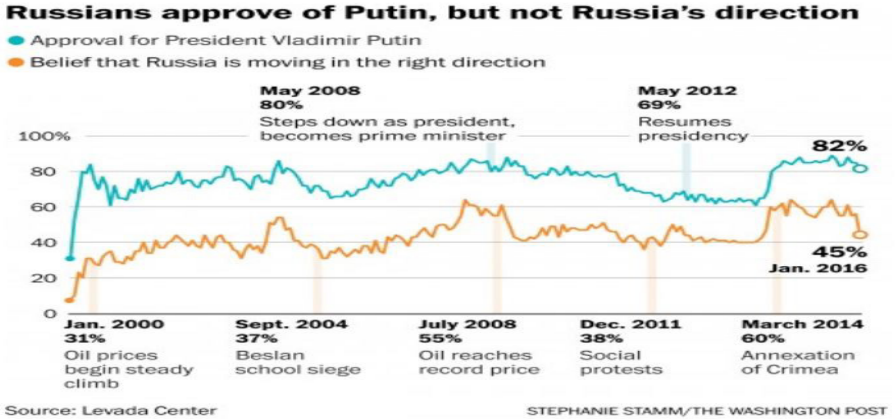
According to a report by the Russian Presidential Academy of National Economy and Public Administration, Russians' real disposable income has fallen by 12.3 percent since the beginning of the economic crisis in 2014. The report concludes that the continuing fall in the population's real income has led to an increase in the poverty level, which between January and September 2016 was 13.9 percent. This indicator is higher than the level from similar periods in 2012-2014. In May 2016, the average monthly salary in Russia fell to \$500, which is below the average monthly salary in China, according to Russia's largest bank Sberbank (Karpova, 2016).

During one of the most severe recent economic crises in 2009, Russia's government prevented even a sharper drop in incomes and a rise in poverty with a massive economic support package. However, the resources for such measures are shrinking by a month — in part because Moscow has been sustainably failing to address the structural problems of its social security system. As a result, several Russian regions were forced to suspend benefit payments or stop the inflation indexing of public sector wages. Even though compared to 2008, the amount of funds allocated to social expenditure in 2016 has risen from 9.1 percent to 14.3 percent, the whole social security system in Russia is currently not sustainable, putting the country's financial difficulties into a sort of a vicious circle (Hille, 2016). To soothe the pain caused by the financial recession, the government has been indexing pensions and public sector wages to inflation — which in 2016 hit 16 per cent. The older unemployed population is also getting affected by the budget deficit. For three years now a part of the pension contributions had been frozen, depriving part of the population of its pensions. This has important implications for all strata of the population, since it entails using current workers' pension savings to pay current retirees.

### **Does Russia's Population Care?**

It has become a conventional argument that Russia's population is notoriously apathetic and has never been especially vocal about its desire to challenge the political agenda (Morozov, 2012; Smith, 1999; Kolesnikov, 2015) due to the paternalistic character of its political culture and the history of the top-down repressions. However, this paper argues that this situation has been and will be changing. Putin is still enjoying high approval ratings, mostly because in the minds of a lot of Russians that he had been associated with economic prosperity of the 2000s. With the realization that economic prosperity was a temporary phenomenon due to the high oil prices and the loss of social security by the population is likely to make them more motivated to speak up. In fact, according to the surveys, Russians draw a sharp line between their support for Putin and their feelings about Russia's direction, which are becoming more and more negative as the economic burden increases. (Figure 2)

Figure 2. Russians approve of Putin, but not Russia's direction



Recent trends in the popular activities suggest that Russian citizens do notice the changes, and are willing to express its concerns, since recently Russia's foreign affairs hit their pockets and directly affect their lives. In 2016 and 2017, the Levada Center, an independent, non-governmental polling and sociological research institution, conducted a series of nationwide surveys. The sample size was more than 1500 people over the age of 18, in over more than 130 localities of 48 of the country's regions. The results of the surveys suggest that even carefully tailored and aggressive Russian propaganda that tells stories about the glorious fights with the West over Syria and Ukraine cannot distract people attention from domestic issues any more. For example, in 2016, the majority of Russians asserted that the most important recent event for them was the rise in prices in the food and services and the decline of incomes (and not the ongoing conflicts in Eastern Ukraine and Syria). The same year, 54 percent of respondents stated that the opportunities to make a decent wage in Russia have changed for the worse over the course of the year, so has the distribution of wealth (45 percent of the respondents). In 2017, 78 percent of the respondents agreed that "Russia is currently experiencing an economic crisis". 44 percent of the respondents stated suggested that this crisis will last for more than two years at least, and "the consequences will be felt for many years". 99 percent of the respondents noticed that the prices on food and services have risen in 2017 compared to 2016.

Not only the economic crisis in Russia has become visible enough for Russians to start talking about it, recently they have become definitely more willing to express the accumulated disappointment and fatigue in a manner of protesting. For about two years now, the truck drivers from more than 40 Russian regions have been protesting against the new transportation tariff system known under the name “Platon”. While this protest tide is not highly organized, and dominated by small players, it could be as well the beginning of the bigger wave of discontent. Interestingly, one of the owners of the “Platon’s” operator, Rosavtodor and RT-Invest Transport System, is Igor Rotenberg, the son of President Vladimir Putin’s billionaire friend Arkady Rotenberg. Thus, the blue-collar workers’ strongly associate the misery the “Platon” truck tax system causing them with the corrupt leadership.

On March 27, 2017, tens of thousands people across the country joined the largest anti-government demonstrations in many years to protest against corruption. These protests were important for a few reasons. First, these demonstrations were the largest massive coordinated protest in the last five years. Furthermore, after the protests in 2011-2013, when tens of thousands of Russian citizens rallied against the results and the conduct of the parliamentary elections, many of them were arrested. In 2012, President Putin signed into the law a bill that drastically increased fines for people who take part in the protests. These two events appeared to be a watershed moment, strongly discouraging Russian citizens from being vocal about their rights and concerns. The fact that the recent anti-protest legislation did not deter people from coming out in the streets is highly significant. (Higgins, 2017) Thousands of citizens chose to protest despite the fresh memory of about three dozen people being charged and incarcerated for a protest in May 2012 that turned violent (Ioffe, 2017). Crowds gathered in around 100 cities and towns across the country despite the Kremlin declaring the protests unauthorized and “illegal” (Pleitgen & Said-Moorhouse, 2017).

In sum, Russia is facing bleak economic and demographic prospects in the near future. It may be a case of managed decline in which the government appeases social and political demands by tapping the big reserves it accumulated during the boom years with oil and gas exports (Movchan, 2017). However, Russia lacks the resources for maintaining such a strategy for much longer since it is now dealing with the budget deficit and a serious monetary imbalance. Russia’s domestic issues such as corruption, high tax burden, an ineffective banking system, and its unpredictable policies both at home and abroad keep

detering a lot of foreign companies from investing. While experts do not predict major economic or demographic catastrophes in the near future, the current economic situation, combined with the alarming demographic trends in Russia over the recent decades, put serious pressure on the country's population. It would be unreasonable to expect a major social upheaval in Russia any time soon; however, growing dissatisfaction with the current regime and protest activity could create a "window of opportunity" for the U.S. and the EU public diplomacy.

### **Is Russia Going to Another War? Evidence from the Federal Budget**

Some might argue that even though Russia's economy is severely hampered by its own political disdain and aggressive foreign policy, Russia's political establishment can be suicidal enough to launch more wars. However, a close examination of the Russian state budget shows that the defense expenditures are not growing but declining. Spending for agencies that can suppress "domestic disorders" is, vice versa, growing, which supports the argument that the recent public dynamics and the government's financial planning have been recently reinforcing each other.

According to Ekaterina Schulmann (2016), of Russian Presidential Academy of National Economy and Public Administration: "If someone thinks that Russia is preparing for a world war, that is not reflected in the federal budget. If Russia is preparing for something, then it is only for some kind of internal disorders. Russia intends "to feed" its defense ministry a little less, and to channel its financial resources into the special services and domestic enforcement structures more, at least, judging from the budget".

A few other sources support this claim. In the 2017 budget, defense spending was reduced from RUB 3.9 (\$68.2 billion) to RUB 2.8 trillion (\$50.4 billion) as compared to the 2016 year, or from 4.7% to 3.3% of GDP (Kolodiychuk, 2017). This trend in the state behavior makes sense if one thinks about the upcoming presidential elections in Russia in 2018 – a potentially turbulent time when the possibility of popular protests is higher. Especially since Alexei Navalny, the Russian opposition leader and the anti-corruption crusader, has announced that he will run for office at the country's next presidential elections in 2018 (Oliphant & Krol, 2016).

According to Vladimir Milov, the former Deputy Energy Minister of Russia and a former visiting scholar at Carnegie Endowment for International Peace, security forces, along with the officials and the financing of government economic projects and subsidies to public corporations together make up almost half of the Russian expenditure. And about one-third goes to pensions and social benefits, and only 6% is allocated for education and health.

### **Policy Implications for the United States and the EU**

Even though the socioeconomic situation in Russia is not getting better, the problem is that the federal-funded propaganda sources cover the majority of the population mentioned earlier (aged 65+). Many observers from Russia attribute the high approval rating of V. Putin to the virtual monopoly of the federal propaganda (Levinson, 2015). The recent surveys conducted by Levada Center conclude that a lot of people in Russia still do not know about the ways to channel their concerns. For example, according to the recent survey conducted by the Public Opinion Foundation, 39 percent of Russian citizens did not know about the protests that took place March 26, 2017 (Levada Center, 2017). Furthermore, according to the survey conducted by the same organization in 2016, the number of Russian citizens, who does not trust mass media sources, increased by 10 percent (FOM, 2016).

These numbers indicate the opportunity for the US public diplomacy to become an important tool to communicate trustworthy information to the Russian citizens and advance the U.S. foreign policy goals. According to the 2017 CSIS project on the U.S. strategy towards Russia, the U.S. public diplomacy was one of the crucial elements in its approach towards the Soviet Union during the Cold War through the U.S. Information Agency. Some experts argue that today the U.S. efforts in tackling the Russian propaganda are insufficient. The information tools available in the U.S. now need to be reevaluated and updated since covert tools as Military Information Support Operations and a limited number of broadcast services are insufficient today. Some experts argue that it is impossible to reach Russian audiences from the outside since a lot of people in the country regular watch state-funded TV channels. However, Russian propaganda has serious limitations. The messages it produces are primitive, repetitive, and ineffective, and it is likely that a lot of Russian people keep consuming it because there is no large-scale and accessible alternative. As of 2016, more than 71 percent of the Russian population are regular internet

users. This makes it possible for the United States and the EU channel their public diplomacy efforts even if they face a pushback from the Russian federal media companies.

Another important opportunity for the U.S. to achieve its foreign policy interests in Russia is expanding and not cutting its educational programs. Since the beginning of the 2000s, a series of decisions by private foundations, the U.S. Congress, and successive U.S. administrations to cut funding for language education, research, and exchange programs focused on Russia and the former Soviet space led to the fact that in 2014 the United States were basically caught off guard. For over thirty years, the U.S. government supported area studies and language education programs at American universities under legislation known as Title VI, while funding advanced social-science research on Russia and Eurasia under the Title VIII program, administered by the State Department. Title VIII, costing less than \$5 million annually, was canceled abruptly in 2013, due to the reallocation of the funds. Funding for Title VI has been cut by nearly 50 % since 2010 (Yalowitz & Rojansky, 2014). Nonprofit organizations have been cutting funding of Russian studies programs as well. Ford Foundation closed its offices in Russia in 2008 in order to reduce costs (Spector, 2009). The MacArthur Foundation provided \$179 million in grants in and on Russia from 1991-2011, an average of \$7-8 million annually. However, from 2011 it has cut grants by half, and ended support for higher education programs. Presently the United States has no comprehensive strategy towards Russia, and the lack of expertise in Russian studies is not going to solve this problem.

The “soft power” tools are not the only ones that might be considered. The power-property relationships in Russia discussed in this paper are relevant in terms of the analysis of the effectiveness of the targeted economic sanctions imposed by the U.S. and the EU. There is still a debate about the extent of the targeted economic sanctions against Russia. This research was focusing more on the power-business relationship in Russia in the energy and industrial complex, which is getting increasingly open towards the Chinese market. This shift may affect the strategic balance in Taiwan, the East China Sea, and the South China Sea as the Chinese military gains access to advanced equipment. Chinese financial institutions are reluctant to ignore Western sanctions, but Moscow and Beijing are developing parallel financial infrastructure that will be immune to some of them (Gabuev, 2016).

Gary Hufbauer, an economist and sanctions specialist at the Peterson Institute for International Economics in Washington, stated that the only way that sanctions can alter Putin's



course of action is if they inflict enough pain on people who are involved in big business and who support his regime. According to him, the current economic sanctions are not able to do that (as cited by Lakshmanan, Arkhipov, Klimasinska, 2014). It still remains to be seen whether sanctions that are in place are effective in targeting Russian business representatives. We do know now, however, that some of them managed to circumvent the sanctions. Igor Sechin, for example, despite being a target of the U.S. sanctions, succeeded in selling a 19.5% stake in Rosneft to Glencore, an Anglo-Swiss multinational commodity trading and mining company, and the Qatar Investment Fund, raising \$11bn. Another important issue is that while the U.S. included three key figures in the Russian economy and politics – Russia's deputy Prime Minister Dmitry Rogozin, and two presidential advisers, Vladislav Surkov and Sergey Glazyev, – the EU omitted them. These facts suggest sanctions need to be reevaluated and imposed to in a more coordinated manner to serve an important pressure point against people who possess economic and political power.

None of the domestic factors discussed in this research are exhaustive sources of Russian foreign policy. However, informal domestic interactions within political and business institutions, and the interplay between the economic development, demographic indicators, and public dynamics can potentially help us understand the constraints Russian political establishment has to deal with, and, hopefully, to work out a more sophisticated approach towards Russia in the future.

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# 4

## FOREIGN POLICY OF IRAN AND RUSSIA IN THE MIDDLE EAST: IDENTITY AND DIVERGENCE

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### **Abstract**

*Both Iran and Russia have many common interests in the Middle East and are cooperating in this region. However there are too many divergences on different issues between two countries. Authors of this paper relate these divergences to the concept of “identity”. Identity in foreign policy of Russia has a meaning different from the meaning of this concept in Iran’s foreign policy. While Iran sees the Middle East as a ground for realizing slogans and ideals that are tied with its revolution, Russia has a pragmatic viewpoint to the region and is ready to cooperate with all partners that can put an end to numerous wars across the region.*

*According to this viewpoint the Middle East is as vital for Russia’s interest as other regions and Russia is even gaining privileges in this region to protect the identity that is tied with other neighboring regions including the Central Asia and Baltic.*

*This paper will focus on the concept of identity in Iran and Russia’s foreign policy and will explain the consequences of different definition of this concept to the approaches of two countries.*

**Keywords:** *Foreign Policy, Identity, Interests, Iran, Russia, Central Asia*

### **Introduction**

Considering Iran’s geopolitical space and neighboring some strategically important regions including the Caucasus, Central Asia, Persian Gulf, and the Middle East, Iran is faced a complicated situation in its relations with these regions’ countries. However because of Russia’s influence in Central Asia, Iran prefers to concentrate on the Middle East.

Also since Iran's interests in different periods are threatened seriously, in the Middle East, the political processes and changes have always occupied Iranian officials. Russian cultural and economic interests in the region are also important and should not be simply ignored and while Tehran and Moscow are interacting in the region, there are some divergences in their foreign policies.

The authors of this paper would study the role of "identity" in Iran and Russia's foreign policies in the Middle East. Based on this paper since the identity-making norms of these two countries, that create specific roles and interests for the country, are different, their appreciation of their identities is different at the same way.

The methodology of this study is descriptive-analytical. At first, the authors would explain the relationship of identity and foreign policy and then would study some examples of both countries' behaviour in the Middle East. This paper would focus on the identity making norms and roles and interests derived from them in the foreign policy of Iran and Russia.

### **A Framework to Explain Fundamental Concepts of Research**

#### **Identity and Foreign Policy**

Identity is a key to understand every country's foreign policy. Also Identity can be described as a concept derived from a country's roles in the international environment and other countries expectations from this country. Thus, according to constructivists, while identity is a relatively stable concept, simultaneously it can be flexible. Because the identity can change according to domestic and international changes. Moreover identity affects the interests and behaviour of a country (Moshirzadeh, 2004: 176).

The countries' appreciation of themselves and others as friends, competitors or enemies would shape their bilateral and multilateral relations (Wendt, 1994: 390-396). According to Constructivism, national values determine a governments goals and objectives that should be prioritized. Also identity can limit foreign policy' options (Jafari Arjmand & Chaboki, 2010: 43).

Considering these factors a regional foreign policy study based on the concept of identity should concentrate on some questions including:

1. How do the governments evaluate region as a whole? How do they conceive their own roles? On which characteristics of the region do they focus?
2. Which situation in the region do they benefit from? Whether they are inclined to co-operation or conflict in the region?
3. What do they think about dangers and the future of the region?
4. Are they interested in engaging transregional powers in regional processes?
5. How do governments think about themselves? Do they think about themselves as a global power or a regional power? Because the countries make decisions of foreign policy and expand or limit their choices.

### **Iran's Foreign Policy in the Middle East and Identity**

All decisions that are made in Iran's foreign policy are adapted with norms that shape Iran's identity and role as "Islamic Republic". Therefore, norms in the sense of intersubjective expectations, based on the value of actions, regulate the foreign policy actions and actions of the Islamic Republic. Iran's identity and interests are determined by the resulting internalized domestic norms and general supranational norms, and in turn, inspiring the country's external behavior. Internal social norms influence foreign policy through the process of socialization, experienced by political decision-makers. Supranational norms are based on values that define acceptable behavior that are common to countries at the international level or at the level of a regional micro system and originate in interstate institutions and non-governmental organizations that act as subjects of norm-setting. The impact of international norms on foreign policy through supranational socialization is due to the fact that countries are concerned about their international authority and reputation not only as allies or reliable partners in the negotiations, but also as respectable members of the international community. Internal or national norms are intersubjective expectations based on common values that determine acceptable behavior at the level of internal society, which are formed in the process of interaction between individuals and groups within domestic institutions and discourses, as well as the collective identity of the country. These norms are divided into two groups: 1) norms that are applied directly in the sphere of foreign policy; 2) another group of norms, which, although regulating relations within the country, still have an impact on

foreign policy. Internal norms shape the behavior of decision-makers through the process of socialization in society and internal public opinion. Therefore, the most important factor and independent variable determining the foreign policy behavior of the Islamic Republic are intersubjective value expectations about acceptable behavior, that is, supranational and national social norms with which the country is dealing (Azghandi, 2002: 98).

Supranational norms explain the same actions of this country, as well as the difference in its behavior at the international level. On the one hand, in the same international regulatory structures, the Islamic Republic manifests behavior similar to that of other countries, and on the other hand, since international norms are formed in various international and, in particular, regional situations, they generate diversity and differences in the behavior of that country compared with other countries. However, despite this, the most important factor of behavioral diversity in Iran's foreign policy is related to the country's internal social norms, which manifest itself in the legal system, constitutional law, electoral procedures and party events, parliamentary debates and research data (Haji Yousefi, 2005: 121-127).

According to this model of norm-consistent policy, there are numerous potential expectations about acceptable behavior of the Islamic Republic in any particular situation. Therefore, out of several available potential expectations, the country acts in accordance with the expectation that originates in norms that have more power, that is, primarily those that are strong enough to influence foreign policy. The strength of the norm depends on two factors: first, the "degree of community", that is, the degree to which a rule is common to political actors within the internal or external social system; second, the "degree of specificity", that is, the degree to which a particular rule accurately determines permitted or unauthorized behavior. As a result, if the norms have sufficient generality and clarity at the supranational and national levels, the choice and acceptance of acceptable foreign policy behavior is easy, as in the case of upholding national sovereignty. Likewise, if the community and the clarity of the norm are sufficient at any one level, and at another level it is uncertain, acceptable behavior is chosen at the first level. However, if the norms do not have commonness and are certainly neither internationally nor nationally, or they presuppose contradictory behavior, the choice of an acceptable behavioral alternative in foreign policy is difficult.

Therefore, national identity and national interests are interconnected concepts. But while national interests cannot change national identity, the national identity can change and develop or limit the national interests (Dehghani Firoozabadi, 2007: 113).

Islamic Republic of Iran's identity making-norms are different including "nationalism", "Shiite Islamism", "Third-Worldism" and the international norms accepted by the international community. Despite these different norms that sometimes are contradicted, Iran's foreign policy never has been based on just one of these norms. But a combination of all these norms in different periods has been pursued by Iran (Sariolghalm, 2000: 49).

Different approaches and outcomes about the national interests of the Islamic Republic of Iran come from its value-based national benefits. The Islamic Republic of Iran has had different national interests and foreign policy objectives during different periods. However, these objectives have always included:

Preserving territorial integrity, National Authority and independence, Protection of Islamic Republic and its foundations and slogans, Protection of Shia minorities, Resistance against U.S international hegemony and Israel's initiatives in the region, Supporting Islamic resistant groups, Economic growth and development.

One of the objectives stated in Iran's 20-years vision plan or document is to achieve the first economic, scientific, and technological place in Southwest Asia (including Central Asia, the Caucuses, the Middle East and the neighboring countries)(Iran's 20-year vision document, 2003). However in the Middle East, regardless of this document, resistance against U.S and Israel and protection of Shia minorities shape Iran's foreign policy. More importantly is the relationship of these identity-making norms and factors with the interests determining which norms should be predominated in various periods.

In the Middle East because of strong religious tendencies, Iran doesn't hesitate to define its interests in the frame work of Shiite Islam. Shiite identity is the most important factor in relations between Iran and Iraq or Lebanon. While the war between Iran and Iraq lasted 8 years, immediately after overthrow of Saddam regime by U.S, Iran increased its influence in Iraq. Also in Lebanon despite geographic distance and low economic relations, Iran has an effective influence. This influence dates back to the years before the Islamic revolution that some Iranian eminent persons including Seyyed Musa Sadr and Mustafa Chamran went to Lebanon to help shia community in this country. After the Islamic revolution this relations extended and led to the full support of Hezbollah. This support is rooted in at least two important revolutionary slogans including fighting Israel and supporting Islamic resistant groups. This position cannot be changed despite regional

and international pressures. Because Hezbollah alongside Hamas and Syria makes a chain that guarantees Iran's influence over the problem of Palestine that according to Iran cannot be solved peacefully.

Fighting Israel and supporting Palestine is a key to understand Iran's foreign policy in the Middle East. This concept explains the reasons for them Iran resumed its relations with Hamas after a period of cold relations during Syrian war. Hamas is the main armed Palestinian group and losing it would limit Iran's options against Israel.

Another example was Syrian crisis. Iran owed Syria because of Hafez Assad's support for Iran during Iran-Iraq war. Also Syria under both Hafez Al Assad and Bashar Al Assad was the most important ally of Iran in the Middle East. But these reasons couldn't persuade Iran to begin a hard and long war in Syria. The main reason for such decision was Syria's role in the "resistance axis" led by Iran against Israel. Losing Syria and handing it over to unknown groups that might make a consensus with Israel could harm Iran's policy towards Israel and Palestine.

But this approach affected Iran's relations with Saudi Arabia, Turkey, Qatar and many other countries in the region. Some of these countries led by Saudi Arabia interpreted this support of Syrian government by Iran as a Shiite-Sunni war and attempted to respond it in other fronts including Yemen.

The crisis in relations between Saudi Arabia and Iran dates back to the Islamic Revolution that caused emerging a model of political Islam that was based on Shiite instructions and undermined United States' influence in Iran. The latter led to a turn in U.S foreign policy towards Saudi Arabia (Ackerman, 2011: 3). Therefore these two countries couldn't improve relations for many years. Saudi Arabia and many other Arab countries' assistance to Iraq during Iran- Iraq war was another reason for Iranians' distrust.

However the relation between two countries improved gradually after the war and Iraq's invasion to Kuwait affected the relations of Iran and Arab countries positively. But Iran's nuclear program made Saudi Arabia pessimist to Iran's intentions in the Middle East. Similarly Saudi's support from U.S. sanctions made Iranians dissatisfied with Saudis' politics.

The Syrian Crisis in 2011 provided a battle ground for two countries to lead a so called proxy war. In these years, beheading a Shiite Cleric Sheikh Nimr, attacking Saudi Arabia's

embassy in Tehran and death of hundreds of Iranians in Hajj in Sep 2015 worsened two countries' relations. Now Saudis accuse Iran of Supporting Houthis in Yemen. While Iran deny any military assistance to Houthis, Iran's IRGC commander Supported the idea of providing advisory assistance for Houthis.

Although this seems like supporting a Shia minority, derived from an identity-making norm and revolutionary slogan, but Iranians interpret this support in the context of resistance against U.S and Israel in the region. Frequent statements by some Israeli officials that condemn Iran's presence in Yemen and talk about secret relations between Israel and Arab countries strengthen this belief among Iranians. Also Iran sees the war in Yemen as an action to make the Palestine problem forget and bold Shiite-Sunni disputes.

While relations between Iran and Saudi Arabia is about to collapse, the relation between Iran and Qatar is expanding after a period of distrust because of Syrian Crisis. Withdrawing from Saudi led coalition by Qatar is the most important reason for Iran's new approach. Similarly Iran-Turkey relations improved after the coup in turkey. Iran-Turkey relations never have been without any challenge but economic ties and energy deal have protected these relations by now. Shiite-Sunni disputes are not an effective factor in mutual relations and Iran traditionally supports Islamists in Turkey including Necmettin Erbakan or Justice and Development Party.

After the coup that Iran condemned it, President Erdogan was not satisfied with Washington's behavior. Fethullah Gulen that is accused by Turkey of plotting the coup is living in the U.S by now and the issuance of non-immigrant visas in Turkey temporarily suspended by U.S embassy in October. These problems between Turkey and U.S led a warmer Tehran-Ankara relation. Then two countries found themselves in a dangerous situation derived from Kurdistan Referendum. It was a watershed in bilateral relations after Syrian Crisis. Chief of General Staff of the Armed Forces of Iran Mohammad Bagheri went to Turkey in August to find a joint solution to stop Kurdish separatism. These co operations now have extended to Syrian crisis and both neighbors are working closely with Russia to end Syrian war. Although Syria is the main subject of disputes, both countries have multilateral relations that benefit them.

## **Russia's Foreign Policy in the Middle East and Identity**

The dominant approach in Russia's foreign policy after the cold war was "Eurasianism". Eurasianism is a geographical concept that alongside other factors makes Russia's identity. According to this approach, Russia's national identity requires Central Asia as a domain to secure Russia's interests. The "Foreign Policy Concept Document" approved in April 1993 emphasized that Russia would remain as "a great power". In this document, Russia despite all its difficulties, was named as a "Great Power", Mostly because of taking responsibilities derived from its power. In this document, Russia showed its desire to be a regional super power, a great global power and a nuclear super power (Karami, 2005: 110-112).

Such definitions of Russia's identity affected this country's national interests. For example after the collapse of the Soviet Union, Russia defined its identity as a democratic country interested in the free market economy that limited its national interests mostly to economic issues. But gradually, other definitions of the identity, presented by other groups that led to a change in Russia's relations with other countries including neighbors. The "look East Policy" was presented in this era.

Three important national documents proposed by Putin at the beginning of his first presidency as a baseline for Russia in international policy included:

- The Foreign policy doctrine (June 2000)
- The National security doctrine (January 2000)
- The Military doctrine (April 2000)

According to these documents some objectives of Russia's foreign policy are: to guarantee the country's security, to safeguard and reinforce its authority and territorial integrity and to achieve a strong and prestigious position in the global community which could be fully consistent with interests of Russia as a great power and as an influencing center. (The Foreign Policy Concept of the Russian Federation, 2000)

But these documents didn't change Russia's Foreign policy immediately. Even by 2014 Russia's first goal was expanding its influence and dominance in the Central Asia not the Middle East. However an understanding of the importance of the Middle East was beginning to shape. From 2003 while U.S. was fighting in Iraq, Russia began to increase



its influence in the Middle East. They have been connected with all players in the Middle East including pro west and anti west forces, Arabs, Israelis and Palestinians, Shiites and Sunnis. However, for many years Middle Eastern countries never mentioned in Russia's foreign policy concepts. But following Syrian Crisis and Iran-Russia co operations in the region, for the first time in Russia's foreign policy concept, Iran and the Middle East was mentioned in 2013 and 2016. (The Foreign Policy Concept of the Russian Federation 2000, 2008, 2013 and 2016)

But Arab Spring interpreted by Russia as an intentional interference by the west to increase pressure on Russia. But gradually a different understanding of this political process shaped in Russia. Russian foreign policy concept of 2013 describes these processes as "desire to go back to one's civilizational roots" (Malashenko, 2014: 2). Political changes in the Middle East were a good opportunity for Russia's foreign policy in the Middle East. Although Russia's power had not increased dramatically, but regional chaos, western countries' weakness and Middle Eastern countries' tendency to find reliable partners expanded Russia's influence in the region. Before this period Russia recognized western countries' dominant role in the Middle East and defined its presence in the region according to this understanding. In this era, Russia avoided any clash of interests with the west in the Middle East and its relations with Middle Eastern countries were affected by the west. An apparent sample was Russia's Role in Iran Nuclear Deal. But in 2015 Russia began to expand its presence in the region. One of the most important steps in this process was Bombing ISIS in Syria in September 2015.

Russia's strategic goals in the Middle East can be categorized as follows:

Protecting Russia's position as a super power, increasing arms deals, protecting Russian hydrocarbon producers, supporting stability in the region, to be known as a supporter for Muslims (Malashenko, 2014: 2).

Now many countries including Syria, Egypt, Iran and Libya have arms deals with Russia and About 90 percent of Algerian arms are imported from Russia, 11 percent of Russian arms exports. However Russians try not to endanger the stability or change the power balance of the Middle East. Russia Also seeks increasing trade with the countries in the region. For example while Turkey as a NATO member is a strategic rival for Russia, but economic ties between two countries is strengthening. In the last decade the volume of

trade between Russia and Turkey was 30 billion dollars. Also 60 percent of turkey's gas is imported from Russia. (John McLaughlin, 2015: 4) Other joint projects agreed by Russia and Turkey are Turkish Stream gas pipeline and akkuyu nuclear power plant that the latter will be built by Rosatom company (РИА Новости, 2014).

However after downing of a Russian Sokhoi 24 warplane by turkey, bilateral relations deteriorated and Russia imposed sanctions on Turkey. But both countries used the failed coup in Turkey as an opportunity for reconstructing mutual relations. Challenges between Ankara and NATO made two countries closer that led to Astana meeting among Iran, Russia and Turkey.

Russia's relations with Israel are also of importance in the region. Although two countries have different viewpoints on many regional and international subjects, but their bilateral relations cannot be described as divergent. Israel is Russia's second trade partner in the Middle East (Oulin, 2013: 81- 85). Also co operations in the oil and gas sector are increasing. However Moscow always has supported the idea of Creating the Palestinian State and has opposed Israeli settlements.

Saudi Arabia is another country that Russia recently has focused on. While Russia strongly opposed Saudi Arabia's influence in Chechnya after the collapse of the soviet, but according to Moscow improving relations with this country is necessary to maintain balance with Russia's relations with Iran as a Shiite country. Russians know that in the Middle East the situation is always changing and it is important to be neutral. Saudi King's visit to Moscow in October was a watershed in bilateral relations. But these relations have not led to the Russia-Saudi Arabia co operation on Syria.

Syria is very important for Russia and Moscow cautiously choose its partners for a political process. In the first years of Syrian Crisis Russia considered it as a regional conflict but after some years Moscow understood this crisis as a process that may change international borders in the Middle East. Then Moscow began to show its desire to stay in Syria. Through this policy, Russia can affect Iraq, Jordan, Israel, Saudi Arabia and even Lebanon. Also Russia's experience in Syria may encourage this country to enter in other regions for example in Sudan.

## **Conclusion**

After the collapse of Libyan regime, Russia prefers to protect stability of governments in the region. Russia's policy in the Middle East is according to international norms and influenced by its relations with the West. However Moscow hesitates to use its vote in the United Nations and the Security Council just to approve western countries' decisions in the region. In recent years Russia has begun to vote in the United Nations more carefully considering its own interests. However Moscow tries not to be recognized as a pro Iran or pro Arab or even pro Israel player. Russia seeks a more expanded and comprehensive role than supporting a regional party. This goal is based on Russia's perception of itself as a Great and international power.

But studying the relation between the identity and interests in Iran's foreign policy shows different and even opposed definition of roles and interests resulted from different identity-making norms. While Iran theoretically defines common cultural and economic interests in the Middle East, it doesn't prioritize this region culturally or economically in practice. To Iran, the Middle East is important strategically. Also Iran's actions in the Middle East coincide with the perception of itself as a regional Power.

Comparing Foreign policy of Iran and Russia show some divergences that derive from identity-making norms they follow. While Iran focuses on opposing U.S and Israel and defines its relations with many countries in the Middle East according to these norms, Russia sees itself as a Super power and tries to mediate in regional conflicts. So both Iran and Russia are cooperating in Syria but Russia also is in touch with Saudi Arabia and Israel. These complicated relations between Moscow and other countries are not problematic at nature. But when Syrian war is near to its end, Moscow's relations particularly with Tel Aviv can affect Tehran-Moscow co operations. Now the problem of long term presence of Iran in Syria has occupied Israeli officials and they are connected with Russians to find a solution for this problem. Also while Iran never has prioritized economic benefits in relations with neighbors and Middle Eastern countries, Russia tends to strengthen economic ties and expand energy co operations in the Middle East. Russia even was not against the idea of an independent Kurdistan, the most important security concern of Iran and Turkey.

This can be related to Russia's foreign policy priorities. Although the importance of the Middle East to Russia cannot be denied, this Region is not the first priority of Moscow.

When Russia began the war in Syria, it was approved that Russia-west opposition in Ukraine could not be solved in the short term. Therefore Moscow strengthened its presence in other fronts. To summarize, Iran and Russia's aims in the Middle East are not divergent completely, but divergences and oppositions can be explained by different identity-making norms. According to this conclusion just as Russia that have not been able to make a compromise on Ukraine Crisis, Iran would not be able to do so.

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# 5

## MIRZIYOYEV'S FIRST YEAR IN PRESIDENCY: ANY HOPE FOR CHANGE?<sup>1</sup>

Gülşen Aydın

### ***Abstract***

*It has been more than a year since Islam Karimov, the leader of Uzbekistan between 1989 and September 2016, passed away. This study aims to examine the changes taking place in the country after Shavkat Mirziyoyev assumed power and evaluate whether they can be regarded meaningful. To this end, first, the reign of Karimov will be examined. The strengthening of executive branch in Uzbekistan at the expense of legislative and judiciary, silencing or forced exile of the opposition forces, curtailment of the civil and political rights of the citizens, restriction of autonomy of civil society organizations and media will be explored to shed light on the highly authoritarian presidency of Karimov. After examining how Mirziyoyev replaced Karimov as president, the study moves on to analyzing the changes introduced by Mirziyoyev in the politics, economy and foreign policy of Uzbekistan. In this regard, his positive steps including freeing political prisoners, moderately relaxing the controls on organizing peaceful rallies, establishing presidential reception centers to reply citizens' complaints, implementation of currency convertibility system and repairing relations Uzbekistan's neighbors, Kazakhstan, Kyrgyzstan, Tajikistan, and Turkmenistan will be explored. The study concludes with arguing that the changes introduced by Mirziyoyev raise hope for political and economic development of the country (democratization and increase in the GDP with necessary improvement in Human Development Index) as well as peace and cooperation in the region, however it will take time to see whether these chances will be enduring.*

**Key Words:** *Authoritarianism, Islam Karimov, Shavkat Mirziyoyev, Democratization, Economic Development, Foreign Policy*

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1 Some sections of this study (sections focusing on Karimov period) are based on the writer's Masters Dissertation: Aydın, G. (2004), *Authoritarianism Versus Democracy in Uzbekistan: Domestic and International Factors*, Middle East Technical University.

## Introduction

There are many reasons justifying an interest in the affairs of Uzbekistan. Although Kazakhstan is the largest of the Central Asian states in terms of landmass, Uzbekistan has the largest population among the Central Asian states. Located at the center of Central Asia, Uzbekistan is the only country that shares borders with each of other Central Asian states. Thus, the developments in this country have the capacity to affect the dynamics in the other Central Asian states.

The president of this country, Islam Karimov, proved to remain in power until his officially announced death on 2 September 2016 amid serious violence against the country's population whose most notorious illustration is the Andijon events of 2005.<sup>2</sup> Shavkat Mirziyoyev assumed power after the death of Karimov and embarked on a reform process in various areas including democratization and human rights, curbing corruption, securing development and efficient working of state institutions and repairing foreign relations.

This study tries to shed light on the changes enshrined by Mirziyoyev's presidency. To this end, first the fully-fledged authoritarian system formed by Karimov is examined with a focus on silencing opposition and all other alternative voices. Afterwards, the study will move on examining the instruments that Karimov utilized to entrench his grip on power, including both the internal measures as well as the foreign policy alignments. Before the conclusion the changes introduced by Mirziyoyev are analyzed. The study concludes with

2 Andijon, the Uzbek city situated in the Fergana Valley known for economic hardship and unemployment as well as the government's frequent repression of Islamic groups, became the scene of popular protests and the following violent government crackdown in May 2005. On May 10 and 11, shortly after the Tulip Revolution in Kyrgyzstan, which started with the protests in the Kyrgyz controlled part of Fergana Valley, the family members and the supporters of 23 local businessmen held demonstrations in Andijon to protest their jailing. The situation went out of control when armed protestors attacked the local prison and released the businessmen as well as hundreds of other prisoners. Following this, on 13 May, Uzbek security forces opened fire against demonstrations including women and children, who gathered in the city centre to protest against the government's oppressive involvement in political and economic affairs. Whereas the Uzbek government claimed that the number of deaths was 180, the international NGOs like International Crisis Group and Human Rights Watch asserted that the death figure was as high as 700 or 800. (Human Rights Watch, *Bullets Were Falling Like Rain: The Andijon Massacre*, Human Rights Watch Report, Vol. 17, No. 5 (D) (June 2005), at <http://www.hrw.org/sites/default/files/reports/uzbekistan0605.pdf> [Last visited 18 May 2010] and International Crisis Group, *Uzbekistan: The Andijon Uprising*, Asia Briefing, No. 38 (25 May 2005), at <http://www.crisisgroup.org/en/regions/asia/central-asia/uzbekistan/B038-uzbekistan-the-andijon-uprising.aspx> [Last visited 18 May 2010].)



arguing that the changes introduced by Mirziyoyev raise hope for political and economic development of the country (democratization and increase in the GDP with necessary improvement in Human Development Index) as well as peace and cooperation in the region, however it will take time to see whether these changes will be enduring.

### **Development of Post-Soviet Authoritarianism under Karimov**

Karimov's rise to the presidency in the last days of the Soviet Union was unexpected, but it was not without reason. The leading members of Uzbek elite of that period, including Skukhrullah Mirsaidov and Ismail Jurabekov, were of the opinion that the government in Moscow would not approve their candidacies since they were seen as part of the hostile old apparatus (Kangas, 2002: 133). Under these conditions, they looked for an alternative leader that could be easily controlled by them. They supported Karimov because they believed that they could control Karimov and impose their own wishes on him once he was in power (Carlisle, 1995:79).

However, to the consternation of Mirsaidov and his supporters, things did not work in the way they had wished. Once in power, Karimov engaged in a power struggle with them to consolidate his power. It can be argued that the August 1991 coup attempt against Gorbachev helped Karimov in this struggle. The failure of the coup benefited Karimov, who had denounced the attempt, while it weakened Mirsaidov, who had aligned himself with the anti-Gorbachev coup (Carlisle, 1995:81). Karimov was on a visit to India when the crisis broke out. He returned to home immediately and found that Mirsaidov and his allies had imposed emergency measures, most probably hoping to replace Karimov by utilizing these measures (Carlisle, 1995:82). After a brief period of hesitation, Karimov expressed his opposition to the coup attempt. Moreover, being anxious not to let his opponents seize the initiative, he declared Uzbekistan's independence on 31 August 1991 (Yalçın, 2002: 53). Thanks to his decisions to condemn the coup and to declare the independence of Uzbekistan, Karimov improved his position significantly and enjoyed the weakening of his rivals.

The post-coup Uzbek politics was marked by a 'thaw' during which the country prepared for its first presidential elections (Fierman, 1997: 378). As the most important aspect of the thaw, Karimov allowed Muhammad Salih (Chairman of the Erk) to run against him in the presidential race. Moreover, during the election campaign, other political forces

such as Birlik and Islamic Renaissance Party were not as persecuted as they had been in the previous months. Karimov's relatively liberal policy towards the opposition in the early independence period came as a result of his low popularity and the influence that Mirsaidov enjoyed. It is probable that Karimov initially pursued a more tolerant policy towards opposition in order to both gain the support of opposition forces in his power struggle against Mirsaidov and to increase his legitimacy in the eyes of Uzbek citizens. As will be seen, as he consolidated his power, he would opt for pursuing a less tolerant policy towards the opposition. The following section is devoted examines the curtailment of alternative voices by Karimov as he gained power.

### **Curtailment of Alternative Voices**

On December 29, 1991, the country's independence was endorsed in a popular referendum by more than 98 per cent of the electorate. In a parallel vote, Karimov won 86 per cent of the vote against his sole opponent, Muhammad Salih (Capisani, 2000: 82). Karimov's victory was discredited by the fact that the media coverage of the electoral campaign was heavily in favour of him. Moreover, the two parties with the largest popular followings, the Birlik movement and the Islamic Renaissance Party, were prevented by the authorities from nominating their candidates.

Being bolstered by his victory in 1991 presidential elections, Karimov gave up his earlier tolerant policy and started to restrain the opposition parties, civil society organizations and the media rigorously. The crackdown on the opposition forces gained momentum with the government arrests and harassments of individuals connected to Birlik (Unity) and Erk (Freedom), the main opposition parties. Following this, the resolution mandating the registration of all public associations was passed in March 1993. This paved the way for the elimination of many important political parties including Birlik and Erk through denial of registration by the authorities. In addition, many political activists were forced into voluntary exile (Fierman, 1997: 388).

Islamic opposition also got its share from the clean-up of the government. Repression started with the elimination of Islamic Renaissance Party. The crackdown on Adolat, which led to arrest of over 100 leading activists of the organization, followed this. The Committee of Religious Affairs established firm control on the religious institutions and the government launched a mass arrest of clergy that operated without the control of the government in

1993-4 (Bohr, 1998: 27). The repression of religious activity not affiliated with state-sanctioned institutions and Islamic opposition intensified after a series of bombings in Tashkent in February 1999. The government alleged that bombings were an assassination attempt against Karimov by the Islamic Movement of Uzbekistan (IMU), an armed organization aiming to overthrow the regime and establish an Islamic state. Since the government campaign targeted the members of Islamic organization as well as the secular opposition, it has been argued that the authorities used the investigations into the bombings as a pretext to clamp down further on perceived sources of opposition (Melvin, 2000: 55).

The suspicion towards NGOs brought about governmental attempts to control the third sector, too (Adamson, 2002: 188). This was achieved through a number of means including the establishing pro-government NGOs, attempts to install government personnel as leaders of NGOs, preventing the establishment of local NGOs through threats and bureaucratic difficulties (including denying registration) and monitoring NGO activities (Adamson, 2002: 188).

Lack of competition has come to mark the post-independence Uzbek politics as a result of these governmental steps. Only pro-government parties and presidential candidates were allowed to participate in elections starting with December 1994 and January 1995 parliamentary elections. In The February 1995, a referendum to extend Karimov's first five-year term in office until 2000 was held; and it was alleged to be approved by 99 percent of the country's voters. All of the five parties participating in the December 1999 parliamentary elections supported the President. In the January 2000 presidential poll, Karimov defeated Jalolov, a Karimov loyalist, who himself admitted that he had voted for Karimov (Nichol, 2010: 7-8). In 2002 a law extending the presidential term from five to seven was enacted. Karimov's supporters argued that this change annulled his previous terms to defend his enduring stay (Kendzior, 2015: 715). As a result, the law extended the term of Karimov until 2007. In December 2007 election Karimov won a landslide victory notwithstanding the two-term limit in the constitution. Then the argument that his 1991 election could not be considered as one of his consecutive terms was used to justify his stay in power. In 2011, the parliament once again reduced presidential term to five years creating an excuse for his next re-election (Putz, 2015). On March 29, 2015 Karimov was elected as the president for the last time (the fourth consecutive term) as he would die two years latter. While giving the news on the coming elections local news

outlet Ferghana News used the headline “Incumbent President Islam Karimov’s Reelection Scheduled for March 2015” in a way implying the lack of meaningful competition and the foreknown result of the elections.

Against this background of repression of all kinds of opposition, Karimov concentrated all power in his hands. The constitution grants the president with a wide range of powers. The lack of competition in the elections ensures a docile parliament. As if this is not enough, Karimov also gained the right of appointing some members of the legislature as a result of 2002 referendum. The first parliament hosted some opposition figures like Mirsaidov and Muhammad Salih, which were removed from the scene on the basis of corruption charges or forced into voluntary exile, respectively (Ilkhamov, 2010).

There were additional reasons to be pessimistic about the role of the parliament. As a result of the constitutional amendments passed in 2004, the unicameral legislature has been transformed into a bicameral one. Now the central government is supposed to report to the upper chamber. Given the reality that the executive maintains strong control over the local government bodies (presidential appointees chair the regional legislative bodies); this regulation means that the government will report to itself and thus it will not be accountable. The lower chamber is supposed to submit the drafts to the upper one for passage. This means that the government can impose strict control over the lower house through the upper house. Moreover, whereas unicameral parliaments can impeach a sitting president only through voting, the new bicameral parliament will have to carry on a more complex and prolonged process to impeach the president. This will provide the president with time to take countermeasures to avoid impeachment (Ilkhamov, 2010). Therefore, the parliament has become even weaker as a result of the changes introduced in 2004.

As Karimov appointed all judges and could dismiss them whenever he wished, the judiciary was also submissive to Karimov. Torture was broadly used to extract confessions. A number of prominent opposition figures have been convicted on crimes blocking their future involvement in politics (Pannier, 2009: 632-642).

### **The Changes Introduced by Mirziyoyev’s Presidency**

Mirziyoyev, cabinet leader since 2003, suddenly emerged as Karimov’s most probable successor after the speaker of the upper chamber Senate stepped for him. Under the constitution, the speaker is normally entitled to assume the role of interim head of state (Reuters, 2016).

He won an election victory by taking the 88.61 of the votes casted in presidential poll held on 4 December 2016. As Karimov, Mirziyoyev was the candidate of the Movement of Entrepreneurs and Businesspeople – the Liberal Democratic Party of Uzbekistan. The other candidates, Sarvar Sadullayevich Otamuratov of Milly Tiklanish Democratic Party of Uzbekistan, Hatamjon Abdurahmonovich Ketmonov of the People's Democratic Party of Uzbekistan and Narimon Majitovich Umarov of Adolat Social Democratic Party received the 2.35, 3.73 and 3.46 of the votes, respectively (The Central Election Commission of Uzbekistan, 2016). According to the report of Organization of Security and Cooperation on elections, the vote was marked by serious flaws. In follow-up to elections, the dominance of state actors and the restrictions on political and civil rights resulted in lack of real competition. As the state strictly restricted and controlled media, only a state-defined coverage devoid of alternative voices reached to the Uzbek electorate (Organization of Security Cooperation, 2016: 1). Candidates avoided criticizing each other and state policies. The problems did not remain limited to the pre-election process. Whereas serious drawbacks such as signs of ballot box stuffing and extensive proxy voting were observed on the Election Day, counting process was also discredited due to severe violations (Organization of Security Cooperation, 2016: 3).

### **Political and Economic Development?**

Notwithstanding this continuity in holding non-competitive elections, Mirziyoyev period also is marked by a thaw and change in various issues. Mirziyoyev identified the priorities for his administration between 2017 and 2021 and embarked on reforms. While the first priority for him is the improvement of the state (development of the institutional framework of the public service, improvement of “e-government” system, improve the quality and efficiency of public services, practical implementation of public control mechanisms), the second is increasing the role of the Parliament and the political parties in democratic reforms and modernization of the country. The third priority is concerned with the rule of law and the broader improvement of the legal system in order to ensure the genuine independence of the judiciary and to guarantee the protection of rights and liberties of citizens. The fourth and fifth priorities are devoted to the economy of the country. They aim at development and economic liberalization to provide macroeconomic stability and the maintenance of high economic growth. Improving competitiveness, modernization and intensive development of agriculture, maintenance of institutional and structural reforms

to decrease the role of state in the economy and to enhance the role of private sector and attracting foreign investments by improving the investment climate are also included in the frame of fourth and fifth priorities. (Mirziyoyev, 2017).

As another important sign of his determination to realize these aims, Mirziyoyev established a widespread system of presidential reception centres, which are responsible for responding citizens' complaints. While these centers do not address severe right abuses, they have proved to be helpful for solving everyday social, communal and practical matters neglected under Karimov's rule like installing streetlights (Human Rights Watch, 2017).

One of the sources of severe right abuses is the rampant torture in the country. Although torture is against law, it plays a "central role" in the justice system, as it is used to make people confess, to threaten the families of detainees or prisoners and to demand bribes (Amnesty International, 2015). Many people, if they are ever lucky to be freed from prison, tell about the horrific techniques of torture they had been exposed to. On this issue Mirziyoyev recently issued the Decree on Additional Measures to Strengthen Guarantees of Citizens' Rights and Freedoms in Judicial-Investigative Procedures. This is a decree emphasizing that evidence obtained through torture is inadmissible. It also underlines the importance of and aims at guaranteeing real independence of the judiciary, improving the quality and transparency of justice system, widening the application scope of Habeas Corpus and fighting corruption (Tashkent Times, 2017).

As another change, Mirziyoyev released some prisoners including Samandar Kukanov of the opposition Erk Democratic Party after 23 years of sentence, Uzbek journalist Bekjon after almost 18 years and Uzbek banking pioneer Rustam Usmonov after 19 years behind bars (Saeed, 2017).

The government has also enhanced the autonomy of Uzbekistan's Ombudsman for Human Rights, Ulugbek Muhammadiyev, appointed just two years ago. An August 2017 law provides the Ombudsman's Office with the authority to get involved on behalf of citizens in various legal cases for the public good. The August 2017 law has made the powers of the human rights ombudsman akin to the UN "Paris Principles" concerning the status and functioning of national institutions for the protection of human rights (Human Rights Watch, 2017).

Economy is also critical for the post-Karimov reform process in the country as in the past most of the protests in this severely authoritarian place of the country were based on the economic concerns. Mirziyoyev seems to appreciate this role of economy well and is keen on realizing necessary reforms. The World Bank has selected Uzbekistan one of the top improvers in the year 2017 in the field of ease of doing business, referring to the reforms in starting business, construction permits, protection for minority investors, tax payments and electricity supplies (Mamatkulov and Gordeyeva, 2017).

As another positive step taken in the field of economy, Uzbekistan's government is making necessary arrangements for full currency convertibility by 2019. This is a critical move as limited convertibility has so far acted as a hurdle in private business development and foreign direct investment. Even the initial measures of the government acted as a serious blow to the black market (Eurasianet, 2017).

### **Changes in Foreign Policy under Mirziyoyev**

As economic grievances formed an important source of protests against the regime, economic development is an important priority for the new leadership as discussed above. Formulating a constructive foreign policy is considered a key to secure growth. Upon resuming power, Mirziyoyev underlined the importance of strong relations with surrounding Central Asian States. He launched some policies in this regard as will be discussed below.

During Karimov's rule, Uzbekistan was regarded a barrier to regional integration and Tashkent's relations with its neighbors were lukewarm at best as seen. In the last year of the presidency of Karimov, Uzbekistan continued to have disputes with neighboring countries, especially Kyrgyzstan and Tajikistan over borders. However, this situation started to change even in the first year of Mirziyoyev. (Freedom House, 2017: 5).

Uzbekistan exchanged commissions with Kyrgyzstan and Tajikistan, improved border cooperation with Kyrgyzstan and restarted regular flights between Uzbekistan and Tajikistan for the first time in 24 years (Mann, 2017: 2). Mirziyoyev paid a visit to Kyrgyzstan at the beginning of September, the first visit of an Uzbek president since 2000. During the visit, significant treaties were signed, including the agreement on the demarcation of the problematic border (Cancarini, 2017: 1). As a result of the agreement, contrary to the last twenty-five years marked by a standoff leading to shooting of Kyrgyz and Uzbek border

guards at each other sometimes, calm started to prevail along the Kyrgyz-Uzbek border (Pannier, 2017). Mirziyoyev also signed a Joint Declaration of Strategic Partnership and Good Neighbor Practices with Kazakhstan's President Nursultan Nazarbayev in March. During the visit, 13 documents on cross-border tariffs, security and trade were concluded. At the same time, some 500 Uzbeks traveled to Kazakhstan's capital, Astana, bringing in trade and investment agreements reaching to \$1 billion value. This is a quite important development as Uzbekistan's total GDP in was approximately \$67 billion (Forbes, 2017).

Mirziyoyev's pragmatic foreign policy is also good news for Afghanistan, too. At the time of writing of this article, Afghan president Mohammad Ashraf Ghani is planning to visit Uzbekistan. The two countries are set to sign a package deal to enhance bilateral cooperation in various areas including trade and economic, investment, transport-communication, science and education (UzDaily, 2017).

Mirziyoyev is also trying to improve relations with Turkey. He visited Ankara on October 25, 2017 as a response to Turkish Prime Minister Recep Tayyip Erdoğan's invitation. Karimov had cancelled the visa-free travel between the two countries and limited the relations with Ankara in the mid-1990s, after Turkey declined to extradite Uzbek opposition leaders Muhammad Solih and Abdurahmon Polat. On October 23, Mirziyoyev signed a decree that has made visa insurance easier for Turkish citizens by eliminating the invitation letter procedure for Turks planning to visit Uzbekistan and ordering the Uzbek bureaucracy to issue visas in three days (Radio Free Europe/Radio Liberty, 2017).

## **Conclusion**

The study first examined how Islam Karimov, who ruled the country between 1989 and 2016, established a fully authoritarian system in Uzbekistan. As shown, Karimov's rule resulted in the strengthening of executive branch in Uzbekistan at the expense of legislative and judiciary, silencing of the opposition forces, curtailment of the civil and political rights of the citizens, restriction of autonomy of civil society organizations and media.

Thus, Shavkat Mirziyoyev faces a quite formidable challenge: the legacy of Karimov's highly authoritarian system based on delicate balances among power centers in the country, mainly the clans. In his first year of power, contrary to the expectations his rule meant neither internal instability nor continuation of the tradition laid down by Karimov. Rather



Mirziyoyev opted for freeing political prisoners, moderately relaxing the controls on organizing peaceful rallies, establishing presidential reception centers to reply citizens' complaints, implementation of currency convertibility system and repairing relations Uzbekistan's neighbours, Kazakhstan, Kyrgyzstan, Tajikistan, and Turkmenistan as well as with Turkey.

As a concluding remark, it can be argued that the changes introduced by Mirziyoyev raise hope for political and economic development of the country (democratization and increase in the GDP with necessary improvement in Human Development Index) as well as peace and cooperation in the region, however it will take time to see whether these chances will be enduring. There is the need to observe the developments in this important country of Central Asia further in the coming years to arrive at a decision about the impact of Mirziyoyev's presidency on the political and economic development of his country and as well as foreign policy of Tashkent. As discussed in this study, first years of presidency of Karimov were more tolerant and less repressive compared the coming years. If this happens once more in Mirziyoyev's presidency, all hopes for change for good will be dashed.

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# 6

## TURKISH FOREIGN AID UNDER THE JUSTICE AND DEVELOPMENT PARTY: A HARBINGER OF PHILANTHROPIC OTTOMAN CULTURAL HERITAGE OR AN INSTRUMENT OF FOREIGN POLICY?

*Fatih Çağatay Cengiz*

### **Abstract**

*According to the 2014 Global Humanitarian Assistance Report, Turkey was 2013's most 'generous' country in terms of international humanitarian assistance: its foreign aid spreads from the Middle East to Central Asia to the Balkans. This paper aims to decipher and understand the material factors underlying the Turkish state's generosity and magnanimity in the context of both pragmatic domestic policy-making processes and the escalation of the refugee crisis in Europe. In other words, while a massive influx of refugees from peripheral zones provides cheap and informal labour for Turkey's industrial base, the EU can also securitize its borders.*

*In this multi-dimensional context, this paper argues that Turkey's foreign aid policy, which entails the 'good governance' component of the post-Washington Consensus, is one of the political linchpins of the country's proactive foreign policy. Turkey's foreign aid policy is motivated by its strategic calculations and aims to enhance the country's presence and sphere of influence. In addition to Turkish faith-based humanitarian organisations, the state-run agency TİKA has been a key institutional tool of Turkish foreign policy ever since its establishment in 1992, after the dissolution of the Soviet Union. Initially, TİKA aimed to provide assistance to the 'Turkic' republics only, but it has since expanded its sphere of influence greatly and increased its Programme Coordination Offices in neighbouring countries.*

*This paper employs the world-systems theory and concept of sub-imperialism when referencing the asymmetric power relations of the global order, in which dependence is maintained by a trichotomy of actors: the imperialist centre, subimperialist agents and the periphery. According to the world-systems theory developed by American sociologist Immanuel Wallerstein, a subimperialist country functions as*

*a mediator between the imperialist centre and the periphery to the advantage of the former. Within this theoretical context, foreign aid becomes a tool for a subimperialist county to reach new zones of influence and ease the burden of imperialist centres. In line with the data and theoretical debates, this paper concludes that foreign aid under the Justice and Development Party is used as an instrument of Turkish foreign policy; an instrument that advances Turkey's soft power, especially in the Middle East, and increases its bargaining power vis-à-vis central powers.*

## **Introduction: Philanthropy in its Historical Context**

Philanthropy has, throughout history, been a constitutive social activity for Turkish state institutions and citizens. It can be argued, with regards to the Ottoman cultural heritage bequeathed to modern Turkey, that three interrelated traditions marked the emergence of a philanthropic system in the Ottoman Empire. While Byzantine/Roman traditions did influence the emergence of Ottoman philanthropy, it was Sharia and Islamic principles that dominated the Empire's philanthropic social activities until the spread of Enlightenment ideas in the 18<sup>th</sup> century and the social upheaval in France marked by the 1789 French Revolution (Çizakça, 2006: 30).

However, Byzantine tradition aimed to further enhance state legitimacy not increase its citizens' welfare. According to French archaeologist Paul Verne (1990: 417), *euergetism* – a form of wealth redistribution practised by Roman citizens – and 'bread and circuses' had three important political functions for state-society relations in Ancient Rome. Firstly, 'doing good deeds' was a means by which political elites, themselves the beneficiaries of economic growth, could sustain political power and the *status quo*. As such, the imperial government used food and amusement to placate Roman *plebs* and ward off their daily grievances.

The Roman people are held fast by two things above all, the corn-dole [*annona*] and the shows...[and] the success of government [*imperium*] depends on amusements as much as more serious things; neglect of serious matters entails the greater loss, neglect of amusements the greater discontent; food largess is a weaker incentive than shows; by largesses of food only the proletariat on the corn-register are conciliated singly and individually [*singillatim et nominatim*], whereas by the shows the whole population [*universum*] is kept good humour (Fronto as cited in Verne, 1990: 418).



Secondly, ‘bread and circuses’ – especially festivals – were tools by which imperial Roman governments indirectly imposed discipline, creating the false consciousness that plebs were free. Thirdly, entertainment and food aid for citizens reflected the symbolic capital of the ruling elite, who needed to show off their superiority through ‘conspicuous consumption’ (Verne, 1990: 418). Imperial generosity – such as the construction of public buildings, improvements to infrastructure and granting special privileges to some cities – was also an expression of the emperor’s prestige: it marked him as a ‘good emperor’ within the ‘ideology of the traditionalist senators’ (Paterson, 2003: 99). Following the Christianisation of the Roman Empire in the fourth century, ‘imperial poor-relief schemes’ were associated with the Christian theology of giving ‘charity’ and ‘relief to the poor’ (Lomas and Cornell, 2003: 8). Adams (2017: 50) argues that this Christian theology – *piae causae* (charities) – had an impact on the emergence of the Ottoman *waqf* system, which recognised local customs and traditions.

