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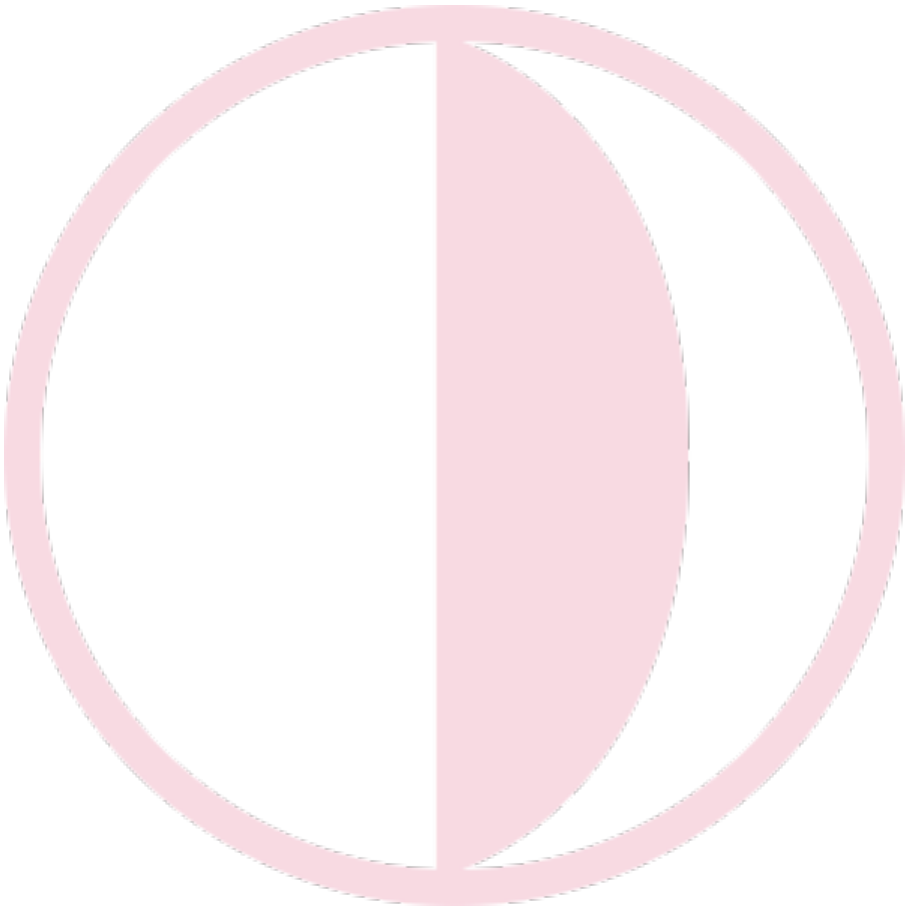

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BAŞ EDİTÖRDEN

Solem Juris'in ilk sayısı vesilesiyle okuyucularımızı, yazarlarımızı ve hakemlerimizi içtenlikle selamlamaktan büyük bir memnuniyet duyuyorum.

Solem Juris, hukuk ve hukuk biliminin gelişimine katkıda bulunmayı amaçlayan, uluslararası, hakemli bir akademik dergidir. *Solem Juris*'i yayımlama fikri; giderek artan uzmanlaşma, hızlı toplumsal dönüşüm ve teknolojik ilerlemelerle şekillenen akademik ortamda, çağdaş hukukun teorik ve pratik sorunlarını ele alan titiz araştırmaları ve eleştirel bakış açılarını bütünleştiren bir bilimsel platforma duyulan ihtiyaçtan doğmuştur. Dergimiz, kavramsal derinliği ve ampirik incelemeyi bir araya getiren, özgün, nitelikli ve uluslararası düzeyde çalışmaları yayımlayarak hukuk literatürüne anlamlı bir katkı sunmayı hedeflemektedir.

Solem Juris, hukuku bütüncül bir toplumsal olgu olarak ele alan disiplinlerarası çalışmalara özel önem atfetmektedir. Dergimiz yenilikçi metodolojik yaklaşımlar kullanan araştırmaların yanı sıra, teknolojik gelişmelerden kaynaklanan yeni hukukî sorunları ele alan; özellikle yapay zekâ ve bulanık mantığın hukuk alanındaki uygulamalarını inceleyen çalışmalara da açıktır. Güncel hukukî meseleleri ampirik saha çalışmaları yoluyla inceleyen ve bulguları eleştirel biçimde değerlendiren araştırmalar da derginin temel ilgi alanları arasında yer almaktadır.

Solem Juris, yılda bir kez Aralık ayında yayımlanan, açık erişimli, çevrimiçi bir akademik dergidir. Derginin yayın dilleri Türkçe ve İngilizcedir. Araştırma makaleleri, karar incelemeleri, çeviriler ve kitap değerlendirmeleri dâhil olmak üzere geniş bir akademik çalışma yelpazesine yer verilmektedir. Hakemli makalelerin tamamı, tarafsızlık ve akademik dürüstlüğü esas alan çift kör hakemlik sürecinden geçirilmektedir. Dergiye gönderilen çalışmaların daha önce yayımlanmamış, özgün bilimsel eserler olması zorunludur. Dergimizin bu ilk sayısında altı hakemli araştırma makalesi yer almaktadır.

Okuyucunun dergimizin adının anlamını merak etmeleri doğaldır. *Solem Juris* adı, fakültemizin öğretim üyelerinden Yrd. Doç. Dr. Erkut Ziya Sivrikaya tarafından önerilmiştir. Latince kökenli olup "Hukuk Güneşi" anlamına gelen bu adlandırma, temel bir düşünceyi yansıtır: Hukukun amacı adalettir ve adalet, güneş gibi, her yerde ve herkes için eşit biçimde doğmalı ve ışık saçmalıdır. Latince bir adın tercih edilmesi, yalnızca köklü Roma hukuk geleneğine bir saygı duruşu değildir. Bu aynı zamanda dergimizin evrensellik iddiasını da vurgulamaktadır. Latince, tarihteki ilk evrensel hukuk sistemi olan Roma hukuku ile özdeşleşmiştir. *Ius gentium* sayesinde Roma hukuku, yabancıları da hukukî düzenin içine dâhil etmiş; kökenlerinden bağımsız olarak herkes için adil olanın uygulanması gerektiği fikrini benimsemiştir. Bu anlamda adalet, doğan güneş gibi Roma hukuk sistemini evrensel ve kalıcı kılmıştır.

Dergi adının coğrafi ve sembolik bir boyutu da bulunmaktadır. Adalet bir güneştir ve *Ex oriente lux* yani güneş doğudan doğar. *Solem Juris*, medeniyetlerin ve hukuk geleneklerinin kesişme noktasında yer alan Yakın Doğu Üniversitesi bünyesinde yayımlanmaktadır. Bu bağlamda derginin adı hem evrensel bir ideali hem de yerel bir entelektüel zemini yansıtmaktadır.

Bu derginin ortaya çıkmasında emeği geçen herkese, özellikle de hakemlerimize özverili katkıları için içtenlikle teşekkür ederim. Farklı hukuk sistemlerinden, geleneklerden ve metodolojik yaklaşımlardan gelen tüm araştırmacıları, *Solem Juris*'in gelecek sayılarında yer almaya ve dergimizi eleştirel hukuk düşüncesi için canlı ve kalıcı bir platform hâline getirmeye davet ediyorum.

Adaletin ne solan ne de dışlayan bir değer olduğu inancıyla, *Solem Juris*'in dünya hukuk literatürüne anlamlı ve kalıcı bir katkı sunmasını temenni ediyorum.

Prof. Dr. Mehman A. Damirli
Baş Editör,
Yakın Doğu Üniversitesi Hukuk Fakültesi
Hukuk Felsefesi Ana Bilim Dalı Başkanı

FROM THE EDITOR-IN-CHIEF

It is my great pleasure to welcome readers, authors, and reviewers to the inaugural issue of *Solem Juris*, an international, peer-reviewed academic journal dedicated to advancing the study of law and legal science.

The launch of *Solem Juris* is motivated by the growing need for a scholarly forum that brings together rigorous research, critical perspectives, and interdisciplinary dialogue on contemporary theoretical and practical legal issues. In an academic environment characterized by increasing specialization and rapid social and technological change, the journal seeks to contribute meaningfully to the legal literature by publishing original, high-quality, and internationally recognized research that advances both conceptual understanding and empirical inquiry.

Solem Juris places particular emphasis on interdisciplinary research at the intersection of law and related fields, fostering a deeper understanding of law as a complex social phenomenon. The journal welcomes studies employing innovative methodological approaches, as well as research addressing emerging legal challenges arising from technological developments, including the application of artificial intelligence and fuzzy logic in law. Empirical field studies that critically examine contemporary legal problems also constitute an integral part of the journal's scholarly focus.

Published annually in December as an open-access, online journal, *Solem Juris* is committed to ensuring the widest possible dissemination of academic knowledge. The official publication languages of the journal are Turkish and English, and it features a broad range of scholarly contributions, including research articles, case commentaries, translations, and book reviews. All peer-reviewed submissions undergo a rigorous double-blind review process, ensuring academic integrity, impartiality, and high scholarly standards. Manuscripts submitted to the journal must be original scientific works that have

not been previously published. The present inaugural issue contains six peer-reviewed research articles.

Readers may naturally be curious about the meaning of the journal's title. The name *Solem Juris*, proposed by our colleague Asst. Prof. Dr. Erkut Ziya Sivrikaya, is derived from Latin and means "the Sun of Law." The choice of this title reflects a fundamental idea: the purpose of law is justice, and justice, like the sun, should rise and shine equally for all.

Our decision to adopt a Latin title is not merely a tribute to the deep-rooted Roman legal tradition. Rather, it emphasizes the universality of the journal's intellectual ambition. Latin, as the language of Roman law—the first truly universal legal system—symbolizes a legal order grounded in principles of equality and justice beyond particular communities or identities. Through *ius gentium*, Roman law extended legal protection to foreigners based on principles deemed just regardless of origin. In this sense, justice, like the rising sun, rendered the Roman legal system universal and enduring.

There is also a meaningful geographical and symbolic dimension to the journal's name. Justice is often said to rise like the sun—and the sun rises in the East (*Ex oriente lux*). Near East University, where *Solem Juris* is published, is located precisely in this region, historically positioned at the crossroads of civilizations and legal traditions. In this context, the journal's title reflects both a universal aspiration and a local intellectual foundation.

I would like to express my sincere gratitude to everyone who contributed to the creation of this journal, especially to our reviewers for their devoted and invaluable contributions. I also warmly invite scholars from different jurisdictions, traditions, and methodological backgrounds to contribute to future issues and to join us in shaping *Solem Juris* as a dynamic and enduring platform for critical legal inquiry.

It is my hope that *Solem Juris*, guided by the ideal of justice that neither fades nor excludes, will become a meaningful and lasting contribution to world legal scholarship.

Prof. Dr. Mehman A. Damirli
Editor-in-Chief,
Chair of the Department of Philosophy of Law,
Faculty of Law, Near East University

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XII LEVHA YASASININ ANLAMI

THE MEANING OF THE XII TABLE LAW

Erkut Ziya SİVRİKAYA [1]

ÖZ

Tamamı günümüze ulaşmayan XII Levha Yasası milattan önce 449 yılında tamamlanmıştır. Eski adetlere dayandığı düşünülen bu yasa erken dönem Roma halkının anlayışını yansıtır. Yasası'nın günümüze ulaşan yorumları ise klasik hukuk devrine uzanmaktadır. Bu açıdan klasik dönem Roma hukukçularının yaptıkları yorumlara dikkatle yaklaşmamız gerekir. Yasanın kimi maddeleri otantik halleriyle değil yorumlanmış biçimleriyle günümüze ulaşmıştır. O halde söz konusu yasanın doğru bir şekilde anlamlandırılabilmesi için otantik maddelerin incelenmesi gerekir. XII Levha Yasası'nın çeşitli tercümeleri hatalıdır. Bu nedenle önce yasanın otantik maddeleri aslına uygun bir şekilde çevrilip yasaya ilişkin değerlendirmeler bu çeviriye göre yapılmalıdır. Üstelik bu değerlendirme yapılırken kimi kavramların klasik dönemdeki anlamları göz ardı edilmelidir. Bunun aksi anakronik bir tutum olurdu. Söz gelimi "in ius vocatio" klasik dönem için magister önünde yapılan görüşmeyi ifade eder, fakat bunun eski dönem için de aynı anlama geldiğini düşünmek bizi hataya yönlendirebilir. Ancak metinin aslına uygun hali üzerinde yapılacak değerlendirme söz konusu kavramların taşıdığı anlamı ortaya çıkartabilir ve bu sayede klasik dönemde yaşadığı dönüşüm gözler önüne serilebilir. Her halde esas anlama ulaşılamasa da en azından bu çalışmanın söz konusu metnin tekrar gözden geçirilmesi için bir akademik tartışmayı başlatması umulur. Bu nedenle önce mevcut yorum ve tercümeler kısaca ele alınıp ardından aslına uygun bir çeviri yapılmış ve metin kısaca tahlil edilmiştir.

Anahtar kelimeler: *Oniki Levha, Duodecim Tabulae, Eski Hukuk Devri, Quirites Hukuku, Ius Civile, Roma Hukuku.*

ABSTRACT

The XII Table Law, which has not survived in its entirety to the present-day, was completed in 449 BC. This law, thought to be based on ancient customs, reflects the understanding of the early Roman people. The interpretations of the Law that have survived to present-day date backs to classical legal period. In this respect, we need to approach the interpretations of classical period Roman jurists carefully. Some articles of the law have survived to the present-day are not authentic but in their interpreted form. For understanding the law correctly, authentic articles must be examined. The translations of the Law of Table XII are incorrect. Authentic articles of the law should be translated and evaluated in accordance with the original. While making this evaluation, meanings of concepts from classical period should be ignored. The opposite would be an anachronistic attitude. For example, "in ius vocatio" refers to meeting held before the magister in classical period, but it may lead us to falsehood to think that it means the same thing for early period. Only an evaluation of the original version can reveal the meaning of the concepts, and the transformation they experienced in classical period. In any case, even if the real meaning cannot be reached, it is hoped that this study will at least initiate an academic discussion to re-examine the text in question. For this reason, first the existing interpretations and translations were briefly discussed, then a literal translation was made, and the text was briefly analyzed.

Key words: *Twelve Tables, Duodecim Tabulae, Early Legal Period, Quirites Law, Ius Civile, Roman Law.*

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1. GİRİŞ

Bir İtalyan atasözü "*Traduttore traditore*" yani "*Çeviren haindir*" der. Çünkü çeviri esas metnin tam karşılığını vermez, veremez. Çeviri, değiştirmek ve aslına ihanet etmektir. Yani her çeviri bir ihanettir. Söz gelimi "*traduttore*" ve "*traditore*" kelimeleri arasındaki ses uyumu başka bir dilde yakalanamayacağından tercümesi aynı espriyi veremez. Burada espri sözü hem nükte hem ruh/öz anlamında kullanılmıştır. Belki "*döndüren dönektir*" diyebiliriz ama döndürenin çevirmen anlamına geldiği hemen fark edilemeyeceği gibi döneklik de metnin aslına ihaneti tam yansıtmaz. Bu bir anti-çeviri tutumu değildir, sadece çevirinin ne zor bir iş olduğu anlatılmak istenmektedir.

O halde bu atasözünü bir başka atasözüyle birlikte kullanmak çevirmenliğe karşı daha adil olacaktır; "*Traduttore traditore sed errare humanum est*" yani "*Çeviren aslına ihanet eder ama hatasız kul da olmaz*". Sözgelimi bir önceki cümlenin çevirisi de aslına ihanet eder, zira "*Errare humanum est*" cümlesi olumsuz ifade içermez. Bu ifade esasen "*Yanılmak insana özgüdür*" anlamına gelir.[2] Fakat bu ifadenin manasına yakın gelen ve edebi açıdan lezzet katan "*Hatasız kul olmaz*" ibaresi, Türk okuyucuya asıl ifadenin anlamını daha güzel aktarmaktadır. Aktarılmak istenen mesaj, farklı dillerde kaçınılmaz olarak farklı şekillerde ifade edilecektir. "*Çeviren haindir*" sözü ile de kastedilen budur.

Nihayetinde çeviren hata yapabilir ve eğer bunlar basit hatalarsa ayıklaması kolaydır. Fakat kimi zaman çevirmen aktaramadığı kavramları benzerleriyle vermeye çalışıp uzun açıklamalar yapar. Eğer çevirmen uzattığı bu anlarda aşırı yoruma kaçarsa esas metinden uzaklaşmış olur. Böyle durumlarda çeviri yapılmış gibi görülür ama aslında çevirmen esas metinde olmayan fikirleri eklemiştir. Bu ise çeviri değil metni yeniden inşa etmektir. Üstelik, antik çağ metinlerinin aslı yerine aktarmalarına ulaştığımızdan daha büyük bir sorunla karşı karşıyayız.

2. METODOLOJİ

Okumakta olduğunuz çalışma bir XII Levha tefsiridir. Esas metin hermenötik (*hermeneutica*) yöntemle ele alınırken sade bir aktarım hedeflenecektir. Yorumlama ve anlamı kavrama kuramı olarak hermenötik, taşıdığı önemli değer sayesinde incelenen olguların daha derinlikli ve kapsamlı biçimde anlaşılmasına katkı sağlamaktadır.[3] Nitekim tefsir (*exegesis*) yorumlama eylemi ise hermenötik onu yönelten kurallardır.[4] Hermenötiğin temel kategorileri hermenötik döngü ve bağlamdır. Bu çalışmada, hermenötik döngü, somut metnin bir parça, onun bağlamının ise bir bütün olduğu anlayışı çerçevesinde ele alınmaktadır. Hermenötik döngünün bu şekilde kavranması, metin yazarının sosyo-kültürel bağlamına ve incelenen kültürün özgül karakterine özel bir vurgu yapmaktadır.[5] Metni kendi bağlamı içinde filolojik sadakatle ele alan bu bütüncül yöntemle yapılan yorumlar, sadece lenguistik bir çalışma değildir. Bu aynı zamanda metnin üretildiği tarihsel, kültürel ve zihinsel bağlamın yeniden anlaşılmasını sağlayacak çok katmanlı bir hermenötik faaliyettir. Böylece çalışmanın anakronizmden uzak bir eksende şekillenebilmesi arzulanır.

Bu gibi antik metinlerin ele alınmasında karşılaşılan en büyük sorun anakronidir. Wittgenstein ve Heidegger'in ortaya koyduğu gibi insan şuuru içinde oluştuğu tarihi aşamaz.[6] Bir metni anlamlandırabilmek için onu yazan kişinin niyetini anlamamız ve metni yazarın içinde yaşadığı döneme göre yorumlamamız gerekir. Lorenzo Valla'nın "*Donatio Constantini*" üzerine yaptığı eleştiri[7] hermenötik yöntem açısından önemli bir örnektir. Bu belge İmparator Konstantin'in tüm Batı Avrupa topraklarını Papa Sylvester'e bağışladığını iddia etmekteydi. Metni derinlemesine inceleyen Valla,

[2] Belgin Erdoğmuş, *Hukukta Latince Teknik Terimler – Özlü Sözler* (İstanbul: İstanbul Bilgi Üniversitesi Yayınları, 2011), 49.

[3] Мехман А. Дамирли, *Сравнительное исламское право: введение в теорию и методологию* [Mehman A. Damirli, Mukayeseli İslam Hukuku: Teori ve Metodolojisine Giriş] (Odessa: Feniks, 2017), 162.

[4] Emre Öztürk, "Hermeneutiğin Tarihsel Dönüşümü", Sanat ve İnsan Dergisi 1(1) (2009): 17.

[5] Damirli, 165-66.

[6] Van A. Harvey, "Hermenötik", çev. Ahmet Güç, *Uludağ İlahiyat Dergisi* 6(6) (1994): 344.

[7] Lorenzo Valla, *On the Donation of Constantine*, trans. G.W.Bowersock (Cambridge: Harvard University Press, 2007), vi.

kullanılan dilin o döneme ait olamayacağını, bu nedenle belgenin düzmece olduğunu ispatlamıştır.

Türk Hukuku'nun Kıta Avrupası Hukuk Sistemine dahil olması nedeniyle güncel hukuk müesseselerimizin dönüşüm süreçlerini incelerken Roma tarihini de gözden geçirmemiz gerekir. XII Levha Yasası, Romalıların ilk yazılı kanunudur ve bunun doğru şekilde anlaşılması Türk Hukuk Tarihi açısından oldukça önemlidir. Milattan önce 449 yılında hazırlanan bu yasanın tam metni günümüze ulaşamamıştır.[8] Elimize ulaşan kısımların çeşitli tercümeleri olmakla beraber bu çevirilerin aslına ne derece sadık olduğu tartışmalıdır. Kuşkusuz, esas metnin kopyalanıp aktarılmasında hatalar yapılması da mümkündür. Antik Çağ, yazının icadından itibaren Batı Roma'nın çöküşüne kadar olan süreyi kapsar. Bu tarihsel dönemin Avrupa merkezli bir bakışı yansıttığı öne sürülebilir, fakat burada ele alınan metnin ve kopyalarının da Avrupa'da üretildiği unutulmamalıdır.

Taşlara kazınan yazıtların otantikliği tartışma götürmezken henüz kâğıdın icat olmadığı bir devirde yazılan diğer metinler ancak tekrar eden aktarımlarla günümüze ulaşabilmiştir. Antik çağda kil tabletlere, tahtalara, kemik parçalarına, deri üzerine, kumaşlara, papirüse ve parşömene yazmak mümkündü. Aslında kâğıt, papirüse ve parşömene göre daha uzun ömürlü değildir. Fakat ucuz ve rahat erişilen maddelerden üretilebilmesi bir yazı aracı olarak kâğıdı erişilebilir ve yaygın hale getirmiştir. Tekrar eden kopyaların artışı da alfabede dönüşümü beraberinde getirmiştir. Antik çağ, yazının icadıyla başlar ama oluşturulan alfabeler Antik çağ boyunca değişmiştir. Söz gelimi Antik çağda Arap harflerinin üstüne ve altına gelen noktalar yoktur. Bu işaretlerin kullanımı Orta çağda görülmeye başlar.[9] Günümüz Türkçesinden bir örnek vermek gerekirse "*kâr*" ve "*kar*" kelimeleri arasındaki farkı bu gibi bir işaretle ayırabilmekteyiz. Antik çağ Latin alfabesi ise sadece büyük harflerden oluşmaktaydı, küçük harflerin kullanımı Orta çağda başlamıştır.[10]

Antik çağda taşa kazınan yasalar hakların mücessem halidir. Hakkedilen harflerin keskin köşeli yapısı ve kâğıda elle yazılan harflerin yuvarlak hatları, Latincede büyük – küçük harf ayrımında veya Arapça kûfî ve nesih yazının farklılıklarında idrak edilecektir. Veyahut Tamil yazısının palmiye yapraklarına yazılması nedeniyle kıvrımlı olduğu zira keskin hatların yaprakları kesip yazmayı zorlaştırdığı öne sürülür.[11] Bu nedenle yazı için kullanılan aletlerin zamanla değişimi alfabeyi de değiştirebilmektedir. Yani antik dönem metinlerinin yazıldığı alfabeler dahi günümüzdekinden farklıdır. I-J, V-U, C-G harf çiftleri arasındaki kimi karışıklar da bu çiftlerden ikincilerin sonradan ortaya çıkmasından kaynaklanır. Verilen çiftlerden birincileri eskiden iki ayrı ses vermekteydi. İlerleyen dönemlerde bu çiftlerin ikinci harfleri alfabeye eklenmiştir. Bu halde "*IUS*" ve "*JUS*" aynı anlamdadır. Benzer şekilde başlangıçta "*U*" harfi olmadığından "*V*" harfi, hem "*u*" hem "*ve*" sesini karşılamaktaydı,[12] bu halde günümüzde "*JUS*" şeklinde yazılan kelime Antik çağda "*IVS*" şeklinde yazılmaktaydı. Bir hukuk metnini incelerken hangi harfle yazılmış olduğu çok önemli görülmeyebilir fakat söz konusu kuralların alfabenin oluşum ve dönüşümü sürecinde meydana geldiğini idrak etmek onu anlamlandırırken bize yardımcı olacaktır.

Anlaşılacağı üzere XII Levha Yasası çok kadim ve iptidai bir yasadır. Metni bu çerçevede ele almamız gerekir. Zamanla değişen kimi kurum ve kuralların bu metne dayanması anakronik yorumlara yol açabileceğinden dikkatli olmak gerekir. Hatta metnin içinde olanlar kadar olmayanlar da kimi konularda aydınlatıcı olacaktır. Metinde olmayan kurumların, aktaran veya çeviren tarafından metne eklenmesi bir aşırı yorum örneği olarak ele alınabilir. Sözgelimi XII Levha Yasası'nın ilk maddesi sadece 11 kelimeyken çevirileri bunun en az iki katıdır. Şimdi bu maddeyi ve çeşitli çevirilerini görelim;

Orijinali; "*SI IN IUS VOCAT ITO NI IT ANTESTAMINO IGITUR EM CAPITO*" (11 kelime)

Sandalcı; "*Eğer (davacı davalıyı) hukuk uygulayıcısı (magistra) önüne çağırırsa, gitsin.*

[8] Özcan Karadeniz Çelebican, *Roma Hukuku* (Ankara: Yetkin Yayınları, 2012), 77.
[9] Mustafa Aydın, "Arap Yazı Sistemi", *İstanbul Aydın Üniversitesi Dergisi* 10(4) (2018): 7.
[10] David Ganz, "The Preconditions for Caroline Minuscule", Viator Medieval and Renaissance Studies 18(1) (1987): 23.
[11] Peter Daniels and William Bright, *The Worlds Writing Systems* (Oxford: Oxford University Press, 1996), 426.
[12] Arap alfabesindeki "و" (vav) harfi de benzer şekilde "u" ve "v" sesi vermektedir. Akdeniz çevresindeki alfabelerde (Alfa-Beta, Elif-Ba) özellikle Fenike alfabesi aracılığıyla bir bağlantı kurmak mümkündür.

Gitmezse (davacı onu) tanıklık etmeye çağırsın: o zaman (sadece) onu zorla alıp getirsin."[13] (22 kelime)

Weston; "*If anyone summons a man before the magistrate, he must go. If the man summoned does not go, let the one summoning him call the bystanders to witness and then take him by force.*"[14] (34 kelime)

Scott; "*When anyone summons another before the tribunal of a judge, the latter must, without hesitation, immediately appear If, after having been summoned, he does not appear, or refuses to come before the tribunal of the judge, let the party who summoned him call upon any citizens who are present to bear witness. Then let him seize his reluctant adversary; so that he may be brought into court, as a captive, by apparent force*"[15] (73 kelime)

Johnson; "*If the plaintiff summons the defendant to court the defendant shall go. If the defendant does not go the plaintiff shall call a witness thereto. Only then the plaintiff shall seize the defendant.*"[16] (33 kelime)

Crawford; "*If he (i.e., anyone) summons to a pre-trial, he (the defendant) is to go; if he does not go, he (the plaintiff) is to call to witness; then he is to take him.*"[17] (33 kelime)

Girard; "*Si quelqu'un est cité en justice, qu'il y aille. S'il n'y va pas, que l'on appelle des témoins et qu'ensuite on s'en saisisse.*"[18] (23 kelime)

Gizewski; "*Wenn der Kläger vor Gericht lädt, soll der Beklagte kommen. Wenn er nicht kommt, soll ein Zeuge zugezogen werden. Dann soll der Kläger ihn [denBeklagten] abholen (capito).*"[19] (27 kelime)

Tüm bu tercümelerde davacı, davalı, mahkeme, magister gibi kavramlar kullanılmıştır. Ayrıca ifadeleri aslına göre daha uzun ve zariftir. Çevirenler, metnin anlattığını mümkün olduğunca açıklanmak istemiştir. Karşılaştırma yaparsak 73 kelimeyle Scott çevirisi en uzun, 22 kelimeyle Sandalcı çevirisi en kısa olandır. Buradaki Scott çevirisini tam bir aşırı yorum örneği olarak verebiliriz. Çünkü orijinal metinde böylesine uzun ve zarif bir anlatımla karşılaşılmaz. Sadece kelime sayıları arasındaki fark, esas metinle tercümesinin uyuşmadığını ispat için yeterli değildir elbette. Örneğin tek kelimelik "*Gelmeyeceklermiş*" ifadesini İngilizceye "*I heard that they won't come*" şeklinde altı kelimeyle aktarabiliriz. Fakat yukarıdaki örneklerde beş ayrı dil arasında tercüme karşılaştırılırken kelime sayıları, anlam aktarımındaki farklar hususunda okuyucuya bir fikir verebilir. Her cümle her daim eşit sayıda kelimeyle çevrilemez, ama ne kadar az kelime o kadar az ihanettir. Esas metin yalın bir dille kısa ifadeler tercih ettiyse tercümenin buna yakın olması makbuldür.

Scott ile Crawford'un İngilizce çevirilerine göz gezdirecek olursak fark daha rahat anlaşılır. Crawford'un bazı kelimeleri parantez içinde vermesi bunların esas metinde bulunmadığını kabul ettiğini gösterir. Onun parantez içinde verdiği kelimeler dikkate alınmadığında daha sade bir tercüme elde ederiz; "*If he summons to a pre-trial, he is to go; if he does not go, he is to call to witness; then he is to take him"* (27 kelime). Bu halde aynı Latince cümle İngilizceye 27 ila 73 kelimeyle aktarılmıştır. İngilizce doğru bir ifade gibi görülmeyecek olan "*he is to go*" Crawford'un esas metindeki sadeliği idrak ettiğini gösterir. Yine de parantezlerle çevirisini genişletmiştir.

Latince metinde fail gizli öznedir. Yukarıda verilen tercümelerde ise fail "*davacı, anyone, plaintiff, he, quelqu'un, Kläger*" gibi farklı şekillerde aktarılmıştır. Kimi tercümanlar esas metinde yer almayan "*davacı*"nın ima edildiği düşüncesindedir.

[13] Sema Sandalcı, "On İki Levha Yasaları" (Yayımlanmamış Yüksek Lisans Tezi, İstanbul Üniversitesi Sosyal Bilimler Enstitüsü, 1993), 45.
[14] Nina Weston, *The Library of Original Sources*, vol. III", ed. O. J. Thatcher (Milwaukee: University Research Extension Co., 1907), 9.
[15] Samuel Parsons Scott, *The Civil Law* vol. I (Cincinnati: The Central Trust Company, 1932), 8.
[16] Allan Chester Johnson, Paul Robinson Coleman-Norton, Frank Card Bourne, *Ancient Roman Statutes: A Translation with Introduction, Commentary, Glossary, and Index* (Austin: University of Texas Press, 1961), 9.
[17] Michael Hewson Crawford, *Roman Statutes,* vol. II (London: University of London, 1996), 556.
[18] Paul Frédéric Girard, *Textes de Droit Romain* (Paris: Librairie Nouvelle de Droit et de Jurisprudence, 1895), 9.
[19] Christian Gizewski, *Überlieferte Fragmente der Lex duodecim tabularum* (Berlin: Technischen Universität Berlin, 2000), 2.

Veyahut Girard'ın kullandığı Fransızce "*cité en justice*"[20] ifadesi günümüzde mahkemeye davet anlamına gelir. Oysa "*cité*" anmak/çağırmak sözünü, "*en*" kelimenin "*-den*" halini, "*justice*" ise adaleti karşılar. Yani Fransızca mahkeme sözünü kullanmadan mahkemeye davet ima edilebilir. Bu açıdan "*in ius vocat*" ifadesine en yakın aktarım "*cité en justice*" olmakla beraber Fransızların uygarlık platformunda yer aldığı göz ardı edilmemelidir. Uygarlarla kandaşların yargılamaları birbirinden farklıdır. Aynı isimle anılan kurum ve kurallar zamanla farklı anlamlara gelebilir.

