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Dark Legacy of Zero Tolerance in Georgia (Criminal Punishment and Sentencing)

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ABSTRACT

Following much-praised promises to reduce crime to zero Georgian Government in 2004 imposed a "zero tolerance" policy embodied in both criminal legislation and legal practice. The fateful phrase "No probation! Everybody to the prison!" explicitly indicated the way of thinking of government officials at that time. This, of course, primarily affected regulations on criminal punishment and sentencing. Unfortunately, the principle of proportionality was largely disregarded, and the goals of punishment were narrowed. In 2012, the new government faced all the consequences of such a one-sided approach – overcrowded prisons, massive human rights violations, etc. As expected, the policy was largely revised. Some radical regulations were repealed. For example, a judge was allowed to use absorption or partial addition of punishment when imposing a sentence in the case of cumulative crimes and cumulative sentences. Sadly, many instances of punishment, such as conditional sentence, imposing more lenient sentences than provided for by law, etc., remain unchanged, presenting the dark legacy of zero tolerance policy.

KEYWORDS: Punishment, Sentencing, Proportionality, Zero tolerance

INTRODUCTION

It is fair to say that Georgian criminal law has seen good, bad, and ugly for the last hundred years. The first two decades (1921-1941) of soviet occupation can safely be defined as the dark age. Both criminal legislature and justice system were oriented to simply punish as many people as possible and as severely as possible, ignoring even the *nullum crimen sine lege* principle. It is not surprising that such repressions in the 1920s and 1930s left a bleeding wound on both the state and society. Nevertheless, from the late 1950s, Georgian legal scholars once again aimed to implement a more elaborate approach. Namely, the principle of proportionality of criminal liability and punishment was reintroduced in and implemented in the Criminal Code of Georgia of 1960. After Georgia regained its independence, the new Criminal Code of 1999 became even more based on proportionate punishment. This consistency was broken in 2004 when the new government declared a "zero tolerance" policy. Step by step Criminal Code was amended to make punishment more and more severe, even when it was not necessary. The judge was left with fewer and fewer freedom in terms of sentencing. While some short-term gains were achieved, overcrowded prisons and massive human rights violations became more than apparent. Overall, things were so bad that in 2012, the newly elected parliament was faced with the need to pass a sweeping amnesty and simultaneously revise the Criminal Code. Since then, many radical regulations have been revised. The purpose of this article is to clarify whether Georgia has finally overcome this issue or still has to deal with the dark legacy of zero tolerance.

Since between 2004 and 2012 Criminal Code of Georgia was amended 93 times, this article cannot cover all of the amendments. Instead, it is primarily focused on the most important general provisions of punishment and sentencing since these are the ones that have the greatest impact on the outcome.

METHODOLOGICAL BASE

Criminal punishment has come a long and thrilling way in evolution from simple revenge to a modern, elaborate concept.[1] The most ancient idea behind punishing someone was built around the offender him/herself. On the other hand, the modern concept is much more mature and targets the entire society. Moreover, it sets specific goals for punishment that need to be achieved. Generally speaking, these are retribution and crime prevention. More specifically, they are divided into several sub-goals, but eventually they all aim to bring two things into society: justice and social good. They are recognized not only by the overwhelming majority of legal scholars but are also directly prescribed in the law. Namely, §1 of Article 39 of the Criminal Code of Georgia indicates that: *"The goal of a sentence is to restore justice, prevent repeated commission of a crime and re-socialize the offender"*. Since these goals are set, every decision regarding punishment and sentencing should be focused on achieving those goals. Respectively, any idea or concept around punishment and sentencing can be and should be analyzed through the prism of retribution and crime prevention. If the idea itself initially contradicts these goals, it is not surprising that the result may seem unsatisfactory. On the other hand, if an idea is more likely to assist in achieving these goals, it is more likely to be acceptable. Since the present article primarily focuses on issues of punishment and sentencing, it would be simply a shame to ignore these very goals.

Since ancient times until quite recently, revenge on the offender has been the main idea of criminal punishment. According to theories of Kant and Hegel, punishment should compensate for the criminal's culpa. Punishment should serve fairness instead of social good.[2] These are

1 see: Abegg, J. F. (1969). The Various Criminal Law Theories in Their Relationship to One Another and to Positive Law and Its History. First Part. Philosophical-historical Development of the Concept of Crime and Punishment. Frankfurt/Main: Verlag Sauer & Auvermann KG, pp.8-73 (In German).

2 see: Roxin/Arzt/Tiedemann. (2013). Introduction to Criminal Law and Criminal Procedure Law. 6th Edition.

often referred to as absolute theories. Kant and Hegel claim that criminal conduct breaches the law; therefore, punishment must be, first and foremost be perceived as a just retaliation for it. Things like social good or expediency of punishment are completely rejected, and the issue is solved purely based on morality. Being immoral, the criminal opposes his will to the law. Therefore, through his action law becomes breached. Consequently, punishment is the means of restoration of what he/she has breached. Hegel rejects the concept of the deterrence effect of punishment combined with the goal of re-education. He argues that since man has free will, the threat of punishment and the attempt to re-socialize him/her would mean reducing him/her to the level of an animal. Kant directly refers to the Talion principle – "An eye for an eye" – and argues that a criminal must be punished since he/she deserves punishment due to what he/she has committed.[3] Sometimes, absolute theories are named theories of retribution. Utter denial of utilitarian ideas brings the offender to the punishment which he/she simply deserves for what he/she has done, and no one cares whether it is socially expedient or not.[4] In this regard, absolute theories are oriented towards the past.[5] Despite their popularity among the people, absolute theories met resistance from some scholars. Beccaria claimed that criminal sentencing based purely on retribution is wrong. He pointed out that punishment must have an exact proportion to the magnitude of the evil that the criminal has committed, make the strongest and most lasting impression on the mind, but be the least painful to the sensibilities of the unfortunate.[6]

The evolution of legal science and consistent retreat from pure retribution made possible the invention of more socially oriented theories commonly known as relative theories. These were based on the idea of expediency instead of morality.[7] Revenge was largely disregarded. Instead, social benefit was considered the main goal, and it was to be achieved through the prevention of crime.[8] In that regard, relative theories became oriented towards the future.[9] Furthermore, two main types of crime prevention were developed.

The first type of prevention developed by List is specifically oriented towards the offender. Therefore, it is commonly known as the concept of special prevention. There are two subtypes of special prevention. Negative special prevention aims to isolate the most dangerous criminals from society and thus protect it.[10] Positive special prevention intents to influence the offender in the right way to prevent him/her from committing another offence in the future.[11] This theory has been much hailed and greatly contributed to the introduction of such important provisions as alternative measures to criminal punishment, parole, etc.[12]

The other type of crime prevention is oriented towards the entire society. It is commonly known as general prevention and was developed by Feuerbach. The main priority here is to influence and deter those individuals who are thinking about committing a crime but have not developed an intent yet. Deterrence is to be achieved through a threat of punishment. Simultaneously, general deterrence is reinforced by sentencing an actual offender. Hesitant individuals should take it as an example and give up criminal thoughts for good. This subtype of general prevention is often referred to as negative general prevention.[13]

Müller, C. F., pp. 4-5 (In German).

3 see: Vacheishvili, A. (1960). Punishment and Means of Social Protection. Tbilisi: Stalin Tbilisi State University Publishing House, pp. 28-31 (In Georgian).

4 see: Dvalidze, I. (2013). General Part of Criminal Law. Punishment and Other Legal Consequences of Crime. Tbilisi: Meridiani, p. 18 (In Georgian).

5 Turava, M. (2013). Criminal Law. General Part. Concept of Crime. Tbilisi: Meridiani, p. 355 (In Georgian).

6 Beccaria, C. (1764). On Crimes and Punishments. Translated From Italian. Breslau, p. 67 (In German).

7 see: Vacheishvili, A. The work cited, p. 31.

8 Grolman, K. (1968). On the Grounds of Criminal Law and Criminal Legislation. Frankfurt am Main: Verlag Sauer & Auvermann KG, p. 56 (In German).

9 Turava, M. The work cited, p. 355.

10 Turava, M. The work cited, p. 355.

11 see: Liszt, F. (1905). Criminal Law Essays and Lectures. The Idea of Purpose in Criminal Law. First Volume. Berlin: J.Guttentag Verlagsbuchhandlung G.m.b.H., pp. 163-179 (In German).

12 Turava, M. The work cited, pp. 355-356.

13 see: Feuerbach, P.J.A.R. (1798). Is protection from crime the purpose of punishment and is criminal law the law of prevention. Library for penal jurisprudence and Legal Studies. (In German).

On the other hand, positive general prevention aims to win the hearts and minds of citizens instead of deterring them. Once an actual offender is sentenced, it instills confidence among citizens, building trust in the integrity and effectiveness of law enforcement in society.[14]

All these theories have been criticized over and over again.[15] The biggest problem was that each of them concentrated on a particular issue and failed to grasp the subject entirely.

Finally, the goals of punishment were systematized as non-utilitarian and utilitarian goals.[16] Based on this system, new unified theories of punishment were developed. Instead of focusing exclusively on one goal, they managed to collect all the good theses put forward by absolute and relative theories. Hence, both non-utilitarian and utilitarian goals are acknowledged at the same time. Adepts of unified theories think that none of the goals guarantees the necessary result on its own. Indeed, instead of picking one, it is possible to combine the best thesis of all three into one unified theory.[17] Of course, it was not done overnight. It took time and effort.[18] It was indeed uneasy since, at first glance, non-utilitarian and utilitarian goals of punishment contradict each other.[19] The state must punish the offender and take revenge on him/her because it is fair and he/she deserves it. At the same time, the state should take care of the criminal, mitigate the punishment if possible, and create a chance for rehabilitation. Despite seeming contradiction, these goals create dialectical unity and complement each other. As Hälschner once noticed, although punishment must serve a multitude of goals, its nature is not determined by one or another of them, not even the majority of them. It is determined by only the absolute goal – justice, since it is truly fair and automatically serves all the relative goals.[20]

Since clarity on methodological basis has been achieved, it is time to analyze specific amendments on punishment and sentencing made to the Criminal Code of Georgia and understand to what extent they contribute to achieving the goals of punishment.

REGULATIONS ON PUNISHMENT AND SENTENCING

First of all, it should be noted that these elaborate goals of punishment do not make a judge's life easier. They require strict adherence to the principle of proportionality of punishment. For some people, proportionality itself seems unattainable. The judge must take into account all important mitigating and aggravating circumstances of the criminal case and impose a proportional sentence. Of course, the task becomes even more difficult when one realizes that he/she needs to achieve proportionality essentially across all five sub-goals of punishment at the same time.[21]

The significance of proportionality of punishment is dictated by the goals of punishment themselves. It is not even so much about the contradiction between non-utilitarian and utilitarian goals. It's about different approaches that these goals require and also about the balance between them. Retribution is about strictness to the criminal. It is about punishing the criminal as he/she deserves due to the seriousness of the crime he/she committed. Therefore, if the sentence is not severe enough, retribution may not occur. On the other hand, positive special prevention is more about perception and even compassion for the criminal to clear his way back into soci-

14 see.: Tskitishvili, T. (2019). Punishment and Sentencing. Tbilisi: Meridiani, pp. 31-32 (In Georgian).

15 see: Köstlin, C.R. (1978). System of German Criminal Law. General Part. First Part. Reprint of the Edition. Tübingen: Scientia Verlag Aalen, pp. 395-413 (In German).

16 Nachkebia, G., Todua, N. (eds.). (2024). Criminal Law (Textbook). General Part. Third Edition. Tbilisi: Meridiani, p. 596 (In Georgian).

17 see: Roxin/Arzt/Tiedemann. The Work cited, pp. 6-7.

18 see: Von Bar, C.L. (1882). Handbook of German Criminal Law. First Volume. History of German Criminal Law and Criminal Law Theories. Berlin: Weidmannsche Buchhandlung, §. 95, pp. 270-273 (In German).

19 Turava, M. The work cited, p. 356.

20 Hälschner, H. (1858). The Prussian Criminal Law System – Second Part of Prussian Criminal Law or General Part of the System. Bonn, p. 440 (In German).

21 Goh, J. (2013). Proportionality – An Unattainable Ideal in the Criminal Justice System. University of Manchester Student Law Review. volume II, p. 50 (In English).

ety. It's about imposing a sentence that is enough for the re-socialization of the offender. Therefore, if the sentence is too harsh, it may be counter-productive and further alienate the offender from a law-abiding society. Based on the above, the sentence must not be too lenient and not too severe. It must be proportionate. Yes, not all five goals have the same weight all the time. Sometimes one of them can become more important than the others. For example, in cases of juvenile offenders, retribution is completely rejected while crime prevention, especially positive special prevention, is a full priority. What if a criminal deserves five years of imprisonment due to the seriousness of the crime he/she committed, but at the same time, three years of imprisonment are enough for him/her to re-socialize? In this case, the judge him/herself must choose which goal is more important – retribution or special crime prevention, and carefully tip the scales in favor of one of them. Anyway, it is extremely important to keep in mind the significance of proportionality and balance between strictness and leniency.

Despite all these difficulties intention of Georgian lawmakers in 1999 on this matter was pretty apparent. Firstly, Article 40 of the original Criminal Code of Georgia of 1999 provided for as many as ten types of punishment. Such diversity certainly contributed to better individualization of punishment, thereby achieving proportionality. Article 41 provided basic and supplementary punishments, making sentencing even more flexible. §3 Article 53 obliged the judge to take into account specific mitigating and aggravating circumstances such as the motive and goal of the crime, the unlawful intent demonstrated in the act, the character and degree of the breach of obligations, etc. However, amendments made since 2004 paint a completely different picture.

IMPOSING A SENTENCE IN THE CASE OF CUMULATIVE CRIMES AND CUMULATIVE SENTENCES

Article 59 of the Criminal Code of Georgia, adopted in 1999, contained three options for punishing a cumulative of crimes: absorption, partial addition, and full addition (cumulative punishment). In case of two or more less serious[22] offences, more severe punishment would absorb the less serious punishment(s). This provision was amended in 2000 so that partial and full addition of punishment was also allowed. At the same time final sentence could not have exceeded 5 years.[23] In case of two or more serious or particularly serious crimes, the punishments imposed for each crime individually would have been partially or fully added up. Plus, the term of imprisonment imposed as a final sentence could not have exceeded 25 years. In case of less serious and serious crime or less serious and particularly serious crime, absorption as well as partial addition and full addition were allowed. Plus, the term of imprisonment imposed as a final sentence could not have exceeded 20 years. At first glance, these provisions were indeed intended to promote the goals of punishment. It would allow the judge to consider all the mitigating and aggravating circumstances of the case and impose a proportional sentence.[24]

In 2006 Parliament of Georgia adopted an amendment to Article 59. According to the new regulation, in case of cumulative crimes, the punishment had to be imposed for every crime individually and then added up (aggregate sentence). Hence, neither absorption nor even partial addition was available to the judge anymore. At the same time, Article 50 of the Criminal Code

22 Less serious – An intentional crime or a crime of negligence for the commission of which the maximum sentence provided for under this Code does not exceed 5 years of imprisonment; Serious – An intentional crime for the commission of which the maximum sentence provided for under this Code does not exceed 10 years of imprisonment, also a crime of negligence for the commission of which the maximum sentence under this Code exceed 5 years of imprisonment; Particularly serious – An intentional crime for the commission of which this Code provides for a sentence exceeding 10 years of imprisonment or life imprisonment; see: Article 12, Criminal Code of Georgia.

23 Law of Georgia on Amendments and Additions to Criminal Code of Georgia. Date of passing: 23.02.2010. Document number: 2644.

24 Guruli, P. (2018). The Judge and Individualization of Punishment (Contradiction Between the Goal and the Mean). Law and the World, Vol. 4 №10, pp. 161-172 (In Georgian).

of Georgia was also amended, and the possible term of imprisonment imposed as a final sentence was increased from 20 to 30 years.[25]

As mentioned above, in 2012 newly elected Parliament of Georgia faced the necessity to declare an amnesty for a vast number of prisoners.[26] Parliament also had to rethink the approach to the subject of imposing sentences in cases of cumulative crimes.[27] New law allowed judges much more freedom. According to the new law, in every case except for recidivism more severe sentence shall absorb a less severe sentence. In case of recidivism,[28] when imposing a final sentence for cumulative crimes, a more severe sentence shall absorb a less severe sentence or the sentences provided for these crimes shall be added up in part or in full. In the case of recidivism, the term of imprisonment imposed as a final sentence may not exceed 30 years.

From the perspective of retribution, this 2013 change makes things significantly better. As mentioned above, retribution is about punishing the offender for what he/she has committed. e/she gets punished because he/she deserved it. So instead of simply adding up the sentences for individual crimes, it's better to think about how severe the punishment the criminal deserves. For example, one individual has committed *theft by illegal entry into a dwelling place* three times. Each time he/she stole 200 GEL (68 EUR), overall 600 GEL. This criminal would face 4 to 7 years of imprisonment for each offence. If there were only full addition available, he/she would face 12 to 21 years of imprisonment. At the same time, another person who committed homicide (intentional killing) would face 7 to 15 years. Does this thief who stole 600 GEL deserve more severe punishment than a murderer? Well, maybe... maybe not. At least a judge should have the right to answer this question, and if the answer is "no", he/she should be able to apply absorption. Although there is also a significant risk of unfairness. Since the judge can't apply partial or full addition unless there is recidivism, some people may receive undeserved leniency. If an offender has committed a series of crimes, for example, 15 episodes of fraud. If this criminal doesn't have recidivism, he/she will face only absorption as if he/she had committed only one episode.

In terms of special prevention, the current regulation is even more significant. It allows the judge to properly individualize the sentence, thus supporting the proportionality of punishment and greatly supporting the re-socialization of the offender. Although recidivism should not be a prerequisite for at least partial addiction, as discussed earlier. Some criminals may need partial addition of sentences to properly re-socialize.[29]

As for the general prevention, the current approach has slight problems. Since general prevention relies largely on the threat of punishment, i.e., the deterrence effect, using absorption instead of partial or total addition may not always be effective. For example, an offender has committed a series of crimes, 15 episodes of fraud, and gets punishment only for one. Such a sentence will not have a deterrence effect on the members of society who think about committing a crime. For most of them, this will be a signal of the possibility of evading responsibility. Thus, the judge should have the right to apply at least partial addition even in cases where there is no recidivism, but there is a need to impose a more severe punishment for general prevention. In general, recidivism is not always a good prerequisite for partial or full addiction. The original (1999) regulation was better than the current (2013) regulation in terms of both specific and general prevention, as it allowed for a more sophisticated approach instead of simply setting a single precondition, such as recidivism.

25 Law of Georgia on Amendments and Additions to Criminal Code of Georgia. Date of passing: 29.12.2006. Document number: 4213.

26 Law of Georgia on Amnesty. Date of passing: 28.12.2012. Document number: 202-RS.

27 Law of Georgia on Amendments to Criminal Code of Georgia. Date of issuing:17.04.2013. Document number: 546-IIS.

28 "Recidivism shall mean the commission of an intentional crime by a person who has previously been convicted for an intentional crime". see: Criminal Code of Georgia, §1, Article 17.

29 Guruli, P. (2023). Imposing a Sentence in Case of Cumulative Crimes (Legislative Tendencies in Georgia). Law and World, Vol. 9, №28, December, p. 185 (In Georgian).

Overall, it is fair to say that the current revised (2013) provisions on imposing a sentence in the case of cumulative crimes and cumulative sentences are much more focused on the goals of punishment. At least the overt radicalism that characterized the zero-tolerance policy is no more. At the same time, undoubtedly, a more detailed differentiation is needed to prevent unjust sentences in the future.

IMPOSING A MORE LENIENT SENTENCE THAN PROVIDED FOR BY LAW

The original 1999 Criminal Code of Georgia introduced a mechanism allowing a judge to impose a more lenient sentence than provided by law if there was a particularly mitigating circumstance in the criminal case.[30] The judge should also have taken into account the personality of the offender him/herself. This provision was consistent with the legislative intent present in 1999. As mentioned above, the goals of punishment require strict adherence to the principle of proportionality. This is usually achieved by individualization of punishment. The judge weighs all the mitigating and aggravating circumstances present in an individual criminal case and imposes the most proportionate punishment. But a judge can't be given absolute power. The measure or term of punishment can't be fully dependent on the judge's opinion. To prevent legal voluntarism, legislator implements the principle of differentiation of criminal liability and punishment. In the special part of the Criminal Code, offences are differentiated from each other. For example, a *theft i.e. secretly taking another person's movable property for its unlawful appropriation*[31] is to be punished by imprisonment for a term of one to three years; The same act *committed by illegally entering a building or other storage facility*[32] is to be punished by imprisonment for a term of three to five years; The same act *committed with a preliminary agreement by a group*[33] is to be punished by imprisonment for a term of four to seven years; The same act *committed by an organized group*[34] is to be punished by imprisonment for a term of six to ten years. Specific offences are differentiated due to the level of social danger that they pose. Each of them gets their minimum and maximum term of punishment. For example, an individual is found guilty of *theft committed by illegally entering a building or other storage facility.* Accordingly, he/she faces three to five years of imprisonment. This is due to the fact that the act he/she committed represents such a degree of public danger that the punishment should be at least three years of imprisonment to be proportional. This perfectly aligns with the goal of retribution. But what if things are not that simple? What if there are one or more particularly mitigating circumstances? What if the judge considers that one year of imprisonment will be perfectly enough for his resocialization, i.e., positive special prevention of crime? In that case following two years will most likely be counterproductive. For this very reason, Article 55 was introduced as an exceptional provision into the Criminal Code of Georgia. The judge had the right to punish the minimum limit of punishment provided for by a specific article for a specific crime (the so-called "below the minimum") or another, more lenient punishment. In above mentioned case, the judge could impose one year of imprisonment that would be proportional to the goal of positive special prevention.

Of course, one may argue that a "below the minimum" sentence may be harmful for retribution and general prevention of crime. Indeed, this provision contains a significant compromise. Of course, the criminal may not get what he/she deserve, and the deterrent effect may be reduced as well. However, it should be remembered that a punishment "below the minimum" is more of an exception than a daily norm. The judge should apply it only when he/she is certain that its application will do more good than harm. Moreover, when used correctly, "below the minimum" punishment can assist positive general prevention,

30 Article 55, Criminal Code of Georgia.
31 Article 177, § 1 Criminal Code of Georgia.
32 Article 177, § 2(b) Criminal Code of Georgia.
33 Article 177, § 3(a) Criminal Code of Georgia.
34 Article 177, § 4(a) Criminal Code of Georgia.

showing that the state not only punishes but also sometimes shows mercy to people who have made mistakes and deserve a second chance.

Three main amendments have been made to Article 55. The first one was made in 2004.[35] This amendment expanded the grounds for application of Article 55. The judge retained the right to impose a sentence "below the minimum" if there were particularly mitigating circumstances. However, he/she also became obliged to impose a sentence of no more than half of the maximum term if the prosecutor presented a plea agreement signed between the parties. Of course, "no more than half of the maximum" and "below the minimum" are not the same. They are quite different. Therefore, it is not entirely clear why such a provision was added to Article 55.

The second amendment (addition) was added in 2005.[36] Judge also became obliged to impose a sentence of no more than two-thirds of the maximum term if the defendant voluntarily admitted his guilt and his confession was not in doubt. Again, "no more than two-thirds of the maximum" and "below the minimum" are very different. Thus, it is clear that the First and Second Amendments somehow missed the base idea of Section 55.

The third and final amendment was made in 2006,[37], and it is fair to say that it did not miss the base idea. It destroyed it. From now on, the judge may impose a sentence "below the minimum", or another more lenient sentence, only in case if a plea bargain is concluded between the parties. This was the prime symptom of the zero-tolerance policy. The accused was robbed of a chance to get a sentence "below the minimum" unless he/she pleaded guilty or/and signed a plea bargain with the prosecutor. The entire concept behind Article 55 suddenly disappeared. What about a particularly mitigating circumstance? It didn't matter anymore. What about proportional punishment? The judge was robbed of a mechanism that was necessary for it. Positive special prevention of punishment? It was no longer considered too important. Unfortunately, the provision provided in 2006 remains in force to this very day.

CONDITIONAL SENTENCE

Unfortunately, a similar story happened with a conditional (suspended) sentence. As mentioned earlier, the concept of a conditional sentence largely follows the concept of special prevention. The original (1999) Criminal Code of Georgia, namely §1 of Article 63, indicated that a suspended sentence could be imposed if the judge decided that it was possible for the offender to re-socialize without actually serving the sentence. This is perfectly aligned with positive special prevention. For example, a person was found guilty of theft (§1, Article 177). He/she faces imprisonment for a term of one to three years. In terms of retribution, it is fine to send this person to prison for at least one year. Such punishment will be perfectly proportionate to the goal of retribution. General crime prevention will also be effective since the deterrence effect will be present as well. However, from the point of view of positive special prevention, there may be other opinions. The judge may consider the mitigating circumstances of the case and conclude that the offender would most likely be re-socialized if not sent to prison at all. This means that no prison sentence will be proportionate to the goal of positive special prevention. This usually applies to individuals who have no previous criminal record, who cooperate, did not have an inherent criminal intent, but were rather pushed by circumstances, etc. Such people usually deserve the opportunity to re-socialize without going to prison. Moreover, the penitentiary system is imperfect and does not always provide the necessary means for resocialization, especially for those entering prison for the first time. If such people end up in prison, they risk becoming involved in a criminal subculture, which will make their resocialization even more difficult.

35 Law of Georgia on Amendments and Additions to the Criminal Code of Georgia. Date of passing: 13.02.2004. Document number: 3295.

36 Law of Georgia on Amendments to the Criminal Code of Georgia. Date of passing: 20.12.2005. Document number: 2352.

37 Law of Georgia on Amendments and Additions to the Criminal Code of Georgia. Date of passing: 28.04.2006. Document number: 2937.

Therefore, having carefully weighed all the pros and cons, the judge may tip the scales in favor of positive special prevention and impose a suspended sentence.

In 2006, a major amendment was made to Article 63.[38] Just like the "below the minimum" sentence, a plea agreement signed by the parties became a necessary precondition for a suspended sentence. On the one hand, the judge is still obliged to impose a proportional sentence. But what if he/she considers that any prison sentence will be disproportional to one or more goals of punishment? If there is no plea agreement signed, he/she is simply powerless because he/she has been deprived of the necessary right to impose a suspended sentence.[39] Once again, principles of individualization of punishment and proportionality of punishment were disregarded. Positive special prevention of punishment was again not considered important.

Furthermore, it must be noted that during the "zero tolerance" period, it was common practice to force the accused to sign a plea bargain. More often than not plea bargain would include a large sum of money to be paid as a fine. This was almost exclusively a prerequisite for a more lenient punishment. People paid money to spend fewer years in prison. No surprise that both suspended sentence and "below the minimum" sentence were a fine object for such "trades". Having no other choice, people simply bought them with money. Most likely, this was precisely the original purpose of the amendments discussed above. Unfortunately, both these provisions remain in force to this very day.

38 Law on Amendments and Additions to the Criminal Code of Georgia. Date of passing: 28.04.2006. Document number: 2937.

39 Guruli, P. (2018). The Judge and Individualization of Punishment, pp. 161-172.

CONCLUSION

Having carefully analyzed the process of revising the legislation in the area of punishment and sentencing, it is fair to note that some radical provisions adopted during the period of zero tolerance in Georgia have indeed been revised. For example, the judge was given back his right to apply absorption, partial addition, or full addition in case of cumulative crimes or cumulative sentences. This is a significant step in terms of the proper individualization of punishment. This, therefore, increases the likelihood of a proportionate sentence being handed down. Overall, the current approach, although in need of some improvement, does contribute to achieving the goals of punishment.

Unfortunately, the same cannot be stated about suspended sentence and so-called "below the minimum" sentence. In both cases, the judge is deprived of the necessary right to properly individualize the sentence. He/she still must impose proportionate punishment, but cannot use the tools necessary to do so. This is especially true for a suspended sentence. Many first-time offenders should be given suspended sentences to assist their re-socialization. But such an opportunity is only limited to those who sign a plea agreement with the prosecutor. Undoubtedly, such a limitation makes achieving the goals of punishment more difficult. Moreover, since a general course for revising such issues was announced, these provisions should have been among the first to be revised. Sadly, the problem remains unsolved to this day, resembling the dark legacy of "zero tolerance".

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4. Law of Georgia on Amendments and Additions to the Criminal Code of Georgia. Date of passing: 13.02.2004. Document number: 3295.
5. Law of Georgia on Amendments and Additions to the Criminal Code of Georgia. Date of passing: 28.04.2006. Document number: 2937.
6. Law of Georgia on Amendments to Criminal Code of Georgia. Date of passing: 17.04.2013. Document number: 546-IIS.
7. Law of Georgia on Amendments to the Criminal Code of Georgia. Date of passing: 20.12.2005. Document number: 2352.
8. Law of Georgia on Amnesty. Date of passing: 28.12.2012. Document number: 202-RS.

Hague Systems on Industrial Designs Protection as an Optimization of IMT-GT ASEAN Economic Cooperation

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ABSTRACT

In the industrial design rights protection regime of IMT-GT ASEAN member countries, there are two instruments as a framework, namely TRIPS and the Hague System. The Hague system is needed to elaborate on the different mechanisms in simplifying the unified design registration process, which simultaneously applies in several member countries. Still, Indonesia, Malaysia, and Thailand have not yet completed ratifying the Hague System into national law and have not revised the legal regulations regarding industrial design in their countries, respectively. In Indonesia, there are still differences in the protection concept between what is regulated in TRIPS and the substance of the Industrial Design Law regarding first to use or first to file, and it still requires domestic registration. This normative legal research concludes the need for harmonization between the rules in treaties as a source of international law and national law, so that the clauses in trade

cooperation contracts do not conflict with the laws of the respective countries that have ratified them. Unification through the Hague system also needs to be supported by expanding the scope of provinces implementing the IMT-GT cooperation project, followed by the strategic policies of each country.

KEYWORDS: Industrial design, IPR, Hague, IMT-GT

INTRODUCTION

Indonesia's commitment to optimizing regional trade cooperation between Indonesia and ASEAN countries has been realized through the formation of the ASEAN IMT-GT (Indonesia – Malaysia – Thailand Growth Triangle) sub-region since 1993 between the leaders of the three countries.[1] Until this year, IMT-GT cooperation projects have been implemented in real terms, including halal industry projects, technology industry cooperation, tourism, and industrial downstream in IMT-GT rubber cities and digital malls in the IMT-GT e-commerce platform.[2]

Indonesia, Malaysia, and Thailand as WIPO member countries which are committed to the development of IPR since the promulgation of TRIPS are of course also obliged to implement the latest developments related to the issue of global scale intellectual property protection including industrial design which now requires ratification of the Hague system since the 1999 Geneva Act. This was also ordered in the ASEAN IPR Action Plan 2016-2025.[3] So it is also an obligation for all WIPO member countries and countries in ASEAN that are committed to the ASEAN IPR Action Plan, including Indonesia, Malaysia, and Thailand, to take steps to accede to the Hague system in their country's national legal system. Apart from being a form of compliance with the results of international treaties or conventions, this also plays an important role in strengthening regional trade cooperation between the three countries in the ASEAN sub-region.

Malaysia and Thailand have shown their seriousness in complying with the Hague system accession obligations at the Parliamentary level. So far, the Indonesian government itself has planned to accede to the Hague Agreement, although this plan has not yet been realized. The Hague System is an international system for registering industrial designs managed by WIPO, making it easier for WIPO member countries.

The obligation to ratify the Hague Agreement, also known as the Hague Statute or Hague System, should be contained in the revision of the Industrial Design Law and become a priority for the work plan of the Directorate General of Intellectual Property for the future, but to date, no final steps have been taken regarding accession to the Hague System. The Hague System, apart from being beneficial for the industrial sector as registrants, will also be of great benefit to the bureaucracy, especially the Directorate General of IP in terms of minimizing administrative workload, manual data entry, inspection, and issuance of industrial design certificates which were originally the obligation of the Directorate General of IP to change to the obligation of WIPO *cq* Bureau International. The unification of the Hague system will not only clarify registration fees and standards but also simplify bureaucratic matters.[4]

IPR as a part of economic law was included in the liberalization of free trade agendas.[5] In-

1 Dayang-Affizah, A. M. (2016). Convergence Behaviour of Growth Triangle: The Case of IMT-GT. Business and Economic Journal 7 (2), pp. 1-6. DOI: <https://doi.org/10.4172/2151-6219.1000205>.

2 Sudirman, A., et al. (2023). Kerjasama Indonesia Malaysia Thailand Growth Triangle dalam Upaya Pemulihan Ekonomi Pasca Pandemi Covid-19. Governance 10 (2), pp. 51-57. DOI: <https://doi.org/10.56015/gjikplp.v10i2.120>.

3 Smith, R.B., et al (2023). Impact of Plurilateral Free Trade Agreements on Innovation: Example of ASEAN. Journal of ASEAN Studies 11 (1), pp. 87-110. DOI: <https:/doi.org/10.21512/jas.v11i1.7975>.

4 Andersson, D.E., et al. (2023). Industrial Design Rights and The Market Value of Firms. Technological Forecasting and Social Change 196 (5), pp. 1-14, DOI: <https://doi.org/10.1016/j.techfore.2023.122827>.

5 Zufikri, Z. (2022). Legal Protection of Intellectual Prop-

donesia, as an active member of WTO and WIPO, should become an active compliance country in ratifying treaties that are closely related to international trade and respect for intellectual property as well as ensuring the implementation of national legal sources resulting from its ratification in accordance with WIPO's strategic plan and the ASEAN IPR Action Plan.

Considering the importance of ratification of the Hague system in the revision of regulations in the field of industrial design in Indonesia as a member country of IMT-GT ASEAN, this normative legal research will discuss the principle of full compliance in the obligation to ratify the Hague system in Indonesia as a member country of IMT-GT ASEAN and how to unify the Hague system in encouraging the strengthening of IMT-GT ASEAN regional trade cooperation. The normative legal research was conducted by conducting a literature and conceptual study through a statutory approach and a conceptual approach to observe the solution for certain issues.

1. FULL COMPLIANCE PRINCIPLE ON THE RATIFICATION OF THE HAGUE SYSTEM INTO THE INDONESIAN NATIONAL LAW SYSTEM

Ratification is the official action of a country to bind itself to an international agreement and statute. It is usually a result of relations developed between countries in an international organizational forum.[6] Ratification by Article 1, point 2 of Law Number 24 of 2000 concerning International Agreements ("UUPI") is interpreted as a legal act of ratification to bind oneself to an international agreement in the form of ratification, accession, acceptance, and approval.[7]

Indonesia has often ratified international agreements or international statutes in the form of statutory regulations, namely ratification through acts or Presidential Regulations. In the field of IPR itself, Indonesia ratified TRIPs for the first time through Law Number 7 of 1994 concerning the Ratification of the Agreement Establishing the World Trade Organization. Ratification is intended to enact the provisions of the TRIPs Agreement into national law. The differences in the political and legal climate between local and global will influence the enactment of the provisions in TRIPs. Another impact of this ratification is to reduce the number of IPR violations in Indonesia, especially industrial property rights.[8]

The legal consequence of ratification is that it is subject to national law.[9] So in ratifying, Indonesia has directly agreed to the agreement of various member countries, even though the legal and political climate was different. By ratifying an international agreement it shows the political will of Indonesia to be bound and accept the rights and obligations arising from the agreement. Ratification of international agreements in the form of laws was carried out if they involved fundamental matters.[10]

The result of ratification is a general agreement that applies globally among member countries of the WTO as international organizations. On the other hand, there may still be a mismatch between legal politics in Indonesia

erty Rights: What is Urgency for the Business World? Jurnal IUS: Kajian Hukum dan Keadilan 10 (1), pp. 12-25. DOI: <http://dx.doi.org/10.29303/ius.v10i1.940>.

6 Martinez, I., Chelala, S. (2021). Trade Agreements and International Technology Transfer. Review of World Economics 157, pp. 631-665, DOI: <https://doi.org/10.1007/s10290-021-00420-7>.

7 Vienna Convention on the Law of Treaties, 1969, Article 2 (b). U.N.T.S., vol. 1155, p. 331 (hereinafter VCLT).

8 Nabila, D.D., Sanusi, S. (2023). Protection for Registered Trademark Under Indonesian Law and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Student Journal of International Law 3 (2), pp. 132-147. DOI: <https://doi.org/10.24815/sjil.v3i2.24121>.

9 Martínez-Zarzoso, I., Chelala, S. (2021). Trade Agreements and International Technology Transfer. Review of World Economics 157, pp. 631-665. DOI: <https://doi.org/10.1007/s10290-021-00420-7>.

10 Pop, C.D. (2023). Treaty Ratification Law – Empirical Study on the Temporal Efficacy of the Parliamentary Procedure. STUDIA 68 (1), pp. 13 – 42. DOI: <https://doi.org/10.24193/SUBBiur.68(2023).1.1>.

and the global world.[11] It is important for Indonesia to adjust the legal and political climate in implementing the TRIPs that must not conflict with the juridical, philosophical, and sociological foundations of the Indonesian state.[12]

Indonesia's participation in membership of international organizations and the ratification of international agreements as a form of implementation of Article 96 of Law Number 13 of 2022 concerning the Second Amendment to Law Number 12 of 2011 concerning the Formation of Legislation. The formation of legislation does not only focus on the material substance but also compliance with formal aspects to create legal products with integrity.[13] Therefore, the principle of absolute compliance (full compliance) is the most urgent principle to be implemented in the Hague statute ratification process. In efforts to ratify the Hague Agreement and adopt it into national regulations, national interests must remain the main focus. The draft of the new Industrial Design Bill must be used as a barometer for the development of Design Policy.

Full compliance in the context of the law of treaties could be translated to the action of observance, application, and interpretation in accordance with or not opposed to the framework of that treaty. However, there is one concession provided in the international legal treaty regime for the contracting parties in performing their duties, namely, reservations. It means "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State".[14] Reservations then may perform as a way to not be bound by the provision of a certain rule of a treaty, and therefore not fully comply with the treaty comprehensively.[15]

Specifically, the *full compliance* principle emanates from the wording of Article XVI, point 5 of the Marrakesh Agreement.[16] It stated that "[n]o reservations may be made in respect of any provision of this Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements [...]". In essence, reservations cannot be made to the Agreement, including its Annexes, unless provided otherwise.

Annex 1C covers the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement).[17] Concerning industrial designs, it requires contracting states to protect designs that are new or original, but not to protect designs that are different merely by technical or functional means.[18] National laws of the contracting state, whether industrial design law or copyright law, shall provide requirements for obtaining design protection.[19] The legitimate interests of third parties may be taken into account in establishing limited exceptions without prejudice to the legitimate interests of the owner of the protected design.[20] The legitimate interests of the owners of the protected design shall remain primary. Commercial purpose usage of the protected design by third parties

11 Tandungan, E.S., et al. (2021). The Legal Provisions of Indonesia Law System on International Agreements. Prosiding The 1st WICSTH, pp. 403-411.

12 Geofrey, M.J.C., Roisah, K. (2020). Patenting Deal in Indonesia: Article 20 of the Patent Law in the Political Perspective of International Trade Law. Law Reform 16 (1), pp. 19-31. DOI: <https://doi.org/10.14710/lr.v16i1.30302>.