In addition, Islam was another source of philanthropy in the Ottoman Empire, as Islamic foundations were the basic social institutions of philanthropic activities. İstanbul was central, as the city was where the majority of Islamic foundations (*waqfs*) worked in cooperation with the state. There were over 2,500 foundations in İstanbul in 1546; to compare, nearly 700 foundations were established in Aleppo between 1718 and 1800 (Baykan and Ayverdi in Çizakça, 2006: 30). It is important to note, however, that the foundation system was based on a principle of decentralisation until the time of Abdulhamid II. Under this principle, some foundations were exempt from taxes and, indeed, directly subsidised by the Empire. Abdulhamid II, on the other hand, aimed to fully control Ottoman philanthropy by directly engaging with the management of foundations (Çizakça, 2006: 31).

Ahmet Serdar (2015: 36) argues that Islamic foundations facilitated economic welfare across the Empire through triggering government savings, as such foundations replaced state agencies in the supply of education and health services. Nevertheless, after the proclamation of the republic in 1923, the Ministry of Islamic Law and Foundations, the Ministry of War and the Caliphate were abolished; thereby, the republic substituted religious bureaucracy with civil bureaucracy (Ulutas, 2010: 391-392). Kemalist reforms aimed to separate religious affairs from state administration, a principle in line with Turkish secularism. Some religious authorities also supported these secular reforms. As Hoca Halil Hülki Efendi, a deputy and mufti from Siirt, explained: ‘There is a great danger in religion’s and

the army's interest in the state affairs. This reality was accepted by all modern countries and governments as a governing principle' (as cited in Ulutas, 2010: 392).

However, civil bureaucracy's absolute control over religious authority during the Republican period made the government more socially responsible for delivering welfare services; services that had fallen under *waqf* influence during the Ottoman Era. In other words, the structural transformation of the state also impacted state-society relations. The Turkish welfare regime – from the developmentalist period until the 1980s – was based on a Bismarckian corporatist line in which formally employed state personnel benefited from pensions and health services while 'family' continued to be the primary mechanism for people who were either working in the informal sector or had recently migrated to urban areas (Buğra and Keyder, 2006). The inegalitarian welfare regime created a three-tier system in which a person's occupation determined their state social welfare benefits. For instance, 'the health benefits that accrued to persons covered by the Social Security Organization was US\$172 per person, for the self-employed covered by Bag-Kur it was \$279 per person, and for those who were covered by the Civil Servants' Retirement Chest it was \$363 per person' (Buğra and Candas, 2011: 518).

However, neo-liberalism and the commodification of social services eroded the traditional pillars of Turkey's welfare regime, opening space for municipalities and civil society organisations to tackle poverty (Buğra and Keyder, 2006). Furthermore, Islamic NGOs were reinvigorated with the establishment of the Fund for the Encouragement of Social Cooperation and Solidarity in 1986, as the Fund's preamble directly stated that such organisations were to provide social assistance to the poor. While praising Islamic foundations for being the 'most ancient and persistent institutions of the Islamic Turkish civilization of Anatolia and the most beautiful examples of cooperation and solidarity', the law on Social Cooperation and Solidarity assigned charities and wealthy citizens a duty to tackle poverty (Buğra and Candas, 2011: 520).

### **The Rise of the Philanthropic Non-Governmental Organisations in Turkey and their Roles as Foreign Policy Agencies**

Faith-based organisations gained momentum in terms of welfare services in the context of the welfare state's retrenchment. According to Daniel Grütjen's findings, the *Deniz Feneri* (Lighthouse) Association – one of the biggest faith-based organisations in Turkey,

founded in 1998 – had 300 full-time employees and 40,000 volunteers in the 2000s. In 2000, *Deniz Feneri* had a two million dollar budget; that number increased dramatically in 2005, when its annual budget topped 25 million dollars (2008: 116, f.n. 18). This increase could have also been related to the ruling government's encouragement of Islamic NGOs in the early 2000s. *Deniz Feneri*, which was designated an 'association of public interest' and able to collect aid without permission in 2004, was also granted the 'Outstanding Service Award' by the Turkish Assembly in 2007. This privileged status also helped increase the amount of aid this organisation delivered. According to *Deniz Feneri's* 2016 Annual Report, the organisation delivered more than 70 million TL of aid in 2016, of which in-kind benefits – such as clothing, food, and cleaning supplies – amounted to approximately 60 million TL. Hence, more than 700,000 needy people in 175,000 families benefited from either in-kind or cash benefits (*Deniz Feneri Derneği*, 2016: 5).

In addition to the *Deniz Feneri* Association, the *İnsani Yardım Vakfı* [İHH, Humanitarian Relief Foundation] – established in 1992, the year the Bosnian War erupted – controlled more than 500 million TL in 2016 (*İnsani Yardım Vakfı*, n.d.). According to their 2016 Annual Report, the İHH reached 650,000 needy people in Turkey that year (2016: 9). It also provided welfare benefits in 84 foreign countries, reaching 15 million people. However, it should be noted that the İHH, which received a tax exemption from the Council of Ministers, has always been more active in the Islamic world. For instance, 64% of all its aid, nearly 500 million TL in 2016, was donated to the Middle East region while 11.5%, 10.5%, 8.5%, and 5.5% of its total aid was delivered to Africa, Asia, Turkey, the Balkans and the Caucasus respectively (*İnsani Yardım Vakfı*, 2016: 4).

Unsurprisingly, Turkey's local Islamic foundations transformed themselves into international agencies and began delivering welfare in foreign countries; countries that correspond to Turkey's zone of influence, as part of its foreign policy. For instance, *Deniz Feneri* provides 'Emergency Aid' to Syria; collaborates with MÜSİAD – one of the biggest capitalist groups in Turkey – to deliver aid to those under 'Buddhist oppression' in Arakan; drills water wells in Chad, Somalia, Ethiopia and Arakan; supports an instauration project for students in a village in Bosnia Herzegovina; donates money for people in Africa to receive cataract surgery; and provides pre-school education for orphans in Gaza (*Deniz Feneri Derneği*, n.d.).

On the other hand, in addition to providing in-kind benefits to people in war-torn Syria, the establishment of an orphanage in Asia, drilling water wells in Africa, the construction of a mosque in Gambia and the establishment of an eye hospital in Niger, the İHH also engages in active humanitarian/diplomatic affairs (*İnsani Yardım Vakfı*, 2016: 34-37). Since 2014, the İHH has been a member of the Committee of Independent Observers, which scrutinises the peace deal between the government of the Philippines and the Moro Islamic Liberation Front. It is also an active mediator and referee for prisoners and convicts in Tajikistan, Kyrgyzstan and Jordan; engages in diplomatic relations with civil society organisations and opinion leaders in Libya, which has been controlled by three different governments since the fall of Muammar Gaddafi in 2011; and was an active organiser in the Gaza Freedom Flotilla in 2010, which aimed to break the Israeli blockade of Gaza (ibid: 36-38). Israeli commandos attacked the Mavi Marmara flotilla, leaving nine volunteers dead and several wounded. According to the Foundation for Political, Economic and Social Research (SETA), a pro-government research institute, Israel's storming of the vessel in international waters violated international law; an opinion supported by the United Nations Human Rights Council's Report (Ulutaş, 2011: 4-13). Therefore, borrowing sociologist Max Weber's terminology, it can be argued that there is an 'elective affinity' between Islamic philanthropic organisations' activities and the state's foreign policy formulations.

The AKP's foreign policy has, thus far, tried to establish a zone of influence in the Middle East, the Balkans and the Caucasus. Ahmet Davutoğlu, former Minister of Foreign Affairs (2009-2014) and Prime Minister (2014-2016), was a staunch critic of Kemalist foreign policy, as it was attached to Western interests and NATO in the Cold War period. Hence, he formulated an alternative doctrine of *Stratejik Derinlik* [Strategic Depth], arguing that Turkey should redesign its foreign policy in order to create a zone of power in the 'near land basin' (the Middle East, the Balkans and the Caucasus), 'near sea basin' (Black Sea, Adriatic, Eastern Mediterranean, the Red Sea, the Gulf, and the Caspian Sea) and 'near continental basin' (Europe, Northern Africa, Southern Asia, the Middle East, and Eastern Asia) (2014: 118). Turkey could benefit from its geographical location and history, its 'specific central country status', in order to do so. In other words, Turkey should pursue an active foreign policy because a 'central country with such an optimal geographic location cannot define itself in a defensive manner' (Davutoğlu, 2008: 78). In a public speech in 2009, Davutoğlu promised that Turkey's near land basin would be the 'center of world politics in the future'.

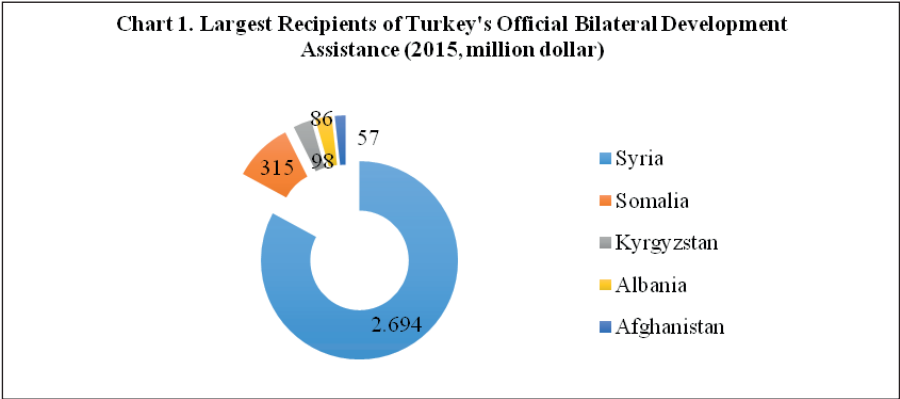
Like in the 16th century, which saw the rise of the Ottoman Balkans as the center of world politics, we will make the Balkans, the Caucasus and the Middle East, together with Turkey, the center of world politics in the future. This is the objective of Turkish foreign policy, and we will achieve this. We will reintegrate the Balkan region, the Middle East and the Caucasus, based on the principle of regional and global peace, for the future, not only for all of us but all of humanity (as cited in Knaus, 2010).

As previously argued, there has been an unsurprising correspondence between the AKP's foreign policy and faith-based humanitarian organisations' practices (Çelik and İşeri, 2016). It is clear that religious identity and identification with the Ottoman Islamic legacy motivates volunteers. For instance, while one of the volunteers in *Cansuyu* identified his/her work with the Ottoman Empire's philanthropic model, a volunteer in İHH was motivated by the 'historical responsibility' to help oppressed Muslims in foreign countries (Çelik and İşeri, 2016: 436). The 'parallelism' between Islamic humanitarian organisations and state policy inevitably results in the appointment of NGO personnel to state cadres. For instance, Kani Torun, former chairman of Yeryüzü Doktorları (Doctors Worldwide), was appointed Turkey's ambassador to Somalia and then became an AKP candidate at the general election (ibid: 438). However, this 'correspondence' is strengthened by the support of state agencies – such as TİKA (Turkish Cooperation and Coordination Agency) – in the delivery of foreign aid.

### **TİKA as a Philanthropic Governmental Organisation and a Foreign Policy Agency**

State agencies engage in humanitarian foreign aid alongside Islamic humanitarian organisations. In this multi-dimensional context, it can be argued that Turkey's foreign aid policy, which entails the 'good governance' component of the Post-Washington Consensus, is one of the political linchpins of the country's proactive foreign policy. Turkey's foreign aid policy is motivated by its strategic calculations and aims to enhance its presence and sphere of influence (Altunisik, 2014). Founded in 1992 after the dissolution of the Soviet Union, TİKA has been a key institutional tool of Turkish foreign policy since its inception. Initially, TİKA aimed to provide assistance to the 'Turkic' republics only, but between 2002 and 2012 TİKA expanded its sphere of influence and increased its Programme Coordination Offices in neighbouring countries from 12 to 33 (TİKA, n.d).

According to the 2013 Turkish Development Assistance Report published by the Turkish Cooperation and Coordination Agency (*Türk İşbirliği ve Koordinasyon Ajansı Başkanlığı*, TİKA), Turkish development assistance increased four-fold in nine years, from \$1.1 billion in 2005 to \$4.3 billion in 2013, under the Justice and Development Party (AKP) (TİKA, 2013: 19). In 2013, out of the \$4.3 billion total development assistance, bilateral assistance accounted for more than \$3 billion (ibid: 9). The countries of the Middle East were the largest recipients of Turkish bilateral development assistance in 2012, with approximately \$1.1 billion going to the region; Africa was the second largest recipient, with \$750 million (TİKA, 2012: 93). Turkey spent 0.21% of its Gross National Income on humanitarian aid in 2013, ranking third in the world after the USA and UK in amount of aid given (TİKA, 2013: 13). In addition, according to the 2014 Global Humanitarian Assistance Report (2014: 132), Turkey was the most ‘generous’ country in 2013 in terms of international humanitarian assistance. In 2017, Turkey is the second largest government contributor (after the USA), spending \$6 billion on humanitarian assistance (Global Humanitarian Assistance Report, 2017: 44-45). Unsurprisingly, the Ministry of Foreign Affairs has claimed that Turkey’s philanthropy is rooted in ‘history and culture’ (2011), a statement in line with the ‘Strategic Depth’ Doctrine developed by Ahmet Davutoğlu. As Chart 1 indicates below, Syria, Somalia, Kyrgyzstan, Albania and Afghanistan were the largest recipients of Turkey’s Official Bilateral Development Assistance in 2015. While Turkey gave Syria \$2.7 billion in 2015, Somalia received \$315 million.



Source: TİKA, *Turkish Development Assistance Report* (2015: 28-29)

## **Understanding Turkey's Magnanimity Through the Lens of Unequal Power Relations**

The world-systems theory and concept of sub-imperialism refer to the asymmetric power relations of the global order, in which dependence is maintained by a trichotomy of actors: the imperialist centre, subimperialist agents and the periphery (Väyrynen and Herrera, 1975: 168). According to the world-systems theory developed by American sociologist Immanuel Wallerstein, a subimperialist country functions as a mediator between the imperialist centre and the periphery to the advantage of the former. As Wallerstein states, a 'necessary structural element in a world economy' – a subimperialist country or semi-periphery area – 'partially deflect[s] the political pressures which groups primarily located in peripheral areas might otherwise direct against core-states and the groups which operate within and through their state machineries' (Wallerstein, 1974: 349-350).

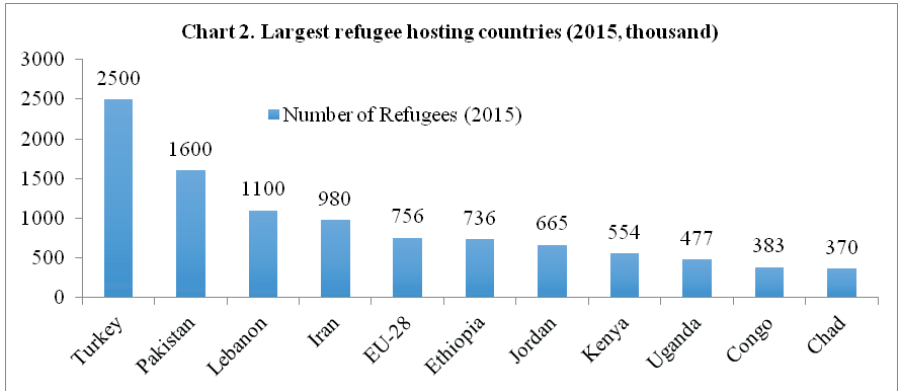
The term 'sub-imperialism' was coined by Brazilian sociologist Ruy Mauro Marini (1965; 1972) in reference to Brazil's 1960s economic expansion under state capitalism. However, the term is not restricted to the economic sphere. According to Marini, sub-imperialism is a way of 'collaborating actively with imperialist expansion, assuming in this expansion the position of a key nation' (1965: 22). Patrick Bond extends the use of the term to refer to countries that lubricate global governance under neoliberalism. With regards to South Africa, he argues that these countries are 'deputy sheriffs' for imperialist centres (Bond, 2013). Therefore, Turkey's sub-imperialist location in the world system can explain its magnanimity with respect to humanitarian foreign aid.

Importantly, the March 2016 migration deal struck between Turkey and the European Union is an example of Turkey's sub-imperialist bargaining power vis-à-vis the EU. According to the 'one in, one out deal', illegal migrants who cross from Turkey to the Greek islands will be returned to Turkey in exchange for one Syrian refugee's resettlement in Europe. As a part of the agreement, Turkish citizens will be free to travel to Europe without visa restrictions; the EU will allocate €3 billion for migrants in Turkey; and new paths will be opened for Turkey's accession to the EU (BBC, 2016). The agreement was hailed as a 'breakthrough' by the German chancellor, Angela Merkel (Rankin, 2016).

It is important to note that the EU could implement a containment policy to prevent migration flows from Turkey, and thereby try to alleviate political crises in Europe related

to issues of migration (Crawley, Duvell, Jones and Skleparis, 2016). By doing so, the EU could also securitise its economic system. Lucia Pradella and Sahar Taghdisi Rad conclude, '[t]he instability along the southern and eastern Mediterranean coastline ... is therefore both a channel of migratory movements and a security threat to European capitalism' (2017: 2422).

On the other hand, as Mark Rice-Oxley and Jennifer Rankin highlight, Europe exports the migration problem to the developing world, mainly North Africa, by means of 'disrupting humanitarian rescue missions in the Mediterranean, offering aid to north African countries that commit to stemming the flow of people themselves, funding the UN to repatriate migrants stuck in Libya and beefing up the Libyan coastguard' (2017). Turkey is no exception. According to the Directorate General of Migration Management (2017), there are about 3.3 million Syrian people under 'temporary protection' in Turkey, but over 3 million live outside temporary refuge centres. Therefore, it is fair to argue that the countries hosting the most refugees are developing and/or underdeveloped countries. Chart 2 shows that Turkey hosts the most refugees in the world, while EU countries as a whole accepted less than 1 million asylum seekers between 2010 and 2016.



**Source:** *ESI European Stability Initiative*, (2017:5). The number for EU-28 represents the recognised asylum claims between 2010-2016 (*ESI*, 2017: 23)

Having said so, it is important to understand the material factors behind the Turkish state's generosity and magnanimity not only in the context of pragmatic domestic policy-making



processes but also in the context of the escalating refugee crisis in Europe. In other words, it can be argued that while the EU can securitise its borders, a massive influx of refugees from peripheral zones provides cheap and informal labour for Turkey's industrial base (Bekçi in Letsch, 2015). Contrary to mainstream xenophobic perceptions of refugees in Turkey, as a burden shouldered by the state, 'Syrian men receive nearly US\$95 less and Syrian female workers US\$140 less than Turkish male workers' average monthly wage' (Akdemir 2017). According to a recent report by Birleşik Metal İş, a progressive trade union in Turkey, 99.6% of male Syrian workers and 100% of female Syrian workers work in the garment sector illegally without insurance (2017: 59). Syrian child labour in Turkey is also common, as Turkey's textile industry supplies textiles for European clothing brands (Johannisson, 2016). The data indicates that the Turkish state does not shoulder the burden of Syrian refugees; indeed, Syrian refugees are shouldering the Turkish economy. In addition, Syrian refugees also contribute to Turkish capitalism by opening new firms. While there were only 30 Syrian-partnered firms established in Turkey in 2010, this number rose to 1,599 firms in 2015 (Karasapan, 2016).

In addition, as Turkey's foreign aid spreads from the Middle East to Central Asia and the Balkans, foreign aid and hosting refugees have become subimperialist tools of expansion. Under the Justice and Development Party, foreign aid is used as an instrument of Turkish foreign policy in order to advance its soft power, especially in the Middle East and Africa. Therefore, Turkey uses foreign aid as a method of public diplomacy with both local and foreign audiences, painting the picture that Turkey is a benevolent state (Çevik, 2016). Not surprisingly, this strategy seems to benefit Turkey's overseas interests, as evidenced by the establishment of a Turkish military base in Somalia in 2017 (Hussein and Coskun, 2017). While Turkey consolidates its presence in East Africa, it will also train Somali soldiers (ibid). As Chart 1 (above) shows, Somalia was the second largest recipient of Turkish official development assistance in 2015, which totalled \$315 million.

## **Conclusion**

This paper explores the reasons for Turkey's philanthropic/humanitarian foreign aid under the Justice and Development Party. Contrary to the belief that Turkey's humanitarian aid is a reflection and continuation of Ottoman philanthropic culture, this paper argues that Turkey's magnanimity rests on material self-interests. In other words, Turkey's foreign aid

is a foreign policy tool. Indeed, the Ottoman philanthropic heritage incorporates the Roman understanding of charity and ostentation of state power. In order to reach foreign policy goals, i.e. expanding zones of influence, state agencies and Islamic faith-based organisations display an elective affinity, and Islamic discourse motivates volunteers. However, it should be emphasised that the proliferation of Islamic philanthropic organisations did not develop in a vacuum. The transition to the neo-liberal era and the retrenchment of the welfare state facilitated the development of a ‘third sector’ for tackling poverty and delivering aid. Nevertheless, NGOs’ direct or indirect participation in foreign policy implementation can create political problems among states – e.g. the 2010 Mavi Marmara incident, in which the Islamic organisation İHH was a major player.

In addition, Turkey benefits materially from migration, as people under temporary protection or refugees contribute to the Turkish economy. Contrary to xenophobic claims that the state feeds them, refugees are in fact shouldering the economy. By taking a refugee, Turkey also eases European countries’ political – if not economic – burden; countries where populist parties are on the rise. Moreover, the EU securitises its border and exports the migration issue to developing countries. As the statistics show, developing or underdeveloped countries host the most refugees. These mutual benefits are consistent with Turkey’s sub-imperialist role within the global order, ‘consisting of a trichotomy of categories of actors for the maintenance of dependence: imperialist center, subimperialist agents and periphery’ (Väyrynen and Herrera, 1975: 168). Thus, one needs a historical-materialist perspective in order to fully grasp Turkey’s ‘benevolence’ with regards to aid.

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# 7

## THE PLACE OF CIVIL AVIATION IN TURKISH FOREIGN POLICY AS A SOFT POWER: SAMPLE OF TURKISH AIRLINES

*Sibel BILKAY - Mustafa Kemal YILMAZ*

### **Abstract**

*The political, socio-economic, cultural, commercial and technological improvements in today's world removed all the obstacles in front of globalization and turned the world into societies which need each other and are in communication with. Improving trade and technology, triggered people demand to move and travel to different parts of the world and thus air transportation became the most reliable, minimizing the distance quickly option.*

*In this study, the overall structure of the civil aviation, the history of aviation in Turkey, Turkish foreign policy and policy components are to be determined in order to find out whether Turkish Airlines Incorporate Company, established in 1933 with the name of Governmental General Management, opening new destinations is parallel to Turkish foreign policy; which in other words, has any influence from politicians at intra-firm decisions and whether it took on a duty of Turkey's 'soft power' mission.*

*At the final Conclusion part, suggestions are provided that other private entities such as Turkish Airlines (THY) can undertake similar missions and also the need of encouraging aviation sector which grows from day to day.*

**Key words:** THY, Soft Power, Foreign Policy, Civil Aviation, International Relations.

### **Introduction**

Commercial aviation became a key sector that serves rapidly within the global system which turned into a single market with improving trade and globalisation. Demand for rapid and added value aviation caused improvement in air transportation. In addition,

speed and safety helps it become a preference not only in terms of touristic but also commercial perspective.

Global aviation industry has a significant commercial volume and is expected to increasingly continue to develop. Aviation sector is a key factor in the development of the countries not only in Turkey but all around the world. Globally developing aviation sector was once established and developed in terms of state monopoly, but then, it has reached an international, even global dimensions with significant contribution of the private sector. In this process, as the countries had sovereignty over the aviation at first, countries started flights to those they had bilateral relations. Later on, with the international agreements, aviation sector removed the boundaries at sky and undertook the "soft power" mission both in Turkey and the rest of the world.

In this study, using of State Airways Enterprise (Turkish Bird), which is established in May 20th, 1930 under the Ministry of Defence and transformed to Turkish Airlines Incorporated Company (T.H.Y. A.O.) that gained the quality of becoming one of the best airlines in the world, as a "soft power" in Turkish foreign policy will be analysed with historical perspective. The study aims to identify whether a relation lies between new destinations opened abroad by Turkish Airlines (THY) as a soft power tool in Turkish foreign policy and incidents, agreements and timing of new consulate openings. The hypothesis is that there is a meaningful relation between the new destinations opened by THY and foreign policy.

In this study, historical development of aviation in Turkey in general, establishment of THY, enlargement and improvement; simultaneously the relation between improvements in Turkish foreign policy and the new destinations opened by THY are analyzed. In conclusion, findings of the study are evaluated and suggestions are presented about the topic (THY,2017).

### **Conceptual Framework at the Civil Aviation and Politics**

This section includes some definitions and details of aviation and foreign policy. Concepts related to civil aviation and foreign policy concepts were discussed.

## **Foreign Policy**

In order to properly define foreign policy, it is necessary to define the concepts of “International Relations”, “International Politics” and “Diplomacy” first:

- International relations, in addition to being a sub-branch of political sciences, is known as a field that studies the relationships, ties and connections between nations. In this regard, the study of international relations, which has the characteristics of an interdisciplinary field, can be described as the mutual interactions of nations and international organizations (Dougherty and Pfaltzgraff 1971, pp. 25-26).
- International relations, which is a highly diverse branch, take additions from many different sciences such as economy, philosophy, law, psychology, anthropology and geography.
- International politics can be described as the policies a country pursues towards another country, countries or an international field. In this regard, if there is a need to analyze the main differences between international relations and international politics; international politics is the policies a country pursues towards what lies beyond its national borders and international relations is the evaluation of these policies on a larger, more systematically and scientific scale (Sondermann 1967, p. 2).
- The concept of diplomacy is described as conducting negotiations between countries through representatives. In a way, every other branch of international relations is used as a result of diplomatic failures (Sondermann 1967, p. 2).

With regards to this general framework, foreign policy is, a country conducting the international policy towards another country or countries via diplomacy. Prior to World War II, foreign policies were run through secret policies, but, after the war, it was observed that the legists in international law field in the United States of America (USA), started to familiarize themselves in foreign policies legal approach and scientific institutes in this field were founded in the USA. In this regard, foreign policy became a field that is researched by political scientists in the process and meanwhile other countries removed the restriction on foreign policies. World War II, which was more devastating

than the first one, helped the increment of studies on the topic in some way (Kürkçüoğlu 1980, s. 310).

## **Foreign Policy Components**

The pursuit of a diplomatic tone and policy suited to the conditions and circumstances of the era in Turkish foreign policies ever since the establishment of the Turkish Republic is considered a necessity of foreign policy. In this regard, the statements in foreign policy form a foundation for concepts in diplomacy and these concepts for components in diplomacy. It is argued that the conceptual framework in Turkish diplomacy and Turkish foreign policy expanded drastically after 2004 (Davutoğlu 2010). Ahmet Davutoglu, Former Turkish Minister of Foreign Affairs, emphasized that history did not come to end with the end of the Cold War, at his speech at Harvard University John F. Kennedy School of Government - Institute of Politics; on the contrary, the real history began now, and further stated that several conflicts that were implicit during the Cold War period started to rise back to surface and a new global political order was necessary for the resolution of these problems (Davutoğlu 2010). In this regard, Ahmet Davutoglu said the development of a new foreign policy vision was underway in Turkey since 2004, and also mentioned the 6 new principals in Turkish foreign policy as follows (Davutoğlu 2010):

- i. The formation of a new balance between security and freedom,
- ii. The development of relations with neighbouring countries through a zero problems strategy,
- iii. A proactive and preventive diplomacy,
- iv. The development of coherent relations with global forces,
- v. The further representation of Turkey in international agencies,
- vi. The creation of Turkish Republic image based on self-confidence and soft power.

Ahmet Davutoglu stated that, Turkey was now pursuing an active and crisis preventing diplomacy within the frame of these principals and on the subject of the relations between Syria – Israel, Turkey was working on negotiator and facilitative activities in the Balkans

while applying soft power on the resolution of crises (Davutoğlu 2010). After 2004, the political framework of Turkish foreign policies witnessed a major revision. Turkey started to use political and perspective concepts that were not used much in active politics, but used by many highly developed countries for their foreign policy. In this context, the concepts below shape the new Turkish foreign policies (Yeşiltaş ve Balcı 2011, p. 17; BİŞAD 2011, p. 13; Davutoğlu 2010):

**Center Country:** The term center country was first used in Turkey by Ahmet Davutoğlu, and described Turkey's ability of movement within the system. This term states that Turkey is not a bridge between East and West, on the contrary, a constituent, constructive and order setting country situation in the formation of a new order on a global and regional level.

**The Politics of a Wait-and-See Approach:** Together with the political strategy of waiting for things to settle down, to create its own solution instead of an immediate reaction to national and international events; it is to take a position, make decisions and implement these decisions in regard to this strategy.

**Vision Orientedness:** Vision orientedness, which is a principal Turkey built its new foreign policy strategy upon, is a concept incorporated into the Turkish political literature in 2009, by Ahmet Davutoğlu. In line with this principle, in case of a situation that did not concern Turkey, a foreign policy concerning the matter would not be pursued back in the day; with this new point of view, it was stated that even though there were not any crises, Turkey should be present due to its international location and historical background (Davutoğlu 2010).

**Security – Freedom Balance:** The balance between security and freedom is not easy to build in a political way, because, security is a fact achieved at cost of freedom, and freedom is a fact achieved at cost of security (Erdoğan 2012). For this reason, nations have difficulty building this balance in their foreign policies. Ahmet Davutoğlu, together with stating the only way different identities to be able to live together in Turkey lied in forming this balance both in national and international politics; also stated that chaos would occur in case security is forsaken for freedom and authoritarian regimes would occur in case the freedom is forsaken for security. In this regard, Turkey is capable of both resolving its

own issues and offering the world a new model when it builds the balance between security and freedom.

**Proactive Diplomacy:** Proactive diplomacy is the type of diplomacy that thrusts the countries to forefront with intent of creating new circumstances or changing the course of current conditions. Turkey embraced the method of proactive diplomacy instead of a wait-and-see approach since 2002 and started to have an active role in progression of regional events.

**Rhythmic Diplomacy:** Rhythmic Diplomacy, as stated by Ahmet Davutoglu, is the simultaneous obtainment of mobility and harmony in diplomacy. In this regard, it is possible for chaos to occur in case of mobility without harmony. In addition, no results would be obtained in case of harmony without mobility (Sabah, 2009). In this regard, rhythmic diplomacy is the type of diplomacy that foresees moving according to the course of events and adapting itself to the events in international situations.

**Multidimensional Foreign Policy:** It is a foreign policy principle that was developed in line with the new foreign policy vision after 2002, due to the necessities of Turkey's central country location. According to this, a general and multi-land foreign policy strategy should be pursued without taking any kinds of events, topics or relations with another nation into account. The most important characteristic of this strategy resembles being in a psychological structure and it renders essential to form a simultaneous relationship with differentiating actors in different lanes. For this reason, Turkey now pursues a multi-dimensional and multi-land foreign policy strategy with both regional and global actors. Davutoglu offers to realize his foreign policy vision as a proactive foreign policy line supported by rhythmic diplomacy (Davutoğlu 2009, p. 264). Turkey's neighbouring areas have seen more Turkish foreign policy elites and politicians in the past several years than they have in previous decades in their capitals. This proactive diplomacy targeted to achieve "zero problems" with Turkey's neighbours and stepped to the next stage, which was named as "maximum cooperation" by Davutoglu in his first press conference as Foreign Minister (Aras 2009, p. 9).

**Active Involvement in Global Level:** It is a concept that foresees participating in international institutions, organizations, agreements and having an active role in their activities. A membership for the United Nations Security Council and The Group of Twenty

(G20), an observatory position in the African Union and in the Arab League and the signing of the Kyoto Protocol can be given as examples of this approach.

**Order-Building Actor:** It is the political view which suggested that Turkey should act as a strong actor in giving a shape to a new world order that was aimed to be built. According to this, in the creation of regional and global orders, Turkey should be defined as a country that did not adjust itself to this order, but, a country which personally pioneered the notion of the creation of the order. There are two principal axes in this regard. The first one is, to try to prevent potential crisis in the axes of peace diplomacy and a new diplomatic tone; and to ensure the pursuit of a constructive diplomacy for peace. The second is, to open application areas for global integration through pioneering the idea of a new order by participating in regional and global organizations.

**Shuttle Diplomacy:** In international politics, it is the name given to rapid diplomatic interviews made by both parties and individuals related to the subject by implication in case of crisis. Quickest possible solution of the present crisis is aimed with these interviews.

**Coherent Relations with Global Powers:** It is based on the formation of a coherent and balanced relationship with each and every actor in the international power system, without seeing them as an alternative to another. In other words, it is the situation of not seeing the strategical collaboration agreements as an alternative to another. Although Turkey is a member of the North Atlantic Treaty Organization (NATO), its efforts of remaining as a dialogue partner with the Shanghai Cooperation Organization, which was founded as an alternative and an opposition to NATO, can state as an example to this situation.

**Maximum Cooperation:** It means to develop cooperation with all the countries, including the neighboring countries, at a maximum level. The removal of visas after the negotiations with many countries, the formation of good relations with other countries after the Turkish Airline's decision of launching expeditions to many places in the world, notably in Africa, as a soft power delegate can occur as examples to maximum cooperation.

**The Alliance of Civilizations:** The Alliance of Civilizations initiative, which was launched by Spain with the co-sponsorship of Turkey in 2005, gathered the support of the United Nations (UN) and in this direction, the High Level Intelligent Group was formed in September 2005, which consisted of scientists and politicians from different countries (UN

2005). The Alliance of Civilizations initiative (Cerrahoğlu 2015), which sprung to life in July 14th, 2005, and held its last meeting between the dates of 13 – 15 November 2006, in Istanbul, and announced the final draft to the public, lost its importance with Spain's withdrawal from the project (Cerrahoğlu 2015).

**Energy Hub/Corridor:** Turkey plays the role of a terminal and a corridor in the distribution of the oil in the Middle East and Eurasia, due to its geopolitical location. In this regard, the energy terminal always had the importance of a diplomatic view based on the distribution of the oil, which is collected in Turkey and distributed to the world through energy lines. It is foreseen that, with the completion of the ongoing projects, Turkey should become a country which is responsible for 6-7% of the worldwide oil distribution and Ceyhan should be an energy center of significant importance (T.C. Dışişleri Bakanlığı).

**Civilization Geopolitics:** Civilization geopolitics is a term used in Turkey's foreign policies for many years. It is also stated that, the perceptions of organic geopolitics, culture and civilization were the foundations of civilization geopolitics. In this regard, a Turkish-Islamic-Ottoman discourse was made by Ahmet Davutoğlu, instead of a western-based one. Therefore, a geopolitical discourse, dominated by the emphasis on civilization and a political point of view developed (Yeşiltaş ve Balcı 2011, pp. 27-28).

**Neo-Ottomanism:** Neo-Ottomanism is Turkey's re-penetration to the old Ottoman geographical area. It also means that, Turkey's foreign policy gets shaped in the axes of the Middle East and Islam (Yeşiltaş ve Balcı 2011, p.28). The Neo-Ottoman movement, which came into the picture in the period of Turgut Ozal and still continued on a different axe until today is perceived in foreign policy as Turkey's desire that reformed the Ottoman hegemony in the Middle East, the Balkans and the Caucasus (Yeşiltaş ve Balcı 2011, p.29).

**Shift of Axis:** It means the cancellation of ongoing alliances and basic orientations by a country for the sake of forming new alliances and new orientations. Although Turkey pursued a western oriented foreign policy ever since the establishment of the Turkish Republic, it recently started to shift its policies from the west to the east, from secularism to pan-Islamism, from the axes of the UN to the axes of the Middle East (Yeşiltaş ve Balcı 2011, p. 30).

**Middle Easternization:** Regarded as a continuation of the shift of axis, this process meant that Turkey gave importance to its relations with Middle Eastern countries.



**The Greater Middle East Project:** The Greater Middle East Project, that aims to bring democracy to Muslim countries and globalize these countries' markets, is established on a geography that starts from the Atlantic coasts of Morocco in the west, to the Karakoram Highway in the North of Pakistan in the east; from the coasts of the Black Sea in Turkey in the north and reaches Aden and Yemen in the south (Cumhuriyet, 2014). In other words, it is the USA's plan to open up the markets of Middle Eastern countries to the World and form the American hegemony in the Middle East, in light of its plans to fight against terrorism and bring democracy. It is stated that, bonds between Turkey and the USA grew stronger with Turkey's involvement in the Greater Middle East Project, following Italy and Yemen's steps (Cumhuriyet, 2014). However, the Greater Middle East Project became one of the main targets of political oppositions in the 2000s in criticizing the Turkish foreign policies (Cumhuriyet, 2014).

**Soft Power:** According to American scientist Joseph Nye, there are three ways to obtain something. The first way is, forcibly obtaining. Brute force and tyranny is used for this. The second is to buy off the opposition. The third way is to persuade the opposition (Kalin 2010). The attempt of persuading someone is regarded as soft power in foreign policy. It is essential to pursue fair, logical and credible policies in the process of persuading the opposition. In the soft power strategy where military power did not indicate an option, all the components of foreign policy should be used in the persuasion of the other country or countries. The strategy of soft power, which uses historical, cultural, traditional, material and psychological elements; appears predominantly as a very important element in the embodiment of Turkey's foreign policies towards Middle Eastern and neighbouring countries.

### **Commercial Air Transport Services**

Airline transportation, which gained a rapid growth trend after World War II and still continues to grow today, has become an essential part of modern life with the economic and social advantages. For this reason, it has become an attractive sector in which countries and also private industries across the globe invest consistently. Airline transportation can be described as scheduled or unscheduled transportation of passengers, cargo and mails through air vehicles within a commercial purpose (Sarılğan 2011, p. 6).

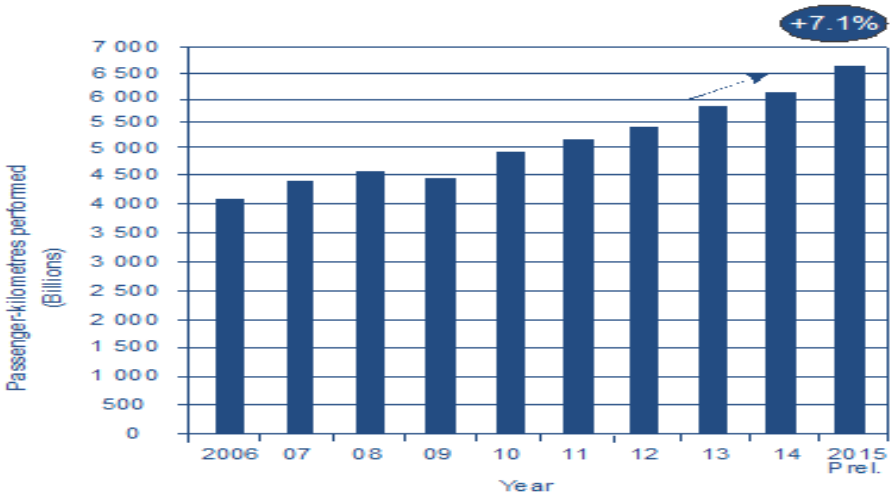
The airline transportation industry connects cities, countries and continents to each other with large flight network. In this regard, it can be argued that forthcoming years will be

aviation and space age by looking at its growth trend in years. In calculation of sectoral data of air transportation issued by the International Civil Aviation Organization on Jan 2017, the numbers of national and international passengers were used and the growth in passenger traffic in the last 10 years, which can also be seen in details in Figure 1, as follows (ICAO 2017):

“Preliminary figures released today by the International Civil Aviation Organization (ICAO) indicated that the total number of passengers carried on scheduled services reached 3.7 billion in 2016, a 6.0 per cent increase over last year. The number of departures rose to approximately 35 million globally, and world passenger traffic, expressed in terms of total scheduled revenue passenger-kilometres (RPKs), posted an increase of 6.3 per cent, with approximately 7,015 billion RPKs performed. This growth is a slowdown from the 7.1 per cent achieved in 2015..”

By the end of each year, ICAO publishes the previous year’s data. Therefore, 2013 data is presented in this study. Account transactions in airline companies happen the following year.

Figure 1. Total Scheduled Traffic as Revenue Passenger-kilometerss



Reference: ICAO, (2017). Total Scheduled Traffic:Revenue Passenger-kilometres performed,2006-2015, <https://www.icao.int/annual-report-2015/Pages/the-world-of-air-transport-in-2015.aspx>

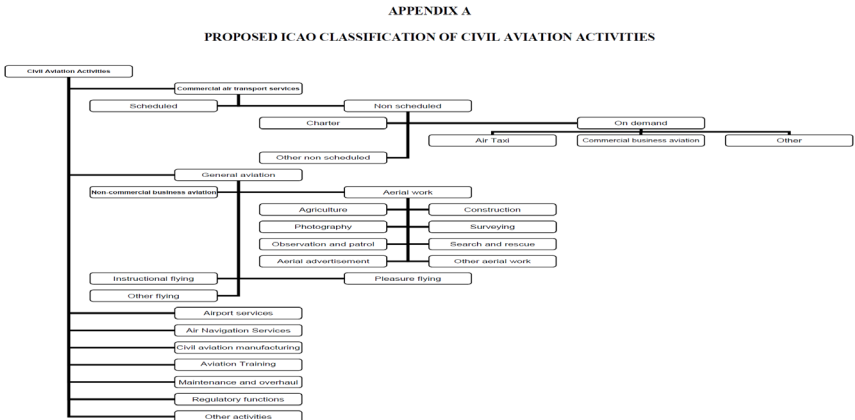
## Civil Aviation

Aviation, although not having a general definition, means the design and/or maintenance of produced air vehicles. The term aviation, in the general sense, is mistaken for civil aviation. But civil aviation, basically, is a sub-branch of general aviation (ICAO Working Paper 2009, p. 4).

As you can see in Table 1.1, general aviation is divided into two sub-branches as civil aviation and military aviation. Civil aviation is divided in five categories within itself as aviation services, manufacturers, air transportation, aerodromes and other services. Air transportation focused in the study is divided in three categories such as general aviation, commercial aeronautics and aerial work (ICAO Working Paper 2009, p. 4):

- i. Commercial Aviation:** The transportation of passengers, cargo or mails for a certain fee.
- ii. Aerial Work:** Works such as air transportations for special objectives, photography, movie shooting, agriculture, observation etc. are evaluated within this scope.
- iii. General Aviation:** General aviation consists of all kinds of activities which are not within the scope of commercial aviation and aerial work.

Figure 2. International Civil Aviation Organization (ICAO) classification of civil aviation



Reference: ICAO Working Paper, (2009). Tenth Session of the Statistic Division. International Civil Aviation Organization, Montreal, Canada, 23-27 November, p. 4.

## **Aviation Industry in Turkey**

Founded on February 16, 1925 by the order of Atatürk, the Turkish Tayyare Society was the first aviation corporation founded by the state and it was opened with an official ceremony on 15 May 1925. Atatürk's opening speech, "The future is the sky; because the nations that cannot protect their heavens can never be sure of tomorrow .. you will get the place waiting for you in the sky." He emphasized the importance of aviation and started a mobilization in the field of aviation (Verel: 1988, 14-74-78). Both the government and the private sector have been actively involved in the aviation industry so far as the numbers are not underestimated. The State has opened Kayseri Aircraft Factory - TOMTAŞ, THK Etimesgut Aircraft Plant and Aircraft Engine Factory, THK Gazi Aircraft Engine Plant - Turkish Air Facilities. (Opened in 1937 with the aim of directing Atatürk's own aircraft and motors) (Yalçın, 2010: 78). Vecihi Hürkuş-Hürkuş Airlines: The name "Vecihi K-6" was given to a plane drawn in 1918 and after the declaration of the Republic, it started to produce a small workshop in İzmir (Hürkuş, 1925:m20). Nuri Demirağ: established the first aircraft factory in private sector. On September 17, 1936, the aviation industry has taken its first base. The first domestic passenger plane was manufactured at Demirağ Aircraft Factory (Osman ve Şakir, 1947: 140-753).

The great breakthrough that Turkey has made with aviation has been in the aftermath of the World War II, when the whole aircraft industry shifted to the United States. The Etimesgut Aircraft Factory and Aircraft Engine Factory were transferred to the Machinery and Chemical Industry Institute (MKEK) by a law in 1952. In 1954, the Aircraft Engine factory was transformed into a tractor factory and the Aircraft Factory was converted into a textile machinery factory in 1968 (Yavuz, 2013).

The situation in the private sector was like that of state enterprises, and Vecihi Hürkuş's company had to close in 1960. Vecihi Hürkuş, who was the first pilot of the Turkish Aeronautical Association, the first aircraft designer and manufacturer, the first aircraft engineer, the first pilot trainer and the first in the name of aviation, had to struggle with financial difficulties in the last days of his life, It is added (Hürkuş, 2008: 9).

Nuri Demirağ, a double-engine passenger plane carrying the name Nu.D-38, produced great interest abroad. Despite taking the world-class aviation passenger aircraft, not go into production. Demirağ, aircraft orders from Spain, Iraq and Iran were blocked by the

government. The Sky School was closed. In 1944, facilities in Yeşilköy were expropriated by the state to be built as an airport. The remaining planes were sold as scrap paper (İnceöz,1996).

The mobilization of aviation, which began with the intensive efforts of Atatürk, faded away in the political conjuncture of the world after World War II. Considering today's technology, TAI-Turkish Aerospace Industries Inc. it is very difficult for us to reach the level of becoming a pioneer in the aviation industry, considering the progressive technology that has been lost at the moment, although the company was taken from the Americans by the share transfer in 2005.

### **Development Parallelism of Turkish Airlines with Political Chronology**

The world suffered economic crisis in the years 1929-30, while on the other hand, the newly formed Republic of Turkey was busy with its own build up and wounds of the war in this period. Atatürk followed the neutrality policy until 1945, while Turkey rigorously applied Atatürk's neutrality policy especially against European countries, the Balkans, the Middle East and the Soviet Union relations. In this context, Turkey continued friendly relations with Italy, France and the United Kingdom, and trade agreements were signed. However, Turkey, while maintaining all the relations with all these countries, signed regional alliances, the Balkan Pact and the Sadabad Pact, bearing the security in the forefront. (İleri,2005: 376) 1933-1945 period in Turkish Airlines corporate history, marks the establishment era (THY, 2017).

After 1945, enriched activities have been witnessed in the field of foreign policy. Russia's Bosphorus-related initiatives and other demands pushed Turkey to follow a policy siding with the USA and Europe; and, in this process, Turkey had to adopt the Truman Doctrine at Turkish foreign policy. In this case, a fully independent Turkey's foreign policy became dependent on the United States and the West. "Helping Greece and Turkey Law 75" agreed on by the US Senate in May 22, 1947, and received approval of USA President Truman afterwards, which followed Turkey to receive Marshall Plan. In this respect, Turkey and Greece received protection and U.S. military assistance which resulted as an end of the Soviet threat (Hatipoğlu,2006:277-284).

The first overseas flight with state airline in February 12, 1947, between Ankara-Istanbul-Athens, to maintain flight services between Ankara- Athens and discuss the matter with Greek Government. In 1951, the year corresponding to the Cyprus problem has occurred, Turkish Airlines launched flights. The negotiations bear positive result while the flight lasted 2 hours and 40 minutes in total (Sever 1997, p.68). At his speech at the Parliament, in May 19, 1950, Prime Minister Adnan Menderes stated the Government would seek closer cooperation with countries in the Middle East and Turkey would pull out the attention of its allies to securing Eastern Mediterranean (Yeşilbursa 2010, pp. 67-98). This description of Prime Minister Adnan Menderes also shows, why THY launched the first international flights to Lebanon (1951) and Egypt (1953). Jeddah flights were introduced in 1953, because of difficulty of travel of the pilgrims and air travel being more comfortable and shorter alternative of travel.

Table 1. New Turkish Airlines flight destinations in 1945-1956

COUNTRY	CONSULDATE OPEN DATE	FLIGHT CITY	THY FLIGHT START DATE
<i>Greece</i>	1926	<i>Athens</i>	1947
<i>Turkish Republic Nouthern Cyprus</i>	1978	<i>Nicosia</i>	1951
<i>Lebanon</i>	1963	<i>Beirut</i>	1951
<i>Egypt</i>	1925	<i>Cairo</i>	1953
<i>Saudi Arabia</i>	1926	<i>Jeddah</i>	1953

References: THY website, (<http://www.turkishairlines.com/en-tr/corporate/history>), and T.C. Dışişleri Bakanlığı website, (<http://www.mfa.gov.tr/default.en.mfa>)

June 1 1961 in Germany historic labor agreement signed between Turkey and the agreement has been valid since April 30, 1964 (T.C. Dışişleri Bakanlığı, 2017). Labour contracts were made with the Netherlands, France, Sweden and some other European countries and labor migration began in Turkey. These developments played an active role in the beginning of THY's European campaigns. The great majority of the flights that started in this period were European countries.

Turkey, which officially joined NATO on February 18, 1952, has made many new initiatives in the economic and social spheres to improve relations with NATO member

countries. With some of them being labor contracts signed with Germany and the Netherlands, Turkish foreign policy, with Prime Minister Turgut Özal in the 1980's, has entered a new phase and the liberal view of domestic politics is reflected in Turkey's foreign trade. Özal has also developed an external relationship with the free trade system. It has also been closely linked to the Black Sea, Middle East, Central Asia and Far East countries with the thought that Turkey needs to be involved in foreign trade in countries other than Europe (Dursun, 2008:426).

*Table 2. New Turkish Airlines flight destinations in 1967-1980*

<i>COUNTRY</i>	<i>CONSULDATE OPEN DATE</i>	<i>FLIGHT CITY</i>	<i>THY FLIGHT START DATE</i>
<i>France</i>	<i>23.02.1924</i>	<i>Paris</i>	<i>01.08.1998</i>
<i>Germany</i>	<i>1920</i>	<i>Koln</i>	<i>1969</i>
<i>Germany</i>	<i>1920</i>	<i>Dusseldorf/Stuttgart</i>	<i>1971</i>
<i>Germany</i>	<i>1920</i>	<i>Hamburg/Hannover</i>	<i>1972</i>
<i>Germany</i>	<i>1920</i>	<i>Nurnberg/Berlin/Copenhagen</i>	<i>1973</i>
<i>Iraq</i>	<i>11.03.2010</i>	<i>Baghdad</i>	<i>1978</i>
<i>Iran</i>	<i>01.01.1921</i>	<i>Tehran</i>	<i>1978</i>
<i>Italy</i>	<i>1924</i>	<i>Milan</i>	<i>1972</i>
<i>Pakistan</i>	<i>1947</i>	<i>Islamabad</i>	<i>21.07.1977</i>
<i>Libya</i>	<i>1952</i>	<i>Tripoli</i>	<i>1978</i>
<i>Kuwait</i>	<i>1969</i>	<i>Kuwait</i>	<i>19.09.1979</i>

*References: THY website, (<http://www.turkishairlines.com/en-tr/corporate/history>). and T.C. Dışişleri Bakanlığı website, (<http://www.mfa.gov.tr/default.en.mfa>.)*

With the Civil Aviation Law, issue number 2920, brought in October 14, 1983, by liberal Prime Minister Turgut Özal, establishing private airline companies was allowed in Turkey. In this context; THY fleet modernization, fleet expansion efforts and new airline companies that started operations increased mobility in the industry. However, the newly-formed companies experienced the bankruptcy due to capital shortage, lack of

maintenance-repair and other infrastructure facilities, qualified personnel and/or know-how of industry; thus, these companies had to end to their activities in the sector (Korul ve Küçükonal 2003, p. 25).

Minister Turgut Ozal carried out active foreign policy in 1980-1990 period. Ozal, described traditional Turkish foreign policy as “passive”, and while not using an initiative in any meaning did not fit in modern understanding and the world; he conducted the strategy in Kuwait War himself Yavuzalp 1998, p. 81). In this respect, new world order declared by the President of the United States during Kuwait crisis, which was the national interest of Turkey, was named “active foreign policy” by Ozal in accordance with the appropriate policy making efforts (Yavuzalp 1998, p.81). Prime Minister Turgut Ozal had a significant role in THY jumping a leap. In 1986, while Turkey was in process of starting THY intercontinental flight, Ozal instructed THY to purchase seven airplanes for intercontinental flights while THY’s intension was only three (Yavuzalp 1998, p. 81). Therefore, the purchase of long-haul airplane to perform transcontinental flight was actualized in accordance with this instruction. Prime Minister Ozal, himself, played a significant role in the development of foreign policy and improvement of THY. New flight destinations opened in this era can be seen in Table 4 Intercontinental flights to various countries in different continents started back then, with regards to these foreign policy improvements. Turkish Airlines has started since 1988 and opened for the first time in the American continent, the New York destination.

*Table 3. New Turkish Airlines flight destinations in 1980-1990*

<i>COUNTRY</i>	<i>CONSULDATE OPEN DATE</i>	<i>FLIGHT CITY</i>	<i>THY FLIGHT START DATE</i>
<i>Pakistan</i>	<i>30.04.1905</i>	<i>Karachi</i>	<i>03.06.1905</i>
<i>Sweden</i>	<i>1923</i>	<i>Stockholm</i>	<i>1982</i>
<i>Jordan</i>	<i>11.01.1947</i>	<i>Amman</i>	<i>31.05.1982</i>
<i>Syria</i>	<i>1946</i>	<i>Damascus</i>	<i>22.02.1984</i>
<i>Spain</i>	<i>01.01.1951</i>	<i>Madrid</i>	<i>1986</i>
<i>Singapore</i>	<i>12.02.1969</i>	<i>Singapore</i>	<i>1987</i>



<i>France</i>	<i>23.02.1924</i>	<i>Lyon</i>	<i>1987</i>
<i>India</i>	<i>08.07.1948</i>	<i>Delhi</i>	<i>02.11.1998</i>
<i>Saudi Arabia</i>	<i>1926</i>	<i>Riyadh</i>	<i>1988</i>
<i>Norway</i>	<i>1926</i>	<i>Oslo</i>	<i>1988</i>
<i>Switzerland</i>	<i>01.10.1925</i>	<i>Basel</i>	<i>1988</i>
<i>Tunisia</i>	<i>1957</i>	<i>Tunis</i>	<i>1988</i>
<i>United States of America</i>	<i>1925</i>	<i>New York</i>	<i>1988</i>
<i>Algeria</i>	<i>1962</i>	<i>Algeries</i>	<i>1988</i>
<i>Finland</i>	<i>1961</i>	<i>Helsinki</i>	<i>1988</i>
<i>Japan</i>	<i>1925</i>	<i>Tokyo</i>	<i>1989</i>
<i>Russia</i>	<i>03.06.1920</i>	<i>Moskow</i>	<i>1989</i>
<i>Thailand</i>	<i>1958</i>	<i>Bangkok</i>	<i>1989</i>
<i>Libya</i>	<i>1952</i>	<i>Benghazi</i>	<i>1990</i>

References: THY website, (<http://www.turkishairlines.com/en-tr/corporate/history>). and T.C. Dışişleri Bakanlığı website, (<http://www.mfa.gov.tr/default.en.mfa>.)

Since 2002, Davutoğlu has defined Turkey's new foreign policy vision and Davutoğlu has introduced various new concepts in the context of foreign policy into Turkish political literature. In the direction of this new foreign policy vision and strategy, Turkey has been able to intervene in events and situations all over the world since it has assumed a more active role in international politics since the ruling AK Party came to power. Africa, Latin America and the Far East such as the location is quite far away countries with political, economic, cultural, is situated in the effort to establish social bonds. In this respect, it is aimed to introduce Turkey in the most effective way in remote countries through the use of foreign policy tool of public diplomacy, which is a soft power method, while developing various structures in both the state and civil society, and to develop cooperation among these countries in various fields (T.C. Dışişleri Bakanlığı, 2013).

In this period, diplomatic relations with many countries, especially with African and Latin American countries, were being developed, bilateral new consulates were opened, visas were removed with a lot of countries, trade and cultural interaction was increased,

soft power tools were used and all countries of the world, Turkey has been reached in political, commercial, cultural, social and scientific fields. The revision of Turkey in foreign policy especially after 2003 has resulted in Turkey opening consulates in many countries, especially in African countries, making trade agreements, deepening superficial or non-existent relations. This global understanding of Turkish foreign policy has been supported by THY, and THY's flight network has expanded considerably.

*Table 4. Turkish Airlines new flight destinations in 1990-2003*

<i>COUNTRY</i>	<i>CONSULDATE OPEN DATE</i>	<i>FLIGHT CITY</i>	<i>THY FLIGHT START DATE</i>
<i>Libya</i>	<i>1952</i>	<i>Bendhazi</i>	<i>1990</i>
<i>Croatia</i>	<i>01.04.1993</i>	<i>Zagrep</i>	<i>1991</i>
<i>Azerbaijan</i>	<i>05.02.1993</i>	<i>Baku</i>	<i>25.03.1991</i>
<i>Spain</i>	<i>01.01.1951</i>	<i>Barcelona</i>	<i>13.07.1992</i>
<i>Bahrein</i>	<i>12.04.1986</i>	<i>Bahrein</i>	<i>1992</i>
<i>Kazakistan</i>	<i>03.02.1992</i>	<i>Almaty</i>	<i>25.05.1992</i>
<i>Uzbekistan</i>	<i>25.04.1992</i>	<i>Tashkent</i>	<i>25.05.1992</i>
<i>France</i>	<i>23.02.1924</i>	<i>Nice</i>	<i>05.06.1992</i>
<i>Turkmenisan</i>	<i>29.02.1992</i>	<i>Ashhabad</i>	<i>29.03.1993</i>
<i>Romania</i>	<i>1994</i>	<i>Bucharest</i>	<i>29.03.1993</i>
<i>United Kingdom</i>	<i>02.09.1924</i>	<i>Manchester</i>	<i>02.06.1993</i>
<i>Ukrain</i>	<i>03.02.1992</i>	<i>Kiev</i>	<i>01.11.1993</i>
<i>Albania</i>	<i>1926</i>	<i>Tiran</i>	<i>1995</i>
<i>Japan</i>	<i>1925</i>	<i>Osaka</i>	<i>1995</i>
<i>Kyrgyzstan</i>	<i>1992</i>	<i>Bishkek</i>	<i>24.05.1996</i>
<i>Bosnia-Herzigovina</i>	<i>1993</i>	<i>Sarajevo</i>	<i>1996</i>
<i>Georgia</i>	<i>14.07.1992</i>	<i>Tbilisi</i>	<i>1996</i>
<i>South Africa</i>	<i>22.03.1994</i>	<i>Johannesburg</i>	<i>1996</i>
<i>South Africa</i>	<i>22.03.1994</i>	<i>Cape Town</i>	<i>28.10.1997</i>
<i>Ukraine</i>	<i>03.02.1992</i>	<i>Odessa</i>	<i>01.04.1997</i>

<i>Ukraine</i>	<i>03.02.1992</i>	<i>Simferopol</i>	<i>21.04.1999</i>
<i>Macedonia</i>	<i>06.02.1992</i>	<i>Skopje</i>	<i>02.09.1998</i>
<i>China</i>	<i>1997</i>	<i>Beijing</i>	<i>20.05.1999</i>
<i>China</i>	<i>1997</i>	<i>Shanghai</i>	<i>2000</i>
<i>Moldova</i>	<i>03.02.1992</i>	<i>Chisnau</i>	<i>12.10.2000</i>
<i>Czech Republic</i>	<i>11.10.1924</i>	<i>Prag</i>	<i>2000</i>
<i>United States of America</i>	<i>1925</i>	<i>Miami</i>	<i>2000</i>
<i>Korea</i>	<i>11.08.1949</i>	<i>Seoul</i>	<i>2000</i>
<i>United States of America</i>	<i>1925</i>	<i>Chikago</i>	<i>2000</i>
<i>Poland</i>	<i>1923</i>	<i>Warsaw</i>	<i>2000</i>
<i>Kosova</i>	<i>17.02.2008</i>	<i>Pristina</i>	<i>2002</i>
<i>Hong Kong</i>	<i>01.07.1997</i>	<i>Hong Kong</i>	<i>28.10.2002</i>

*References: THY website, (<http://www.turkishairlines.com/en-tr/corporate/history>). and T.C. Dışişleri Bakanlığı website, (<http://www.mfa.gov.tr/default.en.mfa>.)*

While THY added 100th plane to its fleet in 2006, decided to participate global airline companies' alliance, Star Alliance. Same year, THY became the first „IATA Operational Safety Audit (IOSA) Operator”“ in Turkey after passing the Aviation Safety Standard „IOSA Program”“. THY started tele-sales the same year and THY Technical Inc. established, gained International Organization for Standardization (ISO) 9001:2000 quality certificate and THY General Manager, Temel Kotil, was elected a Chair to IATA. In 2007, THY won „National Quality Prize”“ in aviation sector and joined Star Alliance in 2008, while establishing Anadolujet in order to provide cheaper domestic flights. And in 2010, THY was awarded first in the world, in economic class treats by Skytrax (THY).