Bu çalışmada ele alınan temel sorun, milattan önce 449 yılında yazılan Latince metindeki tüm imaları idrak edip etmediğimizdir. Bu soruyu sorarken klasik dönem Roma hukukçularının dahi kimi kadim kuralları anlamadan tekrar ettiğinin altını çizmemiz gerekir.[21] Aynı isimle anılan kurum ve kurallar zamanla farklı anlamlara gelebilir.

Öncelikle ilk cümleyi kelimesi kelimesine ele alalım; (SI IN IUS VOCAT ITO): Si (eğer) in (-den) ius (hak) vocat (seslenecek), ito (gitsin). İkinci cümle; (NI IT, ANTESTAMINO): Ni (yok) it (gider) antestamino (şahitlere göstersin). Üçüncü cümle; (IGITUR EM CAPITO): İgitur (öyleyse) em (onu) capito (yakalasın). Şimdi bu cümleleri kendi ifade biçimine uygun şekilde Türkçeleştirirsek; "*HAK İÇİN SESLENİRSE GİTSİN GİTMEZSE GÖSTERSİN VE YAKALASIN*" şeklinde olur. Bu çeviri zarif görünmeyebilir fakat aslına uygundur. Ne hâkim ne mahkeme ne de dava sözü geçer esas metinde.

Romalılar, bu kuralları az ve öz bir şekilde büyük harflerle taşlara kazıdı. O halde çevirenler; "*Aslında bu kısa ifadelerin altında daha incelikli bir hukuk düşüncesi var, fakat rahat okunsun ve idrak edilsin diye böyle yazıldı*" mı demek istiyor? Yani, atasözü gibi sözü azdı fakat özü o zaman herkesçe bilinir miydi? Öyleyse "*haktan konuşulacaksa git*" ifadesi "*mahkeme huzuruna davet edilirsen icabet et*" şeklinde anlaşılmalıdır, çünkü zaten hak mahkemede konuşulur mu demeliyiz? Yoksa bunları aşırı yorum olarak mı değerlendirmeliyiz?

Bu değerlendirmeyi XII Levha Yasası'nın tamamı üzerinden yapmamız gerekir. Tekrar etmemiz gerekirse XII Levha Yasası'nın aslı günümüze ulaşamamıştır. Elimizdeki bilgiler aktarımlara dayanır. Bu aktarımlarda değişiklikler varsa yapacağımız değerlendirmeler sakatlanabilir, fakat sonuçta aktarımda gerçekleşmiş olabilecek değişikliklere rağmen elimize ulaşan metne bakmak zorundayız. Görüleceği üzere sadece Türkçe değil İngilizce, Fransızca ve Almanca gibi diğer dillerde de tercümeler yanıltıcı olabilir. İlk madde için verilen çeviri örneklerini sonraki maddelerde tekrara gerek yoktur. Aksi halde bu çalışmanın hacmi lüzumsuz derecede artacaktır. Yukarıda verilen çeviri örnekleriyle XII Levhanın aslına uygun olmayan bir şekilde çevrildiği gösterilmiştir. Bu aslına aykırı çeviriler söz konusu metnin tamamı için geçerlidir. Bu nedenle bundan sonraki kısımda XII Levha Yasasını mümkün olduğunca aslına uygun, az ve öz çevirmeye çalışacağım. Dolayısıyla sadece birebir aktarım olduğu öne sürülen maddeler çevrilecek, maddeyi aktarmak yerine tarif eden Cicero veya Gaius gibi yazarların yorumları otantik olmadığı için çevrilmeyecektir. Nitekim esas alınan metnin editörü Bruns da otantik kısımları büyük harfle yazarken, yorumları küçük harfle ve yorumcunun ismiyle vermiştir.

Böylesi yorumlarla esas metinin yazılışı arasında asırlar vardır. Kullandıkları Latince birbirlerinden farklıdır ve hatta yorumcuları da esas metni kimi zaman anlamadığını kabul etmektedir. Cicero diyor ki; "*Eski yorumcular, Sextus Aelius ve Lucius Acilius yasayı yeterince anlayamadıklarını, ancak lessus'un bir cenaze kıyafeti olmasından şüphelendiklerini belirtmiştir. Lucius Aelius Stilo ise lessus'un, kelimenin sözlük anlamıyla, kederli bir ağıt olduğunu söylemiştir, ben de bunun doğru olduğunu düşünüyorum.*"[22] Burada Cicero'nun bahsettiği X. Levhada yer alan maddelerden biridir. Cicero'nun ifadelerinden bu kadim Roma yasasının zamanla tartışmalı hale geldiği anlaşılıyor. Yani dil ve toplum zamanla değişmekte, dolayısıyla yasanın anlamı da kayabilmektedir. Bu da daha sonraki devrin hukukçularının XII Levha Yasasına ilişkin

[20] Veyahut "*La citation en justice / Citation en droit*".

[21] Bkz: John Crook, *Law and Life of Rome* (New York: Cornell University Press, 1967), 28: "*It was convenient later, when the original significance of those hoary but often parroted clauses was no longer understood, to attribute to them meanings which gave venerable legislative sanction to what were in fact more recent Roman customs.*"

[22] Cicero, *Yasalar Üzerine*, çev. Cengiz Çevik (İstanbul: İş Bankası Kültür Yayınları, 2022), 62.

aslına uygun olmayan bir yorum yapabilecekleri anlamına gelir.

Zaman, dil ve kültürün değişimi metnin farklı şekilde anlaşılmasına yol açabilir. "*Tempora mutantur, nos et mutamur in illis*" veya "*Ezmanın tegayyürü ile ahkâmın tegayyürü inkâr olunmaz*". Yani zamanla toplum değişip dönüşür. Zamanın farklı evrelerindeki toplumlar farklı şekilde örgütlenmiştir. Bu çalışmada "uygarlık" sözü ile kastedilen, devleti olan toplumdur. "Kandaş" ise Morgan'ın "*barbar*" olarak adlandırdığı devletsiz toplumdur.[23] Kandaşlar, toplumsal düzeni sağlarken devlete ihtiyaç duymaz. Kandaşlıktan uygarlığa geçiş yani devletin inşası bir süreçtir. Bu süreç esnasında uygarlıkta olması beklenen kurumlar tedricen oluşur. Kentin kurulduğu iddia edilen gün Roma bir devlet midir? Romalılar uygar mıdır? Metnin tahlil edilmesiyle açıklık kazanacaktır.

Başlangıçta insanlık uygar değildi. Tarım devrimi sayesinde neolitik çağda toprağı eken insanlar bir yeri sahiplenip yerleşmiş, zamanla artan nüfus bu yerleşim yerlerini büyütmüştür. Bu yerleşimlerin ne gün kent olduğu tam olarak belirlenemez. Aynı şekilde bu kentlerin ne gün devlet olduğunu da bilinemez. İnsanın devleti nasıl icat ettiği çok uzun bir tartışma konusudur. İbn Haldun'un "*Mukaddime*"si bu mesele üzerine ilk ciddi çalışma olarak karşımıza çıkar. Toplumsal dönüşümü ve devletin oluşumunu anlayabilmek için İbn Haldun'un "*asabiyet*"[24] kavramı çok önemlidir. Lewis Henry Morgan'ın "*Ancient Society*" adlı eseri de bu alana değinen erken örneklerdendir. Morgan, Roma'nın erken dönemlerinin henüz uygar olmadığı ve toplumun *gensler* halinde örgütlendiğini belirtir.[25] Hikmet Kıvılcımlı'nın kandaşlıktan uygarlığa geçişi ele alırken takip ettiği yöntem bu çalışmada aynen uygulanacaktır. Tarihsel maddeci olan bu yaklaşım, antik bir metnin tahlilinde söz konusu toplumun metin üretildiği andaki yapısını anlamamızı kolaylaştıracaktır. "*Tarih Tezi*"[26] konuya ilgi duyan okuyucu için oldukça aydınlatıcıdır.

Anlaşılacağı üzere özet ve giriş kısmını takip eden ikinci bölüm çalışmada hangi yöntemle ilerleyeceğimi ele almaktadır. Üçüncü bölümde metni aslına sadık kalarak tercüme etmeye çalışacağım. Dördüncü bölümde ise çeviriyi açıklayarak değerlendireceğim. Bu yolla XII Levha Yasası döneminde Roma'nın toplumsal yapısı irdelenecektir. Bu inceleme neticesinde, "*XII Levha Yasası döneminde Roma bir devlet midir?*" veya "*O esnada Romalılar uygar mıdır?*" gibi sorular açıklık kazanacaktır. XII Levha Yasası'nın esas anlamına ulaşamasak da en azından bu çalışmanın söz konusu metnin tekrar gözden geçirilmesi için bir akademik tartışmayı başlatması umulur.

Temel alınan Latince metin:

Carolus Georgius Bruns, Fontes Iuris Romani Antiqui: Pars Prior Leges et Negotia, editio sexta, cura Thedori Momsen et Ottonis Gradenwitz, Libraria Academica I.C.B. Mohrii, Friburgi in Brisgavia et Lipsiae 1893, pp. 15-40.

Not: Madde numaraları Bruns metnindeki gibi verilmiştir. Nokta ve virgül gibi işaretler antik çağda mevcut olmadığından metinde ve çevirisinde noktalama işareti kullanılmamıştır. Sadece (…) işareti metindeki eksikliğe işaret eder. Aynı şekilde antik çağda küçük harf bulunmadığı için metin ve tercümesi büyük harfle yazılmıştır.

[23] Lewis Henry Morgan, *Eski Toplum,* cilt I, çev. Ünsal Oskay (İstanbul: Payel, 1994), 22.
[24] İbn Haldun, *Mukaddime*, çev. Süleyman Uludağ (İstanbul: Dergâh Yayınları, 2005), 94.
[25] Lewis Henry Morgan, *Ancient Society* (New York: Henry Holt & Company, 1877), 277.
[26] Hikmet Kıvılcımlı, *Tarih Tezi* (İstanbul: Tarih ve Devrim Yayınevi, 1974), 11-27.

3. TERCÜME

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XII Levha hakkında yazılanlar çok ileri tarihlidir. Bunlar arasında bilinen en eski örnek Sextus Aelius Paetus Catus'un milattan önce birinci asırda kaleme aldığı Tripertita adlı eserdir[27] ve yukarıda Cicero'dan aktarıldığı üzere Sextus Aelius dahi bu yasanın kimi kısımlarını anlamadığını itiraf etmektedir. Bu nedenle XII Levha hazırlanırken Solon Kanunlarını incelemek üzere on kişinin Yunanistan'a gittiği söylense[28] de bu hikâyenin Remus ve Romulus gibi bir efsane olması muhtemeldir.[29] Bu yasanın öteden beri takip edilen Roma töresi (mos maiorum) olması daha muhtemeldir. Neticede Solon Kanunundan etkilenilse bile törelere aykırı bir yasanın toplumca kabul görmesi düşünülemez. Tahiroğlu'nun da belirttiği gibi eski hukuku incelerken klasik hukuk mantığından kaçınmamız gerekir. Eski hukukun kavram ve kategorileri birbiriyle kaynaşmıştır.[30] Eski kurumların zamanla değiştiği ve sonraki dönemde edindiği yeni manalara göre yorumlandığı unutulmamalıdır. Eski hukuk devrine dair elimize ulaşan bilgiler ilerleyen dönemlerde kaleme alınmıştır. Bu nedenle XII Levha kendisi üzerinden yorumlanmalıdır. Klasik dönem hukukçularının değerlendirmelerini ise kendi zamanlarındaki hukuka göre ele almamız gerekir.

I. Levhanın ilk maddesinde iki Romalı arasındaki meselenin uzlaşarak çözülmesinin arzu edildiği görülür, hak/hukuk konuşmak için çağrılan gelmelidir. Aksi halde görüşmeden uzak duran kişi karşı tarafça yakalanabilmektedir. Burada bir adli kolluk kuvveti bulunmamakla beraber yakalama/tutuklama için karşı tarafın görüşme konusundaki isteksizliği toplumun diğer üyelerince de görülmelidir. Günümüzde devletin meşru cebir tekeli olması nedeniyle böylesi bir ihkâk-ı hak mümkün değildir. Oysa burada yurttaşların birbiri üzerinde zor kullanma hakkı (!) olması devletin varlığını şüpheli hale getirir. Hak konuşmak için çağırılan kişinin gelmediği halk tarafından görüldüğü an, çağıran kişi karşısındakini zorla getirme yetkisini kazanır.

Görüşme talebinde bulunulan kişi eğer hasta ya da yaşlı ise çağrıyı yapan kişi ona hayvan veya araba tahsis etmelidir. Araba tahsis edildiğine göre tarafların görüşmek için belli bir yere gittiği anlaşılır.

6.maddenin "*ubi*" yani "*orada*" ifadesi bu hak konuşulan yere işaret eder. Fakat orada ilan edilen bir karar/hüküm değil anlaşmadır. İlgili maddede ilan etme fiili "*orato*" üçüncü tekil şahıs, anlaşma fiili "*pacunt*" ise üçüncü çoğul şahıstır. Yani taraflar anlaşırlar ve birisi bunu duyurur. Demek ki söz konusu yerde ilanı yapan kişi uzlaşan kişilerden üstün görülmez ama hem yakalama durumunda hem anlaşma halinde halkın haberdar edilmesi zorunludur.

Burada toplumun bilgisi ve onayı herhangi bir makamdan üstün görülür. Bu açıdan yasada yer almayan kavramlar daha dikkat çekicidir ve bu eksiklik özel hukuktan ziyade kamu hukuku açısından aydınlatıcıdır. Şimdiye kadar yapılan değerlendirme "*in ius*" ve "*in iudicio*" ayrımını akla

[27] Sandalcı, 4.
[28] Michel Villey, *Roma Hukuku Güncelliği*, çev. Bülent Tahiroğlu (İstanbul: Der Yayınları, 2007), 21.
[29] Ziya Umur, *Roma Hukuku Ders Notları*, (İstanbul: Beta, 1999), 18.
[30] Bülent Tahiroğlu, *Roma Hukukunda Mülkiyet Hakkının Sınırları* (İstanbul: Der Yayınları, 2001), 8.

gelecektir. Yani klasik dönemde *magister*[31] önünde yapılan hukukî görüşme için "*in ius / in iure*", bu mesele için seçilen "*iudex*" (hakem veya hâkim) önünde yapılan görüşme için "*in iudicio / apud iudicem*" ifadesi kullanılırdı, ki bu genelde mahkeme olarak çevrilir. Roma hukuku için en azından MÖ. 367 yılından yani praetorluk makamının ihdasından sonra böyle bir ayrımın mevcut olduğunu söyleyebiliriz. Umur, daha öncesi için hakemi tarafların seçtiğini fakat sonradan bu görevi rex veya consul'ün üstlenmiş olabileceğini belirtir.[32] Cicero ise Scaevola'nın iyi bir pontifex (rahip) olmak için mutlaka ius civile'ye hâkim olmak gerekir dediğini aktarır.[33]

XII Levha devrinde hakemlik yapanların rahip olması muhtemeldir. Fakat o dönemin rahiplerine ilişkin yeterli bilgiye sahip değiliz.[34] Anlaşılacağı üzere praetorluk makamı kurulana kadar "*in ius / in iudicio*" ayrımı net görülmez. Bu nedenle "*in ius*" kavramı klasik dönemde eski hukuk döneminden farklı bir anlama gelebilir. Nitekim 7., 8. ve 9. maddelere göre hakkı konuştukları yerde anlaşma olmazsa taraflar halkın önünde (comitio) savlarını dile getirmektedir. Öyleyse ya önünde hak konuştukları kişi hâkim otorite değildir, ki zaten açıkladığı karar değil uzlaşmaydı, ya da comitio istinaf görevi üstlenmektedir. Fakat anlaşıldığı kadarıyla burada esas olan tarafların uzlaşmasıdır ve hak konuşurken (in ius) gittikleri kişi hakemdir, uzlaşmaya aracıdır, arabulucudur.

O halde Romalılar arasında eşitlikçi bir yapı görülür, sadece toplumun bütünü bir Romalıdan üstündür. Çünkü anlaşmazlarsa (ni pacunt) halk huzuruna çıkarlar. Demek ki uzlaşmayla çözülemeyen mesele halkın huzuruna taşınır. Bu nedenle II. Levha'nın 2. maddesindeki "*iudici / ius-dicere*" ibaresi "*hak-söylemek*" şeklinde çevrilmiştir. Eğer önünde hak konuşulan hâkim olsaydı taraflar anlaşamasa da hüküm verirdi. Anlaşmayı seslendiren kişinin hükmetmediği anlaşılır. Genel itibariyle tercümede "*hüküm*" ve "*hâkim*" sözleri hiyerarşik bir otoriteye yani devlete işaret etmekte olduğundan tercih edilmemiştir. Sadece V. Levha'da kişinin kendi malı ve hane halkı üzerinde verdiği karar için "*legassit*" ibaresi hüküm olarak çevrilmiştir. Nitekim bu söz kanun anlamına gelen "*lex*" ile akrabadır.

I. Levha 7. madde öğleden önce iki tarafın beraber geldiklerinde konuşmaya başlamasını, 8. madde öğleden sonra orada bulunan tarafa kararın söyleneceğini, 9. madde ise iki taraf da oradaysa görüşmenin gün batımına kadar sürebileceği belirtilmiştir. Bu halde taraflardan birinin görüşmeden çekilebildiği ve karşı tarafa hakkını teslim ettiği anlaşılır. Zira iki taraf da halen oradaysa görüşme gün batımına kadar sürebilir fakat öğleden sonra sadece tek taraf kaldıysa karar söylenecektir. Bu görüşmenin halk önünde yapıldığı düşünülürse söylenen (ad-dicito) karar da halkın olabilir aksi takdirde neden halkın önünde görüşülmektedir?

Bu halde hukuka ses veren (iuris-dicere) kişi bir sözcü gibi görülmelidir. Ayrıca taraflardan birinin çekilmesi toplumsal kontrol mekanizmalarının bireysel davranışa bir etkisi şeklinde değerlendirilebilir.[35] Zira haksızlığı ortaya çıkan kişi çekilmezse toplum nezdindeki değerini kaybedeceğine inanabilir. O halde haksız görülen kişi çekilip karşı tarafa hakkını vermelidir.

Demek ki önce hakeme gidilir, eğer uzlaşma olmazsa meclis önüne geçilir, eğer taraflardan biri çekilmezse meclis hüküm verir. Burada hükmü veren meclis, toplumun tamamıdır. Toplumsal bütünselliğin birey üzerindeki doğrudan hakimiyeti

[31] Ziya Umur, *Roma Hukuku Lügatı* (İstanbul: İstanbul Üniversitesi Fakülteler Matbaası, 1975), 128: "*Magister: Yüksek işler gören bir gurup insanı temsil eden veya idare eden kimse*". Türkçe literatürde daha sık kullanılan "*magistra*" ise aslında bunun sonuna -a eklenerek türetilen dişil versiyonudur. Örneğin "*filius*" oğul, "*filia*" kız demektir. Yani "magister / magistra" tıpkı "müdür / müdire" gibidir. Türkçe yazında her iki kavram aynı anlamda kullanılırken Latince metinlerde her daim "*magister*" tercih edilmiştir. Nitekim Roma'da kadınların bu makama gelmeleri mümkün değildi. Bu noktada "magistratus" terimine değinmek gerekir. Bu söz "magister"in makamını karşılar ve Türkçeye tıpkı "bakan / bakanlık" ikilisinde olduğu gibi "magisterlik" şeklinde aktarması gerekir. Latince "magister / magistratus" ikilsi; Fransızca (magistrat / magistrature), Almanca (magistrat / magistratur), İngilizce (magister / magistrate) şeklindedir. Belki Fransızca karşılığı "magistrat" yazılıp "majistra" okunduğu için Türkçeye "magistra" olarak geçmiştir. Latince "magister / magistra" ayrımında olduğu gibi; Fransızca "magistrat" erkek, "magistrate" dişi; Almanca "magistrat" erkek, "magistratin" dişidir. Türkçede eril / dişil ayrımı olmadığından "magister" ve "magistra" sözleri cinsiyet ifade etmez ama bu sözlerin Latincede cinsiyet belirttiği unutulmamalı ve "magister" tercih edilmelidir. Aksi halde "*Historia magistra vitae est*" gibi ifadeleri aktarımda zorlanırız.

[32] Umur, *Ders Notları*, 83.

[33] Cicero, 56.

[34] Jörg Rüpke, *Religion in Republican Rome* (Philadelphia: Penn, 2012), 20.

[35] Mehmet Tevfik Özcan, *İlkel Toplumlarda Toplumsal Kontrol* (İstanbul: XII Levha, 2012), 72.

devlete yani bir tüzel kişinin aracılığına ihtiyaç duymaz.

Konuyu bölmemek adına son bırakılan 4. maddede "*assiduus*" varsıl şeklinde "*proletario*" ise yoksul şeklinde çevrilmiştir. Servius Tullius tarafından beş gruba ayrılan varsıl vatandaşlar kendi imkânlarıyla askerlik yapar yani savaş gereçlerini kendi ceplerinden karşılardı ve aynı askeri birlikte yer alan Romalılar aynı sırayla oy verirdi.[36] En son oy veren yoksul vatandaşlarsa Marius devrine kadar askere alınmamaktaydı.[37] Magister seçilen Romalılar da onurlu bir makama geldiklerinden bu hizmetleri için ücret almazdı.[38] Tüm bunlar erken dönemlerde kamu harcamaları için bir hazinenin bulunmadığını gösterir. Daha sonra yani klasik dönemde bir hazine oluşsa dahi onurlu makama gelenler ücret almamayı sürdürmüş ve belki bu sayede yoksulların seçilmesine engel olunmuştur. Fakat erken dönem için toplumsal örgütlenmenin bedelsiz ve gönüllü yani adeta imece usulü yürütüldüğü anlaşılır. Kendi silahlarıyla orduyu teşkil eden Romalıları bugünün Türk ordusuyla karşılaştıralım. Askere alınan Türk vatandaşları bu vazifeyi kendi tüfekleriyle mi yerine getirir yoksa üzerlerine zimmetlenen silahlarla mı? O halde erken dönemin Roma ordusu ve yargısını bugünün ordusu ve yargısıyla eş tutmak anakronik bir hata olur.

Ekonomik açıdan toplum içerisinde bir bölünmeden söz edilebilirse de henüz toplum bütünselliğinden ayrı bir tüzel kişi (devlet) görülmez. Para, hazine, hapishane, kolluk kuvveti yoktur, tamamı silahlı olan yurttaşların bütünselliği orduyu teşkil etmektedir. Önünde hukuk görüşülen kişinin klasik dönemdeki praetor ve iudex ile ne kadar benzeştiği tartışmalıdır. Zira eşitlikçi kandaş toplumlarda bir kimsenin makamı nedeniyle toplumsal eşitliğin üzerine yükseldiği gözlenmez. Bu tür toplumlarda öncülük eden kişiler olsa da ancak *primus interpares* yani eşitler arasında birinci olabilir.

II. Levhada yer alan "*iudici arbitrove*" ifadesi sonundaki -ve eki veya/ile anlamı verir. Burada hastalık ve düşmanlar "*iudex*"[39] (yargıç) veya "*arbiter*" (hakem) için bir engel teşkil eder. Bu halde yargılama için zamanın belirlenmesinde tarafların durumu esastır. 3. maddenin belirttiği üzere şahidi gelmeyen kişi gidip onu aramalıdır. Bu açıdan erken dönem yargısında taraflar daha aktif görünür. Burada görevlileri ile çalışan bir kurum olarak mahkeme idrak edilemez.

Bundan önceki sayfada klasik dönemin "*iudex*"i ele alınırken parantez içerisinde (hakem veya hâkim) şeklinde açıklandı fakat bu paragrafta eski dönemin "*iudex*"i ele alındığından parantez içerisinde (yargıç) şeklinde açıklanmıştır. Hakkı söyleyen kişinin ne derece otorite olduğunu ayırt edebilmek için yapılan bir tercihtir bu. Nitekim kararı söyleyen kişinin meclis namına konuşan bir "*hak sözcüsü*" olabileceği de unutulmamalıdır. Bu sözcülük vazifesi düzenli değil *ad-hoc* olabilir. Sözgelimi Frier *iudex*'in hâkimden çok hakeme benzetilebileceğini öne sürer.[40]

Erken dönem için hâkim yerine yargıç sözünü tercihimde Aristoteles etkili olmuştur. "*Dikaiosyni*" (δικαιοσυνη) sözünün diğer dillere aktarılması güç olsa da Türkçeye doğruluk ve adalet şeklinde çevrilmesi mümkündür.[41] Aristoteles bu sözün "*dikha*" (διχα) yani ikiye bölmekten/yarmaktan geldiğini belirterek yargıç (dikastes / δικαστες) için iki taraf arasında eşit bölen/yaran (dihastes / διχαστεσ) kişidir der.[42] Türkçe ve Yunanca yargı kelimesinin benzer köklere dayanması çok hoş bir tesadüftür. Farklı dönemlere ilişkin açıklamalardaki hâkim/yargıç ayrımı her ne kadar bu sözcükler eş anlamlı olsa da hükmî hukuk ve yaşayan hukuk dikotomisine paralel bir hava vermek arzusuyla tercih edilmiştir. Bilindiği üzere hükmî hukukun kaynağı devlet, yaşayan hukukun kaynağı ise toplumdur.[43] Bu nedenle hükmî hukuk devlete ve uygarlığa işaret ederken yaşayan hukuk insanlığın başlangıcına kadar uzatılabilir. Yani bu çalışmada "hâkim" devletin otoritesini yansıtırken "yargıç" kandaş toplumun otoritesini seslendirir.

[36] Titus Livius, *The History of Rome*, trans. Daniel Spillan, Henry G. Bohn (London: 1853), 58 (LIVIUS, "Ab Urbe Condita", I. XLIII).
[37] Plutarch, *The Parallel Lives,* vol. IX, trans. Bernadotte Perrin (Harvard: Loeb Classical Library, 1920), 483.
[38] Bülent Tahiroğlu-Belgin Erdoğmuş, *Roma Hukuku Dersleri* (İstanbul: Der Yayınları, 2001), 4.
[39] Iudex sözü "ius-dicere" yani "hak-söyleme"den gelir.
[40] Bruce W.Frier, "Autonomy of Law and the Origins of the Legal Profession", *Cardozo Law Review* 11(1) (1989): 261.
[41] Platon, *Devlet I-II*, çev. Azra Erhat-Samim Sinanoğlu, Suat Sinanoğlu (İstanbul: Cumhuriyet, 1998), 119.
[42] Aristotle, *Nicomachean Ethics*, trans. Terence Irwin, (Cambridge: Hackett Publishing, 1999), 73.
[43] Ahmet Özalp, "Eugen Ehrlich Sosyolojisinde Yaşayan Hukuk", *Eskişehir Osmangazi Üniversitesi İlahiyat Fakültesi Dergisi* 11(1) (2024): 27.

III. Levhanın ilk maddesindeki "*aeris rebusque*" ifadesi "*bronz ile*[44] *eşya*" anlamına gelir. Sekizinci levhanın 22. maddesinde de "*libripens*" yani "*terazici*" ifadesi yer alır, *mancipatio* usulü mal devrinde alıcı ile satıcı dışında şahitlerin ve terazicinin bulunması gerekirdi. Terazinin bir kefesine bronz parçası, bir kefesine ise maldan bir parça konulup şahitler önünde belirli sözler söylenmekteydi.[45] Bu teatral merasimin bronz çağına kadar uzanan bir gelenek olması muhtemeldir. Akitlerin yazılı olmadığı bu erken dönemlerde beş şahit ve terazici mülkiyetin devrine aleniyet kazandırır. Ayrıca bronzun değer aracı olarak kullanımından henüz standart bir paranın olmadığı anlaşılacaktır. Bu da yine söz konusu standardı belirleyecek bir otoritenin yokluğuna işaret eder. Her ne kadar Roma kenti demir çağında ortaya çıksa da bronz halen değerli bir metal olarak görülüp değişim aracı olarak kullanılmıştır.

2. madde ile yargıdan otuz gün sonra bronz ve mal teslim gerçekleşmezse borçlunun üzerine el konulup (manus iniecto) adalete (in ius) yöneltileceği belirtilmiştir. Yani tekrar hukuk konuşulan yere gidilir. Burada borçlu söylenen hakka (iudicatum) uymaz ve kefil (vindex) bulamazsa alacaklı tarafından tutulabilecektir.

3. maddeye göre borçlunun hayvan tendonu/siniri (nervo)[46] yani kayışla (ya da zincirle)[47] bağlanması mümkündür. Bu bağlar için bir ağırlık sınırı da öngörülmüştür fakat Crawford ve Girard edisyonlarında bu sınır tam tersine çevirmiştir.[48] Pranga için asgari ağırlığın değil de azami ağırlığın tespit edilmesini daha akla yatkın görmüş olabilirler. Fakat bu pranga için masraf eden alacaklıdır ve azami ağırlık öngörülmese de aşırıya kaçması rasyonel olmazdı. Özellikle de üretim imkanlarının kısıtlı olduğu bir dönemden bahsettiğimiz unutulmamalıdır. Alacaklının evine giderken kayışla bağlanıp götürüldüğü fakat alıkonulduğu sırada prangayla bağlandığı da düşünülebilir. Alacaklının borçluyu alıkoyması ortada bir hapishane olmadığını gösterir. Burada "pondo" olarak verilen ağırlık birimi ile dördüncü maddede verilen "libra", "okka"ya dönüştürülmüştür. Bu dönüşüm Türk okuyucuya eski bir ağırlık birimini aktarmak için tercih edilmiştir. Zira kavramı bozmandan pondus / libra şeklinde aktarmak doğru görülse de o halde fazladan açıklamaya ihtiyaç duyulurdu. Burada sadeliği korumak için hakikate ihanet edilmiştir.

4. maddeye göre tutulan borçludan evvela kendi imkânlarıyla karnını doyurması beklenmektedir. Eğer borçlunun imkânı yoksa alacaklı onu beslemek zorundadır. Günlük asgari tayın 1 libre (veya yarım okka) tahıl olarak belirlenmiştir. Alacaklının borçluya bundan daha fazla yemek vermesi elbette mümkündür.

6. maddeye göre dokuz günde bir (nundinis) ki bu da pazar vaktine işaret eder, borcun parçaları kesilebilir (partis secanto) yani ödenebilir. Borç anlamına gelen "*obligatio*" bağlamak anlamına gelen "*ligere*" fiilinden türemiştir ki borcun ifası için kullanılan "*solvere*" çözmek anlamındadır.[49] Bu açıdan kesmek fiili ile borçluyu başkasının kurtarmasının kastedildiği söylenebilir. Yani borçlu bağıtı çözerken başkası bağıtı keser. Fakat bu kesimde yapılacak hatalardan alacaklı sorumlu değildir.

Bu borcun kesilmesi için belirli bir süre öne görülmüştür. Bu açıdan alacaklının borçluyu tutuklamasından bahsedebiliriz. Tutuklama, hapis

[44] Tamlamanın sonundaki -que eki birlikteliği ifade eder. Nitekim "Senatus Populusque Romanus" (Roma Halkıyla Senatosu) ibaresinin kısaltması SPQR'deki Q harfi de -que ekini temsil etmektedir. Kelime sonuna gelen bu ekin kısaltmada yer almasını Senatus ile Populus'un birlikteliğine bir vurgu olarak yorumlayabiliriz. Romalılar "SPR" şeklinde bir kısaltmayı da tercih etmiş olabilirdi ama bir kelimenin baş harfi olmayan Q'nun kısaltmada yer alması gerektiğine inanmış olmalılar. Gramer açısından "et" (ve) / "-que" (ile) arasında bir fark yoktur, fakat "Senatus et Populus" (Senato ve Halk) şeklinde kullanım iki kurumu ayrı ama beraber gösteriyor hissi vermiş olabilir. Kilise tarihi açısından -que eki "Filioque" (Oğulla) ifadesinden ötürü tartışma konusu olmuştur. İznik konsili kararının Latinceye tercümesine eklenen bu söz Katolik-Ortodox ayrımının temellerinden biridir. Bkz; Thomas Richey, *The Nicene Creed and The Filioque* (New York: E & J.B Young & Co, 1884), 5-30.