13 Astariyani, N.L.G., et al. (2023). Preventive and Evaluative Mechanism Analysis on Regulatory and Legislation Reform in Indonesia. Law Reform 19 (2), pp. 248-269.

14 VCLT, Article 2 (d).

15 Doshi, N.R. (2021). The Law of Treaties with Special Focus on Evolutionary Interpretation of the Treaties. International Journal of Law Management & Humanities 4 (3), pp.2696 – 2608. DOI: <https://doij.org/10.10000/IJLMH.11741>.

16 Marrakesh Agreement Establishing the World Trade Organization, 15.04.1994, 1867 U.N.T.S. 154 (hereinafter Marrakesh Agreement).

17 TRIPs: Agreement on Trade-Related Aspects of Intellectual Property Rights, 15.04.1994. Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) (hereinafter TRIPs Agreement).

18 TRIPs Agreement, Article 25 (1).

19 Ibid, Article 25 (2).

20 Ibid, Article 26 (2).

might be restricted as the owner "have the right to prevent third parties not having the owner's consent from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design" and the protection shall cover at least ten years.[21] To the TRIPs Agreement, there shall not be any reservations made without the consent of other contracting states.[22] The legal relationship between contracting states, in terms of whether any industrial designs may have legal protection in their respective jurisdictions, then, relies on consent. By acting in accordance with the said framework, contracting states may be regarded as satisfying the first dimension of the *full compliance* principle.

Another dimension that may demonstrate whether contracting states are performing *full compliance* can be seen in the principles used in their domestic laws. Law Number 31 of 2000 concerning Industrial Design firmly takes a position in the 'first to file' principle. It means that designs need to be formally registered before they can be protected.[23] While it is not expressly stated, the TRIPs Agreement does not require industrial designs to be registered first to grant protection. In other words, it gives off the impression that the 'first to use' approach is taken considerably.[24] Although Indonesia has ratified the TRIPs Agreement,[25] the *full compliance* principle is not enforced. The *Hague System* co-exists alongside the TRIPs Agreement to provide a robust framework for the protection of industrial designs. While the TRIPs Agreement imposes obligations on contracting states to provide baseline protection, the *Hague System* lays out efficient, practical mechanisms for owners to secure their design internationally.

An examination of the legal relationship between the *Hague System* and the Indonesian law system concerning industrial designs needs to be done carefully. Meanwhile, Indonesia has not yet ratified the *Hague System*; it is understood that *full compliance* has not been adhered to. There might be hints of the implementation of the *Hague System* in the Indonesian legal system, nevertheless.[26] The most prominent contrast point is on Article 3, which mandates that industrial designs must be registered to receive legal protection in Indonesia.[27] This aligns with the need for formal registration, although the *Hague System* allows for international registration of designs through a single-uniform application.[28] The latter can streamline the process for multiple jurisdictions. Therefore, harmonization between international agreements and national law is required to perform *full compliance* with the *Hague System*.

2. INDUSTRIAL DESIGN UNIFICATION IN ENCOURAGING INTERNATIONAL TRADE COOPERATION IN THE IMT-GT ASEAN SUB-REGION

The Hague Agreement or the Hague Statute from the 1961 Hague Agreement and Geneva Act 1999 was a system that allows design owners to centrally register their designs with a number of countries and/or inter-state organizations.[29] This method provides convenience because it

21 Ibid, Article 26 (1), Article 26 (3).

22 Ibid, Article 72.

23 Law Number 31 of 2000 concerning Industrial Design, Article 3. (hereinafter Law 31/2000).

24 TRIPs Agreement, Article 25.

25 Sulistianingsih, D., Ilyasa, R.M.A. (2022). The Impact of TRIPS Agreement on the Development of Intellectual Property Laws in Indonesia. Indonesia Private Law 3 (2), pp.77-88. DOI: <https://doi:10.2504/iplr.v3i2.2579>.

26 Law 31/2000 in Article 1 constitutes the definition of industrial design and its protection; Article 9 determines the ten-year validity of the protection, Article 6 concerns the prohibition of the unauthorized use, reproduction, or distribution of the design.

27 Law 31/2000, Article 3.

28 Jueptner, E. (2020). The Hague Jurisdiction Project – what Options for the Hague Conference? Journal of Private International Law 16 (2), pp. 247-274. DOI: <https://doi.org/10.1080/17441048.2020.1766220>.

29 Hartoyo, B., Noor, M.F. (2019). The Hague Convention 1961: Solution of Foreign Public Document Legalization for Indonesia and ASEAN Member Countries. ABC Research Alert 7 (1), pp. 37-47. DOI: <https://doi.org/10.18034/ra.v7i1.249>.

only passes through one door, one language, and one currency and is cost-efficient because the industrial design right holder does not need to apply for registration of his design in several other destination countries separately.[30] Aiming to develop industrial design products that are more varied and have the same clear standards. This classification was prepared through a periodic revision process according to current developments by WIPO, as the center for carrying out the administration of the Hague Agreement at the international level.[31]

The Indonesian government has now prepared a draft Presidential Regulation concerning Ratification of the Statute of the Hague Conference on Private International Law, which has been submitted by the President to the Indonesian House of Representatives for discussion since 6 August 2024. Indonesia itself has become a member of the HCCH, an intergovernmental organization that focuses on the unification of international private law with a total of 90 member countries, including Malaysia, the Philippines, Vietnam, Singapore, and Thailand from ASEAN. HCCH membership is also useful in resolving cross-border trade disputes and obtaining technical guidance to facilitate accession, thereby providing stronger legal certainty in encouraging increased confidence from investors and international trade partners.[32]

Indonesia, Malaysia, and Thailand themselves as members of the HCCH have also become members of the ASEAN sub-region as IMT-GT, which was officially ratified in 1993 by Indonesian President Soeharto, Malaysian Minister Tun Dr. Mahathir Mochammad, and Thai Prime Minister Chuan Leekpai. IMT-GT has strengthened the connectivity of the ASEAN sub-region in economic growth, including the green economy trend.[33] The green economy in recent years prioritized regional economic development to reduce disparities and increase the competitiveness and welfare of society in the territory of the 3 countries as the ASEAN sub-region. This is proven by the drastic increase in IMT-GT's gross domestic income from USD 20 billion in 1993 to USD 405.7 billion in 2021.

This IMT-GT collaboration continues to be fostered and improved to achieve the 2025 ASEAN connectivity master plan so that digital transformation and creative economic development in line with green economy issues and SDGs can run optimally, especially as IMT-GT has declared a vision to become an integrated, innovative region. Inclusive, green, and sustainable in 2036. For this reason, the launch of the Joint Business Council (JBC) program was launched, which aims to open up opportunities for direct trade and investment cooperation with a business-to-business concept between Indonesia, Malaysia, and Thailand. Various collaborative projects, ranging from the creative economy sector, including tourism, telecommunications, digitalization, special economic zones, and renewable energy, to Human Resources (HR) development, for example, include the Kuala Tanjung Industrial Estate project.

The creative economy as a trade sector is closely related to IPR and cannot be separated from the other.[34] IPR is the basis of rights for creative economy business actors, while the creative economy itself is a forum for the development of innovation and the utilization of the moral and economic rights of IPR holders regarding these innovations, both copyright and industrial property rights. Industrial property rights were involved in international

30 Indonesian Industrial Design Law final draft bill, 2015 version, p. 144.

31 Jorgenson, L., Fink, C. (2023). WIPO's Contributions to International Cooperation on Intellectual Property. Journal of International Economy Law 26 (1), pp. 30-34. DOI: <https://doi.org/10.1093/jiel/jgac049>.

32 Nishitani, Y. (2023). Challenges of Private International Law in Asia. The Korean Journal of International and Comparative Law 12 (1), pp. 23-56. DOI: <https://10.1163/22134484-12340186>.

33 Kibtiah, T.M., Assegaf, S.N.Z. (2024). Recovery of the ASEAN Economy Through a Sustainable Tourism Sector in the Post-Covid-19. Thammasat Review 27 (2), pp. 167-196. DOI: <https://10.14456/tureview.2024.21>.

34 Soraya, J., Althafzufar., M.A. (2024). Intellectual Property Rights Protection for Actors in the Creative Economy Based on Intellectual Property Rights Law Number 28 of 2014 Concerning Copyright. Realism: Law Review 2 (1), pp. 39-53.

transactions with various manners of transferring rights.[35] Industrial property rights include rights to inventions and designs in the form of patents, brands, geographical indications, trade secrets, industrial designs, and integrated circuit layouts, as well as protection of plant varieties.

Industrial designs as a form of industrial property rights have an equally important role as brands and patents as objects in international trade. International mark registration has been made easier since the Madrid Protocol was ratified through Presidential Regulation Number 92 of 2017 concerning Ratification of the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, as well as international scale patent registration through the application of the Patent Cooperation Treaty (PCT) mechanism. It has been adopted in the regulation of the unification of the international industrial design registration system with the ratification of the Hague statute, more popularly known as the Hague System.

The Hague System makes it easy for companies to extend the protection of their intellectual property across multiple countries.[36] It allows them to utilize and protect their industrial designs in the global marketplace. Once the Hague system is truly realized, it will be an attraction for designers to want to register the industrial designs they have created. The Hague system provides more freedom regarding the period of protection that will be obtained by the designer. As an illustration, in the Industrial Design Law currently implemented in Indonesia, the protection is only 10 years, but in the Hague system, the protection is 15-20 years, and the protection period can be extended so that it does not immediately become public domain. Thailand itself has planned to extend the protection period to 15 – 20 years in the accession process, which is still ongoing. The formal requirements and material requirements between Indonesia, Malaysia, and Thailand are similar. The conditions that must be met before applying for design registration consist of formal requirements and material requirements. Formal requirements are in the form of an obligation to provide a written statement including identity, along with proof of ownership of the design, a replica of the product design, a deed of establishment of the legal entity, a power of attorney if necessary, and proof of payment for registration. Material requirements in the form of aspects of novelty, practicality, and applicability are not included in the list of exceptions to obtain industrial design rights, and the creator is a subject who has the right to register the work.

Industrial Design registration in Indonesia is still a very long process. The application is addressed to the Directorate General of Intellectual Property Rights for further formality checks. All applications that have met formal/administrative requirements[37] will be announced no later than 3 (three) months from the date of receipt, so that any third party can submit written objections covering matters of a substantial nature no later than 3 (three) months. Furthermore, to answer the objection, the Industrial Design Applicant can also submit an objection no later than 3 (three) months. In the event of an objection, a substantive examination must be carried out, which takes a maximum of 6 (six) months from the end of the announcement date. If the objection is rejected, the party concerned can submit a lawsuit to the Commercial Court up to cassation. Objections received can be forwarded to the issuance of a certificate. The issuance of a certificate takes a maximum of 30 (thirty) days from the end of the period given for submitting objections. This means that an industrial design certificate can only be obtained after a total duration of approximately

35 Brand, R.A. (2020). Jurisdiction and Judgments Recognition at the Hague Conference: Choices Made, Treaties Completed, and the Path Ahead, Netherlands International Law Review 67, pp. 3-17. DOI: <https://doi.org/10.1007/s40802-020-00152-9>.

36 Heikkila, J.T.S., Peltoniemi, M. (2023). The Changing Work of IPR Attorneys: 30 Years of Institutional Transitions. Technological Forecasting and Social Change 197, pp. 1-23. DOI: <https://doi.org/10.1016/j.techfore.2023.122853>.

37 Industrial Design Law, Article 25.

18 months. Not to mention the costs that must be incurred during this relatively long time, so it could encourage businessmen to put aside the urgency of registering industrial design rights.

Bureaucratic problems that do not save time and costs are also experienced by WTO member countries, including ASEAN countries and the IMT-GT within them. WIPO was trying to facilitate the flow of international registration with the idea that an industrial design right does not have to be registered first in the country of origin of the applicant/creator, following the rules of that country of origin and then re-registered when the industrial design right is to be developed in another country. WIPO's simple step is a single registration for an industrial design right originating from a country, so that it can legally apply not only to the country of origin but also internationally at the same time. This scheme was later called the Hague system. Indonesia itself can choose to become a "Receiving Office/ Transmitting Office" or not. If Indonesia chooses to become an intermediary office, Indonesia must first be ready in terms of the online system and filing, because if the Intellectual Property Office in Indonesia does not master it, it could slow down the application process. Likewise, Thailand and Malaysia.

Referring to the commitment of Indonesia, Malaysia, and Thailand to the ASEAN IPR Action Plan 2016-2025, where one of the main objectives is the accession of ASEAN member countries to the Hague Statute, the implementation of the Hague System should not be delayed for a long time. Indonesia, Malaysia, and Thailand have not ratified the Hague Statute. While Indonesia has reached the stage of drafting the Draft Presidential Regulation, Thailand has reached the stage of being discussed by Parliament. As of November 29, 2022, the Thai Parliament has approved the accession, and it is being reviewed by the Office of the Council State in Thailand.

In Thailand, the industrial design registration process begins with a preliminary examination. If the requirements in the preliminary examination are met, an announcement will be made to the public that the objection period will last for 90 days, followed by a substantive examination. Therefore, the total time to carry out the industrial design registration process in Thailand is from 16 to 24 months, but it may be longer depending on the DIP's ability to process the application and complaints, objections, and additions that arise during the application process.

Thailand has regulated legal protection for industrial designs in the Patent Act of Thailand 1999, BE 2522, as amended by Patent Act (No. 2) BE 2535 and Patent Act (No. 3) BE 2542 so that with the ratification of the Hague statute, changes should also be made regarding the elimination of substantive examinations or combining preliminary examinations with substantive examinations to simplify the process, make it easier to submit claims, extend the protection period as is also being planned by Indonesia in the relevant Draft Presidential Regulation. The capabilities of the auditor profession registered with the Thai Intellectual Property Department are also a consideration for Thailand, whether to become a Receiving Office or not.

Malaysia, as an IMT-GT country that has the Industrial Designs Act 1996, has published a "public consultation paper inviting views on the proposed new provisions and amendments to the Industrial Designs Act 1996 in 2022".[38] It is a part of the practice of compliance with the ASEAN IPR Action Plan 2016 – 2025. The Hague Statute should be adopted as amendments to the Industrial Designs Act after the Hague Statute is ratified in Malaysia. Regarding the accession process of international agreements, there are two special laws in Malaysia as a guideline to ratifying international agreements and the application in business relations between countries, namely the Malaysian Arbitration Act 2005 and the Reciprocal Enforcement of Judgment Act 1958.[39]

38 Wahyuningtyas, S.Y., Giovannus, D. (2024). Chapter 22: IPRs Arbitration in Indonesia and South-East Asia. Research Handbook on Intellectual Property Rights and Arbitration. Elgar Online Publisher, pp. 419-439.

39 Othman, E., et al. (2021). Malaysia: Malaysian Perspectives on the Hague Principles, Oxford Internation-

The increasing impact of international agreements on national legal systems has had the effect of unifying economic cooperation.[40] The joining of IMT-GT with the accession to the Hague statute will make it easier for industrial design owners and companies from the three relevant countries to obtain protection for their industrial designs in many countries or regions using one international application with minimal formalities, thereby increasing competitiveness in the global market and mutual benefits in international trade cooperation activities that exist between the three countries. Examples of IMT-GT business collaboration in the realm of creative industry and IPR that are already underway include the assimilation program of Malay culture and Riau culture in the form of modifications to Malay cultural products, both in the context of copyright designs and industrial design contexts which have also been processed according to market tastes accompanied by optimizing the use of digital platforms for marketing on an international scale.[41] Likewise, Lampung has succeeded in developing a digital economic ecosystem related to IMT-GT.[42] The halal industry program is also one of the IMT-GT programs that has been successfully implemented.[43] Therefore, both the Governments of Indonesia, Malaysia and Thailand should make accession to the Hague statute a priority in regulating industrial design in the future as a form of compliance with the 1961 Hague Agreement and the ASEAN IPR Action Plan, as well as to increase international trade collaboration between the three countries as sub – IMT-GT. This may support the implementation of economic benefits for their Special Border Economic Zone (SBEZ). IMT-GT itself currently covers implementation in 32 provinces, namely 8 provinces in Malaysia, 14 provinces in Thailand, and 10 provinces in Indonesia.[44] Both governments have a hope that in the future it will be expanded to other provinces in the territories of these three countries in line with efforts to strengthen regulations in the business sector through the ratification of the Hague system into national legal products which of course will then be followed by other strategic policy steps in the business sector.

CONCLUSION

Ratification of the Hague system was urgent to be implemented in Indonesia, Malaysia, and Thailand as fellow WIPO and WTO member countries. It was an implementation of the full compliance principle of international treaties that not only serves as a form of compliance through TRIPS, the 1961 Hague Agreement, and the 1999 Geneva Act, but also as a manifestation of Indonesia's commitment to complying with the ASEAN IPR Action Plan. The substance of the Industrial Design Bill which will adopt the Hague system mechanism must not ignore the legal rights and choices of parties entering into industrial design contracts in the international scope so that harmonization between international agreements and national law is required without ignoring the application of the principle of full compliance in the accession process until application of the legal rules resulting from its accession.

The unification of industrial design registration has great benefits for simplifying industrial design registration and reducing the burden

al Law Series, p. 598.

40 Baimurratov, M., et al. (2024). Research on the Impact of International Agreements and Standards on National Legal Systems and Legal Order. Amazonia Investiga 13 (74), pp. 90-102. DOI: <https://doi.org/10.34069/AI/2024.74.02.8>.

41 Nurdin, M., et al. (2022). Urbanizing the Regional Sector to Strengthen Economy and Business to Recover from Recession (1st edition), Routledge Publisher, p. 7.

42 Wiranata, I.J., et al. (2020). Lampung Province e-Commerce Potential in Facing IMT-GT 2020. Prosiding The 1st IC-ASEAN, p. 327.

43 Chandra, R., et al. (2024). Halal Industry Development in Indonesia – Malaysia – Thailand Growth Triangle (IMT-GT): An Analysis of Islamic Diplomacy in Enhancing Regional Cooperation and Economic Development, Iconities 2, pp. 234-249.

44 Haas, M., (2022). Building Growth Areas in Asia for Development and Peace. Jadavpur Journal of International Relations 26 (1), pp. 7-42. DOI: <https://doi.org/10.1177/09735984221081559>.

on government bureaucracy. The implementation of the Hague system can encourage the creation and registration of industrial designs in Indonesia, Malaysia, and Thailand, and has implications for increasing trade cooperation between them and expanding the scope of provinces or districts implementing IMT-GT cooperation projects, which must be followed by strategic policy steps.

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6. Vienna Convention on the Law of Treaties 1969.

Towards the Obligation of Warning Imposed on Banks: A Reading of French Judicial Decisions

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ABSTRACT

The financial crisis and its consequences on households have led the judge to strengthen borrower protections in terms of granting credit. Whether these are granted to professionals or to non-professionals, this is how the concept of uninformed borrower and the duty to warn gradually emerged.

The result of hesitant jurisprudential developments, the duty to warn is not applied in the same way depending on the status of the borrower. Therefore, it must be about the legal frameworks.

If it appears that the bank's warning commitment comes into conflict with the bank's principle of non-interference in the client's affairs, then in reality its intervention in this obligation is primarily through the elaboration a plan and technical support in the form of warnings, which consists of exercising caution in accordance with what is contained in banking practices.

It imposed new obligations on the banker in granting credit, since he was successively subject to the obligation to inform, then to the obligation to advise to guide the borrower, and finally to the obligation to warn, thus giving the bank an active role. Based on this information, the following question arises: What are the legal controls to comply with the warning, the violation of which entails the bank's liability?

KEYWORDS: Bank, Duty to warn, Uninformed borrower, Customer, Case law, Risks

INTRODUCTION

The banking sector is one of the most important pillars of the economy. The credit function is also considered the most important of all, given its role in generating profits for banks in particular and for the economy in general. While the credit function of banks contributes to economic development by financing various projects, it is also a fundamental factor in economic collapse, as it involves assuming risks that cause banking crises that threaten the stability of the country's banking and financial sector.

Although banks are committed to upholding high ethical standards in the distribution of credit, they can behave in ways that violate legal or customary requirements, making this process an opportunity to violate their obligations.

The financial crisis and its aftermath have led to the strengthening of borrower protection measures regarding credit, whether granted to professionals or non-professionals. This is how the concept of the unsophisticated borrower and the banks' obligation to warn gradually emerged. The bank's duty to warn arose from a firm desire to make credit less risky for the borrower, since the latter does not enter into a contract with the bank on an equal footing, and thus to restore a fair balance between the parties.

Within the framework of the bank's duty to warn, the constructive role of the judiciary in the name of good faith and fairness, and its impact, were manifested by the legal recognition of the bank's obligation to warn the borrower, the guarantor, and the investor.

It imposed new obligations on the banker in granting credit, since they were successively subject to the obligation to inform, then to the obligation to advise to guide the borrower, and finally to the obligation to warn, thus giving the bank an active role.

Based on this information, the following question arises: What are the legal controls for complying with the duty to warn, the violation of which entails the bank's liability?

To address this issue, we will adopt a descriptive and analytical approach, analyzing relevant legal texts. We will also use a comparative approach, drawing on French case law addressing the topic.

To address this issue, we will divide our research into two areas. In the first area, we will address the subjectivity of the bank's customer warning obligation, and in the second area, we will address the scope of the warning obligation.

1. THE BANK'S OBLIGATION TO WARN ITS CUSTOMERS

The bank's commitment is to warn of the natural consequences of the effectiveness of legal thinking by keeping pace with modern scientific and technological developments, thus working to achieve effective protection of customers by warning them of the dangers that may arise from banking operations.

1.1. The concept of the bank's obligation to warn

The bank's duty to warn is defined as a preventive measure aimed at assisting the customer by warning them and drawing their attention to enable them to protect themselves against perceived risks.[1]

It is also referred to as a "subsidiary obligation for one party to warn the other party or draw their attention to certain circumstances or information, to inform them of the material or legal risks surrounding or arising from this contract".[2]

Thus, the bank must warn its customers by any means if certain financial activities indicate that they are unable to repay the borrowed

1 Khalifi, M. (2011). Commitment to Electronic Media and Transparency in E-Commerce. Policy and Law Notebooks, University of Ouargla, 3 (4), p. 206.

2 Zarwaq, A. (2018). Protection of Bank Customers in Algerian Law. PhD Thesis, Faculty of Law and Political Science, Mouloud Mammeri University, Tizi Ouzou, Algeria, p. 180.

money. Similarly, if the customer's activities are suspicious, dangerous, or present negative aspects, the bank must warn them not to carry out these activities.[3]

Banks take the form of a warning if the situation leads to this, and the bank or credit broker must warn of the risks of the transaction, explaining its expected risks. The lender, therefore, warns the faithful and prudent borrower about their financial capacity and the debt risks associated with granting loans.[4]

To assist the borrower, the French Court of Cassation included in its ruling of July 12, 2005, the bank's obligation to provide a warning, based on an analysis corresponding to the borrower's repayment capacity.[5]

The French courts have also demonstrated their contribution to the inclusion of this obligation and the clarification of its characteristics by issuing two other decisions: The first ruling handed down by the French Court of Cassation on June 29, 2007, determined the right to benefit from the obligation to notify a borrower who has not provided notice.[6]

The second ruling handed down by the French Court of Cassation on May 31, 2011, clarified that a professional is not necessarily a risk-averse borrower.[7] A pharmacist or a business manager is, therefore, not, by right, a person who is informed about financing.[8]

Thus, the bank must inform the borrower of the risks associated with the loan, taking into account that the bank's obligation to notify falls on the borrower even if another bank has previously notified them. Adherence to a warning can be equated with negative advice, not doing something accompanied by an explanation of the dangers, or simply the problems that could be faced if the advice is not followed.[9]

1.2 The distinction between the obligation to warn, the obligation to inform, and the obligation to advise

The obligation to inform differs from the obligation to warn, as the latter aims to draw attention to or bring to the attention of the other contracting party a negative impact on the contract, or on the subject matter of the contract, which involves a danger or risk of which the other party must be warned.[10] The information commitment requires neutral, objective, and general information that includes only the conditions of the requested service, without addressing the question of the suitability or otherwise of that service.[11] This means that this transfer process takes place without the bank's intervention. It consists of transmitting raw information in its simplest form, without any intervention from the bank.[12]

The effectiveness of warnings regarding bank loans is achieved when the expected or likely risks of entering into these transactions are identified, risks that the customer might reject if they were aware of them. Conversely, the bank's reluctance to explain these risks and warn of their dangers constitutes a breach of its duty to warn.[13]

3 Mughbghab, N. (2009). The Principle of Non-Liability of the Bank Distributing Credits and Its Exceptions. Al-Halabi Legal Publications, Beirut, Lebanon, p. 137.

4 Heisser-Vernet, J-M. (2014). Banks and the granting of credit: from advice to warning. Experts, no (14), p. 27, states: "Takes [at banks] the form of an alert: If the situation leads to it, the banker or credit intermediary must warn of the dangers of the operation, detailing its foreseeable risks".

5 Court of Cassation, Civ.1er, July 12, 2005, Jurisdata 2005-029447.

6 Court of Cassation, Mixed Chamber, June 29, 2007, Jurisdata 2007-039908.

7 Court of Cassation, Com., May 31, 2011, Jurisdata 2011-010665; Court of Cassation, Civ.1er, April 25, 2007, n°06-15.258.

8 Heisser-Vernet, J-M. op.cit, p. 27.

9 Boukhrs, A. (2017). Obligation to Warning in Bank Credit Contracts. Legal and Political Studies, University of Boumerdes, Algeria, 2 (1), p. 125.

10 Rafika, B. (2018). Obligation to Inform Consumers in the Field of Bank Loans. Policy and Law Notebooks, University of Kasdi Merbah, Ouargla – Algeria, 10 (10), p. 14.

11 Boukhrs, A.A. Op. cit, p. 125.

12 Misqawi. L.O. (2006). Banking Responsibility in Financial Credit. Al-Halabi Legal Publications, Beirut, Lebanon, p. 169.

13 Rafika, B. op. cit., p. 14.

If the obligation to advise and guide is considered a positive act, the bank is entitled to provide its client with whatever is convenient for them, and the client is free to follow this advice or not, to remain in compliance with the bank's instructions. However, the situation must be changed, and the obligation to advise and guide must be replaced by the obligation to warn, which the bank imposes on its client if it discovers the existence of unavoidable errors.

The essence of the obligation to advise is that the bank must align the raw information at its disposal with the client's objective in the financing.[14]

Compliance with the warning entails legal consequences that are contrary to the obligation to advise and guide. While it is up to the client to choose whether to follow the bank's advice and guidance, the situation is different regarding the obligation to warn: the client is not free to choose whether or not to comply. Rather, they must do what is requested, as failure to comply with this obligation could result in risks.

However, if the customer fails to respond, the bank has the right to take any precautions it deems appropriate, including stopping or reducing the credit or refusing any increase in it.[15]

In some cases, the bank's obligation is not limited to informing its consumer client, but it must also offer them the optimal solution for their needs. In other words, its obligation goes beyond mere information and includes the need to explain the most appropriate course of action. This involves advising the client on whether or not to enter into the contract, or on adopting a particular position. In this case, the bank is positively influencing the formation of its borrowers' opinions.

Regarding compliance with the warning, this is negative advice intended to draw attention to the possible consequences of failure to comply with the advice provided. However, the obligation to warn is considered less stringent than the obligation to advise, as it does not involve guiding the contracting party as to the intended objective. The second obligation is more stringent, requiring, in addition to warning the client about the risks of the transaction to be concluded, more specific and detailed advice than the warning.

Accordingly, the criterion for distinguishing between the previous obligations is the risk criterion, which determines the degree of intervention required by the professional, where the obligation to warn is considered a strict obligation to inform, and if the risk decreases, then we are dealing with a simple obligation to inform, and with the increase in the degree of risk, the degree of the required obligation increases.[16]

2. THE EXTENT OF THE BANK'S OBLIGATION TO WARN ITS CUSTOMERS

Based on the French Court of Cassation's decision issued on April 22, 2017, which defined the scope of a bank's obligation to warn the borrower, and its confirmation that this obligation is limited and determined according to two basic criteria: one related to the borrower's status, and the second related to the borrowing risks.[17]

2.1 Professional status of the borrower

The obligation to warn is closely linked to the borrowing client, and its scope is therefore determined by their status. On this basis, French courts have distinguished between in-

14 Misqawi, L.O. op.cit, p. 169.

15 Mughbghab, N. Op.cit, pp. 136-137.

16 Rafika, B. Op.cit, p. 14.

17 Court of Cassation, Civil Commercial Chamber, April 20, 2017, 15-16.316, unpublished, provides that: "The obligation to warn a credit institution with regard to an uninformed borrower before granting him a loan only concerns the adaptation of the loan to the financial capacities of the borrower and the risk of indebtedness resulting from its granting, and not the risks of the financed transaction"; Court of Cassation, October 11, 2011, no. 10-19091.

formed and uninformed clients, with the bank's obligation to warn only the latter. An informed client is one who has repeatedly demonstrated their knowledge of the financial markets. This is considered an informed client, and the bank has no obligation to warn them.[18]

The person who provides the warning is also the one who possesses the necessary skills to assess the content, scope, and risks associated with the loans granted by the bank.[19] The French Court of Cassation once again confirmed in a ruling handed down on March 18, 2014, that the person who provides a warning is not subject to the bank's obligation to warn.[20]

Thus, among borrowers, French law has distinguished between informed and uninformed borrowers and has reserved the obligation to warn only to uninformed individuals. French case law has gradually developed criteria for considering and classifying a client as a high-risk borrower. The warning obligation only applies to uninformed borrowers and guarantors; it is therefore up to credit institutions to verify the borrower's status to determine whether or not they are subject to the warning obligation.

In this regard, the French Court of Cassation confirmed on November 19, 2009, that credit institutions must prove that the borrower was warned and was not required to benefit from the duty to warn.[21]

Professional standards are also taken into account, as executives or managers cannot benefit from the duty to warn, and it has been ruled that a doctor cannot benefit from the duty to warn.[22]

In this case, the bank granted a loan to a professional partnership composed of a doctor and two partners. Then, as the partners were prohibited from practicing, the bank granted another loan to the doctor. Due to the expiration of the deadline, the bank called the doctor to pay.

The doctor sued the bank for breaching his duty to warn, and the Toulouse Court of Appeal found that the doctor was a knowing borrower. The Court of Cassation upheld the Court of Appeal's findings, finding that "the doctor, a high-level medical specialist, could not have been unaware of the risks inherent in the transactions he had undertaken. He had gained experience with the first loan taken out over the past three years and was better placed to assess the prospects for the development of his professional activity and, consequently, his repayment capacity". The Court of Cassation, therefore, considered that the Toulouse Court of Appeal's decision was legally justified.

We also add that when two people borrow from a bank, the prudential nature of the loan is assessed individually for each of them, and the bank cannot be exempted from its duty to warn of the presence of an informed person on the borrower's side, whether a third party or a party[23]. Furthermore, the French Court of Cassation has clarified that it is up to the lending institution to determine whether the borrower was aware or not.[24] The status of a borrower, whether aware or not, of a registered company is assessed by the person of its manager.[25]

It should be noted that a manager may be considered unwarned, and the bank is obligated to warn him/her in exceptional circumstances, such as in the absence of experience or personal expertise in the field of credit.[26]

The French Court of Cassation has held that a person who owns 80% of the capital of the project, which is the guarantor, and who is a manager, must be considered warned.[27]

18 Cass.com., November 9, 2010, No. 09-69.997, F-D: Review of banking and financial law, Juris Data No. 2010-020804.

19 Cass.1er Civ., November 28, 2012, n°11-26.477.

20 Cass.com., March 18, 2014, no. 12-28.784, Magniem C/sté BNP Paribas.

21 Cass.com., November 19, 2009, n°07-21.382: Juris Data: n° 2009-050333.

22 Cass.com., May 26, 2010, n°562, 08-10.274: Juris Data: n° 2010-007391.

23 Cass.1er Civ., April 30, 2009: JCPE 2009.

24 Cass.com., November 17, 2009: Juris Data: n° 2009-050458.

25 Cass.com., May 22, 2013, n°11-20.398: Juris Data: n° 2013-010117.

26 Cass.com., April 11, 2012, n°446, 10-25.904: Juris Data: n° 2012-007024.

27 Court of Cassation, Joint Chamber, June 29, 2007, 05-

Thus, a client who holds a senior position in a company or has a regular income can easily be viewed as someone who regularly conducts banking transactions and is therefore presumed to be a warned client.

The French Court of Cassation also relied on the criterion of knowledge and experience in the financial field as a criterion for determining his/her status. It held that the execution of a similar transaction several years prior and repeated practice in the stock market entail the person performing it being considered a warned client.[28]

The most appropriate criterion for achieving the required protection for the client and distinguishing between warned and unwarned clients is the degree of experience in the financial field. This allows professionals and others to benefit from the obligation to warn, depending on the circumstances of each case.

2.2 Risks in banking operations

Credit risk is determined based on a personal criterion. If, at the time the loan is granted, it appears that the loan is not suitable for the client's financial situation, either because it represents a significant financial burden or because their sources of income are unstable, the bank must warn the client to avoid liability.

To fully fulfill this obligation, the bank must not rely solely on the information and data provided by the client regarding their financial situation, as the client could provide false information to obtain credit. It must inquire about the client's financial situation and their ability to pay the monthly installments within the allotted time before granting credit. If the bank determines that the loan is not restrictive and does not carry any risk, it has no obligation to the borrowing client, regardless of their situation, and therefore, its liability is not incurred in this case.

We can draw inspiration here from the case of Mr. and Mrs. Hoareau, where a credit institution, by notarial deed dated October 23, 2001, granted a loan of €76,224 to Mr. and Mrs. Hoareau to obtain a cash flow loan.

Later, believing that the bank should not have granted them such credit without warning them of the risks of the transaction, the couple filed a lawsuit against the bank seeking compensation for their loss. However, the Rennes Court of Appeal dismissed the case in a judgment handed down on January 11, 2008.

The Hoareaus then filed an appeal. They criticized the Court of Appeal, which recognized their status as unsophisticated borrowers, for, firstly, not having verified whether the warning obligation had been complied with, and secondly, for not having investigated whether the credit institution had done so. In other words, it seriously examined the borrowers' actual financial capacity without focusing solely on their salaries.

The couple's appeal was dismissed by a decision of the Commercial Division of the French Court of Cassation on July 7, 2009.[29] The Court of Appeal ruled that, after noting that the monthly loan payments amounted to €1,510.41, the borrowing couple owned the property and that Mr. Hoareau's income had increased by September 1, 2001, to €3,811 per month, while his wife's salary was €1,226.

The appeal judges also noted that Mr. Hoareau's redundancy in October 2002 and his subsequent divorce were the cause of their financial difficulties.

Thus, for the French Court of Cassation, these investigations demonstrated that "on the date the contract was entered into, the credit was appropriate for the borrowers' financial capacity and the debt risks arising from the granting of this loan". It follows that the bank, "in the absence of such a risk, had no obligation to warn them", and the Court of Appeal therefore legally justified its decision.

21.104; Bulletin 2007, Joint Chamber, No. 7.

28 Cass.com., January 12, 2010, no. 08-17.956, Juris Data: no. 2010-051089.

29 Cass.com., July 7, 2009: Hoareau and others v. Société Crédit Lyonnais – Appeal no. 08.13.536 D – Dismissal (C. app. Rennes, January 11, 2008) – gr. no. 735P+B.

For information, the duty to warn is defined as the professional's duty to draw the attention of the person entering into a contract with them to the negative aspects of the contract or its purpose.[30] Thus, in the context of a loan, the banker must inform his client of the risks of the planned transaction, that is to say the risk of not being able to meet the deadlines due to insufficient income and financial solvency.

However, in this case, the term "uninformed", which was not challenged in this case by either the Court of Appeal or the Court of Cassation, takes on particular significance. All the decisions rendered to date imply that the borrower classified as uninformed, or the ordinary person, i.e., considered to be insufficiently informed of the prior transaction, is the creditor of this obligation to notify.

Credit institutions face risks related to the possibility of debtor insolvency. The recovery of borrowed funds is threatened when the latter encounter financial difficulties. Therefore, to reduce these risks, banks conduct a number of inquiries before granting a loan to assess the risk.

First, the borrower is interviewed and must provide various written information to assess their financial capacity. In addition, the Foundation obtains information through documents whose publication is required by law. The trade register, companies, and accounting documents therefore constitute a particularly reliable source of information, particularly when the accounts are subject to audit by the statutory auditor. In addition, the bank may be required to access certain files held by the Banque de France, such as individual loan repayment statements. However, for loans granted for large amounts for professional use, the credit institution may require its clients to conduct specific investigations, particularly by an audit firm.[31]

On this basis, the French Court of Cassation ruled on July 3, 2012, that since the borrower had not claimed that his pledge was disproportionate to his resources and assets, the Poitiers Court of Appeal was not required to determine whether he qualified as an unsophisticated borrower.[32]

CONCLUSION

Considering that the obligation to warn aims to ensure more effective client protection than a specialized professional bank, by requiring the latter to intervene in the client's affairs to warn them of the risks surrounding the banking process.

Among the findings we have reached:

- Not every professional is necessarily a risk advisor. The most appropriate criterion for ensuring the required client protection and distinguishing a risk advisor from a non-specialized advisor is the degree of experience in the financial field. This is evident from the conflicting decisions of the French Court of Cassation. It is worth noting that the Franco-Algerian legislature and judiciary have not adopted the criterion of distinguishing between an informed and an uninformed client;
- If the bank's commitment to warnings appears to conflict with the principle of non-interference in the client's affairs, then in reality, its intervention in this commitment is achieved by implementing a plan and providing technical support in the form of warnings, which translates into the exercise of due diligence in accordance with banking practice;
- Like the obligation to inform and the obligation to advise, the obligation to warn is only one part of the general obligation of prudence and diligence, and may occur before the conclusion of the contract or during its execution. We also recommend that the Algerian legislator, to protect the borrowing consumer, enact legal

30 Fabre-Magnan, M. (1992). On the obligation to provide information in contracts. Essay on a theory, LGDJ, nos. 11 and 467.

31 Gavalda, C., Stoufflet, J., Banking Law, Litec, 2008, 7th ed., no. 497.

32 Cass.com., July 3, 2012, no. 11-33.665.

provisions to determine the controls on the obligations of banks, in particular the warning obligation, by specifying to what extent the status of the borrower is verified (warned or not), and by specifying to what extent the loan granted is sufficient, not onerous, concerning the financial capacity of the borrower, to exclude the liability of the bank due to the absence of a warning obligation on its part.