The revision of Turkish foreign policy, especially after 2003, caused Turkey opening consulates mainly in African countries, signing commercial agreements, deepening or newly establishing relations between. This global perspective of Turkish foreign policy has been supported by THY and the flight network has widened accordingly. THY started or was in the urge to start flights to all the countries Turkey opened consulates or improved

trading and mutual relations. Whilst the company started flying to 21 new destinations in 2006, it started flight schedules to those countries Turkey started or deepened trading and mutual relations immediately. Opening a new route to Khartoum in April 23rd, 2006, after the visit of former Prime Minister, Recep Tayyip Erdogan, in March 2006, is an example to that.

In 2010, a number of diplomatic visits, called as Turkey's African extraction were actualized. Following the opening of the Consulate of Tanzania in May 18th 2009, THY started flights to Dar Es Salam, 10 months later. And began to fly to city of Entebbe of Uganda, another country from African continent, in June 14th, 2010, and opened Embassy in Uganda in October 29th, 2010. Almost simultaneously with 2012, 2013 and 2014, consulates opened in Argentina (2012), Djibouti (2012), Chad (2013), Sri Lanka (2013), Benin (2014), Luanda (2014), Republic of Congo (2014) and THY started flights to those countries. Today, THY is a company that flies to a total of 120 countries and 302 airports with 329 airplane fleets (THY, 2017).

### **Conclusion and Recommendation**

In this study, where history of Turkish Airlines since its establishment up till now, the politics of Turkey of these periods, the developments happened in the world and the general framework of civil aviation are drawn; the proof and details that THY performed Turkey's soft power mission are scrutinized. THY was 100% state owned between years of 1933 and 1955. That is why, THY flight destinations were determined by political decisions of Ministry of Foreign Affairs and Prime Ministry. Those destinations were mostly the countries with closer bilateral relations. For example, the reason for performing the first international flight to Athens, Greece, in February 12th, 1947, was; the relief sent to both Turkey and Greece by US Senate in May 22nd, 1947, and those two countries forming close relations against the threat from Russia. In order to determine new THY destinations as of 1951; Lebanon, Egypt, Saudi Arabia were chosen due to Turkey's political approach in the related era, which was explained in detail at second chapter with regards to expansion to Middle East statement of Prime Minister Adnan Menderes.

In years 1956-1967, THY became an incorporated company and Turkey made attempts to appear in the global arena by both CENTO and NATO memberships. By participating to NATO in 1952, Turkey started new initiatives with other NATO members in

socio-economic and cultural relations to form closer bonds. One of the biggest indications of this, was, labor agreements signed with Germany, Netherlands, Italy, Belgium and other countries in order to supply the labor demand in Europe with Turkish citizens. 6.5% of THY shares were sold to British BOAC, and, bearing all these reasons in mind, majority of the flights were performed to European countries. With labor agreements and improved trading, economic and social relations with European countries; THY Inc. gained place in a highly potential trading sector.

THY achieved a big leap in years 1967-1980. Shares were bought back from BOAC and were nationalized in February 17th, 1977. Labor agreements with France, Denmark, Libya, the Netherlands and Sweden were signed in this era. The agreement dates and opening new destinations to these countries were synchronous. THY caught a growth trend since period of 1980-1990, with effect of Prime Minister Turgut Ozal's active foreign policy. It is observed, THY bought 7 planes at once and started continental long-haul flights with direct orders of Turgut Ozal. In this decade, THY added flights to 19 new countries, 3 being transoceanic.

Although years of 1990s have been a negative and intensive period, in both domestic and foreign policy, because of dispersion of the Soviet Union, many countries proclaiming their independence, Gulf Crisis and the earthquake in 1999; improvements in aviation sector have triggered THY improve synchronously. In this period, two and a half months after opening a consulate in Kazakhstan, in March 2nd, 1992, THY started expeditions to Almaty. The situation was similar with Uzbekistan and Turkmenistan. As of 1990-2002 era, Turkey was performing flights to 32 countries. Since 2003, Turkish foreign policy revised and this revision lengthened until current dates. Due to Turkey's new vision, relations with all the countries improved and THY became a global company in this period. Nowadays, there are very rare countries where THY does not perform a direct or indirect flight via bilateral agreements. The expeditions to some countries are the stations forming a solid base to the hypothesis of the study. The dates of opening consulates in Ghana, Djibouti and N'djamena after Turkey's Africa expansion in foreign policy are synchronous with the flights starting dates.

THY, founded under state in 1955, received a private company status as of today with 50.88% shares offered to public. Although THY is operated as a private company in stock shares market; it is still managed by governmental bodies as shown with this study.

This situation reinforces the hypothesis of the study. In THY, all appointments are made by the Government, from the Board of Directors to lower staff. THY former Chairman, Hamdi Topcu, made the remarks that verified the situation.

All findings of THY portal in official websites of Ministry of Foreign Affairs and Turkish representations, Turkish representations authorities taking place in official protocols and these being assigned by the government again, facts stated in Topcu interview, it is understood that THY is managed from Ankara. THY, always held a high risk of loss in flights performed to those remote areas of the world because it took a considerable time to wait for the trading agreements to mature for the country where only a trading agreement is made. Nevertheless, THY is known as a company to perform scheduled flights. In order to have a chartered expedition completely removed, THY would have needed to wait for the next charter expedition period or has revised with an alternative frequency. One of the main stations has constantly been Ataturk Airport, where THY has planned the first flights, and it has been very hard to get the frequency from Ataturk Airport. Another major company of the sector, Pegasus Airlines, has been performing its flights from Sabiha Gokcen Airport because of the lack of frequency from Ataturk Airport. Within the scope of this study, the information with regards to the profit/loss has not been added, because in a competitive environment the disclosure of such information is acknowledged as a trade secret. Companies use such values when to issue a new flight to a country and/or city, which, in turn, means the present airline company, performing flights, to claim loss.

The way for Turkey to say “count me in” in every aspect, can happen in line with strengthening the aviation sector. THY flying to many various destinations as possible, obtaining a place in the civil aviation sector, receiving awards that prove it is better than many airlines in the world are positive improvements on Turkey’s behalf as it can pass the enlargement trend to industry, trade and tourism sectors in parallel with the sectoral development.

As a result of the study, following suggestions can be made on the topic:

- Turkish Republic allowed the establishment of private airline companies since 1985, and needed to act fair and equal under competition conditions to the companies. For this reason, each particular airline with “Turkish Republic” tail number on, should be entitled to be listed at the Ministry of Foreign Affairs website.

- Turkey's historical frame was referred to having airplane engines, body factories in the 1940s. However, in the past, private enterprises are forced into bankruptcy or received wrong policies. The private sector, and, in particular, those airline transportation firms in growth trend, should be encouraged to airplane maintenance and repair services by Government, while incentives in this regard should be provided. Turkish Airlines has been a private company since 2006, and should have benefited from other private companies' rights, or, concessions that have been offered to THY should have been presented to the other companies, thus, private entrepreneurship in aviation sector would have moved forward.
- Subsequent to the third airport in İstanbul, Turkey to become a center for the "transit flights" is a well known fact. General Directorate of State Airports Authority (DHMI), stated the number of transit passengers at the Atatürk and Sabiha Gökçen Airports 12 million 55 thousand by 2014, and 46.7 million in total while THY carried the majority of this. With the third airport functioning, the number of transit passengers will increase significantly. The biggest advantage of the third airport remarks being operational in the field of transit cargo, too. For this reason, in order to meet the growing demand, the private sector must be encouraged in the field of cargo transportation.

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# 8

## INVESTIGATING EMERGING ENERGY SECURITY ISSUES DURING THE 21ST CENTURY: MARITIME TRANSPORT AND ALTERNATIVE MODES OF LIQUEFIED NATURAL GAS BUNKERING<sup>1</sup>

Burak Şakir ŞEKER

### **Abstract**

*Today, shipping is by far the most international of the world's industries. Each and every day, ships of different size and capabilities carry huge quantities of cargo and a very large number of passengers cost effectively, cleanly and safely. Maritime transport is essential to normal functioning the world's economy as over 90% of the world's trade is carried by sea and it is, by far, the most cost-effective way to move en masse goods and raw materials around the world.*

*The global trade in Liquefied Natural Gas is growing rapidly from almost negligible in 1970 to a certain number that is expected to be a globally meaningful amount by the year 2020. In most cases that describe a LNG value chain commercial development, the LNG suppliers first confirm sales to the downstream buyers and then sign long-term contracts with strict terms for gas pricing; only when the development of the respective project is deemed feasible, the sponsors of an LNG project would invest their money towards operation.*

*There are three main modes for refueling ships via LNG, with probably the permanent installed network being the safest of all. Today, there is no direct infrastructure in place for transferring LNG towards a vessel. The other methods are locally available LNG will be bunkered by loading LNG road tank trucks directly onto the vessel during normal loading operations, or LNG bunkering barge will deliver the necessary fuel. In any case, each of these methods has different aspects; further research can pinpoint the associated advantages.*

1 The opinions expressed in this article are the author's own and do not reflect the official policy or position of the Turkish Government or related any party.

*Turning the discussion into the strategic domain, it is proposed to create a world-wide mapping of LNG related infrastructures and then correlate them with the necessary supply chain, namely with which exactly method of delivery will the LNG fuel be made available to a specific port of call.*

## Introduction

Today, shipping is by far the most international of the world's industries. Each and every day, ships of different size and capabilities carry huge quantities of cargo and a very large number of passengers cost effectively, cleanly and safely. Maritime transport is essential to normal functioning the world's economy as over 90% of the world's trade is carried by sea and it is, by far, the most cost-effective way to move en masse goods and raw materials around the world (IMO, 2017a). Keep in mind that the key characteristic of the contemporary world is the interconnectedness among societies and people across the national boundaries of nation-states. This complex process is called globalization and it is a phenomenon with multi-level influences. With oceans covering almost three-quarters of the earth's surface and with the vast majority of all international trade transported by sea (UNCTAD, 2015), maritime transport should be considered as the backbone of globalization and extremely vital for all "just-in-time economies" (Seker, 2016a: 121-136); for many NATO's members -such as the United States of America (US), Canada and various European countries (Tatar, Bildirici, 2013)- freedom of navigation and the uninterrupted operation of the maritime transport industry are both items of very high priority within their security agenda.

The global trade in Liquefied Natural Gas (LNG) is growing rapidly from almost negligible in 1970 to a certain number that is expected to be a globally meaningful amount by the year 2020. As a reference, the 2015 total "petroleum and other liquids fuel" global consumption was 93.78 million barrels per day (EIA, 2017). During the year 1970, global LNG trade was around 3 billion cubic meters (bcm); by 2011, it was increased up to the level of 331 bcm (Economist, 2012). It is also important to note that various entities within the United States of America energy sector was pushing hard to start exporting LNG by the end of 2015, although these plans have been significantly hampered by the current extremely low oil-prices. In any case, a Black & Veatch Oct 2014 forecast predicted that by 2020, the US alone will export between 10 Bcf/d and 14 Bcf/d (Podaval, 2014). The California Energy Commission provided estimates for the year 2020 for 48.3 billions of cubic feet per day (Bcf/d), up from 2005's trade of 18.3 Bcf/d (base case,

with the high case being 29% higher) (Sison-Lebrilla, 2007: 12-19) In any case, the LNG market could then be roughly 10% the size of the global crude oil market and that does not count the vast majority of natural gas which is delivered via pipelines directly from the well to the consumer.

On the 25<sup>th</sup> of February 2016, it was publicly announced that the first shipment of LNG had officially left American shores towards Brazil, a highly anticipated event that has been years in the making. The company “Cheniere Energy” has already built a new export terminal, putting the finishing touches on the facility rather recently. The company under discussion announced on the 24<sup>th</sup> of February that the first cargo from its Sabine Pass export terminal on the U.S. Gulf Coast in Louisiana was loaded up and would depart immediately (Weber, 2016). In any case, a majority of the world’s supply comes from countries with the largest natural gas reserves: Algeria, Australia, Brunei, Indonesia, Libya, Malaysia, Nigeria, Oman, Qatar, Trinidad and Tabago, as well as Russia and USA. In most cases that describe a LNG value chain commercial development, the LNG suppliers first confirm sales to the downstream buyers and then sign long-term contracts (typically 20–25 years) with strict terms and structures for gas pricing; only when the customers are confirmed and the development of the respective project is deemed economically feasible, the sponsors of an LNG project would invest their money towards development and operation. Thus, the LNG liquefaction business has been limited to players with strong financial and political resources. Major international oil companies (IOCs) such as ExxonMobil, Royal Dutch Shell, BP, BG Group, Chevron, and prestigious national oil companies (NOCs) such as Pertamina and Petronas are very active players in the domain under discussion (WEC, 2013: 12, 17, 22-30).

Liquefied Petroleum Gas (LPG), LNG and Compressed Natural Gas (CNG) are fossil derived fuels and therefore their use can release -one way or another- greenhouse gases into the atmosphere. As vehicle fuels, they are suitable for use in the two dominant internal combustion engine technologies; spark ignition and compression ignition. Although capable of working in either type of engine there are practical factors which limit their applications to one rather than the other. Broadly speaking LPG is compatible with petrol (gasoline) engines, such as those of cars and trucks; LNG and CNG are a better match for heavy diesel vehicles and certainly for large size seagoing vessels. Although, in principle, they can be used to replace diesel or petrol, LPG is better suited as a petrol alternative

for smaller vehicles such as cars and small vans and LNG and CNG are appropriate for larger diesel vehicles (EU, 2011: 32-37).

LNG maintains a higher reduction in volume when compared with CNG so that the (volumetric) energy density of LNG is 2.4 times greater than that of CNG or 60% that of diesel fuel. This makes LNG cost efficient to transport over long distances where pipelines do not exist. Specially designed cryogenic sea vessels (LNG carriers) or cryogenic road tankers are used for its transport. LNG is principally used for transporting natural gas to markets, where it is regasified and distributed as pipeline natural gas. It can be used in natural gas vehicles, although it is more common to design vehicles to use compressed natural gas. Its relatively high cost of production and the need to store it in expensive cryogenic tanks have hindered widespread commercial use (Eberhardt, 2013).

The International Maritime Organization (IMO) has already introduced restrictions on the emissions associated with shipping that came into force in the year 2015 for the already established Emission Control Areas (ECAs) and in 2020 for the rest of the world. For ship-owners, in order to be compliant with these restrictions, changes in the current business model are need with two main options are currently standing out: a) integrating a scrubber in the current propulsion system of their ships b) opt for a more environmental friendly energy resource such as the LNG. It is true that several technological solutions in order to deal with the above mentioned situation are currently being evaluated; however, it needs to be strongly emphasized that for the time being LNG has the possibility of remaining the leading candidate in order to retain a substantial share of the world bunker market (IMO, 2017b: 1-4).

To begin with, it has proven its value, currently, 50 LNG-fuelled ships (excluding LNG carriers) are in operation globally – thereof 44 operate in Norway and two in other European countries. In addition, 69 LNG-fuelled ships are on order, of which 45 by European countries (Ziegenfuss, 2016). It is furthermore estimated that by 2020 the number of non-LNG carrier vessels running on LNG could reach 1,000 (DNV-GL, 2014: 6). When LNG is used for propulsion, ship's emissions easily conform to the new regulatory requirements and less CO<sub>2</sub> is released in the atmosphere, a very positive contribution in order to deal with the adverse overall effects of greenhouse gasses. In addition, economics are in many cases in favor of LNG.

In comparison to diesel, typical emissions savings associated with natural gas are: (EU, 2017)

- greenhouse gas reduction of between 11% and 20%
- NO<sub>x</sub> emissions reduced by 80%
- Particulate emissions reduced by 75%

In addition, when used as a vehicle fuel, LNG engines run quieter than diesel engines.

- Compared to propane, typical emissions savings associated with natural gas are:
- Greenhouse gas emissions reduced by 15%
- NO<sub>x</sub> emissions reduced by up to 50%
- Particulate emissions reduced by up to 10%

Moreover, as energy costs continue to grow, it is more and more necessary to find alternative fuels. Using LNG not only brings many environmental benefits, but also substantial economic savings. The technical innovation in the production of LNG has helped to position LNG as one of the least expensive transportable fuels (DNV GL, 2014: 16).

On the other hand, several uncertainties need to be further evaluated and innovative solutions found in order to transform LNG as the preferred choice also in this segment. Under this framework and by considering the fact that LNG will dominate more and more share in the bunkering market in the years to come, research is needed in order to contribute into the safe and secure operation of maritime transport, the necessary foundation for the delivery of international trade (BP, 2017: 54-57).

### **Infrastructure for LNG Transport**

In very simple technical terms, LNG is created via the transformation of natural gas (predominantly methane, CH<sub>4</sub>) into liquid form; the main reason for this conversation is the ease of storage/transport since within liquid it takes up about 1/600th the volume of natural gas in the gaseous state. Although in this form it is odorless, colorless, non-toxic and non-corrosive, there are still certain hazards: flammability after vaporization into a gaseous state still remains, as well the possibility of freezing traumas or asphyxia. The liquefaction process involves removal of certain components, such as dust, acid gases, helium, water, and heavy hydrocarbons, which could cause difficulty downstream (Chevron, 2017).

The natural gas is then condensed into a liquid at close to atmospheric pressure by cooling it to approximately  $-162^{\circ}\text{C}$  ( $-260^{\circ}\text{F}$ ). LNG cannot be converted to a liquid by pressure alone but must be cooled to a very low temperature (lower than  $-160^{\circ}\text{C}$ ), a process which removes some impurities such as sulphur and water. The LNG must be stored and transported permanently at around this temperature and this is accomplished by super insulation in a pressurised, double tank system, similar in principle to a thermos flask, together with a venting system to take away vapour. The storage pressure of about 8 bar (8 x atmospheric) is not regarded as very high but because of the insulation requirements the tanks are large, the fuel is only suited to large, heavy diesel vehicles such as trucks, buses etc. Although the energy density is about 60% compared to diesel, the fuel costs are much lower and LNG should give lower running costs (KGT Oil, 2017).

For the time being LNG is transported mainly via double-hulled ships specifically designed to handle the low temperature of LNG. These carriers are insulated to limit the amount of LNG that evaporates. LNG carriers are up to 1,000 feet long and require a minimum water depth of 40 feet when fully loaded. LNG is now beyond the early stages of becoming a mainstream fuel for transportation needs. Currently it is used for trucks, marine and train applications; the move to introduce LNG as a transportation fuel has begun (BP, 2016: 20-29).

At the moment there are 50 LNG fuelled vessels in operation, 55 confirmed new builds and the estimation of 100 for 2018 if the exponential growth continues it is expected to have 1000 vessels by 2020. Ensuring the further growth of LNG applications will do a significant impact for EU Blue economy, this utilizing the revenue of Environmental regulations in to the innovation and growth of Baltic Sea regions marine technology providers (IEA, 2016).

Shipping is already under the LNG influence; in very simple technical terms, a typical LNG ship fuel installation consists of a tank (for storage) along with the necessary “cold-box” which is an air-tight enclosure of all the plumbing, valves, evaporation equipment and instrumentation attached to the tank that was previously mentioned. The advantage of this configuration is that the gas-hazardous space is limited within this “cold-box” only, instead of the whole tank compartment. It is necessary to point out that insulation of the tank is of very high importance in order to minimize heat penetration into the tank that could possibly warm up the LNG. The more heat penetration is allowed to happen, the



faster the pressure inside the tank will rise (and the shorter the tank holding time -time before the safety valve opens- is made). However, in order to facilitate the operation of the maritime transport industry via the extensive use of LNG, the point of emphasis at this point of time should be turned into what type of bunkering infrastructures are currently in place or even about to be created in the short/medium time-frame (EC, 2009: 2).

### **Economic and Security Factors**

Today, shale gas accounts for a significant portion of US natural gas production. Up from near zero in 2000, it is predicted to account for about half of US gas output by 2040 (Medlock, 2010:27-28, 33). A significant effect of the fracking revolution has been in LNG. In 2008, US gas production had been relatively flat for years and was expected to decline. The outlook was that the country would be importing 20% of its gas needs by 2020, becoming in the process the world's number one LNG consumer.

US Energy Information Administration (EIA, 2015) released estimates putting US natural gas reserves at their highest level in four decades, and in 2012 the US became the number one gas producer in the world. Many major LNG exporters who had spent years building business plans around a US import market found themselves in a different position. Forecasts in 2006 had most future US LNG imports coming from suppliers in the Persian Gulf; today any such dependence has been all but eliminated. On top of that, the 14 gas exporting nations that talked about forming an Organization of the Petroleum Exporting Countries (OPEC)-like gas cartel in 2007 are now adjusting to a market that is very different from that of six to eight years ago.

Asia remains a growing consumer, particularly with China's latest Five-Year Plan calling for an increase in natural gas usage, Japan replacing lost nuclear capacity with gas-fired plants, and Indonesia committing to increased gas use for power generation, road vehicles, and ships. Much of Asia's overall imports will be in the form of LNG and, according to market analysts Wood Mackenzie, China and Southeast Asian countries will become increasingly important components of overall Asian demand through 2025 (Saputra, 2017). Despite the opportunity for American businesses, how much of Asian demand will be filled by US gas remains an open question. Under US law, the Department of Energy (DOE) must determine whether an LNG export proposal will serve the national interest; definitive

answers to questions of exports affecting trends in domestic gas use, the drive for energy security, and the growth in the domestic economy are still being pursued.

Desire for the US to hold onto its gas is understandable since the gas revolution, in just these early years, has already done much to help the country's economy. The abundant US gas supply is not only making many major manufacturers switch from oil to natural gas as their feedstock source, but also encouraging them to build new plants in America and renovate old ones.

Energy security is becoming a truly strategic issue, with numerous implications for world security. Even without the new concerns raised by the current crises (Tatar, Ülker, 2017), the political, economic and security challenges surrounding the energy supply of many countries are profound: Europe's dependency on oil and gas imports is increasing, as are the energy needs of rising powers such as China and India; political instability haunts many energy-producing and transit states; the quest for energy and other resources has sparked territorial disputes in several parts of the world; terrorist and cyber attacks against refineries, pipelines and power plants are a common occurrence in many countries, as is piracy along critical maritime choke points (Seker, 2016a: 13). Over the past years, however, state's energy security agenda has become ever more systematic and coherent, focusing on three major areas: raising strategic awareness of energy developments with security implications, contributing to the protection of critical energy infrastructure, and enhancing energy efficiency in the military (Seker, 2017b: 17).

Energy developments affect the international security environment and, hence, touch on states' security interests. For example, the American shale gas "revolution" and growing volumes of LNG shipped worldwide may raise new maritime security concerns. By the same token, falling oil and gas prices could increase instability in many energy suppliers that are highly dependent on energy exports, including Russia (Toprak, Tatar, 2011). Finally, energy factors are playing a major role in the current crises in some countries, as supply disruptions, would have far reaching security implications for some other states (Seker, 2017a: 182).

The growing importance of energy considerations in the international debate suggests that energy security could become a permanent fixture in state's education and training programmes. Diplomats and military leaders alike would be given the opportunity to develop

a better understanding of energy and related issues, such as resource competition and climate change, as drivers of future security developments.

Energy infrastructure is a critical part of global energy security, and is subject to a number of vulnerabilities. Around half of the total world oil production is transported by oil tankers on fixed maritime routes, many of which have to pass critical choke points. Port facilities are more complex and congested than ever before. And many parts of critical energy infrastructure today are heavily reliant on cyber systems, which make them vulnerable to cyber attacks (Seker, 2017c: 135-136).

Moreover, over the past years, terrorists and insurgents conducted on average about 500 attacks each year against energy-related targets. This included the bombing of gas and oil pipelines; attacks on fuel trucks; killing and kidnapping associated personnel, and disrupting of electrical power systems. Most of these attacks are clustered in a few specific regions, such as West Africa (Seker, 2017d: 251). However, attacks on energy infrastructure can reverberate far beyond their point of origin. As energy markets are volatile even a single attack can lead to global price spikes. Terrorism can drive up insurance premiums. And the interruption of the flow of energy – even if only briefly – can have multiple ripple effects, both economically and psychologically. In short, energy infrastructure will remain a tempting target (Seker, 2016b: 141).

As most states depend on energy imports from regions outside the border, they have a vested interest in the security of energy infrastructure in the producing or transit countries. Accordingly, sharing best practices on the protection of critical energy infrastructure remains state's most frequently offered cooperation item with partner countries with respect to energy security. Some countries with other organizations also enhance its competence to provide support to the protection of energy infrastructure through its counter-piracy operations in the Indian Ocean. States and organizations' capability to ensure the freedom of navigation in the maritime domain could be the strongest contribution in this field. As an increasing share of global oil and LNG shipments is transported by sea, the security of maritime lines of communication, will become ever more important (Seker, 2016c: 607).

## Conclusion

In summary, there are three main modes for refueling ships via LNG, with probably the permanent installed network being the safest of all. Today, in most ports, there is no (or, very limited the least) direct infrastructure in place for transferring LNG towards a vessel. As a result the other two main methods of delivery: locally available LNG will be bunkered by loading LNG road tank trucks directly onto the vessel during normal loading operations, or a LNG bunkering barge will deliver the necessary fuel. In any case, each of these methods has both positive and negative aspects; further research can pinpoint the associated advantages and disadvantages.

Turning the discussion into the strategic domain, it is proposed to create a world-wide mapping of LNG related infrastructures and then correlate them with the necessary supply chain, namely with which exactly method of delivery will the LNG fuel be made available to a specific port of call. Needless to mention, some type of route optimizing exercise should take place and additionally put forward potential alternative routes in case of a safety of security incident that will disrupt a certain delivery mode.

As a possible work plan, the very first step of the research could be to map existing pipelines for LNG and associate them with main ports. Then “overlying” of roads and associated infrastructure to supplement transport to smaller size ports could be added. Later, the use of dedicated LNG barges and transport ships could be integrated to create a holistic view of what is there available. Finally, some exercise of optimizing as well as identifying viable alternatives routes etc. could take place.

The contemporary world is well interconnected and there is an obvious trend towards economic globalization (Streeten, 2001: 9). It was already pointed out that nearly four fifths of international trade is being conducted by sea. The configuration of the Earth facilitates sea transport since three quarters of the planet's surface is covered by sea or lakes. With the exception of the North and South poles, the transport of passengers and goods by sea-going vessels is possible to and from any part of the world. This fact by itself constitutes a comparative advantage for sea transport against air or land transport.

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# 9

## BİRLEŞMİŞ MİLLETLER VE CİNSİYET POLİTİKALARI (United Nations and Gender Politics)

Volkan TATAR - Serda GÜZEL

### **Abstract**

*Violence against women is a major problem all over the world. When it is examined in the main context, it can be seen that family violence, sexual abuse of female students in school, sexual harassment in workplace and streets, intercourse by wives or foreigners, marriage of girls in young age, acid attacks against women, female circumcision, physical and mental rights violations are the major problems all over the world. The physical, psychological, economic, sexual discrimination and violence against women is a global issue. Particularly ongoing discrimination, legal weaknesses and distortions in social relations cause gender inequality to be viewed as normal. Gender-based discrimination and violence seem to be a general question of the world, especially the underdeveloped regions, and its solution is not limited to the states. These problems are common throughout the world, with concentration in some regions. Naturally, the solution has also been debated over the international organizations that transcend states and are more effective and inclusive. There are major changes in the international political system in the period. Especially with the posture of 1990, the bipolar system of the end, world states now have more interaction with social, economic and political spheres. Perhaps the most important development of our time is whether or not international organizations are at the regional or global level or will take place in our lives. Policies such as the United Nations, which have been recognized and sanctioned around the world, are being followed by the states and are often viewed as guiding. The fact that the strong states of the United Nations are sensitive in different ways and in different ways affects other states as well. From this point of view, the concept of gender is also influenced by power relations and is reflected in the economic and social prosperity and foreign policies of states as a global issue.*

*This study will focus on the support of “gender equality” within the United Nations and the importance given to gender equality policies. Gender discrimination and future generations that will grow up in violence against women are confronted with the danger of confrontation as a common problem of*

*mankind, which is defined not only as that state but as a global village and increasingly related to each other day by day. Therefore, the inclusion of women in the decision-making process, economic and social empowerment of women, and violence and non-discrimination policies and strategies for women will be tried to be examined in the context of United Nations.*

**Key words:** *Gender discrimination, Women, United Nations*

### Giriş

Kadına yönelik şiddet ve cinsiyet ayrımcılığı bir tabu olarak görülmekte ve bu sorun toplumun çoğu kesiminde görmezden gelinmektedir. Sürekli tekrar etmesi ve sıklığı sebebiyle ayrımcılık ve şiddet içselleştirilmiş ve normalleştirilmiştir (Brown,2000). Kadına yönelik şiddet ve ayrımcılık, dünyada ve Türkiye’de, sosyo-ekonomik ve sosyo-kültürel sınıf olmaksızın, kadınların büyük çoğunluğunun maruz kaldığı ortak bir sorundur. Soruna bu anlamda bakıldığında, kadına yönelik şiddet ve ayrımcılık insan hakları sorunu olarak ele alınmaktadır (Brown,2000). 1993 tarihli Birleşmiş Milletler’in (BM), Kadınlara Yönelik Şiddetin Ortadan Kaldırılmasına Dair Bildirge’sinin 1.Maddesinde (BM: 1993) kadınlara yönelik şiddet, ister kamusal ister özel hayatta olsun bu tür eylemlerle tehdit etme, zorlama veya özgürlükten keyfi olarak yoksun bırakma dahil olmak üzere, kadınlara fiziksel, cinsel veya psikolojik zarar veya acı verme sonucu doğuran veya bu sonucu doğurması muhtemel olan, cinsiyete dayalı her türlü şiddet eylemi anlamına geldiği belirtilmiştir (Brown,2000).

Ataerkil toplumda kadınlar, korunaklı bir yapı olarak düşünülen aile içinde de yaygın bir şiddete ve ayrımcılığa uğradığı görülmektedir (Newman,1999). Bu bağlamda bakıldığında kadına karşı şiddet, ayrımcılık ve aile içi şiddet sorunu toplumlarda kadın-erkek eşitliğinin sağlanamaması, kadınların özel ve kamusal alanda ekonomik, cinsel, sosyal istismara maruz kalması, kadının karar alıcı konumlarda yer almaması ya da yeteri kadar temsil edilmemesi, edilse bile söz hakkı tanınmaması veya görmezden gelinmesidir (Bacchi,1999). Ayrıca mağdur olduğu bir durumda, erkek karar alıcıların tutum ve yargılarıyla ile daha da mağdurlaştırılması ve istismara uğraması günümüz toplumlarında önemli bir sorun olarak ortaya çıkmaktadır. Bu konuda sorunun çözümü, ilk önce kadına yönelik şiddeti ve ayrımcılığı toplumun her katmanında ve tabakasinda sorun olarak görmekten ve sorunu tanımlamaktan geçmektedir. Mesele hakkında olumlu gelişmeler de vardır (Yoder,2003). Günümüzde kadına yönelik koruyucu, önleyici kanunlar çıkarılmakta ve uluslararası sözleşmelerle önemli politikalar ve stratejiler geliştirilmektedir (Newman,1999).

Ataerkil toplum yapısı ve ataerkil yapının ürettiği kadına yönelik şiddet ve ayrımcılık sorunun kökleri aile içi egemenlik ilişkisinden kaynaklanmaktadır (Watson,1995). Kadın ilk önce ataerkil toplumun kutsallaştırıldığı aile ortamında istismar edilmekte ve ailenin erkekleri baba figürü, ağabey, erkek kardeş gibi geleneksel cinsiyet normlarını içselleştirmiş erkekler tarafından kadınlar üzerinde egemenlik kurulmaya çalışılmaktadır (Newman,1999). Bu bağlamda şiddet önce evde, daha sonra sokakta, iş yerinde, okulda, kamusal ve özel alanda ortaya çıkmakta (Zanden,1993) hakaret, tehdit, aşağılama ve dayak, cinsel taciz, tecavüz, yaralama, öldürme kadınların uğradığı istismarlar olarak toplumun içerisinde yer almaktadır (Watson,1995). Şiddete, ayrımcılığa, istismara uğrayan kadınların kendilerine olan özgüvenlerini ve değerlerini yitirdiği gözlenmektedir (Watson,1995).

Geleneksel cinsiyet rolleri de önemli sorunlar doğurmaktadır. Kadına yönelik cinsiyet ayrımcılığı bu sorunlardan biridir (Payne,1997). Dünya devletlerine bakıldığında, tarih boyunca kadınlar erkeklere göre toplum bünyesinde daha alt bir tabaka olarak görülmektedir (Watson,1995). Cinsiyet ayrımcılığı aynı zamanda sosyal sorunlardan biridir ve genelde kadına uygulanan bir ayrımcılıktır. Diğer sosyal sorunlarda karşımıza çıktığı gibi, bu sorunun da çözümü tek boyutlu değildir ve bu sorun dünya çapında olarak düşünüldüğünde, çözümü de devlet otoritesi sınırlarını aşmakta çok boyutlu bir yaklaşım açısından ele alınmaktadır (Watson,1995). Bu bağlamda toplumsal cinsiyet eşitliği, insan haklarıyla ilgili bir durumdur ve aynı zamanda kalkınmanın önemli temelini oluşturur (Zanden,1993).

Bir toplumun bütüncül olarak gelişmesi için, erkekler ve erkek çocuklarının ve kadınlar ve kız çocuklarının kendilerini gerçekleştirecekleri, yetenek, birikim ve tercihlerini kullanarak haklarından yararlanabilmeleri gerekmektedir (Payne,1997). Türkiye gibi geleneksel-toplumsal cinsiyet normlarının hakim olduğu ve ataerkil bir sistemin egemen olduğu bir ülkede ve Ortadoğu coğrafyasında geleneksel cinsiyet normlarının eşitleyici bir duruma getirilmesi ve kadınları ekonomik, sosyo-politik olarak örseleyen durumların yok edilmesini amaçlayan stratejilerin uygulanması, bu bağlamda toplumsal eşitliği sağlamada önemli bir yer tutmaktadır. Bu açıdan ele alındığında, kadınların hak ve özgürlüklerini kısıtlayan durumlar, erkek egemenliğini oluşturan ataerkil sistemin tutumları ve kurumlarıdır (Payne,1997). Kadınların düşük statüleri, erkek egemen ataerkil düzenin yol açtığı sorun olarak karşımıza çıkmaktadır. Yukarıda sözü edilen bu önemli etkenler, kadınların özel ve toplumsal yaşamdaki fırsatlarını kısıtlar ve bu olumsuz bir sonuç olarak çoğu zaman travmaya neden olur ve kadınlar, sosyal, politik ve ekonomik bağlamda sorunlara

maruz kalır (Reskin,2000) Sözü edilen bu unsurlar, kadınların sahip oldukları çocuklar üzerinde de olumsuz etkilere neden olabilecek düzeydedir. (Martin,2006). Sorun çocukları da kapsadığında ve kadına karşı uygulanan şiddet, ayrımcılık, ve istismarın olumsuz yan etkileri çocuklar üzerinde de görüldüğünde, tüm insanlığı kapsayan ve devlet sınırlarını aşan bir sonuca dönüşür (Zanden,1993).

### **Toplumsal Cinsiyet**

Kadınlık ve erkeklik kavramları, kültürel ve toplumsal olarak inşa edilen toplum tarafından oluşturulan ve toplumun, kültürün biçimlendirdiği statülerdir ve bu statüler kadını ve erkeği toplum içinde konumlandırır. Dolayısıyla bu kavramlar, kadın ve erkek arasında farklılaşmaya doğurur ve artırır, dahası ataerkil toplum içerisinde güç ilişkilerini de belirler. Cinsiyet (sex), biyolojik kökenli kadın erkek ayrımını yaparken, toplumsal cinsiyet (gender) ise, kadınlık erkeklik kavramını ve toplumsal bakımdan eşitsizliği temsil eden bir kavramdır. (Acker,1992). Bu bağlamda cinsiyet (sex) doğuştan gelen bir unsurken, toplumsal cinsiyet (gender) kültürel toplum tarafından inşa edilen, kadın ve erkeği toplumda konumlandıran ve nerede nasıl duracağını belirleyen, sonradan öğrenilmiş bir kültürel ve toplumsal inşa durumudur (Marshall, 1999). Buradan hareketle, kadın ve erkek kavramları genetikdir ve evrensel bir nitelik gösterirken, tam tersi olarak, kadınlık ve erkeklik, kültürel açıdan inşa edilmektedir ve kültürden kültüre, toplumdan topluma farklılık gösterebilir (Barusch,2002). Cinsiyet kavramı makro düzeyde ele alındığında, kültürel inançlarını temsil eder, bireysel seviyede ise kişilik ve kimlikleri, davranış biçimlerini ve durumsal yapıları içeren bir sistemdir (Ridgeway, Corell, 2000). Cinsiyet, sosyal farklılaşmaya neden olmakla birlikte, bireylerin diğer bireylere karşı nasıl tutum sergileyeceğini de belirler. Bu açıdan ele alındığında cinsiyet eşitsizliği, gücün, maddi refah ve prestijin, kadın ve erkek arasında eşitsiz dağılımı ve hiyerarşik asimetrik olarak tanımlanabilir (Boyd,1998).

Cinsiyet toplumda temel bir statüdür ve sosyal bir anlama da karşılık gelmektedir (Sullivan, 2003). örneğin kadınlar annelik ve eşlik olarak ataerkil bir toplumda tanımlanırken ve davranışları bu rol modellere göre şekil alması beklenirken, erkekler mesleki ünvan ve pozisyonlarıyla konumlandırılmaktadır (Payne, 1997). Güç, prestij ve mülkiyet dağılımı bireysel kabiliyetlere göre değil cinsiyet esasına göre paylaşıldığında, ortaya çıkan bir durumdur (Parillo, 2002). Bir cinsin diğer cins üzerinde baskın olduğu inancına dayanan bir ideoloji olan seksizim yoluyla gerçekleştirilmiş ve meydana gelmiş olur (Payne, 1997).

Ataerkil düzende erkeğin belirleyici, kadının ikinci planda olduğu bir soy ideolojisi vardır (Parillo, 2002). Kadın ve erkek iktidar ilişkisinin gücünü de bu soy ideolojisi belirlerken, ataerkil sisteme göre soyun belirleyicisi erkek olduğu için gücün ve iktidarın sahibi de erkek olarak görülmektedir (Acker,1992). Ataerkil düzende evin temsili ve yönetimi, ekonomik gücün ve kaynakların denetimi erkeğe atfedilmiştir, ataerkil toplum kompozisyonunda kadınların sosyal hak ve özgürlükleri, erkek karşısında konumu, erkek egemen eril gücün iktidar ve tanımıyla belirlenmektedir (Payne, 1997). Aynı zamanda erkek egemen toplumlarda, kadınların toplumda yer edinebilmeleri, doğurma kapasitelerine indirgenmiştir. Çocuk doğurmak, hamileliği önleme, engelleme ve kürtajla ilgili egemen anlayış kadınların bedeni hakkında erkek egemen erkin söz hakkının olması ve kadınların bedeni üzerinden kadınların doğurganlığını, bedenini ve cinselliğini kontrol etme zihniyeti cinsiyet ayrımcılığının sistemik mekanizmalarından sayılabilir (Bacchi,1999). Ataerkil yapının hakim olduğu toplumlarda, kadınların bedeni üzerinden her türlü söz hakkına sahip olduğunu iddia eden egemen eril güç kadını birey olarak görmemekte dolayısıyla sosyal, ekonomik, politik bağlamda erkek egemen düzenin öğretilerinin içselleştirildiği ve normalleştirildiği erkek egemen eğitim ideolojisinde kadın köleleştirilmekte, kadının öz saygısı istismara uğramakta, düşünce gücü zayıflatılmakta sadece egemen eril güçlere kendini onaylatmak ve kabul ettirebilmek için evcilleşmekte ve eve hapsolmakta dolayısıyla temel hak ve özgürlüklerini kullanamamakta ve kadın bireyler hayatlarında yer alan erkek figürlerinin istediği ve izin verdiği süreçte toplumda var olma mücadelesi vermektedir.

Toplumun sosyal, siyasi ve ekonomik yapısı erkek bireylerin “erkekçe” tutumlar takınmak ve “erkekçe” davranmak, özellikle Ortadoğu coğrafyasında bekaret, namus kavramının kadınların bedeni üzerinden kurulması ve kadın bedeninin ve cinselliğinin ve kadının sahip olması gerektiği düşünülen kültürel normların belirlediği “güzellik” anlayışı ve kadın cinselliğinin bastırılması ve erkek egemen toplum tarafından kontrol altında tutulması kadına karşı uygulanan şiddet ve istismarı erkek egemen toplum nezdinde normalleştirmekte ve meşru kılmaktadır (Philips,1995). Burada sözü edilen bu toplum yapısı kadını birey olarak görmemekte, kadını korunması gereken zayıf, aciz bir obje olarak görme zihniyetindedir (Payne,1997). Bu bağlamda siyasi literatür zemininde ele alındığında, kadınların şiddete uğraması, siyasette ve çalışma hayatında yeteri kadar temsil edilmemesi, temel hak ve hizmetlerden bilinçli yada bilinçsiz bir şekilde yoksun bırakılması fırsatlara ve kaynaklara sahip olamaması erkeklerle eşit koşullarda yaşayamaması, cinsiyet ayrımcılığının temelini oluşturan unsurlardır (Payne, 1997).

Kadınların toplumda şiddete maruz kaldıkları konulardan bir tanesi cinsel şiddettir. Cinsel şiddet, istenmeyen davranışları yapmaya zorlama, kadınların istemediği halde cinsel ilişkiye zorlanması, kadınların cinsel yönelimine bağlı davranışlarının değiştirilmesi, taciz etme, cinsel ilişki arasında güç kullanma gibi cinsel şiddet davranışlarını içerir (Mor Çatı). Kadınlara uygulanan psikolojik şiddette küsmek, baskı uygulamak, intihar etmekle tehdit, çocukları uzaklaştırma, arkadaşlara ve aileye kadın hakkında yalanlar söyleme, kadınları engellemek, kadınların güvenini kırma, bilgi saklama, kıskançlık ve kadınlara verilen göz dağıdır. Kadınlara uygulanan şiddet sadece psikolojik ve fiziksel değil, aynı zamanda ekonomik şiddettir. Ekonomik özgürlüğü kısıtlama, erkeğin kazandığı parayı kadınla paylaşmaması, sürekli hesap sorma, parayı kullanarak aşağılamaya ve hor görmeye çalışmadır (Mor Çatı). Ayrıca kadınların maruz kaldığı sözel şiddet de vardır. En fazla görülen ve dikkati çeken bağırma, alay etme, suçlama, yıkıcı eleştiri ve lakap (isim) takmadır. Tokat atma, vurma, yumruklama, tekmeleme, ısırma, çimdikleme, saç çekme, itip kakma, yakma, boğazını sıkma bir aletle vurma mor çatının tanımlamasına göre fiziksel şiddet sınıflandırmasına girmektedir (Mor Çatı).

Bu açıdan ele alındığında feminizm ideolojisi önem kazanmaktadır. Feminizm cinsiyet ayrımcılığına ve ataerkil düzene karşı mücadele eden bir savunma hareketi mekanizmasıdır (Yoder,2003). Sivil haklar, sağlık hizmetleri, aile yaşamı ve cinsler arasındaki ilişkilere yönelik durumlarda ayrımcılıkla mücadele eden bir harekettir (Ridgeway, Corell, 2000).

İrk, cinsiyet, sınıf konuları kadın hakları konusunda da günümüzde mücadele hareketi olarak süregelmektedir. Feminist yaklaşım, işyerlerinde süre gelen cinsel tacize, işe alma ve terfide cinsiyet ayrımcılığının yaygınlığına kadın ve erkek arasında yaşanan gelir dağılımına aile içindeki şiddet konusuna, kadının bedeninin ve cinselliğinin erkek egemen eril güç tarafından kontrolüne odaklanmaktadır (Martin,2006).

Cinsiyet eşitsizliği hemen hemen tüm sosyal kurumlarda, özel ve kamusal alanda görülmektedir. Bu açıdan konuya bakıldığında cinsiyet ayrımcılığını ekonomik, eğitim, siyaset ve sosyal yaşam açısından incelemek mümkün olabilmektedir. (Yoder,2003 ). Feminizm sosyolojik ve politik bir harekettir ve kadının özgürleşmesine ve toplum içerisinde temel hak ve özgürlüklerini kullanarak kadın bireylerin toplum içerisinde soysal ve ekonomik bağlamda yaşam kalitelerini iyileştirmeye odaklanır.(Martin,2006). Feminist teoriler hak eşitliği ve süregelen sistemde kadınların karar verme sürecine katılmasına odaklanır bu bağlamda bakıldığında politik bir harekettir (Payne, 1997). Ulusla arası kadın hareketi insan hakları

bağlamında değerlendirilebilir, Aile içi şiddet, sistematik toplu tecavüzler, kadın bedeninin bütünlüğüne yapılan istismarlar dünya genelinde evrensel kadın hareketi mücadelesi olarak değerlendirilebilir (Zanden,1993).

Bu bağlamda daha öncede ifade edildiği üzere kadın bireyler eğitim, sosyal ve siyasal hayatta şiddete ve istismara ve engellemelere maruz kalmaktadır (Henslin,2003). Eğitim sisteminde cinsiyet ayrımcılığı, kişilerin cinsiyetleri yüzünden eğitim haklarından mahrum kalmasıdır (Coleman ve Kerbo , 2003). Geleneksel eğitim sisteminde erkek çocuklarının eğitim alıp, iş sahibi olması teşvik edilirken, kız çocuklarının ev hayatı sınırları içinde kalıp ev işleriyle ilgilenmesi ve bu bağlamda kadın bireylerin evcilleştirilmesi desteklenmiş ve bunun sonucunda erkek çocukları, kız çocuklarından daha uzun, daha kapsamlı ve daha kaliteli eğitim hakkına sahip olmuştur (Coleman ve Kerbo , 2003). Günümüzde kız ve erkek çocuklarının eğitim sisteminde doğrudan ayrımcılığa uğrama durumu büyük ölçüde giderilmiş fakat uygulamada bu ayrımcılığın hala devam ettiği gözlenebilmektedir (Martin,2006). Kadınların, toplumsal cinsiyet modellerine göre yükseköğrenim hayatları şekillendirilmektedir. Kadın bireyler için öğretmenlik ve hemşirelik gibi meslekler ön plana çıkarken, erkek öğrenciler genellikle teknik bölümlerde var olmaktadır (Cherry,2005). Buradan hareketle, meslekler de, kadın meslekleri ve erkek meslekleri olarak, cinsiyet bağlamında, kültürel ve toplumsal şartlarda sınıflandırılmıştır (Payne, 1997).

Ekonomik olarak ele alındığında, çalışma hayatı açısından kadınların cinsiyetlerinden dolayı çalışma hayatında ötekileştirilmesi güç tatmin düzeyi ve gelirin erkekler arasında pay edilmesi durumudur (Curry vd., 1997). Aynı iş için farklı ücret politikası izlemek, eşit verimliliğe ve potansiyele sahip bireylerin, farklı ücret düzeyine karşı gelen aynı işlere sahip olmaları şeklinde meydana gelebilir (Cherry,2005). Kadınlar iş gücü piyasasında, ucuz emek olarak görülmektedir. Erkeklerden daha az süreli çalıştırılmaları bir yana daha düşük statülü işlerde görevlendirilmekte ve çoğu zaman sosyal güvence olmadan ve düşük ücretlerle görevlendirilmektedir. Ayrıca ataerkil toplumlarda aile reisinin baba figürü olarak görülmesi, ekonomik kriz ve darboğazlarda kadınların ilk önce iş yerlerinden çıkarmaları sonucunu doğurmaktadır. İş yerlerinde işten çıkarma işlemlerine kadınlardan başlamak cinsiyet ayrımcılığının başka bir versiyonudur (Jones,2002).

Siyasi anlamda cinsiyet ayrımcılığı da toplumun her katmanında göze çarpmaktadır (Jones,2002). Geleneksel anlamda siyaset, erkek figürü iş olarak görülmektedir. Siyasi bağlamda, cinsiyet ayrımcılığı kadınların karar verme mekanizmalarında yer almamaları ve

erkeklerle oranla çok düşük temsil edilmeleri şeklinde ortaya çıkmaktadır (Marshall, 1999). Sonuç olarak bakıldığında kadınlar, önemli kararların alındığı siyasi konularda, hala yetersiz olarak temsil edilmektedir. Örnekleri daha da ileriye götürmek mümkündür. Dünya devletlerinden örnek vermek gerekirse; bazı Afrika ve Arap ülkelerinde, parlamentoda hiç kadın bulunmamaktadır (Payne, 1997). Yine bazı devletlerde sadece sembolik pasif görevlerde % 10'un altında yer almaktadır (Payne, 1997). Kadınlar eğitimde, işyerlerinde ve siyasette açıkça ayrıma maruz kalmakta ve sosyal yaşamda da bir takım olumsuz davranışlarla mücadele etme durumundadır (Coleman ve Kerbo , 2003). Özgür davranma kısıtlılığı, giyim, davranış ve konuşmalarına itina gösterme, kendini ifade etmedeki sınırlamalar bunlardan sadece birkaçıdır. Sosyal hayatta kadın, kız çocuk, kız kardeş, eş ve anne gibi temel kadın rolleriyle tanımlanmaktadır (Coleman ve Kerbo , 2003). Sosyal yaşamda, kadının ayrımcılığa maruz kaldığı bir alanda dile yerleşmiş ve normalize edilmiş bu bağlamda meşrulaştırılmış dil yapısıdır. Birçok ataerkil düzenin egemen olduğu toplumlarda eril dil kullanılmakta ve erkek egemenliğini yansıtacak dil yapıları tercih edilmektedir. Bilim adamı ve insanoğlu gibi erkeğin gücünü vurgulayan ve ön plana çıkaran örnekler, bunlardan sadece bir kaçıdır. Yeterli duyarlılığa sahip olan bazı kurumlar, artık bilim insanı terimini kullanmakta ve cinsiyet açısından tarafsız terimlerin ve kavramların kullanımı yaygınlaştırılmaya çalışılmaktadır. Yine kitaplarda kadın ve erkek zamirleri, bir arada ya da birbirinin alternatifi olarak yer alması cinsel eşitlik olarak dil yapısı alanında oluşturulmalıdır (Coleman ve Kerbo , 2003).

Kadın hakları konusunda duyarlılığın artması, demokrasi ve eşitlik kavramlarının gelişimiyle orantılıdır ve bu kavramların toplum düzeyinde kabulü, cinsiyet ayrımcılığını önleyecek etmenler olarak görülebilir. Kadınların hak ve özgürlüklerini artırırken cinsiyet tabakalaşmasını ortadan kaldırmak, kadınların sosyal eşitliğini ve sosyal değişiminin sağlandığı bir durum halini alacaktır (Macionis, 2003).

Türkiye özeline baktığımızda, toplumda ataerkil yapı egemen olarak görülmektedir. Bu düşünce sisteminde, kadının çalışma da önceliği ev olmaktadır. Sosyalleşme sürecinde aldığı eğitimi toplum baskısı nedeniyle sorgulayamayan ve içselleştiremeyen kadın, çalışma hayatının getirebileceği bir takım olanaklardan faydalanmamaktadır (Parillo, 2002). Kadına yönelik eşitlikçi politikaların, Türkiye'de yaşanan cinsiyet ayrımcılığına faydalı olabilmesi için, geleneksel toplum rollerin yeniden tanımlanmasına ve sosyalleşme sürecinin tekrar gözden geçirilmesine ihtiyaç vardır. Bu bağlamda bakıldığında, cinsiyet ayrımcılığı tarih



boyunca kadınların karşılaştığı bir durumdur ve kadınlar erkeklerden çok daha düşük statüde görülmüştür. Bunun neticesinde kadınlar, erkeklere göre daha az hak ve olanaklara sahip olmuşlardır (Coleman ve Kerbo , 2003). Kadının siyasal, toplumsal ve eğitim alanlarındaki temel hak ve özgürlüklerini kendi hür iradesiyle kullanması kadın bireylerin toplum yapısı içerisinde konumunu tekrar belirleyen ve toplumun yeniden biçimlenmesini sağlayan önemli faktörlerdir (Macionis,2003).\_

Kadınlara yönelik cinsiyet ayrımcılığı tüm dünyada incelendiğinde, dağılım homojen değildir. Kadınlara yönelik cinsiyet ayrımcılığı, gelişmekte olan ve gelişmiş ülkelerde farklılık göstermektedir (Zanden,1993). Örneğin gelişmiş ülkelerde kadınların çalışma hayatında ayrımcılık yaşanırken, gelişmekte olan ülkelerde şiddete uğrama, eğitim olanaklarından faydalanmama, dolayısıyla temel hak ve özgürlüklerden yararlanmama şekliyle ortaya çıkmaktadır (Henslin,2003).

Az gelişmiş toplumlarda örnekler çok daha ileri gidebilmektedir. Kadının cinsel istismara uğraması ve bir cinsel meta olarak görülüp kendi isteği dışında fahişeliğe zorlanması gibi olaylar, küresel bir sorun niteliği taşımaktadır. (Zanden,1993). Örneğin yoksulluğun ve ayrımcılığın da etkisiyle, iş bulmakta zorlanan kadınlar, Tayland gibi ülkelerde hızlı bir şekilde büyüyen seks endüstrisinde cinsel meta olarak kullanılmaktadır (Henslin,2003, Şeker, 2016a:137). Bu sektör tüm dünyada büyümekte ve her ne olursa olsun, erkekler tarafından biçimlendirilmekte ve düzenlenmektedir (Macionis,2003).

Sonuç olarak cinsiyet ayrımcılığının, sadece kadınlara yönelik bir hak kaybı olmadığını anlamak ve toplumun bütüne dayanan bir sorun olarak görmek, cinsiyet ayrımcılığının çözüm aşamasında neyin yapılması gerektiğini ortaya de koyacaktır (Henslin,2003). Kadının maruz kaldığı cinsiyet ayrımcılığı ve kadına karşı uygulanan şiddetin Birleşmiş Milletler bağlamında nasıl ele alındığına dair politikalar ve stratejiler bu makalenin temel amacını oluşturmaktadır. Cinsiyet ayrımcılığını önleme faaliyetleri, salt bir devlet politikası olmaktan çıkmış; 20. yy son çeyreğinde küresel bir hedef halini almıştır. Kadın erkek eşitliğini sağlamak, uluslararası örgütlerin hedefinde olmuş, ve BM kapsamında bir siyasal hareket halini almıştır. Kadınlara yönelik her türlü ayrımcılığın önlenmesi sözleşmesi 1979 yılında kabul edilmiştir (BM: 1979). Kadın ve erkekler arasında mevcut olan hukuku eşitliğin kadınlar lehine bozularak uygulanmasını söyleyen olumlu ayrımcılığa yönelik politikalar ve stratejiler özellikle Avrupa Birliği tarafından benimsenmiş ve üye ülkeleri bağlayan hukuki bir özellik kazanmıştır. Kadınların siyasi partilerin ya da sendikaların yönetimlerinde ve

parlamentolarda karar alıcı merci olarak yer alabilmeleri için kotalar ve bu bağlamda eğitim olanaklarından yararlanabilmeleri veya işlerinde daha üst kademelere yükselmelerinde tanınan öncelikler bu kapsama girmektedir (Üşür, 2003). Kadınların eğitimine önem verilmesi, iş gücü piyasasında güçlendirilmeleri cinsiyet eşitsizliğine yol açan kadın ve erkek rollerinin yeniden tanımlanması ve şekillendirilmesi bu politikalar ve stratejilerin kapsamındadır, bu açıdan ele alındığında geleneksel cinsiyet rollerinin tekrar tanımlanmasında ataerkil toplumun önemli bir parçası olarak kabul edilen ve kutsallaştırılan ailenin yanı sıra okul, medya gibi sosyal kurumların da önemi vardır (Coleman ve Kerbo 2003 ).

### Birleşmiş Milletler ve Cinsiyet Ayrımcılığına Karşı Yürüttüğü Politikalar

Uluslararası Örgütlerin sayıca artışı, özellikle II. Dünya Savaşından sonra görülmektedir. Soğuk Savaş döneminde iki kutbun liderleri (Amerika Birleşik Devletleri (ABD) ve Sovyet Sosyalist Cumhuriyetleri Birliği (SSCB)), bir çok uluslararası örgütte yer almış ya da kurulmasına destek olmuştur. Avrupa Birliği'nin ortaya çıkmasında, Sovyetler Birliği'nin Avrupa'daki etkinliğini kırma düşüncesindeki Amerika Birleşik Devletleri'nin etkisi göz ardı edilmemelidir (Şeker, 2016b: 551). Soğuk Savaş'ın sonlanmasından sonra ise hem sayı hem nitelik hem de etkinlik bakımından uluslararası örgütlerin etkisi katlanarak artmış, devletlerin birçok alandaki egemenliğini aşınmış ve 'devletlerin egemenliği' tartışılır hale getirmiştir (Şeker,2017: 140-142). Birleşmiş Milletler (BM) ise 1939-1945 yılları arasında yaşanan ve olumsuz yansımaları hayatın hemen her alanını kapsayan II. Dünya Savaşı'nın sonucu ortaya çıkmıştır. Bir daha bu büyüklükte bir savaşın çıkmasının engellenebilme arzusunun vücutlaşmış şekli olan Birleşmiş Milletler, sadece görevini bu alanla sınırlandırmamıştır. Bugün Birleşmiş Milletler Örgütü, ekonomik, sosyal ve kültürel hakları da ciddi olarak ele almakta ve devletleri bu amaçla yönlendirmektedir (BM,1979,1981). Birleşmiş Milletler Şartı'nın giriş bölümü, '*Bir insan yaşamı içinde iki kez insanlığa tarif olunmaz acılar yaşatan savaş felaketinden gelecek kuşakları korumaya, temel insan haklarına, insanların onur ve haysiyetine, erkeklerle kadınların ve büyük uluslarla küçük ulusların hak eşitliğine olan inancımızı yeniden ilan etmeye, adaletin korunması ve Antlaşmadan doğan yükümlülüklere saygı gösterilmesi için gerekli koşulları yaratmaya ve daha geniş bir özgürlük içinde daha iyi yaşama koşulları sağlamaya, sosyal bakımdan ilerlemeyi kolaylaştırmaya....*'şekliden başlar ve ardından amaç ve ilkeler sıralanır (Birleşmiş Milletler Şartı,1945). Şartın Giriş bölümünde ve ardından tümünde ve hatta BM'nin tüm kurumlarında, sadece kadın değil her türlü ayrımcılığa karşı bir duruş ve yönlendirme dikkati

çekmektedir. Yukardaki paragraftaki kadın ve erkeklerin eşitliği ve adalet vurgusu da hep bu kapsamda değerlendirilmelidir.

BM'nin önemli bir organı olan, Ekonomik ve Sosyal Konsey (ESK), 'Uluslararası ekonomik, sosyal, kültürel, eğitim, sağlık ve ilgili konularda çalışmalar yapmak, rapor hazırlamak ve tavsiyede bulunmak' görev ve yetkisiyle donatılmıştır (Birleşmiş Milletler, Ekonomik ve Sosyal Konsey). Ayrıca Ekonomik ve Sosyal Konsey, yetkisi dâhilindeki konuları Sivil Toplum Kuruluşlarına (STK) danışarak faaliyetlerini yürütür. Ekonomik ve Sosyal Konsey, kadın ve cinsiyet çalışmaları yaparak, ayrımcılığı önlemeye çalışan STK'ların da olduğu 2.100'den fazla STK'ya danışmaktadır (Birleşmiş Milletler, Ekonomik ve Sosyal Konsey). STK'ların hem dünya üzerindeki hem de BM bünyesindeki gelişmelerine paralel olarak, siyasi konular ve programlar hakkında danışılan ortak ve sivil toplumla bağlantıyı sağlayan mekanizmalar olarak görülmeleri sonucunu doğurmuştur.