[45] Cahit Oğuzoğlu, *Roma Hukuku* (Ankara: Ankara Üniversitesi Hukuk Fakültesi Yayınları, 1959), 156.

[46] Latince "*Nervus*" sözü; sinir, tendon anlamına gelir. Türkçe nöron sözü de bu kökenden gelmektedir. Tabakalnmış hayvan sinirlerinden kuvvetli ve elastik ip elde etmek mümkündür. Örneğin güçlü ve elastik özellikleri olan tendonlarla yay kirişi yapılmaktaydı.

[47] Erken dönemlerde zincir yerine kayışın tercih edildiği "nerva" sözünden anlaşılır. Her ne kadar Roma kentinin kuruluşu demir çağına denk gelse de demir üretiminin Cumhuriyet Devri'nin ilerleyen yıllarında arttığı görülür. Bkz: Janet Lang, "Roman iron and steel: A review", *Materials and Manufacturing Processes*, 32(7–8) (2017): 857.

[48] Crawford, 556; Girard, 9.

[49] Türkan Rado, *Roma Hukuku Dersleri, Borçlar Hukuku* (İstanbul: Filiz Kitabevi, 1992), 14.

cezası değildir. Burada kefiller borcu ödeyene kadar üç defa dokuz günlük süre verilmiştir. Alacaklının borçluyu bu süre zarfında tutması bir ceza değil tedbirdir. Hapishanenin olmadığı kandaş toplumlarda hapis cezası görülmez.

7. madde ile Romalıların düşman (hostem) karşısındaki hukukî üstünlüğü dile getirilir. Burada özne belirsizdir. "*Düşmana karşı otorite/güç daim olsun*" derken kimin otoritesi kast edilir, düşman olmayanın yani "*biz*"in yani Romalıların. Şimdiye kadar gözden geçirdiklerimiz belirli bir kamu otoritesine değil kamunun bütün olarak otorite olduğuna işaret eder. Toplumun bütünselliği bir otorite gibi görülür. Bireyler, toplumun görüp onayladığı hallerde birbirine zor uygulayabilmektedir. Ayrıca düşman karşısındaki üstünlüğün borçlunun tutuklanmasını takiben dile getirilmesini, verilen süre sonuncunda borcu kapanmayanın artık düşman (hostis) olduğu şeklinde mi yorumlamamız gerekir? Toplumdan kimsenin kefil olmadığı öteki mi olur? Kandaşlarının dahi kurtarmadığı yadlanmış mıdır? Söz verip bağıt altına girene bu sözü tutamadığında toplumdan kimse yardım etmiyorsa artık onun kandaş asabiyete dahil olmadığı düşünülebilir.

IV. Levha Babanın aile üzerindeki kudretini gösterir. Öyle ki Baba aile üyelerini de diğer malları gibi satabilir. Fakat burada satış hakkına bir sınır getirilmiştir. Babanın oğlunu üçüncü satışından sonra tekrar üzerinde hakimiyet kurması mümkün değildir. Önceden böyle bir sınırlama olmadığı fakat zamanla baba otoritesinin kısıtlandığı düşünülebilir. Böylece baba, evlatlarını sürekli bir gelir kaynağı olarak göremeyecektir. Baba hakimiyet öylesine güçlüdür ki evladını satma yetkisi kaldırılamamış sadece kısıtlanmıştır.

İslâm hukukunda boşanmanın üç defayla sınırlandırılması bu duruma benzetilebilir. Boşanmadan cayma hakkı sınırlanmasaydı defalarca boşanıp cayan koca karısını sürekli bir iddet müddetine mahkûm etmiş olur ve "*mehri müeccel*" ödemek zorunda kalmazdı. Ancak bu durumdan kurtulmak isteyen kadın "*mehri müeccel*" borcunu affetmek zorunda kalırdı. Yani burada kötüye kullanılmaması için bir hak sınırlanmıştır diyebiliriz.

V. Levhanın 3. maddesi babayı malları üzerine vekalet ve ailesi üzerine vesayette serbest bırakmaktadır. Bunun yeni tanınmış bir hak olmayıp evvelden beri zaten böyle olduğu düşünülebilir. Başlangıçta Roma'yı var eden, hanesi üzerinde son söz sahibi babaların ittifakı olsa gerekir. Yukarıda da belirtildiği üzere burada babanın hükmü olarak çevrilen "*legassit*" onu adeta bir kanun koyucu gibi sergiler.

4. ve 5. maddelere bakılacak olursa baba iradesi hayattayken olduğu gibi ölümde de esastır. Eğer babanın vasiyeti yoksa malları önce varisine (heres) yani oğlu veya torununa sonra baba tarafından akrabalarına en son kabilesine kalır. Benzer şekilde, 7. maddeyle aklını yitiren kişinin mallarının baba tarafından akrabalarıyla kabilesi tarafından idare edeceği belirtilmiştir. Burada Kan (Gens)[50] birliğine tanınan haklar kandaş örgütlenmenin hala etkin ve güçlü olduğu gösterir.

VI. Levhanın ilk maddesi sözleşme serbestisi üzerinedir. Yukarıda "*obligatio*" (borç) sözünün bağlamak anlamına gelen "*ligere*" fiilinden türediğini belirtmiştik. Fakat XII Levhada "*obligatio*" sözü bulunmaz, onun yerine yine bağlamak anlamına gelen "*nexus*" (bağıt) sözü yer alır. Bu da eski bir sözleşme türüdür.[51] Başlangıçta alacaklının borca karşı rehin olabildiği bir tür para ödüncü olarak ortaya çıkmıştır.[52] Büyük ihtimalle borç anlamındaki "*obligatio*" sözü bu "*nexus*" kelimesine yüklenen anlamdan türemiştir. Çünkü "*ob-ligo-tio*" sözünün başındaki "*ob-*" yönelme ekidir ve ortadaki "*ligo*" (bağ) sözüne işaret eder, sondaki "*-tio*" eki ise mastar halini gösterir. Yani borç (obligatio) kelimesi bağa (nexus) işaret eder. Erken dönem kullanılan "*nexus*" klasik dönemde "*obligatio*" haline gelmiş olmalıdır.

5. ve 9. maddeler eksiktir. 7. madde başkasına ait yapılardan parça alınamayacağını belirtir. IV-V-VI levhalara bakıldığında ataerkil aile yapısı ve kandaş örgütlenme dikkat çeker. Özel mülk tüm hane halkıyla birlikte babanın idaresindedir. Bu kısma kadar Roma'da ailenin, özel mülkün köklerini görsek de devlete henüz rastlamayız.

VII. Levha 7. madde bir yolun (via) yapımı/bakımı üzerinedir. Söz konusu yol yapılmamışsa istenilen yerden geçilebileceği belirtilir. Burada kastedilenin

[50] Ümit Hassan, *Eski Türk Toplumu Üzerine İncelemeler* (Ankara: Doğu Batı, 2009), 198; "Gens" için "Kan" karşılığını kullanmak yerinde olur.

[51] Belgin Erdoğmuş, *Roma Borçlar Hukuku Dersleri* (İstanbul: Der Yayınları, 2005), 1.

[52] Bülent Tahiroğlu, *Roma Borçlar Hukuku* (İstanbul: Der Yayınları, 2005), 108.

bir köy irtifakı (servitutes rusticorum) olan geçit hakkı (via) üzerine olduğu anlaşılır. Tarla sahibi bir yol belirlemezse yolcular dilediği gibi tarladan geçebilir. Önceki levhada dile getirilen bağ kütükleri ve eksik kalan 9. maddenin budama ifadeleri ile burada bahsi geçen tarladan geçit hakkı toplumun üretim biçimi ve altyapı üzerine aydınlatıcıdır. Erken dönem Roma bir tarım toplumudur. Hatta erken dönem Romalılar için çiftçi-asker demek yerinde olur.[53]

VIII. Levha cezalar üzerinedir. İlk maddenin tamamı elimize ulaşmasa da kötü büyü yapmanın bir suç olduğu anlaşılıyor.

2. maddeyle birisinin vücudu yırtılınca (membrum rupsit) yani yaralama suçu işlendiğinde eğer taraflar anlaşmazsa kısas (talionis) öngörülmüştür. Bu halde yaralama bedelinin tespitinde tarafların serbest olduğu anlaşılır. Fakat birisinin kemiği kırılırsa hür için 300, köle için 150 ceza öngörülmüştür. Belirtilen bu rakamların birimi belirsizdir. III. Levhada tahıl içi libre kullanılmakta ve bedel olarak para yerine bronz öngörülmekteydi. Bu nedenle burada da öngörülen bedelin 300 libre ve 150 libre ağırlığında bronz olması muhtemeldir. Öyleyse bir kölenin kemiği özgürün yarısı kadar değerlidir.

4. maddede "*haksızlık*" veya "*zulüm*"[54] şeklinde tercüme edebileceğimiz "*iniuria*" için öngörülen ceza ise 25'tir. Bunun da 25 libre bronz olması muhtemeldir. Burada bahsi geçen haksız fiilin (iniuriam faxit) önceki maddelerde belirtilen suçlardan daha hafif yaralamaları kastettiği düşünülebilir. Umur, daha sonraki dönemlerde "*iniuria*"nın her tür haksız fiili karşılayacağı fakat XII Levha devrinde sadece bedensel zarara karşılık geldiğini öne sürer. Ayrıca Umur, "*membrum ruptum*" kavramını "*uzuv kırma*" şeklinde çevirir.[55] Buradaki "*membrum*" uzuv ve vücut/et anlamına gelebilmekteyken "*ruptum*" da kırmak ve yırtmak anlamlarına gelir. O nedenle "*membrum ruptum*" hem "*etini yırtmak*" hem "*uzvunu kırmak*" şeklinde çevrilebilir. Fakat bir sonraki maddede kemik kırmak için "*fractum*" kullanmasından "*ruptum*" kelimesini yırtmak anlamında kullandıkları sonucuna varabiliriz aksi halde her iki madde için aynı kelime kullanılmalıydı. Ayrıca deri anlamına gelen "*membrana*" kelimesinin de "*membrum*"dan türediği düşünülürse bu daha muhtemel görünür. Rado ise "*membrum ruptum*"u "*uzuv koparılması*" şeklinde çevirir[56] ki bu Umur'un "*uzuv kırma*" ifadesine nazaran daha doğru görünür. Burada "*et yırtmanın*" uzuv koparmayı ya da göz oymayı da kapsadığı unutulmamalıdır. Vücut dokusunda (et) meydana gelen yırtılma ile bir uzuv kopabilir veya işlevini yitirebilir. Maddelerin sıralaması ve öngörülen cezalara bakacak olursak "*membrum rupsit*"in kemik kırma ve basit yaralamadan daha ağır bir suç olduğu anlaşılır. Daha geniş kapsamı nedeniyle az ve öz olan "et yırtma" ifadesi tercih edilmiştir. Institutiones'te belirtildiği üzere "*ruptum*" sözü dar anlamıyla kırmak olarak anlaşılsa da bunun aslen herhangi bir şekilde bozulma olarak anlaşılması gerekir ve bu ifade yanma, kopma, kırılma, çatlama hallerini de kapsar.[57] Bu ifadeler kendi tercümesine dayandığından "*uzuv kırma*" ifadesi ile Umur'un, bedenin herhangi bir yerinde sebep olunan ciddi bozulmayı/hasarı kastettiği de düşünülebilir. Bu çalışmada tercih edilen "*et yırtma*" tabiri de böylesi geniş bir anlamı hedeflemektedir.

8. madde eksiktir fakat anlaşıldığı kadarıyla başkalarının ürünlerine büyü yapılmaması ve başkasının ürünlerinin alınmasını yasaklar.

12. madde gece vakti hırsızlık yapanı öldürmenin hukuka uygun olduğu belirtilir. 13. madde eksiktir fakat ilk kelimesi "*luci*" ışık/gün anlamına gelir. Önceki maddenin gece vakti yapılan hırsızlıktan bahsettiği düşünülürse bu maddenin de gündüz vakti yapılan hırsızlığa ilişkin olması muhtemeldir. Burada "*endo que plorato*" ile komşuların yardıma çağırılması ifade edilir. Lintott bunu "*self-help*" yani kendine yardım olarak adlandırır.[58] Kolluk kuvveti olmadığından emniyet ve asayiş halk tarafından sağlanır, halk kendine yardım eder. Hatta Lintott "*endo plorato*" gibi çeşitli yardımlaşma örnekleri verdikten sonra Roma hukukunun erken dönemi için törensel yardımlaşma (*ritualized self-*

[53] Reginald Haynes Barrow, *Romalılar*, çev. Ender Gürol (İstanbul: Varlık Yayınevi, 1965), 5.

[54] "Iniuria" sözünün kökü ius/iuris hak-adalet anlamına gelirken başına gelen "in-" olumsuzluk ekidir. Birbirine zıt bu kelimeleri adalet ve zulüm şeklinde tercüme etmek daha uygun olacaktır. Zulüm sadece eziyet anlamına gelmez, zulüm her türlü haksızlığı kapsayan bir kavramdır. Bkz: Ahmet Mumcu, *Osmanlı Hukukunda Zulüm Kavramı* (Ankara: AÜHFY, 1972), 3.

[55] Umur, *Lügat*, 87.

[56] Rado, 197.

[57] I,4,3,12. Bkz: Iustinianus, *Institutiones*, çev. Ziya Umur (İstanbul: İstanbul Üniversitesi Yayınları, 1968), 304-305.

[58] Andrew Lintott, *Violence in Republican Rome* (New York: Oxford University Press, 1999), 13-14, 24.

help) sistemi demektedir.[59] Bu noktada gözden kaçırmamamız gereken, kolluk kuvvetinin yokluğunun o dönem için *imperium* yetkisinin de bulunmadığı anlamına geldiğidir. Eşitlik içerisinde yaşayan kandaş toplum üyeleri birbirine hükmedemez.

16. madde ile karşımıza çıkan "*furtum nec manifestum*" tabiri hırsızlığın aleni olmadığı yani hırsızın suçüstü yakalanmadığı anlamına gelir.[60] Bu gibi bir durumda hırsız verdiği zararı iki misliyle tazmin etmelidir.

21. maddede hami/koruyucu (patronus) himaye ettiği kişiye (cliens) ihanet eder veya aldatırsa kurban (homo sacer) olacaktır. Yani koruma sözünü bozan büyük bir günah işlemiş kutsallığı (sacratio) bozmuş sayılır. Çünkü sözünü bozan kişi sadece kendisinin değil tüm Romalıların güvenilirliğini sarsıp toplumsal bütünselliğe zarar vermiştir. "*Sacer*", Tanrıya ait olan demektir.[61] *Sacer homo* ilan edilen kişiyi herhangi bir Roma vatandaşı öldürebilir ve bu eyleminden ötürü cezalandırılmaz.[62] Bu suçun kefareti Tanrılara adanmış bir kurban olmak gibi görülür. Aslen *homo sacer*'in idama (kurban törenine) mahkûm olduğu fakat kaçarsa herkesin peşinde olsun diye onu öldürmenin suç olmadığı da öne sürülür.[63] Fakat, burada belirli bir kişinin infaz memuru olması yerine toplumun infazcı konumunda oluşu merkezi kamu otoritesinin yokluğuna işaret eder. Recm cezasında olduğu gibi toplumun tüm üyelerinin infazcı olması devletin olmadığını gösterir. Kandaşlar törelerini beraber yaratıp beraber uygularlar.

22. madde terazici ve şahidin üstlendiği görevi yerine getirmediği halde "*in-probus*" (ahlak-sız) olacağı ve bir daha şahitlik yapamayacağını (in-testabilis) belirtir. Daha sonraki dönemlerde karşımıza çıkan "*in-famia*" (şeref-siz) kavramı buradan gelmiş olmalıdır. Bir ceza olarak ahlaksızlıkla yaftalama bize tekrar toplumsal kontrol mekanizmalarının bireysel davranışa etkisini hatırlatacaktır.[64] Toplumsal bütünsellikten dışlanmak kandaş bireyler için ciddi bir yaptırımdır.

24. madde eksiktir fakat atılan kargının (telum) istenilenden uzağa gitmesinden bahseder. Taksirle yaralama veya öldürmeye ilişkin olabilir.

Bu levhadaki cezalar arasında para cezası ve hapis cezası görülmez. Bronz karşılığı öngörülen bedeller para cezası değil maddi tazminattır. Nitekim para cezaları bir kamu hazinesinin varlığına işaret eder. Erken dönem Roma ordusunun teşkili ve magisterlik görevinin bedelsiz üstlenilmesi de böylesi bir hazinenin henüz bulunmadığına işaret etmekteydi. Bu da toplumsal örgütlenmenin asabiyetle şekillendiğini ortaya koymak için yeterli olacaktır.

X. Levha incelenecek olan son levhadır. IX. ve XI. Levhaların metni elimize ulaşmamıştır. XII. Levha ise eksiktir. X. Levhanın ilk maddesi ile şehir içinde cenaze merasimi yasaklanmaktadır.

2. de eksiktir fakat ölü yakmak için dizilen kütüklerin kürekle düzleştirilmemesinden bahseder.

4. madde cenazede kadınların kendilerini tırmalayıp ağıtlar yakarak aşırıya kaçmamalarını buyurur.

5. madde daha sonra cenaze töreni yapmak için ölü kemiklerinin toplanmasını yasaklar.

7. madde eksiktir fakat bir kimsenin kişisel başarılarının çelenkle ödüllendirildiğini gösterir. İlkel toplumlarda toplumsal kontrol sadece kötü görülen davranışların cezalandırılması değil iyi görülen davranışların da teşvik edilmesiyle gerçekleşir. Bu nedenle onur ve erdem (honoris virtutisve) ödüllendirilir.

8. madde eksiktir fakat cenazede altın kullanılmamasından bahseder. Bu maddelerin tümü aşırıya kaçmayan mütevazı bir toplum portresi çizer. Daha önceki maddelerde yoksul ile varsıl ayrımı görülmüştü fakat anlaşılan bu ayrımın sergilenmesi arzu edilmemektedir. O esnada bronzun temel değişim aracı olduğu düşünülürse cenazede altın kullanılması büyük bir varsıllık göstergesi olurdu. Burada tevazu sadece bir erdem değil, kandaş bütünselliğin devamını sağlama yöntemidir.

[59] Lintott, 34.
[60] Halide Gökçe Türkoğlu, *Roma Hukukunda Suç ve Ceza* (İzmir: Albi Yayınları, 2014), 20.
[61] W. Warde Fowler, "The Original Meaning of the Word Sacer", *The Journal of Roman Studies,* 1 (1911): 57.
[62] Türkoğlu, 129.
[63] Harold Bennett, "Sacer Esto", *Transactions and Proceedings of the American Philological Association*, 61 (1930): 7.
[64] Özcan, 72.

5. SONUÇ

XII Levha Yasasının tamamını değerlendirecek olursak asabiyeti yüksek bir kandaş toplumla karşı karşıya olduğumuz söylenebilir. Baba otoritesinin güçlü olduğu yerleşik bir tarım toplumudur bu. *Gens*'e tanınan haklar da kandaş örgütlenmenin halen sürdüğünün göstergesidir. Para, adli kolluk, hapishane, profesyonel ordu gibi kurumlar görülmez, yazılı bir yasa vardır ama bu nesillerden beri izlenen töredir aslında. Watson bu yasanın dinden arınmış olduğunu iddia eder[65] ama yasada ölü gömmeye ilişkin tabular, kurban etme gibi dini yaptırımlar mevcuttur. Bu açıdan inancın örgütlenmeyle iç içe geçtiği söylenebilir. Zaten kandaş örgütlenmede inanç önemli bir yer tutar.

Roma'yı Mars'ın çocukları Remus ve Romulus'un kurduğu elbette ki efsanedir. Bölgede yaşayan insanların tepelerde köyler kurup zamanla bu köylerin birleşiminden bir kent oluşturması, yedi tepeli Roma için daha inandırıcı bir hikâye olurdu. Fakat sınıfsız devletsiz bir topluluğun yani kandaşların örgütlenmesinde inanç asabiyeti beslemektedir. İnanç sayesinde örgütlenip bir kimlik yaratan ve asabiyetini kuvvetlendiren kandaşlar devleti yaratacak, yani sınıflı uygar bir topluma dönüşecektir. Bu nedenle Roma'nın kurucusu kurttan süt emmiş Marsın çocuğu Romulus'tur. Her sene başı savaş tanrısı Marsın (Martius) ayında[66] sefere çıkarlardı. "*Religio*" (din) ve "*Lex*" (kanun) sözlerinin aynı kökten, yani "*legere*" (seçmek/toplamak) fiilinden gelmesi inanç ve örgütlenme arasındaki bu ilişkinin bir örneğidir.

Eğer efsaneyi bir kenara bırakırsak yedi köyü birleştirip Roma kentini oluşturan Tarquinius Priscus'un devletin temelini attığı öne sürülür.[67] Fakat Romalıların silahlı örgütlenmesini düzenleyen Servius Tullius'un da kamusal otoriteyi şekillendirmek bakımından devletin kurucusu olduğu iddia edilebilirdi, veyahut Tarquinius Superbus kentten kovulup ilk consul seçilince Devlet (Res Publica) kuruldu diyenler de olabilir. O halde *regnum* (krallık) devrinin *rex*'i günümüz krallarından farklıdır. Nitekim *rex* unvanının babadan oğula geçmeyişi ve seçilmeleri esas kudretin halkta olduğuna işaret eder. Uygarlık öncesi toplum, sınıfsız eşitlikçi yapısı sayesinde "hukuk" için devlet gibi toplumdan ayrı bir tüzel kişiliği vasıta edinmediğinden kaçınılmaz olarak demokratiktir. Kandaş toplum, kurallarını beraber yaratır ve uygular.

Esasında buradaki problemimiz kandaşlıktan uygarlığa geçişe bir tarih verilememesindendir. Çünkü bu bir anda gerçekleşen bir olay değil zamana yayılan bir süreçtir. Zamanla oluşan kurum ve kurallar eşitlikçi kandaş toplumun içinden kopan bir kısmı yükseltip tüzel kişiyi yaratacaktır. Tüm bunlar göz önünde bulundurulduğunda XII Levha devrinde Romanın yukarı kandaşlık[68] evresinde, yani uygarlığa geçiş aşamasında bir yerleşik toplum olarak değerlendirilmesi gerekir. Bu halde krallık dönemi (regnum) ile erken cumhuriyet dönemi (res publica) Roma kenti henüz devlet değildir.

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[65] Alan Watson, *The Spirit of Roman Law* (London: The University of Georgia Press, 1995), 55.

[66] Roma takvimi "Martius" (Mart) ayı ile başlardı. Bu nedenle Latince "September" (Eylül) yedinci ay, "October" (Ekim) sekizinci ay, "November" (Kasım) dokuzuncu ay, "December" (Aralık) onuncu ay anlamına gelir.

[67] Recai Galip Okandan, *Roma Amme Hukuku* (İstanbul: İstanbul Üniversitesi Yayınları, 1944), 25.

[68] Ümit Hassan, *İbn Haldun Metodu ve Siyaset Teorisi* (Ankara: Doğu Batı, 2010), 222.

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HARMONIZING ENVIRONMENTAL AND SOCIAL SUSTAINABILITY STANDARDS WITHIN THE UN SYSTEM

BM SİSTEMİNDE ÇEVRESEL VE SOSYAL SÜRDÜRÜLEBİLİRLİK STANDARTLARININ UYUMLAŞTIRILMASI

Elvira PUSHKAREVA[1]

ABSTRACT

Until recently, environmental and social standards have primarily been established within international financial institutions. In recent years, a number of UN entities have put in place or have started to adopt environmental and social standards for programming, including establishing grievance mechanisms to investigate compliance with applicable social and environmental policies and procedures. This paper evaluates the efficiency and effectiveness of UN entities in meeting these requirements. Through an analysis of existing frameworks and practices, it identifies key challenges and gaps, providing recommendations to enhance the integration of environmental and social sustainability standards into UN policies and implementation strategies.

Key words: *International Law, Human Rights, International Environmental Law, Environmental and Social Sustainability Standards, UN Law.*

ÖZET

Yakın zamana kadar çevresel ve sosyal standartlar esas olarak uluslararası finans kuruluşları bünyesinde oluşturulmuştur. Son yıllarda ise birçok BM kuruluşu, programlama faaliyetleri için çevresel ve sosyal standartlar benimsemiş ya da benimsemeye başlamış; ayrıca ilgili çevresel ve sosyal politikalara ve prosedürlere uyumu incelemek üzere şikâyet mekanizmaları kurmuştur. Bu makale, BM kuruluşlarının söz konusu gereklilikleri karşılama konusundaki etkinliğini ve verimliliğini değerlendirmekte, mevcut çerçevelerin ve uygulamaların analizi yoluyla başlıca zorlukları ve boşlukları belirlemekte, çevresel ve sosyal sürdürülebilirlik standartlarının BM politikalarına ve uygulama stratejilerine entegrasyonunu geliştirmek için öneriler sunmaktadır.

Anahtar kelimeler: *Uluslararası Hukuk, İnsan Hakları, Uluslararası Çevre Hukuku, Çevresel ve Sosyal Sürdürülebilirlik Standartları, BM Hukuku.*

1. INTRODUCTION

Until recently, environmental and social standards have primarily been established within international financial institutions, including the World Bank,[2] multilateral development banks such as the Inter-

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[2] The World Bank was the first financial institution to embark on this process. From 1984 the World Bank does not finance projects that contravene the borrowing country's obligations under international environmental law, human

American Development Bank and the Asian Development Bank.[3] In recent years, a number of UN entities have put in place or have started to adopt environmental and social standards for programming,[4] including establishing grievance mechanisms to investigate compliance with applicable social and environmental policies and procedures. This alignment reflects a commitment to international environmental law and human rights frameworks, including the Sustainable Development Goals.[5]

This paper evaluates the efficiency and effectiveness of UN entities in meeting these requirements. Through an analysis of existing frameworks and practices, it identifies key challenges and gaps, providing recommendations to enhance the integration of environmental and social sustainability standards into UN policies.

2. A MODEL FOR HARMONIZING ENVIRONMENTAL AND SOCIAL SUSTAINABILITY STANDARDS IN UN PROGRAMMING

In recent years, a number of UN entities have put in place or have started to adopt environmental and

rights, and indigenous rights protection. This principle has been incorporated into various Bank policies and procedures. In 2016, the World Bank adopted a new set of environment and social policies called the Environmental and Social Framework (ESF), which now applies to the World Bank investment project financing. The Environmental and Social Framework (The World Bank, 2017), accessed November 20, 2025, https://thedocs.worldbank.org/en/doc/837721522762050108-0290022018/original/ESFFramework.pdf.

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[4] Programming, in this context, refers to supported activities with defined outcomes and resources, over which the UN entity exercises significant organizational influence (Moving towards a Common Approach to Environmental and Social Standards for UN Programming (UN EMG, July 2019), 7, accessed November 20, 2025, https://unemg.org/wp-content/uploads/2019/07/FINAL_Model_Approach_ES - Standards.pdf).

[5] In alignment with the Environmental, Social, and Governance (ESG) concept, the 2030 Agenda for Sustainable Development, and the 2015 Addis Ababa Action Agenda of the Third International Conference on Financing for Development, an important milestone was the 2018 UN General Assembly Working Group's Report on Human Rights and Transnational Corporations. This report recommended that investment entities and financial institutions systematically integrate human rights due diligence into their operations, recognizing it as a core responsibility under the 2011 UN Guiding Principles on Business and Human Rights (UN Guiding Principles on Business and Human Rights (2011), accessed November 20, 2025, https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf). The report further urged these entities to "not only require effective human rights due diligence" from the companies they invest in but also to "coordinate with other organizations and platforms to ensure alignment and foster meaningful engagement with businesses" on these issues ((UN General Assembly Working Group's Report on Human Rights and Transnational Corporations, A/73/163, 2018). This recommendation signals a critical evolution in the role of international organizations and financial institutions in ensuring that human rights and environmental sustainability are embedded within global business practices. According to Anne Peters and Heike Krieger, the rise of due diligence is a response to, a manifestation of, and a catalyst for "structural change" in international law (in Krieger, Peters, and Kreuzer, eds., *Due Diligence in International Legal Order* (Oxford: Oxford University Press, 2020), 351-389.

social standards for programming,[6] including establishing grievance mechanisms to investigate compliance with applicable social and environmental policies and procedures. These grievance mechanisms offer a formal avenue for stakeholders to engage with UN agencies when they believe a UN-supported project may negatively impact them socially or environmentally. They serve as a recourse for individuals and communities who have already raised concerns through standard stakeholder consultation and engagement channels, whether with Implementing Partners or the respective UN agency, but have found the response unsatisfactory. These standards are being developed in alignment with the provisions and principles outlined in the 2012 UN document, A Framework for Advancing Environmental and Social Sustainability in the United Nations System, as well as the environmental, social and gender policies of the Global Environmental Facility adopted in 2012 and updated in 2018.[7]

In 2016, senior officials of the UN Environment Management Group (EMG) agreed to establish a new work stream under the 'Consultative Process on Advancing the Environmental and Social Sustainability in the UN system'. This work stream aimed to explore options for developing a unified approach to environmental and social standards for programming within the UN system. As part of this initiative, a comparative analysis was conducted on the existing environmental and social standards of seven participating UN entities, such as FAO, IFAD, UNDP, UNEP, UNICEF, UNIDO, and UNOPS. The analysis identified key areas of both commonality and divergence in the content and scope of safeguard requirements. Additionally, the study examined the normative foundations of key safeguard-related thematic areas and reviewed the safeguard frameworks of other international entities.

As a result of this initiative, in 2019, the UN EMG introduced the *Model Approach to Environmental and Social Standards for UN Programming.*[8] This approach provides a set of guiding principles and benchmarks designed to support the implementation of the 2030 Agenda; "reflects key elements of a human rights-based approach to programming and also applies a risk-informed approach to addressing environmental and social risks and impacts."[9] The Model Approach aims "to strengthen the sustainability and accountability of UN-entity programming."[10] By aligning with these benchmarks, UN entities are better positioned to assist partner countries in achieving the Sustainable Development Goals.

Individual UN entities, on a voluntary basis, "would seek to align their environmental and social standards with those of the Model Approach, consistent with their mandates, corporate systems for programme and risk management as well as other related corporate policies and commitments,"[11] including those on environmental and social sustainability. The Model Approach is "not a prescribed policy framework and its benchmark standards in themselves do not establish grounds for defining compliance and accountability, which must be established through entity-specific mandatory policies and procedures."[12]

According to the Model Approach greater alignment of environmental and social standards across UN entities will strengthen "policy coherence and improve collaboration with governments and other national counterparts in country level programming."[13] With regard to the provisions of this document programming shall "anticipate and avoid, and where avoidance is not possible, minimize and mitigate adverse impacts to people and the environment," utilizing a process of screening, assessment and management of environmental and social risks and impacts and application of standard operating procedures, with "special attention to potential impacts on marginalized and disadvantaged groups."

[6] Programming, in this context, refers to supported activities with defined outcomes and resources, over which the UN entity exercises significant organizational influence (Moving towards a Common Approach to Environmental and Social Standards for UN Programming, UN EMG, 2019, 7).