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5. Cass.com., July 3, 2012, no. 11-33.665;
6. Cass.com., July 7, 2009: Hoareau and others v. Société Crédit Lyonnais – Appeal no. 08.13.536 D – Dismissal (C. app. Rennes, January 11, 2008) – gr. no. 735P+B;
7. Cass.com., March 18, 2014, no. 12-28.784, Magniem C/sté BNP Paribas;
8. Cass.com., May 22, 2013, n°11-20.398: Juris Data: n° 2013-010117;
9. Cass.com., May 26, 2010, n°562, 08-10.274: Juris Data: n° 2010-007391;
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11. Cass.com., November 17, 2009: Juris Data: n° 2009-050458;

12. Cass.com., November 19, 2009, n° 07-21.382: Juris Data: n° 2009-050333;
13. Court of Cassation, Civ.1er, April 25, 2007, n° 06-15.258;
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15. Court of Cassation, Civil Commercial Chamber, April 20, 2017, 15-16.316;
16. Court of Cassation, Joint Chamber, June 29, 2007, 05-21.104; Bulletin 2007, Joint Chamber, No. 7;
17. Court of Cassation, Com. May 31, 2011, Jurisdata 2011-010665.
18. Court of Cassation, Mixed Chamber, June 29, 2007, Jurisdata 2007-039908.

Towards a Special Compensation System Aligned with the Unique Nature of Civil Liability for Medical Applications of Genetic Engineering

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ABSTRACT

Medical civil liability has attracted significant attention from researchers due to the issues it raises, especially those related to the use of modern practical, medical, and biological means in treatment and diagnosis. This study aims to analyze the effectiveness of traditional civil liability rules in compensating for damages resulting from the use of genetic engineering in the medical field, focusing on Algerian and comparative legal systems.

The study finds that the current judicial mechanism of fault-providing compensation is not sufficient now to satisfy the demands of modern medical risks, and therefore, there should be new models of compensation reflecting the peculiar nature of medical liability and reinforcing and supplementing judicial protection of patients harmed by modern medical procedures. In addition, this research takes into account future ethical challenges in genetic use and addresses alternative models of compensation being proposed in other jurisdictions. The study points towards the need for urgent legislative reform that balances.

KEYWORDS: Compensation system, Medical liability, Civil liability, Genetic engineering

INTRODUCTION

The technology has become essential in medical and therapeutic research, a landmark in modern science, particularly in gene therapy and early disease detection, rather than detection at an advanced level.

Yet whereas these technologies are bringing enormous benefits, their increasing use exposes patients to risk from therapeutic or experimental treatments with unanticipated physical health effects in the long term. On the one hand, they appear to be offering cures for difficult-to-treat diseases; on the other, they raise serious legal and ethical concerns.

Their use can, in some cases, cause physical or psychological harm to patients. This reality makes it necessary for there to be a strict legal framework to control their use—a framework that honors bodily integrity and protects individuals against harm.

In such an event, the intervention of physicians using genetic engineering to diagnose and cure patients becomes more complex. Physicians can, by negligence or failure to properly use such means, cause harm to the patient, thereby incurring liability under law.

Thus, this study aims to explore the scope of civil medical liability that has emerged due to genetic engineering being applied in clinical practice. It focuses on the legal nature of liability and compensation processes for resulting harm.

This study will examine the regulation needed to oversee the use of genetic technologies in medicine, along with how liability for genetic injury differs from traditional medical liability.

Based on the foregoing, this research paper seeks to address the following core question: What are the distinctive characteristics of civil medical liability arising from the use of genetic engineering, particularly concerning its legal nature and the rules governing compensation?

To answer this question, the research will take a deductive analytical path, founded upon the interpretation of the relevant legal documents that determine the nature of civil medical liability and the clarification of the technologies of genetic engineering and their fields of application.

The research will also analyze the legal precepts that govern the compensation of damage resulting from the use of these technologies.

1. GENETIC ENGINEERING BETWEEN MEDICAL BENEFITS AND REGULATORY CONSTRAINTS

Scientists deciphering genetic codes during the technological revolution have enhanced our understanding of organism traits and disease causation. The breakthrough led to the treatment of genetic diseases through gene therapy, and euphoria and alarm swept scientific circles. Although some see enormous potential for humankind, others worry about misuse.

1.1. The medical applications of genetic engineering

Scientific advances in medicine, genetics, and biology have led to the discovery of innovative techniques that have opened vast new horizons, particularly in the areas of genetic diagnosis and gene therapy.

1.1.1. The role of genetic engineering in disease diagnosis

Pre-marital testing can identify carriers of genetic mutation and assess the risk of passing it on to the child, and enable couples to make informed decisions regarding reproduction, reducing the chance of inherited illness. Similarly, prenatal testing can reveal fetal genetic abnormalities,[1] allowing parents to prepare medically—yet it also raises moral concerns surrounding selective abortion, thus requiring

1 Al-Bouaichi Al-Kilami, F. (2011). Medical Examinations of Spouses Prior to Marriage – Their Legal Bases and Objectives (1st ed.). Dar Al-Nafaes for Publishing and Distribution, Jordan. p. 140.

comprehensive ethical counseling. In the context of IVF,[2] preimplantation genetic diagnosis (PGD) permits the selection of embryos free from genetic disorders, significantly improving healthy pregnancy outcomes for high-risk families.[3]

Yet, such breakthroughs are accompanied by profoundly ethical issues. Disclosure of genetic information can amount to an invasion of privacy and expose individuals to the risk of discrimination in the work environment or under insurance policies. To prevent this, robust legal protection is required to ensure that individual rights are protected while ensuring that the utility of genetic technologies is balanced against the values and moral principles of society.[4]

1.1.2. The role of genetic engineering in the treatment of diseases

Gene therapy, in particular, has transformed the management of inherited disease because it deals with the underlying genetic causes of a disease rather than symptoms. It is achieved through the introduction of new functional genes, the enhancement of current genes, or the removal of harmful sequences. These interventions are today more targeted because of CRISPR technology.

Existing approaches, initially applied in rare genetic diseases like cystic fibrosis, are now being adapted to oncology to optimize immune recognition of tumors and optimize responsiveness to treatment. With widespread administration of viral vectors for gene delivery, delivery continues to be a significant concern.

In HIV-specific studies, gene editing in re-engineered immune cells has been utilized to preclude viral replication. Quantum advances permitted through genomic diagnosis using germline modifications support early diagnosis of mutations based on personalized medicine. Use of genetic technologies brings in conjunction with it ethical and legal issues, mainly consisting of the long-term outcomes and social repercussions of germline modification.[5]

1.2. The legal conditions for the use of genetic engineering in the medical field

There are no special legal provisions in Algerian law for genetic screening and treatment of genetic engineering due to the novelty of such technology. Article 7 bis of the Code de la Famille[6] addresses genetic therapy and diagnosis,[7] and it stipulates prenuptial medical screening. The law does not specify, however, what disease is to be screened for, and it leaves physicians to do so. The law does not specify, however, which disease is to be screened, but leaves it to the discretion of physicians. Genetic engineering and stem cell therapy are governed by Article 355 of the Health Law, which prohibits the removal or transplantation of human organs or tissues except for therapeutic or diagnostic purposes. The doctor's motive must be treatment for a justifiable reason, and if harm results from transferring stem cells, the doctor must not do so to avoid civil and criminal liabilities.[8]

2 Ouskin, A. (2007). The Legal Status of the Human Being Before Birth. In Family Law and Scientific Developments. Laboratory of Law and Modern Technologies, Faculty of Law, University of Oran. p. 18.

3 Zaghbib, N. E. H. (2008–2009). Genetic Engineering and the Criminal Protection of the Human Genome. (Master's thesis, Faculty of Law and Political Sciences, University of Frères Mentouri, Constantine). p. 115.

4 AMPD Languedoc Roussillon. (2013, February). Doping through Genetic Material Modification, Introduction to Gene Therapy, Part II. Hôpital Lapeyronie. p. 01. Available at: <http://wwwold.chu-montpellier.fr/publication/inter_pub/R226/A12813/IntroductionTG.pdf>.

5 Al-Bahji, E. A. (2006). Compensation for Damages Resulting from Genetic Engineering Applications in Light of Civil Liability Rules. Dar Al-Jami'a Al-Jadida for Publishing, Egypt. pp. 100, 102.

6 Family Code, Article 7 bis, and Executive Decree No. 06/154 (2006). Ordinance No. 05-02 (2005). Article 07, including the Family Law. Official Gazette of Algeria.

7 Ben Sghir, M. (2015). The Provisions of Medical Error under Civil Liability Rules: A Foundational Comparative Study (1st ed.). Al-Hamed Publishing and Distribution, Jordan. p. 266.

8 Law No. 18-11. (2018). Article 359, Paragraph 2, and

To perform cell, tissue, or organ transfers for treatment, Algerian legislation establishes some general principles such as licensure in medicine, respect for scientific practice, and informed consent by the patient. The following requirements must be fulfilled:

1.2.1. It should be considered as the last resort for treatment or diagnosis

This condition is emphasized in Article 355 of the Health Law (18-11), which states that human organs cannot be removed, nor tissues or organs transplanted, except for therapeutic or diagnostic purposes. This technique may only be utilized if it is the only available method to treat or preserve the life of the patient or to ensure their physical well-being, without posing any danger to the patient's life or the donor's health. It should also be confirmed that the donor (the source of the cell) is not suffering from any infectious disease that can be transmitted along with the stem cells. This is further underlined in Articles 360, 361, and 364 of the Health Law.[9]

1.2.2. Formality requirement

Algerian law makes available legal formalities in medical contracts under Health Law 18-11. Donors must provide informed, voluntary consent before the head of the regional court, where it is subjected to a test of legality.[10] A report by an expert board is followed by a second authentication to confirm that consent and legislation have been satisfied. Donors can revoke their consent at any time.[11]

For cadaveric donors, Article 362 of the Health Law prohibits organ or cell removal without a certain medical and legal determination of death, as per scientific criteria. In the absence of a written objection, consent must be obtained from relatives or, if absent, the legal heir. Donor anonymity must be maintained by the recipients and their families. Organ removal is prohibited if it interferes with a forensic autopsy, which must take precedence.

Recipients must give written consent in the presence of the chief physician and two witnesses. When the recipient is incapable, a member of the recipient's family may give it. When urgency or exceptional circumstances render contact impossible, the written consent may be waived.[12]

1.2.3. Eligibility

Before the operation, patient consent—or that of a guardian or legal representative—must be obtained, as stipulated in the final paragraph of Article 364 of the Health Law and Articles 44 and 52 of the Code of Medical Ethics. Consent is valid only after the treating physician has fully informed the patient or their representatives of potential medical risks.

As for organ donation, Algerian law prohibits donations from minors, individuals lacking discernment, those without legal capacity, and adults with health conditions that may compromise either the donor or recipient. The physician must inform all eligible donors of the medical risks involved. Donors may withdraw consent at any time, without formal procedures.

A notable feature of Health Law 18-11 is the allowance of blood-forming organ removal from a minor donor, but only for the benefit of a sibling. If no other treatment exists, the procedure may extend exceptionally to a cousin, niece, nephew, or similar relatives (e.g., child of an uncle or aunt), provided that both parents or the legal representative give informed consent.[13]

Article 413 relating to health. Official Gazette No. 46.

9 Health Law No. 18-11. (2018). Articles 361, 364; Executive Decree No. 92-276. (1992), Article 43, Code of Medical Ethics. Official Gazette No. 52. Health Law No. 18-11. (2018). Articles 363, 367. Health Law No. 18-11. (2018). Article 366; Executive Decree No. 12-167 (2012), Articles 5, 6, 7, establishing the National Organ Transplant Agency. Official Gazette No. 22. Health Law No. 18-11. (2018). Articles 430, 431, 432.

10 Health Law No. 18-11. (2018). Article 360.

11 Khadir, A. (2014). La Responsabilité Médicale à l'usage des praticiens de la médecine et du droit. Éditions Houma, Alger. p. 92.

12 Health Law No. 18-11. (2018). Article 364.

13 Health Law No. 18-11. (2018). Articles 360, 361. Official Gazette No. 46; Executive Decree No. 92-276. (1992). Article 43, Code of Medical Ethics. Official Ga-

1.2.4. Free of charge

Algerian Health Law Article 358 prohibits financial transactions in the removal and transplantation of human organs, tissues, and cells. The law also ensures that the identity of the dead donor and the recipient's family shall not be disclosed. The law also prohibits physicians who certified the donor's death from being part of the transplant team to prevent suspicion of illegal inducement or coercion. Article 367 mandates that professionals who are performing organ removal or transplant not receive any fees for the procedures. The measures ensure the ethical management of the human body and rule out any chance of monetary exchange.[14]

1.2.5. Authorization for the venue of organ or cell transplantation

The Algerian legislator also stipulates that organ and tissue transplantation procedures must take place in hospitals authorized by the minister responsible for health to perform such operations. These hospitals are to operate under the supervision and evaluation of the National Organ Transplant Agency, and they must ensure that their medical and technical organization, as well as their hospital coordination, meet the required standards to obtain this authorization.[15] As permitted by the legislator in Article 357 of the Health Law, the establishment of a structure within the healthcare institution is authorized, tasked with the preservation of human tissues and cells.

1.2.6. Sanctions resulting from violations of genetic engineering regulations

The legislator established sanctions for prohibited human organ, tissue, and cell removal and transplantation. In accordance with Articles 430 and 431 of the Health Law, violations—including those committed against minors or individuals lacking legal capacity—are penalized in accordance with Articles 303 bis 16 to 303 bis 20 of the Penal Code.

Physicians are criminally liable for unlawful removal. Law No. 90-01 illegalized the removal of living or dead subjects without legal compliance, and any removal for compensation, even with consent.

Articles 303 bis 16 and 303 bis 17 of the Penal Code impose imprisonment from 3 to 10 years and fines up to 1,000,000 DZD for receiving organs for money, acting as an intermediary, or conducting removals without consent or legal compliance. Additionally, Article 432 of the Health Law penalizes profit-driven promotion of organ, tissue, or cell donation with 6 to 12 months' imprisonment and fines between 200,000 and 400,000 DZD.

These actions are taken so that unethical practices can be evaded, and legality is ensured at every step.[16]

2. THE SPECIFIC NATURE OF CIVIL MEDICAL LIABILITY IN GENETIC ENGINEERING APPLICATIONS

Civil liability of doctors remains a major topic among legal scholars and judges, due to evolving medical practices and the settings in which they occur. One factor affecting this liability is scientific innovation, particularly genetic engineering in medicine.

Thus, the nature of medical civil liability continues to prompt legal and judicial discussion, especially regarding its legal basis.

zette No. 52.

14 Health Law No. 18-11. (2018). Articles 363, 367. Official Gazette No. 46.

15 Health Law No. 18-11. (2018). Article 366. Official Gazette No. 46; Executive Decree No. 12-167. (2012). Articles 5, 6, 7, establishing and structuring the National Organ Transplant Agency. Official Gazette No. 22.

16 Health Law No. 18-11. (2018). Articles 430, 431, 432. Official Gazette No. 46.

2.1. Medical liability for the use of genetic engineering in light of the traditional approach to civil liability

Medical civil liability generally falls under contractual or tortious liability. Tortious liability stems from a doctor's breach of a legal duty, while contractual liability arises from failing to fulfill an agreed obligation. Although fault type usually determines liability, legal opinions and court decisions differ on which kind of fault applies. Some favor tortious fault, while others support contractual fault as the basis for liability.

2.1.1. Medical civil liability based on negligence for the use of genetic engineering applications

In 1833, the French Court of Cassation established that medical liability is based on fault, according to Articles 1382 and 1383 of the Civil Code. Since then, French courts and legal scholars have reaffirmed this principle.

This approach is based on several justifications: proving physician fault ensures patient protection and fair compensation; the technical nature of medicine requires adherence to professional standards; liability for criminal harm must be fault-based; and the doctor-patient relationship concerns personal rights beyond simple contract law.

The Algerian courts followed the same approach, with slight differences at the doctrinal level. Courts will regard medical liability as contractual due to the doctor-patient relationship, but the Algerian Supreme Court ruled on 23/01/2008 that a violation of scientific care standards is a medical fault and it is considered negligence.[17]

Likewise, the Tlemcen Court of Appeals, by virtue of judgment no. 06/12/2003, held that doctor negligence warrants liability and attributed liability to the hospital based on employer liability.[18]

2.1.2. Medical civil liability based on contractual fault for the use of genetic engineering applications

A century after affirming doctor liability for negligence, French judges and scholars began questioning fault-based liability in clinical contexts, promoting a shift toward contractual fault. They argued that when a treatment contract exists, physicians are obliged to meet scientific and professional standards, and the burden is on the plaintiff to prove a breach.

Even where a doctor's mistake is criminalizable, breach of contract may nonetheless provide a basis of legal liability. This view is extended by some to emergency cases, where hospital forms remain an open invitation, and the patient's request constitutes the acceptance.

Others maintain that, although life and health are not contractual matters and public policy upholds patient autonomy, this does not exclude the contractual nature of physician liability.[19]

The French Court of Cassation, in the Mercy case (May 20, 1936), confirmed that a physician-patient contract exists and that failure to fulfill care obligations triggers contractual civil liability.[20]

In Algerian jurisprudence, unlike in France or Egypt, courts often focus on the presence or absence of fault, especially in public hospital cases.[21] However, elements of contractual li-

17 Quillere-Majzoub, F. (2004). La responsabilité du service public hospitalier. In La responsabilité juridique des professionnels, Vol. I (Responsabilité médicale), Proceedings of the Annual Scientific Conference organized by the Faculty of Law, University of Beirut. Helabi Legal Publications, Volume I, Beirut. p. 576.

18 Decision of the Administrative Chamber of the Tlemcen Court of Appeal dated 06.12.2003 (unpublished), cited in: Rais, M. (2012). Scope and Provisions of Civil Liability of Physicians and Its Proof (1st ed.). Houma Publishing and Distribution, Algiers. p. 18.

19 Al-Hayari, A. H. (2002). The Civil Liability of the Physician in the Private Sector in Light of the Jordanian and Algerian Legal Systems. (Master's thesis, Faculty of Law, Ben Aknoun). p. 17.

20 Villa, F. (dir.). (2010). The Major Decisions of Medical Law. L.G.D.J, Alpha Edition, Lebanon, p. 128.

21 Council of State. (03.06.2003). Decision in the case of Bologhine Health Sector v. A.L. and the Ministry of Health; (2003, March 11). Decision in the case of

ability appear, such as Article 44 of the Algerian Medical Ethics Code, which emphasizes patient capacity and consent, implying a contractual framework for the physician-patient relationship.

2.2. Medical liability for the use of genetic engineering in light of modern trends in civil liability

The integration of machines and modern technology in healthcare has sparked debate over civil, particularly medical, liability. Judges and attorneys have heavily criticized the continued reliance on fault as its basis. Some support preserving medical fault within a modern framework by redefining it as professional or presumed fault. Others call for abandoning fault altogether, especially in the context of genetic engineering.

2.2.1. Amending the concept of fault as the basis for civil medical liability

The concept of civil medical liability has been influenced by economic and technological changes in medicine. Traditional liability is in a dilemma to attribute direct harm to physicians, and therefore, it becomes difficult for patients to prove causation. Judges and theorists devised presumed fault as a solution to this dilemma, which allows courts to presume physician fault without total proof, making patient claims of compensation easier.[22]

Public hospitals are commonly held responsible in Algerian law, associating suspected errors with poor management. A July 15, 2002, Council of State ruling condemned a hospital for the death of Mr. Moulay due to a lack of supervision in a psychiatric center.[23]

Later, some jurists proposed professional fault to reflect the unique nature of medical work. This concept, merging tortious and contractual liability, grounds physician responsibility in ethical violations.[24] Article 13 of the Algerian Medical Ethics Code supports this, as do Article 27 of the Saudi Health Professions Practice Act, Article 2 of the Jordanian draft Medical Liability Law, the 1995 Palestinian Patient's Rights Charter, Article 18 of the Lebanese Medical Ethics Law, and Article 26 of the UAE Federal Law on Medical Liability—all affirming that professional errors justify liability.[25]

2.2.2 Adopting the concept of damage as the basis for civil medical liability for the applications of genetic engineering

Legal and judicial thinking has shifted from individual guilt and moral standards due to moral liability's failure to keep pace with social change. Based on the core concept of compensating the injured, more direct and objective liability now applies to physicians and medical staff.

Judicial focus has moved to the harm-causing entity rather than personal fault. Doctors are held liable as custodians of treatment tools or as decision-makers impacting others.

The first move from fault-based to risk theory came in the French Council of State's "Cames" ruling (June 21, 1895), which based compensation on professional risks. French courts have since focused medical liability on harm.[26]

Supporters of traditional liability justify objective liability with two concepts: risk and

M.Kh. v. Béjaïa Hospital; (15.07.2002). Decision in the case of Fernand Hanifi Psychiatric Hospital, Tizi Ouzou Province v. Widow of Moulay; (17.01.2000). Decision in the case of Dorban University Hospital in Annaba v. S.M; (19.03.1999). Decision in the case of Director of the Health Sector in Adrar v. Zaaf Roukia and others. In Khadir, A. (2014). Judicial Decisions on Medical Liability, Vol. 1. Houma Publishing and Distribution House, Algiers, pp. 64, 67, 78, 84, 88.

22 Quillere-Majzoub, F., op. cit. (n 1), p. 577.

23 Council of State. (15.07.2002). Decision in the case of Mental Hospital "Fernane Harfi" in Bouad Issa, Tizi Ouzou v. Widow Moulay. In Khadir, A. (2014), op. cit., pp. 78-79.

24 Rais, M. (2010). Civil Liability of Doctors in Light of Algerian Law. Dar Houma for Publishing and Distribution, Algeria. p. 402.

25 Al-Hayari, A. H., op.cit., pp. 18-19.

26 Quillere-Majzoub, F., op. cit. (n 1), pp. 577-578.

guarantee. The risk principle holds that anyone creating or benefiting from a risk must bear its consequences. In medical institutions, this means compensating for harm caused by their operations in fairness.

The guarantee theory describes the basis of liability: not only fault, but also benefit from an activity requires enduring harm caused. However, these theories may not be in a position to fully protect the injured.

Neither Algerian legislation nor judgments accept harm-based liability strictly in medical settings. Civil law acknowledges liability founded on harm, but it's not accepted in the healthcare industry straightforwardly. As compared to French public health legislation, Algerian public health law lacks such a mechanism of liability, and there is no judgment confirming its practice.[27]

3. THE SPECIFICITIES OF THE COMPENSATION SYSTEM IN MEDICAL LIABILITY FOR GENETIC ENGINEERING APPLICATIONS

Given the widespread medical errors in facilities and the difficulty of proving them—due to technical procedures, challenges in attributing fault, or professional solidarity—the traditional civil liability principles, which assign compensation based on fault (Article 124 of the Civil Code), have proven insufficient to ensure justice. This is especially true regarding fair compensation for harm caused by medical actions, whether or not fault is involved. Thus, a specialized compensation mechanism is needed, suited to the unique nature of damages, particularly from genetic engineering.

3.1. Compensation under traditional civil liability principles: How effective is it in protecting victims?

Traditional civil liability rules primarily seek to assign compensation to the doctor responsible for the harm caused by their fault. Accordingly, a doctor cannot be held liable for compensation without having committed a fault that resulted in harm to another, in line with Article 124 of the Civil Code.

Through the analysis of the Code of Medical Ethics, the Health Law 18-11, and other legal provisions that concern the medical field, it can be seen that the Algerian legislator did not address the issue of compensation in an extended and broad way. Instead, the focus has been on penalties and sanctions resulting from the harm caused by doctors to their patients. Given this ambiguity and the general nature of the legal texts related to the medical field, it is necessary to refer back to the general provisions in the Civil Code governing compensation. The determination of compensation is made by the judge, using their discretionary powers within the legal framework established by the legislator. This situation reflects the typical approach to judicial compensation. However, the practical application of these provisions has shown certain shortcomings in ensuring adequate justice for victims of medical malpractice.

3.1.1. The familiar image of compensation assessment is a judicial estimate, but it is often inadequate

Traditional civil liability assigns compensation to doctors solely when fault that has resulted in damage is determined, based on Article 124 of the Civil Code.

An examination of the Code of Medical Ethics, Health Law 18-11, and relevant provisions demonstrates that the Algerian legislator has addressed sanctions for damages by physicians, not compensation at large. Due to the generality of such texts, judges apply provisions of the

27 Idris, M. S. (n.d.). Medical Errors Towards a Balanced Legal Protection for the Parties of Medical Errors. The Independent Commission for Human Rights (Ombudsman Office), Legal Reports Series, No. 77, Palestine. pp. 52-62.

Civil Code. Compensation is thus determined by the judge via discretionary power under the law. However, this judicial policy does not always result in full justice for victims.

Judicial compensation assessment, though standard, is often inadequate.

Whether before civil, administrative, or criminal courts, judges must establish harm and fault to award compensation.

As in-kind damages are rare in medical cases, compensation is usually monetary, since all harm can be financially valued.

To explain how judges calculate compensation for medical errors, we must outline their role and the circumstances requiring such calculation.

3.1.2. The mechanism of judicial assessment of compensation

The Algerian legislator does not leave judges to assess compensation according to personal discretion. Rather, fixed criteria have to be applied, and decisions are to be reviewed by the Supreme Court. Judges are required to look at both the objective elements of the damage and the personal circumstances of the injured party in awarding compensation.

3.1.2.1. Objective assessment of the damage requiring compensation

Compensable damage includes two elements: actual loss and lost profits, as stated in Article 182 of the Civil Code. Thus, if a medical error causes harm—such as permanent disability or prolonged immobility—it leads to a loss of income, which is compensable.[28]

Judges can also request medical experience to ascertain disability, recovery time, amount of damage, or the type of injury, relying on technical opinions of experts.[29]

3.1.2.2. Subjective assessment of compensatory damage

The judge must take into account the specific circumstances surrounding the victim when determining compensation, in accordance with Article 131 of the Civil Code, which states: “The judge shall assess the extent of the compensation for the harm suffered by the victim in accordance with the provisions of Article 182, taking into account the relevant circumstances”. These relevant circumstances refer to factors related to the victim’s personal, health, family, and financial situation.[30]

3.1.2.3. Timing of the judge’s assessment of compensation

While most civil law commentators agree that the time of assessing the damage is the moment the harm occurs, the right to compensation is not finalized until a judgment is issued. This judgment does not create the right but merely reveals it, as per the Algerian legislator’s position in Article 131 of the Civil Code. If the judge is unable to determine the final amount of compensation at the time of the judgment, the victim is entitled to request a reassessment within a specified period. Additionally, as with any judicial decision, a ruling on compensation is subject to appeal, and the harm may increase or decrease during the period allowed for appeal until a final decision is reached.[31]

3.1.3. Shortcomings of the compensation system under classic civil liability rules

While judicial compensation is a beneficial tool in medical negligence, it has operational limitations, particularly if compared to systems such as the French system. Some of its serious criticisms are:

Slow Processes: Litigation in regular courts is slow and takes time, and this is what extends

28 Ben Sghir, M., Rulings on Medical Error in Light of Civil Liability Rules, op. cit., p. 226.

29 Fillali, A. (2012). Obligations (Action Worth Compensation) (3rd ed.). Dar Mofam for Publishing, Algeria. p. 379.

30 Mansour, M. H. (1998). Medical Liability. Dar Al-Jamiaa for Publishing and Distribution, Egypt. p. 188.

31 Ordinance No. 75-58. (1975). Article 131, concerning the Civil Code, as amended and supplemented by Law 05-10. (2005). Official Gazette, No. 44.

suffering to patients in seeking compensation for medical expenses.

Reliance on Conventional Civil Liability: The burden of proof for the doctor's fault rests with the patients, a burden considering their limited expertise in medicine, resulting in missed opportunities for compensation.

Difficulty in Holding Doctors Accountable: Proofs notwithstanding, the claim may fail due to the doctor's demise, bankruptcy, being uninsured, or the inability to determine the responsible medical professional from among multiple practitioners.

These constraints reveal that the existing system does not provide sufficient justice, and therefore, alternative rules in addition to fault-based liability are necessary.

3.2. The need for collective compensation systems as a supplementary mechanism for patient protection

To ensure effective protection and preservation of victims' right to compensation for harm from medical activities, the mechanism of civil liability must adapt to shifting needs. This means that its compensatory role must be fortified without giving it up. This calls for accepting compensation mechanisms rooted in strict liability beyond the traditional model limited to the victim and the culpable party. Compensation is presently passed on through collective mechanisms.[32]

These systems differ depending on the party that covers medical harm. Most common is medical liability insurance, where insurers indemnify damages from medical errors. Another is national solidarity, which compensates through public solidarity.

3.2.1. Medical liability insurance; enhancing compensation guarantees, but insufficient

Due to significant advancements in insurance, particularly in terms of providing greater protection for victims, Algerian legislation, under Article 296 of the Health Law, requires both public and private healthcare institutions, as well as healthcare professionals practicing independently, to take out insurance covering their civil and professional liability towards patients and third parties. This obligation is in line with the Algerian Insurance Law No. 95-07 of January 25, 1995,[33], and Executive Decree 07-321, which regulates the operation of private healthcare institutions.[34]

3.2.1.1. The content of the medical liability insurance system

The importance of the liability insurance system is the interplay between two interests: on the one hand, the victim's right to compensation, safeguarded by the rigorous system of liability charged to the doctor, and on the other hand, the insurance system, ensuring enterprises' financial ability by distributing the financial burden of damage, rather than relying on the liable party alone. This not only strengthens the victim's right to compensation but also ensures the continuity of medical activity.[35]

Regardless of whether medical liability insurance is mandatory or voluntary, it offers protection to both parties. It fosters mutual support between a doctor, who benefits from financial backing for the victim, and a patient, who is relieved from the need to resort to litigation. Thus, insurance serves as the only means

32 Jaber, A. (1990). Insurance for Civil Liability of Physicians (1st ed.). Dar Al-Nahda Al-Arabia, Egypt. p. 01.

33 Order No. 95-07. (1995). Concerning the Insurance Law. Official Journal, No. 13, 1995.

34 Executive Decree No. 07-321. (2007). Concerning the organization and operation of private healthcare institutions. Official Journal, No. 10, 2007.

35 Ben Tarya, A. (2014). The System of Strict Product Liability and Its Role in Strengthening the Compensation System for Defective Product Accidents (A Study in Algerian and Comparative Legislation). Algerian Journal of Comparative Law, Comparative Law Research Laboratory, Faculty of Law, Abou Bakr Belkaid University, Tlemcen, Issue 01, Algeria. p. 132.

to reconcile the interests of both the doctor and the patient.

Furthermore, the scope of medical liability insurance extends to risks associated with the medical profession itself and covers damages that are eligible for compensation.[36]

3.2.1.2. Observations on the medical liability insurance system

Though the medical liability insurance scheme is important among compensation schemes, there are no criticisms such as:

Others assert that the insurance system provokes negligence and a state of complacency in the exercise of the doctor's duty of care since doctors feel they can be insulated from liability through insurance.[37]

Such insurance can enhance negligence and, as a result, liability claims since victims can sue in the knowledge that they will be compensated by the insurer.

Irrespective of the merits of liability insurance, victims will be greatly disadvantaged in accessing the insured amount, for example, due to the insolvency of the guilty party or the insurer.

There are cases where the insurance system is weak, such as when the causally negligent party is not covered with liability insurance or when the insurance is insufficient to repair the damages to the victim.[38]

3.2.2. Compensation through national solidarity – a complementary mechanism to enhance patient protection

Due to shortcomings in medical liability insurance, the pressure of law has risen for a system of strict liability compensation to achieve justice for the patient who cannot prove fault or when there is no fault. In the aftermath of the Perruche ruling (Nov. 17, 2000),[39] the French legislator introduced profound reforms, notably the system of national solidarity within the Kouchner Law (March 4, 2002),[40] that shifted the onus of injury compensation resultant from public and private healthcare to the state.[41]

Professor Ahmed Aissa sees national solidarity as the basis for collective insurance for medical risks. This compensation model marks the third stage: the first being reform through objective liability based on harm; the second, medical liability insurance; and the third, a guarantee fund for cases not covered by insurance or lacking proven negligence.[42]

3.2.2.1. Areas of compensation through national solidarity

Article L.1142-1, section 2 of the French Public Health Code stipulates: "When the liability of the professional, institution, service, or manufacturer is not determined, any medical accident, iatrogenic condition, or hospital-acquired infection incurs a right to compensation on the part of national solidarity on the part of the patient, or his survivors in case of death, subject to the damage being caused by prevention, diagnostic, or curative acts".[43]

Thus, compensation through national solidarity covers:

- Medical accidents;
- Damages from prescribed medical products;

36 Bakouche, A. (2011). Towards Strict Liability for Medical Consequences (A Study in Algerian and Comparative Law), unpublished. Dar Al-Jamiaa Al-Jadida, Egypt. p. 332.

37 Derése, M.-N. (2008). Perspectives of Medical Law, directed by Geneviève Schamps. Bruylant, Brussels. p. 408.

38 Al-Saraireh, A. A. K. M. (2012). Insurance for Civil Liability Arising from Medical Errors (A Comparative Study) (1st ed.). Dar Wael for Publishing and Distribution, Jordan. p. 238.

39 Cass. Civ. (2000, November 17). n°99-13701, Perruche. In Villa, F. (dir.), Les Grandes Décisions Du Droit Médical. L.G.D.J, Alpha Edition, Lebanon. p. 467.

40 Aissani, R. (2016). National Solidarity in Compensation for Medical Accidents – A Comparative Legal Study. International Law and Development Journal, 4(1), pp. 13-14.

41 Law No. 2002-303. (2002, March 4). Article 98 of Public Health Code, Official Journal of the French Republic, No. 54, introducing Article L.1142-22 into the French Public Health Code. <www.legifrance.gouv.fr> (Last access: 01.05.2025).

42 Issa, A. (2008). Responsibility of Public Hospitals (A Comparative Study) (1st ed.). Halabi Publishers, Lebanon. p. 132.

43 French Public Health Code. Article L.1142-1. (Paragraph I).

- Infections or diseases contracted in a medical facility.

3.2.2.2. Conditions for compensation through national solidarity

The French legislator, in Article L.1142-1, Paragraph 2 of the Public Health Code, offers conditions for compensation based on national solidarity for victims of medical accidents. It is granted if the injury is a direct result of prevention, diagnosis, or treatment, and if it has serious implications in consideration of the patient's condition and expected progress of their illness or injury. The seriousness of the injury, as determined by a decree, considers loss of function and interference with professional and personal life. There has to be a minimum of 25% physical or mental disability for compensation. These standards are intended to limit compensation cases, encouraging equity and protecting public funds.[44]

CONCLUSION

The continuous development of compensation systems, along with evolving frameworks for civil medical liability, as well as the development of rules and regulations for the use of modern biomedical technologies, including genetic engineering, is essential to achieving a fair and just healthcare system. Every system complements the other since no legal system will function without the other legal systems being consolidated.

- Rendering restitution to medical error victims or unforeseen side effects that occur due to advanced medical treatments involving genetic engineering, among others, is an important objective in legal reforms and health policy. Therefore, we propose the following:
- The establishment of a specific legal framework to regulate the fields and controls of genetic engineering in the medical field.
- The creation of a specific legal system to define the nature of civil medical liability, which we advocate for as a general rule based on personal fault, except for adopting objective liability based on damage, but within specific limits and strict controls.
- The establishment of a single compensation system that is complementary to each other, assuring total protection to the victims injured by medical practice. The system would be composed of the traditional compensation system as established via the judge, liability insurance for civil liability, and compensation based on national solidarity, thus making the coexistence of the systems possible, with each one intervening in its domain.

44 French Public Health Code. Article L.1142-1.

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4. Family Code, Article 7 bis, and Executive Decree No. 06/154. (2006);
5. French Public Health Code. Article L.1142-1;
6. Health Law No. 18-11. (2018). Articles 359-367, 430-432. Official Gazette No. 46;
7. Law No. 2002-303. (04.03.2002). Article 98 of Public Health Code, Official Journal of the French Republic, No. 54, introducing Article L.1142-22 into the French Public Health Code. Available at: <www.legifrance.gouv.fr>;
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The Right to the Secret of Correspondence and Its Legal Protection

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ABSTRACT

Respecting the private life of man is one of the most prominent basic rights guaranteed by positive laws and divine laws, as it is a pillar of human dignity and individual freedom. This right includes preserving human secrets and not dispensing them without his/her explicit consent, or outside the framework of a legitimate and justified judicial order. The principle of correspondence is considered one of the most important applications of this right, as it includes all correspondence and communications between individuals, whether written, electronic, or even oral, as long as it relates to their privacy and they do not want to inform others.

Private secrets are an integral part of private life, and they include all information or an incident related to a person and affects his/her interests, such as health data, family relationships, intellectual and religious inclinations, financial situation, and others. The law was approved to protect these secrets, stressing the necessity of preserving them and not being infringed, as Islamic law affirmed this principle through the prohibition of espionage and followed the nakedness of people, in respect of their humanity and the maintenance of their dignity.

Accordingly, any violation of these secrets is a serious prejudice to the basic rights of man and requires legal accountability, as it is inconsistent with moral principles.

KEYWORDS: Public freedoms, Correspondence confidentiality, Privacy, Legal protection, Constitutional amendment 2020

INTRODUCTION

There is no doubt that personal freedoms come to the forefront of freedoms as necessary for the possibility of enjoying other public freedoms, as they are a condition for the existence of other public freedoms. Some have expressed personal freedoms in the term "individual freedoms in the full sense of the word", *Les Libertés Individuelles Premièrement Dites,* because personal freedoms represent the center of the circle for all other freedoms. In the context of personal freedoms, the right to confidentiality of correspondence and that this right is an extension of freedom of thought, because he who fears will violate his messages that do not dare to express this freely. In addition to that, this right is a manifestation of the sanctity of private life, and the importance of this right was guaranteed by most constitutions, guaranteed by treaties, and regulated by laws. So the question arises, what is the meaning of the right to the confidentiality of correspondence? What is the reality of its protection in both international and national laws?

So we decided to divide this research paper into two topics:

- Section I: The concept of the right to the confidentiality of private correspondence;
- Section II: Legal protection for the right of correspondence (internationally and nationally).

1. THE CONCEPT OF THE RIGHT TO CONFIDENTIALITY OF PRIVATE CORRESPONDENCE

The confidentiality of correspondence[1] falls within the framework surrounding the individual, as it is not permissible for others to storm it without his will, and thus the correspondence and what it contains related to the private life of the individual, and no one can see it. Therefore, this topic will be discussed: the concept of the confidentiality of correspondence and the exceptions that respond to the right to prejudice its prohibition and secrecy.[2]

At first, the term correspondence indicates a broad meaning that includes issues that do not fall within the scope of private life, as correspondence may include things that are not from private life.

Definition of the jurists of law. There are some difficulties in determining the meaning of the secret legally, so some know that the secret is all that harms its disclosure with reputation or dignity. The right of correspondence in general means that it is not permissible to reveal the contents of correspondence between individuals, because of the attack on the right of ownership of what this correspondence includes and disrupting this right, and violating freedom of thought as well.[3]

Professor Farouk Al-Kilani defines personal correspondence as "they are human conversations with others that translate his opinions, and it may be directly between individuals without using any modern means of communication, such as wireless and wireless communications, or by using one of these means, so they are indirect".

The correspondence is intended for all written messages, but it was sent by the mail road, or by a special messenger, as it means telegrams and faxes. It is equal in this that the message is

1 Asilan, O. M. (2004). Criminal protection for the profession in Islamic law and positive laws and its applications in some Arab countries. Master Thesis. Naif Arab University for Security Sciences, Riyadh, p. 39.