BM'de sadece organlar ve şartında değil, öncü olduğu diğer anlaşma ve kararlar da dikkatle okunduğunda sadece kadınların değil, çocukların, engellilerin, azınlıkların, göçmen işçiler ve benzeri savunmasız grupları da kapsamına dâhil etmiş ve bu sayede tüm savunmasız grupların bir dayanak noktası haline gelmiştir. Özellikle 1948 yılında kabul edilen İnsan Hakları Evrensel Beyannamesi, oldukça önemli bir belgedir (Birleşmiş Milletler, 1948). Belgenin tamamı incelendiğinde, BM politikasına da paralel olarak, kadınlarında dahil olduğu, tüm dezavantajlı grupları kapsadığı sahip çıkıldığı ve eşitlik alanının genişletilmeye çalışıldığı görülmektedir. Burada unutulmamalıdır ki, BM'nin aktif tutumu ve denetleyici bir mekanizma olması, devletler üzerindeki etkinliğini artırmaktadır. BM çatısı altında önemli gelişmelerden bir tanesi de 'Kadına Karşı Her Türlü Ayrımcılığın Önlenmesi Sözleşmesi (CEDAW: Convention on the elimination of all forms of discrimination against women)'dir (BM, 1979). BM Genel Kurulu tarafından 1979 yılında kabul edilen ve 1981 yılında yürürlüğe giren Anlaşma ile, taraf devletler kadınlara karşı ayrımcılığın ortadan kaldırılması için somut adımlar atmakla yükümlü kılınmıştır. Ayrıca taraf devletleri, CEDAW Komitesine, düzenli olarak kadının insan haklarının geliştirilmesi konusunda ülkedeki devlet uygulamalarını raporlamak ve bu raporları sunmakla yükümlü kılar (Birleşmiş Milletler, 1979).

BM kendi bünyesinde yer alan bazı uzmanlık kuruluşları ile de kadın ve kadın hakları konusunda olumlu etkiler yapmaktadır. Yine BM kapsamında değerlendirilebilecek ve bu çalışmada olumsuzluğu gözler önüne serilen kadın-erkek eşitsizliğinin ücretlere yansımının

da önüne geçilmeye çalışılmıştır. Burada BM bünyesindeki Uluslararası Çalışma Örgütü'nün (ILO) çabası dikkate değerdir. Haziran 1966'de kabul edilen 100 No'lu Eşit Ücret Sözleşmesi'nin Birinci maddesinde, 'eşit değerde iş için, erkek ve kadın işçiler arasında ücret eşitliği' ibaresi yer almaktadır (BM, ILO Sözleşmesi). Aynı sözleşmenin 2. ve 3. Maddeleri de eşit işe eşit ücret ve cinsiyet farkı gözetilemeyeceği üzerinde durulmuştur .

BM Genel Kurulunda birçok kez kadınlar açısından oldukça önemli kararlar alınmış ve olumsuzlukların önüne geçilmeye çalışılmıştır. Genel Kurul kırsal kesimlerde yaşayan kadınların hak ve özgürlüklerini güvence altına almak için kararlara imza atmıştır. Ayrıca, kadınların siyasi haklarının iyileştirilmesinin, barışa da etkisinin yadsınamaz olması, BM kararlarına da açıkça yansımıştır. BM Güvenlik Konseyi Uluslararası barışın ve güvenliğin düzelmesi için çabaladığı bölgelerde, kadınların siyasi haklarının yetkilendirmeye ve cinsiyet eşitliğine yönelik adımlar atmıştır. Ay zamanda kadınların liderlik vasıflarını cesaretlendirme adına kararlar almıştır. (BM, S/RES/2122 (2013), BM Kadın, (2014)). Bu kararlarla hem bölgedeki halkların hem de en küçük birimden başlayarak en üste tüm yöneticilerin, kadınlara ve kız çocuklarına yönelik ihlallerinin önüne geçilmeye çalışılmıştır. Kararlar ana hatlarıyla incelediğinde iki nokta özellikle ortaya çıkmaktadır. Bunlardan ilki cinsiyet eşitliği ve hak eşitliği kavramlarını içeren hukuki düzenlemelerdir (BM, S/RES/1296 (2000)). Burada hem engellemelerin kaldırılması hem de geleceğe yönelik olumlu kararların alındığı, konferansların düzenlendiği görülmektedir. Örneğin Pekin'de yapılan 4. Dünya Konferansında, BM Güvenlik Konseyi kadınlara yapılan ırkçılığın son bulmasına, cinsiyet dengesinin sağlanmasına ve kadının statüsünün iyileştirilmesine karar vermiştir (BM, A/RES/64/141 (2010)). İkinci nokta ise mevcut durumda ağır ihlallerin olduğu bölgelerde kadın ve kız çocuklarına karşı şiddet ve tecavüzü de içeren, ağır insan hakları ihlallerinin önlenmesi çabasıdır. BM birçok kararında, kadın ve çocuklara yönelik taciz, tecavüz, öldürme ve buna benzer eylemleri önleme çabasında kararlar almıştır (BM, SC/9364 (2008), BM Kararı S/RES/1261 (1999), Birleşmiş Milletler: Erişim, Birleşmiş Milletler: Erişim) . Ayrıca bu suçların affedilemeyeceği ve göz ardı edilemeyeceği özellikle belirtilmiştir.

## **Sonuç ve Öneriler**

Erkek egemen toplumlarda kadının yeri geleneksel rol modeller üzerinden değerlendirilmektedir. Kadının erkeğe bağlı ve bağımlı kılınması, kadın bireyleri köleleştirme zihniyeti ulusal gelişmeyi de engelleyen bir durumdur. Kadına karşı uygulanan şiddet ve

kamu ve özel alanda karşılaşılan cinsiyet ayrımcılığı devlet kurumlarının, hükümetlerin kararlı tutumları ve davranış politikalarıyla ve kadın kuruluşlarının deneyimlerinin ve mücadelesiyle yok edilebilir. Okul öncesi eğitimden başlayarak eğitimin hemen hemen her aşamasında toplumsal cinsiyet eşitliği, demokrasi ve insan hakları konusundaki duyarlılık ve önem şiddet ve ayrımcılık konusunda farkındalık çalışmalarının yapılması konunun nihai çözümlerinden biridir. Kadına yönelik her türlü ayrımcılık ve şiddet uluslararası bir boyut kazanmış ve dünya çapında bu ayrımcılığı ve şiddeti engelleme politikaları ve stratejiler üzerinde durulmuştur.

Kadına yönelik şiddet ve ayrımcılığın engellenmesi için ulusal ve uluslararası kurumların iş birliği halinde proaktif bir politika izleyerek uzun soluklu bir mücadele verilmesi gerekmektedir. Nasıl ki bölgesel çatışmalar ve sorunların çözümü için birçok devlet ve örgüt harekete geçmekte ve çözüm aramaktadır, bu hassas konunun da aynı düzlemde ele alınması gerekir. Özellikle bu mücadelenin, devletlerin üzerinden bir oydaşmanın olduğu Birleşmiş Milletler gibi uluslararası örgütlerde sürmesi gerekir.

Devletler, kadın hakları konusunda farklı sebeplerle, yüzeysel ilgi göstermekte ve hukuksal önlemlerle geçiştirmektedir. Tecrübeler göstermiştir ki sadece hukuksal önlemler, konuyu çözemekte ve cinsiyet ayrımcılığı ve şiddetin önüne geçememektedir. Bu bağlamda toplumun en küçük katmanında ailede başlayan şiddet ve ayrımcılık sokağa ve yaşamın her alanına yansımaktadır. Özellikle kadına yönelik şiddet ve her türlü ayrımcılık sadece kadın sorunu olarak değil; toplumsal bir sorunu olarak ele alınmalı ve kadına yönelik şiddet ve ayrımcılık konusunda çaresizlikten sessizleşen ve her türlü istismara karşı koyamayacak hale getirilen kadın bireylere mücadele süresince ulusal ve uluslararası kurumlar ve sivil toplum kuruluşları aracılığıyla destek olunmalıdır.

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# 10

## BM'NİN İNSANİ GÜVENLİK SÖYLEMİ ÇERÇEVESİNDE KOSOVA MÜDAHALESİ (THE KOSOVO INTERVENTION IN THE CONTEXT OF UNITED NATIONS' HUMAN SECURITY DISCOURSE)

Zeynep ARIÖZ

### **Abstract**

*The aim of this study is to analyze the international intervention in Kosovo within the framework of human security discourse. Within the scope of the study, the military intervention without United Nations Security Council approval is sought to be explained with the concept of securitization theory. In this study/research, it is assumed that the human security discourse has a certain impact upon the principles of sovereignty and non intervention at the United Nations. In this direction, throughout the study, the UN's human security discourse is examined through the primary sources such as UN Security Council Resolutions, General Assembly meeting records, UN General Secretary Reports and press conferences. The linkage between the discourse on protecting people from serious human rights violations and extraordinary measures which lead to military intervention in Kosovo have been elucidated by using Copenhagen School's securitization approach. Thus, the military intervention, in the study, is rather conceived as a consequence of securitization process of the Kosovo problem by the UN and International Community under the name of humanitarian values and principles.*

**Key Words:** Kosovo, Securitization, Human Security, Intervention

### **Özet**

*Bu çalışmanın amacı, insani güvenlik söylemi çerçevesinde, Kosova'ya gerçekleştirilen uluslararası müdahalenin analiz edilmesidir. Çalışma kapsamında, Kosova'ya BM Güvenlik Konseyi yetkisi olmaksızın gerçekleştirilen müdahale güvenlikleştirme kavramı ile açıklanmaya çalışılmıştır. Çalışma-*

*da, insani güvenlik söyleminin, Birleşmiş Milletler'de egemenlik prensibi ve iç işlerine karışmama ilkelerinin dönüşümü üzerinde belirli bir etkiye sahip olduğu varsayılmıştır. Bu doğrultuda çalışma boyunca BM'nin insani güvenlik söylemi, BM Genel Kurul ve Güvenlik Konseyi toplantı kayıtları ve karar metinleri, BM Genel Sekreter raporları ve basın demeçleri gibi birincil kaynaklar üzerinden incelenmiştir. Ciddi insan hakları ihlalleri karşısında insanları koruma söylemi ile Kosova'ya askeri müdahaleye varan olağanüstü önlemler arasındaki bağlantı, Kopenhag Okulu'nun güvenlikleştirme yaklaşımından yararlanılarak araştırılmıştır. Böylece çalışmada, askeri müdahale, Kosova meselesinin, BM ve uluslararası toplum tarafından insani ilkeler ve değerler adına güvenlikleştirmesinin bir sonucu olarak anlamlandırılmıştır.*

**Anahtar Kelimeler:** *Kosova, Güvenlikleştirme, İnsani Güvenlik, Müdahale*

## **Kavram Olarak İnsani Güvenlik**

Uluslararası İlişkiler disiplini, Birinci Dünya Savaşı'nın ardından, "Savaş nasıl önlenebilir?" sorusuna cevap bulma arayışı ile ortaya çıkmış, çalışmalarını devletlerin davranışlarını ve aralarındaki etkileşimi açıklamak, anlamak ve öngörmek üzerine yoğunlaştırmıştır. Disiplin içerisinde güvenlik çalışmalarının temel amacı devletlerin neden savaştığını açıklamak ve esasen savaş ve istikrarsızlık problemini çözmek amacı etrafında gelişmiştir. Neorealist teoriden temellerini alan bu çalışmalar, geleneksel güvenlik çalışmaları olarak adlandırılmaktadır (Peoples and Vaughan-Williams, 2010: 19). Bu bağlamda disiplin içerisinde, merkezinde savaş ve askeri faaliyetler olan bir güvenlik kavramı geliştirilmiştir ve güvenlik, geleneksel anlamda bir devletin saldırıdan ya da saldırı tehdidinden uzak olma hali olarak tanımlanmıştır. Güvenliği kavramsallaştırmaya yönelik ilk önemli adım, Arnold Wolfers tarafından atılmıştır. Wolfers, (1952: 485) objektif anlamda güvenliği, kazanılmış değerlere yönelik bir tehdit olmaması, sübjektif güvenliği ise kazanılmış değerlere yönelik bir tehdit korkusunun olmaması durumu olarak tanımlamıştır. Devlet merkezli bir uluslararası sistemden hareket eden bu yaklaşım siyasal realizmin temel varsayımlarını paylaşmaktadır: Geleneksel realist görüş, uluslararası sistemi, devletlerin kendi güvenliğini, komşuları pa-hasına sağlamaya çalıştığı, sürekli olarak avantaj sağlamaya odaklandığı bir güç mücadelesi alanı olarak tanımlamaktadır. Bu çerçevede daimi barışa ulaşmak mümkün değildir. Birinci Dünya Savaşının ardından, realist düşünce ekolünü geliştiren Edward H. Carr ve Hans Morgenthau tarafından uluslararası sistemin yapısına dair ortaya koyulan bu karamsar görüş, İkinci Dünya Savaşı'ndan sonra Kenneth Waltz ve John Mearsheimer gibi neo-realist çağdaş yazarlar tarafından da paylaşılmıştır (Baylis, 2012: 154-155). Ancak Soğuk

Savaş sonrasında yaşanan gelişmeler, realist yaklaşımın öngördüğü risk kavram ve algılarını değiştirmiş ve geleneksel güvenlik kavramının sınırlarını zorlamıştır. SSCB'nin dağılmasıyla, Soğuk Savaş dönemine hâkim olan iki kutuplu sistem sona ermiş, yeni dünya düzeni Batı dünyası ve ABD'nin önderliğinde yeniden yapılanmaya başlamıştır. Bu süreçte dünyayı şekillendiren, birleşme ve parçalanma iki temel süreç olarak dikkatleri çekmiştir. Avrupadaki gibi entegrasyon hareketlerinin yanı sıra, Yugoslavya ve SSCB örneğindeki gibi parçalanmalar, azınlıklar ve etnik-milliyetçi gruplar, bölgesel istikrarsızlıklara sebep olmaları bakımından, güvenlik analizinin merkezi haline gelmeye başlamıştır (Baylis, 2001: 255). Soğuk Savaş sonrası dönemde, zayıf ya da başarısız olarak adlandırılan devletlerde, devlet dışı aktörlerin de dahil olduğu, etnik veya dinsel kimlik hareketlerinin tetiklediği “yeni savaşlar” uluslararası barışa ve güvenliğe tehdit olarak öne çıkmıştır (Kaldor, 1999). Bu bağlamda Soğuk Savaş sonrasında bölgesel çatışma ve istikrarsızlık alanlarına doğrudan müdahalenin ekonomik, siyasi maliyetini üstlenmekten kaçınılması ve Güvenlik Konseyi’ni sınırlayan karşılıklı vetoların ortadan kalkması ile gelişen işbirliği ortamı, BM’ye uluslararası sistemde daha aktif rol oynama imkanı tanımıştır. Körfez Krizi’ne verilen kesin karşılık ile yeni dünya düzenini ilan edilmiş, BM’nin barış ve güvenliğin korunması ve sağlanması görevini yerine getirebileceğine dair olumlu bir ortam oluşmuş ve kolektif güvenlik kavramı yeniden önem kazanmıştır. Güvenliğin askeri ve nükleer boyutlarının ağırlıkta olduğu Soğuk Savaş döneminin sona ermesi ile devletlerin güvenliğini referans alan dar tehdit tanımlaması tartışmaya açılmıştır. Siber saldırıdan, uluslararası terörizme, bulaşıcı hastalıklara, göç ve insan trafiğine, finansal krizlerden, çevresel felaketlere, uyuşturucu ticaretine, etnik dinsel çatışmalara kadar geniş bir yelpazede, ulusal sınırları aşan yeni tehditler BM’nin gündemine taşınmıştır. Yeni tehditlerin uluslar üstü ve sınırı aşan niteliği, devletlerin güvenlik sağlayıcı rolünü tartışmaya açmış, uluslararası ilişkilerde “dünyanın neresinde olursa olsun birey ve toplumların güvenlik gereksinimlerinin sağlanmasını öngören uluslararası normlar, standartlar ve ilkeler ortaya çıkmıştır” (Ovalı, 2012: 294). Rothschild, (1995:55) güvenlik kavramının bu dönüşümünü, ulusların güvenliğinden bireylerin güvenliğine aşağıya doğru ve güvenliği sağlama sorumluluğunun ulusal, uluslararası, bölgesel, hükümet ve hükümet dışı olmak üzere her yönde genişletilmesi olarak değerlendirmiştir. Bu süreçte insani güvenlik söylemi, Soğuk Savaş sonrasında güvenlik odağının askeri tehditlerden uzaklaştırılması ve bireylerin güvenliğin referans nesnesi olarak alınması tartışması etrafında geliştirilmiştir. Bu açıdan insani güvenlik, geleneksel uluslararası güvenlik anlayışından temel bir ayrılma göstermiştir. Akademik ve politik alanda insani güvenliğin tanımına dair tam bir uzlaşıdan söz etmek zor olsa da bir takım eşik kriterler

ön plana çıkmıştır. Örneğin King ve Murray, ( 2002: 591-598) insani güvenliği, “genel bir yoksulluk hali olmaksızın yaşam deneyimi” olarak belirlemekte ve insani güvenlik indeksi olarak sundukları, sağlık, eğitim, gelir, siyasal özgürlük ve demokrasi alanlarında iyi durumda olmak ve bu alanlarda belirli bir eşğin altında kalmamak şeklinde tanımlamaktadırlar. Thomas’a göre (2001:161-162) insani güvenlik, temel maddi ihtiyaçların karşılandığı ve insan onurunun gerçekleştirilebildiği bir durumun varlığını ifade etmektedir. Hampson ise (2002:4) insani güvenlik kavramını, bireylerin fiziksel güvenliğini de içeren temel insani değerlere yönelik tehditlerin yokluğu olarak tanımlanmaktadır. Kimi yazarlarca insani güvenlik kalkınmaya birlikte düşünülmelidir. Buna göre insani güvenlik, sürdürülebilir insani kalkınmanın altında yatan temel koşuldur. İnsan yaşamının sosyal, psikolojik, ekonomik, politik görünümünün bir sonucudur (Leaning and Arie, 2000: 38). Literatürde birbiriyle zorunlu bağı olmayan geniş çapta bir dizi meselenin insani güvenlik olarak etiketlendiğini, bu haliyle kavramın bir “alışveriş listesinden” daha öteye geçemeyeceğini savunanlar ise daha dar tanımlama yoluna giderek bireyleri ve grupları, fiziksel şiddetten koruma konusuna odaklanmaktadır (Krause, 2004: 367). Buna göre, dar tanımlamanın politik etki oluşturma, kavramsal değer ekleme ve bir değişim yaratabilme kapasitesi vurgulanmaktadır. Geniş yoruma, güvenlik meselesini öncelik belirlenemez ve kontrol edilemez kılmakta olduğu iddiasıyla karşı çıkılmaktadır. Bu yoruma göre, insani güvenliğin geniş tanımlanması, kavramın operasyonel hale getirilebilmesini zorlaştırmaktadır. Geniş kapsamlı bir insani güvenlik yaklaşımının, taraftarlarının hedeflerini gerçekleştirmesi ihtimali daha düşük bulunmaktadır (Macfarlane, 2004: 368-369).

Soğuk Savaş sonrası ortaya çıkan insanı merkez alan geniş araştırma kategorisi, hem tehditler hem de tehditlere karşı alınacak önlemler açısından, güvenliğe dair yeni bir kavramsal çerçeve sunmuştur. İnsani güvenlik, güvenlik politikaları için sadece tematik bir genişleme değil dış politika pratiğine etkileri olan düzenleyici bir söylem geliştirmiştir. Bu bağlamda, insani güvenlik, yeni bir dil, stratejik bir söylem olarak öne çıkmıştır. Bu dili çözümlemek için Kopenhag Okulunun güvenlik kavramsallaştırması anlamlı bir çerçeve sunmaktadır. Buna göre güvenlik kavramının merkezinde hala tehdit, savunma ve devlet yer almaya devam ettiği için bir konuyu güvenlik terimleriyle ifade etmek, tehdit-savunma imajlarını uyandırmaktadır ve devlete önemli bir yer ayırmaktadır. Bu yüzden güvenlik kavramı, her zaman bir gelişmeye işaret etmemektedir ve geleneksel imajları yeniden üretmektedir (Wæver, 2007: 66-69). -İnsani güvenlik yaklaşımını da içeren- güvenlik kavramını genişletme taraftarlarının önerdiği daha fazla güvenlik, daha iyi değildir. Güvenlik,

meselerinin normal siyasi süreçlerde çözüme başarısızlığıdır ve negatif bir anlam taşımaktadır (Wæver, 2003: 12). Bu bağlamda çalışmanın da kabul ettiği güvenlik kavramı, referans nesnesinin varlığına yönelik gelişen tehditler karşısında, olağandışı önlemler alarak, bekanın sağlanmasını ifade etmektedir (Buzan, et. al.,1998:21). Bu çerçevede Kopenhag Okulu, etik ya da entelektüel kökeni ne olursa olsun bireyin güvenlikleştirilmesini, siyasal bir pratik olarak değerlendirmekte ve reddetmektedir. Çünkü Buzan'a göre (2004: 369) insan haklarının insani güvenlik olarak yeniden inşa edilmesi, güvenliğin arzu edilen bir şey olarak görülmesi tehlikesini güçlendirmekte ve geleneksel anlamını yeniden üretmektedir (Wæver, 2007: 67). Şöyle ki, aktörler, insani meseleleri, güvenlik terimleriyle ifade ettiklerinde, olağanüstü önlemlere başvurmaları haklılaşacaktır. İnsani güvenlik dili, uluslararası güvenliği, geleneksel anlamda toprak bütünlüğün ötesinde düşünmeye ve yeni önlemler almaya teşvik etmektedir. 1990'larda öne çıkan bu düşünce ile insani güvenliğe yönelik varoluşsal tehditlerin uluslararası boyutlarını ve bu tehditlerle başa çıkmak adına gerekli askeri güç toplamayı ve nihayetinde müdahaleyi içeren bir söyleme varılmaktadır. Bu bağlamda insani güvenlik söylemi, uluslararası müdahaleye varan olağanüstü önlemleri kapsayan politikalar üretmiştir. Bu çerçevede çalışmada, Birleşmiş Milletler'de 1990'lar boyunca hakim olan insani güvenlik söylemi ve güvenlikleştirme süreci incelenecektir.

## **BM'de İnsani Güvenlik**

Soğuk Savaş'ın ardından makro güvenlikleştirmenin en aktif girişimleri, askeri sektör dışında gerçekleştirilmiş ve sistem düzeyinde makro güvenlikleştirmelerden birisi de insan hakları etrafında geliştirilmiştir (Buzan and Wæver, 2009:253-271). Soğuk Savaş'ın sonuyla birlikte, insan haklarının güvenlik kavramıyla birlikte düşünüldüğü önemli bir literatür gelişmiştir. Birleşmiş Milletler, bu sürece destek veren uluslararası bir aktör rolü oynamıştır. 1994'de yayınlanan BM İnsani Gelişme Raporu'nda insani güvenlik söylemi "*freedom from fear and freedom from wants*" korkudan kaçınma ve yokluktan kaçınma şeklinde kategorik bir ayırım üzerine inşa etmiştir. Kategorizasyon, insani güvenliğe yönelik tehditlerin oldukça geniş bir kavramsallaştırmasını ve beraberinde getirmiştir.

Çok uzun zamandır güvenlik kavramı, dışarıdan gelebilecek saldırganlıklara karşı toprakların savunulması, dış politikada ulusal çıkarların korunması veya nükleer bir felaket tehdidi karşısında küresel güvenliğin sağlanması etrafında oldukça dar bir şekilde yorumlanmıştır. Güvenlik, insanlardan çok ulus devletle ilişkilendirilmiştir... Unutulan şey ise

günlük yaşamlarında güvenlik arayışında olan sıradan insanların haklı endişeleridir. Bu insanların pek çoğu için güvenlik, salgın hastalıklar, işsizlik, açlık, suç, toplumsal çatışma, politik baskı ve çevresel tehditlerden korunma anlamına gelmektedir. (UNDP, 1994:22-23)

Bu yeni söylem, korunması gerekeni, güvenliğin referans nesnesini, birey olarak belirleyerek, güvenliği ulusaldan insan merkezli bir alana taşımakta ve askeri nitelikte yeni önlemler almaya çağırıştır:

Bütün bu durumlar karşısında, ülke içindeki şartların sadece kendi halkına değil aynı zamanda uluslararası barış ve güvenliğe yönelik tehdit oluşturduğunu tespit etme ihtiyacı söz konusudur... Kısacası, BM'nin geleneksel eylem şekli, yeni ve farklı mücadeleler karşısında ciddi şekilde gözden geçirilmelidir. BM Şartının VII. Bölümünü yeniden düşünmek, açık bir gerekliliktir. (UNDP 1994: 57)

Söylemin doğuşundan itibaren devam eden 10 yılda kavram, BM'de birçok düzeyde geliştirilmiştir. BM Güvenlik Konseyi, sivil halkı kasıtlı olarak hedef alan ve sistematik, geniş çaplı insan hakları ihlalleri içeren silahlı çatışma durumlarının, uluslararası barışa ve güvenliğe tehdit oluşturabileceğini ve bu bağlamda Konseyin, uygun adımları atmaya hazır olduğunu bildiren 1265 ve 1296 sayılı kararları almıştır (UN Doc. S/RES/1265, 1999; UN Doc. S/RES/1296, 2000).

BM'de insani güvenlik ne zaman sözcelense/ifade edilse, devamında askeri önlemleri çağırmakta ve her defasında geleneksel güvenlik anlayışına dayanma eğilimi göstermektedir. Bu söylemde devletlerin, kendilerinin birer tehdit kaynağı olabileceği ve bu tehditlerin sadece ilgili devletin halkını değil, uluslararası barış ve güvenliği de tehdit ettiği vurgulanmıştır. Bu doğrultuda tehditlere karşı sık sık BM Şartı'nın VII. Bölümünün devreye sokulması çağırısı yapılmıştır. BM desteklediği Küresel Yönetişim Komisyonu BM Şartı VII. Bölümü yeniden değerlendirerek insani gerekçelerle askeri müdahaleye izin vermek üzere değiştirmeyi önermiştir. (Report of the Commission on Global Governance, 1995: 90) 2003 yılında BM desteğiyle Sadako Ogata ve Amartya Sen başkanlığında hazırlanan İnsani Güvenlik Şimdi adlı raporunda da bu eğilim sürmüştür. Rapora göre devlet, güvenliğin temel sağlayıcısı olmayı sürdürmektedir. "...ancak devlet, güvenlik sorumluluklarını yerine getirmekte sık sık başarısız olmaktadır- ve zaman zaman kendi halkına karşı bir tehdit kaynağı haline gelmiştir" (Commission On Human Security,2003:2). BM Genel Sekreteri Kofi Annan (1996-2006) görev süresi boyunca, 1990'larda yaşanan dramatik olaylara atıf yaparak, 54.



Dönem BM Genel Kurul toplantısında açık bir şekilde “gelecek yüzyılda, insani güvenlik için beklentiler ve müdahale” konusunu ele alma isteğini ifade etmiş ve insani güvenlik meselesini güncel tartışmaların merkezine yerleştirmiştir (UN Doc. A/54/PV.4, 1999,1-2). Annan, devlet içi çatışmaların ve bu çatışmalara bağlı birey güvenliğine yönelik tehditlerin hem örgütün hem de uluslararası sistemin gündemine yerleşmesinde önemli bir güvenleştirici aktör görevi görmüştür. Genel Sekreter Annan, uluslararası barış ve güvenliğe dair yeni tehdit unsurlarına işaret ettiği Milenyum Raporu ile dikkati devlet içi çatışmalara ve insani krizlere çekmeye devam etmiştir. Devletlerin sivillerin koruyucusu olduğu varsayımını sorgulayan rapor, “...egemenlik dahi olsa hiçbir yasal ilkenin insanlığa karşı suç işlemek için kalkan olamayacağının, Güvenlik Konseyi’nin uluslararası toplum adına eyleme geçme ahlaki görevine sahip olduğunu” altını çizmiştir. Annan, eleştirilere “eğer müdahale etme, egemenliğe karşı kabul edilemez bir saldırı ise sistematik insan hakları ihlallerine Ruanda’ya Srebrenika’ya nasıl karşılık vermeliyiz?” sorusunu yöneltilmiş ve müdahale ikilemine karşı, silahlı müdahaleyi son, ancak “kitlesel bir kıyım karşısında feragat edilemeyecek bir seçenek” olarak öne sürmüştür (Annan, 2000:43-48).

2000 yılında BM Binyıl Zirvesinde, insani güvenlik somut bir hedef olarak belirlenmiş Genel Kurul’da kabul edilen Binyıl Deklarasyonu’nda, BM’nin temel görevlerinden birisi olan insan haklarını koruma görevi adına “devletlerin kendi içinde ya da devletler arasında fark etmeksizin insanları savaşın zararlarından korumak için çaba gösterileceği” bildirilmiştir (UN Doc. A/RES/55/2, 2000: art. 8). ilerleyen dönemde insani güvenlik söylemi ve insan hakları meselesinin egemenlik iddialarına üstün geldiği temel iddiası, yeniden tasarlanarak koruma sorumluluğu şeklinde BM gündemine girmiştir. Annan, bu çerçevede bağımsız bir kurulu 21. Yüzyılda uluslararası barış ve güvenliğe yönelik tehditler ve uluslararası sorumluluk konusunda ortak bir yaklaşım geliştirmek adına araştırma yapmakla görevlendirmiştir. Panelin sonucunda sunulan BM “Daha Güvenli Bir Dünya” raporunda, soykırım, insancıl hukukun ciddi ihlali, geniş çaplı ölümleri ya da etnik temizliği önlemede egemen devletlerin yetersiz ya da isteksiz kaldığı durumlarda, birçok üye ülke, Güvenlik Konseyi’nin son çare olarak askeri müdahale yetkisi ile icra edebileceği kolektif uluslararası koruma sorumluluğu normunu onayladığını ifade etmiştir (UN, 2004:art. 201,202,203). BM’nin insan hakları ihlallerine karşı kayıtsız kalamayacağına dair gelişen söylem, BM’nin desteğiyle Uluslararası Müdahale ve Devlet Egemenliği Komisyonu’nun (ICISS) kurulmasıyla sürmüştür. Komisyonun 2001’de yayımladığı “Koruma Sorumluluğu” isimli raporu, egemenliğin, devletlere öncelikle vatandaşlarını koruma sorumluluğunu

yüklediğini ve müdahale etmeme ilkesinin yerini uluslararası koruma sorumluluğu ilkesine bıraktığını savunmaktadır (Report of the International Commission on Intervention and State Sovereignty, 2001:XI). 2005 yılında üye devletler, BM Dünya Zirvesinde koruma sorumluluğunu kabul etmişler ve soykırım, savaş suçları, etnik temizlik ve insanlığa karşı suçlara karşı VII Bölümü de kapsayacak şekilde Güvenlik Konseyi'nin müdahale yetkisi onaylamışlardır (UN Doc. A/RES/60/1, 2005: art. 138-139). BM'de insani güvenlik söylemi, nihayetinde askeri müdahaleye varan stratejileri beraberinde getirmiştir. Bu bağlamda, çalışmanın bir sonraki bölümünde, Kosova'daki ciddi insan hakları ihlalleri karşısında insanları koruma söylemi ile gerçekleştirilen askeri müdahale konusu güvenleştirme temelinde ele alınacaktır.

### **Kosova'nın Güvenleştirilmesi**

Kosova'da Şubat 1998 ile başlayıp Haziran 1999'da sona eren silahlı iç çatışma ve ardından 24 Mart 1999'da başlayıp 10 Haziran 1999'da sona eren Yugoslavya ile NATO arasındaki uluslararası çatışma olmak üzere iki türlü bir çatışma yaşanmıştır. Kosova sorunu, AGİT'in yanı sıra, Temas Grubu, AB ve Avrupa Konseyi'nin de gündemine girmek suretiyle 1998 yılında bir iç sorun olmaktan çıkmış, sorunun uluslararası bir kriz niteliğine ulaşması, BM Güvenlik Konseyi'nin konuyu gündemine alması ile ivme kazanmıştır. BM Güvenlik Konseyinde Kosova meselesi bir insan hakları meselesi, insani güvenlik meselesi olarak ifade edilmiştir. Kriz süresince “insani ilkeler ve değerler” adına Kosova meselesi güvenleştirilmiştir. Durumun aciliyeti adına olağanüstü önlemler almanın zemini hazırlanmıştır. Bu önlemler güvenleştirme sürecine uygun olarak istisnai/olağanüstü önlemler şeklinde meşrulaştırılmıştır. 1998 tarihli 3868 sayılı Güvenlik Konseyi toplantısında üye devletler, Kosova'daki şiddet olaylarının “uluslararası barışa ve güvenliğe tehdit oluşturduğunu” ifade etmiş ve ayrıca insan hakları ihlallerinden duyulan endişe bildirilmiş ve bu durumun Kosova'da VII. Bölümü devreye sokmak için gerekli meşruiyeti sağladığı iddia edilmiştir (UN Doc. S/PV.3868 1998). Güvenlik Konseyi VII. Bölüm çerçevesinde 1160 ve 1199 sayılı kararları almıştır. Konsey, bu kararlarda, Kosova'da yaklaşmakta olan “insani felaket” tehlikesini ve müdahale seçeneğini vurgulamıştır (UN Doc.S/RES/1160, S/RES/1199, 1998). Yugoslavya Rambouillet Anlaşması'nı kabul etmeyince, 24 Mart 1999 tarihinde NATO, BM kararı olmaksızın bölgeye Müttefik Güç Harekâtı adıyla hava harekâtı düzenlenmiştir. Böylece, başlangıçta bir iç sorun olan Kosova meselesi, insani temelde alınarak uluslararası bir soruna dönüştürülmüştür. Kosova'da “durumun aciliyetini”,

“insanların korunması gerektiğini” ve müdahaleden “başka bir seçenek kalmadığını” ifade eden söz edimleri, uluslararası aktörlerce ifade edilmiştir. Söylemler, Kosova’da insani bir kriz, bir trajedi yaşandığı ve bu krizin bölgedeki güvenlik ve barışın bozulmasına yol açacağı şeklinde olmuştur. BM, meseleyi bölgede uluslararası barışa ve güvenliğe tehdit olarak tespit ederek, VII. Bölüm kapsamında müdahaleyi meşrulaştırmıştır. NATO, 30 Ocak 1999 tarihinde Kosova meselesini bir açıklama ile güvenlikleştirmiştir. NATO, insani felaketi önlemek için gerekli önlemleri almaya hazır olduğunu, NATO Genel Sekreteri’nin, YFC topraklarına hava harekâtına yetki verebileceğini bildirmiştir (NATO Press Release, 1999). NATO Genel Sekreteri Javier Solana, “yapılan uyarılar dikkate alınmadığı takdirde NATO’nun “insani bir felaketi önlemek için gerekli tüm önlemleri alacağını” ve “askeri harekât dışında bir seçenek kalmadığını” ve bunu yapmanın “ahlaki bir görev” olduğunu bildirmiştir.

Askeri harekâta girişmekten başka alternatif kalmamıştır. Harekâta, Yugoslavya’nın uluslararası toplumun taleplerini reddetmesi üzerine başlıyoruz... Ocak ayındaki uyarılarımızdan bu yana, bu taleplerin karşılanmasındaki başarısızlık, NATO’yu insani felaketi önlemek amacıyla gerekli önlemler ne olursa olsun almaya götürmüştür (Solana, 1999).

Harekât öncesinde Genel Sekreter Annan 30 Ocak ve 17 Mart 1999 tarihlerinde sunmuş olduğu, Kosova’daki duruma ilişkin bilgiler ve gözlemlerine yer verdiği raporlarda Kosova’daki insani duruma dair oldukça dramatik bir tablo çizmiştir (Annan, UN Doc. S/1999/99, 1999:9; UN Documents, S/1999/293). BM Mülteciler Yüksek Komiseri Sadako Ogata, tüm diplomatik çabalara rağmen giderek kötüleşen insani duruma dikkat çekmiş ve Kosova sınırları içinde 230.000’den fazla kişinin yerinden edildiğini, yıl boyunca toplamda 400.000 kişinin evlerini terk ettiğini raporlamış ve Kosova’da bir insani kriz ve felaket yaşandığını bildirmiştir (UNHCR Press Releases, 1999). AGİT, Kosova Gözlem Misyonu üyelerinin bilgilerine dayanarak insani bir felakete tanıklık edildiğini açıklamıştır. (OSCE, 1999) Genel Sekreter Annan’ın, Ocak ayında gerçekleştirdiği NATO genel merkezi ziyareti, de facto olarak harekâta yeşil ışık yaktığı şeklinde yorumlanmıştır. NATO Genel Sekreteri Solana, Annan’ın ziyaretini hatırlatarak “BM’nin, NATO’nun hedef ve kararlılığını paylaştığını” belirtmiştir (NATO Press Release, 1999). Harekattan bir gün önce NATO Genel Sekreteri “insani bir krizin önüne geçebilmek için kimi zaman kuvvet kullanımına başvurulmasının gerekebileceğini” ifade etmiştir (NATO Speeches, 1999). Dönemin İngiltere Başbakanı Tony Blair, harekattan bir gün önce Parlamentoda, Avam

Kamarasına yaptığı konuşmada Kosova'daki durumu “insani felaket” olarak değerlendirmiş ve müdahaleden başka seçenek kalmadığını ifade etmiştir:

Binlerce masum erkek, kadın ve çocuğu, ölümden, barbarlıktan ve vahşi bir diktatör tarafından yürütülen etnik temizlikten, insani felaketten korumak için hareket etmek zorundayız... Miloseviç, barış yolunu seçmedikçe eyleme geçmekten başka alternatifimiz yoktur... Eyleme geçmemenin, uzun döneme insan yaşamı ve barış için daha ciddi sonuçları söz konusu olacaktır. (Guardian, 1999)

Benzer şekilde İngiltere Dış İşleri Bakanı Robin Cook, müdahale için “insani krizin bir felakete dönüşmesini engellemek adına kendilerine başka bir yol bırakılmadığını” ifade etmiştir (Robin Cook, House of Commons, 25 Mart 1999, 1999: Column 538). Fransa Cumhurbaşkanı Chirac, bir trajediyi sona erdirmek için müdahaleden başka seçenek kalmadığını belirtmiştir.

Biliyorum ki Fransız halkı harekete geçmek zorunda olduğumuzu anlayacaktır. Miloseviç'in haksız ve anlaşılabilir tavrı nezdinde, müttefikler oy birliğiyle Sırp hedeflerine karşı askeri müdahaleden başka seçenek kalmadığını konusunda mutabıktır. Bu Balkanların istikrarını daha fazla tehlikeye atacak bir trajediyi önlemek içindir. (CNN, 1999)

Almanya Başbakanı Gerhard Schröder, Kosova'da insanları öldürülmekten, yerinden edilmekten ve sürülmekten kurtarmak ve mültecilerin geri dönüşünün temellerini hazırlamak için NATO askeri harekâtının gerçekleştirilmesinin zorunlu olduğunu bildirmiştir (NATO Speeches, 1999). ABD Başkanı Bill Clinton, 24 Mart 1999 tarihinde ulusa sesleniş konuşmasında müdahaleyi, masum insanları koruma sorumluluğu temelinde ifade etmiştir:

Biz Kosova'da binlerce masum insanı askeri saldırganlıktan korumak için hareket ediyoruz... Bu trajediyi sona erdirmek ahlaki bir zorunluluktur... Kosova insanların kendi ülkelerinde hayatları adına korkusuzca yaşamlarını sürdürebilme umudu bizim şuandaki kati duruşumuza bağlıdır... Amerika, müttefikleri masum hayatları kurtarmayı ve Avrupa'da barış özgürlük ve istikrarı muhafaza etmek için çalıştığında onlarla birlikte durma sorumluluğuna sahiptir. Bu şu anda hareket etme sebebimizdir, çünkü biz masum yaşamları kurtarmayı önemsiyoruz. (Clinton, 1999)

Hava harekâtının başladığı gün Rusya'nın talebi üzerine BM Güvenlik Konseyi 3988 sayılı toplantıyı gerçekleştirmiştir. Müdahale taraftarı üye ülkeler harekâtı, insani gerekçelere

dayandırmış, olağanüstü koşullara işaret ederek istisnai bir önlem olarak müdahaleyi meşrulaştırmıştır. Birçok üye ülke, harekâtı “insani bir felaketi önlemek” için desteklediğini ifade etmiştir. Ayrıca, üye ülkeler, müdahalenin yasal meşruiyeti konusunda, “Kosova’daki durumun, bölgedeki uluslararası barışa ve güvenliğe karşı tehdit oluşturduğunu” tespit eden VII. Bölüm kapsamında alınan 1199, 1160 ve 1203 sayılı kararlara dayanmışlardır (UN Doc. S/PV.3988 1999: Mr. Burleigh (United States of America), s.4, Mr. Fowler (Canada), s. 5, Mr. Türk (Slovenia), s. 6-9, Mr. Buallay (Bahrain), s. 7, Mr. van Walsum (Netherlands), s. 8, Mr. Dejammet (France), s. 8, Mr. Petrella (Argentina), s. 11, Sir Jeremy Greenstock (United Kingdom), s. 11-12, Mr. Kastrup (Germany), s. 16, Mr. Nesho (Albania), s. 18). Rusya, harekâttan iki gün sonra 26 Martta, Belarus ve Hindistan ile birlikte Güvenlik Konseyi’ne NATO’nun güç kullanımının, BM Şartı, özellikle, 2(4), 24 ve 53. Maddelerini ihlal ettiği ve uluslararası barış ve güvenliği tehdit ettiği saptaması yapması yönünde karar almasını önermiştir. Rusya’nın çağrısı üzerine BM Güvenlik Konseyi, 26 Mart 1999 tarihinde yeniden toplanmış, bombardımanın sona erdirilmesi ve müzakerelere dönülmesini kapsayan karar önerisi 3 lehte (Çin, Rusya, Namibya) ve 12 aleyhte (Arjantin, Bahreyn, Brezilya, Kanada, Fransa, Gabon, Gambiya, Malezya, Hollanda, Slovenya, Birleşik Krallık ve ABD) oyla reddedilmiştir (UN Doc. S/1999/328, 1999). BM Genel Sekreteri Annan, kendisine Kosova’daki askeri müdahalenin ön koşulları sorulduğunda, “normalde” Güvenlik Konseyi kararı gerektiğini ifade etmiştir ancak “barışın peşinde, güç kullanımının meşru olabileceği bazı zamanlar vardır” ifadesiyle NATO harekâtını desteklemiştir (United Nations Press Release, SG/SM/693, 1999). Meşru müdafaa hali ya da BM Güvenlik Konseyi yetkilendirmesi olmaksızın egemen bir devlete karşı, insani gerekçelerle güç kullanılması bakımından Kosova müdahalesi, insani güvenlik söyleminin, uluslararası politikadaki etkilerini gösteren bir örnek teşkil etmiştir. BM Genel Sekreter raporları ve açıklamaları, devlet başkanları ve siyasi liderlerin basın demeçleri, BM Güvenlik Konseyi kararları ve toplantılardaki ifadeleri kapsayan söz edimleri, Kosova’da insan hakları ihlallerine referans yaparak müdahale için meşru zemin hazırlamıştır.

## **Sonuç**

Kosova, başta BM olmak üzere farklı seviyelerde ve çok sayıda aktörle makro güvenlikleştirmenin önemli bir örneğini oluşturmuştur. BM’de “insani ilkeler ve değerler” adına Kosova meselesi güvenlikleştirilerek, uluslararası düzenin BM Şartı hükümleriyle sabit kılınan, müdahale etmeme ve iç işlerine karışmama ilkelerinin, insani gerekçelerle aşılması söz konusu

olmuştur. Kosova'nın insani zeminde güvenlikleştirilmesi, “normal siyasi süreçlerin ve kuralların devre dışı bırakılmasını” beraberinde getirmiş ve süreç askeri müdahaleyle sonuçlanmıştır. BM, Kosova'daki insani durumu, “acil ve kritik” ilan ederek, uluslararası barışa ve güvenliğe tehdit olarak tespit ettiği VII. Bölüm kapsamında bir dizi karar almıştır. Askeri harekâtın meşruiyeti, aciliyet ve öncelikli müdahaleye işaret eden özel bir retoriğe sahip BM Güvenlik Konseyi kararlarına ve insani güvenliğin tehdit edildiği argümanına dayandırılmıştır. Müdahale, BM Genel Kurul ya da Güvenlik Konseyi tarafından kınanmadığı gibi, Rusya'nın Güvenlik Konseyi'ne bu yöndeki önerisi 12/3 oyla reddedilmiştir. Hava harekâtının ardından Güvenlik Konseyi'nin almış olduğu 1244 sayılı kararlar, BM, müdahaleyi geriye dönük olarak onaylamıştır. Askeri müdahale, güvenlikleştirme sürecine uygun olarak Kosova'nın benzersiz/unique durumuna ve alternatif bir çözümün kalmadığına dayandırılmış ve olağanüstü önlemler kapsamında askeri harekât meşrulaştırılmıştır. Kosova müdahalesi, uluslararası sistemde gelişmekte olan bir prensip değil, bir olağanüstü hal olarak tanımlanmıştır. Bu tanımlama tesadüfî değil, güvenlikleştirmenin, “olağanüstü hal ilan ederek, istisnai önlemlere başvurma hakkının iddia edilmesi” sürecine karşılık gelmektedir. BM'nin uluslararası düzen için rehber niteliğindeki kurucu normları istisna haline dayanarak aşılmış ve meşrulaştırılmıştır. BM'nin, Kosova meselesinde söylemine hakim olan insani güvenlik kavramının, zamanla yerini koruma sorumluluğuna bıraktığı anlaşılmıştır. Bu bağlamda Libya müdahalesi, BM zirvesinde kabul edilen koruma sorumluluğu prensibinin uygulandığı ilk örneği temsil etmiştir. BM, Libya'da hükümetin kendi halkını korumadığı veya koruyamadığı için ya da kendi halkına zarar verdiği için uluslararası müdahaleyi, egemenlik prensibi ve iç işlerine karışmama prensibine rağmen uluslararası koruma sorumluluğu söylemi ile meşrulaştırmıştır. Suriye'de ise geçen süreç BM'de insani gerekçelerle müdahale kararının alınmasının mümkün olmadığını göstermiştir. Sonuç olarak insani güvenlik söyleminin yalnızca Kosova'nın güvenlikleştirilmesi ile sınırlı kaldığı anlaşılmıştır.

## **Kaynakça**

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## ULUSLARARASI HUKUKTA ARABULUCULUK VE TÜRKİYE (Mediation in International Law and Turkey)

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### ***Abstract***

*There have been divergent views and problems among members of the international community from the past to the present day. International disputes arise when the parties cannot solve these problems. The problem of resolving international disputes that may be of legal and political nature in order to provide peace and tranquility to future generations has become a responsibility for international actors. In the past it was possible to resort to coercion and wars in the resolution of disputes, but this was precisely forbidden in modern international law, which led the parties to peaceful solutions. Mediation, formerly known as mediation, is an international organization of a third state according to general acceptance, and rarely an individual is in negotiations with the parties to a dispute and offers his services by participating in negotiations to help resolve disputes. The topic we will discuss here is International Law Mediation. As an example, we aim to address Turkey, which has an important place in its region and has an opportunity as an area of influence. After describing mediation in international law in a more detailed way in the subject context, we will talk about the mediation activities of Turkey, which is the goal of being a regional power. And we aim to examine the examples of whether it is successful or not and to present a perspective on the future.*

**Keywords:** *Mediation, International Law, Turkey*

### **Giriş**

Geniş anlamda arabuluculuğa baktığımızda bireylerin çeşitli çatışmalarla baş başa kaldığı bilinmektedir. Tarihi anlamda baktığımızda geçmişten günümüze doğru bu konularla ilgili olarak toplum içinde yaşama kuralları içinde hukuki yaptırımlara girişmişlerdir. Uluslararası

hukuk kısmında baktığımızda ise bu durum devletlerin sorunlarını çözebilmesi için çeşitli mücadelelere giriştiklerini de göstermektedir.

Özellikle yıllar geçtikten sonra çatışmalardan ve savaştan rahatsız olan ülkeler artık hukuki alanda normlar oluşturmaya çalışmışlardır. Genel anlamıyla teamüllere dayanan uygulamalar uluslararası kuruluşlar ve toplumlar tarafından da benimsenince daha genel geçer kurallar halini almışlardır.

Tüm bu süreçlerin beraberinde arabuluculuk ile ilgili olarak geniş bir mevzuat oluşmuştur. Bölgesel güç olarak nitelendirebileceğimiz ve dünyanın genel anlamıyla tüm problemlerinin ortaya çıkış noktası diye kabaca değerlendirme yapabileceğimiz Ortadoğu Bölgesindeki bir ülke olan Türkiye'nin arabuluculuk faaliyetlerinden bahsetme amacımız bulunmaktadır.

Bölümler anlamında anlatımı sağladıktan sonra Türkiye'nin arabuluculuk faaliyetlerine belli başlılarına kısaca değinerek geleceğe dair belli başlı çıkarımlarda bulunacağız.

### **Genel Anlamda Arabuluculuk**

Geçmişten günümüze kadar uluslararası toplum üyeleri arasında çeşitli görüş ayrılıkları ve sorunlar olmuştur. Taraflar bu sorunları çözemediklerinde uluslararası uyuşmazlıklar ortaya çıkmıştır. Gelecek kuşaklara barış ve huzur ortamı sunabilmek için hukuki ve siyasi nitelikte olan uluslararası uyuşmazlıkların çözülmesi sorunu uluslararası aktörler için bir sorumluluk haline gelmiştir. Geçmişte uyuşmazlıkların çözümünde zorlama yollarına ve savaşlara başvurulsa da modern uluslararası hukukta yasaklanan bu durum tarafları barışçı çözüm yollarına yönlendirmiştir.

Uluslararası uyuşmazlıkların barışçı yollardan çözüm yollarından biri olan arabuluculuk ise insanlık tarihiyle paralellik gösterir. Geçmişten günümüze bütün sosyal toplumlarda arabuluculuk yöntemine rastlanmaktadır. Uyuşmazlık yaşayan kişiler toplumun ileri gelen yaşlıları, din adamları, bilim adamları gibi toplumun seçkin üyeleri aracılığıyla uzlaştırılmıştır.

Arabuluculuk (mediation) eski adıyla tavassut öğretide genel kabule göre bir üçüncü devletin uluslararası örgütün ve ender olarak bir bireyin bir uyuşmazlığa taraf devletlerle görüşmelerde bulunmalarında ve uyuşmazlıkları çözmede yardımcı olmak üzere görüşmelere kendisinin de katılması suretiyle hizmetini sunmasıdır (Pazarıcı, 2011:458).

Alternatif uyuşmazlık çözüm yolu olarak arabuluculuk, Anglo-Sakson hukuk sistemlerine dayalı bir yöntem olduğu için öncelikle Amerikan ve İngiliz hukuk sistemlerinde benimsenmiş ve uygulamaya konulmuş olup, daha sonraları küreselleşmenin ve serbest piyasaya dayalı rekabetçi ekonomi modellerinin etkisiyle Kıta Avrupası hukuk sistemlerinde de görülmeye başlanmış ve zaman içerisinde Avrupa Birliği düzenlemelerinde de kendisine yer bulmuştur (Bilgin, 2009:11).

Uluslararası uyuşmazlıkların çözümünde arabuluculuk yönteminin kullanılması 19. yüzyıl ile başlamaktadır. Arabuluculuk konusunda uluslararası hukuk kuralları teamül şeklinde gelişmiştir. Arabuluculuk konusunda kuralların kodifiye edilmesi ilk olarak 1899 ve 1907 La Haye Sözleşmeleri ile olmuştur. La Haye sözleşmeleri barışın korunması meselesinin tüm devletleri ilgilendirdiği ve bir uluslararası uyuşmazlık karşısında hiçbir devletin kayıtsız kalmaması üzerinedir. La Haye sözleşmelerinden sonra da birçok uluslararası sözleşmede arabuluculuk faaliyeti bir uluslararası çözüm yolu olarak yer almıştır. Bunlar:

- 1945 tarihli BM Antlaşması
- 1945 tarihli Arap Devletler Ligi Antlaşması
- 1948 tarihli Amerikan Barışçı Çözüm Yolları Antlaşması(Bogota Antlaşması)
- 1959 tarihli Antarktika Antlaşması
- 1964 tarihli Afrika Birliği Örgütü Antlaşması ve Arabuluculuk, Uzlaştırma ve Tahkim Komisyonu Paketi
- 1970 tarihli BM Antlaşması Doğrultusunda Devletler Arasında Dostça İlişkiler ve İşbirliğine İlişkin Uluslararası Hukuk İlkeleri
- 1975 tarihli Avrupa Güvenlik ve İşbirliği Konferansı Nihai Senedi
- 1982 tarihli Uluslararası Uyuşmazlıkların Barışçı Çözüm Yollarına İlişkin Manila Deklarasyonu

Arabuluculuğun geliştirilmesi ve destek faaliyetlerine ilişkin BM Genel Sekreterinin raporu da çok önemlidir.(rapor için bakınız S/2009/189). Rapor BM ve ortaklarının arabuluculuk alanında karşılaştığı sorunları incelemiş ve bu sürecin güçlendirilmesi konusunda değerlendirmelerde bulunmuştur. Oy birliği ile kabul edilen 65/283 sayılı “Uyuşmazlıkların Barışçı Çözümü Çatışmaların Önlenmesi ve Çözümünde Arabuluculuğun Rolünün Güçlendirilmesi” başlıklı Genel Kurul kararı arabuluculuğun giderek artan bir biçimde

kullanılmasını taktirle karşılayıp arabuluculuk çabalarında uluslararası toplumun karşılaştığı sorunları değerlendirip kilit aktörleri arabuluculuk kapasitesini geliştirmeye çağırmıştır.

Rehberine göre bir arabuluculuk sürecinin başarısı ya da başarısızlığı eninde sonunda çatışmalı tarafların arabuluculuğunu kabul edip etmediklerine ve bir anlaşmaya varmaya istekli olup olmadıklarına bağlıdır.

### **Arabuluculuğun Temel Özellikleri**

Uluslararası hukukta arabuluculuktan söz etmek için temel özelliklerin bulunması gerekir. Bunlar:

#### **• Arabulucunun Üçüncü Bir Kişi Olması**

Arabuluculukta uyuşmazlığın çözümünde bağımsız bir ya da birden fazla kişi taraflara yardımcı olmaktadır. Üçüncü kişi konumundaki arabulucunun uyuşmazlığa katılımındaki amaç tarafların düşüncelerini ve davranışlarını etkileyerek veya daha etkili bir müzakere yöntemi ortaya çıkararak mevcut bir uyuşmazlık ilişkisindeki gücün ve sosyal dinamiklerin değiştirilmesi ve böylelikle tarafların çekişmeli olan konularda anlaşmaya varılmasının sağlanmasıdır (Kekeç 2011:76).

Arabulucu müdahalesiyle uyuşmazlık halindeki taraflar arasındaki müzakerelere yeni bir dinamizm gelir. Anlaşmaya varmada ne gibi engelleri olduğuna dair arabulucu şu noktalarda gayret gösterir:

- Bilginin değişimini teşvik etmek
- Taraflara yeni bir vizyon kazandırmak
- Tarafların birbirlerini anlamaları için onlara yardım etmek
- Endişe ve görüşlerinin karşı tarafça anlaşıldığı konusunda tarafları ikna etmek
- Duyarlı ve hassas açıklamaların verimli bir düzeyde yapılmasını ve sonuç doğurmasını sağlamaya çalışmak
- Taraflar arasındaki menfaatler ve anlayışlardaki farklılıkları gidermek
- Taraflara çözüm için gerçekçi seçenekler tayin edebilmelerinde yardımcı olmak
- Esnekliği ve karşılıklı hoşgörüyü teşvik etmek

- Tarafları yaratıcı çözüm önerilerinde bulunma konusunda tahrik etmek
- Genellikle taraflarla ayrı oturumlarla bulunmak suretiyle tarafların birbirine açıklamak istemedikleri menfaatleri ve konuları hakkında bilgi sahibi olmak
- Tarafların tamamının temel menfaatlerine uygun olan çözüm şekillerini üretmek (Özbek, 2011:497)

Uluslararası bir uyuşmazlığın ikiden fazla tarafı olabilir. Bu şekilde de arabulucu üçüncü kişi olarak kalır. Arabuluculuk yapabilecek üçüncü kişiler devletler uluslararası örgütler ve gerçek kişiler olarak karşımıza çıkar.

### • Devletler

Uygulamada en sık rastlanılan yöntemdir. Uyuşmazlık halindeki iki devletin arasını uyuşmazlığa taraf olmayan üçüncü bir devlet düzeltebilir. Arabuluculuk görevini devletler adına onların yetkili temsilcileri yapar. Yetkili temsilciler, devlet başkanı, Başbakan, Dışişleri Bakanı, diplomatik temsilciler veya hükümetin arabulucu olarak atadığı üçüncü kişiler olabilir

İki devlet arasında yaşanan uyuşmazlık aynı coğrafyadaki diğer devletleri de etkileyebilir. Devletler bölgelerinde barış huzur ve güvenliği sağlamak isteyeceğinden bir uyuşmazlık halinde uyuşmazlığı çözüme gayretinde bulunacak olanlar yine bölgedeki diğer devletler olacaktır.

Aynı coğrafi bölgede bulunmayan ABD ve SSCB gibi süper güç olan devletler de arabuluculuk yapabilirler. ABD ve SSCB II. Dünya savaşıdan sonra sayısız uyuşmazlığa arabuluculuk yaparak bunu bir rekabet ve prestij haline getirmiştir.

Küçük devletlerde tehditkar olmayan duruşları sayesinde başarılı bir şekilde arabuluculuk yapabilirler. Stratejik olarak zayıf görünmeleri arabuluculuk girişimlerini daha ahlaki üstünlükle neticelendirmelerini sağlamaktadır.

### • Uluslararası Örgütler

İki devlet herhangi bir uyuşmazlık yaşadığında uluslararası barış ve güvenliği tehdit etme ihtimali olduğundan uluslararası örgütler devreye girerek uyuşmazlığı çözüme kavuştururlar. Uluslararası örgütlerin uyuşmazlık konusu hakkında bilgi ve belge toplayabilme imkânı yüksektir. Bu nedenlerle devletlere göre daha başarılı sonuçlar elde ederler. Uluslararası

örgütlerin çoğu barış ve güvenliği sağlamak için kurulmaktadır. Bu nedenle örgütlerin genel sekreterleri ve bölgesel meslektaşları taraflar arasında arabuluculuk yapmakla uğraşırlar.

BM Antlaşmasının VI. Bölümünde BM organlarının birtakım uluslararası uyuşmazlıkların çözümüne katılması ve arabuluculuk yapması mümkün kılınmıştır. BM Güvenlik Konseyi gerekli gördüğü takdirde tarafların arasında uyuşmazlığı çözme noktasında aktif rol üstlenerek arabuluculuk yapabilmektedirler. BM adına arabuluculuk faaliyetini genellikle BM Genel Sekreteri yapar.

BM'nin yanı sıra diğer uluslararası örgütlerde arabuluculuk faaliyeti yapılabilir. Örnek olarak NATO 1958'de Kıbrıs uyuşmazlığını çözmek için Türkiye, İngiltere ve Yunanistan arasında iki defa arabuluculuk girişiminde bulunmuştur.

Arabuluculuk bölgesel nitelikli bir uluslararası örgüt tarafından da gerçekleştirilir. Genelde örgüte taraf devletlerin kendi aralarındaki uyuşmazlıkların çözümünde arabuluculuk yapmak isterler. Bununla ilgili Afrika Birliği Örgütü (ABÖ) 1975-1990 yıllarında Libya ile Çad arasındaki uyuşmazlıklarda yoğun arabuluculuk faaliyetinde bulunmuştur.