[7] Updated Policy on Environmental and Social Safeguards, GEF, 2018, accessed November 20, 2015, https://www.thegef.org/sites/default/files/council-meeting-documents/EN_GEF.C.55.07.Rev_.01_ES_Safeguards.pdf.

[8] Moving Towards a Common Approach to Environmental and Social Standards for UN Programming. UN EMG, 2019, 7.

[9] *Ibid*, 9.

[10] *Ibid*.

[11] *Ibid*.

[12] *Ibid*, 6.

[13] *Ibid*, 3.

Stakeholder engagement and accountability programming shall promote "meaningful and effective engagement with stakeholders and affected parties" – and in particular marginalized or disadvantaged groups – "throughout the programming life-cycle"; ensure stakeholders have "timely access to appropriate, understandable information on programming activities and potential environmental and social risks and impacts"; and ensure that "affected parties have access to fair, transparent, and inclusive" grievance redress processes and mechanisms. Special effort should be made to engage marginalized and disadvantaged groups, in line with the principle of 'reaching the furthest behind first' and considering that these groups may be "disproportionately affected by potential adverse impacts from programming activities". Measures are to be adopted "to identify, address and reduce the risk of reprisals against programming stakeholders."[14]

The Model Approach calls on the UN entity to ensure implementation of the following measures. With regard to the screening and categorization: the UN entity aligning with the Model Approach shall "screen and categorize proposed programming activities with a distinct planning phase to identify potential environmental and social risks and impacts associated with supported activities", including the risks referred to in the Guiding Principles and Thematic Areas of the Model Approach, and "to determine the nature and level of environmental and social review and assessment", and, provisionally, "the management measures necessary for addressing the identified risks and impacts". Screening, together with the assessment process, establishes the relevance of the benchmark standards outlined in the Model Approach for the programming activities. The UN entity may utilize screening to identify potential environmental and social risks as well as "opportunities for enhancing beneficial programming outcomes". The screening process results "in the assignment of a risk category based on the significance of potential environmental and social risks", including "direct, indirect, cumulative and transboundary impacts", as relevant, in the programming area, including those related to associated facilities. Screening and categorization shall occur as early as possible for programming "with a distinct planning phase," well in advance of approval of supported activities, and be updated accordingly. The UN entity shall seek "to align its environmental and social risk categorization procedures with good international practice", i.e. low risk, moderate risk, high risk.

Programming categorized as Moderate and High Risk requires "environmental and social analysis and assessment that is proportionate to the potential risks and impacts presented by the programming activities". Analysis and assessment shall be undertaken "as early as possible for programming with a distinct planning phase". In no case shall programming activities that may cause adverse impacts "be carried out until completion of the analysis and/or assessment and adoption of necessary management measures", or in the case of initial emergency response and humanitarian action, "application of necessary management controls and procedures to avoid, minimize, and mitigate adverse impacts."

According to the document, the environmental and social assessment, informed by the screening process and initial analysis and scoping of issues, "shall take into account all relevant environmental and social risks and impacts of throughout the programming cycle", including but not limited to impacts on "water and air quality (including impacts on the ozone layer)"; "biodiversity and natural habitats, including land and soils, water, ecosystems and ecosystem services"; livelihoods; the rights of women, older persons, youth, indigenous peoples, persons with disabilities, and marginalized and disadvantaged groups and individuals; fundamental principles and rights at work; worker health and safety; "impacts on the health, safety and well-being of affected communities; tenure security; risks to human security through escalation of conflict, crime and violence"; risks to cultural heritage; "potential exposure and vulnerability of communities to climate change impacts and disaster risks, and potential risks that climate change and disasters may pose to programming outcomes; and the risk of reprisals against individuals and communities in relation to supported activities."[15]

The Model Approach requires the UN entity to ensure that "parties affected by programming activities have access to fair, transparent, and inclusive grievance redress processes and

[14] *Ibid*, 10.

[15] *Ibid*, 20.

mechanisms free of charge."[16] Accordingly, grievance mechanisms should be: legitimate ("enabling trust from the intended stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes"); accessible ("being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access"); predictable ("providing a clear and known procedure"); and transparent.

A systematic analysis of existing frameworks and practices is essential for evaluating the efficiency and effectiveness of UN entities in implementing Environmental and Social Sustainability (ESS) requirements, such as Model Approach to Environmental and Social Standards for UN Programming, and for identifying key challenges and gaps.

This paper examines the development and implementation of ESS frameworks within the UN system, focusing on common challenges and gaps identified across organizations. The research findings are based on the analysis of all seven entities that participated in the 2016 UN Environment Management Group (EMG) project. As participants in this initiative, these organizations were the first within the UN system to be informed about the forthcoming changes in environmental and social sustainability standards. To illustrate these points, the paper uses UNEP and UNDP as representative examples of EMG project participants.

In addition to the EMG project participants, the study also includes a broader analysis of other UN entities outside the project. Among the organizations examined, ILO, UN Women, and UNESCO were included in the analysis, with UNESCO serving as a representative case to illustrate the shared characteristics of the current state of integration of ESS in UN entities outside the scope of the EMG project.

2.1. UNDP

UNDP's projects and programmes effective 1 January 2015.[17] The objectives of the Standards were to: "strengthen the social and environmental outcomes of UNDP projects"; "avoid adverse impacts to people and the environment affected by projects; minimize, mitigate, and manage adverse impacts where avoidance is not possible"; "strengthen UNDP and partner capacities for managing social and environmental risks"; and ensure "full and effective stakeholder engagement, including through a mechanism to respond to complaints from project-affected people". The Standards contained two key components: a Social and Environmental Compliance Unit to respond to claims that UNDP is not in compliance with applicable environmental and social policies; and a Stakeholder Response Mechanism (SRM) that ensures individuals, peoples, and communities affected by projects have access to appropriate grievance resolution procedures for hearing and addressing project-related complaints and disputes.

In 2021, the revised Social and Environmental Standards (SES)[18] were introduced, reinforcing UNDP's "commitment to integrating social and environmental sustainability into its programmes and projects, thereby supporting the achievement of sustainable development."[19] The revised standards highlight foundational principles, such as the commitment to "leaving no one behind", the protection and promotion of human rights, the advancement of gender equality and women's empowerment, "the enhancement of sustainability, and the upholding of accountability."[20]

These standards cover a range of critical areas, including biodiversity conservation and sustainable

[16] *Ibid*, 26.
[17] UNDP Social and Environmental Standards, UNDP, 2014.
[18] Social and Environmental Standards, UNDP, 2021, accessed November 20, 2025, https://ses-toolkit.info.undp.org/sites/g/files/zskgke446/files/2025-02/undp-social-and-environmental-standards_2019-update_rev2023.pdf?gl=1*9s86jd*_gcl_au*MTU5MDA0ODcxLjE3Mzk1MzMzMzQ.*ga*MTkzMTA4NDAxMS4xNzM5NTMzMzM2*_ga_3W7LPK0WP1*MTc0MzA2ODg1NS41LjAuMTc0MzA2ODg1NS42MC4wLjA.
[19] According to the SES, when the implementing partner is a government institution, UN entity, inter-governmental organization, or nongovernmental organization, it is responsible and accountable to UNDP for overall management of the project. UNDP remains ultimately accountable to its Executive Board and respective donor(s) for the sound use of financial resources channelled through UNDP accounts and must ensure the quality of its support. Implementation of the SES is therefore integral to UNDP's quality assurance responsibilities (Social and Environmental Standards. UNDP, 2021, 5).
[20] Social and Environmental Standards, UNDP, 2021, 6-11.

natural resource management, climate change and disaster risks, community health, safety, and security, cultural heritage, displacement and resettlement, indigenous peoples, labour and working conditions, "pollution prevention and resource efficiency."[21] Additionally, UNDP emphasizes "the importance of meaningful, effective and informed stakeholder participation"[22] in the formulation and implementation of its projects, ensuring inclusivity and transparency throughout the process.

The SES describe the requirements regarding screening, assessment and management of social and environmental risks and impacts; stakeholder engagement and response mechanisms; access to information; and monitoring, reporting and compliance. UNDP utilizes its Social and Environmental Screening Procedure (SESP) to identify potential social and environmental risks and opportunities associated with the project.[23] UNDP's mandatory Social and Environmental Screening Procedure (SESP) provides detailed requirements and guidance on screening and assessment. The SESP screens projects for "all environmental and social risks and impacts associated with the SES Programming Principles and Project-level Standards, including direct, indirect, cumulative, transboundary risks and impacts and those related to associated facilities". Based on the screening, UNDP categorizes projects according to "the degree of potential social and environmental risks and impacts, such as low risk, moderate risk, substantial risk and high risk". In addressing projects with potential adverse social and environmental impacts, UNDP requires that "key principles are applied, including a precautionary approach."[24]

In addition, UNDP requires that "the progress of implementation of mitigation and management plans required by the SES is monitored, complaints and grievances are tracked and monitored"; "follow-up on any identified corrective actions" is tracked; and any required monitoring reports on SES implementation are finalized and disclosed. UNDP will ensure the disclosure of relevant information about UNDP programmes and projects "to help affected communities and other stakeholders understand the opportunities, risks and impacts of the proposed activities."[25] In addition, for projects with potentially significant risks and impacts, "periodic reports are provided to the affected communities that describe progress with implementation of project management and action plans and on issues that the consultation process or grievance mechanism has identified as a concern."[26]

To address concerns about UNDP's compliance with its Social and Environmental Standards, policies and procedures, in 2013 UNDP has established a Social and Environmental Compliance Unit (SECU), which is acting on the basis of the Investigation Guidelines.[27] The main purpose of the Compliance Review is to "investigate alleged violations of UNDP's environmental and social commitments" in any UNDP project. Any person or community, or their representative, may file a complaint, if they believe that the environment or their well-being may be affected by a UNDP-supported project or programme.[28] The compliance review may result in findings of non-compliance, in which case recommendations will be provided to the Administrator about "how to bring the Project into compliance" and, where appropriate, "mitigate any harm resulting from UNDP's failure to follow its policies or procedures."

In addition to Social and Environmental Compliance Unit UNDP established a UNDP'S

[21] *Ibid*, 12-61.
[22] Individuals or groups or organizations representing them who (a) are affected by the project and (b) may have an interest in the project (Social and Environmental Standards, UNDP, 2021, 68).
[23] See UNDP Social and Environmental Screening Procedure, including guidance in applying the SESP (UNDP SES Toolkit, accessed November 20, 2025, https://ses-toolkit.info.undp.org/).
[24] *Ibid*, 66.
[25] Social and Environmental Standards, UNDP, 2021, 69; UNDP Information Disclosure Policy of 1996, revised in 2020, accessed November 20, 2025, https://www.undp.org/accountability/transparency/information-disclosure-policy.
[26] Social and Environmental Standards, UNDP, 2021, 70.
[27] Investigation Guidelines: Social and Environmental Compliance Unit, UNDP, 2017, accessed November 20, 2025, https://www.undp.org/sites/g/files/zskgke326/files/publications/SECU%20Investigation%20Guidelines_4%20August%202017.pdf.
[28] The UNDP Accountability Mechanism, Platform, accessed November 20, 2025, https://www.undp.org/accounttability/audit/social-and-environmental-compliance-review-and-stakeholder-response-mechanism.

Stakeholder Response Mechanism.[29] This mechanism helps project-affected stakeholders, UNDP's partners, e.g. governments, NGOs, businesses, jointly "address grievances or disputes related to the social or environmental impacts of UNDP-supported projects". Affected people have a choice, they can ask SECU to pursue a compliance review examining UNDP's compliance with UNDP social and environmental commitments, or they can attempt to resolve complaints and disputes through the Stakeholder Response Mechanism.

2.2. UNEP

UNEP adopted Environmental, Social and Economic Sustainability Framework in 2015[30], which sets out the environmental and social safeguard principles and standards for UNEP programmes and projects. It established procedures for identifying and avoiding, or where avoidance is not possible, mitigating environmental, social and economic risks, and "for discerning and exploring opportunities to enhance positive environmental, social and economic outcomes".

In 2020, UNEP introduced a revised Environmental and Social Sustainability Framework (ESSF) aimed at strengthening the management of environmental and social impacts throughout the project lifecycle. The revised Framework seeks to align with the 2030 Agenda for Sustainable Development, emphasizing improved sustainability practices within UNEP's operations.[31]

The UNEP's ESSF as well as UNDP's SES, are both grounded in key principles of sustainable development, including gender equality and women's empowerment, human rights, leaving no one behind, sustainability, resilience, and accountability. UNEP's standards address similar critical areas as UNDP's SES: "biodiversity, ecosystems and sustainable natural resource management"; "climate change and disaster risks"; "community health, safety, and security"; "cultural heritage"; "displacement and involuntary resettlement; indigenous peoples"; "labour and working conditions", "pollution prevention and resource efficiency."[32]

Under UNEP's ESSF, UNEP commits to implementing a structured approach that includes "screening, assessing, managing, and monitoring environmental and social risks"; and "ensuring meaningful stakeholder engagement and accountability". However, the detailed procedures for implementing this framework are expected to be developed at a later stage within the UNEP Programme Manual.[33]

UNEP screens and categorizes proposed programme and project activities using the Safeguard Risk Identification Form (SRIF), "to identify potential environmental and social risks and impacts associated with supported activities", "to determine the nature and level of review and management measures required for addressing the identified risks and impacts", and "to identify opportunities to support other positive changes to the environment and societies". The screening process results "in the assignment of a risk category" based on the programme and project components "presenting the most significant potential environmental and social risks". The risk categories include "consideration of direct, indirect, cumulative and induced potential impacts" in the programme or project area. Unlike UNDP's four risk categories, UNEP's screening process classifies projects into three risk levels, such as low, moderate. and high.[34] It is essential to highlight that both UNEP and UNDP mandate the application of a precautionary approach in projects with potential adverse social and environmental impacts.[35]

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[29] UNDP'S Stakeholder Response Mechanism: Overview and Guidance, accessed November 20, 2025, https://www.undp.org/content/dam/undp/library/corporate/Social-and-Environmental-Policies-andProcedures/SRM%20Guidance% 20Note%20r4.pdf; UNDP official website, accessed November 20, 2025, https://www.undp.org/accountability/audit/social-and-environmental-compliance-review-and-stakeholder-response-mechanism.

[30] UNEP Environmental, Social and Economic Sustainability Framework, UNEP, 2015, accessed November 20, 2025, http://wedocs.unep.org/bitstream/handle/20.500.11822/8718/- UNEP_environmental%2c_social_and_economic_sustainability_framework2015UNEP_Environmental_Social_and_Economic_Sustainability_Framework.pdf.pdf?sequence=2&isAllowed=y.

[31] UNEP Environmental and Social Sustainability Framework, UNEP, 2020, accessed November 20, 2025, https://wedocs.unep.org/bitstream/handle/20.500.11822/32022/ESSFEN.pdf?sequence=1&isAllowed=y.

[32] *Ibid*, 17.

[33] *Ibid*, 17-18.

[34] *Ibid*, 18.

[35] UNEP Environmental and Social Sustainability Framework, UNEP, 2020, 21; Social and Environmental Standards, UNDP, 2021, 66.

It is crucial that both UNEP's and UNDP's indigenous peoples' policies are based on Free, Prior and Informed Consent principle. According to UNDP's policies, from the earliest stage of project conceptualization and design through implementation and closure, mechanisms are established and applied to ensure the meaningful, effective and informed participation of indigenous peoples in all relevant matters. Culturally appropriate consultations are conducted with the aim of reaching agreement, and Free, Prior, and Informed Consent (FPIC) is secured for any actions that may impact, positively or negatively, the rights, interests, lands, territories (whether titled or untitled), resources, traditional livelihoods, or tangible and intangible cultural heritage of indigenous peoples.[36]

UNEP's policy mandates documentation of a mutually accepted process for good faith negotiations, outcomes, including agreements and dissenting vex, and efforts to accommodate Indigenous peoples' concerns in project design[37]. Both UNDP and UNEP emphasize that they will exclude from their projects any activities for which agreement or consent with indigenous peoples cannot be obtained.[38]

UNEP's ESSF also requires monitoring, including "reporting of environmental and social risks and impacts to project-affected communities";[39] "effective and meaningful stakeholder engagement", including access to "timely and relevant information and grievance redress."[40]

According to the UNEP's standards, stakeholders may access UNEP's Stakeholder Response Mechanism (SRM), which handles both compliance reviews and grievance redress. To address concerns about UNEP's compliance with its environmental and social standards, an Independent Office for the Review of Stakeholder Responses started having responsibility for managing the Stakeholder Response Mechanism, including compliance concerns and grievances, in 2015.[41] In 2020[42] and 2021, UNEP further developed its operating procedures for the SRM[43]. They established the process and guidelines for UNEP's SRM through an Independent Office for Stakeholder Safeguard-related Response. These procedures guide UNEP staff, implementing partners, and affected communities in addressing safeguard-related concerns under the ESSF. The SRM offers compliance review or dispute resolution for UNEP projects and serves as a complementary mechanism to local grievance processes, which should be the first point of contact for stakeholders before escalating issues to UNEP.[44]

2.3. UNESCO

Since 2010, UNESCO has actively participated in the UN Greening the Blue initiative, contributing to UN-wide sustainability efforts. This commitment was further reinforced in 2019 with the adoption of the *Strategy for Sustainability Management in the UN System 2020-2030 - Phase I: Environmental Sustainability in the Area of Management.*[45]

Building on this foundation, UNESCO introduced its Environmental Sustainability and Management Policy in 2021.[46] This policy provides a structured framework and overarching principles for integrating environmental sustainability considerations into UNESCO's global activities. It applies to all UNESCO premises, operations, policies, and programmatic activities that have either a direct or indirect environmental impact,

[36] Social and Environmental Standards, UNDP, 2021, 46.
[37] UNEP Environmental and Social Sustainability Framework, UNEP, 2020, 39.
[38] Social and Environmental Standards, UNDP, 2021, 46; UNEP Environmental and Social Sustainability Framework, UNEP, 2020, 39.
[39] UNEP Environmental and Social Sustainability Framework, UNEP, 2020, 18-19.
[40] Ibid, 19.
[41] UNEP Environmental, Social and Economic Sustainability Framework, UNEP, 2015, Para 3.
[42] UNEP Environmental and Social Sustainability Framework, UNEP, 2020, 20.
[43] UNEP's Stakeholder Response Mechanism. UNEP, 2021, accessed November 20, 2025, https://wedocs.unep.org/bitstream/handle/20.500.11822/32023/ESSFRM.pdf?sequence=13.
[44] UNEP's Project Concern Feedback Form accessed November 20, 2025, https://www.unep.org/about-un-environment/why-does-un-environment-matter/un-environment-project-concern.
[45] Strategy for Sustainability Management in the UN System 2020-2030 - Phase I: Environmental Sustainability in the Area of Management. UNEMG. CEB/2019/3/Add.2.
[46] The Environmental Sustainability and Management Policy, UNESCO, 2021, accessed November 20, 2025, https://unesdoc.unesco.org/ark:/48223/pf0000377627/PDF/377627eng.pdf.multi.

ensuring that UNESCO exercises at least a minimal level of control over these aspects.[47]

The objectives of UNESCO's Environmental Sustainability and Management Policy are as follows: "fully account for the externalities imposed by UNESCO's own operations and facilities"; "prevent the pollution of water, land and air through UNESCO's operations and facilities"; "preserve biodiversity and cultural heritage of and in the communities in which it operates; contribute to climate change mitigation"; "use resources efficiently"; comply with "local, national, regional and international environmental regulations"; provide "safe and healthy workplaces".

Through this policy, UNESCO commits to integrating environmental considerations into its programs and across all stages of the programmatic cycle, including "planning, implementation, monitoring, and evaluation". The policy also emphasizes stakeholder engagement, particularly with "UNESCO staff, Member States, as well as programme implementation partners, contractors, tenants of UNESCO premises."[48] The UNESCO Environmental Management System serves as the principal tool for the implementation of this policy. The implementation process will be closely monitored by the Environmental Management Working Group, which will "conduct regular audits… to ensure adherence to the policy's objectives."[49]

While progress has been made, UNESCO has not yet established a comprehensive environmental and social safeguard framework,[50] nor a complaints mechanism comparable to those of UNDP and UNEP, including a dedicated platform for receiving and addressing grievances. However, UNESCO has taken initial steps towards addressing environmental and social sustainability in its supported projects, reflecting its ongoing efforts to integrate environmental and social standards within its operations. UNESCO has also developed its own policy on engaging with indigenous peoples, intended to guide the organization's work across all areas of its mandate where indigenous communities may be affected or stand on benefit.[51] While the policy affirms UNESCO's commitment to upholding the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)[52] in its policies, planning, programming and implementation,[53] its primary focus is on integrating UNCRIP principles into relevant programme areas. Unfortunately, the policy does not establish specific requirements or procedures for the development and implementation of UNESCO-supported projects, such as engagement of indigenous peoples in project planning or of FRIC, leaving a gap in its implementation at the project level.

3. CONCLUDING REMARKS

As observed, UN entities are actively enhancing human rights and environmental due diligence requirements. These standards are becoming integral to the definition, preparation, and implementation of country programming, ensuring that supported activities align with sustainability goals. The Environmental and Social Sustainability Frameworks (ESSF), for example, establish minimum sustainability standards for UN entities and their implementing partners, enabling them to anticipate and manage emerging environmental,

[47] Strategy for Sustainability Management in the UN System 2020-2030 - Phase I: Environmental Sustainability in the Area of Management, UNEMG. CEB/2019/3/Add.2.
[48] *Ibid*, 2.
[49] *Ibid*, 4.
[50] A similar situation applies to both UN Women and the International Labour Organization. However, unlike UN Women, the ILO, like UNESCO, has taken steps towards addressing environmental sustainability. This includes initiatives such as the ILO Environmental Sustainability Action Plan 2020-2021 (ILO Environmental Sustainability Action Plan 2020-2021, ILO, accessed November 20, 2025, https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40ed_emp/%40emp_ent/documents/publication/wcms_753577.pdf; Sustainable Development and Climate Change, UN Women official website, accessed November 20, 2025, https://www.unwomen.org/en/what-we-do/econo mic-empowerment/sustainable-development-and-climate-change; ILO Strategic Frameworks in the Area of Environmental Sustainability and Climate Change, ILO official website, accessed November 20, 2025, https://www.ilo.org/resource/ilo-strategic-frameworksarea-environmental-sustainability-and-climate.
[51] UNESCO Policy on Engaging with Indigenous Peoples, 201 EX/6, 2018, accessed November 20, 2025, https://unesdoc.unesco.org/ark:/48223/pf0000262748/PDF/262748eng.pdf.multi.
[52] The UN Declaration on the Rights of Indigenous Peoples, A/Res/61/295, 2007, accessed November 20, 2025, https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.
[53] UNESCO Policy on Engaging with Indigenous Peoples, 201 EX/6, 2018, accessed November 20, 2025.

social, and economic challenges. These Frameworks promote an integrated approach that balances environmental, social, and economic sustainability, ensuring a more balanced and responsible development process.

As of today, not all UN entities developed ESSF and related guidance. While participants in the 2016 UN Environment Management group (EMG) project on comparative environmental and social standards analysis have already established such policies, non-participating entities have only begun incorporating basic principles to enhance environmental and social sustainability in their projects, often without detailed procedures or effective mechanisms.[54] It is evident that corporate sustainability due diligence should be a fundamental element of all UN entities' policies. Therefore, each UN entity should develop its own ESSF, drawing inspiration from leading organizations in this field, such as UNDP and UNEP.

A significant challenge across all UN entities is the implementation of grievance mechanisms, which remain undeveloped and inconsistent. Even among UN entities that have established such mechanisms, concerns persist regarding their effectiveness. For instance, since its establishment in 2015, UNEP's Stakeholder response mechanism has received only three complaints.[55] Similarly, UNDP's Social and Environmental Compliance Unit (SECU), in operation since 2013, has recorded just three complaints.[56] In contrast, the World Bank's Inspection Panel, within its first ten years of operation, received 35 complaints.[57] If we consider the period 2013-2023, the World Bank' Inspection Panel received 92 complaints,[58] far exceeding those reported within UNDP and UNEP. While one might assume that this discrepancy reflects a lack of environmental and social concerns in UNEP and UNDP projects, this interpretation is unlikely to be accurate. Since the 1990s, global awareness of environmental and social sustainability issues has risen significantly, and stakeholders, including communities and indigenous peoples, are increasingly relying on grievance mechanisms to seek protection from unsustainable project management and implementation.

Although direct statistical comparisons are complex, it is reasonable to expect that UNDP, as a leading development organization supporting and financing thousands of projects worldwide,[59] would receive more complaints than the World Bank did two decades ago. The significant display in grievance cases suggests a systematic issue, indicating a need for urgent improvements in the design and accessibility of grievance mechanisms within UN entities.

Assuming institutional alignment, the adoption of a standardized grievance mechanism could significantly contribute to greater accountability and more effective redress systems. Establishing a UN Inspection Commission under a unified framework would create a structured, transparent, and accessible process for addressing grievances across all UN entities. The UN Inspection Commission should function as an independent oversight body, responsible for assessing compliance with the ESS of UN entities. While it would not conduct judicial proceedings, it would perform independent administrative reviews, focusing on collecting and analysing grievances related to UN-supported projects, providing impartial evaluation of complaints, recommending corrective actions to enhance adherence to UN policies and standards.

[54] This concussion does not apply to UN financial entities such as the Global Environmental Facility (GEF) or UN Capital Development Fund (UNCDF), as, appropriately, these funding institutions have already integrated environmental and social standards into their policies and procedures. Policy on Environmental and Social Safeguards, GEF, SD/PL/03, 2019, accessed November 20, 2025, https://www.thegef.org/sites/default/files/documents/gef_environmental_social_safeguards_policy.pdf; UNCDF Social and Environmental Compliance Review and Stakeholder Response Mechanism, UNCDF official website, accessed November 20, 2025, https://www.uncdf.org/compliance.

[55] UNEP's Stakeholder response Mechanism official website accessed November 20, 2025, https://www.unep.org/resources/report/uneps-environmental-social-andeconomic-sustainability-stakeholder-response.

[56] UNDP's Social and Environmental Compliance Unit official website accessed November 20, 2025, https://secu.info.undp.org/home.

[57] The World Bank Inspection Panel official website accessed November 20, 2025, https://www.inspectionpanel.org/panel-cases.

[58] *Ibid*.

[59] Annual Report. UNDP, 2024, accessed November 20, 2025, https://annualreport.undp.org/assets/Annual-Report-2024.pdf.

The mandate of the UN Inspection Commission should be limited to external stakeholders directly affected by the implementation of UN-supported projects. Any individual or community believing they have suffered, or may suffer, adverse socio-economic or environmental impacts due to a UN-supported project may submit a request for investigation. For eligibility, complaints must relate to an active or proposed UN-supported project and demonstrate actual or potential harm linked to project implementation. In addition, they must show reasonable efforts to resolve the grievance through existing channels before escalation.

It is imperative to integrate post-investigation control measures within UN grievance mechanisms to ensure effective follow-up on findings and recommendations. Without systematic monitoring and enforcement mechanisms, even a well-founded grievance process risks becoming symbolic rather than impactful. Moreover, it is critical to expand standing in grievance procedures to include non-governmental organizations, both national and international, thereby allowing them to submit complaints on behalf of affected communities. Encouragingly, existing UN grievance mechanisms already incorporate elements of post-investigation monitoring[60] and representative complaint submission by civil society organizations.[61] These practices serve as important precedents for the broader institutionalization of NGO participation in grievance mechanisms.

In addition to supporting affected communities in submitting grievances, granting standing to NGOs is particularly essential in addressing global public interest concerns, such as environmental protection and the preservation of common human heritage. In cases where no directly affected individuals or communities can file complaints, NGOs can effectively represent these collective interests and advocate for broader societal and environmental concerns.

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[60] Social and Environmental Standards, UNDP, 2021, 70-71; UNEP Environmental, Social and Economic Sustainability Framework. UNEP, 2020, 19.

[61] According to the UNDP's social and environmental standards, "a representative, such as a civil society organization, may also file a complaint on behalf of affected communities" (UNDP's Social and Environmental Compliance Unit's official website: https://www.undp.org/accountability/audit/secu-srm/social-and-environmental-compliance-review).

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COMPETITION LAW CONSIDERATIONS FOR AIRLINE ALLIANCES

HAVAYOLU İTTİFAKLARINA İLİŞKİN REKABET HUKUKU DEĞERLENDİRMELERİ

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ABSTRACT

The deregulation and liberalization of the airline industry have led to increased competition in international commercial air transport services, resulting in the emergence of new business models by airlines. This paper investigates the merits and demerits of deregulation and the formation of international airline alliances (IAAs), focusing on their competition law implications. IAAs, which mimic mergers, allow airlines to circumvent domestic restrictions on foreign ownership and expand their market reach through cooperative agreements. These alliances present various forms of cooperation, such as code sharing and block spacing, and aim to integrate products, services, and standards between carriers to provide better service to consumers and eliminate double costs. However, the lack of uniform competition law rules globally means airlines must navigate different national regulations. This paper examines the impact of IAAs on competition, particularly in the European Union and United States, and the response of competition law authorities. It also explores the potential anti-competitive behaviour in the aviation industry and the need for a multilateral approach to aviation competition law.

Key words: *Competition law, Airline Alliances, Aviation Competition Law.*

ÖZ

Hava yolu endüstrisinin deregülasyonu ve serbestleşmenin bir sonucu olarak, uluslararası ticari hava taşımacılığı hizmetlerinde rekabet artmış ve hava yolları tarafından yeni iş modelleri ortaya çıkarılmıştır. Bu makale, deregülasyonun ve uluslararası hava yolu ittifaklarının kurulmasının avantajlarını ve dezavantajlarını rekabet hukuku üzerindeki etkilerine odaklanarak incelemektedir. Birleşmeleri taklit eden uluslararası hava yolu ittifakları, hava yollarının yabancı mülkiyete ilişkin ulusal kısıtlamaları aşmasına ve iş birliği anlaşmaları yoluyla pazar erişimlerini genişletmesine olanak tanımaktadır. Bu ittifaklar, kod paylaşımı ve blok kapasite anlaşmaları gibi iş birliği biçimleri sunmakta; taşıyıcılar arasında ürün, hizmet ve standartların entegrasyonunu hedefleyerek tüketicilere daha iyi hizmet vermeyi ve çifte maliyetleri ortadan kaldırmayı amaçlamaktadır. Ancak, rekabet hukuku kurallarının dünya genelinde yeknesak olmaması, hava yollarının farklı ulusal düzenlemelere uyum sağlamasının zorunlu olduğu anlamına gelmektedir. Bu çalışma, uluslararası hava yolu ittifaklarının rekabet üzerindeki etkisini, özellikle Avrupa Birliği ve Amerika Birleşik Devletleri bağlamında ve rekabet hukuku otoritelerinin tepkisi bakımından incelemektedir. Buna ek olarak, havacılık sektöründe ortaya çıkabilecek rekabete aykırı uygulamaları incelemekte ve sivil havacılıkta rekabet hukuku bakımından çok taraflı bir yaklaşıma duyulan ihtiyacı ele almaktadır.