2 Safia, B. (2012). Legal Protection for Private Life – A Comparative Study. PhD thesis, Mawloud University, p. 225.

3 Morange, S. M. (1995). Les Libertés Publics. France: PU.F., p. 61.

within a closed or open circumstance or that it is an open card, as long as it is clear that the sender is not to be informed of others without discrimination.

It should be noted that correspondence applies with confidentiality in light of the latest means of e-mail, which is more used from the Internet, as the email is often used to transfer and store files and cards, and what is required with it is not permissible to monitor correspondence, nor to disclose information except through the elimination or administrative authorities for legitimate reasons, because the email is part of the concept of correspondence and private life.[4]

Given the importance of this freedom or the role that it plays in a person's life as a human being, close to man, and that concerns him alone. The laws were unanimous in respect of this freedom, and the harsh penalties for those who violate their sanctity have been established. And guaranteed most of the constitutions, including the Algerian constitution in Article 39: It is not permissible to violate the sanctity of the citizen's private life, and the sanctity of his honor, and the law protects them from the "confidentiality of correspondence and communications related to all its forms".[5]

The statement of this freedom in the Algerian constitution came from 1963 to the amendment of the constitution in 2008, as it came in the 1963 constitution in Article 14 of the phrase (ensuring the secrecy of correspondence to all citizens). However, the phrases that came expressing this freedom changed, so (the confidentiality of correspondence for all its forms is guaranteed) in the constitution of 1976,1989,1996, the amendment of 2008 and this phrase is closer to the rightness as it has expanded from these freedoms to include all kinds of correspondence as postal correspondence and all telegrams and telephone communications are a material translation of its ideas and its secrets can It is permissible for a non – source and whoever is directed to see it, confiscate it, conceal it, or hear it in a way of eavesdropping by any means.

As for the elements of the right of the confidentiality of correspondence, they are:[6]

1. The right to confidentiality of correspondence includes all written communications, whether through messages or telegrams;
2. The right to confidentiality of correspondence includes wireless and wireless communications, such as telephone and electronic conversations, as technology has reached today;
3. The right to confidentiality of correspondence is based on the idea of the right of ownership, because of the attack on it. It is an attack on private life and personal freedom;
4. Not to disclose the content of the correspondence, seizure, conceal, or destruction of the correspondence, or inform others.[7]

The Right to Confidentiality of Correspondence in Islamic Law

We find in the idiomatic meaning of the secret in Islamic law: "The secret is all that you conceal and hide yourself and do not see anyone to do harm or to bring an interest or his concern from him without him".

In the fatwas of the Islamic Fiqh Academy, a statement of the meaning of the secret stated that "what a person leads to the last to be concealed by him before or from a distance, and includes what is stimulated by evidence indicating the request of concealment if the custom is to keep his concealment as it includes the peculiarities and disadvantages of the hu-

4 Farouk. A. – K. (1985). Lectures in the Code of Criminal Procedure (Jordan and Al – Muqarin). Amman, p. 100.

5 Al – Shahawi, M. (2005). Criminal Protection for the Variation of Private Life. Arab Renaissance House, Cairo, p. 184.

6 Karima, K. (2006). Protecting the right to privacy from infringement under the Information Society. Journal of Legal and Administrative Sciences, p. 146.

7 Taisayat, H. S. (2000). Human Rights and Basic Freedoms. 3rd edition, Amman, p. 132.

man being that people hate to see".

We find this freedom in the Holy Qur'an, as in the noble Prophet's Sunnah, and one of the noble verses indicating this is the words of God Almighty: "O you who believe, avoid many of the thoughts, because some think that they do not. Do you like one of you to eat the flesh of his brother, dead, and you will be given it.

And from the guidance of the prophecy, we find the words of the Messenger, may God's prayers and peace be upon him, on the authority of Abu Hurairah, may God be pleased with him, that the Messenger of God, peace and blessings be upon him, said: "Do not think that the thought is the lie of the hadith and do not feel or spy". And also his saying: Exposing in his home.

The general principle is the confidentiality and sanctity of private correspondence, but there are exceptions to this general asset, which is: the relationship of paternity, the relationship of marital, and the judicial investigation.

2. THE RELATIONSHIP OF FATHERHOOD AND MARITAL RELATIONSHIPS

The father is the natural guardian of his minor children, and he is the one who bears civil responsibility for the harmful actions that may occur from these minors, in addition to being criminally responsible for neglect in their care. This responsibility should be matched by controls from the father on his children, as he is entitled to monitor the messages he sends and which his children receive to ensure the interests of the children and the interests of the family.

Marital secrets are reserved and escalated even after their separation. It is not permissible for either of them to divulge the correspondence that took place between them during the marriage of the other without the satisfaction of the other. This explanation is matched by Article 153, Paragraph 02 of the Civil and Administrative Procedures Law.

Concerning the personal messages that one of the spouses had been edited or received within the framework of the crime of adultery, and the evidence for breaching the duty of sincerity may raise the question about the possibility of bringing them to the judiciary when it includes the secrets of private life?

To address the position of the Algerian legislator, we need to refer to the provisions of the Penal Code, and we find it on the one hand that it criminalizes the crime of adultery to consider it from the public order, according to Article 339, Paragraph 1. On the other hand, it is allowed to be proven by the victim's husband, and among the permissible methods is mentioned Article 341 of the Penal Code, the letters or documents issued by the adulterer (the husband), these messages are presented by one of the health couple whenever he obtained it and was directly related to the crime of adultery.[8]

The judicial investigation

Some social necessities and public interests require prejudice to this freedom, as the Public Prosecution may look forward to speeches, messages, papers and seized registrations, provided that all that is possible is done, in the presence of the accused and the holder of it or sent to him and codify their observations on them, and according to what appears from the examination to order the inclusion of the papers to the case file or return it to the one who was holding it or was sent to it.

The messages and the disclosure of their secrets are set an investigation procedure that may not be resorted to unless the investigation interest requires that this procedure be broken, after the permission of the competent judge in a limited period and based on the justifications and legal reasons. Article 84 of the Criminal Procedure Law has given this authority to the investigation authority only. It must be adhered to the following provisions of guaran-

8 Al-Ahwano, H. E.-D. (1978). The right to respect private life, the right to privacy – a comparative study. The Arab Renaissance House, p. 67.

tee and guarantee of the correspondence confidentiality:[9]

1. That the confidentiality of correspondence is a benefit to show the truth if the crime is punishable by imprisonment for more than three months, the matter must be issued by the criminal judge based on serious and embarrassing challenges;
2. It is a reason;
3. This is in the narrowest limits and not exceeding 30 days.

3. LEGAL PROTECTION FOR THE RIGHT OF CORRESPONDENCE (INTERNATIONALLY AND NATIONALLY)

Legal protection refers to the measures and mechanisms within the law created to protect and preserve rights, interests, and privacy. The application of laws, legislations, and legal frameworks aimed at ensuring the protection of individuals, their property, their data, and other legal rights. Legal protection acts as a shield against violations of rights, ill-treatment, and rights violations

The Universal Declaration of Human Rights is the first public document, integrated and specialized in human rights. It is undoubtedly a sign that it is the aspect of international human rights law as a branch of international law. After its issuance, the United Nations began working to take more positive steps, so that its results are binding, and the best way towards this goal was to formulate human rights based on my pledges that are formulated in an agreement that takes the form of an international treaty.

3.1. The Universal Declaration of Human Rights

The individual's relationship is no longer just a citizen's relationship with a state, after the Second World War. The international law, to this war, was limited to legalizing the relationship between states and defining their competencies and sovereignty. However, this concept has changed radically after mankind knew the scourge of wars, as global public opinion began to tend towards international protection for the individual in the face of the arbitrariness of dictatorial governments, especially in the field of civil and political rights.[10]

This phenomenon was of a global and regional nature at the same time. The United Nations launched an important project for the preparation of the Universal Declaration of Human Rights, and led the effort to reach the adoption of the Universal Declaration of Human Rights on December 10, 1948.

Concerning the freedom of correspondence, it was stated in Article XII (12) of the announcement that no one is exposed to arbitrary intervention in his private life, his family, his residence, or his correspondence. The most important findings of international efforts during the twenty years after the issuance of the Universal Declaration of Human Rights, the adoption of the two international covenants of 1966, the first for civil and political rights, the second international covenant related to social, economic and cultural rights and a protocol for receiving and studying the notification of individuals who claim to be victims of violation of any of the rights stipulated in the consideration of these notifications.

The new in the two international era is that they have taken the form of an international treaty binding for the parties, and on the other hand, the two covenants include an international system, to enhance and ensure respect for the rights contained in it. The implementation of the two international covenants began

9 Arous, M. (1999). Legal System for Public Freedoms in Algeria. University of Algeria, Algeria, p. 46.

10 Allah, A. – T. (2005). Introduction to Freedoms and Human Rights – Constitutional Expression of Freedoms and Laws. Publishing and Distribution, Algeria, p. 53.

in 1976. By virtue of the global and binding nature of the two covenants, they are considered an important step on the path of protecting human rights at the international level.[11]

Article 17 of the International Covenant on Civil and Political Rights stated that "it is not permissible to interfere in a control or illegal in the privacy of anyone, his family, his residence, or his correspondence". But everyone has the right to protect the law against such intervention or exposure, and it is similar to Article II of the Universal Declaration of Human Rights.

3.2. The International Covenant on Civil and Political Rights

The characteristic of correspondence is one of the manifestations of the individual's privacy and is explicitly protected in Article 17. This protection includes not only during the transfer of written correspondence by mail or by a messenger, but also in the period before sending it and after receiving it. It also includes direct oral communication, and today it must include contact with any mechanical or electronic means. Protection is carried out so as not to disclose its contents except to the recipient person. It is also preserved from aspiration or any other intervention, kicking a message, changing its destination, or delaying it, or by confusion and the tangle of phone lines or electronic communications.

The extent of protection must be expanded, so that the protection of personal communication between two individuals must be expanded to documents that are not usually called correspondence. Examples of this. The idea in these articles may be threatened if the individual responsible for it reveals, especially if these moral, religious, or political values prevailing in society contradict. In any case, it does not matter to him.

Under Article (18) that the International Covenant protects the individual's right even if the materials are not sent by any means of communication, in the Stanley case against Georgia, the US Supreme Court of Justice ruled the innocence when the state agents of the state found, and agents of the state of Georgia during a legal inspection of one of them, and they found three films that were considered immoral and violated the Juria State Law, because it saw that the United States constitution protects the individual's right And ideas, and to read and watch whatever he wants within the retreat of his house, and that he has the right to liberate from the state's research in the contents of his office and whatever the organizations related to the absence, they do not reach the retreat of the individual's house. And if the first amendment to American law means something, it means that the state does not have a matter of telling one who is sitting alone in his home, but rather tells him what books he can read and the films he can see.[12]

Article (17) of the International Covenant on Civil and Political Rights, and if it is read with a capacity of a horizon, it also protects the right to the confidentiality of correspondence, and it prohibits reserve and illegal works that interfere with means such as delivery, preserving ideas and information and keeping them secret. There are also cases in which intervention is permissible to limit the freedom of correspondence, whatever its characteristic, when necessary, in some cases, such as national security and defending public order, or crimes.

3.3. Protection is the right to confidential correspondence in Algeria

The Algerian constitution was concerned with public rights and freedoms and was subject to the right of correspondence and guaranteed and guaranteed the laws by providing penalties for its violation.

3.3.1. Constitutional protection

11 Yasser Al – Huwaish, M. N. (2010). Public Freedoms and Human Rights. Syrian Virtual University, Syria, p. 139.

12 Kashkash, K. (1992). Secret Correspondence Protection. Journal of Sharia and Law Studies, p. 144.

for the right of correspondence

The thing observed on the provisions of the constitution in the field of the legal system of public freedoms only guarantees public rights and freedoms, in public formulas, without accurately addressing the text on accurate issues that are considered an effective guarantee to protect and ensure public freedoms. And since correspondence is forbidden as a warehouse of the privacy of individuals, so most of the constitutions guaranteed this right, including the Algerian constitution 2020 in Article 47, paragraph 02, where it included "every person has the right to confidentiality of his correspondence and his communication in any form" but it came in the public form, unlike some of the constitutions that dealt with this freedom with accuracy and clarity.

And what is noticed on Article 47/2 that the Algerian constitutional legislator remedies the error that was present in the 2016 constitution in Article 39 Paragraph 02 of the 2016 constitutional amendment that came despite its explicit guarantee of the confidentiality of correspondence, but it lacks accuracy, especially in the phrase "guaranteed" where it results in the unconstitutionality of listening seats (listening devices) that can be placed in private phone centers, as well as appears from the formulation of the article 39/2 The unconstitutionality of the fourth chapter related to the interception of correspondence, the registration of assets and the taking of photos in the investigation of the Code of Criminal Procedure (Article 65 bis 5), because the guaranteed phrase suggests that there is no objection to correspondence nor to register the voices in all cases. It was better to mention exceptions in the text of Article 39/2 of the Constitution or for registration after the end of the paragraph, just as Article 40 included the sanctity of the house, so there is no inspection except according to the law .... Thus, the article can be formulated in the context of what the Egyptian project went to, for example, where it stipulated in Article 57/2 of the 2014 constitution that: ... and for postal and telegrams, television conversations and other means of communication, and it is not permissible to confiscate it See it or its control except by a reasonable judicial order, and for a limited period, in accordance with the provisions of the law. Thus, the conflict between the constitutional principle and other laws reduces.

3.3.2. Legislative protection for the confidentiality of correspondence

The Algerian legislator has provided protection for the right of correspondence in both the (criminal) penal laws and civil law.

3.3.2.1. In criminal law

In addition to the constitutional guarantees that protect the confidentiality of correspondence,[13] the Algerian project surrounded this right with texts criminalizing every attack, including Article 303 of the Penal Code, which stipulates that "everyone who breaks or damages messages or correspondence addressed to others, with bad faith, and in other cases stipulated Article 137 shall be punished with imprisonment from one month (1) to one year with a fine of 25,000 dinars to 100,000 DZD or in one of these For two penalties and the punishment is more severe if the attack is issued by the state employees, and that is stipulated in Article 137 of the Penal Code. A user or delegate in the interest of lightning is embezzled, damaging a telegram or broadcasting its content, and the perpetrator is punished, as well as deprived of all public jobs or services for five to ten years.

3.3.2.2. In civil law

The Algerian civil law does not include any explicit text that guarantees the protection of the quality of private life, but rather a general text that protects the fundamental rights of human personality. As the right of the confidentiality of correspondence can be included in the private life and the latter within these

13 Med, S. (2013). The right to privacy between guarantees and controls in Algerian legislation and Islamic jurisprudence. College of Islamic Sciences, University of Oran, Algeria, p. 88.

rights, Article 47 stipulates that: "For everyone who has been legally assaulted by one of the rights inherent to his personality to request the suspension of this attack and compensation for the harm that may be harmed".[14]

CONCLUSION

The right of the secret correspondence is considered one of the most important personal rights stipulated in human rights, whether in terms of the Universal Declaration of Human Rights or constitutional texts and national legislation in countries – including Algeria – and in the interest of the Algerian legislator on the importance of the right of the secret of correspondence he mentioned at the heart of the constitution, which means the opportunity for every person to correspond to others by sending messages and postal parcels in the land, the sea, or the air, to receive messages and parcels and address others with any basket The law is allowed. Whether it is dealt with by well-known traditional or modern electronic communication means.

It is worth noting that, with this technological and scientific development and the increase in technical means that can be used to threaten respect for the confidentiality of correspondence and its prohibition, it has become necessary to increase the legal means to protect this freedom.

14 Aziz, N. A. (2010). Criminal Protection for Private Life – A Comparative Study. PhD thesis, Faculty of Law, Batna University, p. 48.

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The Compromise Nature of Property Rights in Action – Tolerating Neighboring Nuisances?

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ABSTRACT

This article explores the evolving conception of property rights as individual entitlements and socially embedded institutions, emphasizing neighbor law and the duty of tolerance. While civil-law traditions traditionally conceptualize ownership as an exclusive and absolute right, modern legal systems increasingly recognize that property must serve a social function and coexist with the rights and interests of others. Using the Georgian legal framework (Article 175 of the Civil Code), the paper examines how legal norms mediate conflicts between neighboring property owners, particularly where environmental degradation or industrial activity undermines the peaceful enjoyment or economic use of property. The article emphasizes the role of regulatory mechanisms, such as environmental and construction standards, and highlights the judiciary's critical function in determining the permissible scope of interference on a case-by-case basis. Drawing upon the jurisprudence of the European Court of Human Rights, it analyzes how the Court balances individual property rights under Article 1 of Protocol No. 1 with broader concerns addressed under Article 8 of the European Convention on Human Rights. By integrating national legal norms with international human rights standards, the article aims to delineate a coherent framework for resolving property-related conflicts in a manner that respects both private autonomy and the public interest.

KEYWORDS: Property rights, Environmental disturbance, Tolerating neighboring nuisance

INTRODUCTION

As a foundational element of a free and democratic society, property rights underpin individual liberty and enable personal development.[1] Far from being merely an economic asset, property provides a sphere of autonomy, continuity, and control in which individuals exercise self-determination, assume responsibility, and fully participate in social and economic life.[2] In civil-law traditions, ownership is traditionally conceived as an exclusive, absolute right:[3] the owner may use, enjoy, and dispose of the property at will, excluding others from interference and enforcing protection through remedies such as *rei vindicatio* and *actio negatoria*.[4]

However, property—though often portrayed as the archetype of individual autonomy—is neither a purely private nor an isolated institution. It is inherently linked to spatial context and embedded within a broader social milieu. As such, it serves as a medium through which individuals exert influence over their environment while remaining subject to regulations and constraints.[5] This duality underscores that ownership entails not only control over resources but also responsibilities shaped by both legal norms and social expectations. Accordingly, the idea that property carries a **social function** has gained widespread recognition: the right to exclude is not absolute, and the use of property must not unduly infringe upon the rights of others or undermine the public interest.[6]

It is precisely this need to balance private and public interests that gives rise to the **state's positive obligation** in safeguarding property rights. Under constitutional frameworks, including that of **Georgia,** the right to property is protected not only from unlawful state interference (a negative obligation)[7] but also through the establishment of a legal and regulatory environment that ensures one owner's use does not disproportionately infringe upon others' rights or the public good.[8]

Neighborhood law exemplifies how legal systems balance competing private interests. The Civil Code of Georgia establishes a general obligation of mutual respect among neighbors, requiring property owners to exercise their rights in ways that recognize and accommodate the rights of others.[9] Article 175 specif-

1 Nordtveit, E. (2023). The changing role of property rights: An introduction. In Law 2023, Edward Elgar Publishing. pp. 2-3. Available at: <https://doi.org/10.4337/9781839100659.00006>; Totladze, L. (2018). Commentary on the Civil Code, Book II (Chanturia, L., ed.), Article 170, pp. 73-74. Tbilisi, Georgia.

2 Pushkar, P. (2012). Protection of property under the European Convention on Human Rights and the Georgian Constitution: Analysis of the judicial practice of balancing proportionality of interference with the individual property rights. Georgian Constitutional Law Review, (5), p. 143.

3 The emphasis on the absoluteness of property rights reflects the perspective of legal systems based on Roman law. In contrast, the common law tradition, exemplified by English law, adopts a different conceptual framework. Rather than recognizing property as an absolute right, English law views property as a relative right superior to, yet distinct from, mere possession. See. Meskhishvili, N. (2018). Bona fide acquisition of property from an unauthorized person (Doctoral dissertation, Caucasus University), pp. 36-37. Available at: <https://dspace.nplg.gov.ge/bitstream/1234/290150/1/Disertacia.pdf >.

4 Zarandia, T. (2019). Property Law (2nd ed.). Meridiani. p. 50.

5 Smith, J. C. (2012). Some preliminary thoughts on the law of neighbors. Georgia Journal of International and Comparative Law, 39(3), p. 758. UGA Legal Studies Research Paper No. 12-05. Available at: <https://ssrn.com/abstract=2054732>; Zarandia, T. (2019). Property Law (2nd ed.). Meridiani. p. 42.

6 Meskhishvili, N. (2018). Bona fide acquisition of property from an unauthorized person (Doctoral dissertation, Caucasus University), pp. 45-46. Available at: <https://dspace.nplg.gov.ge/bitstream/1234/290150/1/Disertacia.pdf >.

7 Eide, A., Krause, C., Rosas, A. (1995). Economic, social and cultural rights. Kluwer Law International & Raoul Wallenberg Institute of Human Rights and Humanitarian Law. In Meskhishvili, N. (2018). Bona fide acquisition of property from an unauthorized person (Doctoral dissertation, Caucasus University), pp. 45-46. Available at: <https://dspace.nplg.gov.ge/bitstream/1234/290150/1/Disertacia.pdf >.

8 Phirtskhalashvili, A. (2022). The legal dimension of the social function of property. Journal of Constitutional Law, (2), p. 24.

9 Zarandia, T. (2018). Law of Neighbouring Tenements and the Essence of Private-Law Obligation of Tolerance in Georgian Law. Journal of Law, (2), p. 7. Available at: <https://jlaw.tsu.ge/index.php/JLaw/article/view/2576>.

ically recognizes that certain impacts—such as noise, emissions, or vibrations—must be tolerated within reasonable limits.[10] This duty of tolerance reflects the inherently social nature of property rights and the necessity of coexistence in densely inhabited spaces.[11]

In some cases, the **impact arising from adjacent land** may significantly degrade environmental conditions to the point where a property becomes uninhabitable or unusable for economic purposes. Such adverse effects—whether from industrial activity, construction, or other externalities—underscore the importance of a legal framework that balances economic development with the protection of individual property rights.[12] While economic or industrial development may serve the public interest, it should not unfairly harm neighboring property owners. Clear environmental and construction regulations must limit noise, emissions, and other disturbances to protect both the environment and peaceful enjoyment. However, legislation alone cannot fully address the complexities of real-world urban conflicts.[13] Thus, beyond codified rules, **courts play a crucial role in defining the scope of acceptable impact**. Through case-by-case adjudication, they interpret general legal norms, ensuring proportionality and fairness. This judicial oversight prevents both economic development and environmental protection from becoming absolute, promoting a balanced coexistence of private rights and public interests.

The European Court of Human Rights (ECtHR) has developed a nuanced framework for resolving conflicts where environmental nuisances—often stemming from economic, industrial, or public interests—interfere with the rights of neighboring property owners. While **Article 1 of Protocol No. 1 (A1P1)**[14] protects the peaceful enjoyment of possessions, such cases are frequently examined under Article 8 of the **European Convention on Human Rights (ECHR),**[15] which safeguards private and family life, home, and correspondence. This dual approach reflects the Court's recognition that environmental harms implicate both property rights and broader human rights.

For Georgia, as a Contracting State, alignment with Strasbourg jurisprudence is essential. Judicial oversight ensures proportionality in balancing individual property rights against evolving social, economic, and environmental needs. This article analyzes ECtHR case law to elucidate the legal principles underpinning the reconciliation of these competing interests in property law.

1. PROPERTY RIGHTS AND ENVIRONMENTAL CHALLENGES: CONTROVERSIES UNDER THE ECHR

Article 1 of Protocol No. 1 to the European Convention on Human Rights guarantees the right to property. In *Marckx v. Belgium*, the European Court of Human Rights clarified that the provision, by referring to the *"peaceful enjoyment of possessions"* and the *"use of property"*, substantively secures property rights. This protection extends beyond formal ownership to encompass the ability to use, manage, and

10 Comp. Bundesministerium der Justiz. (2024). German Civil Code (Bürgerliches Gesetzbuch, BGB). §. 912. Available at: <https://www.gesetze-im-internet.de/englisch_bgb/>.

11 Zahnow, R., Cheshire, L. (2023). Community neighboring norms and the prevalence and management of private neighbor problems. City & Community, 22(2), pp. 126–144. Available at: <https://doi.org/10.1177/15356841221132497>.

12 López Ostra v. Spain, App. No. 16798/90. European Court of Human Rights. (1994, December 9). Judgement of the Court. Available at: <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57905%22]}>.

13 Zarandia, T. (2018). Law of Neighbouring Tenements and the Essence of Private-Law Obligation of Tolerance in Georgian Law. Journal of Law, (2), pp. 7-8. Available at: <https://jlaw.tsu.ge/index.php/JLaw/article/view/2576>.

14 Council of Europe. (1952). Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol No. 1, as amended).

15 Council of Europe. (1950). Convention for the Protection of Human Rights and Fundamental Freedoms (as amended).

dispose of property, underscoring its essential role in individual autonomy and legal certainty (§ 63).[16]

The ECtHR adopts a broad interpretation of "possessions" under A1P1, covering both tangible and intangible assets, including property and claims based on legitimate expectations. This protection extends beyond domestic legal classifications to include rights in rem and in personam, as well as movable and immovable property. Even interests not formally recognized under national law may qualify as "possessions" under the Convention.[17]

A property right may be protected as a "possession" under A1P1 even if it is revocable or contested under domestic law, at least until the revocation takes effect.[18] The ECtHR also safeguards legitimate expectations, including *de facto* possession and contractual claims. In *Beyeler v. Italy,* the Court upheld a proprietary interest despite a void contract, emphasizing long-term possession, official recognition, and compensation, reflecting its pragmatic approach to both formal and practical property rights (§§ 104–105).[19] A1P1 sets out three rules: (1) a general principle of peaceful enjoyment of possessions, (2) conditions for lawful deprivation of possessions, and (3) the state's right to control property use in the public interest.[20] When interference doesn't fit the second or third rule, the first rule applies (the so-called catch-all formula).[21]

Interestingly, according to ECtHR's established case law, interferences with property rights arising from environmental degradation or neighboring nuisances—such as noise, odors, vibrations, or pollution—are generally assessed under Article 8 of the ECHR, which protects private and family life, rather than under Article 1 of Protocol No. 1. (A1P1). The Court has clarified that **A1P1 does not guarantee enjoyment of possessions in a pleasant or pollution-free environment**. In *Flamenbaum and Others v. France* concerning airport expansion, the Court reaffirmed that such issues fall more appropriately within the scope of Article 8 (§184).[22]

In cases such as *Udovičić v. Croatia*[23] and *Surugiu v. Romania,*[24] where the Court identified a breach of Article 8 due to nighttime noise from a bar or authorities' failure to respond effectively to persistent neighborhood disturbances, it found no need to separately assess a potential violation of Article 1 of Protocol No. 1.[25]

Nevertheless, **the ECtHR recognizes that severe environmental degradation can violate Article 1 of Protocol No. 1 when it significantly impairs a property's value, usability, or control, or imposes an excessive burden on the owner**. In *Öneryıldız v. Turkey,*[26] the Court found violations

16 Marckx v. Belgium, App. No. 6833/74, European Court of Human Rights. (1979, June 13). Judgment of the Court. Available at: <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57534%22]}>.

17 Council of Europe/European Court of Human Rights. (2023, February 28). Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights (Updated). p. 7. Available at: <https://rm.coe.int/guide-article-1-p1-gts-english-update-28-02-2023-/1680ae370a>.

18 Ibid., p. 8.

19 Beyeler v. Italy, App. No. 33202/96, European Court of Human Rights. (2000, January 5). Judgment of the Court. Available at: <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58832%22]}>.

20 Council of Europe/European Court of Human Rights. (2023, February 28). Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights (Updated). p. 20. Available at: <https://rm.coe.int/guide-article-1-p1-gts-english-update-28-02-2023-/1680ae370a>.

21 Ibid., p. 25.

22 Flamenbaum and Others v. France, App. No. 3675/04 & 23264/04, European Court of Human Rights. (2012, December 13). Judgment of the Court. Available at: <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-115143%22]}>.

23 Udovičić v. Croatia, App. No. 27310/09, European Court of Human Rights. (2014, April 24), Judgment of the Court. Available at: <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-142520%22]}>.

24 Surugiu v. Romania, App. No. 48995/99, European Court of Human Rights. (2004, April 20). Judgment of the Court. Available at: <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-61714%22]}>.

25 Council of Europe/European Court of Human Rights. (2023, February 28). Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights (Updated). p. 53. Available at: <https://rm.coe.int/guide-article-1-p1-gts-english-update-28-02-2023-/1680ae370a>.

26 Öneryıldız v. Turkey [GC], App. No. 48939/99, European Court of Human Rights. (2004, November 30). Judg-

of Articles 2, 13, and A1P1 after a methane explosion at a state-run rubbish tip in Ümraniye, Istanbul, killed nine of the applicant's relatives and destroyed his home. The dump, operated by the Istanbul City Council, lacked safety measures despite warnings about methane risks. The authorities failed to act, neglecting preventive measures like gas-extraction systems or resident warnings.

Despite the applicant's home being built without authorization on Treasury land, the ECtHR rejected the government's claim that it wasn't a protected "possession". The Court emphasized that even informal property may fall within the ambit of A1P1 when there is a sufficient degree of recognized occupancy and stability, especially where the State has tolerated the presence of such settlements and facilitated their integration. The destruction of the home, combined with the State's negligence, breached the right to peaceful enjoyment of possessions, highlighting how environmental harm and government inaction can violate property rights when the State fails to balance private and public interests.

In *Öneryıldız v. Turkey*, **Judges *Tümen* and *Mularoni* dissented,** arguing that A1P1 did not apply because the applicant's illegally built dwelling on Treasury land was not a protected "possession". They highlighted the absence of a legitimate property right or enforceable claim and maintained that state tolerance cannot create a proprietary interest. They cautioned that recognizing such claims could undermine town-planning laws, encourage illegal construction, and obstruct regulatory enforcement.

This case illustrates the ECtHR's broad and pragmatic interpretation of "possessions", extending protection to both tangible and intangible interests, including those not formally recognized under domestic law. While environmental nuisances are typically examined under Article 8 of the Convention, the Court acknowledged that, in exceptional cases where environmental harm severely impairs property use or value, A1P1 may also be engaged, particularly if the State fails to strike a fair balance between individual rights and public interests.

ment of the Court. Available at: <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-67614%22]}>.

2. ARTICLE 8 OF THE ECHR AND ENVIRONMENTAL NUISANCES

Article 8 of the ECHR guarantees the right to respect for private and family life, home, and correspondence, forming a key basis for addressing environmental nuisances that impair the enjoyment of one's home. The European Court of Human Rights has repeatedly found that serious harms—such as noise, pollution, and toxic emissions—may violate this right, particularly where states fail to prevent or mitigate the disturbance.[27] This chapter examines the Court's approach to environmental nuisances under Article 8, focusing on how it balances individual rights with public interests and the implications for protecting property in cases of environmental degradation.

2.1. Noise disturbance and the right to enjoy one's home

Under the ECHR, the right to respect for one's home extends beyond the mere physical space to include the ability to enjoy it peacefully. This right imposes positive obligations on public authorities to take appropriate measures, including the enforcement of court decisions, to safeguard individuals from interference. Such interferences may be physical, such as unauthorized entry, or non-physical, including **excessive noise,** odors, or other environmental nuisances. When these disturbances—whether caused by private individuals, commercial activities, or public bodies—go beyond the level of ordinary

27 Council of Europe/European Court of Human Rights. (2023, February 28). Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights (Updated). p. 53. <https://rm.coe.int/guide-article-1-p1-gts-english-update-28-02-2023-/1680ae370a>.

neighborly inconvenience, they may violate the right to quiet enjoyment of the home.[28] However, an issue under Article 8 only arises if individuals are directly and seriously affected by the nuisance in question and are able to prove the direct impact on their quality of life.[29]

In ***Moreno Gómez v. Spain,***[30] the ECtHR established that persistent noise pollution can violate Article 8 of the ECHR, which protects the right to respect for private and family life and home. Ms. Pilar Moreno Gómez, a Valencia resident since 1970, suffered chronic sleep disturbances and health issues due to excessive night-time noise from bars and discotheques authorized by the City Council since 1974. Despite reports confirming noise levels exceeded legal limits and the area's designation as an "acoustically saturated zone" in 1997, the authorities continued issuing licenses, including one for a discotheque in her building, later annulled. Ms. Moreno Gómez's claim against the City Council, alleging violations of her rights to physical integrity and home under the Spanish Constitution, was dismissed by domestic courts for lack of direct evidence linking the noise to her harm.

The ECtHR ruled that Spain's failure to enforce noise regulations breached its positive obligations under Article 8 to ensure a peaceful home environment. The Court rejected the demand for direct **evidence of noise inside her apartment as overly formalistic, given the authorities' acknowledgment of excessive noise levels through municipal reports** and the "acoustically saturated zone" designation.[31] This inaction, persisting over years, impaired Ms. Moreno Gómez's well-being, leading to an award of €3,884 in non-pecuniary damages for mental anguish. The judgment set a landmark precedent, affirming that severe noise pollution, as an environmental nuisance, engages Article 8 when states fail to act. It underscored the state's duty to enforce environmental regulations diligently, ensuring Convention rights are practical and effective, and established a standard for addressing noise disturbances across Contracting States.[32]

Similar findings were reached by the European Court of Human Rights (ECtHR) approximately a decade later in the case of *Udovičić v. Croatia*.[33] In this case, the applicant, Ms. Udovičić, lodged a complaint against the Croatian authorities for their prolonged failure to address excessive noise and other disturbances originating from a bar located beneath her flat in Cubinec, Croatia—a property she had co-owned and inhabited since 1991. The disturbances began in August 2002 when construction commenced to convert the premises into a bar and retail shop. Over the following years, Ms. Udovičić filed numerous complaints raising concerns about the legality of the bar's operating license, insufficient sound insulation, and persistently excessive noise levels. Despite initiating both administrative and civil proceedings, her efforts proved unsuccessful. Her civil claim, filed in 2006, was dismissed in 2007 on the grounds that the noise did not exceed

28 Council of Europe/European Court of Human Rights. (2025, February 28). Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence. p. 123. <https://ks.echr.coe.int/documents/d/echr-ks/guide_art_8_eng >.

29 Council of Europe/European Court of Human Rights. (2024, August 31). Guide to the case-law of the European Court of Human Rights: Environment. p. 32. <https://ks.echr.coe.int/documents/d/echr-ks/guide_environment_eng>.

30 Moreno Gómez v. Spain, App. No. 4143/02, European Court of Human Rights. (2004, November 16). Judgment of the Court. <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-67478%22]}>.

31 See. Ribot, J. (2005). Spain. In H. Koziol & B. C. Steininger (Eds.), European Tort Law 2004. Springer, p. 542.

32 See Paradissis, J.-J. (2005). Noise nuisance and the right to respect for private and family life: The Moreno Gómez case. Journal of Planning & Environment Law, 2005(May), pp. 584–594. For an insightful analysis of the significance of this case in the development of environmental rights under Article 8 of the ECHR.

33 Udovičić v. Croatia, App. No. 27310/09. European Court of Human Rights. (2014, July 24). Judgment of the Court. Available at: <https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22UDOVI%C4%8CI%C4%86%20v.%20CROATIA%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-142520%22]}>.

legal thresholds. Subsequent constitutional and criminal complaints were similarly rejected in 2008.

The ECtHR found a violation of Article 8 of the European Convention on Human Rights. The Court reaffirmed that environmental pollution, including noise, may constitute an infringement of Article 8 rights when it reaches a certain level of severity. Whether this threshold is met depends on factors such as the intensity and duration of the nuisance, and the degree of its impact on an individual's health or quality of life (§ 139). In its assessment, the Court examined several expert reports. While some indicated compliance with regulatory noise limits, others showed exceedances. Significantly, the most recent expert assessment confirmed that noise levels exceeded permissible standards and that the soundproofing measures in place were inadequate. The Court also highlighted the bar's continuous operation for over a decade and the high number of police interventions—87 in total, resulting in 42 administrative measures related to breaches of public order (§§ 141–149).

Despite Ms. Udovičić's repeated appeals to administrative bodies, the authorities failed to adopt any effective remedial measures. This prolonged inaction reflected a lack of due diligence and a failure to appropriately balance the competing interests involved (§§ 152–160). The Court emphasized that although Article 8 does not impose specific procedural requirements, the decision-making process must be fair and must duly consider the interests protected by Article 8 (§ 151). Relevant procedural safeguards include the nature of the decision-making process, the extent of individual participation, and the availability of adequate remedies.

Ultimately, the Court held that the Croatian authorities had not fulfilled their positive obligations under Article 8. By allowing the disturbances to persist for over a decade without effective intervention, the state failed to protect Ms. Udovičić's right to respect for her private life and home. This judgment underscores the importance of procedural fairness and proactive state measures in addressing environmental nuisances that interfere with Convention rights.

In ***Hatton and Others v. United Kingdom (2001),***[34] residents near London's Heathrow Airport challenged night flight restrictions, claiming excessive noise violated their Article 8 ECHR right to private and family life. Despite a 1993 UK quota system limiting noise from aircraft, particularly during 11:30 p.m. to 6:00 a.m., the applicants argued the measures were inadequate. Domestic courts upheld the policy's legality, exhausting remedies by 1996. The ECtHR Chamber found a violation of Article 8, citing insufficient research on noise-related sleep and health impacts, failure to explore less intrusive alternatives, and inadequate justification of economic benefits. The UK's quota system did not sufficiently balance residents' rights against economic interests, rendering the interference disproportionate. Additionally, a violation of Article 13 was found, as the UK judicial review was too narrow, focusing on procedural rationality rather than substantive proportionality. The ruling highlighted states' positive obligations to mitigate environmental nuisances like aircraft noise, ensuring a fair balance between the competing interests—those of the affected residents and those of the wider public economy.

Interestingly, the **Grand Chamber of ECtHR reversed the earlier judgement in 2003, ruling no violation of Article 8** of the ECHR.[35] The Grand Chamber emphasized the UK's "margin of appreciation", granting states discretion in balancing individual rights with public interests in complex policy areas like aviation and economic planning.[36] It noted the UK's extensive consultation

34 Hatton and Others v. United Kingdom, App. No. 36022/97, European Court of Human Rights. (2001, October 2). Judgment of the Court. Available at: <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-59686%22]}>.

35 Hatton and Others v. United Kingdom [GC], App. No. 36022/97, European Court of Human Rights. (2003, July 8). Available at: <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-61188%22]}>.

36 Council of Europe/European Court of Human Rights. (2024, August 31). Guide to the case-law of the European Court of Human Rights: Environment. p. 48. Available at: <https://ks.echr.coe.int/documents/d/echr-ks/guide_environment_eng>.

process, progressive noise mitigation measures (e.g., refined quotas), and the economic importance of night flights for Heathrow's global competitiveness. The Court held that the UK's policy was reasonable and proportionate, not arbitrary, and within its discretion, as states are better positioned to assess technical and economic trade-offs, including sleep research and air traffic logistics. The Grand Chamber confirmed that Article 8 applies to environmental nuisances like noise when individuals are seriously affected, whether caused directly by the state or through inadequate regulation of private activity. However, a fair balance must be struck, with states retaining flexibility under Article 8(2).