### • Gerçek Kişiler

Burada kastedilen üçüncü kişi herhangi bir devlet ya da uluslar arası örgüt adına hareket etmeyen bağımsız gerçek kişilerdir. Uygulamaya bakıldığında arabulucu olan özel kişilerin hukukçu, kanaat önderi, bilim adamı, dini lider, ünlü diplomatlar gibi uluslararası toplum tarafından tanınmış tarafsızlığına güvenilen ve söz sahibi kimseler olduğu görülür. 1977'de Mısır ile Libya arasında çıkan sınır çatışmasında Filistin Kurtuluş Örgütü lideri Yaser Arafat arabuluculuk yapmıştır.

### • Arabulucunun Tarafsız Olması

Arabulucu kullanılacak yöntemi seçerken ve çözüm seçeneklerini değerlendirirken iki tarafa eşit uzaklıkta olmalı tarafsızlığını gölgeye düşürebilecek menfaatlere sahip olmaktan kaçınılmalı ve taraflardan herhangi biriyle tarafsızlığını etkileyebilecek bir bağlantı kurmamalıdır.

### • Arabulucunun Bağlayıcı Karar Vermemesi

Arabulucu uyuşmazlık çözümünde mutlak çözüme kavuşturan kişi olmadığı için görüşleri sadece tavsiye niteliğindedir. 1907 La Haye Sözleşmesi'nin 6 maddesi konuyla ilgili olarak



arabuluculuk sonucunda verilen kararların tavsiye niteliği taşıdığını ve tarafları bağlayıcı bir etkisinin olmadığı vurgulamaktadır.

#### • Arabulucunun Yetkisini Taraflardan Alması

Uyuşmazlığın taraflarından kendine açıkça veya zımnen yetkilendirilme verilmeyen arabulucu bu göreve başlayamaz. Taraflar üçüncü bir kişinin uyuşmazlığın içine girerek bir çözüme ulaşılması konusunda yardım etmesine izin vermelidir. Taraflardan herhangi biri arabulucuya önceden vermiş olduğu yetkiyi geri almaya karar verirse arabuluculuk faaliyeti sona erer.

#### • Arabuluculuğun Gönüllü Olması

Arabuluculuğun başarılı olabilmesi tarafların gönüllü olarak ve istekle bu işi yapmalarına bağlıdır. Gönüllülük unsuru arabulucunun hukuki bakımdan en önemli özelliğidir. Üçüncü bir devlet arabuluculuk teklifinde bulunmaya mecbur olmadığı gibi uyuşmazlığa taraf devletlerden gelecek arabuluculuk talebine de olumlu cevap verme zorunluluğu yoktur.

### Arabuluculuğun Tercih Nedenleri

#### • Zamandan Tasarruf

Bir uyuşmazlığın uluslararası yargı organları önüne taşınması uyuşmazlığın çözüm sürecini epey geciktirebilir. Uyuşmazlığın yargısal yollarla çözümünde zaman açısından yaşanan sorunlar arabuluculuk yöntemini çok iyi bir seçenek konumuna taşımaktadır. Arabuluculuk yöntemi yargılama prosedürlerine gerek duymadan kısa vadede çözümler getirebilmektedir. Taraflar açısından zamandan tasarruf sağlayarak uyuşmazlığın büyümesine engel olmakta ve uluslararası barış ve güvenliğe hizmet etmektedir.

#### • Uzman Kişilerin Arabulucu Olması

Uyuşmazlık konusunu iyi şekilde anlayan arabulucu tarafların istek ve beklentilerini daha kolay anlayabilmekte ve uyuşmazlığın çözümünde de daha başarılı hareket etmektedir. Arabulucunun alanında uzman olması tarafların arabulucuya güven duymasını sağlayarak uyuşmazlığın daha kolay çözümünü sağlar.

### • Kontrolün Taraflarda Olması

Arabulucu taraflara uygun ve mantıklı bakış açılarını göstererek kendi adil ve kabul edilebilir saydıkları çözümleri elde etmelerine yardımcı olmaktadır. Arabulucu tarafları bağlayıcı bir karar vermez. Aralarındaki uyuşmazlığı çözüp çözmemeye ya da uyuşmazlığın çözümünde anlaşmışlarsa bunun hangi şartlarda olacağına karar verecek olan tarafların kendileridir.

### • Yargı Organlarının Yükünü Azaltması

Bir uyuşmazlığın uluslararası yargı organı önüne getirilmesi ve sonuç alınabilmesi yıllar sürmektedir. Bu durumda taraflar bir uyuşmazlığı yargı önüne taşımak yerine alternatif yollara başvururlar. Uyuşmazlık yaşayan devletlerin yargıya başvurmadan diplomatik yollarla uyuşmazlığı çözmeleri yargı organlarındaki iş yükünü azaltacaktır.

### • Gizliliğin Korunması

Taraflar kendilerini rahatça ifade edebilmelidir ki sorunun kaynağına inilip en uygun çözüm yolu bulunabilsin. Burada gizliliğin korunması önemlidir. Tarafların zarar görmemesi arabuluculuğun cazibesini devam ettirebilmesi için arabuluculuk süresince elde edilen bilgilerin hiçbir suretle diğer tarafa ve üçüncü kişilerle paylaşılmaması gerekir.

## Arabuluculuğun Başarısını Etkileyen Faktörler

Arabuluculuğun her zaman başarıyla sonuçlanması mümkün değildir. Bu noktada, arabuluculuğun başarısını etkileyen faktörler önemlidir. Arabuluculuğun başarısını öncelikle; uyuşmazlığın olgunluk evresi, uyuşmazlığın yoğunluk derecesi ve uyuşmazlık konusunun niteliği bakımından uyuşmazlığın ayırt edici özellikleri etkilemektedir. Arabuluculuğun başarısını etkileyen ikinci faktör ise, taraflar ve karşılıklı ilişkileridir. Gerçekten tarafların açık bir şekilde tanımlanabilmiş olması, tarafların rejim türleri, tarafların arabuluculuğu kabul etme sebepleri, tarafların eski ve devam eden ilişkileri, tarafların güç dengesi gibi etkenler arabuluculuk faaliyetinin başarılı bir şekilde sonuçlanıp sonuçlanmamasında belirleyici rol oynamaktadır. Arabuluculuğun başarısını etkileyen son bir faktör ise arabulucunun özellikleridir. Arabulucunun tarafsız olup olmaması, arabulucunun taraflar üzerindeki baskı gücü veya arabulucunun statüsü gibi etkenler arabuluculuğun başarısını etkilemektedir.

Barişçı bir yöntem olan arabuluculuk, uyuşmazlıkların çözümünde oldukça etkili sonuçlar doğurmaktadır. Bu sebeptendir ki, devletlerin en sık başvurduğu barişçı çözüm yöntemlerinden biridir.

## **Arabulucunun Rolü**

2010 Eylülde Türkiye ile Finlandiya “Bariş İçin Arabuluculuk” girişimi başlatmıştır. Bu çabaların sonucunda “Uyuşmazlıkların Barişçı Çözümü, Çatışmaların Önlenmesi ve Çözümünde Arabuluculuğun Rolünün Güçlendirilmesine” ilişkin bir karar tasarısı 22 Haziran 2011 tarihinde BM Genel Kurulunda oy birliği ile kabul edilmiştir. Bu karara binaen BM Genel Sekreteri Ban Ki-moon 25 Haziran 2012 tarihinde hazırladığı raporun ekinde “Etkin Arabuluculuk Yöntemi” adıyla arabulucu konumundaki üçüncü kişilerin başarılı bir arabuluculuk yapabilmesi için üstlenmesi gereken rolleri ve ilkeleri belirtmiştir. Rehber arabuluculuk çabaları çerçevesinde arabulucunun bürüneceği rolü ve gözetmesi gereken temel ilkeleri tanımlamaktadır (Eren, 2014:85).

## **Hazırlıklı Olmak**

İyi hazırlanmış ve desteklenmiş bir arabulucu beklentileri yönetebilir. Anlık çözümlerden kaçınırken ivedilikle bilincini koruyabilir ve bütün süreçteki fırsat ve sınamalara etkin şekilde cevap verebilir.

## **Rıza**

Arabuluculuk faaliyetinde rıza olmaksızın tarafların iyi niyet temelinde müzakerelerde bulunması veya arabuluculuk sürecine bağlı kalması mümkün değildir. Dolayısıyla arabulucular kendilerini çok iyi ifade edebilmeli ve tarafların gönüllü olarak rızalarını göstermelerini sağlamalıdır.

## **Tarafsızlık**

Arabuluculuk faaliyeti tarafların arabulucuya karşı önyargısı ile devam ederse bu durum uyuşmazlığı çözmeye yönelik ilerlemeyi ciddi şekilde etkileyebilir. Bu nedenle arabulucu taraflara adil bir şekilde davranan dengeli bir süreç yürütmeli ve sonuca ilişkin herhangi maddi beklenti içinde olmamalıdır.

### **Kapsayıcılık**

Uyuşmazlık halindeki tarafların görüş ve ihtiyaçlarının temsil edildiği ve arabuluculuk süreci ile sonucuna dahil edildiği kapsam ve biçimi ifade eder. Kapsayıcı bir süreç uyuşmazlık halindeki tarafların ve diğer paydaşlar arasındaki etkileşimi kolaylaştırmakta ve sürece tüm bakış açılarını dahil etmek üzere mekanizmalar yaratmaktır.

### **Ulusal Aidiyet**

Ulusal aidiyet uyuşmazlık halindeki tarafların ve daha geniş bir toplumun arabuluculuk süresince anlaşmalara ve anlaşmaların uygulanmasına taahhüdünü ifade eder. Bir uluslararası uyuşmazlık sadece tarafları değil ayrıca çevrelerindeki diğer toplulukları da etkiler. Bu nedenle savaşın sona ermesi ve barış dolu bir gelecek için uluslararası toplum bütün olarak gayret sarf etmelidir.

### **Uluslararası Hukuk ve Normatif Çerçeve**

Arabuluculuk kişinin hareket kabiliyetini genişleten ve özgür olmasını sağlayan bir çözüm yolu olsa da arabulucular kendilerini görevlendiren kuruluşlardan aldıkları yetkiye dayanarak ve bu kuruluşların kuralları ile düzenlemeleri tarafından belirlenen parametreler içerisinde çalışmalarını yürütür. Bir uluslararası örgüt tarafından görevlendirilen arabulucu o uluslararası örgütün iç tüzüğüne ve kurallarına uymak mecburiyetindedir. Bir devlet tarafından görevlendirilen diplomatik temsilci arabuluculuk yaparken hükümetinin siyasi ve stratejik çizgisinin dışına çıkamaz. Arabulucular başta küresel ve bölgesel sözleşmeler uluslararası insan hakları ve mülteci hukuku ile uluslararası ceza hukuku dahil olmak üzere söz konusu duruma ilişkin uluslararası hukuk kuralları tarafından oluşturulan çerçeve içerisinde çalışmalarını yürütmek zorundadır.

### **Arabuluculuk Girişiminin Tutarlılığı, Eşgüdümü ve Tamamlayıcılığı**

Arabuluculuk faaliyetlerinde yer alan aktörlerin sayısının çeşidinin artmakta olması arabuluculuk girişimlerinin tutarlılığı eşgüdümü ve tamamlayıcılığını hem gerekli hem de gerçekleştirilmesini güç kılmaktadır. Örneğin BM bölgesel, alt bölgesel ve diğer örgütler, devletler, sivil toplum kuruluşları, ulusal ve yerel aktörleri içeren uluslararası toplumun eylemlerinin tümünün arabuluculuk üzerinde etkisi vardır. Aktörlerin her biri arabuluculuk sürecinin farklı aşamalarında özgün katkıda bulunacağı için bu çeşitlilik kıymetli bir

değer niteliği taşıyabilir. Ayrıca çeşitlilik aktörlerin birbirlerine aykırı amaçlarla çalışmaları ve rekabet etmeleri tehlikesini de taşımaktadır.

### **Nitelikli Barış Antlaşmaları**

Arabuluculuğun amacı uyuşmazlık halindeki tarafları barıştırmaktır. Arabulucunun yürütmüş olduğu faaliyetin nihai hedefi tarafların bir antlaşma imzalayarak bazı sağlaması ve bir antlaşmada uyuşmazlığı sonlandıracak çözüm yollarına yer vermektedir. Barış antlaşmaları şiddete son vermeli ve sürdürülebilir barış, adalet, güvenlik ve uzlaşmaya ulaşılması için uygun bir zemin sağlamalıdır.

### **Sonuç**

Türkiye gibi genel anlamda yetkinlikleri eksik olan bölgesinde temsil yeteneği olan ülkelerin ana amaçları arabuluculuk üzerine şekillenmektedir. Ana amaç olarak kalıcı barış, istikrar ve refah ortamının oluşması anlamında sarf edilen çoğu çabanın birçok problemle karşılaşıldığını ve çeşitli süreçlerle uğraşıldığını göstermektedir. Türkiye'nin insan haklarına saygılı tutumuyla Bosna-Hersek, Karabağ gibi çatışma bölgeleri beraberinden gelen her insana kucak açmıştır. Onların herhangi bir şekilde problemler ile uğraşmamasına çalışıp uluslararası toplum tarafından takdir toplayan hamleleri olarak olduğunu sayabiliriz.

Arabuluculuk faaliyetleri bağlamında girilen birçok eylem bulunmaktadır. Bunlardan bilinenleri arasında sayabileceğimiz İsrail ile Suriye arasındaki Golan Tepeleri Uyuşmazlığı sonuç alınamayan arabulucu faaliyetleri arasında sayabiliriz. Akabinde yine sayabileceğimiz Lübnan Krizi konusu ve çözümü konusunda yaşanan hükümet krizi, Cumhurbaşkanı seçim krizi gibi süreçler de çeşitli problemleri oluşturmuş Türkiye'nin çözüm anlamıyla adımlar atma çabası olmasına rağmen yine sonuca ulaşamamıştır.

Filipinler hükümeti ile Moro İslami Kurtuluş Cephesi arasında Türkiye'nin öncülüğünde başlatılan arabuluculuk hareketleri belli başlı bir netliğe kavuşup bir barış anlaşmasıyla sonuçlanan sürecin sonunu uluslararası topluma Türkiye'nin barış için girişim çabalarını göstermiştir.

İran'ın Nükleer programıyla ilgili olarak yaşanan problemler ile BM'deki Brezilya ve Türkiye misyonları öncülüğünde belli bir anlaşma programı hazırlanmış olmasına rağmen belli

başlı bir zenginleştirilmiş uranyum ile ilgili de uluslararası anlaşmalara dayalı olarak gerekenler yapılmış olmasına rağmen boşa çıkan bir hamle olarak başladığını söyleyebilmekteyiz.

Başarısız devlet olarak uluslararası toplum tarafından nitelendirilen Somali ile içinde oluşan Somaliland Özerk Bölgesi ile beraber uluslararası anlamda yaşanıl原因en çeşitli problemlerin oluşu ve zayıf olan devlet yapısının varlığı ülkenin bütünlüğünü tehdit eder duruma gelmiştir. Türkiye'nin arabuluculuğu ile bu konuyla beraber belli bir anlaşma zemini oluşup ülke içi bütünlük sağlanmıştır.

Bütün bu faaliyetler bağlamında Türkiye'nin yapmış olduğu hamlelerin aslında yeteri kadar sonuç oluşturmadığını söyleyebilmiş olsak da, dünyada artık ortaya gelen sorunların ve yaşanan bütün problemlerin artık eskisi gibi sert güçle çözülemeyeceğini ve bunun yanında yumuşak gücü de kullanmamız gerektiği gerçeğini göstermektedir. Türkiye gibi genel anlamda gelişmekte olan ve bölgesel güç olarak nitelendirilebilen ve küresel güç olma kapasitesi olan ülkelerin kendilerini bir nebze de olsa gelişen dünya koşullarına uygun halde davranarak uluslararası toplumun ve hukukun gerekenlerini yapması gerekmektedir (Eren, 2014: 122-132).

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# 12

## THE DEVELOPMENT OF GOOD CORPORATE GOVERNANCE IN TURKEY

*Hatice Kübra Kandemir*

### ***Abstract***

*The relationship between the good corporate governance and the legal families has been well established by the previous studies in the fields of both law and finance. It has been submitted that weaknesses in the governance structure are closely related to weaknesses in the law. However, improvements in the statutory law does not automatically lead stronger governance. This can be explained through path dependency of countries implying that while the laws in the book shows comparability to those in many developed economies the governance of corporations might still developed less due to the institutional differences. Thus, countries with different legal traditions may have different mechanisms for improving the development of corporate governance of corporations.*

*The aim of this paper is to re-visit the relationship between the legal environment and the development of good corporate governance of corporations in particular to Turkey. This paper will provide an understanding of legal aspect of good corporate governance development in Turkey. The elements of good corporate governance, in particular directors' duties (i.e., duty to act fairly, duty of care), the role of independent directors, statutory appointment of external auditing, protection of shareholder rights, transparency and disclosure measures, have already been covered by the laws in the book in Turkey. The availability of decent laws and regulations is important for good conduct of governance of corporations yet more important is its effective enforcement. While weak enforcement may be associated to the legal and institutional differences, alternative mechanisms may be suggested to eliminate these differences. This paper will evaluate the availability and functionality of alternative enforcement mechanisms as means of private legal rules, such as arbitration and dispute resolution, in terms of enhancing good corporate governance in Turkey.*

**Keywords:** *corporate governance, legal traditions, legal enforcement, arbitration, Turkey*

### **Introduction**

The previous research has already established that there is a relation between the governance of firms and the level of legal enforcement and the origin of the rules (La porta et al., 2000). Weaknesses in the governance structure of firms often attributed to weakness in the law. It was suggested that stricter legal rules would result in stronger governance mechanism in firms. While rule makers have their justifications for regulation (Baldwin and Cave, 1999), this provided them another motive for regulation. However, even the developed markets witnessed poor corporate governance examples resulted in the loss of confidence amongst investors, as the notorious case of Enron illustrated (Coffee, 2002; 1404). Thus, a direct conclusion of the stronger governance of firms as the result of the availability of good laws would apparently be a misleading argument.

Moreover, due to the path dependency of countries, while the laws in the book shows comparability to those in many developed economies, the governance of corporations might still have developed less due to the institutional differences. This is particularly relevant for Turkey, which is still going through vital regulatory reforms to make improvements in the statutory law, yet the application of these laws are questionable. This may imply that countries with different legal traditions may have different mechanisms for improving the development of corporate governance of corporations.

The aim of this paper is to identify the elements of good corporate governance in particular to Turkey. In this respect, both the organizational structure and the legal environment will be evaluated.

### **The Elements Of Good Corporate Governance**

The generally recognized issue of corporations today is the potential conflict of interest and abuses of power of the controlling shareholders. This fundamental problem results in the division of ownership and control and called as the ‘agency problem’ (Berle and Means, 1932; 119). In the classical agency problem, it is viewed that managers may act in their own interest rather than those of the shareholders. In the second type of agency problem, because of the influence of controlling shareholders on the management there is no conflict of interest between them. Yet, in those companies, the problem arises as the controlling shareholders’ potential expropriation of minority shareholders’ rights (Nilsson, 2007; 195).



The objective of laws and regulations is to promote companies to adopt good corporate governance mechanisms so that the both types of agency problems are eliminated. To put it differently, adoption of good corporate governance practices would prevent potential conflicts between the stakeholders in a company. The efficient management of companies is also vital in terms of facilitating trust and confidence in securities markets. Thus, the application of good corporate governance practices would help by establishing a stable investment environment for investors.

The adoption of good governance conduct by companies rely both on the firm-level and country-level governance and the interaction between two. For example, a good legal system may act as a substitute for firm-level governance, or it could facilitate a design for firm-level governance. Therefore, to understand the existing governance arrangements and how they could be improved, it is necessary to investigate both the firm-level and country-level governance choices. On that account, this paper is structured under two main sections: (i) firm-level governance: organizational structure and (ii) country level governance: legal environment.

## **A. Firm-level Governance: Organizational Structure**

### **Directors' Duties**

Corporate governance provides different measures to reduce the agency problem. One of the mechanisms offered by corporate governance principles is to bring directors accountable to the shareholders. The law imposes various duties on directors, namely the duty to act fairly and duty of care. In case of any wrongdoings, directors are liable to the company, its shareholders and the creditors. According to the law, managers must fulfill their duties with the care of a cautious manager (Turkish Commercial Code, hereinafter TCC, art. 369). They are also obliged to observe the company's interests in accordance with the rules of honesty (TCC, art. 369).

Yet, the problem arises with the enforcement of these rules where the company owner and the manager is the same person. This is especially the case in family companies that appear widely in Turkey. In those companies, typically family members dominate the board and get hold of the financial control of the firm (Nilsson, 2007; 201). This type of governance

is likely to allow directors to pursue their own interest rather than shareholders' and consequently give incentives to expropriate the minority shareholders' rights.

### **Independent directors**

Independent directors are accepted as an important mechanism to monitor the management in the best interest of shareholders. Yet, usually the independency of these directors has been questioned due to the direct or indirect links with the management. With regard to listed companies, the law issues strict rules for the appointment of independent directors to make sure they have no business relation of significant nature with the firm or firm's subsidiaries (Capital Markets Board of Turkey (Sermaye Piyasası Kurulu - hereinafter SPK) Corporate Governance Principles, art. 4.3.7).

### **Shareholder remedies**

The law requires the equal treatment of shareholders (TCC, art. 357). Any decision taken by the board of directors that is contrary to the equal treatment principle shall be deemed to be null and void (TCC, art. 391).

Furthermore, in case of merger, acquisition, scissions, or transformation of firms, shareholders have right to claim the continuity of rights, right to inspect and right to bring legal action for annulment. Especially the right to bring action for annulment furnishes protection from the arbitrary treatment of controlling shareholders and/or managers.

### **Transparency and disclosure**

Disclosing information on the financial statements and audit reports is recognized as an essential condition to ensure investor confidence and trust in financial markets. It is equally important that the disclosed information is reliable, complete, comprehensible, and accessible.

As the other many countries around the world, the law in Turkey now requires companies (that are subject to independent external audit) to establish a website and publish information on the financial statements that are required to be announced by the law, such

as information on the partners and members of the board of directors and financial reports etc. (TCC, art. 1524).

### **External auditing**

Annual audits of financial reports by independent external auditors are accepted as an integral part of the idea of disclosure. The role of external auditing is to ensure the credibility of the financial statements.

The law in Turkey requires certain companies<sup>1</sup> to be audited by external independent auditors in accordance to the Turkish Auditing Standards that are in line with the International Financial Reporting Standards (TCC, art. 397). The auditor will be elected by the general assembly of the company (TCC, art. 399).

External auditors are supposed to be gatekeepers (Porter et al., 2003; 27). It is assumed that independent auditors would not risk their reputation by verifying the false or misleading information in the financial reports. However, it is often the case that external auditors provide non-audit (advisory) services to the client (the firm). Audit firms tend to please the existent client because they are hoping to earn large non-audit fees from them. This auditor-client relationship is arguably may risk auditor independence (Shapiro, 2004; 1041) and compromise the accountability of auditors and the reliability of audit reports.

In order to reduce the ill-effects of the auditor-client relationship, the law imposed compulsory rotation of auditors and limits their appointments for the same firm with seven years in a 10-year time period (TCC, art. 400).

### **B. Country-level Governance: Legal Environment**

Good corporate governance is also associated with the availability of the sufficient legal rules and the regulatory bodies that are responsible with the enforcement of the laws and regulations.

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1 Companies subject to external auditing is determined according to the criteria established by the Council of Ministers: (i) total assets are 150 million TL or over, (ii) net sales revenues are 200 million TL or over, and (iii) staff members are 500 or over. Cabinet Decision No. 2012/4213, Official Gazette No. 28537 (23.01.2013).

### **Adequacy of laws**

Today's markets involved many complexities and thus subject to high risks. Laws and regulations are justified to fix the inadequacies where the uncontrolled market fails to function properly. For example, making the market more transparent via effective disclosure mechanisms can be cited as justifications for laws and regulations (Baldwin and Cave, 1999:9-16). The downside of these laws is that they may be an overreaction to the crisis or market failures without sufficient consideration (Tomasic and Akinbami, 2011; 272).

Turkish Commercial Code No. 6102 came into force in 2012 and replaced the previous code of 1956 to reform the country's legal framework in the area of commercial law and establish a new modern law regime based on corporate governance principles (i.e. transparency, fairness, accountability, and responsibility). All types of companies, including joint stock companies and limited liability companies are subject to TCC No. 6102. Companies whose shares are listed on the stock exchange are subject to additional regulations issued by the SPK.

Corporate governance principles firstly issued in 2003 by the SPK. They were accepted as voluntary standards of best code of conduct particularly for listed companies and later have evolved into legal rules. By the SPK Communiqué issued on January 2014 (Series IV, No: 56), requirements on the corporate governance of companies are now applied to all joint stock companies (listed or not-listed). Accordingly, companies whose shares are not listed on the stock exchange shall follow the rules on corporate governance if the number of shareholders exceeds 500. The attachment of the SPK Communiqué involves the Corporate Governance Principles in which some of the rules are made obligatory (Series IV, No: 56, Article 5.1).

### **Regulators**

Regulators play an important role in the governance and enforcement of laws. As regards corporate governance, the Capital Market Board of Turkey (Sermaye Piyasası Kurulu - SPK) is the main regulatory authority. The SPK's function is to set and enforce the rules, especially disclosure obligations, for companies listed on the stock exchange.

The laws issued by the SPK provide the main regulatory source in terms of corporate governance of listed companies in Turkey (SPK Communiqué Series IV, No: 56). The role

of the SPK is to ensure that the market is efficient, fair and transparent so that the rights and interests of investors are protected.

## **Enforcement**

The availability of decent laws and regulations is important for good conduct of governance of corporations yet more important is its effective enforcement. Weak enforcement may be linked to the institutional incapacity. Also, the enforcement power of the regulatory authorities in a country may be indicated to the efficiency of the enforcement level in a country.

The SPK is empowered by law to supervise compliance with the law and apply administrative sanctions in case of any breach of its rules. The most common sanctions are warnings, administrative fines, cancellation of licenses, or issuing criminal reports to the Chief Public Prosecutor's Office (Cumhuriyet Bassavciligi).

The efficiency of the SPK monitoring over listed firms depends on a number of factors, including the amount of allocated budget to the supervisory department, the number of investigators and the measures taken to the offenses to name but a few.

## **Lawyers**

Currently, Turkey still is undergoing a process to reform its laws in the area of commerce. There were major changes have been made in the Commercial Code regarding the rules on external independent auditing. For example, a public oversight body named Public Oversight Accounting and Auditing Standards Authority (Kamu Gözetimi Muhasebe ve Denetim Standartları Kurumu – KGK) has been established to oversee the conduct of external auditors. Also, the rules on private litigation in terms of auditor liability has been improved with the amendments in the Capital Markets Law No. 2499 (amended with Law No. 6362, published in the Official Gazette dated 6 December 2012 and numbered 28513).

Yet, for these laws to be applied affectively, first the legal intermediaries, namely the judges, lawyers, and public authorities, should understand the spirit of the law and interpret it

accordingly wherein it is relevant. In this respect, it might be necessary to train lawyers regarding to application of the private litigation of auditor liabilities (Kandemir, 2015).

### **Courts**

Independent courts play an important role in resolving disputes that may arise. In Turkey, courts have been criticized for not being effective enough in their functions. Courts often involve lengthy procedures and high costs that results in long delays. The cumbersome enforcement mechanism in Turkey is often associated to the inefficiencies of the court system. The inefficiency of the court system depends on various reasons that are beyond the scope of this paper. Instead, this paper suggests that the application of alternative mechanism, such as arbitration and alternative dispute resolution may be used in order to eliminate the workload of the courts and increase the level of enforcement.

### **Alternative mechanisms**

Alternative mechanisms as the means of private legal rules may be suggested to eliminating the effects of path dependency, namely the institutional insufficiency and the weak enforcement.

### **Corporate governance ratings**

One of the example is the corporate governance ratings. In this system companies prepare a corporate governance report showing the degree of compliance with these principles and explain reasons for any departure.

In Turkey, BIST Corporate Governance Index (Kurumsal Yönetim Endeksi - XKURY) operates in Borsa Istanbul since 2007. The index includes the companies that apply the SPK Corporate Governance Principles with a corporate governance rating of minimum 7 over 10 as a whole. The corporate governance rating is determined by the rating institutions as a result of their assessment of the company's compliance with the corporate governance principles. Listing in the XKURY is voluntary. Currently, there are 49 companies listed in the index. To encourage the companies, Borsa Istanbul applies a reduction on initial listing fees. Listing in the XKURY is a valid indicator for investors in ensuring that corporate governance of those companies to be inspected by an independent rating institution.

## **Alternative dispute resolution**

Due to the excessive workload of the courts that results in long trials and lengthy procedures, alternative mechanisms are offered to solve disputes between complainants. On account of the fact that alternative dispute resolution procedures are much faster and simple, parties of a legal dispute may choose for these procedures over a trial. Arbitration, is one of the alternative dispute resolution methods, has found a very wide application worldwide especially in commercial disputes that have international or multinational features.

The Union of Chambers and Commodity Exchanges of Turkey (Türkiye Odalar ve Borsalar Birliği - TOBB) offers arbitration services under the Arbitration Council (TOBB Tahkim Kurulu) on the settlement of economic, commercial and industrial disputes among the firms (both international and domestic). The Istanbul Chamber of Commerce (Istanbul Ticaret Odası - ITO) and the Izmir Chamber of Commerce (Izmir Ticaret Odası - IZTO) are other arbitration organizations in Turkey. Turkey is a party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). Hence, arbitral awards are binding and subject to enforcement in foreign courts meaning that it is possible to apply to the foreign courts to enforce an arbitral award granted in Turkey (vice versa).

However, the number of applications made into these centers in terms of commercial arbitration was very poor compared to court litigation. The lack of sufficient knowledge (or having wrong knowledge) about arbitration and alternative dispute resolution methods is likely to prevent the development of such mechanisms. It is necessary to make sure of that national courts, lawyers, and businessmen are getting familiar with alternative dispute resolution methods. It is also crucial to increase the public awareness of the commerce community on the advantages of the arbitration and alternative dispute resolution.

In 2015, the Istanbul Arbitration Centre (Istanbul Tahkim Merkezi - ISTAC) was established based on the Law No. 6570 (published in the Official Gazette dated 29 November 2014 and numbered 29190). The role of the ISTAC is to set the rules and provide advertisement and publications related to arbitration and alternative dispute resolution methods. By the establishment of the ISTAC, it is aimed create an international center for the resolution of commercial disputes between European, Asian and Middle Eastern countries. ([www.istac.org.tr](http://www.istac.org.tr))

It may be argued that the availability of arbitration and alternative dispute resolution methods may increase the confidence of investors. It is because such alternative mechanisms offer parties a neutral and confidential setting where the trade secrets of the parties are protected. The other advantage for investors is that these mechanisms are much more neutral practices than court litigation where the parties are free to choose their arbitrator.

It is expected that alternative resolution methods are likely to become more prominent as it is becoming more popular in international commercial disputes as well.

### **Conclusion**

Turkey has made significant improvements in corporate governance regulations by providing stricter rules for external auditing and transparency and disclosure measures. Due to the institutional differences, stronger laws and regulations may not automatically lead stronger governance. Moreover, not only the availability of laws but also their enforcement is vital for good corporate governance conduct.

The level of enforcement mechanism in Turkey is considered as weak. This might be associated with the insufficiencies in the court litigation system. Yet, the legal system in Turkey have to offer alternate ways in terms of efficient enforcement of laws so that the good corporate governance mechanism has been established. Arbitration may be seen as an alternative to the court litigation system owing to the advantages offering to the investors by means of fastness, simplicity, confidentiality, and neutrality.

Arbitral awards are binding and enforceable in the local courts. However, the local court can cancel the award if the award is contrary to the public order. It is viewed that the national courts should only use the cancellation of arbitration awards when it is necessary so that this does not hinder the effective internal judicial application of arbitration procedures. To put it differently, the local courts should not create an obstruction but they should act friendly to arbitration proceedings.

It is still too early to judge whether arbitration and alternative dispute resolution mechanisms could be a substitute to the court litigation in Turkey. Time will tell as to when we might see these mechanisms will be used more frequently in Turkey in terms of the solution of legal disputes.



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# 13

## TÜRKİYE'DE OMBUDSMANLIK KURUMUNUN ETKİNLİĞİNİ AZALTAN HUKUKİ NEDENLER VE ÇÖZÜMLERİ

### (LEGAL CAUSES AND SOLUTIONS TO REDUCE THE EFFICIENCY OF OMBUDSMAN INSTITUTION IN TURKEY)

*Selda Çağlar*

#### ***Abstract***

*In Turkey, the institution of ombudsman gained constitutional status with the change in the Constitution on the date of 12/9/2010 although previous struggles for it had failed. It was established officially with the Ombudsman Law with the number 6328 on the date 29/6/2012. The Ombudsman, established as connected to the Grand National Assembly of Turkey (GNAT) with a legal entity, started to receive complaints as of 29/03/2013. In this study, whether the decisions given by The Ombudsman, which has been on active duty for over 4 years, have been fulfilled by the administration, and the legal and political reasons for the missing points on these issues will be examined; and recommendations will be made to empower the institutional structure and the functions of the Ombudsman by considering the evaluations of the international institutions mainly the European Union (EU).*

**Keywords:** *Ombudsman, human rights, institutional and functional structure, relations with European Union*

#### **Giriş**

Ombudsman, idarenin işlem, eylem ve davranışlarını denetleyen bağımsız bir devlet organı olarak kamu otoriteleri ile bireyler arasındaki ilişkilerin neden olduğu sorunlarla ilgilenir, kamu yönetimine karşı bireylerin yakınma ve taleplerini kabul eder, ortaya çıkan sorunları çözüme bağlar. Ombudsmanın varlık sebebi ve temel rolü, meşru hak, özgürlük

ve menfaatleri idare tarafından çiğnenen, kullanılması engellenen veya kısıtlanan bireylere hukuksal bir koruma sunmaktır. Kurum, idarenin hukuka aykırılığın ötesinde adil ve hakkaniyete uygun hareket etmediği, bir talep veya sorunu yanlış değerlendirdiği, yorumladığı veya bireylerin haklarını, özgürlüklerini veya menfaatlerini çiğnediği, hiçe saydığı durumlarda bu konudaki yakınmaların dile getirilmesi, sorunların tespit ve çözümlenebilmesi için düşünüülüp oluşturulan bir kamusal başvuru merciidir (Atay, 2014:27-28).

Ombudsmanlık kurumları, her ülkenin kendi sosyal ve siyasi yapısına, hukuksal sistemine, kültürel ve demografik özelliklerine göre değişik şekilde yapılandırılmakta, denetim ve yetki alanları ile faaliyetleri arasında farklılıklar bulunmaktadır. Ombudsmanın şikayet üzerine ve/ya resen harekete geçme, araştırma ve/ya denetim yapabilme, dava açma, ihtar (disiplin uygulamaları), talimat, hatırlatma, basına/medyaya beyanat verme-bildirimde bulunma, parlamentoda konuşma yapma, yıllık rapor ve bülten hazırlama ve sunma gibi araçlardan birkaçını ya da tümünü kullanarak vakıaları sonuçlandırmaları konusundaki yetkileri, ülkenin ihtiyacına en uygun cevap verecek şekilde düzenlenmektedir. Elbette ki faaliyet alanı içinde yer alan her bir yetki ve görev de kendi içinde çeşitli sınırlamalara tabi tutulmaktadır. Örneğin araştırma ve/ya denetim yapılacak kurum ve kuruluşların tür ve sayısı, istenecek belge ve bilgilerin kapsamı gibi. Ancak faaliyet alanı içinde kurumun etkinliğini belirleyen en önemli faktör, ombudsmanın yaptırım gücünü hangi sonuçlandırma araçları ile kullanacağı meselesidir. Ombudsmanlık kurumundan beklenen etkililiğin hangi sonuçlandırma aracı/araçları kullanılarak sağlanacağı ise, ülkeden ülkeye değişiklik göstermektedir. Örneğin Norveç'te salt tavsiye kararı verilmesi bile yeterliyken, Türkiye'de bürokratik ve idari yapının özellikleri, uzlaşmacılıktan uzak siyasi kültür, hukuk devleti ve demokrasi ilkelerindeki zayıflıklara bağlı olarak tavsiye kararları ile etkili bir sonuca ulaşmak mümkün değildir.

Bu çalışmada da ombudsman, öncelikle insan haklarının korunması ve gelişmesine yönelik işlevi açısından genel itibarıyla ele alınacak, izleyen bölümde Türkiye'deki ombudsmanlık kurumuna dayanak teşkil eden Anayasa ve diğer mevzuat incelenerek uluslararası ilke ve standartlara uyumu değerlendirilecektir. Son bölümde ise, Kurum kararlarının idare tarafından yerine getirilmesi konusundaki sorunlarla bağlantılı olarak Kurumun insan haklarını koruma etkinliği tartışılarak alınması gerekli hukuki önlemlere yer verilecektir.

## **Ombudsmanlık Kurumu Hakkında Genel Bilgi**

İdarenin diğer denetim mekanizmalarına ilave olarak bireyin haklarının korunması ve iyi işleyen bir idari düzenin elde edilmesinde ikincil bir güvence mekanizması olarak değerlendirilen ombudsman, klasik bürokrasinin aksine yurttaşın hakkını savunan, onun adına her türlü idari organı sorgulayan, her türlü bilgi ve belgeye ulaşarak elindeki bazı araçlarla idarenin modern yönetim anlayışına uygun işlemlerini sağlamaya yardımcı bir işleyişe sahiptir, bu nedenle de dünyada hızla uygulama alanı bulmuştur. Demokrasilerin gelişmesine, vatandaşların hak ve özgürlüklerinin korunmasına, insan hakları ihlallerinin azalmasına yönelik katkılarından dolayı demokratik yönetimlerde geçerliliğini kanıtlamış, her geçen gün daha çok tercih edilir bir sistem haline gelmiştir (Efe ve Demirci, 2013:53).

Ombudsmanlık kurumunun başarılı uygulamalarının dünyada 140'dan fazla ülkede hayata geçmesi sonucunda görev ve yetki alanları da zamanla genişlemiş, branşlaşma yoluna gidilmiştir. Bu gelişmelere bağlı olarak 'İnsan Hakları Ombudsman'ları öncelikle Avrupa kıtasında önem kazanmış, klasik ombudsmanların görev ve sorumluluk alanlarına insan hakları boyutu da eklenmiştir (Sezen, 2001: 75). Örneğin anayasal statüsüyle dünyada ilk kez kurulduğu İsveç'te çok geniş yetki ve görev alanına sahip ombudsmanların en önemli görevi, hukukun üstünlüğü ilkesini korumak, İsveç Anayasası ve yasalarının sağladığı kişisel hak ve özgürlükleri savunmaktır (TÜSİAD, 1997: 37-56). Aynı şekilde Arnavutluk, Ermenistan, Bosna Hersek, Polonya, Portekiz ve İspanya gibi diğer Avrupa ülkelerinde de ombuds tipi kuruluşlar, insan haklarının ulusal ve bölgesel düzeyde korunmasında oldukça etkindir (Aichele, 2010: 16). Ombudsmanın Avrupa Kamu hukukunda ortak bir değer olarak kabul edilmesi ve kurumsallaşmasında Avrupa Konseyi Parlamenterler Meclisi'nin 2003 yılında aldığı tavsiye kararı da etkili olmuştur (The Institution of Ombudsman, 2003: para.1 ve 10-3).

Ombudsman kurumlarının Birleşmiş Milletler İnsan Hakları Komisyonu tarafından 3 Mart 1992'de kabul edilen ve kısa adıyla 'Paris İlkeleri' (United Nations Commission on Human Rights, 1992; United Nations Centre for Human Rights:1995) olarak anılan standartlarla (International Council on Human Rights Policy, 2004:1-4; International Council on Human Rights Policy, 2005: 5-6) uyumlu olup olmadıkları ise, gerek Avrupa Konseyi organ ve kurumlarınca ve gerekse özel olarak akreditasyon değerlendirmeleri yapmak üzere kurulmuş kuruluşlarca denetlenmektedir.

## **Türkiye’de Ombudmanlık/ Kamu Denetçiliği Kurumu**

Türkiye’de Ombudsmanlık kurumunun yasal olarak kurulması 2006 yılında 5548 sayılı Kamu Denetçiliği Kurumu Kanunu (Kabul Tarihi: 28.9.2006, Resmi Gazete Tarih:13 Ekim 2006, Sayı:26318) ile gerçekleşmiş, fakat Kanun Anayasa Mahkemesi’nin yürürlüğü durdurma ve ardından iptal kararıyla 4 Nisan 2009 tarihinde -hiç uygulanmamış bir kanun olarak- yürürlükten kaldırılmıştır (Anayasa Mahkemesi Kararı, Esas Sayısı : 2006/140, Karar Sayısı : 2008/185). Bunun üzerine 2010 yılında Anayasa değişikliği kanun paketine kamu denetçiliği kurumunun önündeki anayasal engellerin kaldırılmasına yönelik hükümler eklenmiş; Anayasanın 74. maddesinin kenar başlığı “VII. Dilekçe, bilgi edinme ve kamu denetçisine başvurma hakkı” şeklinde değiştirilerek ilgili maddede Kamu Denetçiliği Kurumuna başvuru bir “hak” olarak düzenlenmiştir. Anayasa değişikliğinin yürürlüğe girmesinin ardından 14.06.2012 tarihinde kabul edilen 6328 sayılı Kamu Denetçiliği Kurumu Kanunu, 29.06.2012 tarihinde Resmi Gazete’de yayınlanarak yürürlük kazanmıştır.

## **Kamu Denetçiliği Kurumunun Etkinliğini Azaltan Nedenler**

Ombudsmanın pratik değeri, yargısal denetime göre daha hızlı işletilebilmesi, önemi ise yargının yapamadığı “yerindelik denetimi”ni de yapabilmesinden kaynaklanmaktadır. Zira hukuk devletinde idarenin faaliyetlerinin yasalara uygun olması yetmez; hukuka da uygun olması gerekir. Hukukun temelinde ise insan hak ve özgürlükleri, adalet ve eşitlik ilkeleri yattığına göre, ombudsman idareyi bu açılardan da denetleyerek özellikle “kitabına yutturulmuş” bir haksızlığı ya da adaletsizliği saptayıp kamuoyuna duyuracak bir mekanizmaya duyulan ihtiyacı gidermektedir. Fakat ombudsmanlık kurumunun görev ve faaliyet alanına getirilen kısıtlamalar, bu kurumların kendisinden beklenen işlev ve etkinliği göstermesini engellemektedir. Türkiye’deki Kamu Denetçiliği Kurumu hakkında da büyük ölçüde mevzuattan, bir ölçüde de siyasal sistem ve idari alışkanlıklardan kaynaklanan engel ve sınırlılıklar bulunmaktadır. Bunların başında resen harekete geçme, dava açma/ açılan davalara müdahil olma ve yerinde incele yapma yetkisinin bulunmaması ile idari başvuru yollarının tüketilmesi koşulunun çok ağır olması gelmektedir. Kamu Denetçiliğinin neredeyse tüm idareyi kapsayan geniş faaliyet alanında merkezi bir yapı içinde hareket etmesi ve her geçen gün artan iş yükü ile baş etmeye çalışması, ileri tarihlerde kararlarda yavaşlama ile sonuçlanabilecek, inceleme ve kabul usullerinde filtreleme getirilmesine yol açabilecek niteliktedir.

## 1. Resen Harekete Geçme Yetkisinin Olmaması

Türkiye Ombudsmanının insan haklarını koruma işlevini etkili biçimde yerine getirebilmesinin önündeki önemli engellerden biri, Kurumun sadece şikayetlere bağlı olarak inceleme ve araştırma yapabilmesidir. Oysa Türkiye gibi insan haklarının özellikle bazı alanlarında, örneğin kadına karşı şiddet ve yaşam hakkına yönelik yaygın, süregelen hak ve özgürlük ihlallerinin hem önlenmesinde hem de giderilmesinde, Kamu Denetçiliği Kurumu'nun resen hareket kabiliyetine sahip olması çok önemlidir. Kurumun bu tür yaygın insan hakları ihlalleri ile ilgili olarak her tür araştırma ve incelemeyi yapabilmesi, kamu idaresinin eksik ve aksayan işleyişini, insan haklarına aykırı tutum ve davranışlarını masaya yatırabilmesi, ilgili kurumlara tavsiyelerini gönderebilmesi, kamuoyu ve parlamento ile hükümetin dikkatini çekebilmesi gerekmektedir. Kişilerin temel hak ve özgürlüklerine yapılan müdahaleye karşı şikâyet başvurusunda bulunmalarına engel olunması, kişilerin başvuru yolunu bilmemesi ya da mahkûmlar, çocuklar ve zihinsel engelliler gibi doğrudan başvuru yapamayacak dezavantajlı ve hassas gruplara mensup kişilerden olması durumunda Kamu Baş Denetçisinin resen harekete geçebilmesi daha da önem kazanmaktadır (Kamu Denetçiliği Kurumu (Ombudsmanlık) 2015 Faaliyet Raporu). Kamu Denetçiliği Kurumu'nun bu tür durumlarda elindeki tek silahı özel rapor hazırlamak (m.7/1-ç) ve raporları kamuoyuyla paylaşmaktır (m.7/1-d). Ancak bu yetkinin kullanılması ile resen harekete geçmenin yaratacağı olumlu sonuçların elde edilmesi mümkün değildir.

Diğer yandan Ombudsmana resen harekete geçme yetkisinin verilmesi de tek başına yeterli olmayacaktır. Çünkü yapılan inceleme ve araştırmaların sonucunda dava açmak gerekiyorsa, ombudsmanın bu yetkiye sahip olması ya da açılmış davalara müdahil olabilmesi gerekmektedir. Oysa 6328 sayılı Kanun, yargıya intikal etmiş hak ihlalleri hakkında yapılan başvuruları inceleme yasağı getirmiştir (m.17/3-b). Yeni bir düzenleme ile kamu denetçiliğine en azından yaygın insan hakları ihlalinin olduğu alanlarda resen inceleme, dava açma, açılan davalara katılma yetkisinin tanınmasında fayda bulunmaktadır. Kanun'un uygulanmasını gösteren Yönetmelikte insan hakları, temel hak ve özgürlükler, kadın hakları, çocuk hakları ve kamuyu ilgilendiren genel konulara ilişkin şikayetler için menfaat ihlalinin aranmayacağı belirtilse de (m.7) bu önlem sonuçta yine bir başvuruyu gerektirmekte, ayrıca farklı bir amaca hizmet etmektedir.

Kamu Denetçiliği Kurumu yıllık faaliyet raporları aracılığıyla Kamu Başdenetçisine resen inceleme başlatma yetkisiyle birlikte inceleme ve araştırma konusuyla ilgili dava açma ve

açılan davalara katılma yetkisinin verilmesi gerektiğini sürekli dile getirmektedir. Özellikle insan hakları, temel hak ve özgürlükler, kadın, çocuk ve engelli hakları ile kamuyu ilgilendiren genel konularda şikâyet aranmaksızın resen harekete geçebilmenin, idareye karşı kişi hak ve özgürlüklerinin korunması bakımından önemi vurgulanmaktadır.

## **2. Dava Açma/ Açılan Davalara Müdahil Olma Yetkisinin Bulunmaması**

6328 sayılı Kanun ombudsmana dava açma, açılmış davalara katılma yetkileri konusunda sessiz kalmış, yargıya intikal eden başvurular için inceleme yasağı getirmiştir. Kamu Denetçiliği Kurumu bu sorunun çözümü için ilgili Kanunda değişiklik yapılarak Kurumun tavsiye kararlarında önerdiği çözüm idare tarafından uygulanabilir görülmezse şikâyetin konusuna göre görevli yargı merciine başvurabilme yetkisinin kendisine verilmesini önermektedir. Ayrıca, inceleme ve araştırma konusu ile ilgili davalara müdahil olarak katılabilmek, bu davalarda her türlü usul işlemleriyle birlikte itiraz, istinaf, temyiz gibi kanun yollarına başvurabilmek mümkün olmalıdır. Kamu Denetçiliği Kurumu, dünya uygulamalarında çoğu Ombudsmanlık kurumunda olan bu yetkinin Kuruma verilmesiyle birlikte tavsiye kararlarının daha etkin hale geleceğine, kararlara uyma oranının artacağına inanmaktadır (Kamu Denetçiliği Kurumu (Ombudsmanlık), 2014 Yıllık Raporu: 77 ve 308; 2015 Faaliyet Raporu:84).

Avrupa Konseyi Parlamenterler Meclisi'nin 1615 (2003) sayılı Tavsiye Kararı ile Avrupa'da Ombudsmanlığın Güçlendirilmesi Raporu'nda belirttiği gibi, Ombudsman en azından kanunların yorumlanması konusunda Anayasa Mahkemesi'ne başvurabilmelidir. Kamu Başdenetçisine kanunların yorumlanması veya anayasaya aykırılığı hakkında Anayasa Mahkemesi'ne başvuru hakkının tanınması, şikâyet konusu olayda açıkça hukuka aykırılık tespit etmesi halinde ise adli/idari yargıda dava açma hakkının tanınması, yapılacak denetimin kalitesi ve etkinliğini arttıracaktır.

## **3. Yerinde İnceleme Yapma Yetkisinin Bulunmaması**

Kamu Denetçiliğinin kurumsal etkinliğini zayıflatan bir diğer faktör, Kamu Başdenetçisine veya görevlendireceği kamu denetçilerine yerinde inceleme yetkisinin verilmemesidir. Bilimsel literatür ve AB kurumları ile aynı yönde Kamu Denetçiliği Kurumu tarafından da eleştirilen (AB Avrupa Komisyonu, 2014:11; Kamu Denetçiliği Kurumu (Ombudsmanlık), 2014 Yıllık Raporu: 77) bu eksiklik, bazı durumlarda şikâyet konusuna ilişkin



inceleme ve araştırma açısından olumsuz sonuçlar doğurabilmekte, yerinde inceleme yapılmayan çoğu şikâyetinde bir sonuca varmayı ve karar vermeyi zorlaştırmaktadır. Özellikle ceza infaz kurumları ve karakollar gibi özgürlüğün sınırlandırıldığı yerlerde, taşınmazlarla ilgili şikâyetlerde inceleme ve araştırmanın yerinde yapılması maddi bir zorunluluktur. Kanun değişikliğiyle, Kamu Başdenetçisine başvuruya ilişkin olarak yerinde inceleme yapabilmek yetkisi tanınmalı, yetkinin kullanımı esnasında ilgili idare ve yetkililerin bunun için gerekli her türlü kolaylığı sağlaması zorunlu tutulmalıdır (Kamu Denetçiliği Kurumu (Ombudsmanlık), 2014 Yıllık Raporu: 309-310).

#### **4. İdari Başvuru Yollarının Tüketilmesi Koşulunun Çok Ağır Olması**

Kamu Denetçiliği Kurumu Kanunu'nda şikâyet başvurusunda bulunabilmek için kural olarak idari başvuru yollarının tüketilmiş olması koşulu aranmaktadır. Ancak başvuru yollarının tüketilmesi koşulu oldukça geniş bir kapsama sahiptir. Çünkü Kamu Denetçiliği Kurumuna şikâyet başvurusunda bulunabilmek için ya 2577 sayılı İdari Yargılama Usulü Kanunu'nun 10. maddesi kapsamında idareye başvurmak ya da özel kanunlarda yer alan zorunlu idarî başvuru yollarını tüketmek gerekmektedir. Buna göre, eğer kamu idaresi bir başvuru olmaksızın işlem tesis ettiyse, ilgililer bu işlemin kaldırılması, geri alınması, değiştirilmesi veya yeni bir işlem yapılması için bir üst makama, üst makam yoksa işlemi yapmış olan makama idarî dava açma süresi içinde başvurmak zorundadır. Bu başvurudan bir sonuç alamazsa Kamu Denetçiliği Kurumuna şikâyetinde bulunabilecektir. İdare hukukunda "zorunlu olmayan başvuru" olarak adlandırılan bu yöntem, ombudsmana başvuru için ne yazık ki tüketilmesi zorunlu bir yol olarak düzenlenmiştir. İdari eylemden kaynaklanan bir zarar olduğunda ise, zararın yazılı bildirim veya başka bir şekilde öğrenildiği tarihten itibaren bir yıl ve her halde eylem tarihinden itibaren beş yıl içinde ilgili idareden giderilmesini talep etmek zorunludur. Ayrıca varsa özel kanunlarda yer alan zorunlu idarî başvuru yolları da tüketilmelidir.

Bu koşul, Kurumun ciddi bulduğu acil başvuruları ele almasını engellemekte, bu tür başvurular ya ilgili idareye gönderilmekte ya da reddedilmektedir. Ancak Kamu Denetçiliği Kurumuna resen girişimde bulunma yetkisi tanımayan, mutlaka bir başvuru arayan bir sistemde şikâyet başvurularının böylesine ağır ön koşullara bağlanması, bireyleri hantal ve yavaş işleyen bir idareye kurban etme riskini barındırmakta, ombudsmanlık kurumu da buna seyirci bırakılmaktadır. Hatta bu koşul bazı durumlarda ombudsman aracılığıyla hak

arama imkanını tamamen ortadan kaldırmaktadır. Örneğin, kamu görevlilerinin kendi kurumlarıyla ilgili şikâyetlerde idareye başvurmamaları anlaşılabilir bir durumdur. Aynı şekilde suç ihbarı niteliğindeki şikâyetlerde ihbar yapılacak idareye başvuruyu şart koşturmak, her zaman istenilen sonuçları vermeyecektir. Yine başvuru için idari başvuru zorunlu tutulduğunda kamu denetçisinin güncel gelişmelere ilişkin zamanında inceleme yapması da engellenmekte (Aktaş, 2011:365), bu kurumun diğer denetim mekanizmalarının yanında, fakat daha hızlı işletilebilen bir denetim mekanizması olduğu için tercih edildiği (Kahraman, 2011:362), kamu idaresini gözetleme fonksiyonuna sahip bulunduğu gerçeği göz ardı edilmiş olmaktadır.

Diğer yandan, Türkiye'de Kamu Denetçiliği Kurumunun kararları arasında en yüksek oranın (%37 ile) "gönderme kararları" olduğu yönündeki verilerin (Sobacı/Köseoğlu, 2014:34) de göz önüne alınması ve ilgili Kanun'da yapılacak değişikliklerle idareye başvuru koşulunun sadece zorunlu idari başvurularla sınırlandırılması yerinde olacaktır. Bunun için yapılacak kanun değişikliğinde idari başvuru yollarının tüketilmesi koşulu için 2577 sayılı İdari Yargılama Usulü Kanunu'na yapılan atıf yürürlükten kaldırılmalı, idari başvuru yollarının tüketilmesine ilişkin usul ve esaslar doğrudan Kurumun kendi Kanununda düzenlenmelidir. Böylece, İdari Yargılama Usulü Kanunu'nda öngörülen zorunlu olmayan idari başvuru yolunun, Kamu Denetçiliği Kurumu Kanunu'yla zorunlu hale dönüştürülmesinden kaynaklanan sorun ortadan kalkacaktır. Ayrıca, idarenin tutum ve davranışları ile kanunlarda açıkça kesin olduğu belirtilen işlemlere karşı Kamu Denetçiliği Kurumuna doğrudan başvuruda bulunmayı mümkün kılacak bir hüküm eklenmeli, bu tür durumlarda gereksiz yere idareye başvuru yapma zorunluluğu sona erdirilmelidir. Bu konudaki alınabilecek bir diğer önlem, idari başvuru yolları tüketilmeksizin yapılan başvurular arasında bir hakkın acil olarak yerine getirilmesini ya da ihlalin durdurulmasını gerektiren ve sonradan giderilmesi halinde beklenen faydanın elde edilemeyeceği durumlar var ise, bu başvuruları kabul veya reddin Kamu Denetçiliği makamının takdirine bırakılmasıdır (Kamu Denetçiliği Kurumu (Ombudsmanlık), 2013 Yıllık Raporu: 207-208).

## 5. Merkezi Yapı ve İş Yüğü Sorunu

Kamu Denetçiliği Kurumu merkezi ve yerel tüm idareleri kapsayan geniş bir alanda faaliyet göstermektedir. Buna karşılık Kurum merkezi tek bir birimden idare edilmektedir. Gelecekte aşırı işyükü altında ezilmemek, kararların niteliğini düşürmemek, çalışma hızını

yavaşlatmamak adına ilgili kanun önlem almış, gerektiğinde büro açılmasına izin vermiştir. 2013, 2014 ve 2015 yılları itibarıyla başvuruların coğrafi dağılımına bakıldığında toplam başvuruların %50'den fazlasının dönüşümlü olarak İç Anadolu bölgesiyle Marmara Bölgesi arasında değiştiği görülmektedir (Kamu Denetçiliği Kurumu (Ombudsmanlık), 2014 Yıllık Raporu:51). İç Anadolu Bölgesi'nden gelen şikayet başvuruları açısından Kurumun Ankara merkezli olması bir avantaj kabul edilse de, Marmara Bölgesi'nden gelen yoğun şikayet taleplerini hem çözmek hem de başvurunun yoğun olduğu hak ve menfaat ihlalleri öncelikli olmak üzere, önleyici rol oynamak bakımından İstanbul'da bir büro açılması zorunluluğu doğmuştur. İstanbul'da bireylere daha hızlı ulaşma ve çözüm noktasında bir ofis açılmasına yönelik çalışmalar tamamlanarak İstanbul Bürosu 30/04/2015 tarihi itibarıyla hizmete açılmıştır (Kamu Denetçiliği Kurumu (Ombudsmanlık), 2015 Faaliyet Raporu: 309-310).

Ancak merkezi yapıdan kaynaklanacak sorunların açılacak yeni bürolarla giderilememesi ihtimali ise şimdiden gözönüne alınmalı, merkezi yönetimle yerel yönetimlerin iki ayrı ombudsmanlık çatısı altında toplanması ya da yaygın hak ihlalleri ve dezavantajlı gruplar için özel yetkili ombudsmanlıklar kurulması seçenekleri üzerinde tartışılmalı ve değerlendirme yapılmalıdır.

## **Ombudsman Kararlarının Yerine Getirilmesi Konusundaki Sıkıntılar**

Ombudsman, gerek kararları ve gerekse yıllık faaliyet raporları aracılığıyla kamu yönetimine ayna tuttuğu gibi kötü yönetim uygulamalarını gidermeye yönelik önerileriyle de yanlıştan dönme fırsatı tanımaktadır. Ancak bunun için ombudsman kararlarına uyulması gerekmektedir. İnsan hakları ve demokrasi kültürünün yerleştiği ülkelerde bu kurumların çok saygın bir yeri vardır ve kararlarına uyulma oranı % 90'ın üzerindedir. Örneğin; İngiltere'de Ombudsmanlığın bir kültür haline gelmesi nedeniyle idarenin % 99 oranında tavsiye kararlarına uyduğu, mahkemelerin de genel itibarıyla Ombudsmanın tavsiyeleri doğrultusunda karar verdiği görülmektedir. Yine Norveç Parlamento Ombudsmanının verdiği kararlara idarenin uymama oranı %1'i geçmemektedir. Daha çok arabuluculuk kurumu olarak etkinlik gösteren Fransa Ombudsmanlık Kurumunda tavsiye kararlarına uyma oranı % 80 gibi çok yüksek seviyelerde seyretmektedir (T.C. Kamu Denetçiliği Kurumu (Ombudsmanlık), 2014:241). Türkiye'de ise Kamu Denetçiliği Kurumu'nun idareye hatalı davranıldığının kabulü, zararın tazmini, işlem yapılması veya eylemde bulunulması,

mevzuat değişikliğinin yapılması, işlemin geri alınması, kaldırılması, değiştirilmesi veya düzeltilmesi, uygulamanın düzeltilmesi, uzlaşmaya gidilmesi, tedbir alınması şeklindeki tavsiyelerine uyulma oranı %30'larda seyretmektedir.