Anahtar kelimeler: *Rekabet hukuku, Hava yolu ittifakları, Sivil havacılıkta rekabet hukuku.*

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1. INTRODUCTION

Deregulation and liberalization of the airline industry led to increased competition in international commercial air transport services which resulted in the emergence of new business models by airlines.[3] An increase in demand in international travel and the fact that several states have limited international air travel options contributed to the formation of international airline alliances (hereinafter IAAs).[4]

Another reason for the formation of IAAs was the need to circumvent domestic restrictions regarding the foreign ownership of airlines which are a state purview protected by international treaties such as the Convention on International Civil Aviation (hereinafter the Chicago Convention).[5] The Chicago Convention states that aircraft require authorization before entering the airspace of another State and States have rules in place for national security reasons which prohibit the operation of aircraft in their territories based on foreign ownership laws.[6]

IAAs are able to work around these foreign ownership provisions by mimicking mergers.[7] IAAs are cooperative agreements entered into by airlines and this cooperation may be limited e.g. interline agreements (agreements where origin to final destination fares are published by both carriers and revenue is divided among them) or it may be high as in metal-neutral joint ventures (revenue and profit-sharing agreements[8]).[9]

IAAs present in various forms such as code sharing which allows airlines to sell seats on a partner's flight[10] and block spacing where a set of seats is allocated to an airline in a partner's flight.[11]

The deregulation of the airline industry allowed airline business models to evolve, and airlines consolidated in order to maximize profits.[12] These business models had an effect on the competition in the airline industry and varying implications for consumers (e.g. more flight options) as well as the airlines (e.g. bankruptcies).[13] Scholars predicted that competition in the airline industry in future would be between alliances rather than individual carriers.[14]

Globalization pushed airlines to expand and strengthen their market positions as far as they could both domestically as well as internationally and alliances became a viable and successful mechanism. Public international law, however, has not developed to a stage where there are sufficiently uniform competition law rules to apply in this arena

[3] Jan K. Brueckner and W. Tom Whalen, "The Price Effects of International Airline Alliances," 43 *J.L & Econ.* 503 (2000). Brueckner notes the formation of hub-and-spoke networks and frequent flier programs. Also see Li Zou, Chunyan Yu and Daniel Friedenzohn, "Assessing the impacts of northeast alliance between American airlines and JetBlue airways," *Transport Policy*, 140, (2023): 42, accessed 30 September 2025 https://doi.org/10.1016/j.tranpol.2023.06.011

[4] Charles N.W. Schalngen, "Differing Views of Competition: Antitrust Review of International Airline Alliances," *200 U. Chi. Legal F*. 413 (2000) and Sreekumar Sisira, "A Critical Analysis of Cartels in the Aviation Industry," *Indian JL & Legal Rsch.* 5(1) (2023): 1.

[5] Convention on International Civil Aviation, opened for signature December 7,1944, art. 1, 15 U.N.T.S 295 (entered into force April 4, 1947). Article 1 gives states "…complete and exclusive sovereignty over the airspace above its territory."

[6] Chicago Convention Article 3 (c).

[7] Schalngen, "Differing Views of Competition," 413. IAAs coordinate activities such as pricing of airline tickets.

[8] Paul Stephen Dempsey, "Regulatory Schizophrenia: Mergers, Alliances, Metal-Neutral Joint Ventures and the Emergence of a Global Aviation Cartel" 83(1) *J Air L & Com 3* (2018) 13.

[9] Kate Markhvida, "Antitrust and Competition Law" in PS Dempsey, RS Jakhu, *Routledge Handbook of Public Aviation Law* (Routledge 2017) 309.

[10] "Code-Sharing Agreements in Scheduled Passenger Air Transport – The European Competition Authorities Perspectives." *European Competition Journal* 2 (2006): 263. See also Lan Teng and Mincong Tang, "Cooperative Strategy for Airline Code-Share Agreements–A Comparative Analysis," *Promet-Traffic & Transportation* 36(3) (2024): 433.

[11] Ruwantissa Abeyratne, "The Aviation System Block Upgrades: Legal and Regulatory Issues," *Air and Space Law* 39(2) (2014): 131.

[12] Eli A. Friedman, "Airline Antitrust: Getting Past the Oligopoly Problem," *University of Miami Business Law Review* 9 (2000-2001): 121; Cai, Jingmeng, and Jae Woon Lee. "Enforcing China's Anti-Monopoly Law in Regulated Industries: A Study of the Airline Industry," *Journal of Antitrust Enforcement* 9(3) (2021): 566.

[13] Kate Markhvida, "Antitrust and Competition," 308.

[14] Clinton V. Oster and Don H. Pickerell, "Marketing Alliances and Competitive Strategy in the Airline Industry," *Logistics and Transportation Review* 22(4) (1986): 371; Lan Teng, and Mincong Tang. "Cooperative Strategy for Airline Code-Share Agreements – A Comparative Analysis," *Promet-Traffic&Transportation* 36(3) (2024): 433.

hence airlines find themselves dealing with different national competition law rules.[15]

IAAs seek to achieve an integration of products, services and standards between carriers with the aim of providing better service to consumers and eliminating double costs.[16]

The subject of this paper is to investigate the merits and demerits of deregulation and the emergence of airline alliances and outline the competition law implications they present and the response of competition law authorities around the world. This investigation involves a study of the deregulation of civil aviation to provide context in the determination of whether alliances have a negative or positive impact on competition. Focus will be mostly paid to the European Union and United States systems since they have well-developed air transport services.

2. RESEARCH METHODOLOGY

Under traditional competition law rules, undertakings are prohibited from substituting cooperation for competition and under merger control rules, joint ventures and other types of concentrations are strictly regulated ex-ante. During a period of deregulation in the aviation sector during the late 1970s which began with the US Airline Deregulation Act of 1978 and culminated in the global Open Skies Agreements, the aviation industry moved away from an economic model built around heavy State participation and gravitated towards a more liberal free market approach and this new approach encouraged competition among airlines. Various benefits were gained through this new model such as the emergence of low-cost carriers and increased choices for consumers, but increased competition led to the creation of international alliances in the pursuit of cost efficiencies and as a response to strict regulations against cross-border mergers. Alliances were a necessary tool to achieve several feats in the industry such as meeting the consumers' demand for seamless international travel. However, in the absence of a global competition law enforcement mechanism, different approaches were taken to regulate these alliances. This paper is a qualitative investigation into international alliances and their compatibility with competition law rules. The research questions for this paper are as follows:

1. What are the competition law implications raised by deregulation and the emergence of international airline alliances?
2. What are the approaches that have been taken by the EU and the US competition law authorities to regulate international airline alliances?
3. Are the current methods of regulation international airline alliances fit for purpose?
4. What are the solutions to improve the regulation of international airline alliances while protecting the benefits of competition?

3. THE COMPETITION LAW ISSUES

Airline alliances are arrangements between airlines in which they agree to cooperate to varying degrees.[17] This cooperation is aimed at long-term financial gain and acquiring a competitive advantage on the market.[18] As mentioned earlier, the nationality restrictions that are common in most bilateral air transport agreements have been a major obstacle to the consolidation of airlines. In the presence of these restrictions, airlines cannot engage in mergers with, or acquisitions of foreign airlines and international alliances are a way around this limitation.[19]

Due to an increase in air traffic caused by increased globalization and the limited capabilities of several countries where only a few airlines are designated to service international routes making it impractical for these airlines to offer their service on a wider scale, airlines resorted to international alliances as a response.[20] The operations of an alliance are nearly identical to a merger.[21]

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[15] Viktoria HSE Robertson, "International Competition Law?" in *Elgar Encyclopedia of International Economic Law*, 2nd ed., edited by Thomas Cottier and Krista Nadakavukaren Schefer, (2023) Chapter III.7.1.1; Daniel Steine, "The International Convergence of Competition Laws," *Manitoba Law Journal* 24 (1994): 581.

[16] Peng, I-Chin, and Hua-An Lu. "Coopetition effects among global airline alliances for selected Asian airports," *Journal of Air Transport Management* 101 (2022): 102; Scott Kimpel, "Antitrust Considerations in International Airline Alliances," *Journal of Air Law & Commerce* 63(2) (1997): 476.

[17] Kate Markvhida, "Antitrust and Competition," 316.

[18] Baronnat, Emilie. "EC Antitrust Control of the SkyTeam Alliance," *Aviation L & Pol'y* (Spring 2008): 4251.

[19] Kate Markvhida, "Antitrust and Competition," 317.

[20] Schalngen, "Differing Views of Competition," 413.

[21] *Ibid*.

Another reason for airlines to engage in this type of commercial arrangement is the need for large investments where profitability is low.[22] Where one airline is struggling but cannot access the required investment because the profitability is low a solution would be to join an alliance with a partner which would enable them to aquire that investement while at the same time aquiring the capability to begin operating at an efficient and profitable level.

IAAs aim to integrate a range of products, services and standards between two or more carriers which eliminates cost duplication.[23] By adding value to these services the alliances also seek to create economies of scale.[24] IAAs for example, allow a passenger to travel to a destination via different carriers without having to check in their baggage more than once.[25] This offers a smooth experience for the consumer and adds to the value of the services provided by the alliance.

Another important attribute of an alliance is that it allows an airline to expand its route network thereby increasing the number of destinations it flies to and from.[26] As in the example above, a passenger's single itinerary includes different connecting airports and with different carriers.[27] Carriers are able to market their flights under the alliance brand.

An alliance may be entered into or established for either "tactical" or "strategic" reasons.[28] The tactical alliances are meant to provide reciprocal access to each carrier's network and usually between two carriers where either one is or both of which are often not a part of a larger strategic alliance.[29] An example of such an alliance is the American/jetBlue Interline and Reciprocal Frequent Flyer Accrual Agreement which was terminated in 2014.[30]

This agreement allowed "travelers to make connections between 26 domestic markets and 15 international destinations" by purchasing just one ticket.[31] However, the trend for carriers which offer international services is to join branded strategic alliances such as the 'Big Three" (Star Alliance, SkyTeam and Oneworld).[32]

These IAAs aim to achieve a wide network which covers as much worldwide routes as possible and these alliances have evolved to cover varying degrees of cooperation[33] which shall be discussed. It is important to note that even though alliance partners are in cooperation they may still be in competition with one another depending on the level of cooperation.[34]

It is the form of cooperation which virtually eliminates competition between carriers that has raised concerns regarding competition and has had competition authorities scrambling to apply regulatory standards. The main concern is that once competition is eliminated between carriers there is no incentive to keep prices at a consumer-friendly level and the creation of oligopolies stifles consumer benefits.[35]

Lu notes that in the absence of a truly multilateral air traffic exchange regime, fully liberal air transport

[22] Ridha Aditya Nugraha, "Legal Issues Surrounding Airline Alliances and Codeshare Arrangements: Insights for the Indonesian and ASEAN Airline Industries," *Indonesian Law Review* 8(1) (2018): 37-38. Nugraha notes that there was a string of airline bankruptcies in the United States due to a lack of funders who possessed both the required capital and capacity to meet the requirements.

[23] Scott Kimpel,"Antitrust Considerations," 476.

[24] Simons, Michael S. "Aviation Alliances: Implications for the Qantas-Ba Alliance in the Asia Pacific Region," *Journal of Air Law & Commerce* 62(3) (1997): 841-842.

[25] *Ibid.*

[26] Nerja, Adrián. "Can parallel airline alliances be welfare improving? The case of airline–airport vertical agreement," *Transportation Research Part A: Policy and Practice* 167 (2023): 103: Stephen W. Wang,. "Do Global Airline Alliances Influence the Passenger's Purchase Decision?" *Journal of Air Transport Management* 37 (2014): 54.

[27] *Ibid*.

[28] TransAtlantic Airline Alliances: Competitive Issues and Regulatory Approaches, A Report by the European Commission and the United States Department of Transportation [16 November 2010] 4 (hereinafter Joint TransAtlantic Report).

[29] *Ibid*.

[30] *Ibid*.

[31] Ben Mutzabaugh. "American, JetBlue terminating Frequent-Flyer Pact." USA Today, March 10, 2014. Accessed 30 September 2025, https://www.usatoday.com/story/todayinthesky/2014/03/10/american-jetblue-terminating-frequent-flier-pact/6251545/.

[32] Joint Trans-Atlantic Report. Currently the Star Alliance has 26 member airlines and a network encompassing 1300 airports while the Sky Team Alliance has 19 members with a reach of 1 150 destinations worldwide and the One World Alliance is composed of 13 airlines with a reach to destinations in over 160 countries.

[33] *Ibid*, 4 e.g. cooperation on lounge access.

[34] *Ibid*, 5

[35] Morrish and Hamilton discuss the effect alliances have on the conduct of airlines in S. C. Morrish and R. T. Hamilton, "Airline Alliances—Who Benefits," *Journal of Air Transport Management 8* (2002): 401.

service cannot be realized.[36] IAAs are an alternative and also a useful tool to bypass cabotage restrictions.[37]

Lu also notes that these arrangements are not always smooth as partners sometimes switch between alliances for various reasons and sometimes an alliance is not always the most efficient and profitable way of operating for airlines.[38]

Alliances are scrutinized for the potential harm they might have on competition depending on the type of cooperation they have agreed upon and the carriers involved.[39] It has been argued that code sharing agreements are the most controversial.[40]

On the other hand, it can be argued that IAAs are evidence of a recognition by carriers of the cooperation that is required for the benefit of the aviation industry as well as the consumers and governments have not yet been able to effectively secure such cross-border cooperation regarding liberalization due to the complex and restrictive nature of bilateral agreements.

IAAs try to simulate the conditions that would prevail if the aviation industry was fully deregulated and treated the same way as other commercial activities. As such, there is a broad spectrum of opinions regarding whether alliances have a positive or negative effect on competition. Their continued existence however shows an acceptance by the States that these arrangements have proven useful to some extent while arguments against them are also evidence that at times IAAs have had a harmful effect on competition in the aviation industry.

It is notable that a uniform approach to competition issues in this area on a multilateral level would result in uniform results which would make an assessment of the impact of IAAs clearer.

5. ANTI-COMPETITIVE BEHAVIOR IN AVIATION

A liberalized market requires regulations that ensure that the principles of fair competition are upheld. As such, competition and consumers in the aviation market need to be sheltered from certain practices which have an adverse effect on them.[41] These practices are usually carried out by airlines which have a dominant position on the market and these airlines may act in concert with other airlines as in alliances or mergers or they may act unilaterally.[42]

Cooperative arrangements between competing airlines may have the effect of eliminating competition between those airlines and giving them an even more dominant position on the market. Without the threat of another airline capable of challenging them, they are able to set very high fares which are harmful to consumers. Furthermore, consumers end up with less choices of service.

Dominant airlines also possess the capability to engage in practices aimed at blocking potential new airlines from entering the market. For example, they may charge such low fares for a while in order to undermine a new airline's competitive edge and then raise them once that new airline becomes bankrupt and continue being profitable. In this way they maintain their dominance and consumers lose out in the long run because of the distorted competitive environment which does not force that airline to keep prices at a certain level.[43]

Dominant airlines may also restrict access to

[36] For example, Angela Cheng-Jui Lu addresses the differences between European Community Competition Laws and United States antitrust laws and their application to IAAs: A. Lu, "International Airline Alliances: EC Competition Law, US Antitrust Law, and International Air Transport," *Annals of Air and Space Law* 27 (2002): 401, 412. Also see Michaela Císová, "Remedies in EU and US Merger Control" (2024), accessed 30 September 2025, https://dspace.cuni.cz/handle/20.500.11956/193050.

[37] *Ibid,* 408.

[38] *Ibid*. This can be seen in the termination of the Frequent Flyer Pact between American and JetBlue (n 30). Various reasons contributed to the ending of this partnership one which was the growing competition between the two airlines themselves and reports showing the partnership had stopped being profitable for both sides. In this instance, it became a question of whether to maintain the acquired consumer benefits or seek more profitable avenues of operation. This is always a balance that must be kept in mind by airlines because in assessing alliances competition authorities will usually study the potential benefits to the consumers against the competitive effects of unlimited profits.

[39] Xiaoqian Sun, Changhong Zheng, Sebastian Wandelt, and Anming Zhang, "Airline Competition: A Comprehensive Review of Recent Research," *Journal of the Air Transport Research Society* (2024): 100-13; see also Tae Hoon Oum, Chunyan Yu, and Anming Zhang, "Global Airline Alliances: International Regulatory Issues," *Journal of Air Transport Management* 7(1) (2001): 57.

[40] *Ibid*.

[41] Kate Markvhida, "Antitrust and Competition," 312.

[42] *Ibid*.

[43] This predatory behaviour according to Goetz is designed to send a message by the incumbent airline to new entrants that entry to the market will be dealt with harshly and swiftly. Predatory is behaviour of this nature is prohibited by

facilities at hub airports and this becomes a significant barrier to entry. Availability of slots is one relevant example. It is the goal of competition law to advance economic efficiency by preventing such practices.[44] This goal is achieved by taking into account *inter alia* the following factors:

1. Demand curves and consumer and producer surplus;[45]
2. Elasticity of demand;[46]
3. Cross-elasticity of demand;[47]
4. Profit maximization;[48]
5. Economies of scale and scope.[49]

Markvhida categorizes potential anti-competitive behaviour in the airline industry into three groups.[50] Of these three groups two concern cooperative arrangements by airlines and the third one is unilateral actions by dominant airlines. The practices are "airline mergers, acquisitions and cross border alliances, collusion between competing airlines and exclusionary conduct by a dominant airline."[51]

In most States, the typical competition legislation is applied to airlines while some countries have specific institutions responsible for the application of competition law to airlines especially in the area of granting certain exemptions to the enforcement of these competition rules to airline alliances.

In New Zealand, for example the Commerce Act 1986 deals with competition issues and while it does not contain provisions specific to aviation related exemptions, the Commerce Commission in practice may approve such exemptions.[52] However, in the United States there is a special regulatory framework for reviewing international alliances and the statutory authority is vested in the DOT.[53]

When the competent competition law authorities assess the potential anti-competitive practices of airlines on the market, they have to consider what is referred to as the relevant market and this is divided into the geographic market and the product market.[54]

The ECJ had determined that determining the relevant market is a precondition in assessing the effect of concentration on competition.[55] As a starting point, defining the market allows the relevant authorities to have a picture of the potential effects a certain practice might have on the market as a whole particularly how much market share an undertaking will gain if it proceeds i.e. market power.

This particular court defines the relevant market in terms of substitutability and interchangeability which means that competition between products which form part of the market may be observed.[56] The Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law (hereinafter the Commission Notice) defines the product market similarly to the ECJ.[57] The geographic market is defined as the area where the supply and demand of services takes place.[58]

In the aviation industry the two parts of the relevant market definition are interlinked because the product (air services) involves movement to a geographical location.[59] Airline alliances are scrutinized by competition authorities because these

competition laws for example the Federal Aviation Act in the United States. R. G. Goetz, "Deregulation, Competition and Antitrust Implications in the US Airline Industry." *Journal of Transport Geography* 10(1) (2002): 1-19.

[44] Jones, A., and Sufrin, B, *EC Competition Law: Text, Cases, and Materials*, 8th ed. (Oxford University Press, 2019), 3.

[45] *Ibid*; the relationship between the consumer's willingness to pay (reservation price) and the quantity that will be bought across the market as a whole. There are less consumers who are willing to pay high prices than there are those who are willing to pay low prices.

[46] *Ibid,* 4; whether an increase in price leads to an inappreciable fall in demand (inelastic) or to a substantial fall (elastic).

[47] *Ibid,* 5; how much the demand of a product increases when another product's price increases.

[48] *Ibid,* 5; there is an expectation for firms to be rational actors who behave in a way that maximizes their profits.

[49] *Ibid,* 6; when the average cost of production decreases as more is produced.

[50] Kate Markvhida, "Antitrust and Competition," 312.

[51] *Ibid*.

[52] See for example Ministry of Transport, Air New Zealand/Cathay Pacific Alliance Reauthorization Analysis, August 2019. Accessed 30 September 2025. https://www.transport.govt.nz/assets/Uploads/Report/2019-Cathay-Air-NZ-alliance-full-report.pdf.

[53] Kate Markvhida, "Antitrust and Competition," 312.

[54] *Ibid*.

[55] Case C-68/94 *France v Commission* [1998] ECR I-1375.

[56] Case 85/76 *Hoffman-LaRoche & Co AG v Commission* [1979] ECR 461.

[57] European Commission, *Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law*, (1997) OJ C372/5.

[58] Jones and Sufrin, *EC Competition Law*, 64.

[59] Kate Markvhida, Antitrust and Competition," 312.

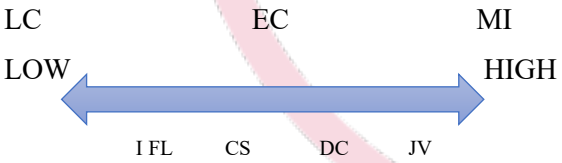
cooperative arrangements between airlines result in significant market power which may lead to anti-competitive behavior. The impact alliances have on competition is related to the level of cooperation between airlines that is required by the agreement.

5. LEVELS OF COOPERATION

Generally speaking, alliance agreeements have been known to cover one or more of these areas: (1) interlining, (2) frequent flyer programs (hereinafter FFP) and lounge access, (3) code sharing, (4) direct coordination (this includes prices, routes, scheduling facilities, etc) and (5) revenue, cost and benefit sharing ventures.

The Trans-Atlantic Joint Report draws a "spectrum of alliance cooperation" which shows that the type of agreement differs depending on the level of integration of the carrier's operations i.e. from: (a) limited cooperation on specific routes to (b) expanded cooperation to develop joint network and (c) merger-like integration.[60] The more integrated the operations of the carriers become the more they begin to resemble a merger.

DOT Spectrum of Alliance Cooperation[61]



*LC – Limited Cooperation

*EC – Expanded Cooperation

*MI – Merger-like Integration

*I – Interlining

*FL – FFP and Lounge Access

*CS – Code Sharing

*D – Direct Coordination

*JV – Joint Venture

6. CODE SHARING AGREEMENTS

These types of agreements are a very common feature of IAAs. For example, the Star Alliance involves a code sharing agreement. Code sharing is when an air carrier (operating carrier) uses the designator code of another air carrier (marketing carrier) in performing its own operations.[62] Code sharing agreements are mainly about marketing not establishing new flights *per se* as each airline carries on operating the same flights it had been operating before.[63]

Code share agreements work through computer reservation systems (hereinafter CRS) which treat flights under the code share agreements as online connections of a higher priority than interline connections.[64] A carrier is able to market a certain amount of seats on another carrier's flight. These agreements may be supplemented by other arrangements such as coordination of FFPs.[65]

Competition implications have to be taken into account by the competent authorities of the States where code share agreement approval is being sought. The problem becomes apparent where the airlines entering into this type of agreement are actual or potential competitors and this agreement seeks to eliminate or restrict this competition to an extent that it may affect potential third party competitors.

One concern for competition authorities when assessing airline's cooperative arrangements is the risk of coordinated anticompetitive behaviour by the airlines. These worries are concerning agreements established on an exclusive basis which it can be argued, may lead to a coordination of fares contrary to fair competition principles or these agreements may become a barrier to entry for potential new entrants as they may prevent access to certain routes

[60] Joint Trans-Atlantic Report, 5.
[61] *Ibid*.
[62] ICAO definition, accessed 30 September 2025, https://www.icao.int/dataplus_archive/documents/glossary.docx.
[63] Emilia Chiavarelli, "Code-Sharing: An Approach to the Open Skies Concept," *Annals of Air and Space Law* 20 (1995): 195. For a discussion on how politics also interacts with open skies arrangements see Tyler B. Spence, Steven M. Leib, "Negotiating International Aviation: Analyzing the Contribution of Politics to the United States' Open Skies Agreements through Democratic Peace Theory," *Journal of Air Transport Management* 115 (2024), accessed 15 September 2025, https://www.sciencedirect.com/science/article/abs/pii/S0969699723001552.
[64] *Ibid*.
[65] Tobias Grosche, and Richard Klophaus. "Codesharing and Airline Partnerships Within, Between and Outside Global Alliances," *Journal of Air Transport Management* 117 (2024), accessed 30 September 2025, https://doi.org/10.1016/j.jairtraman.2024.102591.

from those airlines mainly in the presence of slot constraints.

Code share agreements allow airlines access to global markets which they would otherwise not have access to due to aviation restriction. While this may be beneficial for the airlines who have entered the agreements because they aquire more destinations and frequencies, the impact on fares and service levels may be negative for the consumer e.g. where the airlines of the three major United States alliances account for about two thirds of the domestic origin and destination (O & D) passenger traffic.[66]

While there has been significant agreement regarding the fact that code share agreements on the international market have had a positive effect of lowering fares and increasing passenger traffic, there were fears that on the domestic market level the effect on consumer welfare might not be the same due to a distinction between traditional and virtual code sharing.

Traditional code-sharing refers to the agreement between airlines serving international markets to combine their networks through code-sharing for reasons of creating a seamless travel itinerary for the passengers i.e. an itinerary from a flight under such an agreement would involve a connection between airline A and airline B where the entire ticket is marketed by airline A.

Virtual code-sharing on the other hand refers to when an itinerary involves a connecting flight using the same airline which for the purposes of this example is airline A where the entire ticket is marketed by airline B.[67] A marketing carrier is paid a fee by the operating carrier, but it is the operating carrier who gets most of the revenue from ticket sales.[68]

Another distinction in code-share agreements concerns the amount of seats available on the operating carrier's flight to the code share partner. Under a free flow agreement, the operating carrier has a discretion to decide seat availability and the marketing carrier acts similarly to an agent which means the operating carrier assumes all of the risk and compensation may be decided in unique pro-rata agreements.

In blocked space agreements, there is a set percentage or number of seats available to the marketing carrier on the operating carrier's flight and this can be under a hard agreement where both bear the risk and the marketing carrier has to pay the agreed upon amount regardless of whether they sell the blocked seats or it can be under a soft agreement where the marketing carrier has an option to return the seats based on a prior agreement.

Several other distinctions may be observed in terms of the extent of network overlap.[69] The EU approves a code share after applying a two-pronged test which asks whether the agreement results in anti-competitive effects and if so to what extent the expected economic benefits outweigh these potential anti-competitive effects.[70]

This two-pronged test will be discussed in more detail when the granting of immunity from competition law enforcement to airlines is discussed. Suffice it to say, the impact of code-share agreements on competition depends on various factors which include the type of code-share agreement, the extent to which the code-share partners were in competition prior to the agreement, the extent to which the code-share agreement reduces competition between the carriers involved, the impact the code-share agreement has on third party carriers and the level of benefit it provides to the consumers.

Furthermore, it must be noted that it might be difficult to ascertain the full impact of these and many other cooperative arrangements between airlines due to the unique nature of the aviation industry itself. State involvement in aviation means there will always be political connotations to the industry. For example, Qatar Airways blamed a sixty-five-million-dollar loss on a Gulf dispute that erupted in 2017.[71]

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[66] Jules Yimga, and Javad Gorjidooz, "Airline Code-Sharing and Capacity Utilization: Evidence from the US Airline Industry." *Transportation Journal* 58(4) (2019): 280, accessed 30 September 2025, https://doi.org/ 10.5325/ transportationj.58.4.0280.

[67] *Ibid*.

[68] *Ibid*.

[69] Tae Hoon Oum, Chunyan Yu, and Anming Zhang. "Global Airline Alliances: International Regulatory Issues," *Journal of Air Transport Management* 7(1) (2001): 57.

[70] *Ibid*.

[71] Reuters, "Qatar Airways blames $69 million annual loss on Gulf dispute," September 18, 2018, accessed 30 September 2025, https://www.reuters.com/article/us-qatar-airways-results/qatar-airways-blames-69-million-annual-loss-on-gulf-dispute-idUSKCN1LY0N1.

Further illustration of the geo-political nature of the aviation industry is the state of the aviation industry in the wake of the September 11 terrorist attacks which were preceded by the 'dot.com bubble burst.'[72] The United States closed off its airspace and consequently recorded a decline in passenger traffic, recorded a decline in domestic market demand, experienced a revenue decline from airlines and a significant reduction in employment in the aviation industry.[73] These developments led to the passing of the United States Air Transportation Safety and System Stabilization Act to compensate airlines for losses incurred during the shutdown.[74] These negative phenomena could be observed on a global level as well.[75]

These geo-political events influence the direction of the aviation industry and how governments respond have far-reaching implications. This is why it can be argued that competition in the aviation sector has to be defined differently from other commercial activities.

While airlines and consumers may benefit from airline deregulation, they are also protected by government regulation which may *prima facie* appear to go against liberal principles. Competition in the aviation industry cannot go unchecked or unguided by politics hence it may be argued that a case-by-case assessment when it comes to code-share agreements may be favourable against specific legislation but uniformity in this case-by-case approach is what several scholars argue is needed.

Code-share agreements in international markets have been generally accepted as not exhibiting excessively anti-competitive effects with one exception of a decrease in competition between code-share partners on parallel operated routes.[76] An increase in capacity and decrease in fares has also been observed as a result of code-share agreements where entry by new airlines may be made very difficult.[77]

A report by Steer Davies Gleave[78] recommends an approach to determining the anti-competitive nature of code-share agreements based on:

1) The underlying geography of the agreement;[79]

2) The features of the agreement and its connected agreements;

3) Market Definition;[80]

4) Market Characteristics.

Code-share agreements may be good for competition, or they can be bad. Theoretically speaking, if an airline is dominant on one end of a route then if an airline in direct competition with that airline enters into a code-share agreement with another airline at that end of the market then it increases its competitiveness on that route.[81] On the other hand, code-share agreements may mean that new entrants have to compete with two airlines who dominate both market ends of a route making the code-share a significant barrier to entry.[82]

7. IMMUNITY

Due to the above-mentioned potential effects that cooperation between airlines may have on competition, it has become common for alliances to

[72] IATA, "The Impact of September 11, 2001, on Aviation," accessed 30 September 2025. https://www.iata.org/pressroom/documents/impact-9-11-aviation.pdf.
[73] *Ibid*.
[74] US Congress, Air Trasnportation Safety System Stabilization Act, Public Law 107-42, 115 Stat. 230 (2001), accessed 30 September 2025, https://www.congress.gov/107/plaws/publ42/PLAW-107publ42.pdf.
[75] The Impact of 9/11 reduction in global traffic and global airline revenue, significantly reduced profitability levels for airlines which led to bankruptcies and a spike in oil prices.
[76] These code-share agreements allow airlines to gain significant market power due to the increased frequency they offer.
[77] Code-share agreements tend to be anti-competitive when they are concluded on an exclusionary basis which restricts access by other carriers.
[78] Steer Davies Gleave, *Competition Impact of Airline Code-share Agreements Final* Report (January 2007) prepared for European Commission Directorate General for Competition.
[79] Whether it is a parallel operation, a unilateral trunk operation or a behind and beyond codeshare. A parallel codeshare is when two airlines which provide air services on the same route agree to sell tickets and put their code on the other carrier's flight. In a unilateral codeshare an airline offers service to a destination when it actually does not provide air services on that route but its partner in the codeshare does. Behind and beyond codeshares are arrangements between partners to offer connecting flights from destinations that they operate on hence passengers reach more destinations on the same booking code. Martin Servin Almkvist, "Code-share Agreement – A way to Gain Market Power and Raise Airfares? An Investigation of the Effect of Code-share Agreements on the European Airline Market." Bachelor's thesis, Södertörn University, 2014, 8-9.
[80] This shall be discussed under anti-trust immunity.
[81] Steer Davies Gleave Report,72.
[82] *Ibid*.

seek immunity from competition law enforcement in order to effectively engage in the form of partnerships they seek. This is because by nature, alliances involve concerted efforts to achieve efficiency and profitability which are not entirely based on pure market forces.

The principal reason for establishing alliances has been the restrictive nature of bilateral air transport agreements which presents itself in the form of nationality clauses that prevent foreign airlines from accessing domestic markets. Furthermore, restrictions on cabotage limit an airline's expansion requirements.[83]

Alliances have been said to have been originally meant to allow members to cross-sell each other's tickets.[84] Additionally code-sharing enhances an airline's brand recognition, and the partnership increases an airline's access to its partners' feeder traffic[85] and also enable the airlines to attract more corporate customers.[86]

A collective investment also allows alliances to develop better technology and carry out research which would be too expensive for a single airline to carry out on their own and thus improving their competitiveness and the aviation industry generally as well.[87]

Airlines in an alliance require immunity from ordinary competition law enforcement to allow them to engage in competitively delicate practices such as collusion on prices and service levels. Without this immunity, the alliance would be prevented from carrying out these practices by the ordinary competition law rules hence the alliance would be pointless.