The *Hatton and Others v. United Kingdom* case (2001, 2003) is pivotal in debates over Article 8 ECHR's application to environmental nuisances, particularly noise pollution from Heathrow Airport's night flights. The 2001 Chamber ruling found violations of Articles 8 and 13, criticizing the UK's quota system for insufficiently protecting residents' right to a peaceful home. ***Rhona K.M. Smith*** praises the Chamber's rigorous scrutiny, which narrowed the state's margin of appreciation, independently assessed the policy's inadequacies, and rejected economic justifications without robust evidence, emphasizing that economic well-being under Article 8(2) does not automatically outweigh individual rights in environmental cases.[37]

Conversely, the 2003 Grand Chamber reversed this, upholding the UK's measures due to thorough consultations, noise mitigation efforts, and economic necessity, granting a wider margin of appreciation. It stressed that states, better equipped to handle complex policy, need only act reasonably, not perfectly, when balancing rights and public interests.[38] This shift from the Chamber's rights-centric approach to the Grand Chamber's deferential stance highlights ongoing tensions in prioritizing individual protections versus state discretion in environmental human rights law.

Similarly, in ***Flamenbaum and Others v. France,***[39] the ECtHR addressed the conflict between individual residents' rights and public economic interests arising from noise pollution caused by the expansion of Deauville–Saint-Gatien Airport. Nineteen homeowners, living 500–2,500 meters from the runway, claimed that increased noise from a 1993 runway extension violated their right to private and family life as well as their property rights, moreover alleging procedural flaws in the expansion process. The airport, built in 1931 and upgraded to medium-haul status in 1986, underwent a runway extension in 1993 to support heavier aircraft, intensifying noise for nearby residents. A 1978 noise exposure plan and a 1991 aeronautical constraints plan, approved without an environmental impact assessment (EIA) despite objections from over 500 residents, governed the project. Expert reports confirmed heightened noise levels, but French courts rejected compensation claims, deeming the disturbance typical for airport proximity. Appeals, including to the Conseil d'État, were dismissed by 2003. France later implemented a revised noise exposure plan in 2008 and "reduced noise" procedures in 2009.

Under Article 8, the ECtHR found the noise sufficient to engage the right to private life but held that France balanced public economic interests—regional development—against residents' rights. Despite initial procedural lapses,

37 Smith, R. K. M. (2002). Hatton v. United Kingdom. App. No. 36022/97. The American Journal of International Law, 96(3), pp. 692–699. Available at: <https://doi.org/10.2307/3062172>.

38 See Murdoch v Glacier Metal Co Ltd [1998] Env. L.R. 732, where the Court of Appeal addressed a claim of noise nuisance brought by Mr. and Mrs. Murdoch, who alleged sleep disruption caused by a nearby factory. Although the noise levels slightly exceeded WHO guidelines, the court found no actionable nuisance, emphasizing the character of the neighborhood, the presence of a nearby bypass, and the lack of complaints from other residents. The case illustrates that exceeding noise thresholds alone does not establish liability; contextual factors and the perspective of an average person are decisive.

39 Flamenbaum and Others v. France, App. No. 3675/04 and 23264/04, European Court of Human Rights. (2012, December 13). Judgment of the Court. Available in French. Available at: <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-115143%22]}>.

mitigation measures and thorough domestic judicial review justified the interference, resulting in no violation. For Article 1 of Protocol No. 1, the applicants claimed property devaluation and soundproofing costs, supported by two expert reports. However, one was methodologically flawed, and the other failed to link losses specifically to the runway extension. Lacking clear evidence and given France's mitigation efforts, the ECtHR found no violation (§§ 188-190).

Flamenbaum and Others v. France exemplifies the ECtHR's pragmatic approach to environmental disputes, prioritizing proportionality and state discretion when mitigation measures are implemented.[40] The ECtHR's reliance on the "economic well-being of the country" as a legitimate aim under Article 8, even for primarily local economic benefits, mirrors its approach in *Hatton and Others v. United Kingdom* [GC] (2003) and underscores its jurisprudence on airport-related environmental disputes.[41] The Article 8 ruling reflects deference to France's efforts to address noise pollution through subsequent plans and procedures, despite initial procedural shortcomings. The Article 1 finding highlights the high evidential threshold for demonstrating property-related harm, requiring a clear causal connection to specific state actions. For litigants, it underscores the necessity of precise, well-substantiated evidence to succeed in environmental and property claims under the ECHR.

2.2. Industrial pollution and the right to respect for one's home: Reconciling residential rights and public interests

Although the ECHR does not explicitly enshrine a right to a healthy environment, the European Court of Human Rights has addressed numerous cases concerning the quality of an individual's surrounding environment, recognizing that unsafe or disruptive environmental conditions can negatively impact wellbeing.[42] Article 8 may be invoked in such cases, whether the pollution stems directly from State actions or from the State's failure to adequately regulate private sector activities. However, a claim under Article 8 requires individuals to demonstrate that they are directly and seriously affected by the environmental nuisance and to provide evidence of its specific impact on their quality of life.[43]

In ***López Ostra v. Spain,***[44] the European Court of Human Rights (ECtHR) examined whether the severe environmental pollution emanating from a **waste treatment plant—intended to process liquid and solid waste**—near Ms. López Ostra's residence constituted a violation of Article 8 of the ECHR, which safeguards the right to respect for private and family life. The plant began operating without the necessary environmental license and quickly started emitting strong odors, fumes, and noise that rendered living conditions intolerable for nearby residents, including the applicant and her family.

The Court acknowledged that while Article 8 primarily aims to protect individuals from arbitrary interference by public authorities, it also imposes **positive obligations** on states to ensure effective respect for private and family life. This includes taking reasonable and appropriate measures to prevent serious environmental pollution from adversely affecting individuals' well-being and enjoyment of their

40 Council of Europe/European Court of Human Rights. (2024, August 31). Guide to the case-law of the European Court of Human Rights: Environment. p. 49. Available at: <https://ks.echr.coe.int/documents/d/echr-ks/guide_environment_eng>.

41 Ibid., p. 50.

42 Council of Europe/European Court of Human Rights. (2024, August 31). Guide to the case-law of the European Court of Human Rights: Environment. p. 31. Available at: <https://ks.echr.coe.int/documents/d/echr-ks/guide_environment_eng>.

43 Council of Europe/European Court of Human Rights. (2025, February 28). Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence. p. 53. Available at: <https://ks.echr.coe.int/documents/d/echr-ks/guide_art_8_eng >.

44 López Ostra v. Spain, App. No. 16798/90. European Court of Human Rights. (1994, December 9). Judgement of the Court. Available at: <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57905%22]}>.

homes. The Court emphasized that even in the absence of serious health risks, severe environmental pollution could significantly impair individuals' quality of life and enjoyment of their homes (§ 51).

The ECtHR found that the Spanish authorities failed to strike a fair balance between the town's economic interest in operating the plant and the applicant's right to respect for her home and private life. Despite repeated complaints from Ms. López Ostra and other residents, and several reports confirming the harmful environmental impact, local and national authorities did not take effective action to mitigate the nuisance or suspend the plant's operation. As a result, the applicant and her family were forced to temporarily leave their home due to the persistent pollution.

The Court further noted that the plant operated without the required environmental license and that the authorities had failed to take timely and effective remedial measures. This amounted to a breach of the state's **positive obligations** under Article 8. While the applicant also alleged a violation of Article 3 (prohibition of inhuman or degrading treatment), the Court concluded that, although the conditions were very difficult, they did not reach the required threshold for a violation. Although the ECtHR based its ruling primarily on Article 8, the implications of *López Ostra* extend to **property rights** as well. The applicant's inability to enjoy her home due to environmental pollution can be viewed as an interference with the peaceful enjoyment of her possessions—an aspect protected by **Article 1 of Protocol No. 1**, even though this provision was not explicitly addressed in the judgment.

In ***Fadeyeva v. Russia,***[45] the ECtHR examined whether prolonged exposure to industrial emissions from the **Severstal steel plant,** one of Russia's largest iron-smelting facilities, violated Ms. Fadeyeva's right to respect for private and family life under Article 8. The applicant lived 450 meters from the plant in Cherepovets, within a "sanitary security zone" designated by Russian law as unfit for residential use due to hazardous emissions, including excessive levels of toxic substances like carbon disulfide and formaldehyde. Despite this, the authorities took no effective measures to relocate her or mitigate the environmental risks.

The Court reaffirmed that Article 8 imposes positive obligations on States to protect individuals from environmental hazards, whether caused by public or private entities, that significantly impair the enjoyment of their homes and private lives. **While some environmental risks may be tolerated for public interest, a fair balance must be struck between economic benefits and individual rights to a safe environment.** The Russian authorities failed to enforce environmental regulations or provide Ms. Fadeyeva with alternative housing, despite her placement on a general housing waiting list. This inaction constituted a serious interference with her rights, breaching Article 8. The ECtHR unanimously held that the State's failure to regulate the privately operated steel plant's emissions or offer effective remedies violated Article 8.

In ***Giacomelli v. Italy,***[46] the ECtHR examined whether emissions, odors, and noise from a chemical waste detoxification plant operated by Ecoservizi, located just 30 meters from Ms. Giacomelli's home, violated her right to respect for private and family life. The plant operated without compliance with environmental regulations, and despite Italian administrative court orders to suspend its activity, the authorities failed to enforce these rulings or carry out a timely environmental impact assessment (EIA). Ms. Giacomelli argued that this regulatory inaction caused significant disruption to her daily life and posed health risks.

The ECtHR reiterated that Article 8 protects not only the physical space of a home but also

45 Fadeyeva v. Russia, App. No. 55723/00, European Court of Human Rights. (2005, June 9). Judgement of the Court. Available at: <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-69315%22]}>.

46 Giacomelli v. Italy, App. No. 59909/00, European Court of Human Rights. (2006, November 2). Judgement of the Court. Available at: <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-77785%22]}>.

the right to enjoy it free from serious environmental nuisances (citing *Hatton and Others v. the United Kingdom* [GC], 2003, § 96). States have a positive obligation to regulate environmental risks to prevent significant interference with private and family life. **The Italian government defended the plant's operation as lawful and beneficial to public health and regional development, but it failed to counter the applicant's evidence of harm.** The Court unanimously found a violation of Article 8, concluding that the failure to enforce court-ordered suspensions, apply environmental legislation, or conduct an EIA constituted a breach of procedural safeguards and permitted unlawful, ongoing interference with the applicant's home life. The judgment highlights that environmental degradation, combined with prolonged administrative inaction, can violate Article 8. It affirms the State's duty to enforce environmental regulations effectively and to provide remedies, reinforcing the link between environmental protection and human rights under the Convention.

Similarly, in ***Dubetska and Others v. Ukraine,***[47] the ECtHR addressed serious environmental and human rights concerns arising from the State's failure to regulate industrial pollution and safeguard the living environment of nearby residents. The case involved **several families living adjacent to a coal enrichment plant and a thermal power station** in the Donetsk region. The applicants alleged that the **resulting pollution rendered their homes uninhabitable and posed significant health risks**, thus violating their rights under Article 8 of the European Convention on Human Rights. Despite repeated complaints and scientific reports confirming the presence of toxic substances in the air, soil, and drinking water, the authorities failed to adopt effective measures either to curb pollution or relocate the families to safer housing.

While the Ukrainian government acknowledged the existence of pollution, it argued that the enterprises operated within legal limits and that various agencies were working to resolve the problem. However, the Court found that the authorities had not taken timely or adequate steps to mitigate the environmental hazards or to protect the applicants' private and family life.

The ECtHR held that there had been a violation of Article 8. It reaffirmed that, although economic development is legitimate, States must strike a fair balance between public interests and individual rights. In this case, the **prolonged inaction left families exposed to environmental harm for years, infringing on their ability to enjoy their homes and compromising their well-being.** The judgment underscores that mere recognition of environmental risks is insufficient under the Convention; effective remedial or protective action is required to satisfy a State's positive obligations under Article 8.

CONCLUSION

The European Court of Human Rights (ECtHR) has developed a sophisticated jurisprudence addressing environmental nuisances under the European Convention on Human Rights, particularly through Article 8, which safeguards the right to respect for private and family life, home, and correspondence, and, in exceptional cases, Article 1 of Protocol No. 1, protecting the peaceful enjoyment of possessions. An analysis of the ECtHR's case law shows that ***the Convention does not offer a direct mechanism for protecting property from environmental nuisances like noise or emissions. Instead, it serves as an auxiliary tool where such nuisances seriously impair quality of life, health, or use of one's home.*** The legal status of the property is secondary; the key factor is the impact on fundamental rights.

Cases such as *López Ostra v. Spain* (1994), *Fadeyeva v. Russia* (2005), *Giacomelli v. Italy* (2006), *Dubetska and Others v. Ukraine* (2011), and *Öneryıldız v. Turkey* (2004) illustrate the

47 Dubetska and Others v. Ukraine, App. No. 30499/03, European Court of Human Rights. (2011, February 10). Judgement of the Court. Available at: <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-103273%22]}>

Court's nuanced approach to balancing individual rights against public interests in the context of environmental degradation. These rulings collectively affirm that ***severe environmental harm—whether from noise, toxic emissions, or pollution—can significantly impair the enjoyment of one's home,*** engaging Article 8 when the State fails to act, whether through direct action or inadequate regulation of private entities.

The ECtHR consistently underscores States' positive obligations to implement and enforce effective environmental regulations, conduct timely impact assessments, and provide remedies such as mitigation or relocation to protect residents from serious nuisances. In *López Ostra*, the Court found Spain's failure to regulate a waste treatment plant's emissions, which forced the applicant to relocate, breached Article 8 by neglecting the balance between economic interests and individual well-being. Similarly, *Fadeyeva* and *Giacomelli* highlighted regulatory inaction regarding industrial pollution, emphasizing that States must proactively address private-sector harms. *Dubetska* reinforced this, condemning Ukraine's failure to mitigate or relocate families affected by coal plant pollution. These cases establish that mere acknowledgment of environmental risks, without effective action, fails to meet Convention standards, as States must ensure practical and effective protection of rights.

In exceptional cases, environmental harm may engage Article 1 of Protocol No. 1, as in *Öneryıldız*, where the destruction of the applicant's home due to State negligence at a rubbish tip violated property rights. The Court's broad interpretation of "possessions" to include informal dwellings reflects its pragmatic approach, though dissenting opinions warned against encouraging illegal construction. Cases like *Moreno Gómez v. Spain* and *Udovičić v. Croatia* illustrate Article 8's relevance to urban noise, confirming that ***persistent disturbances require effective State intervention.*** In contrast, *Hatton and Others v. United Kingdom* [GC] and *Flamenbaum and Others v. France* highlight the Court's deference to State discretion under the margin of appreciation, especially where ***mitigation efforts and public benefits are evident,*** **underscoring the balance between individual rights and the public interest.**

This jurisprudence underscores the interplay between environmental protection, property rights, and human rights. The ECtHR's approach ensures that States uphold fundamental rights by maintaining a fair balance between individual interests and public needs through effective regulation and oversight. For countries like Georgia, such rulings serve as important guidance for domestic courts in resolving property and environmental disputes with an emphasis on proportionality and fairness. ***The Court's focus on procedural safeguards—such as transparency and access to remedies—reinforces the rule of law and protects individuals from governmental inaction.*** These decisions affirm that protecting the environment is integral to human dignity and require States to take proactive measures to prevent serious environmental harm.

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The Efficacy of "Anti-Gender-Based Violence Laws" in Addressing the Scourge of Gender-Based Violence in South Africa

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ABSTRACT

South Africa has encountered a notable increase in incidents of gender-based violence (GBV) over recent years. The failure of South Africa's criminal justice system to effectively address GBV cases has resulted in the stigmatisation of the system. Consequently, the public's trust in the criminal justice system has diminished. In 2023, three "anti-GBV laws were enacted; these laws aimed at combating GBV, namely the Criminal Law (Sexual Offences and Related Matters) Amendment Act, the Criminal and Related Matters Amendment Act, and the Domestic Violence Amendment Act (DVVA). This study evaluates the efficacy of these laws in mitigating the prevalence of GBV in South Africa. Specifically, the research seeks to determine whether the anti-GBV laws offer protection to victims both before and after their rights are violated by perpetrators of gender-based violence. Additionally, the study investigates whether these laws expedite the legal processes involved in handling GBV cases. A comparison is made between the newly enacted laws and the Domestic Violence Act, which is recognised as the primary legislation governing GBV in

South Africa. Recommendations are provided regarding the effective implementation of preventive legal measures outlined in the DVAA to safeguard GBV victims and combat the escalating rates of GBV in South Africa. This is a qualitative study, and it draws its insights from various sources, including articles, case law, legislation, the Constitution, and international legal frameworks.

KEYWORDS: Gender-based violence, Victims, Anti-GBV laws

INTRODUCTION

Gender-based violence (GBV) is defined as the 'violence that is directed at an individual based on his or her gender. It includes physical, sexual, and psychological abuse; threats; coercion; arbitrary deprivation of liberty; and economic deprivation, whether occurring in public or private life. Gender-based violence takes on many forms and can occur throughout the lifecycle.[1]

The article's main focus is on gender-based violence against women and children due to the high number of cases of GBV that are reported. Bosielo JA in *S v Makatu*[2] emphasised *"the escalating trend of violent crimes, such as murder and sexual offenses, in the nation. These criminal activities significantly threaten the fundamental societal and ethical structure. The society is experiencing a profound division. A large portion of the population, especially the marginalised and powerless groups like women, children, the elderly, and the sick, live in constant fear. It is a fact that virtually every female in the country is at risk of becoming a victim of either murder or rape. This unfortunate reality is juxtaposed against the backdrop of the emerging constitutional democracy, which promises a better existence for all. These offenses have permeated our picturesque nation's entire territory like a destructive disease. They pose a severe threat to our emerging democracy and must be eradicated at their core".*[3]

GBV is acknowledged as a severe infringement of human rights,[4] impacting predominantly women and girls, perpetuating ongoing harm.[5] This hinders their ability to live up to their fullest potential in a state of liberty and peace.[6]

GBV is one of South Africa's most serious and disturbing problems. According to the 2023/2024 crime statistics, South Africa recorded 10,516 rapes, 1,514 cases of attempted murder, and 14,401 assaults against female victims in July, August, and September. In the same period, 881 women were murdered.[7] This is a worrying trend that has been identified and reported globally. The Minister of Police described South Africa as being brutal and dangerous to women and children.[8] In *Tshabalala v S.*,[9] the court observed that hardly a day passes without any incident of gender-based violence being reported.[10] The number of social media campaigns seeking justice for victims of gender-based violence also demonstrates this.[11]

1 Ziniakova, T. (2021). Gender-Based Violence in International Human Rights Law: Evolution Towards a Binding Post-Binary Framework. William & Mary Journal of Race, Gender, and Social Justice, Vol. 27, Issue 3, 709. (2021). Available at: <https://scholarship.law.wm.edu/wmjowl/vol27/iss3/4> (Last access: 15.01.2025).

2 S. v Makatu. 2014 (2), SACR.

3 S. v Makatu. Supra, para 30.

4 UN High Commissioner for Refugees (hereinafter UNHCR). Sexual and Gender Based Violence. Available at: <https://www.unhcr.org/sexual-and-gender-based-violence.html> (Last access: 15.06.2024).

5 The World Bank. (2019). Gender-Based Violence (Violence against Women and Girls). Available at: <https://www.worldbank.org/en/topic/socialdevelopment/brief/violence-against-women-and-girls>. (Last Access: 15.01.2025).

6 Ncube, P.M. (2021).Protection Orders in South Africa: The Effectiveness of Implementation and Enforcement for Victims of Gender-Based Violence. Unpublished Dissertation. (M.Phil.). University of Cape Town.

7 South African Government. Minister General Bheki Cele: Quarter four Crime Statistics 2023/24. Available at: <www.gov.za> (Last access: 05.02.2025).

8 Ibid.

9 Tshabalala v S. 2020 (5) SA 1 (CC).

10 Tshabalala case, para 61.

11 Each day in South Africa, a woman or girl is murdered/raped or abused. To name the few cases of gen-

These crimes are mostly publicised on social media platforms, which results in campaigns and hashtags 'justice for victims of gender-based violence', which have created a perception that the criminal justice system is failing to prioritise the interests of victims of gender-based violence. As a result, they resort to social media or commit vigilantism. The effect of gender-based violence is a significant human rights infringement with real social and formative effects on the victims, their families, networks, communities, and society.[12] In response to this scourge, three anti-GBV laws were enacted, namely the Criminal and Related Matters Amendment Act,[13] the Criminal Law (Sexual Offences and Related Matters) Amendment Act,[14] and the Domestic Violence Amendment Act.[15] This paper focuses on the recently assented anti-GBV laws, arguing for the proper implementation and effectiveness of these anti-GBV laws in protecting and promoting the interests or rights of victims of GBV as well as eliminating the high rise in cases of gender-based violence. It also argues against the public's perceptions, which are based mostly on social media platforms, that the criminal justice system favours the perpetrators of GBV instead of protecting the victims.

1. SYNOPSIS OF CASES OF GENDER-BASED VIOLENCE IN SOUTH AFRICA

This section presents a brief overview, albeit not comprehensive or exhaustive, of a range of atrocious offences documented in diverse media platforms, perpetrated against women and identified as having elicited significant public reaction.

- In 2013, a 17-year-old Anene Booysen was brutally attacked, raped, and disembowelled in Bredasdorp, Western Cape. In 2017, a 22-year-old Karabo Mokoena went missing, and her body was later found burned in an open field in Johannesburg.
- In 2019, a 19-year-old university student Uyinene Mrwetyana was raped and murdered at a post office in Cape Town.
- Pule, a 28-year-old South African woman, 8 months pregnant at the time, was declared missing. After an investigation, police established that her boyfriend, Ntuthuko Shoba, was responsible for her murder by hiring a hitman to kill her.
- Ms Namhla Mtwa was brutally gunned down at the gate of her home in Mthatha, and no arrests have been made regarding her death to date.
- In 2021, a 23-year-old law student, Nosicelo Mtebeni, was killed and her body dismembered; her body was found stuffed inside a suitcase in East London by her boyfriend.
- The body of a female child aged 6 was discovered concealed beneath a bed subsequent to her disappearance being documented on Thursday, the 7th of December 2023, within the vicinity of NU 13 Inyibiba near Mdantsane in the Eastern Cape. The individual responsible for this act met his demise due to the vigilante actions carried out by the community's residents.

These are not the only victims of GBV; the list is endless, which is an alarming factor that

der-based violence that have been doing rounds are, Uyinene Mrwetyana, who was a 19-year-old lady that was tortured to death by a male Post Office employee. Nosicelo Mtembeni, was a 23-year-old final year student who was brutally butchered to death by her boyfriend.

12 Nobanda, L., Nkosi, S.L., Sibanyoni, E.K. (2021). A Possible Explanation of Violence Against Women During the Covid-19 Lockdown in South Africa: A Systematic Review. Acta Criminologica: African Journal of Criminology & Victimology, Vol. 34, no. 3.

13 Criminal and Related Matters Amendment Act 12 of 2021 (hereafter CRMAA).

14 Criminal Law Sexual Offences and Related Matters Amendment Act 13 OF 2021 (hereafter SORMA).

15 Domestic Violence Amendment Act 14 of 2021 (hereafter DVVA).

needs to be addressed. This paper notes the responses to protecting the victims of GBV, such as the establishment of the Commission of Gender Equality (CGE) in terms of section 187 of the Constitution, which promotes gender equality and protection, development, and attainment of gender equality.[16]

2. LEGAL FRAMEWORK ON GENDER-BASED VIOLENCE IN SOUTH AFRICA

GBV is also a human rights issue as it violates the rights of its victims. GBV is recognised as being not only a South African issue; rather, it is a worldwide problem. The spate of GBV has existed for a long time; in South Africa, it is also linked to the apartheid regime, which discriminated against blacks.[17] However, when South Africa became a democratic country, it tried to eliminate all the roots of apartheid, including gender-based violence. This part analyses the legal instruments developed to fight GBV nationally and internationally.

2.1. International legal instruments on GBV

South Africa adheres to numerous international instruments aimed at fostering equality and non-discrimination. The eradication of gender-based violence stands out as a primary objective in upholding the principles of the global community. Reflecting on the year 1948, when the Universal Declaration of Human Rights was adopted,[18] South Africa, despite refraining from signing the declaration due to the apartheid regime, contributed to the consolidation of a rights framework that promoted international peace at the domestic level.

The International Covenant on Civil and Political Rights (ICCPR), enforced in 1976, prohibits discrimination based on gender.[19] There is a contention that the ICCPR's prohibition of "inhuman or degrading treatment" should be construed as a prohibition against violence towards women.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1979 marked a significant advancement in securing essential rights for women.[20] It mandates states to undertake necessary actions, such as legal reforms, to amend or eliminate existing laws, regulations, customs, and practices that perpetuate discrimination against women.[21]

In 1993, the United Nations Declaration on the Elimination of Violence against Women ("DEVAW") was adopted by the UN General Assembly.[22] This declaration characterises violence as any form of gender-based aggression

16 Section 187(1) provides that the Commission for Gender Equality must promote respect for gender equality and the protection, development, and attainment of gender equality.

17 Meyiwa, T., Williamson, C., Maseti, T., Ntabanyanecom, G.-M. (2017). A Twenty-Year Review of Policy Landscape for Gender-Based Violence in South Africa. Gender and Behavior, Vol. 15, no. 2.

18 1948 Universal Declaration of Human Rights. This segment underscores the significant international agreements, treaties, declarations, resolutions, and norms concerning gender-based violence. The Universal Declaration of Human Rights from 1948 serves as the fundamental cornerstone at the global level in the fight against violence targeting women. It delineates the fundamental rights and principles of equality, security, freedom, integrity, and dignity for all individuals, including women.

19 1976 International Covenant on Civil and Political Rights.

20 Convention on the Elimination of All Forms of Discrimination against Women Adopted and opened for signature, ratification, and accession by General Assembly resolution 34/180 of 18 December 1979 entry into force 3 September 1981, in accordance with article 27(1).

21 Article 1 of CEDAW defines the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

22 Declaration on the Elimination of Violence against Women Proclaimed by General Assembly resolution 48/104 of 20 December 1993.

leading to, or having the potential to result in, physical, sexual, or psychological harm or distress to women. It encompasses acts such as threats, coercion, or unwarranted deprivation of freedom, whether occurring within the public sphere or in private settings. Member states are urged by DEVAW to diligently strive to prevent, investigate, and, in accordance with domestic laws, penalize instances of gender-based violence, regardless of whether such acts are perpetrated by state entities or private individuals.[23]

2.2 South African laws on GBV

South Africa has made huge progress in developing a legal framework that aims at eliminating gender-based violence and promoting and protecting the victims of gender-based violence. Apart from the provisions of the South African Constitution that promote equality,[24] non-discrimination,[25] and dignity[26] in all races and genders, South Africa has passed legislation in this regard with far-reaching consequences on GBV. There are laws that are enacted, for example Domestic Violence Act of 1998 as amended by the Domestic Violence Amendment Act of 2021, which is known as the legislation that protects the victims of GBV. The alarmingly high rates of GBV in South Africa led to the amendment of the Criminal and Related Matters Amendment Act,[27] Criminal Law (Sexual Offences and Related Matters) Amendment Act,[28] and the Domestic Violence Amendment Act.[29] These laws were formulated after the 2018 National Presidential Summit on GBV, which gave rise to the country's National Strategic Plan of GBV.[30] The 'anti-gender-based violence laws' focus on the rights and interests of victims of gender-based violence in the criminal justice system.

DVAA came into operation on 5 August 2022. The purpose of the Act is to inter alia amend the CPA to further regulate the granting and the cancellation of bail in domestic-related offences.[31] It also seeks to regulate sentences in respect of offences that have been committed against vulnerable persons. This resulted in the amendment of the CPA.[32]

DVAA also precludes the release on bail of the person arrested for allegedly committing an offence listed under section 1 of the Domestic Violence Act, which involves persons who are in a domestic relationship. DVAA seeks to protect the victims of domestic and gender-based violence by tightening bail provisions applicable to such matters.

The Criminal Law (Sexual Offences and Related Matters hereinafter SORMA) Amendment Act took place on 31 July 2022. An essential objective of the SORMA Amendment Act is to enhance the legal framework by introducing a range of new sexual offences.

The SORMA Amendment Act establishes a new offence known as sexual intimidation.[33] This transgression occurs when an individu-

23 Article 2 of DEVAW. Violence against women shall be understood to encompass, but not be limited to, the following: (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution; (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

24 Section 1 (a) of the Constitution of 1996 is founded on the values of (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms; (b) non-racialism and non-sexism.

25 Section 9 (3) of the Constitution of 1996.

26 Section 10 of the Constitution of 1996.

27 Act 12 of 2021.

28 Act 13 of 2021

29 Act 14 of 2021 amending the Domestic Violence Act 116 of 1998.

30 The National Strategic Plan on Gender Based Violence and Femicide is a policy document developed to address GBVF in South Africa.

31 S. v Robertson. 2023 (2) SACR 156 (WCC).

32 Act 105 of 1997.

33 Section 14A of the Sexual Offenses Related Maters Amendment Act 13 of 2021.

al, with intent and unlawfully, communicates a threat to a complainant that gives rise to a reasonable apprehension of impending harm in the complainant, suggesting that a sexual offence will be perpetrated against the complainant, a family member, or an individual in a close relationship with the complainant.

The scope of the offence of sexual intimidation is broader and encompasses the threat of impending harm. Any sexual offence had awareness of a child being a victim of a sexual offence, they were obligated to report such details to a law enforcement officer. Failing to comply constituted an offence, and upon conviction, the individual could face a maximum sentence of five years' imprisonment.[34]

The enactment of the Criminal and Related Matters Amendment Act (CRMAA) took effect on 5 August 2022. In contrast to the SORMA Amendment Act and the DVAA, which specifically address issues related to domestic violence and sexual offences, the scope of CRMAA is broader and more general. This legislation modifies various laws, including the Criminal Procedure Act[35] and the Criminal Law Amendment Act[36], to enhance support for victims of gender-based violence.

CRMAA sanctions the utilisation of intermediaries to facilitate testimony in court by vulnerable witnesses, such as children, elderly individuals, or those with physical, mental, or emotional conditions, in proceedings other than criminal trials.[37] Historically, many vulnerable witnesses have experienced intimidation and distress while testifying in court, leading to a feeling of being unheard or unfairly treated.[38] This has discouraged witnesses and eroded public trust in the legal system.[39] The amendment allows these witnesses to testify without being physically present in court, utilising an intermediary from a more informal setting, promoting their comfort and avoiding potential distress. The Act imposes stricter criteria for bail considerations in cases involving domestic violence offenses or violations of protective orders,[40] criminalising breaches of court orders aimed at safeguarding individuals from the accused.[41]

Furthermore, CRMAA mandates harsh minimum sentences for convictions of murder or attempted murder where the victim is/was in a domestic relationship with the perpetrator, as well as in cases of rape involving a child, elderly person, individual with a disability, or someone in a domestic relationship with the perpetrator.[42] The imposition of minimum sentences aims to shield vulnerable groups from violent crimes, addressing instances where the justice system failed to protect gender-based violence victims, sometimes resulting in continued suffering or tragic outcomes despite seeking help from authorities.[43] All these Acts underscore the government's commitment to preventing such occurrences, signalling zero tolerance for gender-based violence and ensuring decisive action against offenders to safeguard victims' rights.

3. EFFECTIVENESS OF THE IMPLEMENTATION AND ENFORCEMENT OF THE ANTI-GBV LAWS FOR VICTIMS OF GBV IN SOUTH AFRICA

From the above analysis and discussion, it has been observed that the recently enact-

34 Laws and policies to prevent and respond to violence against women and children in South Africa by University of Cape Town Children's Rights Institute.

35 Criminal Procedure Act 51 of 1977. Hereafter CPA.

36 Criminal Law Amendment Act 105 of 1997.

37 Section 59 of CRMAA.

38 Mbandlwa, T. (2022). Women's Day, Women's Month for Who? For South African Women or South African Government and Politicians? Journal of Pharmaceutical Negative Results (13), 269.

39 Nomnganga, P. (2021). The Right to a Speedy Trial for Crime Victims in South Africa. LLM Dissertation at Walter Sisulu University (Unpublished), 31.

40 Mpako, A., Ndoma, S. (2023). South Africans see gender-based violence as most important women's-rights issue to address. Institute for Justice and Reconciliation.

41 Domestic Violence Amendment Act and the Harassment Act 12 of 2011.

42 Section 59 of CRMAA.

43 Maila v The State, 2023, ZASCA 3.

ed anti-GBV laws provide measures that may successfully curb the scourge of GBV in South Africa. It is also apparent that the criminal justice system played a role in this pandemic, as it has been identified as neglecting the victims of GBV; this is also evidenced in *S. v Tshabalala*.[44] This section responds to the recurring nature of these offenses and implicates the implementation and enforcement of these anti-GBV laws. It also argues that proper implementation and enforcement of these laws may be the solution to the scourge of GBV in South Africa.

Tlaletsi AJ in *AK. v Minister of Police*[45] held that '*The state has a duty to protect women against all forms of gender-based violence that impair their enjoyment of fundamental rights and freedoms. It has to take reasonable and appropriate measures to prevent the violation of those rights. The South African Police Service (SAPS) is one of the primary state agencies responsible for the protection of the public in general, in particular women and children, against the invasion of their fundamental rights by perpetrators of violent crimes. The courts are also under a duty to send a clear message to perpetrators of gender-based violence that they are determined to protect the equality, dignity, and freedom of all women*'.[46]

These amendments are important as they simplify the process for individuals seeking protection orders against perpetrators. This constitutes a crucial measure in enhancing personal safety against violence and abuse. The amendments are geared towards ensuring accountability among personnel responsible for assisting individuals reporting domestic abuse or seeking protection orders. Provisions of the Criminal Law (Related Matters Amendment Act) place a duty on the public to report any form of GBV that they have or may have noticed on someone else's behalf. Failure to do so may result in an offence and a sentence of at least 5 years. This entails that the normal trend is that it is only the duty of the police to protect society; however, the public must not normalise GBV, and that it is not only the victim who must lay charges or report the GBV.

This paper argues against the public's perception of the judiciary and concurs with Ntlama[47] that the judiciary is independent and the confidence in the judiciary cannot be replaced by the invidious philosophies that appear to compromise the independence of the judiciary.[48] The public is compelled by this Act to report such instances even without the victim's permission. These anti-GBV laws have paved the way in reducing GBV that has bitten South Africa, and attempts to restore the dignity and reputation of both the criminal justice system and the judiciary. In essence, the legislature has, as a result, effected an overhaul of the Domestic Violence Act to be more responsive to the need to afford maximum protection to women and girls who are exposed to domestic and gender-based violence.[49] This is propelled by the global quest for the creation of a specific crime or offence of domestic violence. South Africa is appropriately taking heed of that call with the hopes of reducing the scourge of domestic violence and maybe, with time, reducing it to a comfort level of societal safety.

CONCLUSION

The scourge of GBV in South Africa has resulted in the enactment of more effective laws regulating GBV. Although South Africa is known as a country that promotes and protects human rights through its Constitution, it is disheartening to witness it being recorded globally as a country that is almost helpless in fighting GBV. This scourge has caused major issues for most-

44 S. v Tshabalala, 2022, ZAGPJHC 881.

45 AK. v Minister of Police, 2022, ZACC 14.

46 AK. v Minister of Police supra, para 3.

47 Ntlama, N. (2020). Gender-Based Violence Ignites Re-emergence of Public Opinion of Judicial Authority. De Jure Law Journal, 286-306.

48 Ibid.

49 George, L. (2020). Gender-Based Violence Against Women in South Africa. Ballard Brief: Vol. 2020, Issue 2, Article 7. Available at: <https://scholarsarchive.byu.edu/ballardbrief/vol2020/iss2/7> (Last access: 15.05.2024).

ly the criminal justice system. Enacting the anti-GBV laws has shed light on not disapproving of the public's opinion on the way that the criminal justice system has been handling things regarding GBV. From the above discourse, these anti-GBV laws promote the protection and possible ways that the courts must adhere to when dealing with cases of GBV and protect the rights and interests of the victims. Proper implementation and enforcement of the provisions of DVAA on protection orders can become a great initiative in eliminating or significantly reducing GBV. This paper affirms that the duty to curb the scourge of GBV does not lie only in the criminal justice system alone; the legislative framework that regulates GBV also places a duty on the public as well, that they must report any suspicious incidents of GBV.

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6. Criminal Law Amendment Act 105 of 1997;
7. Criminal Law Sexual Offences and Related Matters Amendment Act 13 of 2021;
8. Criminal Procedure Act 51 of 1977;
9. Declaration on the Elimination of Violence against Women Proclaimed by General Assembly resolution 48/104 of 20 December 1993;
10. Domestic Violence Act 116 of 1998;
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The Russian Military Intervention in Ukraine: An Analysis through the Lens of International Law

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ABSTRACT

Russian troops invaded Ukrainian territory on February 22, 2022, for the sake of defending its borders from the alleged NATO threat, led by the United States. This move created widespread legal debate, calling for a number of positions on whether Russia's actions were justifiable self-defence in international law or breached the Geneva Conventions governing international humanitarian law. This research paper aims to bring to the fore the military activities carried out by Russian soldiers in Ukraine, taking into account the legality of such a military operation under Article 51 of the United Nations Charter, which discusses the right to self-defence and exercise of the right of self-defence on the part of states. We shall also examine whether military intervention violates humanitarian law. The analysis shall use relevant legal documents, albeit more specifically, the 1949 Geneva Conventions, the Rome Statute of the International Criminal Court of 1998, in addition to using the United Nations Charter and those that are supplementary. To this effect, the paper will examine the subjectivity of operations to international law and humanitarian implications thereof towards Ukraine. The findings of this research on

the legality of military interventions and state responsibilities according to international law will offer a complete appreciation of the legal and ethical dimensions of the conflict.

KEYWORDS: Intervention military, International humanitarian law, International Criminal Court

INTRODUCTION

Under the new international order, the global arena has witnessed several military interventions aimed primarily at eliminating violations of international humanitarian law and human rights, as well as changing political regimes that infringe upon these rights. Regardless of the justifications presented for these military actions, a common characteristic is the use of armed force against the integrity and independence of states, which undermines their role as the largest sponsors of peace in the world. Much discourse has been dedicated to exploring the legal nature of these military interventions.

Military intervention, in general, oscillates between two prominent concepts in international law: the legitimate right to defend a state's sovereignty and territorial integrity (as seen in the U.S. war on terrorism) and the violation of international humanitarian law. Such interventions often result in casualties and infrastructural damage, whether intentional or unintentional (as exemplified by the war in Gaza).

On February 22, 2022, Russian troops invaded Ukrainian territory under the pretext of defending national security against perceived threats from the West, particularly NATO. This military operation triggered significant political reactions, dividing global opinion. One faction categorically rejects Russia's infringement on Ukraine's sovereignty, while another supports Russia's justifications.

From an international law perspective, the key questions arise: How does the Russian military intervention align with the requirements for legitimate defense as outlined in Article 51 of the UN Charter? Additionally, how does it relate to violations of international humanitarian law?

To address these issues, we have structured the research paper into two main topics. The first topic examines Russian military intervention and its connection to the right of legitimate defense. This will include an analysis of military intervention in international law (the first requirement) and the legitimacy of Russian military actions in light of international humanitarian law (the second requirement).

The second topic will explore the extent to which the Russian military intervention violated international humanitarian law. This includes assessing Russia's international responsibility for such violations (the first requirement) and evaluating how these violations in Ukraine substantiate the case for Russia's international accountability (the second requirement).