Kamu Denetçiliği Kurumu, bu oranın uluslararası seviyelere ulaşması için öncelikle idare nezdinde üst düzeyde irtibat birimleri kurulması ve bu amaçla yasal düzenlemeler yapılması gerektiğini düşünerek (T.C. Kamu Denetçiliği Kurumu (Ombudsmanlık), 2013:81) idareyle görüşmeler yapmış, 2013 yılında Sosyal Güvenlik Kurumunda ve Maliye Bakanlığında üst düzey irtibat birimleri kurulmuştur. 2014 yılında ise, İstanbul Büyükşehir Belediyesi (İBB) ile bağlı Genel Müdürlükler ve iştirakleri hakkındaki şikayetlerle ilgili olarak İBB Genel Sekreter Yardımcısının koordinasyonu üstlenmesi, en yoğun başvuru alanlarından temsilcilerin yer alacağı komisyonun başvuruları incelemesi, nihai görüş ve bilgilerin İBB Genel Sekreter Yardımcılığınca Kuruma gönderilmesi konusunda mutabakat sağlanarak uygulamaya geçilmiştir (T.C. Kamu Denetçiliği Kurumu (Ombudsmanlık), 2014:251). Ancak birebir ilişkilerle getirilen bu çözüm çok sınırlı ve yetersizdir. Kalıcı çözüm, 6328 sayılı Kanun'da Kurum tarafından verilen tavsiye kararlarına uyulup uyulmaması konusunda idare içerisinde hangi makam ya da kişinin karar alacağı konusundaki boşluğun doldurulmasıdır. Çünkü uygulamada, tavsiye kararları hakkında karar veren makam ya da kişilerin idari hiyerarşide çok alt düzeyde olabildiği, kurumların "İmza Yetkileri Yönergeleri" ile bu yetkilerin alt düzeydeki yöneticilere verildiği, bu kişilerin ise sorumluluk almaktan kaçındığı, üst makamların da konu hakkında bilgisinin olmadığı görülmektedir. Kamu Denetçiliği Kurumu, kanunlardaki özel hükümler saklı kalmak kaydıyla, tavsiyelerin uygulanmasına karar verme yetkisinin genel ve özel bütçeli kamu idarelerinde uzlaşmaya yetkili üst düzey yöneticilere, valiliklerde ve il özel idarelerinde valiye, kaymakamlıklarda kaymakama, belediyelerde belediye başkanına, diğer idarelerde ise en üst yöneticiye ait olması gerektiğini düşünmekte ve raporlarında bu öneriyi dile getirmektedir (T.C. Kamu Denetçiliği Kurumu (Ombudsmanlık), 2014:310-311) .

İdarenin Kamu Denetçiliği Kurumunun tavsiye kararlarına olumsuz yaklaşımına yol açan bir diğer etken, kamu görevlilerinin risk almaktan çekinmesidir. Özellikle mali sonuçları olacak durumlarda, kamu görevlileri Sayıştay denetimi ve soruşturma geçirme gibi kaygılarla kararı uygulamakta tereddüt gösterebilmektedir. Bu durumda tavsiye kararları doğrultusunda yapılan işlem veya eylemden dolayı idareye veya kamu görevlilerine sorumluluk yüklenemeyeceği ibaresinin kanunda açıkça yer almasında fayda bulunmaktadır.

Kurum tarafından verilen tavsiye kararlarının yerine getirilmesini sağlamak için kararların TBMM tarafından takip edilmesi de son derece önemlidir. Gerçekten de tavsiye kararlarının TBMM tarafından izlenmesi iki açıdan önemlidir: birincisi, tavsiyeler yeni bir yasa ya da yasa değişikliğine işaret ediyorsa bu yapısal sorunun çözülebilmesi; ikincisi ise, parlamentonun halkın temsilcilerinden oluşan, ortak iynin bulunması için çalışan saygın bir kurum olması, aynı zamanda hükümet üzerinde siyasi denetim yetkisinin bulunmasıdır. Parlamento, hükümeti ve idareyi idari açıdan denetleyememekle birlikte yerine getirilmesi gereken tavsiye kararı salt idari ve hukuki değil, siyasetin de müdahalesini gerektiren bir nitelik taşıyorsa, TBMM bünyesinde kurulacak bir izleme mekanizması hem Bakanlar Kurulu hem de tek tek bakanlıklar üzerinde etkili olabilecektir. AB ilerleme raporlarında da tavsiye kararlarının hem kamu idaresi hem de TBMM tarafından uygun araçlarla izlenmesi, gerekli olan tedbirlerin alınması salık verilmektedir (T.C. Kamu Denetçiliği Kurumu (Ombudsmanlık), 2014:89-90).

Kurum kararlarının uygulanma oranının düşük seyretmesinin ürettiği en olumsuz sonuç ise, kamuoyunda ombudsmana başvuru yapmanın bir sonuç vermediği yönünde bir kanaat oluşması ve başvuru sayısında da düşme görülmesidir. 2013 yılında 7638 adet şikâyet başvurusu yapılmış olmasına rağmen, 2014 yılında 5639 adet şikâyet başvurusu yapılmıştır. 2015 yılında biraz yükselen başvuru sayısı (6055), 2016 yılında 5519 başvuru ile 2014 yılı rakamlarının altına düşmüştür (Kamu Denetçiliği Kurumu (Ombudsmanlık), 2016 Yıllık Raporu: 87). Tanıtım faaliyetlerine ağırlık verilmesi neticesinde 2016 yılı ve 2017 yılı ilk 5 ayları değerlendirildiğinde başvurularda %239'luk bir artış gerçekleşmiştir. 2016 yılı ilk 5 ayında 2289 başvuru yapılmışken, 2017 yılı ilk 5 ayında 7609 başvuru yapılmıştır (Bülten Ombudsman, 2017, Sayı 7, s.7, s.98).

Her ne kadar diğer ülke uygulamalarından da bilindiği üzere, Ombudsmanlık kurumlarının ilk faaliyete geçtikleri yıl başvuruların yüksek düzeyde olması, sonraki yıl bu sayıda belli oranda düşmenin yaşanabilmesi olağan olsa da, Kurumun tanınırlığı, bilinirliği arttıkça başvuru sayısında da oransal bir artış yaşanması beklenir. Türkiye'de ise, 2013 yılına kıyasla 2014 yılında başvuru sayısının düşmesinde kurumların tavsiye kararlarını uygulama konusunda isteksiz davranmasının etkili olduğu kanaati güçlüdür. Bu durumun kişilerin yanında idarenin de aleyhine bir sonuç ürettiği ortadadır (T.C. Kamu Denetçiliği Kurumu (Ombudsmanlık), 2014:241).

## Sonuç ve Öneriler

Türkiye’de ombudsmanlık kurumunun elindeki en önemli silah olan “tavsiye kararları”nın idare tarafından yerine getirilmesindeki gecikmeler ya da ihmaller çok ciddi bir sorun oluşturmaktadır. Özellikle merkezi idareye ilişkin olarak gözlemlediğimiz yargı kararlarının yerine getirilmesindeki gevşeklik, herhangi bir yaptırım gücü olmayan ombudsmana karşı daha yoğun yaşanmaktadır. Daha önce AB raporlarından da aktarıldığı üzere, ombudsman kararlarının yaklaşık 1/3’ünün yerine getiriliyor olması, kurumun etkinliğini çok zayıflatmaktadır. Bu nedenle, Kamu Denetçiliği Kurumu’nun elindeki inceleme ve araştırmalardan yola çıkarak yargısal yollara başvurabilme, açılan davalara müdahil olabilme, yerine getirilmeyen kararlarıyla ilgili dava açma veya önyak olma girişimlerinde bulunabilme yetkilerine sahip olması aciliyet içinde giderilmesi gereken bir ihtiyaca işaret etmektedir. Bunun yanı sıra ilgili kanunlarda yapılacak değişikliklerle, Kuruma resen inceleme ve Anayasa Mahkemesine başvurma yetkilerinin tanınması, insan hakları ile ilgili temel metinlerin imzalanması sürecinde Kurumun görüşüne başvurulmasının zorunlu hale getirilmesi, Kurum tarafından fiilen uygulanan uzlaşma müessesesinin yasal zemine kavuşturulması, tavsiye kararlarının uygulanması konusunda değerlendirme yapacak mercilerin açıklanması, tavsiye kararını uygulayan idareye ve kamu görevlilerine sorumluluk yüklenilemeyeceğinin ifade edilmesi gerekmektedir.

Türkiye’deki ombudsmanlık kurumuyla benzer faaliyet alanlarına sahip kuruluşlar göz önüne alındığında ise, Kamu Denetçiliği Kurumu’nun sadece şikayet üzerine değil, resen araştırma ve incelemelerde de bulunabilmesinin Türkiye’de önemli bir ihtiyacı gidereceği söylenebilir. Diğer yandan Kurum’un çalışma yöntemlerinin çeşitlendirilmesi, yerinde inceleme ve araştırma yapabilme, her tür bilgi ve belgeye erişerek sonuca varabilme imkanının tanınması gerekmektedir. Bürokratik hantallığın bir türlü aşlamadığı Türkiye’de Kurumun ilk elden ve doğrudan bilgi ve belge temin edebilmesi işleyişi hızlandıracak, daha etkili ve doğru sonuçlar elde edilmesine yardımcı olacak, idarenin şeffaflığını geliştirecektir.

Merkezi idare içindeki bazı kurumlar ve faaliyetler hariç tutulmakla birlikte Kamu Denetçiliği Kurumu’nun yerinden yönetim kuruluşlarıyla merkezi idareyi kapsayan denetim alanının genişliği nedeniyle ortaya çıkabilecek aşırı iş yükünün ise, ya yeni bürolar kurularak ya da merkezi ve yerinden yönetim kuruluşları için iki ayrı ombudsmanlık şeklinde yapılandırılarak aşılması mümkündür.

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# SAĞ KALAN EŞİN EDİNİLMİŞ MALLARA KATILMA REJİMİ VE MİRAS HUKUKU AÇISINDAN DURUMUNUN DEĞERLENDİRİLMESİ

(Evaluation of the Status of Surviving Spouse in  
Terms of Law of Succession and the Regime of  
Participation in Acquired Property)

Senar ÇAĞIRGAN TUNCER

## ***Abstract***

*The regime of participation in acquired property has been adopted as the statutory matrimonial regime in Turkish Civil Code (TR CC, Article 202/I). Unless the spouses do not duly agree on a different matrimonial regime before or after the marriage, the regime of participation in acquired property has effects and bears consequence between the spouses.*

*In the regime of participation in acquired property, each spouse has two groups of property, the personal properties, and the acquired properties. The liquidation process is implemented at the end of the matrimonial regime. The spouses get the right to claim half of the net value of their acquired property after the liquidation process.*

*One of the reasons for annulment of the regime of participation in acquired property is the death of one of the spouses. The surviving spouse shall be entitled to claim the amount determined at the end of the liquidation process of the matrimonial regime. The surviving spouse is also the legitimate heir of the deceased spouse (TR CC, Article 499).*

*The rights of surviving spouse addressed by the regime of participation in acquired property and the rights granted by the succession law since he/she is the legitimate heir of the deceased spouse's will be examined by comparing them in this study.*

**Keywords:** Surviving Spouse, The Regime of Participation in Acquired Property, Acquired Property, Personel Property, The Legitimate Heir

## Giriş

Eşlerden birinin ölümüyle birlikte evlilik birliği sona erer. Evliliğin ölümle sona ermesi sağ kalan eş açısından hem mal rejimi hem de miras hukuku anlamında bir takım hakların doğması sonucunu doğurur. Nitekim eşlerden birinin ölümü anında hem eşler arasındaki mal rejimi sona erer (TMK m. 225/I) hem de mirasın mirası açılır (TMK m. 575). Mirasçılara intikal eden mirasın belirlenebilmesi için öncelikle mal rejiminin tasfiyesinin yapılması gerekir (Sarı, 2007; 85). Evlilik birliği devam ederken eşler arasında mal rejimi olarak edinilmiş mallara katılma rejimi geçerliyse; ölüm ile sona eren mal rejiminde katılma alacağının tespiti ile terekenin belirlenmesi mümkün olacaktır (Sarı, 2007: 85). Bunun yanında, edinilmiş mallara katılma rejiminin ölümle sona ermesi sebebiyle sağ kalan eşe aile konutuna ilişkin olarak tanınan haklar da ancak mal rejiminin tasfiyesi sonrasında belirlenebilecektir (Sarı, 2007: 85; Acar, 2012: 146).

Sağ kalan eş, ölen eşin yasal mirasçısıdır. Sağ kalan eşin miras oranı birlikte bulunduğu zümreye göre belirlenir. Sağ kalan eşin sahip olduğu miras hakkı yanında aile konutu ve ev eşyasına ilişkin olarak miras hukukunda da hakları bulunmaktadır. Mal rejimlerinde sağ kalan eşe aile konutu ve ev eşyası bakımından tanınan hakka uygun olarak Medeni Kanunun mirasa ilişkin hükümlerinde de sağ kalan eşe bu malvarlığı değerlerine ilişkin hak tanınmıştır. Türk Medeni Kanununun 652. maddesine göre; eşlerden birinin ölümü halinde tereke malları arasında aile konutu ve ev eşyası varsa; sağ kalan eş bunların mülkiyetinin, miras hakkına mahsuben kendisine verilmesini isteyebilir.

Çalışmamızda öncelikle edinilmiş mallara katılma rejimi kısaca anlatılacaktır. Daha sonra eşlerden birinin ölümü ile aralarında geçerli olan edinilmiş mallara katılma rejiminin tasfiyesi üzerinde durulacaktır. Son bölümde ise; sağ kalan eşin mirasçılığı anlatılacaktır.

## Sağ Kalan Eşin Edinilmiş Mallara Katılma Rejiminden

### Kaynaklanan Hakları

#### A. Genel Olarak Edinilmiş Mallara Katılma Rejimi

Türk Medeni Kanunu m. 202/I hükmünde; “*Eşler arasında edinilmiş mallara katılma rejimi asıldır*” denilmek suretiyle, 743 sayılı önceki Medeni Kanununda yasal mal rejimi olan mal ayrılığı yerine edinilmiş mallara katılma rejimi, yasal mal rejimi olarak kabul edilmiştir.

Edinilmiş mallara katılma rejiminde, eşlerin malları edinilmiş mallar ve kişisel mallar olarak iki gruba ayrılır. Eşlerin, her iki grupta da yer alan malvarlığı değerleri üzerinde, tek başına mülkiyet hakları vardır (Acabey, 1998: 100). Bu mal rejiminde, mal rejimi devam ederken veya rejimin sona ermesi halinde, eşler arasında ortak bir mal grubu oluşmaz (Öztan, 2004: 249; Acabey, 1998: 100). Eşler, yasal sınırlar içinde kendi mülkiyetinde bulunan kişisel ve edinilmiş malları tek başına yönetebilir, bu mallardan yararlanabilir ve bunlar üzerinde tasarrufta bulunabilir (TMK m. 223/I). Eşler kendi borçlarından da bütün malvarlığıyla sorumludur (TMK m. 224). Eşlerin malvarlıkları, temel yapısı itibarıyla, mal ayrılığı rejiminde olduğu gibi birbirinden ayrılmış olsa da, eşlerden birinin diğer eşin edinilmiş malları üzerinde katılma alacağına sahip olması, bir eşin diğer eşin malvarlığına yaptığı katkı sebebiyle değer artış payına hak kazanması ve eşlerin mal grupları arasında meydana gelen değer kaymalarının denkleştirmeye tabi olması gibi özellikleriyle, edinilmiş mallara katılma rejimi, mal ayrılığı rejiminden ayrılır (Öztan, 2004: 249; Zeytin, s. 65).

Edinilmiş mallara katılma rejiminin temelini oluşturan edinilmiş mal grubu, eşlerin mal rejiminin devamı süresince karşılığını vererek edindiği malvarlıklarını kapsar (TMK m.219/I). Türk Medeni Kanunu m.220 hükmünde kişisel mallar belirtilmiştir. Eşlerin aksi ispat edilinceye kadar tüm malları edinilmiş mal olarak kabul edilir (222/III).

Edinilmiş mallara katılma rejimi sona erdikten sonra kural olarak, eşlerin edinilmiş mallarının net değerini ifade eden artık değer (TMK m. 231) yarısı üzerinde diğer eşin veya mirasçılarının alacak hakkı olur. Buna artık değere katılma alacağı denir (TMK m. 236/I). Bu açıdan; edinilmiş mallara katılma rejiminde eşler tasfiye sonunda aynı hak değil alacak hakkı sahibi olur (Kılıçoğlu, 2011: 77). Eşler, tasfiye sonunda, katılma alacağı dışında, birbirlerinin malvarlığına yaptıkları katkı sebebiyle de, bu mallarda ortaya çıkan değer artışı oranında, alacak hakkına sahiptir (TMK m. 227).

## **B. Edinilmiş Mallara Katılma Rejiminin Eşlerden Birinin Ölümü Nedeniyle Sona Ermesi**

Türk Medeni Kanunu m. 225 hükmünde, eşlerden birinin ölümü edinilmiş mallara katılma rejiminin sona erme sebebi olarak gösterilmiştir. Eşlerden birinin ölümü, eşler arasındaki evliliği ve mal rejimini kendiliğinden sona erdirir (Sarı, 2007: 84).

Kişiliğin sona erme sebebi olan ölüm (TMK m. 28/I), ölen kişinin sağlığında içinde bulunduğu hukuki konum ve hukuki ilişkileri de sona erdirir. Kişiliğin ve hak ehliyetinin kaybı nedeniyle, hukuki ilişkilerde hak süjesi olma durumu da ortadan kalkar. Bu nedenle ölüm, evlilik yanında eşlerin tarafı olduğu mal rejimi ilişkisinin de sona erme sebebidir.

Ölüme bağlanan sonuçlar doğal bir olay olarak kişinin ölümüyle doğabileceği gibi, ölümüne kesin gözle bakılan bir olayda kaybolan kimsenin cesedinin bulunamaması halinde, bu kişi hakkında ölüm karinesinin kabulü durumunda da ortaya çıkar (TMK m. 31). Ölüm karinesi gereğince ölümüne kesin gözle bakılan bir olayda kaybolan ve cesedi bulunamayan bir kişi hakkında, o yerin en büyük mülki amirinin emriyle kütüğe ölü kaydı düşülür (TMK m. 44). Hakkında ölüm kaydı düşülen kişi, kaybolduğu, ölümüne kesin gözle bakılan olayın meydana geldiği tarihte ölmüş sayılır ve kişiliğe bağlı haklar bu tarihte son bulur (Serap Helvacı, 2006: 12). Ölüme bağlı sonuçlardan biri olarak, bu kişi evli ise, evliliği hiçbir karara gerek olmadan, kendiliğinden sona erer (Helvacı, 2006: 12). Hem doğal olay olan ölüm, hem de ölüm karinesinin kabul edildiği hallerde, evlilik yanında, eşler arasında geçerli olan mal rejimi de sona erer (Sarı, 2007: 84; Zeytin, 2008: 88).

Eşlerden hangisinin önce veya sonra öldüğü tespit edilemediğinde, eşler hakkında birlikte ölüm karinesi uygulanır. Bu durumunda, eşler aynı anda ölmüş sayılır (TMK 29/II) (Helvacı, 2006: 12). Birlikte ölüm karinesine göre birlikte öldüğü kabul edilen eşler arasında geçerli olan mal rejimi, eşlerin ölüm anında sona erer. Mal rejiminin tasfiyesi eşlerin mirasçıları arasında gerçekleştirilir (Sarı, 2006: 84).

Kişinin ölüm anı, tıbben tespit edilmelidir (Helvacı, 2006: 9; Sarı, 2007: 85). Tıbben tespit edilen ölüm anında ölüme bağlanan bütün sonuçlar doğmaya başlar. Ölüm olayına, konumuzla ilgili olarak, aile hukuku ve miras hukuku açısından sonuçlar bağlanmıştır. Buna göre; ölüm anında evlilik ve eşler arasında geçerli olan mal rejiminin sona ermesi yanında, mirasbırakanın mirası açılır (TMK m. 575) (Hausheer, 2002: 1269; Sarı, 2007: 85). Ölüm nedeniyle mal rejiminin sona ermesi halinde, ölen eşe ait mirasın tasfiyesinden önce mal rejiminin tasfiyesi yapılır (Sarı, 2007: 85; Gümüş, 2008: 288). Nitekim mal rejimine ilişkin tasfiyenin yapılarak tasfiye sonucuna göre, ölen eşin mirasının kapsamı tam olarak belirlenir (Sarı, 2007: 85; Gümüş, 2008: 288).

### **C. Edinilmiş Mallara Katılma Rejiminin Tasfiyesi ve Sağ Kalan Eşin Katılma Alacağı**

Edinilmiş mallara katılma rejiminde, evlilik süresince eşlerin edinilmiş mallarının kazanılmasında, evlilik kurumunun özelliği gereğince eşler arasında işbölümü ve işbirliği olduğundan hareket edilerek, evlilik sona erdiğinde eşlerden her birinin diğerine yaptığı katkının parasal değer olarak kendisine ödenmesi kuralı benimsenmiştir (Sarı, 2007: s. 102). Bu nedenle Türk Medeni Kanunu madde 236/I hükmünde, edinilmiş mallara katılma rejimi kanunda öngörülen sebeplerden biriyle sona erdiği takdirde, eşlerin edinilmiş mallarının mal rejiminin sona erdiği andaki durumu ve sürüm değeri tespit edilerek, bu değer in yarı oranında diğer eşe katılma alacağı adı altındaki parasal değerin verilmesi öngörülmektedir. Katılma alacağının tespiti ve hesaplanması, edinilmiş mallara katılma rejiminin tasfiyesi aşamasını oluşturur (Sarı, 2007: s. 103).

Türk Medeni Kanununun 226- 230. maddelerinde edinilmiş mallara katılma rejiminin tasfiyesinin ne şekilde ve hangi sıraya göre yapılacağı belirtilmiştir (Sarı, 2007: 109; Şıpka, 2011; 166). Tasfiyenin yapılma şekli sırasıyla;

- Mal rejiminin sona ermesi anında eşlerin malvarlıklarının belirlenmesi,
- Eşlerin malvarlığı değerlerinin edinilmiş mal ve kişisel mal olarak ayrılması,
- Edinilmiş mallara eklenecek malvarlığı değerlerinin tespiti (TMK m. 229),
- Eşlerin kişisel malları ile edinilmiş malları arasında denkleştirme yapılması (TMK m. 230),
- Edinilmiş mallara ilişkin borçların düşülmesi,
- Artık Değerin belirlenmesi,
- Katılma alacağının tespiti.

#### **1. Mal Rejiminin Sona Ermesi Anında Eşlerin Malvarlıklarının Belirlenmesi**

Edinilmiş mallara katılma rejiminin tasfiyesinde ilk olarak eşlerin malvarlıklarının, mal rejiminin sona erdiği an itibarıyla belirlenmesi yapılır (Sarı, 2007: s. 109). Bir malvarlığı değerinin kendisine ait olduğunu iddia eden eş, bunu ispatlamakla yükümlüdür. Eşlerden hangisine ait olduğu ispat edilemeyen mallar onların paylı mülkiyetinde sayılır (TMK m. 222/II). Bundan sonra eşlerin malları edinilmiş mallar ve kişisel mallar olarak ayrılır. Aksi ispat edilinceye kadar eşlerin tüm malvarlıkları edinilmiş maldır (TMK.m.222/III).

Türk Medeni Kanunu madde 226/I gereğince; mal rejiminin son bulması halinde, eşlerden her biri diğerinde bulunan mallarını geri alır. Ancak eşlerin malları arasında paylı mülkiyete tâbi mal varsa, eşlerden biri daha üstün bir yararı olduğunu kanıtlamak suretiyle diğerinin payını ödeyip, o malın bölünmeden kendisine verilmesini isteme hakkına sahiptir (TMK m. 226/II).

### **2. Eşlerin Malvarlığı Değerlerinin Edinilmiş Mal Ve Kişisel Mal Olarak Ayrılması**

Eşlerden birinin ölümü sebebiyle mal rejiminin sona ermesi durumunda, ölüm anına göre eşlerin malvarlıklarının belirlenmesinin ardından, eşlerin malvarlıklarının edinilmiş mal ve kişisel mal olarak ayrılması gerekir (TMK m. 228/I). Edinilmiş mallar ile kişisel malların belirlenmesi sonucunda tespit edilen edinilmiş mallar, eşlerin katılma alacağının hesabına esas oluşturacaktır (Sarı, 2007: 132).

#### **a. Edinilmiş Mallar**

Edinilmiş mallara katılma rejiminde edinilmiş mallar, Türk Medeni Kanunu madde 219 hükmünde; mal rejiminin başlangıcından itibaren, bu rejimin devamı süresince eşlerin karşılığını vererek edindiği malvarlığı değerleri olarak tanımlanmıştır (Acar, 2012: 155). Buna göre; edinilmiş mallara katılma rejiminin iki temel unsuru; mal rejiminin devamı süresince edinilen bir malvarlığı değeri olması ve malvarlığı değerinin karşılığı verilerek edinilmiş olmasıdır. Aynı maddenin ikinci fıkrasında beş bent halinde edinilmiş mallara örnek olarak, eşlerin bazı kazanımları sayılmıştır. Buna göre;

- Çalışmasının karşılığı olan edininimler,
- Sosyal güvenlik veya sosyal yardım kurum ve kuruluşlarının veya personele yardım amacı ile kurulan sandık ve benzerlerinin yaptığı ödemeler,
- Çalışma gücünün kaybı nedeniyle ödenen tazminatlar,
- Kişisel mallarının gelirleri,
- Edinilmiş malların yerine geçen değerlerdir.

Maddedeki sayım, sınırlayıcı değil örnekleyici niteliktedir (Özta, 2004: 251; Acar, 2012: 163).



Kanun edinilmiş malları Türk Medeni Kanunu madde 219/I hükmünde eşlerin karşılığını vererek edindiği malvarlığı değerleri olarak tanımlamakla birlikte, ikinci fıkrasında örnek olarak saydığı malvarlığı değerlerinin bazıları karşılığını vererek edinme kavramına uymamaktadır (Öztan, 2004: 250). Bu açıdan kanun, beş bent halinde saydığı edinilmiş mal örneklerini, karşılığını vererek edinme kavramına uymasa da edinilmiş mal olarak kabul etmiştir (Öztan, 2004: 252; Sarı, 2007: 139). Buna göre; edinilmiş malların tespitinde sadece yasada yapılan tanım (TMK m. 219/I) yeterli olmamaktadır. Edinilmiş mal kavramı içine giren mallar yanında yasada edinilmiş mal olarak sayılan malvarlığı değerleri ve Türk Medeni Kanunu madde 220 hükmünde sınırlayıcı şekilde sayılan kanun gereğince kişisel mallar da dikkate alınarak edinilmiş malların tespiti yapılmalıdır.

## **b. Kişisel Mallar**

Kişisel mallar kanunla veya kanunda öngörülen sınırlar içinde, eşler arasında yapılan mal rejimi sözleşmesiyle belirlenebilir (Hausherr, 2002:1096).

### **aa. Kanuna Göre Kişisel Mallar**

Türk Medeni Kanunu madde 220 hükmüne göre aşağıda sayılanlar kanun gereğince kişisel mal olarak belirlenmiştir:

- Eşlerden birinin yalnız kişisel kullanıma yarayan eşya,
- Mal rejiminin başlangıcında sahip olunan mal varlığı değerleri veya miras yoluyla edinilen malvarlığı değerleri yahut karşılıksız kazanma yoluyla elde edilen malvarlığı değerleri,
- Manevi tazminat alacakları,
- Kişisel malların yerine geçen değerler.

Buna göre Türk Medeni Kanunu 220 hükmünde, edinilmiş mallara katılma rejiminde kanuna göre kişisel mallar, tek tek sayma yöntemi ile sınırlı sayıda belirlenmiştir (Hausherr, 2002:1096; Sarı, 2007: 169).

### **bb. Sözleşmeye Göre Kişisel Mallar**

Türk Medeni Kanunu madde 221 hükmü, sadece bu maddede belirtilen sınırlar içinde eşlere mal rejimi sözleşmesiyle kişisel mal yaratma imkânı vermiştir. Eşlere kişisel mallara

ilişkin olarak verilen düzenleme imkânı sadece maddede sayılan durumlarla sınırlıdır (Sarı, 2007:181). Buna göre sözleşmeye göre kişisel mallar:

- Bir mesleğin icrası veya bir işletmenin faaliyetini sürdürebilmesi için gerekli olan malvarlığı değerleri, mal rejimi sözleşmesiyle kişisel mal olarak kabul edilebilir (TMK m. 221/I).
- Eşler, kişisel malların gelirlerinin kişisel mal olarak kalmasını mal rejimi sözleşmesiyle kabul edebilirler (TMK m.221/II).

### c. İspat

Eşler arasındaki mal ortaklığı rejimi sona erdiğinde, eşlerin malvarlığı değerlerinin, eşler arasında geçeli olan mal ortaklığı rejiminin türüne göre, kanun hükümleri ve eşler arasındaki mal rejimi sözleşmesinin hükümleri çerçevesinde kişisel mal mı, ortaklık malı mı olduğu tespit edilir. Eşlerin malvarlığı değerlerinin hangi mal gurubuna girdiğinin tespitinde Türk Medeni Kanunu madde 222/III hükmüyle edinilmiş mallara katılma rejiminde, edinilmiş mallar için getirilmiş olan ispat kolaylığı sağlayan karine, mal ortaklığı rejiminde Türk Medeni Kanunu madde 261 hükmüyle ortaklık malları için getirilmiştir. Bu hüküm, Medeni Kanunun genel hükümlerinde yer alan ispat kuralına (TMK m. 6) uygun olarak düzenlenmiştir (Hausheer, 2002:1239). Bu maddeye göre; eşlerden biri tarafından kişisel malı olduğu ispatlanmadığı sürece tüm malvarlığı değerleri edinilmiş mal sayılır. Bu karineye göre; eşler aksini ispat etmediği sürece bütün malvarlıkları edinilmiş mallar içinde yer alır. Bir malvarlığı değerinin kişisel mal olduğunu iddia eden kişi bu iddiasını ispat yükü altındadır.

Mal ortaklığı rejiminde, ispat yüküne ilişkin Türk Medeni Kanunu madde 221 hükmü emredici niteliktedir. Bu nedenle eşlerin sözleşmeyle ispat yüküne ilişkin farklı bir düzenleme kararlaştırmaları mümkün değildir (Sarı, 2007: 189).

Bir malın kişisel mal olduğuna dair iddiada, bu malın, kanunda veya eşler arasında yapılan mal rejimi sözleşmesinde belirtilen kişisel mallara girdiğinin kanıtlanması gerekir. İspatın ne şekilde yapılacağı, iddia sahibinin, kişisel mal olduğunu iddia ettiği malın, hangi sebeple kişisel mal tanımına girdiğini öne sürmesine göre değişir. Eşlerden birinin kişisel kulanımına girdiği için, eşin kişisel malı olduğuna ilişkin iddia, maddî vakianın ispatı niteliğinde olduğu için her türlü delille ispatlanabilir (Sarı, 2007: 190). Eşler tarafından

mal rejimi sözleşmesiyle kişisel mal olarak kararlaştırıldığı iddiası ise; sadece kanuni şekil şartına uyularak yapılan mal rejimi sözleşmesi ve bu mal varlığı değerinin mal rejimi sözleşmesinde kişisel mal olarak kararlaştırılan malvarlığı grubuna girdiğinin tespitiyle mümkündür (Sarı, 2007: 190).

Türk Medeni Kanunu madde 216 hükmünde düzenlenen envanterden, ispat yükünün yerine getirilmesinde yararlanılabilir (Hausheer, 2002: 1240; Sarı, 2007: 190; Şıpka, 2013: 126). Türk Medeni Kanunu madde 216/II hükmüne göre; envanter, malların getirilmesinden itibaren bir yıl içinde yapıldığında, aksi ispat edilene kadar doğru olarak kabul edilir. Envanterin hazırlanmasından geriye doğru bir yıl içinde getirilen ve envanterde kişisel mal olarak belirtilen mallar açısından ispat yükü yer değiştirir. İspat yükü, malın kişisel mal olmadığını iddia eden tarafa geçer (Öztan, 2004: 241; Şıpka, 2013: 126).

### **3. Eklenecek Değerler**

Türk Medeni Kanunu madde 229 hükmüne göre aşağıda belirtilen değerler, edinilmiş mallara eklenecek değerler olarak belirtilmiştir:

- Mal rejiminin sona ermesinden önceki bir yıl içinde diğer eşin rızası olmadan, alışılmış hediyeler dışında yaptığı kazandırmalar.
- Bir eşin mal rejiminin devamı süresince diğer eşin payını azaltmak amacıyla yaptığı devirler.

### **4. Denkleştirme**

Türk Medeni Kanunu madde 230 hükmüne göre; eşlerin kişisel mallarıyla edinilmiş mallarının ya da edinilmiş mallarıyla kişisel mallarının borçlarının ödenmiş olduğu hallerde, tasfiye sırasında bir denkleştirme istenebilmesi kabul edilmiştir. Eşin kişisel mal grubuna ait bir borcu, edinilmiş mal grubundan ödendi ise, edinilmiş mal grubunun kişisel mal grubundan denkleştirme alacağı vardır (Zeytin,2008: 217).

### **5. Artık Değer ve Hesaplanması**

Artık değer Türk Medeni Kanunu madde 231/I hükmüne göre, artık değer; ekleme ve denkleştirmeden elde edilen miktarlar da dâhil olmak üzere, her eşin edinilmiş mallarının

toplam değerinden, bu mallara ilişkin borçların düşülmesiyle elde edilen net değerdir. Artık değerın hesabında edinilmiş malların tasfiye anındaki sürüm değeri esas alınır ( TMK m. 232).

Artık değerin hesaplanmasında artık değerin aktif kısmını; mal rejiminin sona erdiği anda mevcut edinilmiş mallar, eklenecek değerler, denkleştirme ve değeri artış payı alacağı; pasif kısmını ise değeri artış payı borcu, denkleştirme borcu ve edinilmiş mal grubuna ait borçlar oluşturur (Zeytin, 2008: 216). Türk Medeni Kanunu madde 230 /II hükmüne göre bir borcun hangi mal grubuna ait olduğu belirlenemiyorsa o borcun, edinilmiş mal grubuna ait olduğu kabul edilir.

## **6. Artık Değeri Katılma Alacağı**

Yasa artık değeri paylaşılmasında yarı yarıya hak sahibi olma ilkesini kabul etmiştir. Buna göre her eş veya mirasçılar, eşler arasında aksine bir anlaşma yoksa diğeri eşe ait artık değeri yarisında hak sahibi olacaktır (TMK m.236). Tasfiyede eşlerin birbirinden olan alacaklarla takas edilmesi esası öngörülmüştür (Kılıçoğlu, 2011: 125). Eşlerin artık değeri yan yarıya pay alması ilkesi emredici bir hüküm olarak öngörülmemiştir. Eşlerin artık değeri paylaşılmasında mal rejimi sözleşmesiyle başka bir esas kabul edebilmeleri olanaklı kılınmıştır. Ancak eşler arasında yapılacak bu tür anlaşmaların müşterek olmayan çocukların ve bunların altsoylarının saklı paylarını ihlâl etmemesi ilkesi benimsenmiştir (TMK m. 237).

## **D. Değeri Artış Payı Alacağı**

Mal rejiminin devamı süresince, eşlerden her birinin diğeri bir malın edinilmesine, iyileştirilmesine veya korunmasına hiç ya da uygun bir karşılık almadan yaptığı katkıdan dolayı hak kazandığı alacağı, değeri artış payı alacağı denir. Değeri artış payı eşler arasındaki mal rejimi sona erdikten ve tasfiye talep edildikten sonra istenebilir (Sarı, 2007: 274). Değeri artış payına ilişkin alacağın tespiti ve ödenmesini sağ kalan eş, ölen eşin mirasçılarında talep edebilir (Sarı, 2007: 275). Değeri artış payı; eş tarafından katkı yapılan malda, tasfiye sırasında ortaya çıkan değeri artışı için, eşin bu katkısı oranında ortaya çıkan alacak hakkıdır. Bu alacak o malın tasfiye sırasındaki diğeri göre hesaplanır ( TMK m. 227/I).

Örneğin; eşlerden biri tarafından 300.000 TL değeri bir ev edinilmiş, diğeri eş bu paranın 100.000 TL kısmını karşılamış. Tasfiye anında evin değeri 600.000 TL' ye çıktığı

kabul edilirse, katkının yapıldığı tarihte evin değerine göre yapılan katkı oranı  $1/3$ 'tür. Bu katkının tasfiye anındaki evin değer artışına göre tutarı  $600.000 \times 1/3 = 200.000$  TL'dir. Bu hesaba göre; katkıda bulunan eşin 200.000 TL değer artış payı alacağı olacaktır. Mal rejiminin ölüm sebebiyle sona ermesi halinde sağ kalan eş bu değer artış payı alacağını katılma alacağına ek olarak, ölen eşin mirasçılarından talep edebilecektir. Katılma alacağı ve değer artış payı alacağı ayın veya para ile ödenebilir. Ayın ile ödemede malın sürüm değeri esas alınır (TMK m. 239/I). Katılmadan doğan alacağın ve değer artışı payının derhal ödenmesinin borçlu eş için ciddi güçlükler doğurması halinde, uygun bir süre erteleme talep edilebileceği kabul edilmiştir (TMK m.239/II).

### **E. Sağ Kalan Eşe Aile Konutu ve Ev Eşyasına İlişkin Tanınan Haklar**

Aile konutu; eşlerin, iradeleriyle seçtikleri, evlilik ve aile yaşantılarının merkezi olarak, birlikte ve sürekli biçimde kullandıkları konut olarak tanımlanabilir (Akıntürk, 2002: 113; Öztan, 2004: 200; Dural, Ögüz ve Gümüş, 2013: 204). Türk Medeni Kanunu m.194 hükmünün gerekçesinde aile konutu; "eşlerin bütün yaşam faaliyetlerini gerçekleştirdiği, yaşantısına buna göre yön verdiği, acı ve tatlı günleri içinde yaşadığı, anılarla dolu bir alan" olarak tanımlanmıştır. Bu durumda sadece ailenin barındığı, yaşadığı yer aile konutu olarak kabul edilebilir (Şıpka, 2004: 74). Aile konutunda yaşamı devam ettirmek için gereken taşınır eşyalar da ev eşyasını oluşturur. Türk Medeni Kanunu m. 240 hükmü, mal rejiminin ölümle sona ermesi durumunda, sağ kalan eşe, eski yaşantısını devam ettirebilmesi için, ölen eşine ait olan ve birlikte yaşadıkları konut üzerinde katılma alacağına mahsuben, yetmediği takdirde bedel eklemek suretiyle intifa ve oturma hakkı tanınmasını isteme hakkı vermiştir. Haklı sebeplerin varlığı halinde eş oturma ve intifa hakkı yerine mülkiyet hakkı da isteyebilecektir (TMK m. 240/III). Aynı koşullar altında ev eşyasının mülkiyeti de sağ kalan eş tarafından istenebilir (TMK m. 240/II).

Sağ kalan eşin mal rejiminin ölümle sona ermesi durumunda aile konutu ve ev eşyası üzerinde aynı hak talep edebilmesi için aşağıdaki şartlar gerekir (Doğan, 2003: 655-661):

- Sağ kalan eşin katılma alacağına sahip olması gerekir,
- Aile konutu ve ev eşyasının ölen eşe ait olması gerekir,
- Sağ kalan eşin aile konutu ve ev eşyası üzerinde aynı hak talep etmesi gerekir,

- Sağ kalan eşin talepte bulunacağı ev, evlilik birliği devam ederken eşlerin birlikte oturduğu ev olmalıdır.

Türk Medeni Kanununun 240/IV hükmü gereğince, sağ kalan eş, mirasbırakanın bir meslek veya sanat icra ettiği ve altsoyundan birinin aynı meslek ve sanatı icra etmesi için gerekli olan bölümlerde, aile konutuna ilişkin bu hakkını kullanamaz. Kanun tarımsal taşınmazlarda da miras hukuku hükümlerini saklı tutmuştur. Buna göre; tarımsal taşınmazlar bakımından, ölen eşin mirasçılarının birinin ehil olması şartı ile tarımsal taşınmazların kendisine bölünmeden tahsisi talebi, sağ kalan eşin aile konutuna ilişkin talebi karşısında öncelikli olacaktır (Doğan, 2003: 666).

### III. SAĞ KALAN EŞİN MİRAS HUKUKUNDAN KAYNAKLANAN HAKLARI

#### A. Sağ kalan eşin Miras Hakkı

Sağ kalan eş, yasal miras hakkına sahiptir. Her zümre ile birlikte mirasçı olur ( Dural ve Öz, 2012: 36). Türk Medeni Kanunu m.499 hükmünde eşin değişik mirasçılarla olan mirasçılığında miras payı düzenlenmiştir. Buna göre:

1. Mirasbırakanın altsoyu ile birlikte mirasçı olursa, mirasın dörtte biri,
2. Mirasbırakanın ana ve baba zümresi ile birlikte mirasçı olursa, mirasın yarısı,
3. Mirasbırakanın büyük ana ve büyük babaları ve onların çocukları ile birlikte mirasçı olursa, mirasın dörtte üçü,

bunlar da yoksa mirasın tamamı eşe kalır. Son durumda sağ kalan eş tüm mirasa sahip olmakla devletin mirasçılığını engellemiş olur (Dural ve Öz, 2012: 40).

Türk Medeni Kanunu m. 505/I hükmünde, “*Mirasçı olarak altsoyu, ana ve babası veya eşi bulunan miras bırakan, mirasının saklı paylar dışında kalan kısmında ölüme bağlı tasarrufta bulunabilir*” denilmek suretiyle sağ kalan eş saklı paylı mirasçılar arasında sayılmıştır. Sağ kalan eşin saklı payının oranı ise Türk Medeni Kanunu m. 506/ I-bent 4 hükmünde; altsoy veya ana ve baba zümresiyle birlikte mirasçı olması hâlinde yasal miras payının tamamı, diğer hâllerde yasal miras payının dörtte üçü olarak düzenlenmiştir.

## **B. Sağ Kalan Eşin Miras Hukuku Hükümlerine Göre Aile Konutu Ve Ev Eşyası Üzerindeki Hakkı**

Türk Medeni Kanunu m.652 hükmünde; “Eşlerden birinin ölümü hâlinde tereke malları arasında ev eşyası veya eşlerin birlikte yaşadıkları konut varsa; sağ kalan eş, bunlar üzerinde kendisine miras hakkına mahsuben mülkiyet hakkı tanınmasını isteyebilir.

Haklı sebeplerin varlığı hâlinde, sağ kalan eşin veya miras bırakanın diğer yasal mirasçılardan birinin istemi üzerine, mülkiyet yerine intifa veya oturma hakkı tanınmasına da karar verilebilir.

Miras bırakanın bir meslek veya sanat icra ettiği ve altsoyundan birinin aynı meslek ve sanatı icra etmesi için gerekli olan bölümlerde, sağ kalan eş bu hakları kullanamaz. Tarımsal taşınmazlara ilişkin miras hukuku hükümleri saklıdır” denilmek suretiyle miras hukukunda da sağ kalan eşe, aile konutu ve ev eşyasının özgülenmesi düzenlenmiştir. Bu hükme göre sadece sağ kalan eş, miras hukuku açısından aile konutu ve ev eşyasına ilişkin bu haktan yararlanabilir (Dural ve Öz, 2012: 488). Miras hukukundan sağ kalan eşe birlikte oturdukları ev ve ev eşyası için tanınan bu özgüleme hakkı, mal rejimlerinde de öngörülmektedir (TMK m. 240, TMK m. 255, TMK m. 279). Sağ kalan eş, ölen eşle birlikte yaşadıkları ortak konuta ilişkin bu hakkını ya miras hukukuna göre ya da mal rejimi hukukuna göre isteyebilir. Her iki hakkı birden talep edemez (Dural ve Öz, 2012: 488; Doğan, 2003: 687).

Edinilmiş mallara katılma rejiminde sağ kalan eşin aile konutu ve ev eşyasına ilişkin hakları ile miras hukukunda aile konutu ve ev eşyasına ilişkin hakları karşılaştırıldığında, sağ kalan eş edinilmiş mallara katılma rejimine göre aile konutu üstünde katılma alacağına mahsuben oturma hakkı veya intifa hakkı talep edebilir. Haklı sebepler varsa mülkiyet hakkı talep edebilir. Miras hukukuna göre ise aile konutu üzerinde mülkiyet hakkı talep edebilir (Dural ve Öz, 2012: 487)

Sağ kalan eşin Türk Medeni Kanunu m.652 hükmüne göre hak talep edebilmesinin şartları (Dural ve Öz, 2012: 489-490; Doğan, 2003: 686-690):

- Mal rejiminin tasfiyesi sonunda aile konutu ve ev eşyası üzerinde sağ kalan eş lehine bir aynı hak kurulmamış olmalıdır,

- Sağ kalan eş miras hakkına sahip olmalıdır. Buna göre saklı paya sahip yasal mirasçı olan sağ kalan eş mirastan feragat etmesi veya mirası reddetmesi durumunda bu hakkı kullanamaz.
- Aile konutu ve ev eşyasının mülkiyetinin ölen eşe ait olması gerekir,
- Sağ kalan eşin aile konutu ve ev eşyasının özgülenmesine ilişkin talepte bulunması gerekir,
- Talepte bulunulan evin ölmeden önce ölen eşle birlikte oturulan ev olması gerekir.

Türk Medeni Kanunu, edinilmiş mallara katılma rejiminde sağ kalan eşe aile konutu ve ev eşyası üzerindeki talep hakkına getirmiş olduğu sınırlamayı, miras hukukuna ilişkin 652. maddesinin son fıkrasında da getirmiştir. Buna göre; daha önce edinilmiş mallara katılma rejiminde belirttiğimiz sınırlamayla aynı şekilde, sağ kalan eş, miras bırakanın bir meslek veya sanat icra ettiği ve altsoyundan birinin aynı meslek ve sanatı icra etmesi için gerekli olan bölümlerde aile konutuna ilişkin bu hakkını kullanamaz. Kanun, tarımsal taşınmazlarda ise; miras hukuku hükümlerini saklı tutmuştur.

### Sonuç

Evlenmenin eşlerden birinin ölümüyle sona ermesi durumunda, eşler arasındaki mal rejiminin sona ermesi ve sağ kalan eşin yasal mirasçı olması sonucu, sağ kalan eşe ilişkin olarak hem mal rejimlerine ilişkin hükümlerde hem de miras hükümlerinde bir takım hakları doğar. Sağ kalan eşin miras hukukundan doğan haklarının tam olarak belirlenebilmesi için öncelikle mal rejiminin tasfiyesinin yapıp tasfiye sonucu doğan haklarının net olarak ortaya konulması gerekir. Zira miras hukukundan kaynaklanan miras hakkının belirlenmesi, terekenin aktif ve pasiflerinin tespiti ile mümkündür. Bunun için eşlerden birinin ölümü halinde mal rejiminin tasfiyesi sonucu terekenin mal rejimi hükümlerine göre alacaklı mı borçlu mu olduğunun tespiti gerekir. Evlilik devam edenken eşler arasında yasal mal rejimi edinilmiş mallara katılma rejimi geçerliyse; eşlerin edinilmiş mallarının tespit edilerek, ekleme ve denkleştirmeden sonra elde edilen değerden edinilmiş mallara ilişkin borçlar da düşülerek artık değerın bulunması sonrasında eşlerden her biri veya mirasçıları artık değerın yarısı üzerinde alacak hakkına sahip olurlar. Eşlerin karşılıklı alacakları takas edilir. Ortaya çıkan katılma alacağına göre sağ kalan eşin terekenin alacaklı mı borçlu mu olduğu ortaya çıkması sonucu net terekenin belirlenmesiyle mirasın tasfiyesi mümkün olacaktır. Bunun yanında sağ kalan eşin edinilmiş mallara katılma rejimine göre aile konutu ve ev eşyasına ilişkin aynı hak talep hakkının olup olmadığı da mal rejiminin tasfiyesi sonrasında ortaya çıkar. Zira sağ kalan eş edinilmiş malların tasfiyesi sonucunda katılma



alacağına sahip olduğu takdirde bu alacağına mahsuben yetmez ise bedel eklenmek suretiyle ölen eşe ait olan ve birlikte yaşadıkları konutta intifa veya oturma hakkı, ev eşyası üzerinde de mülkiyet hakkı talep edebilir.

Miras hukuku açısından da sağ kalan eş ölen eşin, saklı pay sahibi yasal mirasçısı sıfatını taşır. Sağ kalan eşin miras hakkının oranı, birlikte mirasçı olduğu zümreye göre değişiklik gösterir. Türk Medeni Kanunu m. 499 hükmüne göre: mirasbırakanın altsoyu ile birlikte mirasçı olursa, mirasın dörtte biri; mirasbırakanın ana ve baba zümresi ile birlikte mirasçı olursa, mirasın yarısı; mirasbırakanın büyük ana ve büyük babaları ve onların çocukları ile birlikte mirasçı olursa, mirasın dörtte üçü; bunlar da yoksa mirasın tamamı, sağ kalan eşe kalır.

Miras hukuku açısından da sağ kalan eşe, mülkiyeti ölen eşe ait olan aile konutu ve ev eşyası üzerinde mülkiyet hakkı talep edebilme imkânı tanınmıştır. Sağ kalan eş, kendisine mal rejiminin tasfiyesinden tanınan aile konutu ve ev eşyasına ilişkin aynı talep hakkı ile miras hukukundan tanınan aile konutu ve ev eşyasına ilişkin aynı talep hakkını birlikte kullanamaz. Bu iki talep hakkından birini seçmek zorundadır. Sağ kalan eş bu durumda menfaatine uygun olarak mal rejiminin tasfiyesi sonucunda katılma alacağına sahip olmaması durumunda miras hukukundan kaynaklanan aile konutu ve ev eşyası üzerindeki talep hakkını, mirastan feragat veya mirasın reddi gibi sebeplerle ölen eşin mirasçısı olmaması durumunda ise, mal rejiminden kaynaklanan aile konutu ve ev eşyasına ilişkin aynı hakkını talep edebilir. Hem mal rejimine ilişkin aile konutu ve ev eşyasına ilişkin sağ kalan eşe tanınan aynı talep hakkında hem de miras hukukuna ilişkin aynı talep hakkında, mirasbırakanın bir meslek veya sanat icra ettiği ve altsoyundan birinin aynı meslek ve sanatı icra etmesi için gerekli olan bölümlerde, aile konutuna ilişkin bu hakkını kullanamamasına ilişkin sınırlama bulunmaktadır. Aynı şekilde her iki düzenlemede de tarımsal taşınmaza ilişkin miras hükümleri saklı tutulmuştur.

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# 15

## LEGITIMACY OF CENSORSHIP IN THE WEST: AN ANALYSIS FROM HUMAN RIGHTS PERSPECTIVE

Sezai Çağlayan - Mustafa Çakır

### **Abstract**

*Censorship encountered commonly in nondemocratic societies is a concept forbidding a work of art or science, or it sometimes appears to prevent simple street demonstrations. The concept as the opposite of freedom of expression reminds of undesirable implementations. Yet, it may sometimes be witnessed in a democratic society. At first sight this seems contradictory. It may however be needed for the sake of some concerns as to the existence of a society like preserving national security, territorial integrity, public safety or preventing hate speech, or for more individual concerns such as protecting women and children from pornographic harm. This paper argues that censorship can be employed in the name of the above-mentioned concerns in western liberal democracies in a certain extent. The application of censorship in a western liberal democracy is certainly limited to the said concerns and not able to get beyond them.*

**Keywords:** *Censorship, Liberal democracy, national security, territorial integrity, public safety, pornography, hate speech*

### **Introduction**

Science and art as main pillars of civilization have been the concepts making major contributions to history of humanity. Accordingly, communication is known as a conveyer of these concepts from one generation to another. This transfer can be performed by way of written, verbal or pictorial means such as books, magazines, internet, broadcasting, caricatures, movies, theatre, graffiti, paintings, song and so on and so forth. Censorship, which is commonly known as a formal restriction or prohibition of means of expressions mentioned above (Moore, 2013:46), has also existed together with these developments

for ages. Severity and frequency of censorship have been however decreasing through the last century in liberal democracies.

Censorship, the purpose of which is to ban written and other materials (Marx, 2001), would be seen due to political, economic, legal and some other reasons. It could be said that censorship is extremely inimical to the notion of freedom of expression recognised as one of fundamental human rights in western democratic societies. Putting aside the progress of universal legal system created by the United Nations (Hereinafter UN), there are mechanisms protecting the right to freedom of expression from censorship in western world like the European human rights system and the Inter-American human rights system (Carolyn, 2007). The former one is a system the main institution of which is the Council of Europe, and the European Convention on Human Rights (Hereinafter ECHR) is the charter of this institution that serves for 'human rights', 'democracy' and 'the rule of law' (Council of Europe, 2013). The ECHR established in 1950 and become valid in 1953 (Rehman, 2012:184) has played a major role in the protection of freedom of expression. Likewise, the latter namely the American Convention on Human Rights (Hereinafter ACHR) is the treaty of the Inter-American human rights system founded in 1969 and come into force in 1978 (Smith, 2012:121). The ECHR with its judicial organ called as the European Court of Human Rights (Hereinafter ECtHR) is the most effective mechanism dealing with more cases in this field. Besides, domestic jurisdictions with their judicial mechanisms in western countries are also vital for guaranteeing freedom expression from disproportionate censorship. For example, the American Supreme Court is one of domestic substantial judicial bodies for human rights and freedom of expression in particular.

This paper tries to approach to the issue from the viewpoint of western mechanisms in general. It thus argues that censorship or a ban of an expression can only be in question under some specific circumstances such as preventing pornographic harm on woman and children, preserving national security, territorial integrity and public safety, and prohibiting hate speech. This study is not purely an assessment of one of the above-mentioned mechanisms nor does it subordinate one of them. Some considerable regulations and selected cases regarding freedom of expression and censorship in the European system, the Inter-American system and particularly in the US will be assessed. There will be of course more cases here from the European system, not because of order of importance,

it is because of the fact that European system has deep-rooted history and experiences. In western liberal democracies, there of course exists many domestic judicial mechanisms engaging with the issue, but owing to the limits of the paper, only the three mechanism and their cases will be able to be analysed.

This study proceeds in three sections. Firstly, a brief history of censorship will be given by making a comparison between authoritarian regimes and liberal democracies. Secondly, legal protection of freedom of expression will be expressed within the given jurisdictions. Lastly, possible reasons of censorship in a liberal democratic society will be evaluated by way of assessing the relevant cases in the said jurisdictions.

### **A Brief History of Censorship: From Autocracy to Liberal Democracy**

The matter of censorship has been seen in various areas for different purposes throughout history. It is not only enforced by the government but also by private interest groups (American Civil Liberties Union, 2006). Censorship had been similarly carried out by the church that is an institution of the Christian community for a long time (Hagstorm, 2004:148). For instance, Socrates, one of the greatest philosophers was the first person victimised due to his divergent thoughts in 399 BC (Hagstorm, 2004:148). He was killed in order for keeping the *status quo* and preventing the spread of new thoughts. Additionally, introducing laws and banning books from being published have also been examples of early censorship applications from European Continent to the Far East (Newth, 2012). These indicate how early examples of radical censorship were applied. It can therefore be said that “Censorship reflects a society’s lack of confidence in itself, and it is a hallmark of an authoritarian regime” as pointed out by Justice Potter Stewart (1966).

On the other hand, after the age of enlightenment, the world order was rebuilt on legal and democratic grounds. Liberal democracy is the most suitable type of government for states which have been becoming democratic societies over an half century (Chan, 2002:10-11). Together with the establishment of liberal democracy, freedom of expression has gained a victory over censorship particularly in the western world. Despite the fact that censorship is not as heavy as early examples, it can still be seen in the western liberal societies in the name of public interests that will be analyzed under 4<sup>th</sup> heading.

## **Legal Protection of Freedom of Expression**

Free speech discussions in liberal democracies concentrate upon the borders of freedom of expression rather than whether it must be secured (Barendt, 2006:1). Starting from this point, freedom of expression discourse is explained with its limits in article 10 of the ECHR:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. (ECHR, 1950)

Similarly, article 13 of the ACHR (ACHR, 1969) articulates the right to free speech with its restrictions. Defining freedom of expression by similar words in different systems is therefore an evidence of having the same values and being a liberal democratic state. However, having some limits shows that freedom of expression is not an absolute right, it is one of the 'qualified rights' (Liberty, 2008). It can thus be said that freedom of expression may sometimes be subjected to some limitations when required.

Although the exceptions of freedom of expression stated in article 10 of the ECHR are justifiable under some circumstances, it does not mean that the party states can violate freedom of expression in any case. The ECtHR, for example, assesses all parameters in each case then makes a decision. It shows that the Court does not prefer to strike monotonous attitude when hearing the cases, it therefore plays a vital role in determining as to whether there is a violation of freedom of expression. There must here be three requirements in order for justifying a violation of article 10 of the ECHR (Macovei, 2004:29): First, state intervention is confirmed by law; second, an intervention purposes the protection of 'interests' mentioned in article 10; third, an intervention is obligatory in a 'democratic society' (Macovei, 2004:29). As understood, for censoring acts or discourses, they need to be evaluated whether they threaten public interests specified in the above said article by taking into account the three requirements.

## **Justification of Censorship in Liberal Democracies**

### **Obscenity, Pornography and Ethical Reasons**

Pornography which might sometimes be a rational reason for the limitation of freedom of expression can be described as a 'sexually explicit' material that is either an image or a word (West, 2013). Obscenity also implies 'sexually explicit' materials but its scope is not as wide as the scope of pornography and it is banned due to its detrimental content for society (Barendt, 2006:352). However, it is often difficult to differentiate such materials whether they are artistic productions or unsuitable visual materials. On the one hand, conservatives believe that pornography and its nasty content are danger threatening family life and spiritual values in a society (West, 2013). On the other hand, liberal thought is contrary to 'pure legal moralism' (Scoccia, 1996:779). In other words, freedom expression is a right of individuals that a state cannot interfere with. However, limitation of this right might be in question in particular circumstances. For instance, the reference point of liberals could be based on Mill's argument (2011:26). According to the argument, "that the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others". Accordingly, the question of censorship over pornography has also been discussed by feminist movement. Catherine Mackinnon argues that women are subjected to degrading treatments or they are sometimes murdered in pornographic materials in order to increase satisfaction levels of both consumers and pornography producers and thus these materials are unlawful (1991:796). Although some ideas exist in favour of pornography as a free speech argument ((Dworkin, 1981),(Langton, 1990)), pornography may become a threat for society or particular groups in a society. It is, therefore, censorship might be possible in those danger circumstances.

Pornography is not something that can explicitly be defined and there is more than one type of pornography damaging morals of society or particular groups like women and children. The statement of Justice Stewart (1964) depicts the difficulty of definition of pornography very well: "I can't define pornography but I know it when I see it". However, child pornography and obscenity are the ones that would easily be justifiable than adult pornography in terms of censorship in liberal democracies. This justification can be given by considering the harm principle because children and women are generally abused in pornographic materials and those materials cannot be alleged in the name of free speech.

For instance, child pornography is a kind of pornography that would be seen either in the shape of picture or movie (Ost, 2009:29). There is no doubt that the production of child pornography mostly result in the abuse of children (O'Donnell and Milner, 2007:69) and the materials comprising child pornography therefore never be used as a means of any free speech argument. States which adopt liberal democracy generally regulate the child pornography, for example, it is proscribed under Federal law in the US (2011). Additionally, the prohibition of child pornography is confirmed by the Supreme Court of the US in the case of *New York v. Ferber* (1982). In this case, Paul Ferber selling pornographic films that include child pornography was convicted due to a violation of New York state law. This shows that the distribution of child pornography is not recognised as a way of freedom of expression and censorship can reasonably be applied to child pornography.

In addition to child pornography, obscenity is the other form of pornography not protected by the first amendment (Hudson, 2002). Likewise, extreme and hardcore pornography are exaggerated forms of pornography containing obviously obscene materials and they are repudiated as works of art. The right to freedom of expression exists in order to ensure the spread of ideas but pornography is not related to ideas. 'The free speech principle' does not therefore cover pornography (Koppelman, 2008:71). In the case of *Ginzburg v US* (1966), the publisher of Eros magazine, Ralph Ginzburg, violated the federal obscenity statute and convicted because of mailing the three publications that were 'sexually explicit'. Publications of pornographic materials may not obviously be found as means of freedom expression in some cases. Together with the US, European states also do regulate the pornography in regional context as well as in their domestic legal systems. The party states to the ECHR have positive obligations in terms of protecting persons against undesirable conducts of other private persons in their territories (Xenos, 2012:2). Likewise, the doctrine of margin of appreciation developed by the ECtHR is a proper tool for solving problems stemming from disagreement of the convention rights (Gerards, 2011:82).