For example, collusion on pricing in other commercial activities outside aviation would be considered a violation of Section 1 of the Sherman Antitrust Act in the United States.[88] As already noted, an alliance may allow partners to agree on set prices and while this may be a *prima facie* violation of competition rules, alliances may be exempted from competition enforcement by the competent authorities.

Due to wide acceptance of the benefits to the aviation industry that have been gained from alliances, the competent authorities have to perform a balancing act between the potential benefits and the potential negative effects on competition an alliance may pose. This analysis focuses on the impact the alliance may have on prices or service quality.[89]

This analysis is either carried out by the relevant authorities under a separate regime or under typical merger and cartel provisions of the usual competition laws.[90] As alliances tend to express merger-like qualities with increasing cooperation as illustrated by the DOT spectrum of alliance cooperation it may be argued that the rules regulating mergers may be applied to them.

Mergers are regulated in order to pre-empt firms from establishing dominant positions on the market which are detrimental to effective competition. Cartel provisions prohibit agreements aimed at restricting competition. These agreements may be

[83] Lykotrafiti, Antigoni. "Regulatory Convergence Between U.S. Antitrust Law and EU Competition Law in International Air Transport—Taking Stock." *Journal of Competition Law & Economics* 19(1) (March 2023): 146, accessed 30 September 2025. https://doi.org/10.1093/joclec/nhac013. Compare this with earlier arguments in Gillespie, William, and Oliver M. Richard. "Antitrust Immunity Grants to Joint Venture Agreements: Evidence from International Airline Alliances," *Antitrust Law Journal* 78(2) (2012): 443, 445.

[84] Volodymyr Bilotkach and Kai Huschelrath, "Antitrust Immunity for Airline Alliances," *Journal of Competition Law & Economics* 7(2) (2011): 335, 342. Also see Kenneth Button, "Code Sharing, Airline Alliances, and Other Forms of Airline 'Cooperation' in Developing Countries" in *Airlines and Developing Countries*, edited by Kenneth Button, Leeds: Emerald Publishing Limited, 2023, 153. (https://doi.org/10.1108/S2212-160920230000010009), accessed March 30 September 2025.

[85] Feeder airlines are those airlines which connect passengers off the main line with the main line and usually using short routes. It means they carry passengers' short distances to get them to a hub where they can catch a connecting flight to a longer distance. John H. Frederick and William J. Hudson. "What Is a Feeder Airline?" *Journal of Air Law and Commerce* 13(1) (1942): Article 4, accessed 30 September 2025, https://scholar.smu.edu/ cgi/viewcontent.cgi?article=3293&context=jalc. Feeder traffic can also be obtained on the basis of the IATA Prorate Agency Agreement or a bilateral agreement between airlines.

[86] Joint Trans-Atlantic Report, 8.

[87] Joint Trans-Atlantic Report, 9.

[88] The Sherman Antitrust Act of 1890 (26 Stat. 209, 15 U.S.C. §§ 1–7) amended by the Clayton Act 1914. In Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979), No. 77-1578. the Court found that a practice has to be one that always tends to restrict competition and decreases output for it to be considered *a per se* violation. This was in relation to a test for price fixing.

[89] Kate Markvhida, "Antitrust and Competition," 318.

[90] *Ibid*.

horizontal meaning between two competitors on the same level of the supply chain or vertical as between a manufacturer and a distributor.[91]

Cartels are formed when two or more competing independent firms enter into an agreement to fix prices and share customers and limit production thereby eliminating competition between them and removing an incentive to improve services as well as the product.[92]

Since alliances more or less are established to carry out said illegal practices, in the United States alliances have to seek immunity from the DOT while in the EU approval is given by the Commission.

8. THE DOT APPROACH

A prerequisite for receiving antitrust immunity for an international alliance from the DOT is the existence of an "open skies' agreement between the United States and the foreign airline's country.[93] Under the US-EU Air Transport Agreement for example, both parties commit to removing market barriers to entry in the interests of maximizing consumer benefits through opening up domestic air markets to global capital.[94]

In assessing the proposed airline alliance, the DOT uses a public policy test. This test analyses whether the alliance violates the antitrust laws and has a negative effect on competition and the benefits to be gained by it on a public welfare perspective.[95]

The request for immunity begins with a formal application in a public docket which is decided on after a thorough and open competition analysis by the Secretary of Transportation.[96] Public comments are invited after the application is "substantially complete" and a decision has to be made within a six-month time frame.[97]

The DOT has the discretion to approve agreements which may significantly reduce competition provided the agreements are needed to fulfil a sufficiently important transportation or consumer welfare related need and these needs cannot be met by any reasonable less anti-competitive means.[98]

Domestic alliances in the United States however generally do not enjoy this immunity grant and the DOT does not enjoy the same jurisdictional authority in this instance as it does regarding international alliances.[99] While the Department of Justice (DOJ) has authority to review domestic alliances under merger provisions when it comes to international alliances the DOJ acts in an advisory capacity.[100]

The DOT approach to granting immunity is noteworthy for the following factors according to the OECD:

1. The process is transparent whereas in several jurisdictions these proceedings are carried out in private.

2. The broad public policy test allows the DOT to consider a wider range of factors such as a free trade agenda in addition to the competition principles whereas other jurisdictions such as Canada employ a purely competition law test.

3. The DOT employs an *ex-ante* review of an alliance to protect it from enforcement from private and public actions whereas in other jurisdictions an *ex-post* review is used to challenge an alliance once

[91] EUR-Lex Glossary of Summaries, accessed 30 September 2025, https://eur-lex.europa.eu/summary/glossary/ antitrust. html.

[92] European Commission, "Competition: Cartels Overview," accessed 30 September 2025, http://ec.europa.eu/competi tion/cartels/ overview/index_en.html.

[93] Hand, William. "Continental Joins the (All)Star Alliance: Antitrust Concerns with Airline Alliances and Open-Skies Treaties," *Houston Journal of International Law* 33(3) (2011): 649, 656.

[94] EU-US Air Transport Agreement of April 30, 2007, amended by the Protocol of 24 March 2010 Article 21.

[95] Kate Markvhida, "Antitrust and Competition," 319.

[96] U.S. Department of Transportation, *Procedures for Review of Agreements Filed Pursuant to 49 U.S.C. 41308*, 14 C.F.R. – 303.03(b) (2025). "When the Secretary of Transportation decides it is required by the public interest, the Secretary, as part of an order under section 41309 or 42111 of this title, may exempt a person affected by the order from the antitrust laws to the extent necessary to allow the person to proceed with the transaction specifically approved by the order and with any transaction necessarily contemplated by the order."

[97] U.S. Congress, *International Air Transportation Competition Act of 1979*, Pub. L. No. 96-192, 94 Stat. 35 (1980), codified at 49 U.S.C. – 41710 on Time Requirements.

[98] Joint Trans-Atlantic Report, 13.

[99] OECD International Transport Forum, *Air Service Liberalization and Airline Alliances: Country-Specific Policy and Analysis*, 2014, 58-59, accessed 30 September 2025, https://www.itf-oecd.org/sites/default/files/docs/14air serviceagreements.pdf.

[100] *Ibid* 59.

it has been concluded by airlines.[101]

Anti-trust immunity conferred upon international alliances may adversely affect customers in Trans-Atlantic overlaps and in order to maintain competition in these overlap areas, the DOT employs the "carve out" technique which means these overlaps were not included in the immunity grant.[102]

In these overlap areas, the airlines in partnership remain in competition. They cannot collude on prices on the carved-out route and if they do it would be illegal, and they would be open to anti-trust enforcement because the grant of immunity does not specifically apply to that route.[103]

Airlines challenge the carve out system on the basis that it disrupts their ability to provide benefits to connecting passengers by prohibiting coordinated practices between certain routes.[104] It is also argued that carve outs present unnecessary cost expenditures related with serving passengers on an "individual carrier' basis which is what an alliance hopes to eliminate in the first place.[105]

It must be noted that these carve outs may be viewed as a compromise between the DOJ which has an interest in protecting the interior air transport market competition and the DOT which works with wider foreign policy considerations. Carve outs are applied where competing airlines offer non-stop flights between two cities and a reduction in competition would result in adverse effects on time sensitive travellers.

The DOT is only mandated to grant antitrust immunity only as far as is necessary for the alliance to proceed if it is found to be in the interest of the public.[106] However, the DOT has been accused of granting immunity on a purely political basis e.g. the Northwestern/KLM and the American Airlines/British Airways alliances which some argued were granted for the advancement of the open-skies policy without due regard to the statutory requirements laid down in the DOT's mandate.[107]

These accusations seem to be in line with the DOT's approach since the inception of the open skies era of advancing the liberalization agenda at the expense of some form of immediate material gain or in this case legal principle.

In fact, in the American Airlines/British Airways case, the DOT employed manipulative legal practices to induce the United Kingdom to create a "de facto" open skies agreement with the United States by allowing access to Heathrow Airport.[108]

9. THE EU APPROACH

The assessment of international alliances in the EU is carried out by the Commission applying EU competition rules found in Articles 101 and 102 of the TFEU. This assessment uses an approach almost similar to the one used by the DOT.

Once it is established that an agreement is anticompetitive as defined in Article 101(1) TFEU[109] it can be allowed to proceed provided it "contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair

[101] *Ibid,* 60.

[102] Edelman, Jonathan. "Reviving Antitrust Enforcement in the Airline Industry," *Michigan Law Review* 120(1) (2021): 125, accessed 30 September 2025, http://www.jstor.org/stable/45418832.

[103] Examples of carve outs can be seen in immunity grants to the United –Lufthansa alliance in 1996 and the Delta-Air France-A1 Italia alliance in 2002.

[104] Edelman, "Reviving Antitrust."

[105] *Ibid*.

[106] G. S. Sanchez, "An Institutional Defense of Antitrust Immunity for International Airline Alliances," *Catholic University Law Review* 62,(1) (2012): 140, 156.

[107] Ibid,162. Brian F. Havel, *Beyond Open Skies: A New Regime for International Aviation*, 2009, 287-293. Also see Marko Stilinović and Dino Gliha, *Code-Sharing Agreements and Competition Protection in the European Union*, Zagreb: Pravni fakultet Sveučilišta u Zagrebu, 2017, 559-582, accessed September 30, 2025, https://www.croris.hr/crosbi/publikacija/prilog-skup/703611.

[108] Sanchez, "An Institutional Defense of Antitrust,"163.

[109] "The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

share of the resulting benefit" and it does not:(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."[110]

Similarly, abusive practices by a dominant firm are prohibited under Article 102 but can be objectively justified and if so they have to be proportionate.[111] The Commission may initiate an investigation into the competition effects of alliances on its own discretion and is jointly responsible for the enforcement of competition rules with the Member States as the European Competition Network (ECN).[112]

Alliance partners may provide the Commission with commitments which modify their alliance agreement to pre-empt potential anti-competitive effects, and such commitments include those submitted in the Sky Team Alliance (Aeromexico, Air France, Alitalia, Continental, CSA, Delta, KLM, Korean Air and Northwest)[113] case which included:

1. Availing slots at EU airports for new competitors.

2. Sharing FFPs with new competitors if need be.

3. Making room for interline agreements with new competitors to allow them to offer round trips.

4. Negotiating special prorate agreements for behind and beyond traffic.[114]

These proposals submitted by the parties were in line with a standard remedy package established by the Commission to counter potential anti-competitive effects from airline alliances i.e. slot divestitures, access to joint FFPs, regulatory measures and other remedies e.g. limiting price levels to avoid predatory pricing.[115]

10. CONCLUSION

Deregulation of the aviation industry is an on-going process. This is due to the fact that the State plays a prominent role in aviation. This is primarily seen through bilateral negotiations of the exchange of air traffic rights. This system allowed States to exchange the freedoms of the air on a reciprocal basis.

It may be argued that this system presents more fairness than the deregulation regime because States get as much as they give while the discussion above shows that open skies agreements largely work in the favour of technologically advanced countries who have a need to expand their airline networks to maximise profits.

While evidence has been discussed showing that airline alliances may pose a substantial threat to competition there is no agreement as to the conclusiveness of this evidence. Furthermore, competition authorities from major aviation countries such as the United States and the EU are of the opinion that the aviation sector will be better served by allowing fair competition to thrive.

However, these same competition authorities have had to apply tests which are outside the scope of the competition considerations when assessing the conduct of airline alliances. As already mentioned, the DOT has been accused on numerous occasions of exceeding its statutory mandate by pursuing political goals.

Even in the EU, nationalization clauses were prohibited as being anti-competitive after significant resistance by the Member States who were wary of ceding their bilateral negotiating autonomy to the supranational body. Agreement as to how much the EU should encroach on Member States's sovereignty in the pursuit of its single market integration goals is not unanimous.

The United States, the early proponents of deregulation, have a history of bowing to the demands of domestic airlines and using their considerable influence in the aviation industry to secure their dominance over it. As has been seen by the admissions of the early proponents of the

[110] European Union, *Consolidated Version of the Treaty on the Functioning of the European Union*, art. 101 (3), [2012] OJ C 326|47.
[111] Joint Trans-Atlantic Report, 15.
[112] *Ibid*.
[113] European Commission, "Competition: Commission Confirms Sending Statement of Objections to members of SkyTeam Global Airline Alliance," MEMO/06/243.
[114] Behind traffic is "airline traffic connecting at the origin airport of an O&D pair" and beyond traffic is "airline traffic connecting onward from the destination of an O&D pair" (O &D pair is "the route between an origin airport and a destination airport"); OAG Traffic Analyzer-Glossary, accessed 30 September 2025, http://cdn2.hubspot.net/hubfs/490937/Product_help_pages/Traffic_Analyser/TA_Glossary.pdf?t=1470149038800.
[115] Baronnat, E. "EC Antitrust Control of the SkyTeam Alliance," *Issues in Aviation Law and Policy* 2004-2008, 42-58.

deregulation doctrine, more studies are required to determine whether deregulation is much better than a heavily regulated aviation industry.

Other States take pride in their government owned airlines hence these airlines enjoy a competitive advantage through state aids which are illegal in certain jurisdictions such as the EU. This disadvantages other airlines on an international scale but the argument as to the illegality of state aids in this context has to be had taking into account government policy considerations.

Considerable agreement seems to centre around the fact that there needs to be a multilateral approach to aviation competition. This is apparent when discussing the legal scrutiny of airline alliances in relation to their potential effects on competition. A truly multilateral approach on the same scale as the Chicago Conference seems unlikely but cooperation can be achieved at regional levels albeit delicately as can be seen through the Trans-Atlantic Joint Report.

While aviation deregulation has indeed resulted in considerable benefits to the consumer and development of the aviation sector, several States are not willing to lessen the impact of the sovereignty over airspace principle which allows them to impose protectionist laws that prohibit cabotage and direct foreign investment. The substantial ownership provisions are a major example of this.

These provisions have been the main reason of the emergence of airline alliances, and it seems airline alliances are forming a unique body of competition law which requires strenuous economic analysis. This can be seen in the granting of immunity from enforcement of competition law rules.

Granting immunity seems to be an admission that sometimes anti-competitive behaviour is acceptable in light of the benefits that can be had especially in the case of airline alliances, and this is evidenced by the frequency of immunity granted to these alliances.

When it comes to the granting of this immunity, States have different procedures and different competent authorities to carry out the task. It is in this area that the need for a harmonisation of rules on a multilateral level is apparent. A unified approach would ensure that this immunity is granted in a way that is acceptable to States and would likely lead to more cooperation regarding aviation regulation.

Truly open skies have not yet been achieved, and it is debatable whether they will ever be. After making a commitment to deregulation a decade earlier, Africa seems to be still in the same protectionist framework. The issue of the Gulf Carriers shows that some States do not believe in fair competition as it is envisaged by the invisible had theory.

There are cases of government bailouts in the aviation industry as well because of its unique function of connecting countries to the outside world. It is because of these reasons that it can be argued that the aviation sector cannot be truly deregulated.

While it is evident that a multilateral approach would be desirable in some areas such as granting immunity, it is unlikely this can be achieved on a global scale because States are on different sides of the deregulation argument.

For these reasons it is suggested that aviation deregulation can be better achieved through bi-lateral negotiations or liberal agreements on regional levels which would create areas of deregulated airspace that is truly beneficial to all States.

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BEYOND RHETORIC: THE UN UNIVERSAL PERIODIC REVIEW AND EXAMPLE OF HUMAN RIGHTS PROTECTION IN THE DEMOCRATIC REPUBLIC OF NORTH KOREA

RETORİĞİN ÖTESİNDE: BM EVRENSEL PERIYODIK İNCELEMESI VE KORE DEMOKRATIK HALK CUMHURIYETI'NDE İNSAN HAKLARININ KORUNMASI ÖRNEĞI

Divine Chiamaka GOSIOHA [1]
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ABSTRACT

The United Nations Human Rights Council views the Universal Periodic Review system (UPR) as the most comprehensive and inclusive mechanism for evaluating state compliance with international human rights obligations. However, this system relies heavily on state cooperation and compliance, hence, this article seeks to constructively evaluate the effectiveness of the Universal Periodic Review system, particularly within non-compliant states. In specific terms, this article seeks to examine whether the UPR translates into real progress in human rights protection beyond rhetoric and deliberations. Focusing on the Democratic People's Republic of Korea as a case study, the article examines whether the UPR results in tangible progress in human rights protection or merely serves as rhetorical window dressing. It provides recommendations on strengthening these mechanisms through the creation of an independent human rights' judicial organ that not only legally binds the reviewing states to the Universal Periodic Review outcome but also accords jurisdiction to legally enforce punitive measures against non-compliance.

Key words: *Rhetoric, Universal Periodic Review (UPR), Human Rights Protection, Evaluation, North Korea.*

ÖZ

Birleşmiş Milletler İnsan Hakları Konseyi, Evrensel Periyodik İnceleme (EPİ) sistemini, devletleri insan hakları antlaşması yükümlülüklerine karşı sorumlu tutmak ve hem ulusal hem de uluslararası düzeyde insan hakları korumasını ilerletmek için en evrensel forum olarak görmektedir. Ancak, EPİ sistemi büyük ölçüde devletlerin işbirliği ve uyumuna bağlıdır. Bu çalışmada, uyumsuz devletler içinde EPİ sisteminin etkinliği yapıcı bir şekilde değerlendirilmektedir. EPİ sisteminin retoriğin ve sonuçsuz müzakerelerin ötesine geçip insan haklarında gerçek bir ilerleme sağlayıp sağlamayacağını incelemeyi amaçlamaktadır. Bu analizi yaparken, yükümlülüklerine rağmen insan haklarını sağlamaktaki başarısızlığıyla kötü bir şöhrete sahip olan Kore Demokratik Halk Cumhuriyeti vaka çalışması olarak kullanılmaktadır. Kuzey Kore vakası, devletlerin uyum göstermediği durumlarda EPİ sisteminin sınırlamalarını ve eksikliklerini göstermektedir. Sonuç olarak EPİ yaptırım mekanizmalarının etkisiz olduğu ve acil reform ihtiyacı ortaya çıkmaktadır. Çalışma, devletleri EPİ sonuçlarına yasal olarak bağlayan, insan hakları yargı yetkisine sahip, bağımsız bir yargı organının oluşturulması gibi önerilerle, söz konusu mekanizmaları güçlendirmeye yönelik tavsiyelerde bulunacaktır.

Anahtar kelimeler: *Retorik, Evrensel Periyodik İnceleme (UPR), İnsan Haklarının Korunması, Değerlendirme, Kuzey Kore.*

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1. INTRODUCTION

The UPR is executed and overseen by the United Nations Human Rights Council (UNHRC). The process is rooted in the foundational human rights system, including the UN Charter,[3] the Universal Declaration of Human Rights (UDHR).[4]

One of the key strengths of the UPR is its role in scrutinising member states' compliance with their human rights obligations. Every UN member state is obliged to participate in the review process, regardless of whether it has ratified specific human rights treaties. According to *Tistounet,* "the UPR is the most comprehensive and objective mapping of the human rights situation in the world."[5]

While the procedural structure of the UPR is commendable, this article does not focus on its formal merits, but on a more substantive question: to what extent does the UPR have real-world impact beyond diplomatic rhetoric?

Despite the system's procedural strength, concerns persist regarding its tangible effectiveness.

Critics such as *Noam* contend that the UPR may serve as a shield for member states to avoid accountability. They argue that instead of implementing substantive reform, many states use the platform to deflect criticism.[6] Additional concerns arise from the mechanism's reliance on voluntary compliance and the absence of robust enforcement tools for addressing persistent non-compliance.

This article investigates the Democratic People's Republic of North Korea (DPRK), hereinafter referred to as North Korea, as a case study to evaluate whether the UPR translates into meaningful change in the protection of human rights. Given North Korea's widely documented record of gross human rights abuse and ongoing defiance of international norms, it provides a compelling case study for assessing the UPR's impact.

The main hypothesis of this study is that the UPR system is largely ineffective in bringing about tangible, lasting change. North Korea is used to explore why authoritarian states tend to resist compliance, despite having voluntarily joined the UN and ratifying several human rights treaties. This study demonstrates that the UPR fails to produce concrete outcomes in context such as North Korea.[7] This lack of effectiveness would be proven based on tangible data, including reports by the UN Commission of Inquiry, witness testimonials, and statements from other stakeholders.

Therefore, the research question of this study revolves around the following: Is the UPR merely rhetoric, or is it an effective tool in driving real progress in human rights advancement? Why does UPR appear to be progressive in some countries and redundant in others? These questions will be addressed through a comparative analysis of democratic and authoritarian UPR performance data as well as a nuanced analysis of North Korea's UPR reports and the final reviews of each UPR cycle. This article highlights the need for reforming human rights law enforcement mechanisms.

The study begins with an overview of the UPR's structure, procedural framework, stakeholders, and the key components of the mechanism. It then proceeds to discuss the motivating factors for compliance between democratic and authoritarian states with regard to procuring a pattern or trend of performance that is peculiar to each country. North Korea is then evaluated in depth to assess whether its non-compliance is exceptional or reflective of broader trends among authoritarian regimes.

Subsequently, this article highlights some general criticisms of the UPR system, aiming to shed more light on its weak and ineffective areas. The article concludes with recommendations for reform. It

[3] United Nations, *Charter of the United Nations*, adopted at the United Nations Conference on International Organization, San Francisco, April 25–June 26, 1945, accessed August 11, 2025, https://www.un.org/en/about-us/un-charter.

[4] *Universal Declaration of Human Rights*, adopted by the United Nations General Assembly at its 183rd plenary session, Paris, December 10, 1948.

[5] Eric Tistounet, *The UN Human Rights Council: A Practical Anatomy* (London: Routledge, 2021), 45.

[6] Noam Schimmel, "The UN Human Rights Council's Universal Periodic Review as a Rhetorical Battlefield of Nations: Useful Tool or Futile Performance?" *World Affairs* 186(1) (2022): 14.

[7] Human Rights Watch, *World Report 2024: North Korea Chapter*, accessed August 1, 2025, https://www.hrw.org/worldreport/2024/country-chapters/north-korea.

essentially proposes the creation of an independent judicial organ at the universal level, with the authority to legally mandate non-compliant states to fulfil their human rights obligations. It also discusses practical pathways to implementing such reforms in a court system in a politically motivated environment, such as the UN, which depends solely on state cooperation to function effectively.

2. THE UNIVERSAL PERIODIC REVIEW SYSTEM IN CONTEXT

Despite its significance in maintaining international legal accountability, its effectiveness in addressing issues of human rights abuse, especially in non-compliant states, is a subject of ongoing debate.[8] The discourse is centred around the fact that authoritarian regimes have used the system to influence reporting, divert criticism, and feign compliance without executing any real changes.[9]

This chapter examines the UPR in context, analysing the challenges it faces within different non-compliant states such as Russia, Iran, and North Korea, with the aim of laying the foundation for the discussion of North Korea's role in a broader context of defiance against global human rights enforcement mechanisms.

2.1. Overview of the Universal Periodic Review (UPR)

The Office of the United Nations High Commissioner for Human Rights (OHCHR) provides foundational information about the UPR. Established in March 2006 by the UN General Assembly (UNGA) in resolution 60/251, the UPR was designed to prompt, support, and expand the promotion and protection of human rights in every country[10].

The UPR is a unique process that involves periodic review of the human rights records of all 193 UN Member States. It is based on the principle of equal treatment of all countries and provides an opportunity for all states to declare what actions they have taken to improve the human rights situation in their countries and overcome challenges to the enjoyment of human rights. Currently, no other mechanism of this kind exists.[11] The first periodic review was conducted in 2008, and since then, all 193 countries have undergone the review system three times. The fourth cycle of the review began in November 2022 at the 41st session of the UPR Working Group.[12]

This review was based on three major documents and information sources. The first source is the National Report, which requires the state under review to produce a report on the country's human rights situation. The second report is compiled by the Office of the High Commissioner for Human Rights (OHCHR) as a supplementary document to the national report presented by the state under review. The third source includes key stakeholders, such as national human rights institutions (NHRIs) and non-governmental organizations (NGOs), including Human Rights Watch and Amnesty International.[13] These reports provide an additional level of scrutiny and a more nuanced outlook on the gravity of human rights situations that may have been excluded or overlooked in the national state or OHCHR reports.

After a thorough examination of these reports, recommendations for improvements are made in the form of outcome reports and are adopted by the plenary of the Human Rights Council, marking the end of the process for that cycle. Member states are primarily responsible for implementing recommendations following a review cycle. Subsequent review cycles are treated as a follow-up to the progress of member states by addressing their identified shortcomings in protecting human rights.

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[8] Valentina Carraro, "Promoting Compliance with Human Rights: The Performance of the United Nations' Universal Periodic Review and Treaty Bodies," *International Studies Quarterly* 63(4) (2019): 1079.

[9] Elvira Domínguez-Redondo, "The Universal Periodic Review: Is There Life Beyond Naming and Shaming in Human Rights Implementation?" *New Zealand Law Review* 4 (2012): 673.

[10] Office of the United Nations High Commissioner for Human Rights (OHCHR), "Basic Facts About the UPR – UPR Info," accessed August 6, 2025, https://www.ohchr.org/en/hr-bodies/upr/basic-facts.

[11] *Ibid.*

[12] Office of the United Nations High Commissioner for Human Rights: "Universal Periodic Review (UPR) Home": Universal Periodic Review | OHCHR: 20.05.2024

[13] Tistounet, *The UN Human Rights Council*, 8.

The main question remains: can the UPR effectively translate its recommendations into actual actions within member states?

Etone, Nazir, and Storey supported the UPR system, stating that it contributed to positive changes on the ground.[14]

Carraro mentions that a major feature of the UPR enforcement mechanism is extreme public and peer pressure, whereby states that respond better to these pressures tend to be more compliant, whereas states less likely to be affected by such pressure are non-compliant.[15]

The next section examines this theory of compliance within democratic and authoritarian regimes. The key question is, why are some states unnerved by public pressure or so-called naming and shaming while others are not? To answer this, democratic states—Canada and Germany—will be analysed against authoritarian states— Iran and North Korea.

2.2. Motivating Factors for Compliance

Carraro explained the theory of compliance *as* a process whereby states comply with their international obligations through various mechanisms, including management, constructivist, and enforcement approaches. Carraro further asserts that external pressures such as public scrutiny, international pressure, and the practical feasibility of recommendations are effective enforcement approaches to exert compliance from states.[16] This is analysed between democratic and authoritarian states.

Democratic states, such as Canada and Germany, have undergone approximately three UPR cycles between 2009 and 2022.[17] They are among the democratic countries with a strong record of compliance with the UPR enforcement mechanisms. For instance, Canada, in its most recent cycle in 2018, accepted over 75% of recommendations.[18] They have consistently shown a strong willingness to align their national democratic values with those of the UPR.

Germany presents a similar pattern, especially regarding the advancement of political and civil rights, including freedom of expression, social welfare, and asylum policies. Germany has also undergone three UPR cycles, with its latest review held in 2021.[19] In its 2021 cycle, Germany accepted nearly all the recommendations provided at the end of its review and has since demonstrated significant legislative action towards implementation.

States such as Canada and Germany operate under a system of democratic accountability towards their citizens and the international community. An international reputation can be a strong motivating factor for these countries to comply with their obligations.

Their motivation to comply with their human rights obligations is, in this sense, straightforward. It is tied to their desire to maintain legitimacy and uphold their democratic values. This contrasts with authoritarian regimes, which may prioritize regime survival and the maintenance of state sovereignty over international opinion, no matter how negative the narrative is.

North Korea, which is the main case study, exhibited this pattern. In its 2019 UPR session, it rejected approximately 130 of the 262 recommendations provided on issues of political freedoms, freedom of movement, and even the dismantling of labour camps.[20] Their justification for the rejection was largely centred "hostility and

[14] Edward R. McMahon and Tomek Botwicz, "Human Rights and the UN Universal Periodic Review Mechanism: A Research Companion," 86. In *Human Rights and the UN Universal Periodic Review Mechanism: A Research Companion*, edited by Damian Etone, Amna Nazir, and Alice Storey. Abingdon: Routledge, 2024.

[15] Carraro, "Promoting Compliance with Human Rights," 1090.

[16] *Ibid,* 1080.

[17] United Nations Human Rights Council, "Universal Periodic Review: Canada," *OHCHR*, accessed August 7, 2025, https://www.ohchr.org/en/hrbodies/upr/ca-index; "Universal Periodic Review: Germany," *OHCHR*, accessed August 7, 2025, https://www.ohchr.org/en/hr-bodies/upr/de-index.

[18] UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Canada* [UN Doc. A/HRC/39/10] (New York: United Nations, 2018).

[19] UN Human Rights Council. *Report of the Working Group on the Universal Periodic Review: Germany* [UN Doc A/HRC/47/6]. New York: United Nations 2021.

[20] Human Rights Watch, *Joint Submission for the Universal Periodic Review of the Democratic People's Republic of Korea*, accessed August 10, 2025, https://www.hrw.org/news/2024/04/09/joint-submission-universal-periodic-review-democratic-peoples-republic-korea.

inconsistency" of the recommendation with its National Socialist principles.[21]

These regimes are not accountable to their citizens or international actors; they have found ways to create allegiance with other authoritarian states, so that international sanctions do not significantly impact their economy.

Consider Iran as an example: Iran is subject to extensive sanctions, largely due to its nuclear program, human rights abuses, and alleged support for terrorism. To salvage the effects of these sanctions, Iran has built strong alliances with other autocratic states like China and Russia, which have provided economic and political support to the country.[22] Reports show that they have received access to financial support, investment in infrastructure, and economic support through grey market channels with the assistance of their allies.[23]

In other words, since the country has been able to find a sustainable means of running its economy, the principles of peer review, public pressure, and international cooperation on which the UN and the UPR mechanisms rely do not pose a strong motivating factor to provoke these states to comply. Instead of adhering to international compliance, these autocratic states devised means to evade accountability. For instance, they tend to accept broad, non-specific recommendations to create an appearance of compliance, while simultaneously rejecting recommendations for substantial policy changes. Additionally, they devise rhetoric by reframing the narrative to best suit their interests.

In stark contrast to democratic states, these states limit or resist the operation of independent civil societies in the UPR process. They would typically require only government-affiliated NGOs to submit reports on behalf of the state, which generally distorts the review process.

The examination of the broader patterns of compliance and resistance to the UPR among democratic and authoritarian regimes in this section provides a clear case for the next section, which focuses on the unique case of North Korea regarding its limitations and challenges with the UPR and its human rights obligations.