In tackling these questions, we employed an analytical approach, gathering relevant legal material and analyzing it in relation to the realities of the Russian-Ukrainian armed conflict.

Section One: Russia's declaration of war on Ukraine and the issue of justifying it by the right of legitimate defence

The tension in the relationship between the two states led to a military intervention carried out by the Russian Armed Forces on Ukrainian territory, and the Russian government's pretext was that what it was doing came in the context of Article 51 of the UN Charter and that the state has the right to defend itself from any threat affecting its security and sovereignty.[1]

The concept of legitimate defense did not fully materialize until after the establishment of the United Nations. It emerged as a recognized principle within international norms and laws, allowing

1 See Article 51 of the Charter of the United Nations. Available at: <https://www.un.org/ar/about-us/un-charter/full-text> (Last access: 04.10.2024).

states to take measures they consider necessary to protect their core interests when under attack. As public international law evolved, emphasizing the principle of preventing military force, the idea of legitimate defense developed as an exception to the general rule against the use of force, as outlined in the UN Charter,[2] which aims to maintain international peace and security.[3]

From a legal perspective, military intervention extends beyond the principles of public international law, such as the principle of non-interference in the internal affairs of states. It can also be analyzed through the lens of international humanitarian law, particularly in reference to the second Common Article of the four Geneva Conventions of 1949. This article stipulates the international protection of members of the armed forces who have laid down their weapons, as well as individuals unable to fight due to illness, disability, detention, or other reasons. All such individuals must be treated humanely in all circumstances, without any harmful discrimination based on race, color, sex, religion, belief, birth, wealth, or any other criterion.[4]

Based on the previous discussion, we will examine the manifestations of military intervention in international law. This will involve a detailed explanation of each aspect separately in the first and the second requirement. We will also assess the legality of military intervention within the framework of international law.

The First Demand: Manifestations of military intervention in international law

Although the use of force and its threat are prohibited under the United Nations Charter, the international landscape reveals a different reality. Numerous international conflicts continue to occur where force has been employed, each with its justification based on specific contexts. The wars in Afghanistan, Iraq, and Ukraine represent Western military interventions that were framed under various pretexts, including the war on terrorism, preemptive war, preventive war, and humanitarian military intervention. These aspects of military intervention will be discussed in detail in the following sections.

The First Branch: Military intervention as a manifestation of the war on terror

Terrorism is not a new phenomenon and does not have a singular definition.[5] Its manifestations have varied across different times and places, yet its fundamental nature has remained constant. Since the League of Nations established the Convention for the Prevention and Punishment of Terrorism in 1937, combating terrorism has consistently been a priority for the international community. Starting in 1963, sixteen international legal instruments aimed at preventing and punishing terrorist acts have been adopted. Furthermore, for over a decade, the United Nations General Assembly has passed annual resolutions on measures to combat international terrorism, initiated by the Sixth Committee.[6]

The Security Council has adopted numerous resolutions aimed at combating terrorism, with Resolution 1373/2001 holding particular signifi-

2 The prohibition of resorting to the use of force and the threat of it is stipulated in Article 51 of the charter, which states as follows: "nothing in this charter weakens or detracts from the natural right of states, individually or collectively, to defend themselves if an armed force attacks a member of the United Nations, until the Security Council takes the necessary measures to maintain international peace and security". See the full text of the Charter available at: <https://www.un.org/ar/about-us/un-charter/full-text> (Last access: 04.10.2024).

3 Kamrsho, H., Alloush, F. (2020). The limits of legitimate defence under the UN Charter and the statute of the International Criminal Court. Journal of Legal and Political Sciences, Vol. 11, No. 02, p. 551.

4 Mabrouk, G. (2014). The military intervention in Mali and the extent of its legitimacy. Notebooks of Politics and Law, No. 11, p. 64.

5 NATO. (2020). The reference method for combating terrorism, p. 11.

6 United Nations. (2009). Handbook on international cooperation in criminal matters to combat terrorism. United Nations Office on drugs and crime, New York, p. 1.

cance. Adopted in the aftermath of the events of September 11, 2001, this resolution has both a general and binding nature. Its adoption under Chapter VII of the United Nations Charter signifies that terrorism is to be regarded as a threat to international peace and security.[7]

NATO defines terrorism in its military documents as "the unlawful use or threat of use of force or violence, which instils fear and terror, against individuals or any attempt to coerce or intimidate governments or societies or to impose control over populations and property to achieve political, religious, or ideological goals.[8]

A significant debate arose during the Rome Conference that established the International Criminal Court regarding the court's jurisdiction over international terrorism crimes. Attendees were divided into two opposing views. The first group argued that terrorism should fall under the court's jurisdiction, as it is one of the most serious crimes threatening international peace and security, in addition to violating international humanitarian law. The second group, however, contended that terrorism is a transnational crime, and the court should not address it due to difficulties in defining it, a lack of consensus on the definition of international terrorism, and challenges in investigation and prosecution. They argued that national criminal courts should be the sole authority to address such crimes.

The second Branch: Military intervention as a form of humanitarian intervention

Although the concept of intervention has been widely applied in international relations, there is little consensus among scholars on the definition of "humanitarian intervention", leading to the emergence of various interpretations. One interpretation is the broad concept of humanitarian intervention, which holds that such interventions are justified in response to any form of suffering, whether caused by natural disasters or human actions, such as armed conflicts. In contrast, the narrow concept restricts humanitarian intervention to actions that are free from political or military motivations and any form of coercion. In this sense, humanitarian intervention is truly humanitarian, meaning it does not involve economic or strategic interests, nor does it exhibit bias or selectivity in its outcomes or methods.[9]

In 1915, the jurist Roger defined humanitarian intervention as the right of a state to exert control over another state's actions concerning its internal sovereignty when the law of humanity is in conflict, with the intervening state seeking to justify its actions legally.[10]

Christopher Greenwood states that humanitarian intervention is limited to cases where a large segment of citizens—who may not necessarily be subjects of a state or another state—are exposed to death or torture on a large scale as a result of the policies of the government of that state.[11]

The Secretary-General of the United Nations, Kofi Annan, raised his famous question about how the international community should respond to gross and systematic violations of human rights that affect every principle of our common humanity. The International Commission on Intervention and State Sovereignty specifically[12*] described this issue as follows: "Generally, it aims to build a broader understanding

7 Ibid.

8 NATO. (2020). The reference method for combating terrorism, p. 11.

9 Awashria, R. (2003). Humanitarian Intervention as a Mechanism for Achieving World Peace in the Concept of the Countries of the North. Available at: <https://www.asjp.cerist.dz/en/article/75645> (Last access: 04.10.2024).

10 Ibid., p. 13.

11 Ibid., p. 14.

12 * The International Commission on Intervention and State Sovereignty is a body established by the Government of Canada in September 2000 in the wake of the controversy surrounding the NATO bombing campaign in Kosovo. See: Massingham, E. (2009). Military Intervention for Humanitarian Purposes: Does the Doctrine of the Responsibility to Protect Enhance the Legitimacy of the Use of Force for Humanitarian Purposes? International Review of the Red Cross, Vol. 91, No. 876, p. 160.

of the problem of reconciling intervention to protect human beings with state sovereignty. More specifically, it seeks to develop a global political consensus on how to move beyond polemics and often paralysis, towards effective action within the international system, particularly through the United Nations".[13]

The Committee uses six criteria to justify humanitarian military intervention, aiming to have these criteria accepted at the global level. It believes that these criteria can help bridge the gap between theory and practice regarding the responsibility to protect. These criteria are:[14]

1. **The Just Cause Criterion**: This requires the existence of widespread loss of life, with or without the intent to commit genocide, as a result of a deliberate act or negligence by the state;
2. **The Appropriate Authority Criterion**: This determines the body authorized to intervene in humanitarian situations;
3. **The Good Intention Criterion**: This means that the purpose of humanitarian intervention is to stop or prevent human suffering, and that overthrowing the regime is not a legitimate reason for intervention;
4. **The Last Resort Criterion**: This indicates that resorting to the use of force should be the last option for intervention, as outlined in Articles... of the Charter of the United Nations;
5. **The Appropriate Means Criterion**: This emphasizes the need to consider proportionality in any intervention process, in accordance with the principle of proportionality in international humanitarian law;
6. **The Reasonable Probability of Success Criterion**: This requires that military action be justified, provided that its chances of success are reasonable.

13 Ibid., p. 160.

14 Ibid., pp. 161-162.

The third branch: Military intervention as a manifestation of preemptive war

Both the concepts of preventive and preemptive war, despite their different pronunciations, lead to the same act. They serve as a circumvention by major powers to confer some kind of legitimacy on their aggressive actions, allowing them to evade international accountability. It should also be noted that the preparatory committee for the draft definition of the crime of aggression has rejected the notion of a legitimate preventive defense.[15]

Despite the preparatory committee's rejection of preemptive war as a means of legitimate defense, the international arena has witnessed many practices that illustrate this concept. One notable example is the Cuban Missile Crisis:

The Cuban Missile Crisis: During this crisis, the United States put forward several formal legal arguments in support of establishing a so-called "defensive quarantine" before any actual use of force by the Soviet Union or Cuba. Most of these arguments centered on the role of regional organizations and their ability to authorize the use of force in the absence of a formal Security Council resolution. However, several Security Council representatives discussed the notion of preemption during the Council's deliberations on the American proposal. Although there was no clear consensus supporting this principle, there was also no clear consensus opposing it. Many states that opposed the United States' position did not outright reject the principle of preemption; rather, they questioned whether the criteria established under customary law had been met in this particular case.[16]

Six-Day War (1967): On June 5, 1967, Israel

15 Saadi, M. Between preventive war and proactive war in international law. Available at: <https://www.asjp.cerist.dz/en/downArticle/325/1/1/45310> (Last access: 04.10.2024).

16 Arend, C. (2003). International Law and the Preemptive Use of Military Force, The Center for Strategic and International Studies and the Massachusetts, Institute of Technology, The Washington Quarterly, p. 94.

launched an armed attack against the United Arab Republic (comprising Syria and Egypt) and quickly achieved victory in what became known as the Six-Day War. During Security Council discussions, Israel claimed that it was acting in anticipation of what it believed would be an imminent attack by Arab states. The Soviet Union, Syria, and Morocco opposed Israel's actions, rejecting any principle of preemptive self-defense. Conversely, Israel's supporters, such as the United States and the United Kingdom, tended to endorse the principle of preemption. However, once again, there was no clear consensus against the principle.[17]

The second demand: Legality of Russian military intervention in international law

The right of legitimate defense has held significant importance in international law since the issuance of the Charter of the United Nations,[18] Article 2(4), originally stated that the non-resort to the use of force and the threat of force in the relationships between states is paramount. In this context, Resolution 2526 of the United Nations General Assembly indicates that the threat or use of force constitutes a violation of international law and the Charter of the United Nations. However, the Charter makes an exception in Article 51, which provides for the inherent right of a state to respond to any aggression against its security and territorial integrity. Analyzing the text of Article 51, we note that the international legislator coined the term "natural", describing the right of legitimate defense as a "right". This indicates that this right has existed since ancient times, and that Article 51 has revealed and regulated it. The use of the term "authentic" does not merely denote the preservation of a widespread right; rather, it was developed to recognize that states still have the right to exercise legitimate defense, albeit under the control and responsibility of the UN Security Council[19].

The question that arises in this regard is how to explain the Russian military intervention in Ukraine through the Russian perspective on this concept, as well as the views of the rest of the international community. In the first part, we will discuss the Russian justifications for military intervention, linking it to Article 51. Then, we will analyze the nature of this intervention concerning the conditions for exercising the right of legitimate defense in international law, along with comments from various segments of the international community on the subject in the second part.

The first branch: Russia invokes the provisions of Article 51 as justification for military intervention in Ukraine

Russia believes that it has the full right to use force if it perceives a threat to its security, considering Article 51 of the UN Charter; it asserts that Russia's interests are as legitimate as those of the West and emphasizes that the United States and Europe have ignored its interests in this context.[20]

In a surprising development, contrary to many estimates, Russian President Vladimir Putin announced the launch of a military operation in Ukraine early on Thursday morning in 2022. In an address to the people, Putin emphasized that the circumstances required decisive and immediate action after the Donbas republics appealed to Moscow for help. He stressed that his country's plans did not include the occupation of Ukraine, but that many individuals, including Russian citizens, should be

17 Ibid, pp. 94, 95.

18 Benalla, A.K. (2019). The legitimacy of military intervention outside the framework of the Security Council: The situation in Syria. Political Studies, Egyptian Institute for Studies, p. 3.

19 Tuta, H. (2018). The right of legitimate defense between international legality and American practice. Journal of Law, Vol. 07, No. 02, p. 164.

20 An article published on the Al Jazeera.net, available at: <https://www.aljazeera.net/midan/reality/politics/2022/2/24/> (Last access: 04.10.2024).

brought to justice for crimes against civilians, as he stated.[21]

The second branch: The conformity of Russian military operations in Ukraine with the conditions of legitimate defence in Article 51 of the charter

The right to legitimate defense is an inherent and natural right of both states and individuals, recognized by most domestic and international legal systems. However, exercising this right does not grant states or individuals broad discretion. The right to legitimate defense is mentioned in the United Nations Charter because it is not absolute; it comes with conditions that must be met for this right to be invoked. These conditions can be examined in international courts and international criminal courts as a justification for permissibility, whether related to the act of aggression on one hand, or the act of response on the other.[22]

The conditions that must be met for an act of aggression or an act that justifies retaliation are as follows: the aggression must be armed and unlawful; it must be immediate and direct; it must involve a violation of one of the essential rights of the state; and the state's will must play a role in the occurrence of the aggression.[23]

As for the conditions that must be met in the act of repelling aggression, the response or self-defense must be justified if the state or individual has no other means than resorting to defensive action. In other words, there must be a necessity that compels the response to the aggression, and it must be carried out in a manner proportional to the scale of the aggression.[24]

Accordingly, for the act of response or defense to be justified and deemed permissible under the principles of legitimate defense, two conditions must be met: necessity and proportionality.[25]

Therefore, the question remains: If the Russian military intervention is not an exercise of the right to legitimate defense, as the Russian government claims, can this intervention be considered a violation of international humanitarian law? This question becomes especially pertinent in light of the International Criminal Court's actions, as its prosecutor has called for an investigation into international crimes allegedly committed on Ukrainian territory since the beginning of the operations. This is the issue we will address in the next section.

Second section: Russian military intervention in Ukraine in the light of international humanitarian law

International humanitarian law was established to prevent war and mitigate its devastating effects on humanity. It achieves this by establishing preventive and deterrent mechanisms that regulate the conduct of combat operations and the treatment of civilians, prisoners of war, and other issues arising on the battlefield. State adherence to international humanitarian law is based on political will and commitment to the provisions of international agreements and norms. Any violation of these rules by a state or its individuals will result in the state's civil liability for any damages caused, in addition to the criminal liability of individuals whose actions constitute war crimes under international criminal law.

Accordingly, we will discuss in this section the establishment of Russia's international responsibility for violating the rules of international humanitarian law in the first part. We will then examine how the Russian military intervention in Ukraine constituted violations of these rules and the extent to which this serves as a justification for establishing Russia's international responsibility in the second part.

21 Ibid.
22 Kamrsho, H., Alawash, F., Op-cit, p. 556.
23 Ibid., p. 558.
24 Ibid.
25 Ibid..

The first demand: Establishment of Russia's international responsibility for violating the rules of international humanitarian law

Rule 149 of Customary International Humanitarian Law provides that a state is responsible for violations of international humanitarian law attributable to it, which include: violations committed by its organs, including its armed forces; violations committed by persons or entities delegated a degree of governmental authority; violations committed by persons or groups acting on its instructions or under its direction or control; and violations committed by private persons or groups that the state recognizes as its conduct.[26]

Therefore, the establishment of Russia's international responsibility for violating the rules of international humanitarian law is subject to those rules regarding the legal basis for this responsibility, whether in the Rome Statute or the agreements of international humanitarian law.

The first branch: The legal basis for international responsibility for violations of international humanitarian law in the Rome Statute of 1998

Establishing international responsibility in cases of serious violations of international humanitarian law and international criminal law is crucial for maintaining stability and human security. The first paragraph of Article 8 of the Statute of the International Criminal Court stipulates that the Court has subject-matter jurisdiction over war crimes, especially when they are committed as part of a general plan or policy or during large-scale commission of these crimes. The second paragraph of the same article confirms that war crimes represent serious violations of international humanitarian law.[27]

The Rome Statute classifies war crimes according to four criteria: grave breaches of the four Geneva Conventions of 1949, other breaches of the rules and customs of armed conflict, and crimes of armed aggression against the security and territorial integrity of states.[28]

The Statute criminalized aggression in its latest amendment in 2010 at the Kampala Conference. Article 08 bis* defines the crime of aggression as established by the United Nations General Assembly in its Resolution No. 3314 dated 1974. According to the definition in Article 08 bis, the crime of aggression is committed within the framework of an aggressive act stemming from the personal will of an individual who has the means to control the political and military actions of the aggressor state.[29]

Paragraph 2 of the above article defines an act of aggression as the use of armed force by a state against the sovereignty, territorial integrity, or political independence of another state, or in any manner inconsistent with the Charter of the United Nations. The term 'act of aggression' applies to any of the following acts, whether with or without a declaration of war, in accordance with United Nations General Assembly Resolution 3314 (XXIX) dated 14 December 1974:[30]

1. The invasion or attack by the armed forces of a state on the territory of another state;

26 ICRC. The database of international humanitarian law, customary international humanitarian law, custom IHL Database. Available at: <https://ihl-databases.icrc.org/customary-ihl/ara/docs/v1_rul_rule149> (Last access: 07.10.2024).

27 Lunisi, A. (2019). Gross violations of the rules of international humanitarian law: between the text of Article 8/2 of the statute of the International Criminal Court and the obstacles to its activation. International Journal of legal and Political Research, Vol. 3, No. 02, pp. 131-132.

28 See International Criminal Court. (2021). Statute of the International Criminal Court, Article 8. ISBN No. 92-9227-386-8, The Hague, The Netherlands.

29 United Nations. Résolution 3314 (XXIX) De L'assemblée Générale, Définition De L'agression. Audiovisual Library Of International Law, p. 5.

30 Kina, M.L. (2016). The Concept of the Crime of Aggression in the System of the Permanent International Criminal Court. Journal of Political and Legal Notebooks, Issue 14, p. 299.

2. Any military occupation resulting from such actions, regardless of duration;
3. Any annexation by force of the territory of another state, or part thereof.[31]

The second branch: The legal basis for international responsibility for violations of international humanitarian law in the four Geneva Conventions of 1949

Serious violations of the four Geneva Conventions of 1949 are acts committed against persons or property protected under these conventions.[32] These violations include acts such as murder, torture, inhuman treatment, forcing prisoners of war or protected persons to serve in the armed forces of the hostile state, unlawful deportation, transfer, or confinement, and taking hostages.[33]

Other violations of the laws and customs of armed conflict include 26 war crimes, such as directing attacks against the civilian population, intentionally targeting civilian objects, launching attacks against personnel, installations, materials, units, or vehicles involved in humanitarian or peacekeeping missions, intentionally launching attacks knowing they will cause incidental loss of life or injury to civilians, and conducting indiscriminate attacks, including shelling of towns, villages, and dwellings or isolated buildings that are not military objectives.[34]

The legal basis for international responsibility for violations of international humanitarian law can also be found in Article 5 of the Convention on the Prevention and Punishment of the Crime of Genocide. This article obligates the parties to the Convention (i.e., states) to adopt, in accordance with their national constitutions, the necessary legislative measures to enforce the provisions of the Convention. In particular, it requires states to impose effective criminal penalties on perpetrators of genocide or any of the other acts listed in Article 3 of the Convention.[35]

The legal basis for international responsibility for violations of international humanitarian law can also be found in Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This article requires each State Party to adopt effective legislative, administrative, judicial, or other measures to prevent acts of torture within its jurisdiction. It also explicitly states that no exceptional circumstances—whether a state of war, a threat of war, internal political instability, or any other public emergency—can be invoked by a State Party as a justification for torture. Additionally, orders from a superior officer or public authority cannot be used as a justification for torture.[36]

31 Ibid.

32 The Geneva Conventions and their Additional Protocols are international treaties that contain the most important rules to limit the barbarity of war. The Conventions provide protection to people who do not participate in the hostilities (civilians, health workers, and relief workers) and those who are no longer participating in the hostilities (wounded, sick, shipwrecked soldiers, and prisoners of war). See the official website of the International Committee of the Red Cross available at: <https://www.icrc.org/ar/document/geneva-conventions-1949-additional-protocols> (Last access: 12.10.2024).

33 Lounisi, A., Op-cit, pp. 135-136.

34 Ibid.

35 See article 05 of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted and submitted for signature, ratification or accession by the UN General Assembly Resolution 260 a (D-3), of December 9, 1948; date of entry into force: January 12, 1951.

36 See article 02 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly and opened for signature, ratification and accession in resolution 46/39 of 10 December 1984; date of entry into force: June 26, 1987.

The second demand: Violation of the rules of international humanitarian law by the Russian military intervention in Ukraine as a justification for Russia's international responsibility

In light of the above, we observe that the Russian army's commitment to the rules of international humanitarian law during its military intervention in Ukraine appears to be low. This is evident from reports by the United Nations and preliminary investigations by the International Criminal Court, which suggest the possibility of widespread human rights violations and breaches of international humanitarian law by Russian forces in Ukraine. Such actions could inevitably lead to the establishment of international criminal responsibility for Russia.

The first branch: Russian military intervention violates the rules of international humanitarian law from the perspective of the United Nations

The United Nations has warned that ongoing violence in Ukraine has left millions living in "constant fear" of indiscriminate shelling, while efforts continue to reach the country's most vulnerable populations. A month after Russia's invasion, more than 3.7 million people have fled the country, with an estimated 13 million others stranded in affected areas or unable to leave due to increased security risks and the destruction of bridges and roads, according to Carolina Lindholm Billing, the UN Refugee Agency's representative in Ukraine.[37]

According to the Office of the UN High Commissioner for Human Rights, 78 children have been killed and 105 injured in Ukraine since the war began in February 2022. However, these figures only reflect those the UN has been able to confirm, and the actual toll is likely to be much higher. The war has also had devastating effects on civilian infrastructure and access to basic services. For instance, the World Health Organization has reported attacks on healthcare facilities across the country, while the Ukrainian Ministry of Education and Science has documented damage to more than 500 educational facilities.[38]

For his part, United Nations Secretary-General António Guterres stated in a speech to the General Assembly that the Russian invasion of Ukraine compels UN member states to unite in "cooperation and solidarity" to support all those affected and "overcome this violation of international law". During a Security Council session on Tuesday morning, Ukrainian President Volodymyr Zelensky discussed what he described as the most horrific war crimes since the end of World War II, committed by Russian forces in his country. The session included a screening of video clips showing atrocities against civilians and the destruction of infrastructure and buildings.[39]

Michelle Bachelet, the UN High Commissioner for Human Rights, expressed her horror at the images of civilians killed in the streets and in makeshift graves in the town of Bucha, Ukraine. Bachelet added that the reports received raise serious and disturbing questions about the possibility of war crimes, severe violations of international humanitarian law, and grave violations of international human rights law.[40]

The second branch: Violation of the rules of international humanitarian law by the Russian military intervention from the perspective of the International Criminal Court

The Prosecutor of the International Criminal Court (ICC), Karim Khan, announced his decision to open an investigation into the situation

37 The United Nations news website available at: <https://news.un.org/ar/> (Last access: 12.10.2024).

38 Ibid.

39 Ibid.

40 Ibid.

in Ukraine as soon as possible. In a statement, Mr. Khan explained that while Ukraine is not a party to the Rome Statute and therefore cannot refer the situation directly to his office, it has twice exercised its right to accept the Court's jurisdiction over alleged crimes under the Rome Statute.[41]

The first declaration, submitted in 2014, allowed the ICC to investigate crimes committed on Ukrainian territory between 21 November 2013 and 22 February 2014. The second declaration extended this period indefinitely, granting the ICC jurisdiction over alleged crimes occurring throughout Ukraine from 20 February 2014 onward.[42]

The ICC Prosecutor stated that, after reviewing his Office's findings from the preliminary examination into the situation in Ukraine, he has confirmed "a reasonable basis to proceed with the opening of an investigation". He added, "In particular, I am satisfied that there is a reasonable basis to believe that alleged war crimes and crimes against humanity have been committed in Ukraine, based on the events already assessed during the Office's preliminary examination.[43]

The International Criminal Court's decision to open an investigation into Russian military violations during its intervention in Ukraine signals international accountability for the Russian government. This indication is further validated by the issuance of an arrest warrant for the Russian president by the ICC Prosecutor, following the proven violation.[44]

CONCLUSION

There is a broad consensus that the use of force in international relations is a taboo that the United Nations does not tolerate. However, the issue of military intervention for humanitarian purposes, or what is known as preemptive wars, remains contentious. This has placed the UN in a difficult position, particularly since the countries most likely to engage in such interventions are permanent members of the Security Council.

In light of our study on Russia's military intervention in Ukraine, we have reached the following conclusions:

- Military operations in Ukraine do not fall under the provisions of Article 51 of the United Nations Charter, as Russia claims, because the conditions required by the article are not met;
- Russia's military intervention in Ukraine constitutes a violation of international law and international criminal law, as outlined in Article 8bis of the Rome Statute;
- Russia has committed violations of international humanitarian law during its military intervention in Ukraine, as evidenced by the documented information presented above.

41 Ibid.

42 Ibid.

43 Ibid.

44 The arrest warrant states: "There are reasonable grounds to believe that Vladimir Putin is criminally responsible individually for the war crimes of unlawful deportation of population (children) and the war crime of unlawful transfer of population (children) from certain occupied areas of Ukraine to the Russian Federation (within the meaning of Articles 8-2-a-vii and 8-2-b-8 of the Rome Statute), directly, and/or jointly with and/or through other persons (Article 25-3-a of the Rome Statute), as well as for the failure to exercise due control over his civilian and military subordinates who committed or permitted these crimes and who were under his authority and employees under his control, in accordance with the rules on superior responsibility (Article 28-b of the Rome Statute)". See the official website of the International Criminal Court available at: <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> (Last access: 12.10.2024).

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Response to Incitement: Call for Algeria Sanctions (International Legal Analysis)

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ABSTRACT

The consequences of the war in Ukraine have reached beyond Europe, significantly impacting regions such as the southern Mediterranean. Within this geopolitical context, Algeria—although maintaining a neutral stance in the conflict—is often perceived by Western actors as a longstanding ally of Russia. This perception has triggered political reactions in the United States, particularly among a minority group in Congress led by Representative McClain, who has suggested the possibility of imposing sanctions on Algeria. This article explores the legal nature and potential implications of such a proposal, questioning its validity and examining its alignment with international law. In doing so, we aim to assess whether the proposed measures fall within the permissible boundaries of unilateral coercive actions or constitute an overreach with no solid legal foundation. Moreover, this paper critically evaluates the broader impact of the report on regional stability, arguing that it may contribute to escalating tensions in an already fragile geopolitical landscape.

KEYWORDS: Report, Sanctions, American Congress, International law, Protection

INTRODUCTION

The war in Ukraine has revealed some weaknesses and even some disorder in the joint American-European reaction. It is above all a question of the somewhat soft approach of the Franco-Italian German trio compared to its hard corollary from the USA, notably under the auspices of the former Biden administration, the United Kingdom and the rest of the EU, especialy the eastern bloc of Europe, such as Poland and the Baltic countries. About this war, its beginning was marked by condemnation of the act of aggression coming from Russia and altering the sovereignty of a UN member country (UN/GA/12407, 2 March 2022).[1] And subsequently, some authors tried to justify the American interference by looking for some legal arguments in this sense, such as the reference made to the rules of *jus ad bellum.*[2]

In addition, and still within the framework of international law, there was also the thesis of self-defense by Ukraine against Russian military intervention, advanced in the context of general interference from the West. However, the problem that remained here was that supplying arms to Ukraine would still be inconsistent with the principle of neutrality of States during an armed conflict, knowing full well that Ukraine is not part of NATO and therefore is not protected by this politico-military organisation.[3]

Beyond the American-European reaction and that of the members of NATO, it is perhaps better to return to the meeting of the general assembly of the UN aforementioned, where a lot of States abstained from the condemnation explicitly from Russia. Among these countries, there are global economic forces like China and India, and other fluctuating medium-sized regional powers like Iran and even Algeria in the southwest of the Mediterranean. To tell the truth, we are talking about countries with a non-Western culture. About Algeria, it started to be affected by the war in Ukraine through the energy crisis. Indeed, the Russian economic counterattack, consisting of blocking the gas lines (Nordstream 1 and 2) supplying the EU Member States, has pushed them towards other suppliers such as Algeria. It should be noted that this country is already linked to the EU and its Member States by the association agreement,[4] especially article 61 (energy and mining), putting the development of gas transit among the objectives of cooperation in the field of energy and mining. Thus, the word gas is cited 24 times as a product benefiting from the preferential rights granted by the Community to products originating in Algeria.

Following the aggravation of the energy crisis, the United States of America and through its ex-Secretary of State for Foreign Affairs Antony Blinken who visited Algeria, asked the authorities of this country to increase its exports gas to EU Member States.[5] For its part, Algeria, which is the third suppli-

1 United Nations General Assembly. (2022). UN/GA/12407. Eleventh Emergency Special Session, General Assembly Overwhelmingly Adopts Resolution Demanding Russian Federation Immediately End Illegal Use of Force in Ukraine, Withdraw All Troops.

2 "...it is important for the United States to follow the rules of jus ad bellum–defined in Article 51 of the UN Charter as a State using force against another State with the consent of the State being invaded–when specifying the amount of force they will use against Russian opposition". Qiang, A. (2022). The Russian Invasion of Ukraine: Examining the Legality of US Interference. Columbia Undergraduate Law Review. Available at: <https://www.culawreview.org/journal/the-russian-invasion-of-ukraine-examining-the-legality-of-us-interference>.

3 For arguments trying to resolve this inconsistency, see: Heller, K.J., Trabucco, L. (2022). The Legality of Weapons Transfers to Ukraine Under International Law. Journal of International Humanitarian Legal Studies, Brill ed. p. 12. Available at: <https://brill.com/view/journals/ihls/aop/article-10.1163-18781527-bja10053/article-10.1163-18781527 bja10053.xml>.

4 Council of the European Union. (2002). Council Decision 6786/02 on the signing, on behalf of the European Community, of the Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part. Brussels.

5 Apart from the economic nature of Mr. Blinken's visit, this did not prevent the American Secretary of State for Foreign Affairs, who visited Algeria, from trying to convince the Algerian authorities to reduce their degree of cooperation with Russia and in the meantime to guarantee the supply of gas to Europeans.

er of gas to the EU, has responded by these technological incapacities to double its production, although this country has reassured France and before it Italy to do its best to partially remedy the Russian part in the market of these two EU member states. Despite this, soon after Mr. Blinkin's return was accompanied by an official non-executive approach from a parliamentary minority arguing for the imposition of some sanctions to the detriment of Algeria, and which we will expose the content with more comment (I). Then, we will criticize through legal arguments this same report, tending to intensify the tensions that risk generalizing potential armed conflicts in the southwestern part of the Mediterranean Sea (II). Finally, we are looking for a few arguments along the lines of advocating for the protection of medium-sized countries. We specify that these are located at the gate of a great power or a military alliance (III).

1. ALGERIA SANCTIONS: MCCLAIN'S BIPARTISAN CALL AGAINST ALGERIA

As a reminder of the report calling for the imposition of economic sanctions against Algeria, we quote that on September 30, 2022, twenty-seven U.S. lawmakers led by Republican congresswoman Lisa McClain took this initiative; hence, we wonder about the legal nature of the said report and especially about its scope. At first glance, it is an internal non-binding text that does not reflect the majority of the votes of the American Congress, but more or less, it approaches the legal nature of a recommendation. Recommendations allow an institution or body to make their views known and to suggest a line of action without imposing any strict legal obligation on those to whom the recommendation is addressed, who may be high-ranking state officials, like the US Secretary of State for Foreign Affairs in our case, or other institutions or citizens. We will present this definition following an analogy made to a few articles of the Treaty on the Functioning of the European Union (TFEU).[6] It seems reasonable to us to make this analogy given that the United States of America is a federal state and that the EU, which tends more and more towards integration, is therefore approaching the model of a federation of states.

As for the content of this appeal, it emphasizes the American federal law called Countering America's Adversaries Through Sanctions Act (CAATSA),[7] and is intended for countries that are enemies of America, or even countries cooperating on a military level with anti-American countries or organizations. It should be noted that Algeria was not the first country cited in such a report because Iran, North Korea, and even states supposedly considered good allies were the subject of similar calls, and this is the case with Turkey and Egypt, which bought S-400 anti-missiles and Sukhoi-35 fighter planes, respectively, from Russia.

Russia was really the subject of sanctions since 2018, i.e. even before its military intervention in Ukraine, these sanctions came as a result of Russian cyber-activities. However, Russian cyber attacks are part of its armed operation in Ukraine even if they are criticized in terms of their inability or insufficiency from american and Western point of view,[8] and of which we do

6 Art. 288 (ex Article 249 TEC): To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. Recommendations and opinions shall have no binding force. See for more details and explanations on the recommendations the consolidated version of the TFEU, in particular Article 288, in Official Journal of the European Union (ex-EC), C 326/47, 26.10.2012.

7 On August 2, 2017, US President Donald Trump signed into law the "Countering America's Adversaries Through Sanctions Act" (Public Law 115-44) (CAATSA), which among other things, imposes new sanctions on Iran, Russia, and North Korea. On this law and its application against Russia, see generally: Galbraith, J. (2018). Executive Branch Imposes Limited Russia-Related Sanctions After Statutory Deadlines. American Journal of International Law , Vol. 112 , Iss. 2, pp. 296 – 303.

8 According to the American view, "Russia does not have a true cyber command. While the Presidential Administration and the Security Council coordinate

not always share the same opinion.

If we insist so far on Russia it is to understand what link maintains the impact of the operation carried out by this country in Ukraine with the elaboration by some members of the US Congress of the report which calls for sanctioning Algeria in reference to CAATSA and especially for see further if this is sufficiently justified legally, knowing well that we are within the framework of the internal American legal order and not necessarily with reference to and in accordance with international law.[9] It is therefore to CAATSA text that we must return to seek out and examine the American arguments which revolve around Algeria's military cooperation with Russia. This cooperation described as strategic and materialized by a bilateral international agreement but it goes back to a period preceding the Russian war in Ukraine, so it is a real Algerian-Russian partnership and/or association which has several facets, that is to say it covers several military aspect and other fields,[10] hence the question on the real causes of the advent or rather the elaboration of the said report.

We can say that American fears do not necessarily stem from Algerian-Russian military cooperation alone because Algeria is located in an area traditionally considered to be dependent on NATO's field of maneuver, and Algeria does not constitute a threat to this politico-military entity or its member states. On the other hand, the said report of the American Congress intervened to put pressure on Algeria and to prevent it from joining BRICS, in particular because this country has explicitly embarked on this path. For Algeria, this initiative is only a means of protecting itself against the excesses of the Arab spring which has overwhelmed a lot of countries belonging to the same region and consequently the Algerian ambitions to integrate the BRICS have no visible link with the Ukrainian crisis, nor with the attempt to weaken the US dollar, nor for that matter contribute to the new theory of the multipolar world. So to prevent any degradation in Algeria, such as that experienced in Libya, Syria, or in the rest of the countries, which have experienced instability due to the external conspiracy of the Arab Spring, Algeria is required to reflect on enhanced multi-faceted cooperation with the BRICS. A balanced association that departs from the Euro-Mediterranean model and takes into account the Algerian-Russian strategic partnership, which reflects a confirmed geostrategic agreement model. This, without neglecting, of course, the history, which preceded this partnership on the legal and political levels.

To clarify this situation, we talk about Algeria as a third country to BRICS, but also and above all a medium-sized regional player, which maintains good historical relations with the member states of this entity. We aim here first Russia, then China, South Africa, and India, without neglecting Brazil. Although we try to take advantage of bilateral Algerian-Russian relations in view of their visibility. Moreover, it seems reasonable to take the Algerian-Russian cooperation forward as a first step towards the association between Algeria and BRICS, without harming Western interests. In a legal context, access to a possible association agreement between Algeria, on the one hand, and BRICS

cyber operations involving various agencies and non-state or quasi-state actors, they are not a cyber command in the US sense. There is no clear delineation of operational responsibility and no uniform system of reporting and accountability. Rather, Russia's cyber-active agencies and actors are governed through a largely informal system of relationships in which political expediency may trump operational efficiency". Soldatov, A., Borogan, I. (2022). Russian Cyberwarfare: Unpacking the Kremlin's Capabilities. Available at: <https://cepa.org/comprehensive-reports/russian-cyberwarfare-unpacking-the-kremlins-capabilities/>.

9 Ventouratou, A. (2022). Litigating Economic Sanctions. The Law & Practice of International Courts and Tribunals, Bill Nijhoff ed., p. 593.

10 Algerian Presidential decree N° 06-129 of April 3, 2006 ratifying the agreement between the Government of People's Democratic Republic of Algeria and the Government of Russian Federation on Trade, Economic and Financial and Debt Processing of the Algerian Republic Democratic and Popular towards the Russian Federation in respect of the previously granted, as well as the related protocol, signed in Algeria on 10 March 2006. Official Journal of the People's Democratic Republic of Algeria N° 21, April 5, 2006.

and its member states, on the other hand, is justified by the current situation in this North African country. Indeed, Algeria is linked to the European Union and its member states by the Euro-Méditerranéen Association Agreement. It should be noted that the outcome of this international convention followed the weakening of Algeria during the black decade (from 1992 to 2002). This has weakened the Algerian position in negotiations with their European counterparts since the start of the Barcelona process, known as the 5 + 5 jargon. The result was the ratification of an agreement that did not serve Algerian interests well, knowing full well that it imposes only European values on the Algerian side and that in a single direction. This embarrassing international conventional situation which makes any Algerian attempt to get closer to Brics minimal is doubled by the degrading security situation in neighboring Libya, triggered by France, supported by NATO and aggravated by Turkish interference, also a member of the NATO. Coming to this serious stage of the attack on the principle of state sovereignty, Algerian security fears from certain countries have finally become legitimate. In this sense and to better express this situation, "The realities of international relations show that this practice was manifested in the inability of the U.N. Security Council to prevent NATO military intervention in Libya».[11] Consequently, a minimum of rapprochement of Algeria with BRICS seems essential, in particular that certain countries of this entity, such as Russia and China, had a joint reaction on any refusal of foreign interference whatsoever in the Algerian neighborhood. On the other hand, we present this idea of a common policy with the reservation because even within the member countries of this organization, the geostrategic external policies do not always aim at the subject of unanimity.[12]

11 Asadov, B., Gavrilenko, V., Nemchenko, S. (2021). Brics in International Legal Space: Humanitarian Imperatives of International Security. Brics Law Journal, Vol. VIII, Iss. 1, p. 17.