In spite of the fact that the restrictions of pornography preclude the full-enjoyment of freedom of expression in some instances, these restrictions cannot be totally abolished because they sometimes become essential for the prevention of pornographic harm. However, it is difficult to understand the harm of pornography (Barendt, 2006:370). What is more, the problems arising from the internet technology have been tried to solve by both experts and law makers especially since the beginning of the new century (Nunziato, 2007:1535).



As it is seen, there is an obscurity as to the definition, scope, types and harm of pornography and therefore, it may sometimes be exposed to censorship.

### **National Security, Territorial Integrity and Public Safety**

Censorship and its other forms such as limitations and restrictions might appear when it comes to national security, territorial integrity and public safety. The second paragraph of article 10 of the ECHR is the legal foundation of the said limitations. The means of free speech arguments like demonstrations and similar actions may be subjected to censorship. Article 11 of the Convention –freedom of assembly and association- has some limitations in the name of public interests as well. Nonetheless, since press is the best means of expression of free speech, these kinds of limitations must not exceed its scope arbitrarily. In this context, written and visual media to sometimes be subjected to prior censorship, which is the prohibition of free speech materials before their publication (Torres, 2003:7), for the protection of these interests. Prior censorship as a tough form of censorship is banned in the Inter-American human rights system while it is not stated in the ECHR (Torres, 2003:7). However, article 17 of the ECHR –prohibition of abuse of rights- in general prevents violation of convention rights from extreme restrictions. All these show that even though the idea of censorship contrasts with liberal values, it may appear in some occasions in liberal democracies too.

Firstly, national security can be given as one of the most important reasons of censorship of freedom of expression. The matter of national security has been in contradiction with civil liberties for a long time. ‘Civil liberties’ are described as ‘luxury’ especially in wartimes as pointed out by Baker (2003:548). This situation might be found acceptable in emergency times, yet can restrictions on liberty be possible in peacetime? Keeble (2005:359) notes that the debate of ‘security-liberty’ conflict has become a current issue after the September 11 attacks in liberal democratic countries. The issue of national security has been, therefore, considered important in every time. The ECHR deals with the importance of national security in the first paragraph of article 15:

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law (ECHR, 15).

As it is seen in the provision of article 15 of the ECHR, freedom of expression could be censored when necessary for public interests. In the light of these regulations, the case of *Surek v Turkey* (1999) would be examined in terms of national security. In this case, there were news in a magazine, which is published weekly, calling for a total liberation fight against the armed forces of Turkish Republic. Thereupon, this issue of the magazine was seized and the owners of the publication were found guilty by Istanbul National Security Court. The owners of the publication claimed that freedom of expression was violated by this decision of the Turkish court and they applied to the ECtHR. According to the ECtHR,

“The impugned article associated itself with the PKK and expressed a call for the use of armed forces as a means to achieve the national independence of Kurdistan” (ECtHR).

Furthermore, the court added that;

The content of the article must be seen as capable of inciting to further violence in the region. Indeed the message which is communicated to the reader is that recourse to violence is a necessary and justified measure of self-defence in the face of the aggressor (ECtHR).

Press censorship is of course unacceptable situation in a liberal democracy. However, as can be seen in the above case, it may sometimes be found necessary for the sake of national security. It is known that such attempts calling for violence directly and deliberately especially in critical periods cannot be acceptable and ‘incitement to violence’ is not protected by article 10 of the Convention (Macovei, 2004:17).

Secondly, states do primarily provide their territorial integrity in order for the preservation of national security. In other words, national security and territorial integrity are complementary concepts. The norm of territorial integrity is developed and guaranteed by the UN Charter (1945). It is thus important that censorship and similar restraints can be applied to some rights and freedoms in liberal democratic societies. However, due to the fact that each state has different geographical position, natural wealth and political stance, the severity of imminent danger may show an alteration from one country to another. In parallel with these features of states, although the rate of censorship cannot be equal in each state, it is still seen. In order to clarify the issue, necessity of censorship in a liberal democracy can be determined by the case law. Once again, the case of *Surek v*

*Turkey* (1999:3) has illustrated the close link between national security and territorial integrity. Likewise, the protection and immunity of confidential information belonging to the state does not violate freedom of expression (Macovei, 2004:19) as will be seen in the case of *Leander v. Sweden* (1987).

Another point as to censorship is the question of public safety. The matter of public safety would of course be assessed as the third concept in addition to national security and territorial integrity since public is one of the fundamental elements of states. Apart from that although press is a powerful means of free speech, people may put into words their ideas, requests and complaints in streets within the context of freedom of assembly for educational, ideological or another aims. However, gathering a number of people in an enclosed or a narrow space in order for demonstration may cause danger (Jervis, 2004:25). Therefore, some restraints might be applied to meetings if there is a danger for the lives of participants or audiences.

In conclusion, territorial integrity, national security and public safety are essential subjects that cannot be separated from one another. Terrorism and similar activities would be accepted as threats for each of three situations. In case of dismemberment of the state or similar conditions, the three key issues could be at risk. It is already known that no one can enjoy his/her rights effectively in those circumstances. Therefore, censorship in these circumstances could be justifiable in liberal democracies.

## **Hate Speech and Censorship**

Hate speech leading to major ‘personal offence’ (Mill, 2013) consists of verbal and nonverbal expressions. Such expressions which are against some specific groups like racial groups or others have been banned since the second half of the twenty century (Barendt, 2006:170-1). As the discourse of hate speech morally harms people, it is unaccepted as free speech argument. In spite of the fact that scholars interesting in social science try to determine harms that hate speech cause, it is not easy to do this due to indefinite character of the discipline (Wolfson, 1997:56). It is also difficult to identify materials whether they are hate speech or not. Furthermore, the members of intended groups and their reputations are labelled and humiliated by hate speech arguments (Parekh, 2006:2017). Groups of people living in a society as ‘ethnic’ and ‘racial’ minority are protected by imposing restriction on hate speech and these restrictions might be regarded as essential for the protection of

equality, self-respect and physical integrity of those people (Barendt, 2006:171). For these reasons, hate speech can be subjected to some sorts of censorship in liberal democracies.

The restraints on hate speech are indicated in the ECHR and its case law. For example, the case of *Leroy v France* (2008) could be a good example of press censorship in a liberal democratic state. The applicant, a cartoonist, drew a caricature supporting terrorism in a newspaper. Due to the expression – “We have all dreamt of it... Hamas did it” (2008) used by the applicant in the cartoon, the cartoonist was served with fine by a domestic court. After this decision, the cartoonist applied to the ECtHR. The court held that there was no violation of article 10 of the ECHR because the three factors indicated in the third section were taken into consideration during the Court’s assessment. Further, the expressions of the cartoonist morally harm the dignity of American people. This case does reflect a racial discrimination and therefore the cartoon illustrating hate speech is banned.

## Conclusion

Censorship applied by authorization holders has been an impediment against artistic and scientific developments as well as communication tools since early periods of mankind. The application of censorship can be realised for political, economic and similar interests in different levels. Even though censorship had been carelessly used in ancient regimes, the usage of it has been subjected to some limitations in liberal democracies. In other words, it is not arbitrary used at least it should not be used in that way in a liberal democracy.

The progress of freedom of expression has caused the limitations of arbitrary usage of it. In this context, a number of steps have been taken for the protection of freedom of expression against censorship in the realm of law. However, due to the fact that these developments have brought individual rights into the forefront, these rights including freedom of expression sometimes conflict with general public interests. In this point, this paper argued that censorship may sometimes be needed for the protection of public interests such as public morality, national security, territorial integrity, public safety, physical integrity and dignity of persons in liberal democratic societies. Nevertheless, it should not be understood that censorship would be applicable to the rights guaranteed by the European and the Inter-American conventions or domestic legislation of western states. It could only be accepted under the circumstances in which public interests are under threat. The reason why freedom of expression or freedom of assembly could face with censorship is

that the two rights are one of the qualified rights with exceptions. Since they are not absolute rights, censorship may become appropriate in the above-mentioned circumstances.

Pornography is a controversial issue that can be discussed within the context of censorship. Even though there have been so many points of view about the censorship of pornography, no one can deny the fact that obscene materials and child pornography are extreme discourses repudiated as freedom of expression. It is obvious that those extreme materials cause both moral corruption and child abuse. Therefore, censorship could be necessary in these kinds of specific situations.

The second reason justifying censorship is national security. The issue of national security expressed in detail in article 15 of the ECHR has evidential value for the justification of censorship. It is important to note that no one can take advantage of these rights without peace. Territorial integrity is also prominent subject for the achievement of peace and it cannot be distinguished from national security. Additionally, censorship may also be used for public safety that is a crucial notion associating with national security and territorial integrity.

Lastly, hate speech is one of the significant questions in relation to censorship. Written or verbal materials which include hate speech argument can harm the dignity of minorities or some specific groups in a society. Due to the fact that harm does not fall into the free speech arguments, censorship might be applied in order to prevent the emergence of harm or finish it.

To sum up, authoritarian regimes intend to use censorship as a weapon in order to protect administrators' interests. However, censorship should only be allowed for the protection of public interests and this usage of censorship must be proportional and necessary in western liberal democracies.

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# 16

## INTELLECTUAL PROPERTY PROTECTION FOR PLANT INNOVATION: COMPARATIVE ANALYSIS

*Tugba GULES*

**Key Words:** *Intellectual Property Law, Patent, Plant Variety Protection, Biotechnology*

### Introduction

The present study is designed to analyze technological advances in plant innovation and the changing aspects of intellectual property law frameworks. The study aims to contribute to existing knowledge by providing a comparative analysis of the key legal challenges and the resulting implications.

The landscapes of plant genetic resources have been changing since the convergence of intellectual property protection and plant development. Advancements in plant genetics transformed not only the characteristics of plants (e.g., hybrids), and their breeding methods (e.g., molecular breeding) but also the status of plants from being the product 'of' nature to being a product derived 'from' nature allowing legal entitlement to the intellectual property (hereinafter IP) embodied within. This thereby opened the doors for conflicts, ambiguities and changes in the realm of legal discourse.

The potential of plants as a technology platform is increasingly being explored as are the socio-ecological impacts. However, the implications of these changes on existing IP law frameworks remain largely unexplored. Plant variety protection (hereinafter PVP) in particular is one of the least studied forms of IP protection, which is a concern candidly shared by all scholars who are engaged in this topic. Even though there has been very little direct engagement in PVP and existing literature has largely focused on the geo-political

implications, it remains a productive area for exploring the interplay between technological change and the evolution of IP law.

The analysis presented in this study not only reveals the unique challenges of plant innovation but also displays the widening gap between technology in the constant state of evolution on one hand and traditional concepts of patent law on the other. A deeper understanding of these challenges may aid bringing plant innovation debates in line with the realities of scientific research, and might even help making the doctrinal conundrum more traceable.

### **Existing Intellectual Property Framework for Plant Innovation**

Although IP historians backdate the origins of IP rights to as early as the mid-15th Century,<sup>1</sup> the IP protection of new plant varieties is a recent phenomenon. When viewed in retrospect, plant inventions appear to follow a fairly straightforward path from total lack of IP protection up until the turn of the 20th Century to gradually increasing protection by the turn of the 21st Century.<sup>2</sup>

For centuries, several important developments were achieved in plant innovation in the absence of IP protection as plant material had no statutory IP protection in any nation until 1930.<sup>3</sup> The main developments for the IP protection of plant-related inventions were achieved during the last forty years of the 20th Century. Increasingly in recent decades, however, a growing number of countries have been implementing or broadening the scope of IP protection for plant genetic resources. Since then the relative importance of such protection has been a subject of considerable debate.

From the proponent's point of view, IP protection has been the key driving force in recent outpourings of innovative research in plant development. Opponents, however, contend

1 See (Lesser et al., 2007) (“[G]uild members in mid-15th century Venice, averse to direct competition from former apprentices, passed a law prohibiting the apprentice from entering the trade until about 18 years had lapsed. That edict, according to intellectual property (IP) historians, marked the origins of patents. Indeed, the duration of a patent (20 years from date of filing the application) is said to be modeled after that apprenticeship period in long-ago Venice. Yet some easily copied creations were not granted similar IP protection, in Venice or anywhere else, until many centuries had passed. Plants are one example of this”).

2 See (Wright & Pardey, 2006)

3 See (National Research Council, Committee on Managing Global Genetic Resources, 1993, p. 412)

that the provision of such protection is shifting research priorities, and the structure of the industry, resulting in reduced competition, impeding follow-on innovations and the overall reduced social benefits of these investments.<sup>4</sup>

Archibugi and Filippetti (2014) draw attention to the observation that “the generation, transmission and diffusion of knowledge are complex phenomena and both supporters and detractors of IP rights often tend to exaggerate the effects that they have in the economy and society.”<sup>5</sup> As noted by Eaton (2013), any informed perspective on these debates should recognize that there are different interests involved in considerations of IP policy.<sup>6</sup>

The current international landscape for IP protection of plant genetic resources demonstrates the results of continuing complex interactions between many sets of actors, representing many different interests. Although the earlier literature in economics and innovation focused on the competing interests between consumers and innovators interests,<sup>7</sup> there is a growing recognition of the ever increasing differences between innovators and diverse groups of consumers.<sup>8</sup> Diversity of interests presents challenges for arriving at a balanced view of the IP protection systems’ strengths and limitations. In addition, rapid proliferation of the emerging technologies such as information technology, nanotechnology, and biotechnology shows that the impact of the IP system depends on the type of technology itself.<sup>9</sup>

4 For the sake of brevity, it is not possible to cite the diverse literature here, but a few illustrative sources include: (De Schutter, 2009; Donnenwirth, Grace, & Smith, 2004; Fowler, 1994; Kloppenburg, 2005; Overwalle & Geertrui, 2010).

5 See (Archibugi & Filippetti, 2014).

6 See (Eaton, 2013).

7 See (Arrow, 1962, pp. 609–26) and (Nordhaus, 1969, pp. 18–28) (both emphasizing differences between consumers and innovators interests).

8 See (Hilgartner, 2009, p. 197) (“By no means is there agreement among the diverse people and groups active in the increasingly visible politics of intellectual property...Thirty years ago intellectual property seemed to be a topic primarily of interest to a narrow group of specialists. Today, in contrast, intellectual property is widely perceived as a domain where important societal decisions are routinely made. In the 1980s and increasingly in the 1990s, visible public controversies often surrounded intellectual property decisions. Much of the debate centered around areas of rapidly emerging technology, such as biotechnology,... and the patenting of life forms, genes... a growing number of scholars, non-governmental organizations (NGOs), activists, and other observers came to see intellectual property policy as a battleground implicated in far-reaching decisions about the future of contemporary societies and the terms of global governance”).

9 See (Moser, 2013, pp. 23–44. (Explaining that “inventors’ dependency on patents varies strongly across industries, so that radical changes in patent laws may influence the *direction*

This is certainly true in the plant innovation context, where the development of a novel plant variety is carried out by many actors; by farmers, small-medium sized companies, multinational biotechnology companies, as well as publicly funded research institutions.

In this context, farmers are not only consumers, but can also be innovators. Innovators (such as plant breeders and biotechnology companies) are not only competing with each other, but also due to the self-replicating nature of the plants, can be competing with millions of farmers who are also consumers.<sup>10</sup>

Today, it is frequently emphasized that IP protection is vital to the ability of plant breeders, particularly in the plant biotechnology sector to generate a return on costly R&D investments incurred under greater competition.<sup>11</sup> Baum and Silverman (2004) demonstrated that biotechnology start-ups with more patents obtained significantly more venture capital financing. Thus, it appears that venture capitalists are more likely to invest in start-ups with a strong history of patenting.<sup>12</sup>

According to industry representatives interviewed by the US Federal Trade Commission (FTC), the biotechnology industry would not have emerged “but for the existence of predictable patents.”<sup>13</sup> A study by Fuglie et al. (1996) suggested that US private investments in agricultural biotechnology increased fourfold (nominal) in the first twelve years after the *Diamond v. Chakrabarty* decision.<sup>14</sup>

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if not the level of technical change”). See also, (Oguamanam, 2013) (explaining that “IP has differing degrees of suitability for different industrial sectors”); (Pardey, Koo, & Nottenburg, 2004, p. 213) (pointing out that “[t]he impact of a patent system also depends on the type of technology itself. Agriculture seeds have special attributes, most significantly their almost costless reproducible nature, that merit special attention”).

10 See (J. M. Chen, 2006, p. 105 quoting) Chen explains that “plant breeders therefore face two sources of competitive pressure whenever they release seed into the market. Not only must they fend off competing breeders, but every customer is also a potential rival.”

11 See (Haile, 2010), <http://www.genengnews.com/genarticles/ip-position-critical-to-biotech-investment/3235/> (noting that the strength of a company’s intellectual property strategy and position is one of the top three questions posed by investors).

12 See (Baum & Silverman, 2004).

13 See (United States Federal Trade Commission, 2003, p. 35) The report states that “hearings participants from the biotech industry generally credited the Court’s decision in *Chakrabarty* as the beginning of their industry, without which genetic engineering would not have made nearly as much progress.”

14 See (Fuglie, 1996)

According to Janis et al. (2014), “the plants arguably present the strongest of cases for robust IP protection. Elite plant varieties are expensive and time-consuming to produce; yet, once created, they are inexpensive to duplicate. Indeed, in the case of self-pollinating plants, they may replicate themselves prodigiously.”<sup>15</sup>

In other words, because the pure information feature of the invention is embedded in the metabolic process of the plants, access to this information does not preclude ‘a person skilled in the art’ to be able replicate the same elite variety. In fact, self-pollinating plants are self-disclosing by their nature. Since plant breeding is a knowledge-based, comprehensive activity, the self-replicating nature of the product, in effect, reduces the lead time which should be necessary to recoup the costly investments to zero.

Thus, provision of IP protection is an assurance that the risks and high costs involved in creating the innovation will be captured by the innovator.<sup>16</sup> Ultimately the device that enables one manufacturer to gain advantage over another in a market with perfect competition is innovation. What is lost in sharing knowledge, however, is its market value. The traditional paradigms of IP protection were not developed to address the challenges of self-replicating plants. Prior to the advancements in biotechnology, it was considered challenging to prove that the use of the well-known methods involved the exercise of ingenuity; developments in plant breeding did not qualify as inventions. They were considered as mere discoveries. The breeding of a new variety was considered to be obvious and lacking in an inventive step as the methods of plant breeding were practiced in order to produce simply anticipated results since Neolithic times. In addition, plants were not considered as an invention that was capable of meeting the detailed written disclosure and enablement requirements.<sup>17</sup> That meant that the features of a plant invention were not reducible to a written description to allow someone ‘skilled in the art’ to reliably reproduce the new variety. Following a Century long debates on the challenges of fitting

15 See (J. Chen, 2005, p. 110, footnote 26; Janis, Jervis, & Peet, 2014a).

16 See (Crespi & Straus, 1996; Dodds et al., 2007)

17 See (Janis, Jervis, & Peet, 2014b) (“[P]atent law developed against a backdrop of predominantly mechanical inventions, and copyright law developed in an age of print media. Neither seemed a good fit for plants, at least in some minds. For many years, plants were not regarded as being susceptible to detailed written disclosures of the type commonly accepted for mechanical inventions. Moreover, in view of limitations in the state of knowledge of plant genetics, plant breeding was viewed as intuitive and unpredictable, and thus not a good fit for straightforward rules prohibiting duplication”).

plants into the IP landscape,<sup>18</sup> the legal system responded by designing a *sui generis* plant variety protection system explicitly for plants.<sup>19</sup>

Although the PVP system was initially designed for the *exclusive* protection of plant inventions, the quest for stronger protection has led to the introduction of patent protection. Today patents are increasingly being applied to protect plant genomes, plant transformation methods and in some jurisdictions the plants and plant varieties themselves.

The realm of plant innovation is diverse and full of contradictions. Social and economic concerns, particularly over food security, are deeply embedded in the nature of plant innovation, and push the boundaries of the traditional normative view, particularly the one that links the role of IP system singly to its capacity to encourage innovation (regardless of its function in other economic and social sectors).<sup>20</sup> This tension has been repeatedly seen in international agreements affecting plant innovation and access to plant genetic resources in general.<sup>21</sup>

The cumulative nature of plant innovation and its dependence on access to genetic resources, coupled with added pressure from the rapid rate of advancements in biotechnology is pushing the boundaries even further, questioning the very premise of the monopoly privilege of patents over open source sharing mechanisms for further innovation. This is certainly true in the case of the emerging field of plant synthetic biology, which may be defined as the engineering of plant systems.<sup>22</sup>

18 See (Janis & Kesan, 2002) Janis and Kesan point out that “the problem of providing adequate *ex ante* incentives for innovations in plant breeding has vexed the intellectual property community for at least a hundred years... On the other hand, policymakers have long perceived a lack of fit between plant innovation and traditional intellectual property regimes.”

19 See (Reichman, 1994, pp. 2432–2558) See also, (Janis et al., 2014b, p. 11) (“[A]s plant breeding became accepted as a branch of scientific enterprise, and as seed companies and nurseries began to develop, the pressure to extend intellectual property protection to plants began to mount. The legal system’s response proceeded concurrently along multiple dimensions: some “hybrid” intellectual property regimes were designed specifically for plants, and some adaptations to the traditional paradigms were formulated.”).

20 See generally, (Borges Barbosa, Chon, & Moncayo von Hase, 2008; Dutfield, Muraguri, & Leverve, 2006).

21 See generally, (Helfer, 2009; Raustiala & Victor, 2004).

22 See (Deibel, 2014) (pointing out that “the introduction of open source in the life sciences is increasingly being suggested as an alternative to patenting”).

The landscape of plant genetic resources has been changing since the convergence of IP protection and plant development. This is because IP protection both conditions and influences innovation. On the other hand, technological change drives the evolution of the IP system by presenting new challenges and disrupting the balance among the diverse and opposed interests.

### **Intellectual Property Protection for Plant Innovation: Comparative Analysis**

At present providing IP protection for plant varieties is becoming the norm.<sup>23</sup> Article 27.3(b) of the TRIPs Agreement obliges member states of the World Trade Organization (WTO)<sup>24</sup> to provide protection for ‘plant varieties’ either by patents or by an effective sui generis system, or any combination of patents and plant variety protection systems. While the Article expressly permits WTO member states to exclude plants, animals and essentially biological processes from ‘patentability,’ they are specifically obligated to provide ‘patent protection’ for ‘micro-organisms and nonbiological and microbiological processes.’ Thus, all of the WTO member states are bound to provide IP protection in accordance with the obligations set forth in Article 27.3 of the TRIPs Agreement.

Although at the international level the TRIPs Agreement to a certain extent brought a unified character to the standards of exclusion in the area of biotechnological inventions, aside from the mandatory obligations set forth in Article 27.3, the Agreement allows considerable discretion for signatory countries to model their national laws. As will be explained below, member states have adopted different approaches in tune with their national policies, which are more expansive in some than in others.

As a result, there are considerable differences in the scope and treatment of plant inventions among various national jurisdictions. Even though in some jurisdictions, plants as a product are excluded from patentability, plant cells and genes may be eligible for patent protection. Therefore, the concern regarding the patentability of plants is not only

23 See (Llewelyn & Adcock, 2006, p. 1), (“[I]n the 21st century, the provision of plant property rights (mainly in the form of patents and plant variety rights) is regarded as the norm. Indeed, for plant varieties international trade law mandates that such protection must be provided”).

24 See the list of the members of the World Trade Organization, numbering 164 as of August 2016 of which about two thirds are developing countries [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm).

limited to plants themselves, but also refers to the sub-cellular parts of plants, including cells and genes, as well as processes in the production of plants.<sup>25</sup>

These deviations are important for an accurate understanding of the trends in patentability of plant inventions. Therefore, the present section makes a comparative analysis of patent laws and practices relating to plant innovation in the jurisdictions that allow patentability of plant inventions and the countries with major agricultural sectors. Developed and developing countries not only followed different paths in their legal evolution, but also have contrasting approaches to the IP protection of plant genetic resources. The approaches taken by these countries, among the various other reasons, mainly reflect their economic and development needs, which are reflected in three distinguished patterns.<sup>26</sup>

Prior to the 1980s, *sui generis* PVP system was designed as the exclusive form of IP protection of plants. However, with the advent of molecular breeding, the majority of developed countries broadened the scope of patent protection to include plant genetic resources and follow a liberal pattern. Examples of such countries are the US, Japan, Australia and South Korea, while a more contained, modified approach is observed in the EU since it is difficult to address the diverse needs of several members. A similar intermediate approach has also been observed in Canada.

On the other hand, the vast majority of the developing countries have a restrictive approach.<sup>27</sup> Many patent laws adopted in developing countries have excluded the patentability of plant varieties. For instance, the approach taken by India, Brazil, China, Mexico and Argentina represents a more restrictive and narrow scope of patentability of plant inventions.

## Liberal Approach

### Australia

In Australia, there is no explicit provision under the Patent Act No. 83 of 30/10/1990 (as last amended by Act No. 8 of February 25, 2015) which allows technologies in all fields

25 See WIPO Committee on Development and Intellectual Property, Patent-Related Flexibilities In The Multilateral Legal Framework and Their Legislative Implementation at the National and Regional Levels - Part III (Geneva, 2014) CDIP/13/10 REV, [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=270806](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=270806).

26 See (Janis, 2014).

27 See, International Centre for Trade and Sustainable Development, *Resource Book on TRIPS and Development* (Cambridge University Press, 2005), 389.



to be patentable (except “human beings and the biological processes for their production”) provided that there is an “invention,” which is defined as “an innovative idea which provides a practical solution to a technological problem.”

Following *National Research Development Corporation v Commissioner of Patents* (1959), agricultural and horticultural processes are patentable,<sup>28</sup> provided they are not excluded by any other of the “traditional principles” (as referred to in *NV Philips Gloeilampenfabrieken v Mirabella International Pty Ltd*).<sup>29</sup> In addition according to case law established by *Ranks Hovis McDougall Ltd's Application* (1976)<sup>30</sup> a new plant or animal can be regarded as a manner of manufacture if it involves the technical intervention of man and is useful in economic affairs.<sup>31</sup>

Also, a biological entity, such as micro-organisms, may be patentable if the technical intervention of man (i.e., manufacture) has resulted in an artificial state of affairs which does not occur in nature. In *Cancer Voices Australia et al. v. Myriad Genetics Inc.* (2013),<sup>32</sup> it was held that the patentability of isolated nucleic acids “does not turn upon what changes have been made to the chemical composition of such substances as a result of them having been isolated,” thus, naturally occurring nucleic acids that have been isolated are patentable subject matter.<sup>33</sup>

However, there is a different set of provision for innovation patents. Innovation patents have lower thresholds.<sup>34</sup> Under Section 18 (3) and (4) of the Patents Act No. 83 of 1990, plants and the biological processes for the generation of plants are excluded from eligibility specifically for innovation patents which are designed to protect inventions that do not meet the high inventive threshold required for standard patents.

28 See *National Research Development Corporation v Commissioner of Patents* (1959) CLR 252.

29 See *NV Philips Gloeilampenfabrieken v Mirabella International Pty Ltd* (1995) CLR 655.

30 See *Ranks Hovis McDougall Ltd's Application* (1976) AOJP 3915.

31 See Australian Patent Office Patent Manual of Practice & Procedure, section 2.9.2.15 Agriculture and Horticulture and Micro-Organisms and Other Life Forms (2013), [http://www.ipaustralia.gov.au/pdfs/patentsmanual/WebHelp/Patent\\_Examiners\\_Manual.htm](http://www.ipaustralia.gov.au/pdfs/patentsmanual/WebHelp/Patent_Examiners_Manual.htm).

32 See *Cancer Voices Australia et al. v. Myriad Genetics Inc.*, (2013) FCA 65.

33 It must be noted, however, that this case is now on appeal to the Full Federal Court.

34 For more information on the differences between the standard and innovation patents in Australia, see (Janis, 1999, p. 151).

It is possible to apply for an innovation patent on processes that use a plant or part of it but do not result in the generation of a plant. In other words, an innovation patent may still be available for process claims but not for the 'product by process' claims.<sup>35</sup> Furthermore, under the Section 19 (4) of the Patents Act 1990 No. 83 of 1990 the exclusion does not apply if the invention is a microbiological process or a product of such a process.

Plant varieties can be protected under the Plant Breeder's Rights Act 1994 (consolidated as of April 24, 2013 as last amended February 25, 2015).<sup>36</sup> Plant variety *per se* is also patentable.<sup>37</sup>

## Japan

Art. 2(1) of the Tokkyohō [Patent Act], Law No. 121 of April 13, 1959, defines a statutory invention as "a highly advanced creation of technical ideas utilizing a law of nature."

In 1975 the Patent Act was amended in order to allow patentability of chemical compounds and micro-organisms. There is no explicit statutory provision related to plants. Thus, plants and essentially biological processes for the production of plants including breeding methods are in general patentable in Japan, provided the invention fulfills the criteria of novelty, industrial applicability<sup>38</sup> and inventive step,<sup>39</sup> and is properly disclosed.

In 1997, the Japan Patent Office (JPO) published its Implementing Guidelines for Inventions in Specific Fields. Chapter 2 of the Guidelines is entitled "Biological Inventions." According to the Guidelines, inventions in the DNA and biotechnology field can be divided

35 For more information, see <http://www.ipaustralia.gov.au/get-the-right-ip/plant-breeders-rights/pbr-and-other-ip-rights/patents-and-plants/>.

36 [http://www.wipo.int/wipolex/en/results.jsp?countries=AU&cat\\_id=10](http://www.wipo.int/wipolex/en/results.jsp?countries=AU&cat_id=10); The Australian Government deposited its instrument of accession to the 1978 Act of the International Convention for the Protection of New Varieties of Plants on February 1, 1989 and 1991 Act on December 20, 1999 <http://www.upov.int/news/en/pressroom/41.html>.

37 See *The Grain Pool of Western Australia v the Commonwealth* [2000] HCA 14 23 March 2000.

38 With regards to industrial applicability, the Guidelines provide examples of an invention whose utility is not described or cannot be inferred. Japan Patent Office (April 2012) [www.jpo.go.jp/tetuzuki\\_e/t\\_tokkyo\\_e/Guidelines/7\\_2.pdf](http://www.jpo.go.jp/tetuzuki_e/t_tokkyo_e/Guidelines/7_2.pdf).

39 Japan Patent Office (April 2012) "An invention of a plant *per se* does not have an inventive step, where characteristics of the plant created can be easily predicted from the characteristics of publicly known plants within the species to which the plant belong and where the invention does not have advantageous effects that a person skilled in the art cannot foresee."

into four categories: genetic engineering, micro-organisms, plants and animals. Inventions related to plants include “inventions of plants per se, those relating to parts of plants (e.g., a fruit), those of a process for creating plants, those relating to use of plants.” The 2000 ‘Examination Guidelines for Patent and Utility Model’ further confirmed that plants might be protected by patents. Pursuant to the Guidelines that were released on Dec. 28, 2000, undifferentiated plant cells and plant tissue cultures are treated as micro-organisms.

The revised 2012 ‘Examination Guidelines for Inventions in Specific Fields: Biological Inventions’ further clarifies that transgenic plants are also allowable subject matter under Section 32 of the Japanese Patent Act. In 2015, the guidelines for ‘Application Examples of the Specific Technical Fields’ were removed to the JPO’s ‘Examination Handbook for Patent and Utility Model.’ Although plant genes and cells are patentable, it was clarified that “all nucleic acid molecule-related inventions, including full-length cDNAs and SNPs, without indication of function or specific, substantial and credible utility, do not satisfy industrial applicability, enablement or written description requirements.”<sup>40</sup> Plant Varieties are also provided protection under the Plant Variety Protection and Seed Act.<sup>41</sup>

## **South Korea**

There is no explicit statutory provision concerning the patentability of plants in the Patent Act (Act No. 950 of December 31, 1961, as amended up to Act No. 11962 of July 30, 2013). Under the Patent Act, Article 2 subparagraph (1) provides that “[i]nvention means the highly advanced creation of a technical idea using the rules of nature.”

Before the revisions on October 1, 2006, it was prescribed in Article 31 of the Patent Act that a person who invents a new and distinct variety of plants, which reproduces asexually, may obtain a plant patent thereof.

40 See Trilateral Project B3b (ex-24.1)-Comparative Study on Biotechnology Patent Practices (Theme: Patentability of DNA sequences), [http://www.jpo.go.jp/torikumi\\_e/kokusai\\_e/1306-056.htm](http://www.jpo.go.jp/torikumi_e/kokusai_e/1306-056.htm).

41 See Plant Variety Protection and Seed Act (Act No. 83 of May 29, 1998, as last amended by Act No. 49 of May 18, 2007), <http://www.wipo.int/wipolex/en/details.jsp?id=6977>. The Government of Japan deposited its instrument of accession to the 1978 Act of the International Convention for the Protection of New Varieties of Plants on August 3, 1982 and the 1991 Act November 24, 1998, <http://www.upov.int/news/en/pressroom/33.html>. See also, <http://www.hinsyu.maff.go.jp/en/about/overview.pdf>.

This provision has been removed from the Patent Act due to the fact that the language of the provision limited the scope of patentable subject matter of a plant invention by stipulating the requirement of “asexual reproduction.” Thus, the scope of patentable subject matter, as it currently stands, encompasses not only asexually reproducible plants but also sexually reproducible plants as well as plant cells, genes, and breeding methods.

Plant varieties can also be protected under the Plant Variety Protection Act (Act No. 11457 of June 1, 2012, as amended up to Act No. 12062 of August 13, 2013).<sup>42</sup>

## United States

Although there is no explicit statutory provision for utility patents (*cf.* 35 USC. § 101), plants can be protected by utility patents as per the decisions in *Diamond v Chakrabarty* (1980)<sup>43</sup> and *J.E.M. Ag Supply v. Pioneer Hi-Bred International* (2001).<sup>44</sup> Plant genes and micro-organisms are patentable as long as they possess utility.<sup>45</sup> However, one cannot get patents on genes *just by* isolating them from nature.<sup>46</sup>

In addition, asexually reproduced plants can also be protected by plant patents (35 USC. § 161). Plant varieties can also be protected by plant variety protection (7 USC. § 2321).<sup>47</sup>

What follows from the above review is that, in the United States, Japan, South Korea and Australia, patent protection is available, in principle, for new varieties of plants, transgenic plants, plant groups, plant products such as fruit and oils, plant materials used in the industrial processes (e.g., cell lines used in cultivation methods), propagating material

42 <http://www.wipo.int/wipolex/en/details.jsp?id=13731> Korea deposited its instrument of accession to the 1978 Act of the International Convention for the Protection of New Varieties of Plants on 7 January 2002. <http://www.upov.int/news/en/pressroom/49.html>.

43 *Diamond v Chakrabarty*, 447 US 303 (1980).

44 *J.E.M. Ag Supply v. Pioneer Hi-Bred International*, 534 U.S. 124 (2001).

45 See *In re Fisher*, No. 04-1465 (Fed.Cir. September 7, 2005); *In re Kubin* No. 09-667,859 (Fed. Cir. April 3, 2009).

46 See *Ass'n for Molecular Pathology v. Myriad Genetics, Inc. (Myriad IV)*, 133 S. Ct. 2107 (2013).

47 The United States became a party to the 1978 UPOV in 1981 by Executive Agreement. See H.R. Rep. No. 103-699, at 9 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2423, 2425. The United States signed the treaty in October 1991, but did not submit the treaty to the Senate for ratification until late 1995. Convention for the Protection of Plants, S. Exec. Rep. No. 105-15, at 1 (1998). The United States deposited its instrument of ratification on January 22, 1999, and it became effective on February 22, 1999. See Press Release No. 35, UPOV, Ratification by the United States of America of the 1991 Act of the International Convention for the Protection of New Varieties of Plants (Jan. 22, 1999).

(i.e., seeds or cuttings), particular plant traits, plant parts, plant components such as specific genes or chromosomes, plant culture cells, plant breeding methodologies, and vectors and processes involved in the production of transgenic plants. Clearly, these states' IP laws provide a broad scope of protection. In addition, all of the above states are parties to the 1991 UPOV Convention (the International Convention for the Protection of New Varieties of Plants),<sup>48</sup> thus UPOV model *sui generis* plant variety protection is available and allows dual protection for plant varieties under both patents and PVP.<sup>49</sup> As explained below, the EU and Canada on the other hand follows a less permissive approach.

## Modified Approach

### Canada

There is no explicit statutory provision concerning the patentability of plants in the Patent Act (R.S., 1985, c. P-4, Act current to 28/02/2011).

As per the decision in *Re Application of Abitibi Co.* (1982)<sup>50</sup> unicellular micro-organisms are patentable as are processes to produce life forms. Whole plants (higher life forms) do not constitute patentable subject matter. This does not affect the patentability of components of whole plants and does not limit the scope of claims over those components to less than the whole plant (lower life forms).<sup>51</sup>

Genes are patentable because they are considered chemical compounds. Claims spreading over genes extend to the entire organism despite the non-patentability of higher life forms. Thus, while *de jure*, whole plants cannot be patented, *de facto*, they can through claims over plant genes or cells.<sup>52</sup>

48 "UPOV" is the French acronym for "Union pour la Protection des Obtentions Végétales."

49 See *J.E.M. Ag Supply v. Pioneer Hi-Bred International*, 534 U.S. 124 (2001). See also, (Smyth, Phillips, & Castle, 2014, p. 510)

50 See *Re Application of Abitibi Co.* [1982], 62 C.P.R. (2d) 81.

51 See *Harvard College v. Canada* (Commissioner of Patents) [2002], 4 S.C.R. 45.

52 See *Monsanto Canada Inc. v. Schmeiser* [2004], 1 S.C.R. 34. See also, Chapter 17, Manual of Patent Office Practice, [http://www.cipo.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h\\_wr00720.html](http://www.cipo.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr00720.html); See also, Barbosa, D., and K. Grau-Kuntz. *Exclusions from patentable subject matter and exceptions and limitations to the rights-biotechnology*. (WIPO/SCP/15/3), 2010, [www.wipo.int/edocs/mdocs/scp/en/scp\\_15/scp\\_15\\_3-annex.pdf](http://www.wipo.int/edocs/mdocs/scp/en/scp_15/scp_15_3-annex.pdf), 2010.

## European Union

Under the Article 53(b) of the European Patent Convention and the European Biotech Directive, 98/44/EC, which harmonized the rules concerning patent protection for biotechnological inventions,<sup>53</sup> plant variety *per se* and essentially biological processes for the production of plants are not patentable.<sup>54</sup> However, a plant which is characterized by a particular gene (as opposed to whole genome) is patentable. Furthermore, transgenic plants if they are not restricted to a specific plant variety are patentable, and plant cells that are considered to be “microbiological products” are patentable. Transformation processes are patentable as well.<sup>55</sup>

The protection conferred by a patent on a product containing or consisting of genetic information does not extend to material in which the genetic information does not perform its function.<sup>56</sup> The exclusion of essentially biological processes in Article 53 (b) of the European Patent Convention does not extend to product claims or product by process claims.<sup>57</sup>

As can be seen from the above review, even though *in principle* the scope of patent eligibility for plant variety *per se* and the whole plant is restricted, in application, the judicial interpretations suggest a more permissive approach.<sup>58</sup> In addition, the patentability

53 See Convention on the Grant of European Patents, art. 53(b), Oct. 5 1973, as revised Nov. 29, 2000, 1065 U.N.T.S. 254, <http://www.epo.org/law-practice/legaltexts/html/epc/1973/e/ar53.html>.

54 See EU Biotech Directive (“(29) Whereas this Directive is without prejudice to the exclusion of plant and animal varieties from patentability; whereas on the other hand inventions which concern plants or animals are patentable provided that the application of the invention is not technically confined to a single plant or animal variety; (30) Whereas the concept ‘plant variety’ is defined by the legislation protecting new varieties, pursuant to which a variety is defined by its whole genome and therefore possesses individuality and is clearly distinguishable from other varieties; (31) Whereas a plant grouping which is characterized by a particular gene (and not its whole genome) is not covered by the protection of new varieties and is therefore not excluded from patentability even if it comprises new varieties of plants; (32) Whereas, however, if an invention consists only in genetically modifying a particular plant variety, and if a new plant variety is bred, it will still be excluded from patentability even if the genetic modification is the result not of an essentially biological process but of a biotechnological process.”), [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_1/wipo\\_grtkf\\_ic\\_1\\_8-annex1.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_1/wipo_grtkf_ic_1_8-annex1.pdf).

55 See The European Biotech Directive, 98/44/EC, Sections 29, 30, 31, 32 and *Novartis II/Transgenic Plant*, [2000] E.P.O.R. 303, 319.

56 See *Monsanto Tech. LLC v. Cefetra BV*, 2010 E.C.R. 7, Case C-428/08.

57 See State of Israel-Minister of Agriculture/Tomatoes, G2/12; Syngenta Participations AG/Broccoli, G2/13 (Enlarged Bd. of Appeals of the EPO, March, 25, 2015).

58 See (Janis, 2014, p. 220). Janis explains that “the European Patent Convention, Article 53(b), includes what appears on its face to be a robust exclusion of both ‘plant varieties’ and ‘essentially biological

of plant cells or genes as well as technical transformation processes are generally allowed. Although separate protection is also available for 'plant varieties' through plant variety protection both in European Union and Canada,<sup>59</sup> dual protection is not permitted as in the US, Australia, Japan or South Korea.

### **Minimum Standards Provided by TRIPs**

In contrast to those jurisdictions that have been reviewed so far, a more restrictive approach to the patentability of plant inventions has been adopted by the following countries. Although the provisions provided by the respective legislatures do not conform to a uniform standard, when reviewed together, their pattern shows that they all modeled their national laws within the limits of the minimum standards required by the TRIPs Agreement. Before proceeding to review each country's legislative provisions, it is useful to recall the obligations set forth in the TRIPs Article 27.3(b). According to a literal interpretation of this provision, four possible implementation alternatives are identified.<sup>60</sup>

As depicted in the legislative provisions of the following jurisdictions, the scope of patentable subject matter do not extend beyond the mandatory obligations required by the TRIPs agreement. In addition, in all of the following jurisdictions, plant varieties can only be protected through plant variety protection systems.

### **Argentina**

National law excludes plants, animals and essentially biologic procedures from patentability.<sup>61</sup> Micro-organisms are only patentable (VIII, § 4g) if they conform to the usual positive patenting conditions.

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processes for the production of plants.' Experience has demonstrated that the European Patent Office has a more mixed normative commitment to excluding plant innovation from the utility patent system than this language might seem to project."

59 See EC Council's Regulation on Community Plant Variety Rights, No. 2100/94 of 27 July 1994; Canada deposited its instrument of accession to the 1978 Act of the International Convention for the Protection of New Varieties of Plants on March 4, 1991 and more recently amended the Plant Breeders Rights Act to include provisions that bring it into line with the 1991 Act which came into force on February 27, 2015. More information is available at <http://laws-lois.justice.gc.ca/eng/acts/P-14.6/index.html>.

60 See (Dutfield, 1999).

61 Article 6(g) and 7(b) of the Law No. 24.481 of 23/05/1995 on Patents and Utility Models (as last amended by Law No. 25.859).

Plant varieties can be protected under the Law No. 20.247 of March 30, 1973, on Seed and Phyto-genetical Creations.<sup>62</sup>

## **Brazil**

National law excludes patents for all or parts of the plant except the transgenic micro-organisms<sup>63</sup> that fulfill the three patentability conditions which are novelty, inventive activity and industrial applicability.<sup>64</sup> Plant varieties can be protected under the Law No. 9.456 of April 28, 1997 (Plant Variety Protection Law).<sup>65</sup> Under the Ordinance No. 005/2012 the patenting and licensing of genetic technology of restrict use and derived products, as well as the products applicable to the soybean culture, that is, any process of human intervention to the generation or multiplication of genetically modified plants to produce sterile reproductive structures and any form of genetic manipulation aimed at the activation or deactivation of genes related to fertility of the plants by external chemical inducer are prohibited.

Therefore patenting or licensing of the technologies within the above defined scope may not only violate the Brazilian Biosafety Law (Law No. 11,105/05) and the Law on Genetically Modified Soybean (Law No. 10,814/03), it is also punishable with up to two to five years of imprisonment as a crime.

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62 Argentina deposited its instrument of accession to the 1978 Act of the International Convention for the Protection of New Varieties of Plants on November 25, 1994 which came into force on December 25, 1994. <http://www.wipo.int/wipolex/en/details.jsp?id=74>.

63 According to Article 18 of the Brazilian Law, transgenic microorganisms are organisms, except the whole or part of plants or animals that express, through direct human intervention in their genetic composition, a characteristic not normally attainable by the species under natural conditions.

64 Article 10 (IX) and 18 of the Industrial Property Law No. 9.279 of 14/05/1996 (as last amended by Law No.10.196, of 14/02/2001). See also, Brazilian Guidelines for Examination of Patent Applications in the areas of Biotechnology and Pharmaceuticals filed after December 31, 1994, published in the Industrial Property Journal No. 1648 of August 6, 2002. Section 2.28.2.

65 <http://www.wipo.int/wipolex/en/details.jsp?id=517>. Brazil deposited its instrument of accession to the 1978 Act of the International Convention for the Protection of New Varieties of Plants on April 23, 1999 which came into force on May 23, 1999 see [http://www.upov.int/upovlex/en/text\\_notification.jsp?id=74](http://www.upov.int/upovlex/en/text_notification.jsp?id=74).



## China

Plants and plant varieties are not patentable. However, production methods are patentable.<sup>66</sup> Transgenic plants are not patentable. Neither are micro-organisms and genes or DNA fragments existing in the nature are considered as scientific discoveries; however, they are eligible for patenting in isolated form as per Section 9.1.2.4, Chapter 10, part II of the Guidelines to Examination of Patents in People's Republic of China (2010).

Plant varieties can be protected under the Regulations of the People's Republic of China on Protection of New Varieties of Plants (promulgated by Order No. 213 of March 20, 1997, of the State Council of People's Republic of China).<sup>67</sup>

## India

National law excludes from patentable inventions the following: plants and animals in whole or any part thereof *other than micro-organisms* but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals.

Biotechnological processes are patentable, even if the end product of the process contains a living organism.<sup>68</sup> Also, there is no barrier to the issuance of a patent for making and duplicating an organic product by a nonbiological process.<sup>69</sup> In addition, plant varieties can be protected under the Protection of Plant Varieties and Farmers' Rights Act, 2001.<sup>70</sup>

## Mexico

National law excludes from patentable subject matter "biological elements found in nature, including naturally occurring DNA and proteins... essentially biological processes for obtaining, reproducing and propagating plants... plant varieties."<sup>71</sup>

66 See Article 25(4) of the Patent Law of 28/12/2008.

67 <http://www.wipo.int/wipolex/en/details.jsp?id=846>. China deposited its instrument of accession to the 1978 Act of the International Convention for the Protection of New Varieties of Plants on March 23, 1999 which came into force April 23, 1999.

68 See *Dimminaco A.G. v Controller of Patents & Designs*. Calcutta High Court, case No. 268/2002, January 15, 2002.

69 See *Speaking Roses International Inc. v. Controller General of Patents and Anr.* 2007 (109) Bom L R 630.

70 <http://www.wipo.int/wipolex/en/details.jsp?id=2401>. India has initiated UPOV membership but has not deposited its instrument of accession.

71 Article 16 (I), (II), and (V) of the Industrial Property Law of June 27, 1991 (as last amended on 09/04/2012).

Plant varieties can be protected under the Federal Law on Plant Varieties.<sup>72</sup>

## Conclusion

As can be seen from the above review, when compared to the liberal approach in the US, Japan, Australia, South Korea and the modified approach followed in the EU and Canada, the scope of protection provided by the above states is narrower. The divergences in the level of flexibility between the states in the above three categories can be best summarized in the context of the specific provision for plant varieties set forth in Article 27.3(b) of the TRIPs Agreement. As stated earlier, WTO member states have the option to meet their obligation to provide IP protection for plant varieties either by patents only, or by an effective *sui generis* system or a combination thereof. While the states that follow a liberal approach permit a combination of both patent and plant variety protection, the states that have an intermediate approach only allow plant variety protection the same as the states that provide minimum standards.

The strength and scope of protection of plant inventions differs considerably between the patent system and PVP system; patents confer broader monopoly privileges. Taken together, the prevalent approach to patentability of plant invention (with the exception of the states that follow a liberal approach) depicts the broad policy considerations in limiting the scope of IP protection for plant innovation.

However, the scope and interaction of IP protection for plant innovation is becoming more complicated with the advances in scientific plant breeding, which not only challenge the core rules and scope of protection employed in the IP systems but also continually ensuing in various patentable processes employed in plant development.

As explained earlier, the fact that plant innovation did not seem to fit the conceptual limits of the existing IP systems was the underlying reason that led to the design of *sui generis* PVP to address these limitations. In contrast to PVP that protects the plant variety as a whole entity and its intrinsic value, patent protection looks for its intended use and may cover its parts and transformation processes. In fact, the protection afforded by a plant

<sup>72</sup> [http://www.upov.int/upovlex/en/text.jsp?file\\_id=224281](http://www.upov.int/upovlex/en/text.jsp?file_id=224281) Mexico deposited its instrument of accession to the 1978 Act of the International Convention for the Protection of New Varieties of Plants on July 9, 1997 which came into force on August 9, 1997.

variety right is perhaps more akin to that of copyright than to traditional patent protection. The reasoning behind this conclusion is the fact that PVP was primarily designed to protect the breeder from competition by commercial users of the protected variety and only incidentally from other plant breeders who breed the variety independently on their own. In addition, both PVP and copyright cover a whole entity (and not its parts), they do not protect its intended use, but its intrinsic value. PVP as a *sui generis* IP system, however, neither fits completely into copyright nor patent paradigms. This is because copyright law's infringement regime coexists with a traditional fair use doctrine, whereas PVP infringement provisions are subject to different and more extensive infringement exemptions.

Although both the patent system and PVP system aim to promote plant development research and foster the industry that supports it, the extent of protection reflects that the patent system strengthens the position of the investor, while the more limited scope of protection conferred by PVP illustrates the emphasis on further research and development in new varieties.

PVP right holders can only control propagating materials of the protected variety, such as the multiplication and sale of seeds, whereas patent holders may have the right to ownership claims over not only the propagating material, but also the genetic information and industrial processes. This in turn results in greater control and monopoly privileges than those conferred with PVP certificates because multiple features and phases of a plant invention can be claimed with patent protection.

In addition, each system differs with regards to checks and balances. The stakes are high and difficult to reconcile, particularly for the plant breeding industry and the farmers. Because PVP is tailored for specific conditions of plant development, it incorporates more problematic aspects of patent protection of plant varieties. Farm-saved seed exemption provided with PVP is neither perfect nor costless, but in comparison to patent system's checks and balances, PVP provides more public interests flexibilities. In addition, absence of a corresponding breeder's exemption in patent laws is also a major limitation.

The differences between the patent system and PVP have broad implications on innovative activity. Patent protection appears to have negative effects on research priorities, and the structure of the industry, resulting in reduced competition and impeded follow-on innovations.

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# 17

## THE GENIUS & THE IMBECILE: DISENTANGLING THE 'LEGAL' FRAMEWORK OF AUTONOMY IN MODERN LIBERAL EUGENICS, FROM NON- THERAPEUTIC GENE ENHANCEMENT USE IN GENE EDITING TECHNOLOGIES

*Lau Pin Lean*

### ***Abstract***

*This paper intends to gravitate into a brief exposition of the framework of 'liberal eugenics' (often described as the more liberated, compassionate form of eugenics, distinguishing itself from the pejorative eugenics movements of the past, by employing an autonomous nature of decision making vis-à-vis parents and beneficiaries), considered from the perspective of non-therapeutic uses of gene editing technologies. Where emerging technologies (such as the gene editing technology known as CRISPR/Cas9) are concerned, democratic innovations need to be balanced against a social movement of a non-radical nature in the interest of enlightened medical discourse; taking into account that the variables of each regulatory space is often inundated with issues such as plurality, different ideals of morality and public opinion, and the determination of stewardship responsibilities, amongst others.*

*Specifically, this paper intends to extrapolate on the 'legal' formulation of the modified concept of 'autonomy' that is central to the liberal eugenics paradigm. In essence, it has been described as 'liberal' because the underlying justification for a selection process excludes intervention from a State, and centralizes the role of the family as the key decision-maker in adjudging the proprieties of both therapeutic and non-therapeutic medical treatments.*

*However, this paper hypothesizes that notwithstanding this 'gift' of autonomy, the legality of the concept in itself continues to raise the more discursive issues relating to gene modification/enhancement debates, germ-line modification, the savior sibling dilemma, distributive justice/access, disability, and considerations of primary/personhood of a human being, amongst others. This paper poses that the autonomous*

*element in liberal eugenics may be an illusory disguise to escape the shackles of past negativities, and may still require a more holistic and reflected discourse as part of a regulatory or governance framework.*

## Introduction

I have a distinctly vivid memory from my childhood; I am seated on a leather-covered stool, a resplendent deep maroon in colour, embellished with shiny, brass studs around the edges. Before me, the smooth, silken-like polish of my Weinbach piano; and it was here I spent most of my sunny afternoons, a five-year old child, perched on my stool, struggling to let my smallish fingers fly across the ivory keys to the melodic gavottes of Bach, or the ferocious cantatas of Schubert. From my Weinbach piano, I moved on to the quintessential rock-star's tools (guitars): the harmonious frequencies of a Takamine, the edginess of a Fender Stratocaster and the blissful peace of a Kohala tenor. And when the digital age became the focus of modern lives, I gleefully exercised my musical inclinations, using my beloved instruments in conjunction with sophisticated music-making software and applications, furiously writing original pieces with the ease of technology. In present day, many years from the time of my recollection, music has become an integral part of my life, one that I cannot envisage my existence without. And now, I question, how much of the integration of music into my life, was actually through my own personal volitions? As a child, was I equipped with the appropriate mental and emotional faculties to determine the 'goodness' of a particular activity and the impact that it would have on my future? Or did I simply brave the tides of *'que sera, sera'* and trusted that the choices my parents made for me, would be for my personal benefit? In this manner, is the sense of 'autonomy' I now exercise in my musical choices, a product of birth, predilection or gravitational ease, or did it stem from the little pushes and prods of my parents in my formative childhood years?

If we were to answer this question, with the benefit of reflection of years in hindsight, and choose to resonate with J.S. Mill's concept of human liberty, (Mill, 1869) it is simply that children, in their own right as small persons, do not possess the necessary wherewithal to exercise personal liberties (Stanley, 2017). Whether there is a measure of truth in this abstraction, must be left to an alternative forum. It suffices to state that, although there is some length and breadth of scholarship that seeks to critique the Millean exclusion of children (Mill, 1869, p. 89) from the discourse on the development of the self, and the

factorial importance of liberty and autonomy in this development, the lack of “sustained analysis” (Stanley, 2017, p. 50) in this area points to the correctness of Mill’s engagement on liberty (Stanley, 2017, p. 50). Other scholarly expositions have levied the accusatorial judgment upon Mill by postulating on the persistence of moral and legal paternalism; (Simões, 2011) rejecting the notion that “adult autonomy” (Stanley, 2017, p. 49) is a legitimate means of imposing one’s choice over another person, namely, the child. If one were to accept the critiques on Mill’s endorsement of a watered-down version of paternalism, then it must also logically follow that these critiques would similarly find disparagement in the parental exercise of decisions over their own offspring, which would then escort us beyond the exploration of naturally and socially accepted parental responsibilities.

In attempting to dissect the anatomy of these broad questions, this paper is essentially an exercise to bring us closer to our understanding of the concept of autonomy, and the decisions made in furtherance of that autonomy, based on the plethora of choices presented to us. In particular, this paper is interested in the scope in which parental autonomy (or adult autonomy) is exercised within the sphere of ‘liberal eugenics’ (Agar, 1998), first delving into the general framework of liberal eugenics and its apparent legitimacy and legality permeating of a eugenics purpose. Secondly, the paper will weave the discourse on liberal eugenics and its main component, autonomy, within the configuration of advanced scientific and medical technologies, focusing specifically on gene editing technologies (gene enhancements) and Pre-implantation Genetic Diagnosis (“PGD”) used for non-therapeutic, non-medical purposes. Thirdly, the paper presents the hypothesis that the concept of autonomy in the convergence of these scientific advancements may simply be an illusion or disguise in favour of individual (parental) reproductive liberty and equality, because the more discursive issues (including the gene enhancement / modification debates, distributive justice and equality of access, disability rights, and the considerations relating to the primacy and personhood of human beings, amongst others) tells us otherwise. It is not possible, however, to plunge into a detailed investigative etude of each of these human rights concerns, and hence, the focus drawn will be briefly transposed in relation to a selection of these determinants. Finally, the paper calls for a reconsideration and re-evaluation of the concept of autonomy in liberal eugenics, especially from a legal perspective, on the basis of these increasingly discursive human rights considerations. An attempt to justify a restriction on full scale and complete autonomy and liberty in the non-therapeutic

use of these technologies is sought; through the imposition of a holistic, reflected and well reasoned regulatory or governance framework.

Therefore, how do we then begin to demonstrate the trajectory of autonomy in children, or, more specifically addressed in this paper, future offspring? Should we choose to accept, that as a child, I may have been ‘directed’ into a certain future plan by my parents, or is this simply a by-product of the natural ripples of parenting? The views in response to this question will undoubtedly be polarized by the affectations of our understanding of the concept of autonomy, and to whom it extends, with or without justifiable exclusion. Dare we be so bold as to say that parental decisions made for the welfare of their offspring, is usually motivated by a desire to provide ‘the best’ (in their reasoned opinion)? Dare we further say, that the innate desire to want ‘the best’ may disturbingly run close to some form of eugenics when it becomes humanly feasible to bestow upon this future offspring an actual ‘the best’ of human characteristics? These dialectic questions test the foundational tenets of autonomy, which is by no means, an alien concept in moral and legal philosophy. Although by its presentation, one is likely to recognize that a certain thing requires ‘autonomy’ on the part of the person exercising such decision, it is more difficult to conceptualize and distill the spherical scope of autonomy in different facets of everyday lives, particularly where children or future offspring are concerned. As a notion that continues to dominate debates cross-cutting the necessity of medical treatment and individual decision-making processes, for example, the elevation of liberty and autonomy to a “supreme status” (Coggon & Miola, 2011) is likely to stop one’s vehemently contradictory view in his or her tracks, a form of ‘conversation-stopper’ in that sense.

### **Homemade ‘Kitchen’ Eugenics and the Birth of “Liberal Eugenics”**

In an age where the digitalization and proprietization of information, knowledge, and opinions, amongst others, reign as the fruitful successes of technological advancement, the simultaneous thrill and trepidation in medical sciences and technologies bring forth a squall of new ontological questions. They raise calculated possibilities for a new era where parents may truly give their children ‘the best’, vis-à-vis new lines of inquiry and knowledge in the human genome that not only have the capacity to treat previously-untreatable diseases of a genetic nature, but on perhaps a more macabre level, to “fulfill the longstanding dream of the eugenics movement.” (Kevles, 1999) Let us now not delve into the most

trampled aspects of human rights, in Hitler's eugenics agenda of the Nazi movement during the Second World War, or the judgment of Justice Oliver Wendell Holmes in *Buck v Bell* (D. Galton, 2002, p. 58) in the United States (all of which have ruefully earned the term 'eugenics' its pejorative and despicable connotation); instead, let us choose to reflect on whether the continuing advancement in human genomics in our present time may signal the emergence of a 'new' eugenics. (Kevles, 1999, p. 90) Within the midst of prodigious titillation that new genomic developments and technologies may "yield a powerful arsenal of therapies and cures", (Kevles, 1999, p. 85) it is perhaps convenient to overlook the potential perils of misusing these ground-breaking genomic technologies where non-therapeutic applications are concerned, for example, relating to human enhancement. Or perhaps it is simply more agreeable to the palate, to trust that as human beings, we would not allow our basal Promethean hubris to 'remake nature', to overshadow the prime importance of treating and eradicating human conditions and diseases. In democratizing our abilities to make potentially better decisions about non-therapeutic medical treatments, the importation of a liberal element to 'new' eugenics (Agar, 1998) pronounce elevated claims about how we choose to view the concept of autonomy by shifting the responsibility of decision-making onto potential individual parents, instead of the state.