3. CASE STUDY: EVALUATING THE EFFICACY OF THE UPR IN NORTH KOREA

North Korea, officially known as the Democratic People's Republic of Korea, is separated from South Korea by the Korean Demilitarised Zone (DMZ) along the 38th parallel. North Korea is led by the Kim Dynasty, which began with Kim Il-sung; the leadership is currently held by Kim Jong-un, who assumed office in 2011 and has been leading for 12 years and five months as of May 2024.[24] The country operates under a socialist ideology, which implies that property is owned and distributed by the state based on the needs and interests of its citizens.[25]

Michael Kirby, the chief UN investigator of North Korean rights abuses, described the human rights situation as a 'Holocaust-type phenomenon', comparing the violations to those perpetrated by the Nazis during the Second World War. *Choi and Howe emphasized* the fact that North Korea has consistently neglected its duties to protect or guarantee basic rights for its citizens and has equally resisted becoming an international human rights law-abiding state.[26]

North Korea officially joined the United Nations on September 17, 1991.[27] As of 2019, North Korea has

[21] *Ibid.*

[22] Atlantic Council, "Global Sanctions Dashboard: How Iran Evades Sanctions and Finances Terrorist Organizations Like Hamas," Atlantic Council, 2024, accessed September 10, 2024, https://www.atlanticcouncil.org/blogs/econographics/global-sanctions-dashboard-how-iran-evades-sanctionsand-finances-terrorist-organizations-like-hamas/.

[23] *Ibid.*

[24] BBC News, "North Korea Leader Kim Jong-il Dies: State Media," 2011, accessed September 1, 2025, https://www.bbc.com/news/world-asia-16239693.

[25] Democratic People's Republic of Korea, *National Report Submitted in Accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1* (Geneva: United Nations Human Rights Council, 2009), https://www.refworld.org/reference/statepartiesrep/unhrc/2008/en/59455.

[26] Jina Choi and M. Brendan Howe, "United Nations Contributions to Promoting Human Rights in the DPRK: Impetus for Change," *Asian International Studies Review* 19(2) (2018): 115.

[27] United Nations, *Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, 2014, "Admission of the Democratic People's Republic of Korea and the Republic of

ratified five human rights treaties:[28] the Convention on the Rights of the Child (CRC),[29] the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[30], the Convention on the Rights of Persons with Disabilities (CRPD),[31] the International Covenant on Civil and Political Rights (ICCPR),[32] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[33] Ratifying these treaties obliges North Korea to adopt and implement policies that promote and protect the rights outlined in each document.

Regardless of how commendable signature or ratification is, it could be, as *Geodde* puts it, "a low-cost symbolic gesture as opposed to actual implementation via domestic legislation".[34] Unfortunately, this has been the reality for North Korea in the UN.

Retrospectively, North Korea's compliance with and responsiveness to its ratified human rights treaty obligations has been consistently substandard; it has obstructed efforts by Special Rapporteurs to investigate the human rights situation in the country by refusing entry access. While North Korea has made attempts at treaty-related legal revisions, it has obstructed the monitoring mechanisms of treaty bodies and cited reports or findings as confrontational.[35]

This disruptive behavior led to the establishment of a Commission of Inquiry (COI) in March 2013.[36] The COI was mandated to investigate systematic, widespread, and grave violations of human rights in the country[37]. It marked "a critical turning point in elevating the North Korean human rights issue into the global political arena with unprecedented gravity".[38]

Although North Korea rejected the mandate of the COI and abruptly ignored the invitation to participate in the investigation;[39] the COI still carried out extensive activities, including examining defector testimonials, remote monitoring, and more, in identifying the extent and seriousness of human rights violations in the country.[40]

The results of this investigation were a 400-page comprehensive report detailing a variety of violations of basic rights, including social and economic rights to food due to the prejudiced distribution system, the right to life exacerbated by the great famine, and civil rights such as freedom of opinion, access to information, freedom of religion, and freedom of movement (citizens are unable to freely travel within and outside the country).

Additionally, the report details violations of the freedom from torture and inhumane treatment, citing that citizens are detained without a free and fair trial, tortured, and can face public execution in various detention facilities and political prison camps.[41] North Korea has repeatedly disputed these claims by citing a lack of credible on-site statistics; their complete isolation and rejection of putting

Korea to Membership in the United Nations," accessed April 25, 2024.

[28] Human Rights Watch, *World Report 2024: North Korea Chapter*.

[29] United Nations General Assembly. *Convention on the Rights of the Child*. United Nations, Treaty Series, vol. 1577, p. 3. Adopted November 20, 1989, accessed August 11, 2025. https://www.refworld.org/legal/agreements/unga/1989/en/18815.

[30] United Nations General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, United Nations, Treaty Series, vol. 1249, p. 13, adopted December 18, 1979, accessed August 11, 2025, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-againstwomen.

[31] United Nations General Assembly, *Convention on the Rights of Persons with Disabilities*, A/RES/61/106, adopted December 13, 2006, accessed August 11, 2025, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities.

[32] United Nations General Assembly, *International Covenant on Civil and Political Rights*, United Nations, Treaty Series, vol. 999, p. 171, adopted December 16, 1966, accessed August 11, 2025, https://www.refworld.org/docid/3ae6b3aa0.html.

[33] United Nations General Assembly. *International Covenant on Economic, Social and Cultural Rights*. UNTS vol. 993, p. 3. Adopted December 16, 1966, accessed August 11, 2025, https://www.refworld.org/docid/3ae6b36c0.html.

[34] Patricia Goedde, "Human Rights Diffusion in North Korea: The Impact of Transnational Legal Mobilization," *Asian Journal of Law and Society* 5(1) (2017): 6.

[35] *Ibid.,* 7.

[36] *Ibid.*

[37] United Nations, *Report of the Detailed Findings of the Commission of Inquiry*.

[38] Goedde, "Human Rights Diffusion in North Korea," 2.

[39] Goedde, "Human Rights Diffusion in North Korea," 15.

[40] Choi and Howe, "United Nations Contributions to Promoting Human Rights in the DPRK," 5.

[41] *Ibid*, 75.

their state up for investigation solidifies their rhetorical gestures to evade accountability.

3.2. Analysis of North Korea's Response to the UPR

As of April 2024, North Korea has participated in three UPR cycles, submitting its first national report in 2009, its second in 2014, and its latest report in 2019.[42] *Chow* summarized the focus of the 2009 and 2014 reports as broadly surveying the human rights regime and its policy developments.[43]

In its 2009 national report, North Korea placed great emphasis on describing the basic principles and nationalistic values surrounding human rights, a tactic to shift the focus away from real issues surrounding the protection of human rights in the country. They essentially made it clear that there should not be a universal definition of human rights; instead, it is to be determined and guaranteed by sovereign states.[44]

Aside from this, the report is equally filled with vague and ambiguous descriptions of human rights enforcement mechanisms within the country, reporting, "No person is arrested, detained, or arbitrarily deprived of life, according to the Constitution and the criminal law, unless he/she has committed a very serious crime".[45]

These so-called "very serious crimes" have been proven through stakeholders' reports to include trivial actions such as foraging for or stealing food, attempting to escape, repatriation from a neighbouring country, rioting, assaulting guards, religious worship, and criticizing the country, actions that do not warrant the death sentence.[46]

During their discussions on issues of gross human rights abuses raised by key stakeholders, North Korea has deflected accountability and instead held international bodies and human rights experts responsible, stating that their anti-DPRK resolutions were moves aimed at "divorcing the DPRK citizens from their government under the pretext of protection of human rights".[47] Generally, the other two cycles, held in 2014 and 2019, adopted similar approaches.

For instance, regarding protecting the right to food, they stated, "Though affected by floods and typhoons, agricultural output increased year after year thanks to the nationwide efforts concentrated on farming….".[48] Deliberately omitting information on how these foods are distributed or gaining access to them. As usual, the North Korean government mentions little to no actual progress by implementing the recommendations of previous findings and instead dwells on self-presenting North Korea as a compliant actor in the protection of rights within their jurisdiction.

However, it is inconsistent with international obligations. Key stakeholders' reports, like those from Human Rights Watch (HRW), have continuously told a different narrative than the one North Korea would wish the international community to believe. For instance, regarding the issue of inhumane treatment of individuals, it was noted that "pregnancies are generally disallowed inside prisons, and testimonies suggest that, should efforts by authorities to induce abortion not be successful, babies alive at birth are killed. Some accounts even describe prisoners being forced to kill their new-born child".[49]

The Citizens' Alliance for North Korean Human Rights (NKHR) has also reported that statutory laws preventing employment and workplace discrimination are meaningless in practice. Additionally, education and health services are so expensive that only the rich can afford such basic

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[42] United Nations Human Rights Council, *Report on the Universal Periodic Review: Democratic People's Republic of Korea*, Session 6, A/HRC/WG.6/6/PRK/1 (May 5, 2009); Session 19, A/HRC/27/15 (July 21, 2014); Session 35, A/HRC/42/8 (August 9, 2019).

[43] Jonathan Chow, "North Korea's Participation in the Universal Periodic Review of Human Rights," *Australian Journal of International Affairs* 71(2) (2017): 149.

[44] United Nations Human Rights Council, "Report of the Working Group on the Universal Periodic Review: Democratic People's Republic of Korea," submitted at its 6th Session, A/HRC/WG.6/6/PRK/1 (May 5, 2009), 4, para. 15.

[45] *Ibid*, 4, para. 15.

[46] *Ibid*, 5, para. 17.

[47] *Ibid*, p. 8, para. 36.

[48] United Nations Human Rights Council, "Report of the Working Group on the Universal Periodic Review: Democratic People's Republic of Korea," submitted at 19th Session, A/HRC/WG.6/19/PRK/1 (May 2014), 11, para. 74.

[49] *Ibid*, p. 4, para. 36; UN Human Rights Council, "Report of the Working Group," 4, para. 36.

rights.[50] The International Federation for Human Rights reported that "since the DPRK's first UPR, dozens of people have been executed".[51]

The judiciary was regularly bypassed, and these executions frequently occurred in an arbitrary manner, including within the DPRK's vast prison camp framework. Both public and secret executions were carried out and the death penalty was applied to non-serious crimes and against vulnerable groups.[52] This pattern has persisted, as a recent 2024 report by HRW reveals that North Korean citizens live in a controlled, repressive, and isolated state, due to prolonged COVID-19 measures.[53]

Throughout their UPR participation, the pattern has been clear: North Korea considers its national sovereignty a higher priority than its international obligations. Their reductionist view is captured in its statement, "It is of the view that as human rights are guaranteed by sovereign States, any attempt to interfere in others' internal affairs, overthrow the governments, and change the systems on the pretext of human rights issues constitutes violations of human rights".[54] This distorted interpretation of sovereignty allows for the justification of resisting public scrutiny and rejecting the UN's technical assistance, which has created a devastating outcome for victims of human rights abuse within the country.

Although North Korea joined the UN, acceded or ratified several international human rights documents, it appears that this was a tactic to promote its national sovereignty, create strong political alliances, and project itself on the global front, as opposed to genuine interest in moving the union's values, as exemplified by its rhetoric and participation in the UPR process.

The general behaviour of North Korea towards the UN and the UPR process has been riddled with extreme objections and the use of false narratives to challenge real provisions of support as a direct interference in the country's independent affairs and an infringement against the government. Consequently, its reports were summarised on the premise that the protection and promotion of genuine human rights meant defending the country against foreign interference and achieving durable peace and stability for the state.

Nevertheless, upon closer analysis, public scrutiny and international reputation have also been motivating factors, albeit weak ones. This is because, despite their allegiance to national sovereignty over citizens' rights, how they are perceived on a global front can also increase the amount of public pressure on the country for compliance. This is evident when North Korea accepted nearly half of its 167 UPR recommendations in its second UPR cycle after rejecting all of them in the first cycle in 2009, because the 2013 COI report detailing horrific abuses was released.

However, such performative actions can be clearly seen as a facade and a deflection through rhetorical devices, as there is no real progress or change. In a 2024 joint submission between the Transitional Justice Working Group and HRW, they noted, "Since the last UPR, the DPRK has not meaningfully engaged with any international human rights mechanisms and has adopted new repressive laws, further deteriorating the human rights conditions in the country".[55]

The case study of North Korea mirrors other authoritarian and non-compliant states, particularly regarding their motivating factors. Although each of these countries differs in its methods of non-compliance, at the core is the motivation to uphold national values and sovereignty over the protection of human rights.

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[50] Marzuki Darusman, *Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea Report*, U.N. Doc. A/HRC/25/63 (February 7, 2014), 7, para. 18.

[51] *Ibid.*

[52] Darusman, *Special Rapporteur Report*, 7, para. 21.

[53] Human Rights Watch, *Statement at Interactive Dialogue with the Special Rapporteur on the Situation of Human Rights in Democratic Republic of the Congo*, accessed May 10, 2024, https://www.hrw.org/news/2024/03/18/ statement-interactive-dialogue-special-rapporteur-situation-human-rights-democratic.

[54] United Nations Human Rights Council, "Report of the Working Group on the Universal Periodic Review: Democratic People's Republic of Korea," Session 6, A/HRC/WG.6/6/PRK/1 (May 5, 2009), para. 15.

[55] Human Rights Watch, "Joint Submission for the Universal Periodic Review of the Democratic People's Republic of Korea," *HRW News*, accessed August 10, 2025, https://www.hrw.org/news/2024/04/09/jointsubmission-universal-periodic-review-democratic-peoples-republic-korea.

This analysis demonstrates that the UPR enforcement system requires strong reforms. These reforms should be more robust and well equipped to address countries such as North Korea, which are notoriously non-compliant despite their motivating factors. The subsequent sections will highlight some criticisms of the UPR system and recommendations to improve and strengthen its effectiveness.

4. CRITIQUES OF THE UNIVERSAL PERIODIC REVIEW

The UPR has received considerable criticism regarding its operative aspects. *Noam* has argued that authoritarian regimes use the UPR not only to serve their interests but also to employ rhetorical strategies to defend, downplay, and deny any alleged violations and present themselves as human rights heroes before the UN.[56] In this section, the author discusses two criticisms: first, the lack of effective enforcement mechanisms; and second, the tendency of the UPR to serve as a hub for evading rather than advancing accountability. This is done with the aim of highlighting the shortcomings of the UPR.

4.1. Lack of Effective Enforcement Mechanisms

The OHCHR has attempted to answer the question, "What happens if a state is not cooperating with the UPR?" by stating that "in such cases, the Human Rights Council decides what measures it would employ in addressing persistent non-compliance".[57] However, what these measures entail and what steps should be taken to protect victims of human rights abuses were not mentioned, thereby leaving the issue open to ambiguity and potential abuse.

Baek categorised the enforcement mechanisms into three approaches: *"(i) exerting pressure on target countries with gross human rights violations, including an attempt at regime change; (ii) providing a policy of prioritised peacebuilding followed by a gradual realisation of human rights; and (iii) adopting a parallel and concurrent approach to human rights, economic support, and peace*"[58]. He explained that none of these positions has clearly resolved the issue of human rights in the target countries.[59]

In practice, the approach of the UPR system in human rights enforcement has primarily been non-confrontational and cooperative, involving the typical "naming and shaming" of countries with poor human rights records, dialogue and recommendations, and, in very rare cases, economic coercion[60]. Unlike treaty bodies or international courts, the UPR lacks the capacity to impose sanctions or mandate binding decisions on noncompliant states. Instead, it relies heavily on states' willingness, external persuasion, diplomatic pressure, and peer accountability in addressing noncompliance.

George and Michael have highlighted that "the impact of naming and shaming on the reputation of states is weaker than conventionally imagined in relation to compliance with international legal obligations, whether human rights-related or not"[61]. The rationale behind this critique is that the enforcement mechanisms are wholly dependent on the state's goodwill and desire to participate; they are of little to no use for those who are not willing to participate.[62]

Counter-arguments to this criticism posit that the current UPR enforcement mechanisms are the best means necessary for advancing human rights, as resorting to any other alternative, more intrusive methods would impede the state's sovereignty and autonomy, hence hindering cooperation and progress in human rights protection. For instance, *Baek* highlighted in his article that "The protection

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[56] Schimmel, "The UN Human Rights Council's Universal Periodic Review," 10.

[57] OHCHR, "Basic Facts About the UPR – UPR Info."

[58] Buhm Suk Baek, "Partially Right, Partially Wrong: Rethinking the Implementation of International Human Rights Law in Countries with Gross Human Rights Violations," Pacific Focus: Inha Journal of International Studies 33(3) (2018): 359.

[59] *Ibid.*

[60] Domínguez-Redondo, "The Universal Periodic Review," 675.

[61] W. George Downs and Michael A. Jones, "Reputation, Compliance, and International Law," *Journal of Legal Studies* 31 (2002): 95.

[62] Olivier De Frouville, "Building a Universal System for the Protection of Human Rights: The Way Forward," in *The UN Human Rights System: Case Law and Commentary*, ed. Cherif M. Bassiouni and William Schabas (Cambridge: Intersentia Publishing Ltd, 2011), 241.

and promotion of human rights can be mainly enhanced with a respect for state sovereignty".[63]

The present authors view the above refutation as unfounded. The emphasis of the critique is not on the mechanisms and procedures of the UPR, but on the system, structure and outcome of the mechanisms employed after each UPR cycle. While it is customary to respect state sovereignty and non-intervention, the implications and severity of human rights violations necessitate the need for stronger enforcement measures, beyond non-confrontation and co-operation.

Baek, in his article, explains that the traditional sense of state sovereignty, which is states having absolute autonomy within their internal borders, devoid of external scrutiny and interference, is gradually becoming obsolete. Such principle can be defied on strong legal grounds of gross and systematic abuses by the state concerned.[64] In other words, the protection of nationals' basic human rights takes precedence over respecting the principle of non-intervention.

Despite claims that the UPR enforcement mechanism could pose an infringement on state sovereignty, it is undeniable that the UPR enforcement system needs to become more robust and effective in addressing human rights issues. Creating stronger mechanisms is not an impediment to state sovereignty, as some have claimed. Instead, it is, as *Nazir, Storey, and Yorke* put it, "a lens to question the legitimacy of state sovereignty through a cosmopolitan reflection."[65]

4.2. Potential for Evading Accountability

UPR is a system of interactive and constructive dialogue; hence, the likelihood that member states will excessively politicise the entire UPR process is alarmingly high. Human Rights Watch, in its report, highlighted the fact that "*The quality of the UPR depends on critical but fair assessment by peers. In a few cases, governments have been able to avoid such critical assessments by rallying the support of friendly governments eager to praise their human rights record without devoting any attention to the shortcomings that exist regarding human rights in all states*".[66]

Terman, in her article, examined about 40,000 recommendations from the first two cycles of the UPR process. The examination tested the different aspects of political relationships between states, including formal military alliances, humanitarian aid, arms trade, and geopolitical affinity. They found strong evidence that "states spare their strategic partners in the review process, giving less severe commentary on average".[67] Beyond rallying friends and politicizing the process, the UPR has also been criticized for being used as a rhetorical gesture to evade accountability. *Noam* expresses that some of the UPR national reports are "not detailed or data-driven, are highly selective, impressionistic, and lacking in shared standards of assessment which would enable comparative analysis."[68]

Counter-arguments to this critique posit that the fact-checking measures set in place by the UPR system mitigate the possibility of member states evading accountability. *Ramcharan emphasises* that the Council considers principles of universality, impartiality, objectivity, non-selectivity, inclusiveness, and many others when selecting its composition and members.[69]

The present authors refute the above counter-argument, noting that despite the existence of fact-checkers, the UPR system is centred on the voluntariness and cooperation of member states regarding the recommendations provided. As *Baek*

[63] Baek, "Partially Right, Partially Wrong," 4.

[64] Buhm Suk Baek, "Economic Sanctions Against Human Rights Violations," in *Cornell Law School Inter-University Graduate Student Conference Papers*, 1–95 (Ithaca, NY: Cornell Law School, 2008), 3.

[65] Amna Nazir, et al., "Human Rights and the UN Universal Periodic Review Mechanism: A Research Companion," in *Human Rights and the UN Universal Periodic Review Mechanism*, ed. Damian Etone, 1st ed. (New York: Routledge Taylor & Francis Group, 2024), 37.

[66] Human Rights Watch, *Curing the Selectivity Syndrome: 2011 in Review of the Human Rights Council*, 7, accessed September 20, 2025, https://www.hrw.org/report/2010/06/24/curing-selectivity-syndrome/2011-review-human-rights-council.

[67] Rochelle Terman and Erik Voeten, "The Relational Politics of Shame: Evidence from the Universal Periodic Review," *Review of International Organizations* 13(1) (2017): 2.

[68] Schimmel, "The UN Human Rights Council's Universal Periodic Review," 25.

[69] Bertrand G. Ramcharan, *The Law, Policy and Politics of the UN Human Rights Council* (Leiden: Brill Nijhoff, 2015), 153.

stipulates, "in order to improve the human rights conditions in so-called rogue states, the main force should come from the inside".[70]

While the inclusion of reports from key stakeholders in the UPR process does play a significant role in reviewing states' human rights obligations, the process is intrinsically political, with states often forming strategic alliances to advance their interests, evade accountability, and limit the advancement of human rights within their jurisdiction.

The final section of this article will examine the UPR system beyond critiques. It would analyse its effectiveness in advancing human rights protection, particularly in North Korea, a persistent non-compliant state.

5. EFFICACY OF THE UPR AND RECOMMENDATIONS FOR REFORMS

The reports analysed in this article have shown that the UPR has not effectively driven real change in North Korea. Instead, North Korea has been used by the UPR as a political means to divert focus and attention away from the documented human rights violation within its borders.

To put things into perspective, North Korea, during its first cycle, rejected 167 recommendations posed to it. However, after a report was issued by the Commission of Inquiry in 2014 on the violations in the country, it quickly announced acceptance of 121 recommendations just before the second UPR cycle in May 2014. *Chow* explains that this was done to divert attention from its human rights violations, attempt to boost its international image, advocate for the primacy of state sovereignty over universal human rights, and challenge the legitimacy of country-specific human rights mechanisms, such as the COI and Special Rapporteur.[71]

Recent reports from Human Rights Watch have shown that the situation in the country has only got worse, especially with the outset of COVID-19, specifically noting, "In 2023, the government continued to maintain extreme and unnecessary measures under the pretext of protecting against the COVID-19 pandemic, with deepened isolation and repression; border, trade, and travel restrictions; and strong ideological control. Till date, it does not tolerate pluralism, and it bans independent media, civil society organizations, and trade unions."[72]

The present authors argue that the motives behind North Korea's persistent practice regarding implementing the UPR recommendations are largely due to ally countries with substantial power within the UN, willing to support North Korea, and veto any detrimental resolution against them, most notably China. This argument is backed by a report by Human Rights Watch stating, "The Chinese government continued to seek to detain North Korean asylum seekers and return them to North Korea, violating China's obligations as a state party to the UN Refugee Convention."[73]

5.1. Recommendations for Reforms

The above analysis underscores the urgent need for reform of the UPR enforcement mechanisms. The primary recommendation for improving the UPR system is the establishment of an independent judicial organ, the World Court of Human Rights (WCHR), specifically to challenge states' non-compliance, render binding judicial decisions, and provide adequate reparation for victims of human rights abuses. This recommendation has equally been suggested by Nowak, who states, "by far the most effective method to implement the right to an effective remedy on the international level is to allow direct access of the rights holders to a fully independent international human rights court with the power to render binding judgments and to grant adequate reparation to the victims of human rights violations".[74]

5.1.1. Creation of an Independent Judicial Organ

The need for creating an independent judicial organ - WCHR, which would serve as a corrective measure or an equalizer to the political nature of the UN system, is increasingly imminent because it would have the jurisdiction to issue binding decisions on human rights violations and would provide a channel for states to be held accountable

[70] Baek, "Partially Right, Partially Wrong," 359.
[71] Chow, "North Korea's Participation in the Universal Periodic Review of Human Rights," 146.
[72] Human Rights Watch, "North Korea Chapter."
[73] *Ibid.*
[74] Manfred Nowak, "The Need for a World Court of Human Rights," *Human Rights Law Review* 7(1) (2007): 258.

for their inactions regarding their international human rights obligations.

The importance of such a court at the UN level is underscored by its pivotal role within regional human rights systems. The European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACHR), and the African Court on Human and Peoples' Rights are courts that have the authority to issue binding decisions based on their conventions and provide direct reparation for victims.

The existing UN judicial organs: the International Court of Justice (ICJ) and the International Criminal Court (ICC) play a very limited role. They are not effective or equipped to handle the demands of the proposed WCHR.

The ICJ serves as the primary organ for adjudicating legal disputes between states, providing advisory opinions on legal questions referred to it by the union. It is mainly of an advisory nature and cannot issue binding or enforceable rulings without the consent of both parties.[75] The ICC, on the other hand, although not formally a part of the UN system, collaborates closely with it to prosecute individuals for perpetrating crimes against humanity, genocide, war crimes, and aggression, regardless of their nationality or status.[76] The court only intervenes in cases where member states are unable or unwilling to prosecute offenders.[77] This makes both courts very weak in holding states accountable for human rights violations.

The WCHR can address these limitations. The court would have jurisdiction over both state and non-state actors, providing a comprehensive legal framework for deciding cases involving human rights violations, including those committed by businesses or other legal entities. This court would be equipped to issue binding decisions and enforce reparations for victims, overcoming the gaps of both the ICJ and ICC.

5.1.2. Theoretical Framework of the World Court of Human Rights (WCHR)

The theoretical framework of the WCHR requires careful consideration, as various elements must align for effective functioning within the UN human rights system. The court must have a strong legal foundation, institutional independence, and strong enforcement mechanisms to ensure compliance, particularly from non-cooperative states.

Several Human Rights Law scholars and the authors of the Draft Consolidated World Court Statutes,[78] particularly *Manfred Nowak and Julia Kozma,* support the establishment of a WCHR. Manfred Nowak and Julia Kozma are prominent authorities in human rights law, particularly in the domains of torture prevention and enforcement methods. Nowak, a former UN Special Rapporteur on Torture,[79] and Kozma, a legal expert, has worked extensively on prison monitoring and police custody reforms.[80]

Their Draft Consolidated Statute advocates for a court with integrated supranational characteristics, as existing regional courts, despite differing structures and missions, provide deeper insights into the requirements, demands, and constraints needed to achieve the objectives of the court.[81] The present authors agree with Nowak's recommendations in Articles 1 and 2 of the Draft Statute, proposing that the Court be established as a permanent UN institution, with binding authority on all human rights violations, complementing national human rights courts as per Article 9[82]. Article 9(1) requires

[75] International Criminal Court, *Rome Statute of the International Criminal Court*, adopted July 17, 1998, Art. 36, accessed August 9, 2025, https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf.

[76] International Criminal Court, *Rome Statute*, Art. 14-16.

[77] *Ibid*, Art. 16.

[78] European University Institute, *Consolidated World Court Statute*, European University Institute, 2010, accessed August 9, 2025, https://www.eui.eu/documents/departments centres/law/professors/scheinin/consolidatedworldcourtstatute.pdf.

[79] Czech Centre for Human Rights and Democracy, *Interview with Professor Manfred Nowak, The World Court of Human Rights – a proposal on the shelf, ready for use*, March 2016, accessed August 15, 2024, https://www.humanrightscentre.org/blog/interview-professor-manfred-nowak-world-court-human-rights-proposal-shelf-ready-use-2016.

[80] Julia Kozma, *Biographical Data Form of Candidates to the Subcommittee on Prevention of Torture (SPT)*, 2022, accessed February 10, 2025, https://www.ohchr.org/sites/default/files/documents/hrbodies/spt-opcat/elections2022/2022-08-26/kozma.pdf.

[81] European University Institute, *Consolidated World Court Statute*.

[82] Manfred Nowak and Julia Kozma, *Draft Statute of the World Court of Human Rights*, 2009, arts. 1–2, accessed September 22, 2025, https://opil.ouplaw.com/ display/10.1093/law-mpeipro/e3863.013.3863/law-mpeipro-e3863.

member states to establish national human rights courts within one year of ratifying the statute, providing domestic remedies for human rights violations.[83]

However, the present authors disagree with the one-year requirement for the establishment of the Court as announced in Draft Article 9, considering it extremely impractical and idealistic, especially for states with limited resources and unstable judicial systems. Authoritarian states, which are often uncooperative with UN mechanisms, may resist the statute in its entirety. Historically, it took nine years to fully establish the European Court of Human Rights (ECtHR) after the signing of the ECHR[84]. Expecting member states to establish the Court within a year would create more discussions and disagreements, and would lack providing states the opportunity to create and conduct the necessary national preparatory process. Even if the Court were established in a year, the rush to establish, and possible shortcomings, may result in public opinion undermining the credibility and effectiveness of the courts at the national and international levels.

The present authors recommends that the WCHR apply the principle of subsidiarity, collaborating closely with existing national judicial organs. As the primary enforcers of human rights obligations, member states should receive support and oversight from the WCHR to ensure domestic compliance. The WCHR should have broad jurisdiction to address human rights abuses, including cases involving direct victims, groups, states, multinational corporations, and international organizations, and the authority to compel states to provide adequate reparation for the harm suffered. Due to its complementary nature, the Court can only hear cases after the exhaustion of all domestic remedies, and its admissibility criteria would be assessed based on timelines and compatibility with the relevant human rights treaties.

It is also important to note that the jurisdiction of the WCHR falls within the scope of already existing human rights treaties that have been ratified by member states. For new treaties upon creation or ratification, they are not automatically included in the jurisdiction of the court, as is the practice under international law with the International Court of Justice (ICJ).[85] The ICJ does not automatically assume jurisdiction over new treaties; its jurisdiction is mostly dependent on whether or not the states involved have consented to the court's authority, either explicitly within the clauses themselves or through declarations from the member states designating the ICJ as the means for dispute resolution. This would equally be the case for the WCHR.

However, even if there is an explicit clause in the new treaty conferring jurisdiction on the WCHR, it would only be effective if the states involved provided consent or declarations. Conversely, the WCHR could adopt a similar framework to the ICJ's Optional Clause under Article 36 of its Statute, which would allow member states to voluntarily consent to the Court's jurisdiction, thereby enabling states to accept the jurisdiction over disagreements resulting from human rights abuses or new treaties.

Article 5 of the Draft Consolidated Statute highlights the Court's structure as consisting of twenty-one judges who are citizens of parties to the present Statute. These judges are to be elected in their individual capacity, and the Court's structure shall be categorized into chambers and committees for different case types and caseloads. These judges must have the highest moral authority, impartiality, and integrity, with full competence in the field of human rights. They must act independently without allegiance to any of their own or other countries.[86]

The present authors agree with the assessment criteria for judges but disagrees with having only twenty-one judges. The WCHR is of a universal nature and represents the interests of all individuals regardless of nationality; this should be reflected in the composition of the court. Limiting the number of judges to twenty-one may lead to marginalization

[83] *Ibid*., art.9(1).

[84] The Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950. *Council of Europe* (Accessed May 20, 2025). https://www.coe.int/en/web/human-rights-convention/the-convention-in-1950#:~:text=The%20Convention%20for%20the%20Protection,force%20on%203%20September%201953.

[85] International Court of Justice, *The Statute of the International Court of Justice*, 1945, Art. 36, accessed August 20, 2025, https://www.icj-cij.org/en/statute.

[86] Nowak and Kozma, *Draft Statute*, arts. 5.

and fail to represent the diverse legal traditions and regional representation necessary for a global institution. The UN General Assembly, in its resolution A/RES/51/210, emphasizes the importance of inclusivity and global diversity.[87]

The present authors suggests that WCHR should have 30 to 35 judges, allowing for more specialized chambers to handle complex human rights cases and ensuring balanced geographic representation. This suggestion aligns with the composition of the UN judicial organs, such as the ICJ, which has approximately 15 judges despite its streamlined focus on interstate disputes. In contrast, the ICC has about 21 judges, despite its focus on prosecuting individuals for their gross human rights abuses[88]. Expanding the WCHR bench is crucial for effectively meeting its objectives.