12 Asadov, B., Gavrilenko, V., Nemchenko, S., op. cit, p. 21.

For what has been said, can we consider the report made by a minority of the American parliamentarians in the future to have consequences similar to those of the Russian decrees by which the Russian Federation considered Donbass as part of its national territory on the eve of its annexation by military force?

2. LEGAL CRITICISM: NATO SOUTHWEST MEDITERRANEAN CONFLICT INCITEMENT

First on board, it is known that the organization of international society is carried out by supra-national legal texts, although in reality, there is no real authority that takes precedence over that of the States. This means that the international institutions are found in a juxtaposed and non-hierarchical pattern and that their creation is only the result of an agreement between States, which explains the existence of a kind of solidarity between these international institutions, despite of their vocation, whether universal or regional.[13] To tell the truth, the application of an international text issued by an organization is the consequence of a state's consent, which is reflected in the classic process of the signature, then the ratification of the same legal text. But what about a national text or judgement coming from an institution of a purely national nature and which pleads for the extraterritorial effect of a domestic law or decision?

This question on which we try to answer, concretizes the practical aspect of our article; in particular, that the writers of the report, coming from an American parliamentary minority guided by Mrs. Lisa McLaine, want to give it an extraterritorial effect. Specifically, they want to subtract international sanctioning authority by viewing it as part of a rather American national sphere. Before going any further with this analysis and watching over its consequences on the interna-

13 Knudsen, T.B. (2019). Fundamental Institutions and International Organizations: Solidarist Architecture. International Organization in the Anarchical Society. The Institutional Structure of World Order, p. 175.

tional scene, we prefer to pause before a few antecedents, whether it be a legislative or judicial act. On the history of this practice, it is important to examine some examples like the arrest warrant issued by a Belgian judicial court against a former senior official of the Democratic Republic of Congo, whose name is Yerodia.[14] The negative point in this case, which was decided by the International Court of Justice (ICJ), consists in the absence of any detail on the legality of the universal jurisdiction recognized by a Belgian national court. The reasoning of the ICJ was content to observe that this question was not contained in the final submissions of the Parties.

Even if the ICJ showed rigor when it attributed more importance to the primacy of the rules of international law to the detriment of their corrolaries of domestic law (Belgian legal rules relating to universal jurisdiction in criminal matters), some authors were a little skeptical and saw at the time in the position of the high international court a kind of hampering the development of international criminal law.[15]

On this same idea of universal jurisdiction that Belgium was criticized for, this country was finally convinced to remove this notion from its national legislation, and this time after a diplomatic incident with Israel following a Belgian attempt to try Ariel Sharon for crimes under international criminal law in accordance with this universal jurisdiction.

If Belgium ended up admitting the primacy of international law by renouncing the rules of universal jurisdiction in its national legislation, is this the case for other countries, especially Russia and the United States of America?

The answer is of course negative and we argue our opinion by the elaboration of the report coming from a minority of the members of the American Congress and which is the subject of this study, knowing well that Algeria counted until a period recently a trustworthy ally for the United States in its quest to fight terrorism. Yes, in this sense, the United States, which once drew up an anti-terrorism law (Patriot Act),[16] has completely changed its position towards new adversaries and always by legal means, which are legislative texts and reports.

In a similar step, the Soviet Union, which defended the principle of the *proletariat* in Eastern Europe and Afghanistan, this time preceded its war in Ukraine by a new legislative legal step consisting of considering the Donbas sheltering a strong Russian community as a territory divided between two independent republics of Ukraine. Again, Russia and by presidential decree, annexed Donbass and two other regions of southern Ukraine.[17]

14 The Court found that the issue and international circulation by Belgium of the arrest warrant of 11 April 2000 against Abdulaye Yerodia Ndombasi failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Congo enjoyed under international law; and that Belgium must cancel the arrest warrant. We recall that the International Court of Justice (ICJ), principal judicial organ of the United Nations, delivered its Judgment in the case concerning the arrest warrant of 11 April 2000. ICJ, Democratic Republic of the Congo v. Belgium, 14 February 2002. We recall that the DRC's request before the International Court essentially maintained that the Belgian mandate had been issued in flagrant contradiction to a decision of international law recognizing absolute immunity for the benefit of a Minister of Foreign Affairs as accepted by the jurisdiction of the Hague. Zuppi, A.L. (2003). Immunity v. Universal Jurisdiction: The Yerodia Ndombasi Decision of the International Court of Justice. in Louisiana Law Review, vol. 63, n° 2, p. 309.

15 Boister, N. (2002). The ICJ in the Belgian Arrest Warrant Case: Arresting the Development of International Criminal Law. Journal of Conflict and Security Law, Volume 7, Iss. 2, p. 293.

16 "The Trump Administration also took unprecedented steps to exclude immigrants based on their (non-Christian) religious beliefs—whether those beliefs were sincerely held or merely imputed by DHS officials based upon the immigrants' race, ethnicity, or country of origin. This Section will discuss the two principal mechanisms used by the Trump Administration to bar nonChristians from entering the United States. First, it will address the so-called "Travel Bans". Then, it will describe the decimation of the United States' longstanding commitments to refugee resettlement". Elias, S.B. (2021). Law as a Tool of Terror. Iowa Law Review, Vol. 107, Iss. 1, p. 18.

17 Just after the start of the Russian military operation in Ukraine, the two professors of international law Oona Hathaway and Scott Shapiro abusively criticized Russian military activities in Ukraine, without any reference to the Minsk agreements, saying: "But while the

In response, the United States, which has been quick to provide military support to Ukraine, has spared no legislative effort to put pressure on Algeria, Russia's strategic ally located at the southwestern gate of the Mediterranean.

Have legislative texts become a means of instrumentalization and proliferation of wars?

Before answering this question, we will refer to two internal legal texts, one of which is American, the other is Russian.

Unfortunately, the condemnation of this practice, which results in the attack on the sovereignty of a member country of the United Nations by another more powerful one, and which is carried out through a presidential decree or by internal legislation, has not been criticized as strongly as towards Russia.

To clarify this observation, until now, the international society, which is very busy with the war in Ukraine and the gas crisis resulting from Russian countermeasures towards the EU, has considerably neglected the irresponsible practices of the Biden administration, which tolerates the steps aimed at sanctioning some countries. These are, of course, the countries that have traditionally counted in the pro-Russian camp, and this is the case of Algeria, which continues to be subjected to pressures of this type and of which the aforementioned report, directed by the congresswoman Lisa Mac Laine, is proof.

In this regard, if the tracing of the provisions and principles of international law has been done until now to the detriment of the Third World countries, from now on, the competition between the West and the new emerging Eurasian component will take the lead in changing this state of affairs. All that we have mentioned about the indifference of the leading states of the international community towards the UN Charter and those who prefer to take refuge in internal legislative or executive practices is only a maneuver to prolong conflicts in the world. In reality, the law has become a mere means of doing things for the great powers that are fighting in a world that is slowly transforming from monopolistic to multipolar.

Unfortunately, the legal follows the political, and thus the failure of certain legislative, executive, or even judicial bodies in a given country to respect the provisions of international law remains insufficient to justify the drafting of the report calling for sanctions against Algeria. It is thus a competition between the American theory of the intensification of conflicts traditionally supported by the old fox Kisenjer and that of a multipolar world defended by Dugin, who remains faithful to the return of the polar balance. We note that this theory has been strongly supported to explain the proliferation of conflicts in the world, but also been framed by other authors. Among these, we cite Avi Cober, who has attempted both to assess the crystallization of low-intensity theory and to consider how to bridge the gap between the importance of low-intensity conflict and hedging theory, if any.[18]

The explicit link between the report written on the initiative of Ms. Lisa McLaine in collaboration with other members of the American Congress, on the one hand, and the theory of low-intensity conflict, on the other, testifies to a practice that has become common and which is the politicization of the law. Unfortunately, the law has become a means that serves political ends, and we find this normal as long as the powerful States deviate more and more from the fundamental principles of international law, such as are enshrined in the Charter of the United Nations. As a result, we move from the internationalization of domestic law to the na-

invasion ordered by Russian President Vladamir Putin is in direct violation of the most fundamental principle of the international legal order—the prohibition on the use of force—it's too early to write the obituary of the post-war international system". Hathaway, O., Shapiro, S. (2022). On International Order. Law Faculty Offer Analysis of Russia's Invasion of Ukraine, Yale Law School. Available at: <https://law.yale.edu/yls-today/news/law-faculty-offer-analysis-russias-invasion-ukraine>.

18 Kober, A. (2002). Low-intensity Conflicts: Why the Gap Between Theory and Practise? Defense & Security Analysis, Vol. 18, Iss. 1, p. 15.

tionalization of international law through sanction by domestic texts, under the influence of a state policy within a powerful country.

To illustrate this situation which consists in the nationalization of international law, i.e. settle transnational, or even international, conflicts or disagreements between traditional entities of international law by the provisions of domestic law (legislation or parliamentary report as in our case), we insist on the qualification of the term "military activity" in some States, whose same operation is considered an act of war or even an actual invasion, violating the sovereignty of the invaded country.

The occupying or invading state most often pleads for military activity to the detriment of war,[19], which shocks people's minds. By way of illustration, the Americans adopted the jargon "military activity" in Afghanistan, Iraq, Syria, and for any armed operation carried out by this country. And yet, the legal trace is not completely ruled out. The conception of military activities stems from the lack of precision of the international standard. Therefore, once it fails international compromise, the obligation of precision unfortunately falls on states. And it is fulfilled on an intra-state level, through a national law, for example, the American law on *"Authorization for the Use of Military Force"*. Since 2001, the Americans have considered any Islamist military group located abroad as a threat that requires American military activity on the territory where this militia is located.[20] According to this purely state authorization, the legal margin is national through the anticipated control of legal conformity of the military intervention. Similarly, the Russian Parliament, after recognizing the self-proclamation of the two republics of Donetsk and Lugansk by confirming presidential decrees, decided to intervene on Ukrainian soil. A struggle that aims to isolate the Azov brigades of the Ukrainian far right, supported by mercenaries and Western military experts from NATO, according to the Russian version. However, the interpretation, or rather the control of this Russian national law, like its American predecessor, should not be exclusively national. The effects of the said intervention occur on a supranational level, where the interest of the international community is not necessarily preserved. And therefore, a strict minimum embodied in international judicial control seems essential. We are in the presence of the judicial assessment of the military act by an international body, such as the International Court of Justice.

Let's go back to Mrs. Mc Lain's report, it fits into the context of putting pressure on Algeria, which adopted a vision close to Russia and China and which implicitly sees in the Russian intervention in Ukraine a simple military activity, whereas it saw in the American operations carried out in Moslem countries an invasion violating the territorial integrity of these countries in reference to the UN Charter.

Beyond law and politics, it may be necessary to go back to the history of conflicts to understand the source of each vision. For the Ameri-

19 "Derived from the wording of Article 42 of the 1907 Hague Regulations, occupation may be defined as the effective control of a foreign territory by hostile armed forces. It is not always easy to determine when an invasion has become an occupation. This raises the question whether or not the law of occupation could already be applied during the invasion phase. In this regard, two main positions are usually put forward in legal literature. Generally it is held that the provisions of occupation law only apply once the elements underpinning the definition set out in Article 42 of the 1907 Hague Regulations are met. However, the so-called 'Pictet theory', as formulated by Jean S. Pictet in the ICRC's Commentary on the Geneva Conventions, proposes that no intermediate phase between invasion and occupation exists and that certain provisions of occupation law already apply during an invasion". Zwanenburg, M., Bothe, M., Sassoli, M. (2012). Is the law of occupation applicable to the invasion phase? International Review of the Red Cross, Vol. 94, Iss. 885, p. 29.

20 "Thus, an "associated force" is not any terrorist group in the world that merely embraces the al Qaeda ideolo-gy. More is required before we draw the legal conclusion that the group fits within the statutory authorization for the use of military force passed by the Congress in 2001". Johnson, J.C. (2012). National Security Law, Lawyers, and Lawyering in the Obama Administration. Yale Law and Policy Review, p. 146. Available at: <https://law.yale.edu/yls-today/news/qa-professor-hathaway-presidential-war-powers-and-war-terror>.

can and Western vision on the Russian military intervention in Ukraine, Mr. Timothy Snyder and although he recalled the various Russian attempts to annex Ukraine, strongly denied the saying that history repeats itself, because he wanted to give a new essence to human action to change the real datum of the invasion.[21] However, this does not prevent us from borrowing the same historical touch from Mr. Snyder to explain the elaboration of the American report wanting to condemn Algeria and subsequently impose economic sanctions against it, with reference to CAATSA. Unfortunately, this vision testifies to the continuity of the difficult and complex relations between the West and Algeria, with a few rare exceptions during short periods under the Kennedy (JFK), Clinton and Trump administrations and whose American tendency was based on the pacification of relations by preserving the American economic interest above all, unlike the Biden administration which opts for radical armed solutions.

Similarly, the Russian or even Eurasian vision sees in the European and Western intervention in the Arab world, including Algeria and North Africa, a real invasion destroying the religious values of these Muslim-leaning countries.

As a result, the US parliamentary report against Algeria conceals an ideological and historical conflict between the West, on the one hand, and Russia and its allies, on the other, although it intervened in legal form. Consequently, a possible American or North Atlantic military action against Algeria will be treated by the member states of NATO as a simple special operation for the democratization of this country. On the other hand, this same act will surely be qualified as an invasion violating the sovereignty of this country according to the legal reasoning of Russia, China, and the other allied states of these two countries. In short, in all these hypotheses, Algeria, like Ukraine and formerly Libya, Syria, Yemen, Afghanistan, Nicaragua, Vietnam, etc., needs stronger protection under international law. This need remains urgent, especially since these countries constitute border areas of conflict of interest between the East and the West.[22]

Still in the context of explaining the drafting of a report, the initiative of which dates back to an American parliamentary minority led by Ms. Lisa McLaine, it is important to insist on the fact that the political and historical visions materialize through the legal vision which in turn reflects the conflict between domestic law and international law. This concretization has been advanced in the context of post-Soviet countries, including Ukraine, through the means of conceptualizing troubles or troubled links to explore the relationship between international law and national law.[23] On the other hand, such an analysis is rare in the case of Arab countries, which previously suffered the same fate as Ukraine. We are content to say that the link between the internal order and the international order must be interpreted with reference to the principles of international law, in particular that of justice, equity, and good faith, without any historical influence. or political, but this

21 "If history literally repeats itself, there would be no human agency. ... It's the same as saying 'Things never change'". Gonzalez, S. (2022). War in context: Yale's Ukraine course reaches a global audience. Brief analysis of the historical vision of the balance of power between Ukraine and Russia as presented by the Yale historian Timothy Snyder. Available at: <https://news.yale.edu/2022/11/08/war-context-yales-ukraine-course-reaches-global-audience>.

22 Johnson, J.C. (2012). National Security Law, Lawyers, and Lawyering in the Obama Administration. Available at: <https://law.yale.edu/yls-today/news/qa-professor-hathaway-presidential-war-powers-and-war-terror>.

23 "We argue that the nexus approach can capture and navigate the complexity that is created by the confluence of various factors, rather than simplifying reality and ignoring the factors or contexts that may be difficult to address due to disciplinary rules, boundaries and/or methodological shortcomings. We assume that the interplay between international law and domestic norms in each post-Soviet country is shaped by a unique set of conditions, including divergent levels of economic development, varied political regimes, and different foreign policy trajectories, among them policies of international law, and readiness to socialize into international law norms". Wittke, C. (2022). Troubled Nexuses Between International and Domestic Law in the Post-Soviet Space. Review of Central and East European Law, N° 47, p. 255.

requires an international compromise between the great powers.

Moreover, it is important to trigger the alert for the Algerian case even if the latter was not the first to be the subject of a report of a parliamentary nature referring to the sanctions included in the CAATSA. On the other hand, if Egypt and Turkey, which were subject to similar sanctions, did not incur enough risk in terms of the use of armed force against them, Algeria must be worried. Indeed, this country remains in the eyes of NATO and the West in general, the geostrategic ally of Russia in the southwestern region of the Mediterranean. This reality alone constitutes a possibility of creating, in the short or medium term, an armed conflict controlled by the United States of America, the aim of which is both to put pressure on Russia and to extend the sphere of influence of NATO further south in the Mediterranean, to the detriment of the new Eurasian alliance. For this, what protection for Algeria and States in a similar situation from the point of view of international law and international politics?

3. ADVOCATE FOR SAFEGUARDING MEDIUM STATES AT GREAT POWER BORDERS

Will the re-emergence of the bipolar world, the West and the Eurasian Alliance, push Algeria more and more towards Russia and its allies to protect itself from Western pressure which is becoming gradually accentuated, as it was the case for Ukraine, which has found refuge near the United States and the European Union against Russia? But first of all, is this comparison or similarity between Ukraine before the war or on the eve of the Russian military intervention, on the one hand, and Algeria, on the other hand, credible? Then, what are the means offered to Algeria to protect itself against a possible military intervention, knowing that apart from the non-binding nature of the report of the American Congress calling for the application of sanctions against Algeria, the threat of Western interference remains real in a tense international political climate?

The answer to these questions, which will be analyzed on the two legal and political levels, requires a precision that relates to the definition of the average or modest State being on the doorstep of a great power, or a military alliance. Thus, it will be necessary to resort to examples, through international practice and previous events. To do this, we wonder about the criteria to be used to know which countries are concerned by this possible protection.

The precision of the notion of "third State" is most often resolved by what is called the negative delimitation of the said concept. Consequently, any third State is considered to have this quality vis-à-vis an international agreement and therefore towards an organization created by this same agreement. In this sense, Article 2 of the Vienna Convention on the Law of Treaties states in its point 1-h) that "for the purposes of this Convention "third State" means a State not a party to the treaty".[24]

More positively now, the concretization of the aforementioned definition implies that Algeria is considered as a third State with regard to the Washington Treaty – or North Atlantic Treaty which is the base of the North Atlantic Treaty Organization (NATO) because this country is not a signatory member in the said agreement and even more, we can put forward two criteria to clarify the concept of the third State and which are the neighborhood, but above all the distinct or romantic interest between these two parties (Algeria and NATO). It is this same remark that also applies to Ukraine vis-à-vis Russia, in particular that the first constitutes the geostrategic extension for the second as a powerful country and also for the Shanghai Cooperation Organisation (SCO),[25] especially in

24 For more details on this concept, see. Aust, A. (2007). Modern Treaty Law and Practice. Cambridge University Press, Cambridge, pp. 256-261. The author has devoted Chapter 14 of his book to explaining this notion of a third State.

25 "Regarding the impact of the war in Ukraine, Russia and China declared their willingness to "share the

its two military and economic aspects. The purpose of this organization is to deepen partnerships, taking into account the strategic interaction between China and Russia, and to expand cooperation between this hard core and the countries of Eastern Europe, including Ukraine, in various fields. We note at this stage that Ukraine has opted for a rapprochement with the West to the detriment of its rather Slavic Eurasian space. The same for Algeria, which has a tendency towards the East justified by its history, while it is located at the southwest door of Europe and NATO.

On the history of these situations, Cuba has provided a good illustration of a country's revolt against an American attempt to impose or continue to impose liberal Western values in that country, which led to a political crisis and limited US military intervention in Cuban territory.[26] At that time, the Soviet Union did not hesitate to give its politico-military support to Cuba as the United States is doing today to Ukraine. The reproduction of this same scenario is not ruled out for good for Algeria, and to understand it legally, we will use some articles that appear in the Vienna Convention on the Law of Treaties. The essence of these texts is summarized in the reciprocal rights and obligations between the powerful State and/or the neighboring Organization to the third State, whose interest is not common. These are Articles 35 and 36 of the Vienna Convention on the Law of Treaties, referring respectively to the obligations and rights of the third State,[27], subject of our study. Who says obligation and right says that the protection of the third State is not absolute.

The reflection of obligations and rights between a great power and a neighboring third State practicing a policy that does not conform to the expectations of the great power is reflected on the political level by the interplay of the intensity of low-intensity conflicts and finding refuge in the country's adversary or enemy. To tell the truth, if Ukraine or even before Cuba sought to find refuge in article 36 of the Vienna Convention and to take advantage of American-European aid (for Ukraine) or formerly Soviet support (for Cuba), these same two countries of modest size have found refuge with one of the great powers with which they share the same values (Cuba/Soviet Union, on the one hand and Ukraine/United States, EU and other Western-leaning countries). And yet, this balance between rights and obligations of the medium-sized State, divided between legal and political arguments, and which does not offer sufficient protection to this State against the danger arising from any possible military penetration against it, Western threats unveiled against Algeria, has allowed customary law to intervene to have its say. It is a question here of Article 37 of the Vienna Convention, which takes up the sharing of obligations and rights between a powerful State and/or a powerful organization, on the one hand, and a third State,

responsibility and readiness to play a leading role in bringing stability at the global level" and to "strongly support each other on issues concerning the key interests of each side". However, there were no declarations of increased Chinese support for the Russian Federation. However, President Vladimir Putin indicated that he had "given an answer to the questions and concerns arising from the Chinese side". Analysis of the 22nd Shanghai Cooperation Organization (SCO) Summit held in Samarkand on September 15-16, 2022, with the participation of leaders of its member states. Available at: <https://www.osw.waw.pl/en/publikacje/analyses/2022-09-20/against-backdrop-war-shanghai-cooperation-organisation-summit>.

26 Shalom, S.R. (1979). International Lawyers & Other Apologists: The Case of the Cuban Missile Crisis. Polity, Vol. 12, n° 1, p. 87.

27 Article 35 (Treaties providing for obligations for third States): "Treaties providing for obligations for third States An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing". Article 36 (Treaties providing for rights for third States): "1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides. 2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty".

but with reference to customary law.[28] This article strengthens the protection of the third State by relying on the principles of international law, influenced in turn by the political context whose basis comes from force, hence the question of the relationship between law and power internationally.[29]

What is disappointing in terms of international law protection of medium-sized countries against visible pressure, for example a report calling for the application of economic sanctions, which gradually turns into military intervention from a large power or a military alliance, is that the "partial" assistance of international society remains after the act of aggression, or more or less after the attack on the sovereignty of the State subject to sanctions and/or ground of the armed operation in a following stage. This situation is common in international law, and it is the decision of the International Court of Justice that is authentic, in its judgment known as American military and paramilitary activities on the territory of Nicaragua and against it. The first legal obstacle in the face of such actions arises in terms of the legal qualification of the operation in question. In other words, are we in the presence of a simple military activity, alias special operation, or a real war? The disadvantage of a firm answer to this question in international law aggravates the situation within the State subject to intervention (Cuba, Nicaragua, Iraq, former Czechoslovakia, Hungary, and finally Ukraine).

Coming back to the Nicaragua case, the ICJ did not express explicit reservations on the use of the aforementioned term, although the international high court has repeatedly used synonyms going in the direction of war. This is the case, for example, of the use of "force"[30] against another State, as well as "attacks"[31] carried out on foreign territory. The most important thing in this case is that the ICJ avoided using the word war, which appears only three times as a reminder in reference to former armed conflicts, or by limiting itself to revealing acts contrary to the law of war.

For what has been said, the medium-sized state is obliged to seek its protection by developing a policy of self-defense.[32] The Turkish experience demonstrates a hitherto unprecedented success of this country, which is on the southwestern border of both Russia and the Eurasian alliance. This country, like Algeria, was the subject of a parliamentary report calling for sanctions against it following its attempt to acquire Russian S-400 missiles. These sanctions were subsequently abolished by the Trump Administration. Moreover, this country has successfully normalized its relations with its unstable geographical environment.

In short, Algeria is led to guarantee its self-defense by the balance of its external relations, without losing Eurasian support. Borrowing from a common view in private law, the medium-sized country that finds itself on the doorstep of a great power or military alliance has a status similar to the refugee who has the right to seek refuge in State X, but at the same

28 Article 37 (Revocation or modification of obligations or rights of third States): 1. When an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed. 2. When a right has arisen for a third State in conformity with Article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State".

29 Steinberg, R.H., Zasloff, J.M. (2006). Power and International Law. American Journal of International Law, p. 64.

30 Dans l'arrêt du 27 juin 1986 imposant le Nicaragua contre les Etats Unis d'Amérique, la CIJ a évoqué l'utilisation américaine de la force sur le territoire nicaraguayen comme élément de violation du droit international coutumier : v. Affaire des activités militaires et paramilitaires au Nicaragua et contre celui-ci, (Nicaragua contre les Etats Unis d'Amérique) – in Fond, Résumé des arrêts, avis consultatifs et ordonnances de la Cour internationale de Justice, Arrêt du 27 juin 1986, sous paragraphe 4 et 6, p. 202. Available at: <icj-cij.org/public/files/case-related/70/6504.pdf>.

31 Ibid.

32 Green, J.A. (2009). The International Court of Justice and Self-Defence in International Law, Oxford, Hart, pp. 63-109.

time it is incumbent on him to respect the obligation not to harm the public order of State Y with which he maintains a relationship of original membership. Is such a comparison logical, and therefore, is it successful? The answer is not overwhelmingly positive, especially since the principle of sovereignty is very present in public international law, compared to that of the condition of foreigners. On the other hand, this same comparison can hold insofar as we contribute to it a functional task which intersects with the attempt to achieve protection by the State in question.

CONCLUSION

In a destabilized international climate which is related to the security crisis in Europe caused by the Russian military intervention in Ukraine and its impact of economic unrest and disruption of gas energy supply, a report resulting from the initiative of a parliamentary minority American has just called for the application of sanctions against Algeria, in reference to an American law which goes in this direction and which is intended basically for countries that are enemies of the United States of America.

What was a little surprising is the very moment of the advent of this report, which intersects with the intensification of the conflict between the West and the new Eurasian alliance, through a hybrid war on Ukrainian soil.

Our vision centered on the fact that this report will be able to spread conflicts and reach the southwestern region of the Mediterranean, an area that has remained stable until now.

We began this work with a legal analysis of the said report, which is close in this respect to a recommendation, given that it is not necessarily mandatory. At the same time, we have shown that this report aims to put pressure on Algeria to prevent it from throwing itself freely into the arms of Russia and therefore to obstruct it in the face of any attempt to allow it to join the BRICS.

Then, we evaluated and at the same time criticized the content of the report text, in particular that it is unreasonable to apply sanctions against a Country with reference only to the provisions of domestic law. In this sense, several arguments have been presented to this effect, whether on the involvement of the ICJ when it rejected Belgium's responses based on universal jurisdiction (basically a judicial competence exercised by a Belgian national judge) to justify its issuance of an arrest warrant to the detriment of a senior Congolese official, or even when we mentioned the example of some American and Russian internal legal texts.

Faced with this situation, we have finally pleaded for the protection of medium-sized states, sometimes even modest ones, subjects of pressure or even economic or military intervention from a neighboring great power, or a neighboring military alliance. This protection remains unconvincing on the legal and political level, which pushes the State to intervene to practice a method of self-defense.

We have previously stressed that the self-defense referred to here is not necessarily limited to military reaction,[33] but it can consist in adherence to a few international conventions and in the normalization of bilateral or even multilateral relations, the purpose of which is to maintain a safe balance for the state subject to pressure or intervention.

33 Article 51 Charter of UN: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security".

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Interpretation of Marriage Law Determination: An Analysis Study of the Adult Age of Marriage in Indonesia

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ABSTRACT

This study addresses the implementation challenges of Indonesia's Law No. 16 of 2019, which amended Law No. 1 of 1974 regarding marriage. The previous law set minimum marriage ages at 19 for men and 16 for women; the 2019 amendment raised the minimum age for women to 19, standardizing it for both sexes. A key issue highlighted is that this legal age limit may not fully account for the necessary biological, sociological, and other preparations essential for marriage, despite the aim of legal reform to protect family integrity. The research specifically focuses on the implications of this minimum marriage age from the perspective of Islamic law. Using a qualitative, descriptive-analytical library research method with an Islamic law approach, the study examines the differing views on the concept of maturity for marriage. The findings indicate that while the previous age of 16 for women was often considered adolescence in terms of overall maturity, the new legal age of 19 for both men and women is generally regarded as adulthood and deemed prepared for initiating family life within the framework of Islamic law.

KEYWORDS: Interpretation, Legal determination, Marriage, Adult age

INTRODUCTION

The existence of Islamic family law, especially in the study of limiting the age of marriage, is endless and deserves to be discussed from time to time, but it also attracts the attention of legislators, academics, and family law observers who study it from their respective scientific perspectives. However, studying in depth the modernization of Islamic family law through the issue of the age of marriage in Indonesia, of course, cannot be separated from the study of the social history of Islamic marriage law which has been recorded in the study of Islamic law.[1] In the renewal of Islamic family law, it is necessary to explore the important aspects behind the social dynamics in the discussion of Islamic family law.[2] The Islamic family law justice system, as one part of the national legal system project.[3] This can be seen based on the dynamics of the legislative process carried out by the government, although at the beginning of independence, the government was not very concerned with Islamic judicial institutions. As a result, the government, which only regulates marriage administration issues, has an impact on the practice of family law, which is still directly proportional to the existing law.[4]

The strengthening of understanding of law as a tool of social engineering and supported by legal instruments that have existed before, has an impact on the increasingly active government in issuing legal products in the form of regulations on family law. One of its achievements is the enactment of the Marriage Law No. 1 of 1974 concerning marriage.[5] In this regard, the government has succeeded in articulating the important elements in the practice of Islamic family law into the standard legal language that has until now been applied nationally. The context of the initial period of enactment of the Marriage Law above, in historical records also cannot be separated from its socio-historical context.[6] On the one hand, this is due to the still strong taklid attitude of some Indonesian people towards certain schools of thought, while on the other hand, the position of Islamic law in the context of the state always reaps polemics, especially in the stage of state ideological debate, so that Islamic law seems to be at the midpoint between the paradigms of the state religion and state paradigm.[7] The development of the paradigm that the legal function is effective as a means of social engineering above, has made the state's efforts through the Marriage Law successful in changing several things related to the practice of marriage in Indonesia, including the issue of the age of marriage.

In historical records, the application and uniformity of the minimum age for marriage in Indonesia, initially, wanted to be regulated through the contents of Article 7 paragraph (1) of the 1973 Marriage Law which states that the minimum age for marriage is 21 years for men and 19 years for women.[8] However, because this draft law has drawn debates that are prone to conflict, it has to be postponed. This ended in the official stipulation of the 1974 Marriage Law,

1 Djamour, J. (2021). The Muslim matrimonial court in Singapore. London: Routledge. p. 39.

2 Cheema, S.A., Abbas, M.Z., Khan, A.U. (2018). Contribution of the Lahore High Court in The Development of Islamic Family Law in Pakistan. Journal of International Law & Islamic Law 14, No. 1, p. 15.

3 Sportel, I. (2020). Moroccan Family Law: Discussions and Responses from the Netherlands. Journal of Muslim Minority Affairs 40, No. 1, p. 68.

4 Weitzer, R. (2020). The campaign against sex work in the United States: A successful moral crusade. Sexuality Research and Social Policy 17, No. 3, p. 407.

5 Muslih, I., Nurdin, Marzuki. (2020). Effectiveness of Marriage Services Through Information System Management (SIMKAH) at Palu City Religious Court. International Journal of Contemporary Islamic Law and Society 2, No. 1, p. 25.

6 O'Connell, H.A., Bratter, J.L., Casarez, R.S. (2020). One drop on the move: historical legal context, racial classification, and migration. Ethnic and Racial Studies, p. 10.

7 Khalfaoui, M. (2020). Current Muslim Understandings of Classical Family Law in a Modern Secular Context: Germany as a Case Study. Journal of Muslim Minority Affairs 40, No. 1, p. 121.

8 Khaidarulloh, K. (2020). Paradigm Contestation In National Legal System: A Study Of Unification Of Marital Age Regulation In Indonesia. JARES (Journal of Academic Research and Sciences) 5, No. 1, p. 48.

but with minor changes, especially regarding the determination of the age of marriage, which finally had to be lowered through Article 7 paragraph (1). The state stipulates that marriage is only permitted if the man has reached the age of 19 years and the woman has reached the age of 16 years.[9]

The provisions in fiqh explain that the age of marriage is different from the provisions of the legislation in Indonesia, which stipulates the age of marriage in the same marriage law as 19 years, based on the decision of the Constitutional Court.[10] In view of the rules governing the age of marriage in the Law of the Republic of Indonesia Number 1 of 1974, as well as the Compilation of Islamic Law, the regulations in the legislation need to be obeyed by all levels of Indonesian citizens.

Along with its development, in 1991, the regulation on the age of marriage in the 1974 Marriage Law was again clarified and strengthened by the emergence of the Islamic Law Compilation.[11] With the same editorial, through Article 15 paragraph (1) and (2) Complications of Islamic Law, the state stipulates that a Muslim who wants to marry must be at least 19 years old for men and 16 years old for women. If you do not meet this age requirement, in accordance with Article 7, paragraph (2) of the Marriage Law, the prospective bride and groom can request a dispensation from the religious court.[12] The debate about the age limit of children where a person is considered an adult in the context of marriage is related to readiness and maturity, not only physically, but also psychologically, economically, socially, mentally, religiously, and culturally. This is because marriage at an early age often poses various risks, both biological risks, such as damage to reproductive organs, as well as psychological risks. The ambiguity in determining the limits of normative adulthood occurs because there are different legal perspectives on the problems that develop in society at all social levels.[13]

The issuance of Law No. 16 of 2019 on the amendment of Law No. 1 of 1974 concerning marriage has provided great benefits, where initially 16 years for women and 19 years for men have changed to 19 years for men and 19 years for women.[14] This should be appreciated because the struggle to revise Law Number 1 of 1974 has been approved by the Constitutional Court. Thus, the age provisions set by the Constitutional Court of 19 years for men are considered to have reached maturity in their attitude, capable of acting, maintaining, and being responsible for their actions. Meanwhile, a 19-year-old woman is considered to be an adult and able to run a household.

The revision of Article 7 regarding the age limit for marriage in the Marriage Law has become a serious focus on at least four things. First, to prevent early marriage, which has a further impact on the occurrence of pregnant women and childbirth at a young age, which poses a high risk to the health of pregnant women and childbirth; as well as early marriage in the context of psychological mental readiness of married couples who are feared to be at high risk of divorce rates. Second, to protect the rights and interests of children, given that, according to Law no. 23 of 2002, as the implementation in the Convention on the Rights of the Child, it is stipulated that what is meant by children is up

9 Murni, S. (2020). The Marriage Age Limit According to Indonesian Law No. 16, 2019 as Effort to Child Protection. In: International Conference on Law, Economics and Health (ICLEH 2020). Atlantis Press, p. 226.

10 Horii, H. (2020). Legal reasoning for legitimation of child marriage in West Java: Accommodation of local norms at Islamic courts and the paradox of child protection. Journal of Human Rights Practice 12, No. 3, p. 510.

11 Schenk, C.G. (2018). Islamic leaders and the legal geography of family law in Aceh, Indonesia. The Geographical Journal 184, No. 1, p. 16.

12 Wahyuningrum, D.R., Suhariningsih, S., Sulistyorini, R. (2021). Jurisdictional Implications Vagueness of Marriage Dispensation Norms in Law Number 16 Year 2019. International Journal of Multicultural and Multireligious Understanding 8, No. 7, p. 568.

13 Epstein, C.F. (2020). Woman's place. California: University of California Press, p. 86.

14 Bukido, R., Wantu, F.M. (2020). Synchronize The Different Law Rules Study Of Law Number 16 Year 2019 And Law Number 35 Year 2014. Journal of Legal, Ethical and Regulatory Issues 23, No. 2, p. 4.

to the age of 18 years. Third, considering the sociological readiness of the couples to become an autonomous family in the midst of society. Fourth, paying attention to economic readiness in relation to the complexity of household needs today, which increasingly require careful planning.[15]

In formal juridical terms, the age limit for marriage in Indonesia is regulated in the Marriage Law No. 1 of 1974 and the Compilation of Islamic Law.[16] In the law there is an article that determines the age limit of a man and a woman who will carry out a marriage, which is contained in Article 7 Paragraph 1 which states that marriage is only permitted if the man has reached the age of 19 years and the woman has reached the age of 19 years old. Avoiding the unequal age limit of men and women in marriage, giving encouragement and role models regarding the revision of the Marriage Law, the first step in realizing to carry out togetherness in order to protect the rights of children in Indonesia.[17] This method prioritizes togetherness and closeness to children, so that making decisions regarding children's rights is the responsibility of the parties involved. From that, reforming the age of marriage in the marriage law is the basis for upholding justice in the existing law in Indonesia.

Thus, to reform the limitation on the age of marriage, there is something that needs to be considered, namely, the existence of equality at the age of adults in the Law of the Republic of Indonesia. Adult age, if still based on the Law of the Republic of Indonesia Number 23 of 2002 concerning protecting children, is eighteen years old, Therefore, the minimum age limit of 16 years for women and 19 years for men to get married, as stated in the Marriage Law and the Compilation of Islamic Law, was changed to 19 years for women and 21 for men. The principle of prioritizing the best interests of children in every decision-making concerning children is the obligation of all parties.[18] Therefore, reconstructing the age of marriage in the marriage law is a concrete step as an effort towards Indonesian law enforcement, support and demands for the revision of the marriage law is a manifestation of the joint efforts of the citizens of this nation to save the future of Indonesian children, because children are only entrusted and a gift from God. The chronological explanation of the age of marriage problem above indicates that the age of marriage is a complex problem. This issue is not only a concern of the state, but also a separate concern for activists, academics, and institutions.

DISCUSSION
The Essence of Marriage

The term marriage in the Marriage Law Number 1 of 1974, Article 1, paragraph 2, marriage is defined as an inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family, household based on the One Godhead.[19] Meanwhile, according to the Compilation of Islamic Law, as contained in article 2, it is stated that marriage in Islamic law is marriage, namely a very strong contract or *miṡāqan galīẓan* to obey Allah's commands and carry it out is worship.[20] Meanwhile, according to Anwar Hafidzi and Mohd Hatta Mohd Hani, it means that the word

15 Duraku, Z.H., Jemini-Gashi, L., Toçi, E. (2020). Perceptions of early marriage, educational aspirations, and career goals among Kosovar adolescents. Marriage & Family Review 56, No. 6, p. 515.

16 Suhargon, R., Anggeraini, F. (2021). The Juridical Review of Law Number 1 of Year 1974 on Marriage and the Compilation of Islamic Law Concerning Status of Different Religious Wedding Abroad. Legal Brief 10, No. 2, p. 198.

17 Nasution, K. (2021). The Roles of Families in Combating Drugs Uses, Violence and Terrorism. Samarah: Jurnal Hukum Keluarga dan Hukum Islam 5, No. 1, p. 36.

18 Savirimuthu, J. (2020). Datafication as parenthesis: reconceptualising the best interests of the child principle in data protection law. International Review of Law, Computers & Technology 34, No. 3, p. 324.

19 Lahilote, H.S. (2020). Legal Transplant in the Substance of the Authority of Religious Courts in Indonesia. JL Pol'y & Globalization 93, p. 135.

20 Suhargon, R., Anggeraini, F. (2021). The Juridical Review of Law Number 1 of Year 1974 on Marriage and the Compilation of Islamic Law Concerning Status of Different Religious Wedding Abroad. Legal Brief 10, No. 2, p. 198.

marriage is a translation of the words nakaha and zawaja.[21] These two words are terms in the Qur'an to refer to marriage.