Enter CRISPR/Cas9, a revolutionary genome editing tool touted to be the latest breakthrough in the history of medical technologies, holding a vast wealth of promise and a battery of potential medical applications and interventions into human genes. [CRISPR is the abbreviation for Clustered Regularly Interspaced Palindromic Repeats, a "unique organization of short repeated DNA sequences found in the genome of bacteria and microorganisms" ("CRISPR," 2014), including human beings. Cas9 is an enzyme that occurs within our biological systems and in conjunction with a modified form of CRISPR vis-à-vis technology designed by scientists, is used as a pair of molecular scissors to cut or 'edit' strands of DNA; in this instance, parts of the DNA which contains abnormal or mutated genes]. With a capacity to 'edit' out genetic abnormalities, mutations and defective genes in human cells, CRISPR/Cas9, which has already been tested with success in early human embryos earlier this year, (Le Page, 2017) (in addition to dominating the legal, ethical and moral implications of genetic enhancements), also proves to be a formidable opponent in the consideration of future offspring conceived through in-vitro fertilization ("IVF") and pre-implantation genetic diagnosis ("PGD"). The intersection of science, ethics and medical treatment at this converging point in the future fate of pre-implantation

embryos, places a viscous strain on the already-proliferating legal, ethical and moral arguments about CRISPR/Cas9 and its intervention into the framework of life as we know it; and, with this, the recognition, that the more pompous we become about our achievements and advancements in modern societies that embody the cosmopolitan community of rights afforded to all of us, the more we spiral towards the eugenics direction that we seek to distance ourselves from.

The potentiality of damage through the proffering of choices and options that may come with CRISPR/Cas9 in non-therapeutic use, and without discounting the prospective abuses that may chance, allows the perforation of our thinly-veiled strives for a form of inconsequential perfection of human nature. This is considerably more acute when we think about potential uses (or misuse) of CRISPR/Cas9 in current reproductive technologies, specifically PGD. Intended from the outset to be a genetic diagnosis testing mechanism prior to the implantation of an embryo in the process of IVF, PGD has been subject to considerable debates regarding its propriety since the 1980s (Botkin, 1998). Bio-conservatives and dystopian theorists alike have warned of the impending erosion of humankind in the event the combination of these technologies could be easily available and result in a 'designer baby' normative (Stankovic, 2005). The imagination runs wild with the notion that technologies may someday allow us to 'design' the 'perfect' child, not simply one that is free from disease and illness, but also one that embodies the 'perfect' attributes (Brock, 2009). Brock disputes that there is no such thing as 'perfection' and that this ideation is relative to the experience and values of parents who make that judgment of 'perfection') that helps him or her succeed in life (Turriziani, 2014). The present scientific narrative, however, takes a more grounded view, citing that these fears remain theoretical in nature, and as advanced as medical technologies are at the moment, the fear of a future of designer babies is unfounded (Yong, 2017). Of course, this theoretical narrative would only be possible if we choose to accept a complete, unfettered imposition of autonomy indiscriminately respecting of (reproductive) liberty and choice. On this basis, the modified formulation of liberalism in eugenics, enabling a creeping entry of what may be perceived to be an advantageous exercise of will and liberty on the part of potential parents may not be as simplistic as it sounds. The continued emergence of highly-discursive issues raised by the idea of non-therapeutic human enhancement in liberal eugenics, signals that the concept of autonomy in the latter, is merely a stop-gap measure and temporary treatment of the symptoms of an underlying disease (one that tirelessly strives

for an ideation of ‘perfection’), that continues to fester in a cesspool of uncertainty absent the stability of a regulatory or governance framework.

It would not be difficult to imagine this scenario: a couple sitting at their kitchen table, hands entwined, elated at the successful oocyte retrieval of the wife, both of them parleying the possibilities of what their future offspring would be like upon successful fertilization with the husband’s sperm in in-vitro fertilization (“IVF”). “If he has your height, he could become the next Kobe Bryant!” she would say. “With your brains and intelligence, he’d be a successful corporate lawyer like you, and make plenty of money!” he would reply. Cue, happy laughter. In all instances, this would be nothing more than a regular conversation between a husband and wife, excited and hopeful to welcome all possibilities of a new child, picturing the idyllic future their offspring would have. Would this scenario be arguably be more concerning, however, if said couple found themselves in the position of being able to realize the characteristics of the future child they would want? “Would you like blue eyes or brown?” she would ask, leafing through the pages of a catalogue of ‘desirable’ characteristics. “I don’t care; I’d prefer if she could be a musical prodigy, preferably violin or cello, become world-famous and sell-out shows at Carnegie and the Royal Albert Hall,” he would reply. “And we must make sure she doesn’t have that tiresome polycystic kidney disease that runs in your family. Remind me to tell our doctor that.” The question I would now pose, is to ask what commonalities or differences can be ascertained from these two scenarios. The difference lies in the simple fact that the first scenario is an aspirational visualization; the second is the ability to convert that aspirational visualization into reality, with the appropriate resources. In both circumstances, whether we choose to acknowledge it, is that eugenics works its mysterious will. In both cases, I’d refer to the commonality of one underlying theme: homemade “kitchen” eugenics, where a discussion between family members at the kitchen table is imbued with unsuspecting hints of eugenics fashion. A third scenario, however, is more bleak and somber in outlook, where these ‘eugenics’-type decisions are made by parents, regarding the treatment of genetic conditions, or diseases, that have a high likelihood of being transmuted to a future offspring; in other words, for therapeutic purposes or medical treatment. This third scenario is beyond the scope of this presented discourse, and is not in contention in this paper, because the outcome of the decision-making process is based on the presumption to ensure the health and welfare of a future offspring, free from debilitating illnesses, diseases, or genetic conditions that may hamper his or her experience of human

life, what is commonly termed as ‘therapeutic’ treatment, ‘correcting’ an abnormality or defective component in the genetic makeup of the prospective offspring that would prevent them from functioning in their lives.

It must be made abundantly clear, that this paper is not a wholesale opposition to contemporary interpretations of what it means to engage in eugenics, neither is it an opposition to decision-making processes exercised by parents for their offspring. The demonstration that is sought here, is that the term, in itself, is one loaded with evocations of humanity’s behavior at its worst in the understanding of our historical accounts. Additionally, the hesitation to use the word ‘eugenics’ is an understandable one, but the fallacy of humankind is to presume that we do not make eugenics-based decisions in our daily lives. In its ordinary historical meaning coined by Sir Francis Galton, eugenics means “well-born” or “of noble race”, the study “of conditions under which men of a high type are produced” (F. Galton, 1883). The historical orbit of the theory of eugenics that we now know of, has been systematically characterized by an over-zealous commitment to the (perhaps misconceived) betterment of human citizens in a particularized society in a state. Notwithstanding the absence of a unified, single theory about the social philosophy of eugenics, historical accounts have demonstrated to us that the saturation of eugenics’ components have influenced a variety of state-sanctioned eugenics practices. Contrary to popular belief, the dark history of eugenics did not begin with the Nazi regime. The latter had, in fact, been influenced by the early eugenics movements in the United States in the late nineteenth century that began with the Chinese Exclusion Acts of 1882 and 1902 (D. Galton, 2002, p. 91). The general drive to enhance the improvement of society, throughout the course of eugenics’ history, has been marred by forced sterilization programs, mass murders and euthanizations, all of which acutely violate an individual’s fundamental right of “life, liberty, or property”, (Stone, Seidman, Sunstein, Tushnet, & Karlan, 2005. See: the Fourteenth Amendment of the United States Constitution) and viewed through the lens of modern constitutional jurisprudence, is even more appalling because of the fact that these were state-sanctioned. This is conspicuously ironic, because it is often accepted that the role, purpose and responsibilities of government or state, is, first and foremost, to protect its citizens (Heyman, 1991). But governments, state or federal, are often suffused with volatility, and we are no strangers to the reality of cronyism, mismanagement, corruption and tainted ideological or political agendas; and governments, like any changeable artefact in the corporeal world, can be overthrown or simply, fail in its duties and responsibilities.



On this basis, it is facile to accept that a shift in the paradigm of decision-making, a gift of autonomy to individuals in the body of citizenry, is a most attractive ideal, even if the underlying connotations swim the turbid waters of eugenics. From as early as the late 1930s, attempts were made within the European context (with specific reference to Germany), to found a more liberating form of developing eugenics philosophy. Scholarly denouement put forward strides to recognize eugenics selection in a more “natural and voluntary process” (Osborn, 1937, p. 395), by propagating a “freedom of parenthood” (Osborn, 1937, p. 391), which would consequently be in line with “the concepts of individual liberty and of non-interference by government” (Osborn, 1937, p. 395). Whether or not we choose to agree with the development of a specific eugenics philosophy at that point of time, however, should be premised within the context of an alternative forum. The containment of the profusion of morality, goodness and ubiquitous ethics should also be borne in mind, but cannot be meaningfully addressed within the confines of this paper.

Hence, the contemporary movement of liberal eugenics, in itself, is premised on the fact that should technological advancements progress to the point of safety and availability, then parents should be at liberty to use at their disposal, the full spectrum of these technologies for the purposes of enhancement of their future offspring. The allure of liberal eugenics pivots on the centrality of this choice: the shift in autonomy from state to individual, and the freedom from state interference in its subsequent exercise by individuals. Liberal eugenics finds one of its most prominent proponents in Nicholas Agar, who appears to have put forward a balanced theory that levitates between a conservative bioethics view, and a more radical trans-humanist perspective, but one that is also consistent with the concept of state neutrality. As a firm supporter of scientific and technological developments seeking to improve the quality of human life, Agar contends for the benefits that may be reaped from genetic treatments and engineering tools (Agar, 1998). Given a return to the two hypothetical scenarios mentioned above, Agar would be quick to argue that, should we focus on the veritable sustenance and orientation of a variety of “life plans”, (Agar, 1998, p. 143) the ‘new’ eugenics foothold vis-à-vis tools of genetic engineering technology, is capable of presenting adequate constraints built into the exercise of autonomy (in this regard, bearing upon the parents of the future offspring), which will not interfere into this varied projected plan of the offspring’s future, and will not be capable of directing the offspring only into the direction of one life plan (Agar, 1998, p. 141). This supports the view that “the family is the level of implementation” (Wiesenthal &

Wiener, 1999, p. 385), and because the target of ‘new’ eugenics is robustly rooted at the DNA level (ear-marked in the scientific, chemical or structural discrepancies in DNA), and not within societal structure in the manner of the old eugenics (Wiesenthal & Wiener, 1999, p. 385), the voluntariness and flexibility of liberal eugenics is a far-cry from its ominous ancestor.

Enthusiastic defenders of liberal eugenics further enunciate that the removal of the ‘offending’ element of past eugenics movements (that is, the coercive edict issued by the state) would result in varied, diverse options in the choices to be exercised by parents for their future offspring. The old-fashioned eugenics reeked of extreme disparity, and was guilty of its somewhat successful efforts to “produce citizens out of a single centrally designed mould”. (Agar, 1998) The implication of this “single centrally designed mould”, as Michael Sandel correctly identifies, is that “its burdens fell disproportionately on the weak and the poor, who were unjustly sterilized and segregated” (Sandel, 2004, p. 60). In the past, it is clear that the marginalization of these specific groups; of the ‘feeble-minded’ or “imbeciles” (Burrus, 2011), the disabled, the diseased, the lepers, for example, have carried forward in the recesses of our darkest memories. The fear of a return to these dark times, therefore, is a reasonably founded one.

On this basis, political philosophers have put forward arguments that if the abhorrent aspects of state-sponsored eugenics is removed from the equation, and the outcomes of the tools of genetic engineering are evenly and fairly distributed to the general population at large, then the ‘eugenics’ as we know it is no longer in existence; and therefore, becomes unobjectionable (Buchanan, Brock, Daniels, & Wikler, 2001). Given this reasoning, then the practice of liberal or modern eugenics based on the fundamental tenets of individuality, and liberty, should be differentiated and accepted. Gyngell and Douglas further illuminate by reference to Robert Nozick’s proposal (Nozick, 1974) for a “genetic supermarket” (Gyngell & Douglas, 2015, p. 242) whereby “it involves no centralized decision fixing the future human type(s)” (Nozick, 1974). The “genetic supermarket” would be the Walmart of modern genomic societies; and potential parents would be the sole arbiters in determining the ‘products’ (characteristics, attributes, and such) that they intended to buy. Despite these justifications, however, this is not to say that this new form of liberalism, does not also evoke a form of squeamishness from the less-convinced, for reasons that primarily evoke the ethics of humanity and human nature, (Habermas, 2003), vis-à-vis

the attribution of choice and responsibility to parents, instead of a rumble through the lottery of chance and the cosmos. The contention presented in this paper recognizes this paradigm shift, but also questions whether the transposition of choice and autonomy, is truly an enlightened one, which should allow unfettered access and a complete freedom cognizant of a “right” bestowed upon parents in respect of their offspring.

### **Of Autonomy, Choices and Helicopters**

One of the key arguments put forward in this paper rests on the interpretation of the exercise of autonomy, and queries the manner in which it has been imbued with legal (and philosophical) reasoning within the context of self-determination. For example, within the bulbous sphere of medical treatment and services, the principle for the respect of autonomy makes its presence felt in the doctrine of informed consent (Article 5, Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, Conseil de l'Europe, 1997) (“the Oviedo Convention”) and commands the stage through dimensions of clinical practice and ethics. The establishment of the doctrine of informed consent is therefore a fundamental tenet in the relationship of knowledge, communication, interaction and understanding between medical and research professionals and patients, resting on the premise that an individual may then make full and conscious decisions in consenting to any form of medical treatment or interventions. In fact, a scrutiny of the Oviedo Convention reveals that a majority of its principles and articles are both sophisticated and discerning in light of respect for the principle of autonomy. From the legal perspective, however, the depths of the concept of autonomy, having its roots in Greek philosophy (Wardrope, 2015), has been given importance vis-à-vis innumerable pronouncements, direct and indirect, through both national and international legislations and treaties, (such as the Oviedo Convention), and also form the underlying values of various constitutional systems.

With advancements made in medical technologies and research environments, a modification of the exercise of autonomy should be encouraged to commensurate with the changing dynamics of informed consent in clinical health settings as well. The proponents of the liberal eugenics coalition appears to have struck a chord insofar as the exercise of autonomy is concerned in the decision-making process to reap the benefits of gene editing or engineering tools. At first blush, it is possible to find that the equivalency of choice

and autonomy afforded to parents of future offspring is more acceptable on a moral level in comparison to eugenics movements of the past. However, the heart of the matter is intractable insofar as “[making] children into products of deliberate design” (Sandel, 2004, p. 60) is concerned. I posit that the legality of the concept of autonomy in this instance continues to falter in the light of the more discursive issues that provoke the framework of human rights considerations. In particular, the coupling of parental autonomy in liberal eugenics (for non-medical, non-therapeutic purposes), together with one of the most contentious debates in the field of bioethics, that of gene enhancements and the accompanying germ-line modification concerns, is a surefire, explosive combination that will continue to provoke the fiery discourse on interventions into the human genome, particularly where the exercise of choice through the options proffered by gene editing technologies, are not exercised by the intended beneficiary or recipient of the technology- the future offspring. Without the intention of disrespect for the freedom of parenthood and choices made by parents for and on behalf of their children, I posit that choice and autonomy within the contemplation of liberal eugenics is merely a cloak, and does little to dispel the salient legal and ethical debates that continue to mar the landscape of controversial uses of new and emerging technologies.

Even to the untrained neophyte, it may be inescapably logical that non-therapeutic enhancement treatments for future offspring cannot be a bad thing. John Harris states that we should view enhancement with positivity because the very meaning of enhancement is to make things better, and therefore, he questions how an enhancement could be viewed as something negative (Harris, 2010). Defenders of genetic enhancements, such as Oxford philosopher, Julian Savulescu, (Savulescu, 2001) believes in a moral requirement on the part of parents to ‘enhance’ their children, vis-à-vis a principle he calls “procreative beneficence” (Savulescu, 2001, p. 413). This principle, in essence, puts parents at the forefront of choice-making, to ensure that they “select the child, of the possible children they could have, who is expected to have the best life, or at least as good a life as the others, based on the relevant, available information.” (Savulescu, 2001, p. 413). Some measurable contentions have been levied against how one would ascertain the ‘goodness’ of a human life, citing distinctions that may be drawn between medical treatment and genetic (medical) enhancement. Pro-enhancement philosophers, Savulescu (Savulescu, 2007) and Harris (Harris, 2010), however, refute this claim and both deem that this distinction is not morally significant (Selgelid, 2014, p. 9). In fact, the provision of reasoning in this context

rests on the supposition that to enhance is to therefore increase the general well-being and welfare of an individual, and by this invocation, treatment is “a special case of increasing the well-being and/or functioning of those with diminished amounts of such things” (Savulescu, 2009) and is therefore a “subset” of enhancement. Harris provides provocative arguments about how we already accept and widely practice medical and non-medical enhancements in the context of modern life, such as vaccinations, special schools, food supplements, music lessons, and the like (Harris, 2010), all of which pursue the bid to increase the abilities of children. If these practices in child-rearing are commonplace, and in fact, viewed as universally acceptable, then we should question why genetic enhancements through a similar process of selection of the ‘best’ attributes, is morally problematic. (This presupposes, above the other legal and ethical concerns, that safety and risks are no longer objectionable issues, in the same manner that medical or other therapeutic treatments are also considered safe enough).

On the basis of intersection between the enhancement debates provided above, with the new eugenics, Agar argues that the freedom and autonomy of choice and decisions imparted upon parents provides a deeper-seated respect for reproductive liberty and human rights, (Agar, Brock, Lauritzen, & Prusak, 2006), certainly a far cry from the old eugenics programs, which provoked extremely vehement objections because of “the use of state power in the pursuit of eugenic aims.” (Selgelid, 2014, p. 8). The defenders of contemporary eugenics enhancements further pronounce that the development and continuous evolution of human rights protection in modernized democratic societies has been implanted deeply enough to ensure that the past atrocities of the old eugenics movements are not repeated (Selgelid, 2014, p. 8). The fundamental protections and freedoms accorded by international and regional human rights instruments such as the Universal Declaration of Human Rights, and the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights, in short), amongst other key human rights instruments, accord contemporary societies with a much more stringent and higher level of human rights recognition and protection than they had been imbued with in our past histories (Selgelid, 2014, p. 8).

Notwithstanding the permeability of the human rights discourse, the practical realities are often much harder to reconcile. Within the discourse of disability rights, for example, the narrative still remains highly polarized. Some disability advocates criticize the selecting-out

or negative selection of heritable disability traits, or the avoidance of bearing an offspring that may have serious disabilities. Conversely, these advocates state that disability should be treated as “just another manifestation of human diversity” (Bognar, 2016) because disability is a “mere difference” (Basas, 2014). On the other hand, the “medical model of disability” (Savulescu & Kahane, 2011) takes an opposite stand by stating that disabilities such as dwarfism, deafness, or mental disabilities, for example, should be corrected if the opportunities to do so were to be made available to parents, because to consciously make a procreative choice to have a child with these disabilities, would be wrong. Since the promulgation of the liberality of eugenics rests on parental autonomy, which encompasses these decisions to either select-out, or maintain these disability characteristics, the implications become tangled in a web of irreconcilable debate. Because of this, and particularly in cases of mental disabilities, the implicational throwback of familiarity to old eugenics in its aim to eliminate “the feeble-minded” or “imbeciles” (Burrus, 2011) becomes very acute. Indeed, in Savulescu’s and Kahane’s attempt to consider a “welfarist approach” to disability, (Savulescu & Kahane, 2011, p. 45), they recognize that “conceptions of disability that associate it with deviation from the normal are entrenched in the public discourse, medicine and law” (Savulescu & Kahane, 2011, p. 50) and therefore, a dramatic “conceptual revolution” (Savulescu & Kahane, 2011, p. 51) would be necessitated. Within the context of the principles of equality and distributive justice, and with the recognition that inequalities do exist within the stratified layers of society, the intensification of these inequalities may possibly be exacerbated (Reiss & Straughan, 1996). Indeed, Selgelid states that “given that ordinary medical technology is not equally available to all, there is no reason to believe that enhancement oriented technologies would be either.” (Selgelid, 2014, p. 9). Whether there is truth to the trepidation that enhanced individuals would, on a practical level, be able to pose advantageous over others, is still a subject matter that is being debated. Indeed, on this basis, Singer has stated “many of the advantages people will seek to ensure for their children will be advantageous for them only in comparative, not absolute terms.” (Singer, 2009, p. 282), and he emphasizes the need to differentiate between an “intrinsic good” and “positional good”, both of which essentially involve value judgments and the necessity to consider the benefits it may bestow on a social level. (Singer, 2009, p. 288). It is also concurrently irrefutable that inequalities that exist within societies should be a matter of social reconstruction by states, but this does not mean that we should also downplay the existing problems of inequalities: “the extent of inequality is a key consideration” (Selgelid, 2014, p. 11) in the determination

of arguments that seek to justify the restriction on autonomy and liberty in the use of these technologies.

### **The Illusory Gift of Autonomy**

Posed against the topography of this background, this paper attempts to demonstrate that the root of the exercise of autonomy and choice may be a delusive constituent within the liberal eugenics framework, and in fact, is not as clear-cut as it may appear to be. Through the over-arching framework of the state working its ‘invisible’ hand (which I do not view as a necessarily evil occurrence), I posit that first, parental autonomy in making decisions relating to genetic enhancement of their future offspring, cannot be completely value-free; secondly, I echo the sentiments of Wiesenthal & Wiener (Wiesenthal & Wiener, 1999) that put forward the illusory and false sense of security in autonomous power as an extension of societal structures; and thirdly, I refer to Foucault’s discourse on the existence of power relations in every human interaction, even between parents and children, “subject to negotiation, each individual having his place in the hierarchy, no matter how flexible it would be” (Foucault, 1983), as well “bio”-power and politicization of the human body by subjugation through social and covertly-political controls (Foucault, 1977).

Riding on the wave of Harris’ justifications (Harris, 2010) for the enhancement of future offspring, and by virtue of existing mechanisms of improvement in which parents already do engage for their children, I turn to the highly criticized but tongue-in-cheek portrayal of ‘Asian’-style parenting in Amy Chua’s *Battle Hymn of the Tiger Mother* (Chua, 2011). In this biographical (and satirical) account of Chua’s authoritarian parenting style, often referred to within parenting pedagogy as ‘helicopter-parenting’, I draw a preliminary hypothesis that “heavily managed, high-pressure child rearing” (Sandel, 2004) and the “trend towards hyper-parenting” (Sandel, 2004) does not drastically differ from concerted parental decisions taken to implement genetic enhancement technologies on their offspring. The beneficiaries of Chua’s strict parenting style are her highly accomplished, Ivy-leagued daughters, Sophie and Lulu; and the biography describes Chua’s hard-line methods in bringing up her children, pushing them through enormous amounts of study and music practice on a daily basis so that they could (and did) achieve the success that only many could dream about. However, Chua also received intense criticism on this, and many termed her parental methods as “abuse” (Cochrane, 2014). In *Harvard Girl*, (Weihua & Xinwu, 2000)

written in Chinese and hailed in the People's Republic of China to be the foremost parenting 'manual', special focus was placed on early education and how parents could raise successful children through a strict, methodical lifestyle and to be accepted into top-tier universities in the United States. (The subject of Harvard Girl, Liu Yiting, was not only accepted into Harvard to study applied mathematics and economics, but also received offers from Columbia, Yale and Wellesley). These examples demonstrate that the reality of child-rearing is not only saturated and particularized as part of cultural determinism, but also truly begs the question of autonomy on the part of the children or future offspring, and their parents, and whether it may be parental ideologies instead that have been imposed on these children. There is no argument that the successes of these children are attributable to their parents and the manner in which they were raised; and on this basis, there are modern examples where parents send their children to exclusive private education schools, or music lessons to hone the abilities of their children at playing the violin or piano, and dance lessons in the hopes of raising the next Anna Pavlova, and even providing nutritional supplements like ginkgo biloba vitamins to boost focus and memory. More disturbingly, studies have shown the increase of young adults' misuse of drugs like Adderall or Ritalin, in universities, due to intense pressure to do well in their studies, with some scholars calling for these drugs to be available to them without a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) (Flanigan, 2013), and as legitimized neuro-enhancement tools within a legalized framework.

Within the field of non-medical, non-therapeutic genetic enhancements, barring the difference on a molecular level, I pose that there is no significant difference between using gene enhancement technologies for the purposes of enhancing a future offspring's cognitive and intellectual abilities, versus parenting styles that serve to nudge their offspring in education, music, and other fields that may be regarded by parents as 'good'. In both instances, the desire and intentions of parents to provide the 'best' for their children is not disputed, although the motives for such desires and intentions will invariably be very subjective; but both instances also demonstrate that the heralding light of choice and autonomy is a flawed one. Agar's contention that genetic engineering cannot alter the future life plans of offspring (Agar et al., 2006) and therefore, maintains the functionality of autonomy, cannot be truly sustainable, because, as in the case of 'normal' child-rearing, a majority of parents do deliberately and concertedly push their children towards a definitive life plan; there is no guarantee that the decisions made in respect of genetic engineering



will not echo the same sentiments. It is, of course, arguable that the expansion of a child's life plan, following the initial directedness of parental decisions, may evolve into an unassociated and distinct future life plan; but it should also be recognized that the subsequent trajectory of this later life plan may have been fundamentally affected and heavily influenced by the initial directedness of parental decisions; in a similar manner that decisions by parents to genetically enhance their children may be canvassed. The 'autonomy' therefore exercised by parents, in this manner, is value-laden, burdened with societal expectations of a 'good life', and in some instances, may be a projection of the parents' internal unconscious ideologies and desires of their definitions of a 'good life' for themselves.

The concept of autonomy in liberal eugenics and gene enhancement also takes a slippery fall when we examine the structural architecture of equality, citizenry and individual relationships within the function of society. Wiesenthal and Wiener (Wiesenthal & Wiener, 1999, p. 390) posit that the new eugenics do not particularly lead to true empowerment and true autonomy. Quoting Freeman Dyson, (Dyson, 1997) who raised the provocation question whether scientific advances do truly empower individuals, Wiesenthal and Wiener state "whether true or false empowerment exists if whether scientific advances or technology has provided more freedom of choice to the individual, or whether it has enabled the forces of social control to better direct, supervise, impose, or enforce its will and decisions upon the populace." (Wiesenthal & Wiener, 1999, p. 390). They further state that true empowerment "reduces societal control over the individual by shifting power from the government... to the individual." (Wiesenthal & Wiener, 1999, p. 390). The paradox, however, in this shift of power, is that individual choices made are often inextricably linked to some variation of societal control with links to communities; an informal mechanism of social control and a possible watered-down version of cultural and societal hegemony. With the appearance of conferring greater choice upon individuals, namely parents, how are ethical values then to be determined within the scope of communities? Parents are already choosing endowments that may lead their children down the path of "socially defined success" (Wiesenthal & Wiener, 1999, p. 391), and in this process, the empowerment in genetic decision-making has the effect of transforming genetic structures into a consumer by-product (Wiesenthal & Wiener, 1999, p. 392). When consumerism and the outcomes of gene enhancement becomes entangled, so too does autonomy and decision-making; the truth of the matter lies in the fact that true empowerment only lies with those who are wealthy and may have access to these enhancement

services, and therefore, reminiscent as a “symbol of conspicuous consumption” (Wiesen-thal & Wiener, 1999, p. 392).

Finally, I turn to Foucault’s discourse on power relations, (Foucault, 1983) and draw analogous parallelism to the relationship between state and citizens/individuals, and particularly, between parents and child, as a means to dismember the illusive hold of autonomy in liberal eugenics and gene enhancement. Within the milieu of the natural course of human interactions, Foucault has rightly emphasized the existence of power relations in *omnium gatherum*. The expansive breadth of his work also reveals a fascination with sciences and technology; this I view to be a fully-functioning theme on the means to identify the politicization of individuality within the domination framework, referring to this as the “political economy of the body” or “political investment of the body” (Foucault, 1977, pp. 25–30), of “power” (Foucault, 1977), “knowledge” (Foucault, 1977, p. 27) where he states “we should admit rather that power produces knowledge.....; that power and knowledge directly imply one another; that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations”; and “the body” (Foucault, 1977, p. 25). With the backdrop of genetic modification of human beings, genetically modified organisms, embryonic stem cell research, the proliferation of bio-data and bio-banking, and other such advancements that have come to polarize our philosophical, legal and ethical discourses, this is consistent with Foucault’s moniker of these issues: “biopolitics” or “biopower” (Foucault, 1976). If we do agree with the alignment of Foucault’s theories on the existence of omniscient power relations that exist at every level of human interaction, then the underlying reason for the legitimacy of autonomy may come into question through the influence of these power relations.

I pose that an analogy can be drawn from visiting the scope of power relations between citizens and state, considering the interplay between law and legal regulation, with ‘architectural regulation’ (Lessig, 2006. The ‘architectural regulation’ initially coined by Lessig refers to “Code” as a means of regulating cyberspace, but has been developed in recent years to encompass a broader means of regulatory design that can sometimes serve to ‘complement’ the operability of formal laws). Hence, I pose that the architectural framework of regulating societies (Tien, 2005) can sometimes be as powerful as the textual rules of the law and legislation. The operation of social controls that regulates norms of conduct

vis-à-vis the law (which controls and enforces sanctions on behaviors after the fact or action) is supplemented through the *fait accompli* in the construct of architectural regulation, an incidental method that facilitates the present conditions of action, social settings and resources available to individuals through constraints on some behaviors, which then make other behaviors possible. (This can be distinguished with laws that deal with consequences, actions or behaviors after the fact, (Lessig, 2006, p. 237) whereas architectural regulation presents an immediate barrier to certain consequences, actions or behaviors.) This can change the manner in which the nature of rules are presented and enforced because architectural regulation has the capacity to “design out” individual decisions and actions (Tien, 2005, p. 3). In this manner, the exercise of individual liberty and autonomy, may be disfigured vis-à-vis the creation of social norms (established through architectural constraints) that seemingly give rise to that that liberty and autonomy. Consequently, I view that this has the capacity to preserve the “politicization” of human bodies (Foucault, 1976) in the manner put forward by Foucault, and hence, amounts to an ‘invisible hand’ that continues to be exerted by the state. In the very same manner, the dynamics of these power relations within the context of a family is also prevalent, and the beacon light of equality sought between relations is inevitably unbalanced in favor of the party with a stronger positioning, made apparent through the fragmentations of power, knowledge and control.

This is not to say, however that this ‘invisible hand’ is invariably negative; in many ways, I predicate the necessity of some measure of state involvement because the discrete nature of liberal eugenics and gene enhancement technologies goes beyond the frontiers of human life. The conjecture made here is simply that the exercise of autonomy really is not fully autonomous, and cannot be fully appreciable in the manner described of liberal eugenics.

## **Conclusion**

I invite us all to reflect on a democratic diversity of opinions that leads to the exercise of autonomy in particularized ways. I surmise that the rallied efforts by liberal eugenicists in framing autonomy are still in deficit because it is very difficult to articulate and implement. If we are to be honest with ourselves, and are faced with possibilities to choose between an enhanced (The Genius), versus ‘normal’ or disabled (The Imbecile), future offspring, we are likely to find ourselves at the crossroads of moral, ethical and in some

instances, religious dilemmas. Jasanoff has proclaimed that there is a highly “complex relationship between our technologies, our societies, and our institutions, and the implications of those relationships for ethics, rights and human dignity” (Jasanoff, 2016): the intense polarization of opinions and concerns in bio-medical issues generally is evidence of this truth. I pose that we should attempt to obviate sugar-coating concepts that induce the “yuk factor” or “wisdom of repugnance” (Kass, 1997) within ourselves, and the issues raised in this paper certainly do that without the necessity to exert much effort.

Instead of presenting the concept of autonomy in liberal eugenics as one reminiscent of the full spectrum of ease, individual liberty and pretty rainbows, I put forward that democratic innovations like these, no matter how advantageous they may be to humankind, must be balanced against a social movement of a non-radical nature in the interest of enlightened medical discourse. The key is not to allow ourselves to be deceived into a belief of full and complete autonomy, viewed through rose-tinted spectacles; it is more meaningful and useful to understand the shortcomings of how autonomy operates in liberal eugenics, and to take advantage of these shortcomings to begin questioning how we may strike a balance. Understanding that it is often easier said than done, Jasanoff states that we may begin by inducing a fundamental reboot into our views of ethics within the context of science and technologies (Jasanoff, 2016, p. 86); taking into account that the variables of each regulatory space is often inundated with issues such as plurality and different ideals of morality and public opinion. This, however, is the task for bioethicists, policy makers, lobbyists, and legislators, in establishing and extending a workable, sustainable regulatory or governance framework that monitors the use and limits of these specific technologies, especially for non-therapeutic purposes. The ‘invisible hand’ continues to wave its influence over all aspects of contemporary societies, but the challenge then would be to strike a composite balance between a justifiable restriction of autonomy in reproductive liberties and technologies, and the simultaneous deference to the protection of fundamental human rights.

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# 18

## THE IMPACT OF THE NEW TECHNOLOGIES ON THE LAW: REGULATING THE BIO-PRINTING TECHNOLOGY

*Mirko Djukovic*

### ***Abstract***

*The first living transplantation of organ (kidney) was performed in 1954. According to the data of the GODT (Global Observatory on donation and transplantation) 119 873 organs were transplanted in 2014. Out of this number, 79 950 kidneys (99 countries) and 26 150 livers (74 countries) were transplanted. Today, 63 years later we are facing revolutionary discovery that could determine the future of human kind: the age of bioengineering. Understanding of how to engineer cells, tissues and organs is improving at a rapid pace. Any day now scientists could publish and present the very first printed human organ. Using 3D printers, research centers all over the world are printing cells, muscles, blood vessels, tissues and organ prototypes. Through this process of bio-printing, the indirect and hopeful outcome is that the global shortage on donated organs or tissues could possibly be addressed; but the perceived, altruistic intention of bio-printing (to save lives through viable transplants) is simultaneously fraught with its own set of complexities. The limited recourses in the matter gives us the opportunity to set certain arguments that could be used for future debates and initial solutions to understand this technology and its implications on every day life. Often, the sole printing of vessels or tissues that are used as implants is indeed life-saving in nature. Although printing entire organs is still not feasible at this juncture, bio-printing presents itself as a game-changing technology within the sphere of therapeutic medicine. The author of this paper will first inquire as to the extent this technology may be regulated. Relying mostly on the ethical, legal and social implications of new biotechnological achievement the paper will try to tackle few of the pressing issues in regulating the technology.*

## Introduction

The first living transplantation of organs (kidney) was performed in 1954. Today, 63 years later we are facing revolutionary discoveries that could determine the future of human kind: the understanding of how to engineer cells, tissues and organs is improving at a rapid pace. Using three-dimension (hereinafter “3D”) printers, research centers are printing cells, muscles, blood vessels, tissues and organ scaffolds. Bio-printing is a process in which patient’s cells are taken via biopsy (or stem cells could be used as well) out of which the cell-ink is made; using hydrogel which is a network of polymer chains filled with vitamins, proteins, nutrients essential for the cells to live in and for printers to print out scaffolds in which via 3D projection cell-ink or bio-ink is inserted.

Everything we know about medicine is about to expand beyond the imaginable, hence, social scientists and other interested stakeholders should give attention to this revolutionary technology and be prepared to debate its incumbent legal, ethical, social and other implications; at the outset, some of these could include issues relating to permissible state interventions in matters that traditionally concern the exercise of individual autonomy, or the distributive justice argument regarding the costs of, and access to these technologies by all layers of society, or from a more naturalistic perspective, whether humankind should, indeed, be the creator of printing tissues and body parts when the creation of Man, (whether from a religious or evolutionary perspective), may have been based on a finite or impermanent end. These are merely some of the legal, ethical and social issues. The aim of this paper is to provoke certain questions and arguments that could become groundbreaking in future research on bio-printing and to provide an overview of the possible outcomes of regulating this specific technology.

In my realm of understanding, bio-printing potentially poses a far bigger legal and ethical issue than any other new technology at this juncture, thus one of the main questions of this paper is whether would it be possible to use existing regulations of constitutional law, international law and human rights law to regulate bio-printing technologies, and if so, to what extent would the underlying norms of these laws apply to this emerging technology? This inevitably leads to consider to what extent would bioethics matter in analyzing and regulating bio-printing? And finally what are the most urgent areas to be regulated and what could be possible challenges?

## **The Big Bang of Medicine**

In her book *“The Ethics of Invention: Technology and the Human Future”* Shelia Jasanoff (Jasanoff, p.1) said: “Our inventions change the world and the reinvented world changed us”. In 1953 a two-page article by Francis Crick and James Watson was published. The paper was about their findings on DNA, the basic matter that controls the development and functioning of all the living organisms. This paper was the big bang of medicine at the time. It changed the basic understanding of human nature. Almost 70 years later we are still debating ethical, legal and social issues of this discovery and its implications in the bio-logical sciences and technologies. And debates will continue, as we are now opening new chapters of human history in which altering DNA in the early stages of embryonic development or even before, is possible. Understanding different diseases before a person even gets them became full time scientific goal of this century. Couple years ago, first artificial human tissue was grown in the laboratories and transplanted onto living human. Today we are facing possibility of using 3D printers in creating more complex parts of our organism. The genome editing and bio-printing, what a combination for human enhancement! But hold your hopes before we actually alter our bodies should we ask ourselves are we sleepwalking into nightmare thus sliding into dystopian future of George Orwell, Margaret Atwood, Jacques Lob, Kazuo Ishiguro?

The gratitude that humankind should harbor in modern medical technologies should be attributed to Henrietta Lacks, a patient who was diagnosed with cervical cancer on February 8, 1951. When she was diagnosed with cervical cancer, the Afro-American mother of five from Virginia, inadvertently presented us with a possibility to learn and evolve. Her cancer cells were the source of the HeLa cell line, the very first immortalized cell line, and thus far, the most important cell line in medical history. The reason why this is so, is very simple and very genuine; the HeLa cell lines could be reproduced indefinitely, offering invaluable medical data even in our present day. HeLa is the most commonly used human cell line in medical research, and the pharmaceutical and cosmetic industries. So far scientists have grown an estimated 50 tons of her cells with almost 11 000 patents involving HeLa cells. Unfortunately, to date, the Lacks family never received any form of compensation for the use of Henrietta's cells, although to my knowledge they never exercised their rights before any US court. The overall principle here seems to suggest that patient consent is not required for research on human tissues obtained during medical treatment, if the donor's identity is undisclosed. In light of several conventions regarding the use of

human tissues in biomedicine, the position of consent has evolved and become a more dynamic one, such as: Council of Europe Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin; The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Oviedo Convention).

However, the seminal *Moore* case (Moore, 1990, p. 2) takes on a different approach to the “commercialization” of human cell lines or tissues. Although the Court of first instance ruled that patients had the right to control their tissues, the Supreme Court of California decision of July 9, 1990, overruled this opinion and stated that any discarded blood or tissue samples of a patient cannot be seen as his personal property, thus hindering any individuals to share profits earned from the commercial products that were the outcome of the scientific research conducted on that blood or tissue. The facts indicate that the patient, Mr. Moore, was treated for hairy cell leukemia by UCLA Medical Center in 1976. Similar to the case of Henrietta Lack, Moore’s cancer cells were developed into a cell line that was commercialized by UCLA and David Golde, a physician of Mr. Moore. The commercial value of his cells was estimated at more than \$3 billion. Mr. Moore, however appealed before the court asking to be compensated since the commercialization of the product was conducted without his knowledge. The California Supreme Court judgment had set a principle according to which tissues removed from the patient’s body are to be considered abandoned as medical waste. However, the Court did implicate that doctors should disclose their financial interests to the patients in such cases. The resulting trajectory from cases such as Moore, perhaps, may have spurred research and development into a direction to consider more infinite ways of how human tissues could be replicated to the point that would not unduly prove burdensome to an individual.

In 2003, Thomas Boland (a Clemson University researcher) creatively modified the unassuming ink-jet printer so that it could accommodate indispensable human cells in scaffolds. Dr Forgacs, in 2004, developed a varied technology to engineer 3D tissues with cells without using scaffolds. In 2009, a US-based company, Organovo created the first bio-printer using Forgacs’ technology. In 2010, they printed the first blood vessels derived from human cells.

## Can We Keep up With Science?

These three annals in medicine are interesting because they have at least one question in common, that prompts us to further consider how these kinds of technologies influence legal systems (or perhaps, vice versa). From an objective viewpoint, we may be aware of its impact on health and medicine, but we must also reflect on how these groundbreaking moments influence the social construct in which we live? There may be no easy way in which to arrive at appropriate answers. The basic foundational viewpoint I have formulated is that before taking into account the work of the creators of these technologies, it is first prudent to take cognizance of and to reflect upon the interpretation of the existing norms by existing scholars. For example, Therese Murphy and Gearoid O Cuinn, conducted thorough research on interpretation of the European Court of Human Rights (hereinafter “Court”) approach with regards to new technologies; offered us the reasoned view that according to the case law of the Court, “human rights also have the capacity to ‘reinvent’ innovation. By this we mean that rights can shape perspectives on the needs, benefits and priorities that drive innovation in the first place” (Murphy and O Cuinn, 2010, p. 604).

It would be inconceivable to think, 50 to 60 years prior to our present day, that we would live in such a technologically-advanced world where 3D printers could perform bio-printing procedures of human tissues. According to various websites that give overview and insights on 3D printing, this technology is cutting-edge in medicine, as some of the benefits of this technology include printing cartilage which is used in orthopedic surgeries; 1 in 10000 children are born with *microtia*, a type of congenital deformity in which the ear is not completely developed thus scaffolds of the ears are being printed and ears could be repaired when children are only babies; during brain surgeries, the *dura matter* (superficial meningeal layer) is removed so that surgeons can access the brain whereas ReDura printers print *dura matter* which is created for each patient individually and over 10000 patients have received it.

Scientific and technological revolution is a reckoning force that changes the world every day. Thus, it influences the current social relations as well as our understanding of legal systems in which the influences occur. As legal scholars, we may be conditioned to think that legal norms are molded by social changes, and not vice versa. Legal norms cannot regulate the social relations that did not occur, or those that we do not have knowledge

of. We regulate the world as we perceive it in the very moment of creation of that norm. However, in interpreting the norms, we may be bound by universal *jus cogens* legal principles that, no matter the circumstances, we are not to fail. Such is the principle of respect for human dignity. As the Court noted in *Tavli v Turkey*, courts as a matter of fact are facing the challenges of “our modern societies” (referring to the new technologies) thus the Court advised national courts that the positive laws should be understood “in light of scientific progress and the social repercussions that follow”.

The legal and ethical issues implicated in the HeLa cell line and Moore case are abundant and have been unwaveringly tangled in numerous research papers. The Supreme Court of California interpreted the case of a cell line and argued the right for patients to any commercial benefits due to the fact that products derived from their cell lines were created by the doctor and had been “transformed” via his “inventive effort,” and to say otherwise would “destroy the economic incentive to conduct important medical research”(Moore, 1990, p. 17). Now we are facing new challenges in understanding tissue engineering and bio-printing technology and its implications on the law.

My concern in particular is what happens “when law might be displaced by new technologies as tools of societal regulation?”, as Flear (2011, p. 642-647) points in his review of *New Technologies and Human Rights* by Therese Murphy. Moreover, as Brownsword suggested: “when aspects of the individual, the human, are designed-in or designed-out in order to channel human conduct the Rule of Law is replaced by the Rule of Technology. This revolutionary sting emphasizes the profound repercussions of science and technology not just racing ahead and becoming disconnected from law and morality, but their rise as ways of governing.” Jasanoff (2016, p. 13) writes a fair assessment of the fallacies of why it is so hard to regulate new technologies, she says it is largely based on the myths of (i) technological determinism (ii) technocracy and (iii) intended and unintended consequences (whether foreseen or not). If we consider these assessments in the area of bio-printing, indeed we should be very cautious on how to proceed, as it seems that law needs to keep up with science.

### **The Technology Makers v Law Interpreters (Law Makers)**

This research on the impact of these technologies on the law, began with the original research on “Legal and Ethical Aspects of 3D printing (Bio-printing) of Human Tissues for

Transplantation Surgeries” last year at the Central European University under the supervision of professor Judit Sandor. When I started the research it took me months to grasp the scientific background of the technology. A lawyer with no medical education handling the published papers in medical journals, even I questioned the sanity of my choices. I remember the very first feeling about it, as I recall it today, it was a clear hype about new topic but also about new technology. I remember thinking “oh, look what this technology can do”. This I see today as hopeful principle of the technology hype. As I went deeper into understanding it, I was thinking if I give in to the first notion, I will not be able to make any critical reflection and thus as lawyer will not be able to catch on the legal issues that might arise. This was a clear appeal to the technology. And as I started reading about ethical and legal issues in bio-technology I understood that hype about technology so early might negatively reflect on how it is perceived by public. The more we are excited about it and only see the positive outcomes we will overlook the potential problems.

A progression through the relevant scholarly literature indicates that, in legal theory, there are a few different ways to refer to the new technology or new technology law, such as *emerging, modern, high, novel, revolutionary*, which I understand, is a consequence that legal practitioners and legal theory are still struggling to understand, particularly with regards to the impact that technology has on the law. From a legal perspective, and as legal scholars, we may have been taught to see a legal framework and positive laws as rules to abide by, to follow, to examine and exercise in each and every individual case. However, it is difficult when one is not able to follow the challenges of technological revolution. Thus, a more in-depth examination of the literature reveals that discussing the technology and law always leads to a discourse about the human rights factor in this sphere. There exists a thin line between technology and law, which may necessitate crossing before trying to understand the impact of technology on law and/or the impact of law on the technology.

The historical accounts of humankind remind us what happens when any new technology becomes a tool that can simultaneously be abused as much as it confers benefits. There are positive cases (such is the case of HeLa cells without which many pharmaceutical and medical breakthroughs would not be possible) and very dark, negative, disgraceful moments (such as the development and use of nuclear weapons). This is especially the case of the commercial technologies that become accessible only to a few, whether by reason of factors such as expertise, costs, or awareness of the same. There are currently no

regulations on bio-printing and there has been no litigation on bio-printing as well thus far, and none is expected anytime soon. In 2014, the United States Patent and Trademark Office published the first two patent applications on bio-printing, assigned to an “early-stage regenerative medicine” company named Organovo. In fact, Organovo was the first company/entity to commercialize bio-printing, currently performing tests on toxicity on its 3D liver model (Tran, 2015). The Organovo bio-printer can print skin tissue, heart tissue, blood vessels, and other basic tissues for surgical therapy and transplantation. As one can imagine, this technology is expensive, and the most of incentives and funds to develop it originated from private investments. It is easy to understand that those who invested in the technology would likely endeavor to claim property rights and expect a profitable return of their investments. The impact of bio-printing on the law will be even more visible (and likely, dangerous) when private funds and corporations use the opportunity to invest more in the technology and appropriate the gaining momentum to exploit the desperation of those who are waiting for organs. Once the technology advances beyond its current confines, and when it becomes possible not only to print blood vessels, cartilage or skin, but entire organs, these private entities will be able to manufacture organs and sell them directly to patients waiting for transplants. This is the point where bio-printing technology meets law, the crucial convergence which involves issues of bioethics. Understanding the consequences of the new technologies in medicine, and in dealing with bioethical questions, international organizations have consistently opted for the human rights approach. Following the core principles of the human rights protection today, we have several international documents that address certain issues that could be the subject of scrutiny in the field of bio-printing. This is where law must step up and those in-charge of policy-making must react in time and prevent the Rule of Technology from prevailing over the Rule of Law.

In addition to the property and commercial aspects, we must not forget to think about the possibility of piracy, data theft, quality control and assurance mechanisms as well as any other related rights. This is why the regulatory agencies such as US Food and Drug Administration and the European Medicines Agency (as well as international agencies within the international organizations), are expected to play a key role in the development of bio-printing technologies.



Since there are no regulations on this technology, the Courts will likely be instrumental in its role in defending basic legal principles. Referring to the new technologies in medicine while analyzing case law of ECHR, Murphy and O Cuinn in the context of protection of the principle of human dignity under Article 2 of the ECHR, referred also to the opinion by Judge Marcus-Helmons in the case of *Cyprus v Turkey*. “(..) noting that ‘the rapid evolution of *biomedical techniques*’ meant that ‘new threats to human dignity may arise’, Judge Marcus-Helmons alluded to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (hereinafter “the Oviedo Convention”) as an instrument that ‘seeks to cover some of those dangers’. He went on to note two problems with this Convention: first, ‘only a limited number of States have signed it’ and, second, it only affords the European Court of Human Rights consultative jurisdiction.” (Murphy and O Cuinn, 2010, p. 612) Furthermore, authors considered a concurring opinion of Judge Pettiti in *Malone v UK* who emphasized the role of the Court as a “guardian of the Convention” and as such, the Court fulfills this role “by investing Article 8 with its full dimension and by limiting the margin of appreciation afforded to individual member states, especially in those areas where the individual may be placed in a position of vulnerability as a result of *modern technology*” (Murphy and O Cuinn, 2010, p. 619).

In *KU v Finland* a similar position was recorded, where Court underlined the importance for legislators to be aware of scientific progress and its social repercussions (Murphy and O Cuinn, 2010, p. 620). The right to private life includes several specific rights protected under Article 8 including data protection and bio-information (D.J. Harris et al, 2014, p. 520) Information about an individual’s health constitutes important element of private life, including the knowledge of a person’s genetic make-up, and the Court (Z, 1997; Marper, 2004) reminded contracting states that “*their pursuit of technology as a regulatory tool must not compromise the guarantee of the right to respect for human rights.*” Finally, according to para. 1 of the Appendix to the Draft Memorandum to Recommendation Rec(2003)10 of the Committee of Ministers, the Court states that it “should be understood as a legal instrument aimed at securing individual rights and as such it may be of limited relevance to policy issues in the field of bioethics.”

Until such time as an international legal framework is firmly established in place, the Courts are left to rely on their existing jurisprudence, on the possibility to interpret the

law in line with the new technological achievements. So to answer our first question of this paper, indeed it is of a great value to rely on constitutional law as well as international law standards, however, it would be of a great value if the existing international agencies and bodies or intergovernmental groups take the first steps in analyzing the effects of bio-printing, offer the possible solutions for a workable legal framework (at an international, or at the very least, a regional level) and insure the overall quality control of the technology, thus improving the efficacy of this life-saving invention.

### **Regulating New Technology v Human Rights**

The impact of bio-printing on medicine and human health, life span and welfare is enormous. To name just a few of the possible consequences: the elimination of need for organ donors, as at this moment, for example, in the US only, there are 120 000 people on the waiting list whereas each day approximately 22 people die waiting for a new organ (Organ Procurement and Transplantation Network); the rejection of the organ is highly impossible (because the tissue is “fashioned” from an individual’s own cells or bodily tissues) thus the jeopardy of losing life over the medical treatment is highly unlikely compared to the existing methods; the prospect to an end to animal testing since it would be possible to print human organs and test the drugs, and so revolutionizing pharmaceutical methods. But how do we regulate such a complex technology and avoid possible menaces of misuse? How might a reflection and understanding of human rights assist and help shape new technologies in the contemporary world? Are human rights relevant at all in this equation?

In understanding this technology, I questioned if the legal framework of the transplantation surgery is applicable. The problem is to define what is bio-printed organ? The process of bio-printing involves placing cells (ink) into the layers of scaffold which is an artificial creation whose purpose is to make possible for cells to attach on each other creating designated tissue. After a while the scaffolds disintegrate leaving human biological materials behind. Since transplantation standards prohibit selling “human” organs and 3D printed organs are not considered human, consequently this norm is not applicable (Jacobson, 2015, p. 1132). Furthermore I wondered who owns bio-printed product? We can apply Brownsword’s analogy in Moore case: how can it be rational for regulators to permit me to have property rights over someone’s tissue and for someone to have property rights over

my tissue, while not recognizing either of us as proprietors of our own tissue? As there is no evident answer yet, discussion will have to be upgraded further.

In his book *“Our Posthuman Future: Consequences of the biotechnology revolution”*, Francis Fukuyama holds that as a result of biomedical advances humanity will be altered beyond recognition. Brownsword (2009, p. 25) argues to the contrary, that “while in effort to regulate new technologies humanity would learn a great deal about the strengths and weaknesses of traditional regulatory instruments but would also spot the potential of these emerging technologies as regulatory tools, supplementing and even supplanting traditional modes of regulation.”

In order to understand the technology regulation, Brownsword offers his approach called the “bioethical triangle” which consists of three different ethical views that are teleological-oriented: the *utilitarian* approach which advocates the pursuit of human welfare (health), wealth and happiness; the *human rights view* advocating respect for individual human right, and the *dignitarian* perspective advocating constituency of human dignity. He notes that “much of history of bioethics hinges on ethical opposition to the idea that the interests of individuals may be legitimately sacrificed for the greater good” (Brownsword, 2011, p. 37). However, Article 3(2) of UNESCO Declaration opposes this, stating: “the interest and welfare of the individual should have priority over the sole interest of science or society.” The question in a matter is if humanity would opt to respect this norm, given the promise that bio-printing provokes.

As Mark Flear notices, “the acuteness of the problem is captured by Michel Foucault’s notion of power/knowledge, which recognizes how changes in knowledge provide a basis for the production and exercise of governmental power and control. Foucault took this insight further through his neologism “governmentality”, alerting us to the way in which knowledge provides the basis for various techniques of governance that in late modernity are fused with the concern for optimization through neoliberal political rationality. When science and technology become increasingly entwined with formal sites of power, accountability becomes ever more crucial. Of course, hitherto law and morality have eventually caught up with science and technology” (Flear, 2011, p. 642).

Constitutions and international treaties represent a social contract, which is a system of guaranteed rights of individuals and collectives giving power to those individuals to contain

government power. The most efficient way to implement the Rule of Law is by respecting the human rights set by the system of constitutions and treaties. So how could human rights help us in understanding the relationship between new technologies in medicine and law? Brownsword (2011, p.37) emphasizes that the key challenge to human rights is that it must compete for relevance and regulatory territory with dignitarian ethics. He argues that this would be the only way to cope with the odds that science and technology are racing ahead of law and morality whilst compromising human dignity in the process.

On the other hand, Koops (2008, p. 157) seeks for criteria, which are relevant for the purpose of assessing the acceptability of normative technology. According to him, in the context of a general acceptance of democratic and constitutional values, there are primary and secondary criteria. The primary criteria for normative technology are comprised of human rights, moral values, rule of law and democracy. The secondary criteria include transparency of rule-making, accountability, expertise, independence, efficiency, choice, effectiveness, flexibility and transparency of rules.

However, the challenge remains “since most Western governments are committed to promoting such transfers, biotechnology is caught on the horns of a very particular dilemma: how to justify its promises of innovation and progress credibly when the interests of most scientists are unacceptably aligned with those of industry, government, or – occasionally – ‘public interest’ advocates” (Jasanoff, 2003, p.231).

### **Conclusion: What Could Go Wrong?**

While conducting research in this area, I have been able to map certain legal aspects that should be addressed in the first attempt of setting out an international legal framework. For the purpose of my research on “Legal and Ethical Aspects of 3D printing (Bio-printing) of Human Tissues for Transplantation Surgeries”, I have taken into account relevant policies and legal frameworks of the EU and US. Thus, I have identified that bio-printing will impact Intellectual Property law (particularly relating to patent and copyright matters); property rights; data protection issues (genetic data); and finally policies, regulations, role of governments and international treaties that could regulate the technology under the presumption that UNESCO Declaration is to be respected and that the human rights aspects would prevail. If we begin the discourse by examining the human rights aspects, the most probable objection could be that the use of human rights to establish a global,

one-size-fits-all bio-printing standard, is that the present human rights corpus is a Western ideological construct with little relevance to, for example, the African and Asian legal heritage. For example, Mutua provides help in understand the Euro-centric narrative of nature of the human rights corpus and pleads for a genuine cross-contamination of cultures to create a new multicultural human rights corpus (Mutua, 2001, p. 245). Human rights are conceived as excessively individualist for non-Western mentalities and lack a significant concern for personal duties and for the common interest of society (Andorno, 2008, p. 7).

When it comes to data protection, we are interested in a specific part of the process that relates to the storage of the genetic data and data protection issues. In this regard, I conceived that the wide range of studies pertaining to stem cell research, (in particular, because this area of research has been highly polarized and have produced some useful rules and guidelines), would be applicable. The object of protection in bio-printing would be both: personal and genetic data. To a certain extent, some rules from the International Declaration on Human Genetic Data of 2003, could be applied, such as those concerning collections and storage of the genetic data, right to information and consent. A conclusion by the renowned Centre for Law and Ethics in Biomedicine in Budapest, Hungary ("CELAB"), was put forward in its EUCeLLEX project: namely, that most national regulations are different and there is no unique approach to legislation. A similar situation exists in the US (Gibbons and Kaye, 2007).

Exploring the "ambiguous and fragmented legal framework" that was developed in the field of genetic data since the Human Genome Project, Judit Sandor of CELAB asks *"should we protect human tissues as persons?"* (Sandor, 2013, p. 143) She further concludes: "we should make more careful distinction between personal and human, between our social-cultural and biological identities..." The specific issue with property rights was somewhat clarified by Supreme Court of California; however, Brownsword challenges that reasoning. Namely, if we presuppose that each person has a right to his or her own bodily integrity, it follows that person has a property right in a relation to his removed body part. This, of course, does not apply in cases of donation of organs or tissues or bodily materials, resting upon the altruistic nature of such donations. Or Sandor's conclusion could be helpful here: "Rights over the human tissue do not make us (persons) equal with our (human) samples." So who owns the data and organ once it is printed out of the cells that were removed previously from the human?

Patent-eligible subject matters include “process, machine, manufacture, [or] composition of matter,” but not “laws of nature, physical phenomena, and abstract ideas.” Essentially, anything produced by man is patentable. However, this does not apply to any human organism. Thus, the patentability of human bio-printing is more complex than bio-printing of nonhuman organism. American author Jasper Tran applied the Supreme Court jurisprudence and so-called Prong test established in *Diamond v. Chakrabarty*. Accordingly, bioprinting’s patentability depends on whether a bioprinted product is a product of human ingenuity and non-naturally occurring (Tran, 2015). While tissue printing is seen as a treatment (an implant method) it is rather difficult to say so for organs. In the first case it could also be that such a treatment could fall under the scrutiny of pharmaceutical patent principles. Scientists are still not able to print exact mimics of an organ, meaning, to an exacting nano-scale standard, thus patenting organs as final products with such great precision may not be possible just yet.

There are also a number of other questions related to individual national health care systems, the accessibility of the technology to all persons, quality assurance mechanisms, the overall costs, and the like, just to name a few. Soon enough, scientists will understand how to provide life for cells during the printing process, and may also discover how to print complex organs that consist of different types of tissues; thus, bio-printed organs are likely to be only accessible to those willing to pay for such personalized treatments (“personalized medicine”?). Consequently, this may inadvertently result in perpetuating the division between the rich and the poor and marginalized. Ultimately, we would need to exercise great caution and prudence; without proper regulation whether by national legal systems, or whether through a regional or international reach, this new technology would not be able to effectively serve its main aim: which is to save the lives of all individuals who need it (and not simply the lives of some individuals who have the capabilities to access it).

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On 3D printing technology: <https://3dprinting.com/>

Organ Procurement and Transplantation Network: <https://optn.transplant.hrsa.gov/>

CELAB project, more information available at: <https://celab.ceu.edu/>

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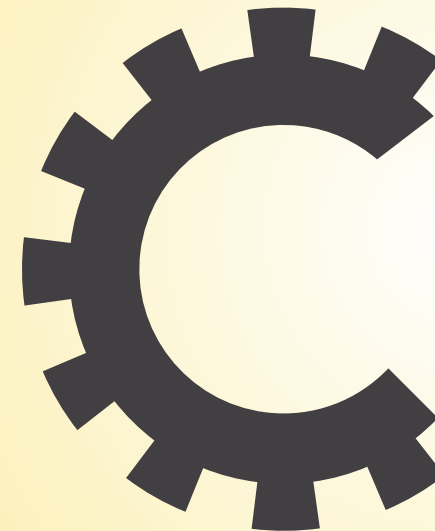
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