In the context of human creation, Allah SWT created His creatures in pairs based on the sunnatullah. In this regard, Marcia Inhorn views marriage as making a person have a partner.[22] The word of God in the letter al-Żāriāt, verse 49 reads:

> *"And we created everything in pairs so that you may remember the greatness of Allah".*

This is confirmed by Allah in the Qur'an Surah al-Nisa' verse 1, which reads:

> *"O mankind, fear your Lord who created you from a single person, and from him Allah created his wife; and from both of them Allah has produced many males and females. and fear Allah who by (using) His name you ask one another, and (maintain) friendly relations. Verily, Allah is always watching over you".*

Scholars define marriage in different syar'i terms. Beni Ahmad Syaebani quoted the opinion of Slamet Abidin and Aminudin, detailing several meanings of marriage according to several scholars, namely:[23]

1. Hanafi scholars define marriage or marriage as a contract that is useful for having mut'ah on purpose. This means that a man can control a woman with all his limbs to get pleasure and satisfaction.
2. Syafi'iyah scholars say that marriage is a contract using the pronunciation of *nikāh* or *zauj*, which has the meaning of possessing. This means that with marriage, a person can get pleasure from his partner.
3. Malikiyah scholars say that marriage is a contract that contains mut'ah to achieve satisfaction by not requiring a price.
4. Hanabilah scholars say that marriage is a contract by using inkāh and *tazwīj* pronunciation to get satisfaction. That is, a man can get satisfaction from a woman and vice versa. In this sense, there are words belonging to the meaning of the right to own through a marriage contract. Therefore, husband and wife can take advantage of each other to achieve life in their household, which aims to form a sakinah mawaddah wa rahmah family in the world.

However, the Hanafi, Malikiyah, Syafi'iyah, and Hanabilah scholars have different opinions in giving the connotation (emphasis) on the ownership issue caused by the existence of the contract. For Hanafiyah scholars, the marriage contract has the consequence that the husband has the right to have pleasure (*milk al-mut'ah*) from his wife. For the Syafi'iyah scholars, the contract results in the husband having the opportunity to do *waṭi'* (intercourse) with his wife, while according to Malikiyah, the contract results in ownership for the husband to get delicacy from his wife. Meanwhile, Hanabilah scholars emphasize the take and give aspect of the benefits of the marriage contract for husband and wife.[24]

In terms of the practice of worship, marriage is a sunnah practice that is firmly prescribed by the Qur'an and the Prophet Muhammad, in line with sexual character and in accordance with a lawful and clean channel to obtain offspring who can maintain self-respect, joy of heart. , and inner peace. This small understanding refers to several provisions of fiqh and positive law in the form of the age of the bride and groom at marriage, namely, the child who is not yet mature and is not psychologically ready to

21 Hafidzi, A., Hani, M.H.M. (2020). Wahbah Zuhaili's and Sayyid Sabiq's Perspective on The Principles of Marriage Contract in Indonesia. Al-'Adalah 17, No. 1, p. 197.

22 Inhorn, M.C., Birenbaum-Carmeli, D., Vale, M.D., Patrizio, P. (2020). Abrahamic traditions and egg freezing: Religious Women's experiences in local moral worlds. Social Science & Medicine 253, 112976.

23 Saebani, B.A. (2021). Marriage in Islamic Law and Law. Jakarta: Pustaka Setia, pp. 11-12.

24 Hassan, M.H. (2017). Debating Various Forms of Civil Disobedience in Islam. Civil Disobedience in Islam. Singapore: Palgrave Macmillan, p. 85.

carry out household responsibilities.[25] Because the provisions of fiqh are qualitative. In addition, marriage is the path chosen by God for His creatures, especially humans, to reproduce and preserve their lives. In this regard, Allah SWT created humans not only in their perfect physical form but also equipped with software in the form of natural basic sexual instincts, the need for a partner, and feelings of affection for the opposite sex.[26] Therefore, Allah also provides it with suggestions, commands, and prohibitions so that humans can manage the software in the form of marriage.

The Urgency of Marriage Age in the Islam Perspective of Imam Madhhab

Islamic law does not regulate the minimum age limit for marriage. The absence of religious provisions regarding the minimum and maximum age limits for marriage is assumed to provide leeway for humans to regulate it.[27] The Qur'an indicates that the person who is going to get married must be ready and able. The word of God in QS. al-Nūr: 32:

> *"And marry those who are alone among you, and those who are worthy of marriage from your male slaves and your female slaves. If they are poor, Allah will enable them with His bounty. And Allah is Extensive (His gift) and All-Knowing".*

Furthermore, the Messenger of Allah, in his words, advised young people to carry out marriages on the condition that they had the ability.

> *"It was narrated from Alqamah r.a that he said: I once walked in Mina with Abdullah r.a, we met Usman r.a, who then approached Abdullah. After talking for a while, Usman asked: "O Abu Abdurrahman, will I set you up with a young woman? Hopefully it will be able to remind you of your good old days". Hearing the offer, Abdullah replied: What you say is in line with what the Messenger of Allah said to us: "O youth! Whoever among you has the physical and mental ability to marry, let him marry. Indeed, marriage can keep the eye and maintain honor. So whoever is not capable, let him fast because fasting can keep lust. (H.R Bukhari dan Muslim).*[28]

Indirectly, the Qur'an and Hadith acknowledge that maturity is very important in marriage. Adult age in fiqh is determined by physical signs, namely signs of puberty in general, among others, the perfect age of 15 (fifteen) years for men, *Ihtilām for men, and menstruation for women is at least 9 (nine) years old*.[29] With the fulfillment of the criteria for puberty, it is possible for someone to get married. So a person's maturity in Islam is often identified with baligh. If there is an abnormality or delay in physical or biological development, so that at the usual age a person has issued semen for men or issued menstrual blood for women but the person has not yet issued the signs of maturity, then start the return period based on the age that a person usually shows signs of puberty. The start of the age of puberty between one person and another is influenced by differences in the environment, geography, and so on.[30]

The size of maturity as measured by the criteria for puberty is not rigid. That is, if it is casuistically very urgent, the two prospective brides must be immediately married, as a mani-

25 Noor, Z., Lee, N. (2021). Dawud al-Fatani's Thoughts on Marriage in Īḍāḥu l-Bāb li-Murīdi l-Nikāḥ bi-l-Ṣawāb. Hawwa 1 (aop), p. 1.

26 Perry, M.E. (2020). Gender and disorder in early modern Seville. United Kingdom: Princeton University Press, p. 14.

27 Plümper, T, Neumayer, E. (2020). Human rights violations and the gender gap in asylum recognition rates. Journal of European Public Policy, p. 3.

28 Ghazaly, A.R. (2019). Fiqh munakahat, Jakarta: Prenada Media, p. 11.

29 Sitorus, I.R., Yusmita, Y. (2020). The Age of Marriage on Interdisciplinary Islamic Law Perspectives. Jurnal Ilmiah Mizani: Wacana Hukum, Ekonomi, dan Keagamaan 7, No. 1, p. 4.

30 Bougnères, P. (2002). Genetics of obesity and type 2 diabetes: tracking pathogenic traits during the predisease period. Diabetes 51 (suppl 3), S295-S303.

festation of the sadd *al-zārī'ah* method to avoid the possibility of greater harm. Scholars have different opinions on setting age limits for people who are considered adults. Syafi'iyah and Hanabilah scholars state that boys and girls are considered mature when they reach the age of 15 years.[31] Hanafiyah scholars stipulate that the age of a person is considered baligh as follows: boys are considered balig when they are 18 years old, and 17 years old for girls. Meanwhile, scholars from the Imamiyyah group state that boys are considered mature when they are 15 years old, and 9 years for girls. For girls who are 9 years old, there are two opinions. First, Imam Malik, Imam Shafi'i, and Imam Abu Hanifah said that a girl who is 9 years old is the same as an 8-year-old child, so that she is considered not yet mature. Second, a child is considered to have reached puberty or an adult because it has been possible to menstruate, so that it is permissible to marry even though there is no agency for him as an adult woman has.[32]

Considering that marriage is a very strong contract or agreement (*mīśaqan galīẓan*), which requires everyone who is bound in it to fulfill their respective rights and obligations with full justice, harmony, and balance. Marriage as a form of legal imposition is not enough just to require balig (age enough). The legal imposition (*taklīf*) is based on reason (*aqil* and *mumayyiz*), balig (age enough), and understanding.[33] This means that a person can only be burdened by law if he is reasonable and can understand well the taklif addressed to him. Regarding the principle of maturity in marriage, scholars tend not to discuss the age limit for marriage in detail, but rather to discuss the law of marrying young children. Marriage of young children in fiqh is called *agīr* or *agīrah* marriage or *zawāj al mubakkir*.[34] *agīr* or *agīrah* means small. However, what is meant *by "agīr"* or *"agirah"* are men and women who are not yet mature. Underage marriage cannot be separated from the right of ijbār, namely the right of the guardian (father or grandfather) to marry off his daughter without having to obtain prior approval or permission from the girl to be married, as long as she is not a widow.[35]

A father can marry off his young and virgin daughter as long as she is not yet mature without his permission, and there are no khiyar rights for the daughter if she has reached puberty. On the other hand, fathers are not allowed to marry off their young sons. However, a daughter can not immediately be fertilized by her husband if she is still too young, so that she is mature enough to have a relationship like husband and wife.

Scholars who allow guardians to marry off their underage daughters are generally based on the history that Abu Bakr ra. Marry Siti 'Aisyah ra. with the Messenger of Allah.

> *"Have told me Yahya bin Yahya, Ishaq bin Ibrahim, Abu Bakr, and Abu Kuraib. Yahya and Ishaq have said: Have told us and said al Akhrani: Has told me Abu Mu'awiyah from al A'masyi from al Aswad from 'Aisha ra. said: Rasulullah SAW married me when I was 6 years old, and lived with me when I was 9 years old, and he died when I was 18 years old.* (HR. Muslim).[36]

Abu Bakr ra. had married 'Aisyah to the Messenger of Allah when she was a child without her prior consent. Because at that age, his

31 Zulaiha, E., Mutaqin, A.Z. (2021). The Problems of The Marriage Age Changing in Indonesia in the Perspectives of Muslim Jurists and Gender Equality. Hanifiya: Jurnal Studi Agama-Agama 4, No. 2, p. 99.

32 Melnikas, A., Ainul, S., Ehsan, I., Haque, E., Amin, S. (2020). Child marriage practices among the Rohingya in Bangladesh. Conflict and health 14, No. 28, p. 8.

33 Analiansyah, A. (2017). The Development of Legal Subjects in Islam and Its Influence on the Development of Fiqh: A Study of Islamic Legislation in Indonesia. Aricis Proceedings, p. 1.

34 Afrianty, D. (2020). Rising public piety and the status of women in Indonesia two decades after reformasi. TRaNS: Trans-Regional and National Studies of Southeast Asia 8, No. 1, p. 66.

35 Sultana, S., Guimbretière, F., Sengers, P., Dell, N. (2018). Design within a patriarchal society: Opportunities and challenges in designing for rural women in Bangladesh. Proceedings of the 2018 CHI Conference on Human Factors in Computing Systems. No. 536, p. 5.

36 Muslim, H. (2014). Shahih Muslim, Juz I. Bandung: Dahlan, p. 45.

agreement cannot be considered perfect. However, regarding the marriage of 'Aisyah ra. With the Prophet Muhammad, some scholars are of the opinion that this is an exception or specialty for the Messenger of Allah himself, as the Messenger of Allah was allowed to have more than four wives, which his followers were not allowed to follow. Another opinion states that the marriage of the Prophet with 'Aisyah is more motivated by da'wah. However, the right of a father or grandfather's *ijbār* cannot be exercised at will.

Ulama' Syafi'iyah said that to be able to marry underage boys, it was necessary to have benefit (good interests). As for girls, several conditions are needed, including:[37]

1. There is no real enmity between the daughter and her guardian, her father, or her grandfather.
2. There is no real enmity (hatred) between her and her future husband.
3. The prospective husband must be kufu (appropriate or equivalent).
4. The prospective husband can give a proper dowry.

According to Ibn Shubrumah, he has a different view from the view of the majority of scholars above. Ibn Shubrumah is of the view that it is not recommended for boys or girls to be married. They can only be married after reaching the age of puberty and through the explicit consent of the interested parties.[38] The word of Allah SWT explains about age in QS. Al-Nisā': 6:

> "*And test the orphans until they are old enough to marry. Then, if in your opinion they are intelligent (good at maintaining wealth), then hand over to them their wealth*".

Underage marriage is not recommended, considering that they are not considered to have the ability to manage property (Rusyd). Besides, they don't need marriage either. They fear that they will not be able to fulfill the obligations that must be carried out in life as husband and wife, especially in managing household finances. As for the little girl who is widowed (either because her husband died or divorced), then her guardian is not allowed to marry her back, as well as for someone else (guardian other than the father) allowed to marry her until she is mature.[39] So, a young child who is a widow has the same position as an adult widow, that is, he gives permission when he is about to be married.

> "*Has told us Qutaibah bin Sa'id: Has told us Sufyan from Ziyad bin Sa'ad from Abdillah ibn Al Fadhli: Have heard Nafi' bin Jabir with news from Ibn 'Abbas ra. that the Prophet SAW said: A widow has more rights over herself than her guardian and a virgin must be with her permission and her permission is her silence".* (HR. Muslim).[40]

The Indonesian Ulema Council gave a fatwa that the age of marriage eligibility is the age of ability to act and receive rights (*ahliyat al adā' and expertyyat al wujūb*).[41] *Ahliyyat al adā'* is the nature of a person's legal ability to act, who has been considered perfect to be responsible for all his actions, both positive and negative. While *ahliyyat al wujūb* is the nature of a person's ability to accept the rights that are his rights, and is not yet capable of being burdened with all obligations. The scholars of the madhhab agree that menstruation and pregnancy are evidence of a woman's puberty, pregnancy that occurs due to fertilization of the ovum by sperm, while menstruation has the same position as releasing semen for men.[42] The opinion

37 Wiludjeng, H. (2020). Marriage Law in Religions. Jakarta: Penerbit UKI Atma Jaya, p. 10.

38 Efevbera, Y., Bhabha, J. (2020). Defining and deconstructing girl child marriage and applications to global public health. BMC Public Health 20, No. 1, p. 7.

39 Baugh, C.G. (2017). Early Ḥanafī Thought. Minor Marriage in Early Islamic Law. Brill, Vol. 41, pp. 78-102.

40 al-Asqalāniy, A. Fath al-Bāry bi Syarh Shahīh al-Bukhāry juz IX. Beirūt: Dār al-Ma'rifah, t, th, p. 184.

41 Indonesian Ulema Council. (2009). Ijma' Ulama (Decision on Ijtima' Ulama of the Indonesian Fatwa Commission III of 2009). Jakarta: Majelis Ulama Indonesia, p. 78.

42 Gesink, I.F. (2020). Intersex in Islamic medicine, law, and activism. The Routledge Handbook of Islam and

of Imam Maliki, Imam Shafi'i, Imam Hambali, and Imamiyah is that the growth of armpit hair is proof of a person's maturity. Meanwhile, Imam Hanafi rejects this opinion because armpit hair is no different from the hair that grows on other body parts.

Balig has the meaning until or clearly. Namely, children who have reached a certain age where it becomes clear to them all the affairs or problems they face. His mind has been able to consider or clarify what is good and what is bad. The puberty period is the adult period of everyone's life. Signs of maturity, when a man has released semen and when he has released menstrual blood or has become pregnant for a woman.[43] The start of the legal age of puberty can vary from one person to another, due to differences in environment, geography, and so on. The legal limit for puberty is when a person is 12 years old for a boy and 9 years old for a girl.

While the final limit among the scholars, there are differences of opinion. According to Imam Abu Hanifa, after a person reaches the age of 18 years for men and the age of 17 years for women.[44] From the above view, Abu Hanifah's thoughts are included in the maximum in determining a person's age. So that view is the basis for the regulation of the Marriage Law in the State of Indonesia. For more details, we can see the minimum age limit for marriage in various Islamic countries as a result of the study of the fuqaha, as shown in the following table:[45]

Table 1.
Comparison of Marriage Age in Different Countries

NO	COUNTRY	MALE	FEMALE
1	Algeria	21	18
2	Bangladesh	21	18
3	Indonesia	19	19
4	Iraq	18	18
5	Libanon	18	17
6	Libya	18	16
7	Malaysia	18	16
8	Morocco	18	18
9	Egypt	18	16
10	Pakistan	18	16
11	Somalia	18	18
12	Syria	18	17
13	Tunisia	19	17
14	Türkiye	17	15
15	Yemen Selatan	18	16
16	North Yemen	15	15
17	Jordan	16	15

This problem is real because the case of marriage, in addition to entering into the sunna of worship called "*ubudiyah*", and is a worship between humans called "*mu'amalah*" which, in Islamic teachings, is formed in global regulations. With this in mind, the baliq category to be able to hold a marriage must be able to interpret the term ijtihadiyah meaning, because it must carry out thoughts related to the problem of limiting the age of marriage, adjusting the circumstances of the place and time of the regulations so that they can be implemented.

The perspectives of the jurists are different regarding the limitation of the age of marriage, due to the textual pradikma of the texts, both the Qur'an and hadith, as well as knowledge in contextuality based on the perspective of tradition, cultural perspective, social situation perspective, and physical perspective. The jurists of fiqh experts provide what requirements if a person wants to get married, he is already baliq.

Gender. Routledge, pp. 116-129.

43 Rowe, R. (2020). The reproductive microbiome: an emerging driver of sexual selection, sexual conflict, mating systems, and reproductive isolation. Trends in ecology & evolution 35, No. 3, p. 224.

44 Ullah, N., Abd Aziz, S.N.B., Idrees, R.Q. (2021). Child Marriages: International Laws and Islamic Laws Perspective. Journal of Educational and Social Research 11, No. 3, p. 60.

45 Khalfaoui, M., Jones, J. (eds.). (2020). Islamic Family Law in Europe and Islamic World: Current Situation and Challenges. Germany: Carl Grossmann Verlag, p. 91.

The characteristics of baliqh that are used are seen in body growth, namely, menstruation has occurred for women and men have wet dreams. However, the jurists have set limits in terms of age. But it can be remembered, both parents have an obligation to marry off their children who are not yet mature. The appropriate age provisions applied to the Marriage Age Maturation plan are a good input in realizing *Maqasid Syariah* to foster households.[46] The application of this can regulate the relationship between male and female partners; in keeping offspring, creating a *sakinah, mawaddah, warahmah* family; keep the lineage, maintain diversity in the family; set a good relationship model in the family, and regulate the economic aspect in the family.

According to Ibn Kathir, the age for marriage has arrived, not based on a mature age, but on the maturity of the mind. Rasyid Ridho stated in Bulug al-Nikah that the arrival of a person to the age of marriage is to have a wet dream for men and menstruation for women. At that age, one can conceive an embryo and create a child to carry on the offspring, allowing one's soul to immediately get married. At that age, every individual has had the burden of the regulations recorded in Islamic religious law that have been determined, both charity, worship and muamalah, and other worship. Interpreting the word "*rusyd*" means the feasibility of a person in carrying out *tas'arruf* so that he can take benefits and avoid those that are detrimental. This is a sign of the perfection of his mind.[47]

Rashid Ridho agrees with Ibn Katsier's opinion on the implementation of "*rusyd*". This explains that until someone has reached the age of marriage, see the development of the body, which is already menstruating for women and wet dreams for men. According to Buya Hamka, the word Bulug al-Marriage is defined as having reached puberty. Baliqh, or maturity of one's mind, is not focused on the age of each individual, but focuses on intelligence (intelligent) or mature thinking.[48] It is also mentioned that someone whose age is not mature allows him to be intelligent, and some people have reached the age of puberty, sometimes his thoughts are not necessarily mature.

Buya Hamka's opinion, which prefers to take the middle path, stated that the age limit is very relative, because each child is certainly not the same. In this case, the intelligence of the mind becomes the main focus, so that the time is ready for marriage. From various perspectives, according to the study, Ibn Kathir's opinion emphasizes natural maturity and has reached baliqh. According to Rasyid Ridho and Buya Hamka, it focuses on the maturity of the mind, which looks at the behavior and nature in the life of each individual.[49]

Looking at the efforts above, it explains that there have been differences in views between classical scholars and contemporary scholars in answering the question of whether or not someone is allowed to get married. The essential purpose of marriage is that it can meet most of the physical and spiritual needs and pass them to the offspring. Therefore, some things do not yet exist for a child who is not in a state of puberty. He focused his goal on marriage. In this case, Ibn Syubrumah tried to escape from the textual confines. To understand this problem, it is seen from a historical, social, and cultural review that exists in the community. In understanding the marriage of the Prophet Muhammad SAW with Aisyah r.a (who at that time Aisyah was only six years old), Ibn Syubromah's explanation said that there was a special rule for Nabiyullah Muhammad SAW that all Muslims should not follow in the teachings of Islam.[50]

46 Lei, M.K., Beach, S.R.H. (2020). Can we uncouple neighborhood disadvantage and delinquent behaviors? An experimental test of family resilience guided by the social disorganization theory of delinquent behaviors. Family process 59, No. 4, p. 1801.

47 Rasyid, R.M. (2000). Tafsir al-Manar, Juz I. Mesir: Dar Al-Qutub, pp. 396-397.

48 Trakic, A., Tajuddin, H.H.A. (2021). Islamic Law in Malaysia: The Challenges of Implementation. Singapore: Springer Nature, p. 43.

49 Rasyid, R.M. (2000). Tafsir al-Manar, Juz I. Mesir: Dar Al-Qutub, pp. 396-397.

50 Sawai, R.P. (2020). Inculcating the Sense of Modesty (Al-Haya') in Youth from the Perspectives of the Quran

According to the author of a statement from contemporary jurists, it is better to look at so that the requirements for marriage are not seen in the form of adult body development (baliqh), can also be seen in the perfection of thought and spirituality (*rusyd*), in paying attention to the problem of limiting the age of marriage from various perspectives. With this, marriage does not require mental readiness (biological), but psychological readiness (physical), social readiness, religious readiness, and even readiness in spiritual intelligence. Changes that occur at the age of marriage adjust from the set of all principles, thus enabling a person to be ready to live in a household that is in accordance with Islamic advice. Thus, from actions based on Islamic law, it is very contrary to the laws and regulations in Indonesia, so in the view of Islam, actions like this can be used as a form of action against national law. From that, it is clear that the studies from previous fiqh books or books were in harmony and appropriate at that time, while at this time, further in-depth discussion is needed to review the issue of legal content in legislation to realize the framework for achieving what is meant by Islamic law reform, especially at this time in the era of globalization of human civilization, which is increasingly advanced.

Existence Analysis of Law Number 16 of 2019 on Age Of Marriage in Family Law Perspective

According to Law Number 1 of 1974, it is explained that the meaning of marriage is an inner and outer bond between a man and a woman as husband and wife, to form a happy and eternal family based on God Almighty. If it is associated with child marriage that is not psychologically mature, then this can trigger disharmony and so on. If it is associated with child marriage, which is not psychologically mature, then this can trigger disharmony. The rules are explained in Law Number 16 of 2019 regarding the amendment to Law Number 1 of 1974 concerning marriage. Article 7, paragraph (1) of the Law states that marriage can only be carried out if the male party reaches the age of 19 years and the female party has reached the age of 19 years. The provisions on the age limit are based on the benefit of the prospective bride and groom's household. With this age limit, it is hoped that the maturity of the two prospective brides can be achieved in running their household. Maturity in question is the maturity of the age of marriage, maturity in thinking, and acting, so that the purpose of marriage, as mentioned above, can be carried out properly.

If examined further, the provisions regarding the age limit for marriage in the article appear to be more concerned with physical and biological readiness. This has not led to considering the psychological readiness of the two prospective brides. According to researchers, the age set by law, namely 19 years for boys and 19 years for girls, is still classified as a juvenile stage, where a person at this time is still in the process of growing in reaching maturity. The process of developing maturity in question includes mental, emotional, social, and physical maturity. Psychologically, adolescence is a time when children feel they are on the same level as older people. Does not include children, and also does not include adulthood. Therefore, adolescence is often called a period of self-discovery.

In relation to building a happy family, the age limit regulation in the law makes it impossible to be able to consult and decide matters wisely between them, and the lack of support for their partners, due to their weak way of thinking. The purpose of marriage is to create happiness in the family. It can be achieved when the marriage is carried out by a couple who are in adulthood, which is 21 years old. The ability to master and control emotions, able to express emotions in more acceptable ways, can be achieved when someone is 21 years old, when someone enters adulthood. Although there are still emotional tensions at this time, which are related to the

and Sunnah. Ma'ālim al-Qur'ān wa al-Sunnah 16. No. 2, p. 25.

problems they experience, such as issues of position, marriage, finances, and so on, someone who has reached that age is more able to control his emotions. When an adult takes action, he not only relies on the impulse of lust, but also involves his mind. Channeling emotions by involving reason and common sense is a characteristic of adult behavior.

In Islamic law itself, the age limit for a person who gets married is not clearly and unequivocally defined in the Qur'an and Hadith. Both of them only provide signs, conditions, and guesses about how a person is considered worthy to carry out a marriage. Muslims are given the freedom to set a minimum age limit for marriage, so that the minimum age limit for marriage is handed over to the perpetrators without violating the conditions that have been determined, and also adjusted to the social conditions in which the law is enforced. In another view, Islamic law, which regulates family affairs in particular, has been modified to be in the amendment of Law Number 16 of 2019 concerning marriage limits, which is the result of the collection and selection of various expert opinions in the field of fiqh. Of course, all the rules contained in it have reflected human values, respecting the rights of women, evenly distributed nuances of grace and wisdom, and are able to realize the benefit of all mankind.

Maqāsid Syar'ah itself, which is the goal of Islamic law, has five main objectives (maintaining religion, soul, lineage, property, and reason). Everything that supports the achievement of the five main goals, he supports it and everything contrary to one of the five goals, he prevents. In marriage, the protection of offspring is one of the elements maintained by the Shari'ah to maintain and protect offspring in the world, which is to be realized from the Marriage Law. In accordance with the objectives of Islamic law, namely taking benefit and avoiding harm (*jalbu al-maṣāliḥwa dar'u al-mafāsid*). Therefore, marriages that are carried out at a young age need to be avoided to physically save the mother and baby from unwanted things. According to al-Ṣatiby, the shari'a stipulated as in the Marriage Law, especially in Article 7 regarding the age limit for marriage, must be able to realize the benefit of the servant (*maṣāliḥal-'ibād*), both in this world and in the hereafter. This benefit, in al-Ṣatibi's view, becomes *Maqāsid Syar'ah*. In other words, the determination of the rule of law, both in its entirety and in detail, is based on a motive for establishing the law, namely, realizing the benefit of the servant.

Mental readiness is necessary in dealing with various problems that will be experienced by married couples in their household journeys. The ability to deal with various problems that will arise in the household will be difficult when both are still in the category of teenagers aged 19 years. Therefore, adulthood is a requirement for everyone who will carry out marriage to maintain his mental readiness, and adulthood only occurs when a person is 21 years old. What is expected when the marriage occurs in adulthood, the husband and wife have been able to take responsibility, create good relationships, form a balanced relationship between the two (*mu'*āsyarah bi al-ma*'rūf*), and think with common sense. Intellect is an important part of the purpose of the Shari'ah that must be protected from its damage. Preventive efforts that are carried out by Islamic law are actually aimed at increasing the ability of the mind and guarding it from various things that harm it.

The age of marriage in Islam is very concerned with the maturity between the two prospective husbands and wives. This has resulted in a prohibition against underage marriages as agreed in the legislation. This prohibition also cannot be solved by the existence of a dispensation, because the dispensation is only a case that cannot be comprehensive on the permissibility of underage marriage. Although there is a minimum age limit for marriage, in this case, it appears that Law No. 16 of 2019 on amendments to Law No. 1 of 1974 concerning marriage in Article 7 paragraph (1) has equated the age of marriage. On the one hand, it emphasizes that to get married, someone who has not reached the age of 19 years must obtain parental permission, while on the other hand, it is stated

that marriage is only permitted if the man has reached the age of 19 years and the woman has reached 19 years. The difference is that if you are less than 19 years old, parental permission is required, and if you are less than 19 years old for men and 19 years old for women, you must get permission from the court. This is also reinforced in the Compilation of Islamic Law.

The different age limits of maturity in the Complications of Islamic Law that should be today should not occur. First, in the Complications of Islamic Law Article 98 Paragraph (l) related to child care, which reads: "The age limit for a child who can stand alone or as an adult is 21 years, as long as the child is not physically or mentally disabled or has never been married". While the rules of maturity in Law no. 1 of 1974 there are also have differences. For example, the first Article 6 Paragraph (2) reads: To carry out a marriage, a person who has not reached the age of 21 (twenty-one) years must obtain the permission of both parents.

From the explanation of the maturity rules from both the KHI and Law Number 16 of 2019, it can be concluded that the Complications of Islamic Law are more likely to identify maturity at the age of 21 years, while Law Number 16 of 2019 is more likely to determine maturity at the age of 19 years. However, strangely, the two regulations both set a marriage age limit of 19 years for men and 19 years for women. At the age of 19, if you look at the rules of maturity in the Compilation of Islamic Law is not considered an adult and can be said to be a minor. Meanwhile, when viewed from the maturity rules of Law Number 16 of 2019, the age of men and women can be said to be adults. This later became the point of critical analysis of researchers related to the marriage age of Indonesian Muslims.

The researcher concludes that if the age limit for marriage in Indonesia remains at 19 years for men and 19 years for women, while the maturity review in the Complications of Islamic Law is stated to be 2l years and in Law Number 16 of 2019 it is stated 19 years, then this is need to be discussed again. When the age of men is set at 21 years, it means referring to the maturity provisions set by the Complications of Islamic Law, while when the age of women is set at 19 years, it means referring to the maturity provisions referred to by Law Number 16 of 2019. Thus, the rules of maturity in this matter of marriage will be more compact and sustainable. Thus, for the benefit of the household to be built, researchers believe that 21 years is the appropriate age for those who are getting married. Not at the age of 19, who are still classified as teenagers who need more learning in all aspects of their lives. Someone who reaches the age of 21 years is considered to have reached maturity in his attitude, capable of acting, and responsible for what he decide. Maturity in question is the maturity of the age of marriage, maturity in thinking, and acting, so that the purpose of marriage, as described in the law, is to form a harmonious and eternal household life can be carried out properly.

The purpose of Allah in enjoining His law is to maintain the benefit of humans both in this world and in the hereafter. To realize the benefit, based on the research of ushul fiqh experts, 5 main elements must be maintained and realized, the five points are:[51]

1. Maintaining Religion (*hiẓh al-dīn*)
   Maintaining religion based on its importance can be divided into three levels:
   a. Maintaining religion at the dharuriyah level, namely maintaining and carrying out religious obligations that are included in the primary level, such as performing the five daily prayers. If the prayer is ignored, then the existence of religion will be threatened.
   b. Maintaining religion at the Hajiyah level involves carrying out religious provisions to avoid difficulties, such as congregational and qasar prayers for people who are traveling. If this provision is not implemented, then it does not threaten the existence of religion,

51 Helim, A. (2019). Maqāṣid Al-Sharī'Ah versus Uṣūl Al-Fiqh. Yogyakarta: Pustaka Pelajar, p. 24.

but we only make it difficult for people who do it.

c. Maintaining religion at the tahsiniyah level, namely following religious instructions to uphold human dignity, while at the same time completing the implementation of obligations to God, for example, cleaning the body, clothes, and place.

2. Nurturing the soul (*hifẓ an-nafs*)
   Nurturing the soul based on the level of importance is divided into three levels:
   a. Nurturing the soul at the dharuriyah level, such as meeting basic needs in the form of food to sustain life.
   b. Maintaining the soul at the hajiyat level, such as the permissibility of hunting animals to enjoy delicious and halal food, if this is ignored, then it does not threaten the existence of human life, but only makes life difficult.
   c. Maintaining the soul at the level of tahsiniyat as stipulated in the procedures for eating and drinking.
3. Nurturing reason (*hifẓ al-`aql*)
   Maintaining reason in terms of importance is divided into 3 levels:
   a. Maintaining reason at the dharuriyah level is like drinking alcohol because it threatens the existence of reason.
   b. Maintaining reason at the level of hajiyat, as it is recommended to seek knowledge.
   c. Maintaining the mind at the level of tahsiniyat is like avoiding imagining and listening to things that are not useful.
4. Nurturing offspring (hifẓ an-nasb)
   Caring for offspring in terms of the level of need is divided into three:
   a. Nurturing offspring at the dharuriyah level, as it is prescribed for marriage and forbidden to commit adultery.
   b. Maintaining descendants at the hajiyat level, as stipulated in the provisions of mentioning the dowry at the time of the marriage contract.
   c. Maintaining offspring at the level of tahsiniyat, such as khitbah and walimah in marriage.
5. Maintaining property (*hifz al-mal*)
   Maintaining treasure can be divided into 3 levels:
   a. Maintaining property at the Dharuriyah level, such as the Shari'a regarding the procedures for property ownership and the prohibition of taking people's property illegally.
   b. Maintaining property at the hajiyat level, such as the Shari'a on buying and selling regarding the sale and purchase of goods.
   c. Maintain property at the level of tahsiniyat, such as the provisions to avoid deception or fraud.

The *maqāṣid syarīah* above is a very clear picture of how to determine the ideal age limit for marriage. The ideal age limit is when marriage is carried out at that age, it is most likely that the *Maqāṣid syarīah* and the objectives of implementing Islamic marriage law will be realized. On the other hand, the age that is not ideal for marriage is when the marriage takes place, where it is likely that the goals of marriage will not be achieved, even if they are achieved, they will not reach their maximum limit. This is the principle of the ideal age limit for marriage.

If you look at the Islamic law that was in effect at the time of the Prophet, the issue of age for marriage is not urgent, because the Prophet is a human being who is *ma'um* (awakened from sin) while the companions as explained by the Prophet, are like the stars if we follow in his footsteps, then we will get clear instructions. Therefore, regardless of the age of marriage for men and women, it is not an important issue to realize the objectives of Shariah law enforce-

ment of Islamic marriage. While the rules that apply in Law Number 16 of 2019, article 7 paragraph (1) concerning marriage, that the minimum age for marriage for women is 19 years and 19 years for men, this is also based on the needs of the Indonesian people, and as a middle ground. from an age limit that is too low and an age limit that is too high. But the question is, is the actual age limit for marriage ideal for realizing the goal of legalizing marriage? Although Islamic law and positive law are declared valid, they have not been said to be ideal because they are considered unable to fully realize the goals of Sharia.

The ideal marriage age is a marriage that is carried out by a man who is at least 25 years old and a woman at least 20 years old. The ideal age limit is considered to be ready and mature from the medical, psychological, social, and, of course, religious aspects, so that it can create a family in accordance with the *Maqāṣid syarīah* marriage law. This age limit is considered to be ready both in terms of health and emotional development to face a just family life. Thus, justice in determining the age of marriage can be interpreted as goodness, virtue, and truth, which is a moral obligation that binds members of society with one another. Justice as a value is a goal that is mutually agreed upon by members of the community and strives to achieve it for the sake of justice itself. Another meaning of justice is as a result or a decision obtained from the application or implementation of the law. Justice is also defined as an ideal element, namely as an ideal or an idea contained in all laws.

An understanding of the foregoing shows that in the life of society and the state, what is in the common interest will be easily achieved if society is organized according to the ideals of justice. Justice demands that all people be treated equally, so justice is a value that embodies a balance between parts of society, between personal goals and common goals. This shows that one form of universal legal ideals is the demand for justice. The question of how to determine whether the law is fair or not. It does not depend on or is not measured by the objective criteria of justice, but is measured by what society considers fair. To understand the law that reflects the community's sense of justice, one must first understand the true meaning of the law. According to the view held in the legal science literature, the meaning of the law is to realize justice in human life. This meaning will be achieved by the inclusion of the principles of justice in the regulation of living together.

The regulation of people's rights and freedoms using the criteria of justice shows that in humans, there is a feeling of justice that brings people to an assessment of the factors that play a role in the formation of law. This realization of the feeling of justice is not only owned by citizens but also by the authorities. Therefore, by building on the principles of justice, justice can be referred to as legal principles or legal ideas. Every community must get its rights proportionally to achieve social justice for the community. In terms of age determination, people have the right to get the justice they aspire to, because justice belongs to a person from the beginning and must return to him in the justice process, starting from physical and moral interests, relationships, and the quality of various things, both familial and social. economic, physical, and intellectual work, to things that were not previously owned or owned but were later obtained through legal means.

However, because this age limit is not included in the legal requirements for a marriage, it is certainly not easy to disseminate this provision quickly and have it accepted by all parties. However, of course, this provision cannot be enforced absolutely; therefore, the existence of dispensation for those who wish to marry under the provisions of the minimum age limit that has been determined seems to still be able to be accommodated. However, of course, the government must provide clear limits on the reasons that can be used for prospective brides who are not old enough to hold a marriage, so that the legal certainty of a law can be ensured. It can be concluded, what needs to be considered is the issue of benefit, and its impact is very relevant in the public's attention. This

state of the Republic of Indonesia transforms the formation of legislation in order to make citizens aware of the law. Throwing away justice to pursue togetherness does not take risks and deliberately avoids evil so that it is lighter, even though it is threatened by even more serious harm, should be considered carefully.

Avoiding inequality in the age limits of men and women in marriage, providing encouragement and role models regarding the revision of the Marriage Law, the first step in realizing togetherness to protect rights before children in Indonesia. This method prioritizes togetherness and closeness to children, so that making decisions regarding children's rights is the responsibility of the parties involved. From that, reforming the age of marriage in the marriage law is the basis for upholding justice in the existing law in Indonesia.

CONCLUSION

The concept of the age limit for marriage in national law is stated in the Law of the Republic of Indonesia Number 16 of 2019 amendments to Law Number 1 of 1974 concerning Marriage, from actions based on Islamic law, very contrary to the laws and regulations in Indonesia. From an Islamic point of view, actions like this can be used as a form of action against national law. From that, it explains that studies from previous fiqh books or books are in harmony and appropriate at that time, while at this time more in-depth discussion is needed to review the issue of the content of the law in the legislation to realize the framework for achieving what is meant by Islamic law reform, especially at this time in the era of globalization of human civilization which is increasingly advanced.

It needs to be reviewed, whether it has been effective or not yet applied to the community in marriage and how the community responds to the Marriage Law, The determination is very firm in determining what is stated in the Law of the Republic of Indonesia Number 16 of 2019 concerning Marriage, consideration of maslahah and harm is relative. The condition of the Republic of Indonesia requires stricter regulations. Creating justice for the common good so that it can create legal awareness in the Indonesian people in direct marriage regarding the provisions of adult age and marriage age for children.

The issue of the minimum age limit for marriage is an area of ijtihadiyah, so it is always open to changes when conditions, society, time, and place have demanded such changes. In this regard, the author offers to reconstruct this provision to 19 years for women and 21 years for men. This is based on consideration of aspects of biological, psychological, and socio-cultural maturity. As for men, at the age of 21 years, they have fulfilled the requirements to assume responsibility and are able (*rusyd*) to become family leaders.

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