The key question regarding the WCHR theoretical framework centres on whether it should be established as a direct mandate under the UN Charter or as a sub-institution of the Human Rights Council. If it were a subsidiary of the Human Rights Council, there would be a high tendency for the Court to be influenced by the political agenda of the UN member states, which would make it difficult for the Court to operate impartially and independently on human rights cases.[89] For the WCHR to be effective, it needs to be shielded from fulfilling state interests and any types of political interference, whether on a personal or institutional level.

Hence, the present authors recommends that this body, similar to the ICJ, be recognized as a principal judicial organ, deriving its authority directly from the UN Charter. To formally include this new body, the UN Charter must undergo the formal amendment process outlined in Article 108.[90] With such an amendment, the WCHR would be granted full institutional power and authority. Any other method, such as creation by the General Assembly under Article 22,[91] would establish a subsidiary body, which would not have the same legal standing or influence. If the UN Charter remains unamendable, alternative articles may nonetheless furnish a legal foundation for the creation and enhancement of the WCHR.

Article 13 of the UN Charter[92] empowers the General Assembly to commence studies and recommend proposals for the advancement of international law and human rights. This could serve as the basis for advocating the establishment of the WCHR. Furthermore, Article 62 authorizes the Economic and Social Council (ECOSOC)[93] to provide recommendations and advocate for human rights, facilitating the establishment of the WCHR as a significant body within the UN framework.

The WCHR, being established as a primary institution, would not only enhance its legitimacy but also grant it a stronger legal foundation, more autonomy, and clearer authority. Most of its decisions would carry significant weight in the international community, making the court one of the pillars of the UN human rights system.

Article 55 of the UN Charter, which contains the promotion and protection of human rights, provides the basis for the establishment of this Court[94]. This approach would ensure that the Court would have a universal legal standing and a legal basis that protects it from political pressures.

The primary feature of this proposed court would be its enforcement mechanisms. A major challenge with enforcing international law judgments is the absence of coercive power found in national legal systems. Since the Court's decisions would be binding and final, to ensure execution of the judgments, *Nowak* suggests transferring the supervision of the execution of all judgments to the UN High Commissioner of Human Rights

[87] United Nations General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, UNTS vol. 660, p. 195, adopted December 21, 1965, accessed August 11, 2025, https://www.refworld.org/legal/agreements/unga/1965/en/13974.

[88] International Criminal Court, "Members of the Court," *Understanding the International Criminal Court*, accessed November 11, 2024, https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf.

[89] Lise S. Zuercher, *The Nature of Power and Influence at the Human Rights Council: A Membership Network Analysis,* Universal Rights Group, 2020, accessed May 19, 2025, https://universal-rights.org/publications/the-natureof-power-and-influence-at-the-human-rights-council/.

[90] UN, *Charter of the United Nations*. art. 108.

[91] *Ibid,* art. 22.

[92] *Ibid,* art. 13.

[93] *Ibid,* art. 62.

[94] *Ibid,* art. 55.

(OHCHR). He specifically asserts the following in Article 17 of the Draft Statute:

"Any judgment of the Court shall be transmitted to the UN High Commissioner for Human Rights who shall supervise its execution. The States Parties, other respondent parties, and the applicants shall report to the High Commissioner all measures taken to comply with the judgment and enforce its execution. If the High Commissioner concludes that any State Party or other respondent party fails to abide by or enforce any judgment of the Court, it shall seize the Human Rights Council or, in appropriate cases, the Security Council with a request to take the necessary measures to enforce the judgment."[95]

The present authors agree that entrusting the OHCHR with executing the court's judgments ensures that there is a supervisory authority to oversee implementation among member states. It integrates existing enforcement mechanisms into the court's jurisdiction. This approach mirrors that of the ECtHR, which has the Committee of Ministers to enforce its judgments. However, the reliance on the Human Rights Council and Security Council as final arbiters for non-compliant states introduces complications. Both bodies are criticized for being politicized. The Security Council's permanent members have veto powers, allowing them to block enforcement actions that conflict with their geopolitical interests. For WCHR enforcement mechanisms to be more effective, there must be impartiality, enhanced neutrality, and accountability.

The present authors recommend establishing an independent enforcement committee within the WCHR framework. This committee would collaborate with the OHCHR, the Security Council, and the Human Rights Council, but would operate independently. Its sole mandate would be to implement the court's decisions by monitoring and overseeing compliance. Composed of independent experts from each member state and civil societies, this approach could strengthen the court's effectiveness.

To this end, the present authors recommend the establishment of an independent enforcement committee within the WCHR framework. This committee would be required to collaborate closely with the OHCHR, Security Council and the Human Rights Council but would operate independently of these bodies. Its mandate would be solely to implement the court's decisions through the monitoring and overseeing compliance. They would be composed of independent experts from each member state as well as civil societies. This approach could strengthen the effectiveness of the court.

5.1.3. Challenges and Criticisms of the WCHR

Although the concept of a WCHR is invigorating, holds great potential, and has been considered a generally favourable idea by some, the major opposition to such a court largely centres around its feasibility and the pragmatic approach to implementing such a system.[96] Several criticisms highlight that such a court would face significant political resistance from member states.

Stefan Trechsel, the former president of *the European Commission on Human Rights (ECHR),* who proposed the idea for a world court in 1993, revisited the idea in 2004 and concluded that the proposal was "neither desirable, necessary, nor probable." His primary concern was that member states would not be willing to consent to such a court, thereby rendering it ineffective.

Additionally, *Antonio Cassese,* a key advocate for international judicial solutions to human rights challenges, also opposed the idea of a world court, describing it as naive and expendable because states would not submit their domestic relations with individuals within their territory to binding international scrutiny.[97]

While the present authors acknowledge the validity of the critics' fears that political resistance, especially from powerful sovereign states, may present a major obstacle to the creation and implementation of the WCHR. Such critiques fail to consider the evolving nature of state behaviour in global cooperation. It has been seen through several

[95] Nowak and Kozma, *Draft Statute*, arts. 17.

[96] Philip Alston, "Against a World Court for Human Rights," NYU School of Law, Public Law Research Paper No. 13-71 (2014), 18, https://ssrn.com/abstract=2344333.

[97] *Ibid.*

international agreements and organizations that states can be incentivized to adopt binding frameworks when diplomatic pressure and economic incentives align.

For instance, the Paris Agreement on Climate Change demonstrates how states, despite having different interests, can cooperatively commit to addressing global challenges. Although the issues of climate change and human rights abuses differ, at their core, international cooperation is attainable through persistent diplomacy, incentives, and the creation of global frameworks that balance state sovereignty with international accountability.

Additionally, the creation of the ECtHR and the ICC suggests that states can concede their sovereignty and submit their citizens to international judicial oversight, even on sensitive national issues. There is now a modern shift in the paradigm of state sovereignty in the international legal order, whereby the protection and guaranteeing of the basic and fundamental rights of individuals takes precedence over state sovereignty. Louis Henkin explains that sovereignty is not a shield for human rights violations.[98] In other words, although political resistance is a tangible fear or obstacle, it can be mitigated through the incorporation of multi-tiered compliance incentives. This could include both positive and negative incentives.

Research by Harold Koh has shown that states are more inclined to comply with international law if it occurs through the "internationalisation of norms" rather than through direct coercion.[99] To this end, WCHR should leverage existing diplomatic mechanisms and public pressure to help states properly integrate human rights norms into their legal systems. This would reduce the need for external interference within these states.

An obvious question regarding the above recommendation is how authoritarian states like North Korea could submit to the jurisdiction of such a court, especially given their track record of hostility or non-compliance with international legal obligations and norms. The present authors recommends that the WCHR adopt a phased integration strategy to address this issue.

This strategy implies that states would be required to gradually submit to the jurisdiction of this court; it should not be imposed outright. The consensus can begin with more cooperative states, and over time, more states would accede to the court's jurisdiction. This same approach was adopted by the ECtHR, which drastically reduced political resistance while building a broader consensus on the enforcement of human rights obligations. Over time, authoritarian states like North Korea may increasingly see compliance not as a loss of sovereignty, but as an alignment with global norms that enhance their diplomatic standing and domestic governance.

5.2. Potential Implications

Without establishing a robust accountability mechanism for the protection of human rights, humanitarian crises can be exacerbated, affecting large numbers of individuals. Also, humanitarian organizations may be unable to access or provide the necessary technical support for victims. Considering North Korea, reports indicate that citizens have continually experienced extreme food shortages, with about 72% of defectors claiming never to have received any government food rations as of 2016 or 2020.[100]

Furthermore, there is an increased likelihood of continued violations of human rights, without a judicial organ dedicated to keeping member states directly accountable for their human rights obligations, perpetrators are indirectly encouraged to continue aggression and abuse against citizens, which in turn, creates suffering and unbearable conditions for victims. Above all, there is a risk of undermining international mechanisms. When systematic violations of human rights go unaddressed, it creates scepticism about the

[98] Louis Henkin, "Human Rights and State 'Sovereignty,'" *Georgia Journal of International and Comparative Law* 25(1) (1996): 43.

[99] Harold Hongju Koh, "Why Do Nations Obey International Law?" *Yale Law Journal* 106(8) (1997): 2602, accessed August 10, 2025, https://openyls.law.yale.edu/bitstream/handle/20.500.13051/1394/Why_Do_the_Nations.pdf.

[100] Hyonhee Shin, "North Korea Defectors Cite Dwindling Food Rations, Market Reliance: Study," *Reuters*, August 9, 2025, https://www.reuters.com/world/asia-pacific/north-korea-defectors-cite-dwindling-food-rations-market-reliance-study-2020206/#:~:text=North%20Korea%20has%20faced%20serious,border%20trade%20during%20the%20pandemic.

credibility of these mechanisms and could potentially weaken the collective resolve to uphold human rights.

6. CONCLUSION

This article has thoroughly examined the UPR as a crucial human rights enforcement mechanism. It has illuminated both the strengths and weaknesses of the UPR, especially within its capacity for driving tangible improvements to the protection of human rights in authoritarian countries like North Korea.

While the UPR exhibits commendable and praiseworthy aspects such as providing a universal interactive platform for discussing human rights records within the borders of member states and serving as a medium for holding states accountable to their obligations, it has also been questioned how much change its mechanism proffers within member states. The limitations of solely relying on diplomatic pressure and voluntary compliance, especially in authoritarian states like North Korea, were also emphasized.

Going back to the research questions, the depth of analysis in this article has procured answers to the negative. It has shown that in countries like North Korea, known for their persistent non-compliance and poor records of human rights abuses, the UPR has largely been ineffective in driving tangible progress. The implication of this is that innocent victims continue to suffer at the hands of their government.

North Korea is part of a broader problem of non-compliance. The need for reform remains both urgent and indispensable in modern practice, and the present article tries to highlight a major recommendation: the creation of an independent judicial body, a body that would not only be responsible for legally enforcing states' compliance with their human rights obligations but would guarantee that individuals, regardless of nationality, can get adequate reparations for harm suffered or for the abuse of their basic human rights. As explained in this article, the practical implementation of such an institution may be challenging and time-consuming, but it is not impractical and can be achieved with adequate planning and strategizing.

The hallmark of this analysis is to create more awareness of a significant problem in the discourse of international human rights law. Besides rhetoric, dialogue, interactive forums, and international pressure, and diplomatic sanctions, there is a need for more robust and tangible measures to be set in place to protect the innocent, weak, and vulnerable from unjust interference with their basic rights. Every human, regardless of nationality, should be considered the responsibility of the international community, in addition to their domestic state. Although it may be impractical to expect a complete eradication of human rights abuses in all countries, there needs to be such eradication of gross and systematic abuses as those described in this article.

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THE INFLUENCE OF THE UNCITRAL MODEL LAW ON DOMESTIC ARBITRATION REGIMES: A COMPARATIVE STUDY OF THE UNITED KINGDOM AND THE UNITED STATES

UNCITRAL MODEL KANUNU'NUN ULUSAL TAHKİM REJİMLERİ ÜZERİNDEKİ ETKİSİ: BİRLEŞİK KRALLIK VE AMERİKA BİRLEŞİK DEVLETLERİ'NİN MUKAYESELİ İNCELEMESİ

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ABSTRACT

This article examines the relationship between the UNCITRAL Model Law on International Commercial Arbitration and domestic arbitration regimes through a comparative analysis of the United Kingdom and the United States. As a non-binding legislative template, the Model Law functions as a normative reference aimed at promoting harmonisation, party autonomy, limited judicial intervention, and the effectiveness of arbitral proceedings. Rather than focusing on formal implementation alone, the study explores different modes of engagement with the Model Law across distinct legal systems. The analysis demonstrates that, although the United Kingdom has not formally adopted the Model Law, the Arbitration Act 1996 reflects a significant normative alignment with its core principles. In contrast, the United States has incorporated the Model Law directly into its legal framework for international commercial arbitration through Chapter 3 of the Federal Arbitration Act. By comparing these two approaches, the article highlights how shared arbitration standards may be achieved through both legislative adoption and autonomous domestic regulation. Focusing on judicial intervention, interim measures, and the setting aside and enforcement of arbitral awards, the study illustrates the adaptability of the Model Law within different legal cultures. The findings suggest that the Model Law's continued relevance lies in its flexibility and its capacity to function as a common reference point for the development of international arbitration law across jurisdictions.

Keywords: *International Commercial Arbitration, UNCITRAL Model Law, Comparative Arbitration Law, Judicial Intervention, Domestic Arbitration Regimes.*

ÖZ

Bu makale, UNCITRAL tarafından hazırlanan Uluslararası Ticari Tahkim Model Kanunu'nun, ulusal tahkim rejimleriyle kurduğu ilişkiyi Birleşik Krallık ve Amerika Birleşik Devletleri örnekleri üzerinden karşılaştırmalı olarak incelemektedir. Bağlayıcı bir uluslararası sözleşme niteliği taşımayan Model Kanun, uluslararası tahkim hukukunun uyumlaştırılmasında önemli bir normatif referans noktası olarak kabul edilmektedir. Çalışma, Model Kanun'un ulusal hukuklarda doğrudan uygulanmasından ziyade, farklı hukuk sistemlerinde nasıl benimsendiğini, yorumlandığını ve uyarlanarak etkili hâle geldiğini analiz etmeyi amaçlamaktadır. Bu çerçevede makale, Birleşik Krallık'ta Model Kanun'un formel olarak benimsenmemiş olmasına rağmen, Tahkim Yasası 1996'nın temel ilkeleri ile Model Kanun arasında önemli ölçüde normatif bir paralellik bulunduğunu ortaya koymaktadır. Buna karşılık, Amerika Birleşik Devletleri'nde Model Kanun'un Federal Tahkim Yasası'nın 3. Bölümü aracılığıyla uluslararası ticari tahkim bakımından doğrudan kabul edildiği tespit edilmektedir. Çalışma; mahkeme müdahalesinin sınırları, geçici hukuki koruma tedbirleri ve hakem kararlarının denetlenmesi gibi temel alanlarda iki ülkenin yaklaşımlarını karşılaştırarak, Model Kanun'un esnek yapısının farklı hukukî gelenekler içinde nasıl işlev kazandığını değerlendirmektedir.

Anahtar Kelimeler: *Uluslararası Tahkim, UNCITRAL Model Kanunu, Karşılaştırmalı Hukuk, Mahkeme Müdahalesi, Tahkim Hukuku*

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1. INTRODUCTION

The UNCITRAL Model Law on International Commercial Arbitration occupies a central position in the development of modern international arbitration. Since its adoption in 1985 and subsequent amendment in 2006, the Model Law has served as a legislative reference point for states seeking to modernise their arbitration frameworks and to align domestic law with internationally accepted standards. While a significant number of jurisdictions have enacted the Model Law in whole or with limited modifications, others have chosen to maintain autonomous arbitration regimes while nevertheless engaging with the Model Law's underlying principles.[2] This diversity of approaches raises important questions regarding the role of the Model Law beyond formal legislative adoption and the ways in which its principles interact with domestic arbitration systems.

This article examines that interaction through a comparative analysis of the United Kingdom and the United States. These jurisdictions present two contrasting but equally influential models of engagement with the UNCITRAL Model Law. The United States has formally incorporated the Model Law into its legal framework for international commercial arbitration through Chapter 3 of the Federal Arbitration Act. By contrast, the United Kingdom has not adopted the Model Law as a legislative instrument, relying instead on the Arbitration Act 1996, an autonomous statute rooted in domestic legal tradition. The comparison of these two approaches provides a useful lens through which to assess the flexibility of the Model Law and its capacity to function as a normative reference across different legal cultures.

1.1. Purpose and Scope of the Study

The primary purpose of this study is to analyse how the UNCITRAL Model Law operates as a point of reference for domestic arbitration regimes, rather than to assess its formal implementation as binding legislation. The article seeks to clarify the extent to which the principles embodied in the Model Law are reflected in, or diverge from, the arbitration frameworks of the United Kingdom and the United States. In doing so, it aims to contribute to a more nuanced understanding of the Model Law's role in shaping international arbitration practice beyond the boundaries of formal adoption.

The scope of the study is limited to international commercial arbitration and focuses on key areas where the Model Law's principles are most visible, namely party autonomy, judicial intervention, interim measures, and the setting aside and enforcement of arbitral awards. The analysis does not attempt to provide an exhaustive account of all aspects of arbitration law in either jurisdiction but instead concentrates on those elements most relevant to assessing the interaction between the Model Law and domestic arbitration regimes.

1.2. The UNCITRAL Model Law as a Normative Reference

Rather than constituting a binding international convention, the UNCITRAL Model Law was designed as a flexible legislative template capable of accommodating diverse legal traditions. Its function extends beyond direct enactment, operating as a normative reference that informs legislative drafting, judicial interpretation, and arbitral practice. This characteristic allows the Model Law to exert influence even in jurisdictions that have chosen not to adopt it formally, by providing a coherent set of principles reflecting internationally accepted standards of arbitration.[3]

Understanding the Model Law as a normative reference is particularly important in the context of this study. It enables an examination of how domestic arbitration regimes may align with, adapt, or depart from the Model Law's principles without being legally bound by its provisions. This perspective also avoids overstating the Model Law's role, acknowledging the autonomy of domestic legal systems while recognising the Model Law's contribution to the harmonisation of international arbitration norms.

1.3. Methodology and Comparative Framework

The article adopts a doctrinal and comparative methodology. It analyses primary legal sources, including legislation and case law, alongside

[2] Robert E. Meade, "Arbitration Overview: The AAA's Role in Domestic and International Arbitration," *Journal of International Arbitration* 1(3) (1984): 263; Sabra A. Jones, "Historical Development of Commercial Arbitration in the United States," *Minnesota Law Review* 12 (1928): 240.

[3] George M. von Mehren, and Alana C. Jochum, "Is International Arbitration Becoming Too American?" *Global Business Law Review* 2 (2011): 47.

relevant scholarly commentary, to assess the relationship between the UNCITRAL Model Law and the arbitration regimes of the United Kingdom and the United States. The comparative framework is structured symmetrically, examining each jurisdiction separately before drawing comparisons on specific themes, thereby ensuring balance and analytical clarity.

The comparison focuses on both formal and functional aspects of engagement with the Model Law. In the case of the United States, attention is given to the Model Law's formal incorporation through federal legislation and its application by domestic courts. In relation to the United Kingdom, the analysis concentrates on the extent to which the principles of the Model Law are reflected in the Arbitration Act 1996 and in judicial practice. This structured approach allows for a balanced assessment of different modes of engagement with the Model Law and facilitates meaningful comparative conclusions.

2. THE UNCITRAL MODEL LAW ON INTERNATİONAL COMMERCİAL ARBİTRATİON

The UNCITRAL Model Law on International Commercial Arbitration was adopted in 1985 with the objective of addressing the fragmentation and unpredictability that characterised national arbitration laws at the time. By offering a coherent and internationally accepted framework, the Model Law sought to facilitate international commercial arbitration by reducing legal uncertainty and enhancing procedural efficiency. Its revision in 2006 further strengthened this framework, particularly in relation to interim measures and the recognition and enforcement of arbitral awards, reflecting developments in arbitral practice and the growing complexity of international commercial disputes.

2.1. Objectives and Legal Nature of the Model Law

The primary objective of the UNCITRAL Model Law is to promote the harmonisation and modernisation of national arbitration laws. Unlike international conventions, the Model Law does not create binding obligations for states. Instead, it operates as a legislative template designed to be adapted by national legislatures in accordance with their domestic legal traditions. This non-binding nature allows states to engage with the Model Law in varying degrees, ranging from full adoption to selective incorporation or mere normative alignment.

The legal nature of the Model Law is therefore inherently flexible. It provides a set of core procedural rules and principles intended to ensure fairness, efficiency, and legal certainty in international commercial arbitration. At the same time, it preserves a significant degree of legislative discretion, enabling states to tailor their arbitration frameworks to local needs while maintaining compatibility with international standards. This balance between uniformity and flexibility is a defining feature of the Model Law and underpins its widespread acceptance.[4]

2.2. Core Principles of the Model Law

At the heart of the UNCITRAL Model Law lies a set of fundamental principles that define its approach to international commercial arbitration. These principles aim to enhance party autonomy, limit judicial interference, and reinforce the effectiveness and finality of arbitral proceedings. Together, they form the normative foundation upon which the Model Law operates and provide a benchmark for assessing domestic arbitration regimes.

2.2.1. Party Autonomy

Party autonomy constitutes one of the central pillars of the UNCITRAL Model Law. The Model Law grants parties considerable freedom to determine the procedural and substantive aspects of their arbitration, including the choice of arbitrators, applicable law, seat of arbitration, and procedural rules. This emphasis reflects the consensual nature of arbitration and recognises the parties' ability to design a dispute resolution mechanism tailored to their commercial needs.

By prioritising party autonomy, the Model Law enhances the flexibility and attractiveness of arbitration as an alternative to litigation. At the same time, this autonomy is not absolute. The Model Law establishes mandatory safeguards to ensure

[4] Paola Catenaccio, "Cultural Variation in Arbitration Journals: The International Court of Arbitration Bulletin and Arbitration International Compared", in *Discourse and Practice in International Commercial Arbitration* (Routledge, 2016), 163-178.

procedural fairness and equality between the parties, thereby striking a balance between freedom of choice and the integrity of the arbitral process.

2.2.2. Limited Judicial Intervention

Another core principle of the Model Law is the limitation of judicial intervention in arbitral proceedings. Article 5 of the Model Law provides that courts shall not intervene in matters governed by the Model Law except where expressly permitted. This principle aims to protect the independence of the arbitral process and to prevent undue delays caused by excessive court involvement.

Limited judicial intervention supports the efficiency and finality of arbitration while preserving a supervisory role for national courts in specific circumstances, such as the appointment or removal of arbitrators, the granting of interim measures, and the setting aside or enforcement of arbitral awards. The Model Law thus adopts a balanced approach that recognises both the autonomy of arbitration and the necessity of judicial support.[5]

2.2.3. Competence–Competence

The principle of competence–competence, enshrined in Article 16 of the Model Law, empowers arbitral tribunals to rule on their own jurisdiction, including objections relating to the existence or validity of the arbitration agreement. This principle prevents premature court interference and ensures that jurisdictional disputes are addressed efficiently within the arbitral framework.

By recognising the tribunal's authority to determine its jurisdiction, the Model Law reinforces the autonomy and effectiveness of arbitration. Judicial review of jurisdictional decisions is permitted, but typically only at a later stage, thereby maintaining an appropriate balance between arbitral independence and judicial oversight.

2.2.4. Recognition and Enforcement of Arbitral Awards

The recognition and enforcement of arbitral awards constitute a fundamental aspect of the Model Law's framework. The Model Law aligns closely with the New York Convention by establishing limited and clearly defined grounds upon which recognition and enforcement may be refused. This alignment enhances legal certainty and promotes the cross-border enforceability of arbitral awards.[6]

By restricting the grounds for refusal, the Model Law reinforces the finality of arbitral awards and strengthens confidence in arbitration as an effective dispute resolution mechanism. This principle plays a crucial role in facilitating international commerce by ensuring that arbitral decisions are respected and enforceable across jurisdictions.

2.3. Modes of State Engagement with the Model Law

States may engage with the UNCITRAL Model Law in different ways, reflecting varying legal traditions and policy considerations. Some jurisdictions have adopted the Model Law in its entirety, thereby incorporating its provisions directly into domestic law. Others have enacted modified versions, adapting specific provisions to better align with local legal frameworks. A further group of states, while not formally adopting the Model Law, have nonetheless drawn upon its principles as a source of guidance in legislative reform and judicial interpretation.

These differing modes of engagement demonstrate the Model Law's versatility as both a legislative template and a normative reference. Understanding this spectrum of engagement is essential for the comparative analysis undertaken in this article, as it provides the conceptual framework for examining the contrasting approaches of the United Kingdom and the United States in the sections that follow.

3. THE UNİTED KİNGDOM AND THE UNCITRAL MODEL LAW

The United Kingdom represents a distinctive model of engagement with the UNCITRAL Model Law. Despite being one of the world's leading centres for international arbitration, the UK has never formally adopted the Model Law as part of its domestic legal framework. Instead, international and domestic arbitration in England, Wales, and Northern Ireland is governed by the Arbitration Act 1996, a

[5] Richard Boivin, "International Arbitration with States: An Overview of the Risks," *Journal of International Arbitration* 19(4) (2002): 285- 99.

[6] Alan Redfern, Martin Hunter, Nigel Blackaby, and Constantine Partasides, *Redfern & Hunter: Law and Practice of International Commercial Arbitration,* 6th edn. (Sweet and Maxwell, 2015), 165.

comprehensive and autonomous statute grounded in English legal tradition. The relationship between the Model Law and UK arbitration law is therefore not one of implementation, but rather of normative alignment and functional convergence.[7]

3.1. The Autonomous Nature of the Arbitration Act 1996

The Arbitration Act 1996 was enacted with the objective of modernising English arbitration law while preserving its established legal principles. The Act was designed as a self-contained and flexible framework capable of accommodating both domestic and international arbitration without reliance on external legislative models. Its foundational principles, set out in section 1, emphasise party autonomy, procedural fairness, and limited judicial intervention.

Although the Act was developed contemporaneously with the growing international acceptance of the UNCITRAL Model Law, it does not replicate the Model Law's structure or terminology. Instead, it reflects an independent legislative approach that draws upon longstanding common law traditions and prior statutory developments. This autonomy has enabled the UK to maintain a distinct arbitration regime while remaining compatible with international arbitration standards.

3.2. Alignment with Model Law Principles

Notwithstanding its autonomous character, the Arbitration Act 1996 exhibits a significant degree of alignment with the core principles embodied in the UNCITRAL Model Law. This alignment is most evident in the areas of party autonomy, judicial support and restraint, and the authority of arbitral tribunals.

3.2.1. Party Autonomy and Procedural Flexibility

Party autonomy occupies a central position in the UK arbitration framework. The Arbitration Act 1996 grants parties broad discretion to determine the procedural rules governing their arbitration, including the conduct of proceedings, the appointment of arbitrators, and the applicable law. Where the parties have not reached agreement, the Act provides default rules that ensure procedural efficiency and fairness.

Compared to the Model Law, which adopts a more codified procedural structure, the UK approach is notably flexible. This reflects the English legal tradition's emphasis on contractual freedom and the parties' capacity to shape their dispute resolution process. While the mechanisms differ, the underlying commitment to party autonomy aligns closely with the Model Law's core philosophy.[8]

3.2.2. Judicial Support and Intervention

The principle of limited judicial intervention is explicitly recognised in section 1(c) of the Arbitration Act 1996, which provides that courts should not intervene in arbitral proceedings except as permitted by the Act. This mirrors the spirit of Article 5 of the Model Law, albeit without direct incorporation.[9]

At the same time, the UK framework allows for a more defined role for the courts in supporting the arbitral process. Courts may intervene in matters such as the appointment and removal of arbitrators, jurisdictional challenges, and procedural irregularities. In exceptional circumstances, the courts may also review arbitral awards on points of law, subject to strict statutory conditions. This calibrated approach reflects a balance between respecting arbitral autonomy and safeguarding the integrity of the process.

3.3. Interim Measures under English Arbitration Law

The Arbitration Act 1996 confers extensive powers on arbitral tribunals to grant interim measures, unless the parties agree otherwise. Under section 39, tribunals may order a range of provisional measures, including security for costs, the preservation of evidence, and procedural directions relating to the

[7] Ray Turner, *Arbitration Awards: A Practical Approach* (Blackwell Publishing 2005), 210; Stuart Sime, *A Practical Approach to Civil Procedure* (Oxford University Press 2014), 109; Adrian Zuckerman, *Zuckerman on Civil Procedure*, 7th edn. (Sweet & Maxwell, 2021), 270; Şanal Görgün, Levent Börü ve Mehmet Kodakoğlu, *Medeni Usul Hukuku,* 12th edn, (Yetkin Yayınları 2023), 793.

[8] Ejder Yılmaz, *Medeni Usul Hukuku Ders Kitabı*, 6100 Sayılı HMK'na Göre Yeniden Yazılmış, 25th edn. (Seçkin Yayıncılık, 2014), 779; Ziya Akıncı, *Milletlerarası Tahkim,* 6th edn. (Seçkin Yayınevi 2021), 3.

[9] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law,* 2nd edn. (Oxford University Press 2012), 13.

conduct of the arbitration. These powers enable tribunals to manage proceedings effectively and to protect the parties' interests pending the final resolution of the dispute.

In addition to tribunal powers, section 44 of the Act authorises courts to grant interim relief in support of arbitration, including injunctions and orders for the preservation of assets. This judicial assistance may be provided even where an arbitral tribunal has been constituted, particularly in cases of urgency. The UK approach thus combines broad tribunal discretion with supportive judicial intervention, ensuring the practical effectiveness of arbitration.

3.4. Case Law Reflecting Model Law–Consistent Principles

Judicial decisions under the Arbitration Act 1996 further illustrate the UK's alignment with principles commonly associated with the UNCITRAL Model Law. In *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan*, the UK Supreme Court emphasised the centrality of consent to arbitration, holding that an arbitral award could not bind a non-signatory state. This decision reflects the Model Law's insistence on the validity and existence of an arbitration agreement as a foundation for arbitral jurisdiction.[10]

Similarly, in *Lesotho Highlands Development Authority v Impregilo SpA*, the House of Lords reaffirmed the principle of limited judicial intervention by rejecting an attempt to set aside an arbitral award on the basis of an alleged error of law. The court underscored the finality of arbitral awards and the restricted grounds for judicial review, reinforcing the autonomy of the arbitral process. These cases demonstrate how English courts, while operating within an autonomous statutory framework, apply principles that are consistent with those underlying the Model Law.

4. THE UNİTED STATES AND THE UNCITRAL MODEL LAW

The United States presents a contrasting model of engagement with the UNCITRAL Model Law, characterised by formal legislative incorporation rather than indirect alignment. Unlike the United Kingdom, the US has adopted the Model Law expressly for international commercial arbitration through Chapter 3 of the Federal Arbitration Act (FAA). This chapter, enacted in 2002, applies the Model Law to international arbitration agreements and awards falling within its scope, thereby integrating the Model Law into the federal arbitration framework.[11]

The US approach reflects a deliberate policy choice to harmonise its international arbitration regime with globally recognised standards while preserving the existing domestic arbitration framework under Chapters 1 and 2 of the FAA. As a result, the Model Law operates alongside, rather than replacing, other federal arbitration provisions.

4.1. Adoption of the Model Law through Chapter 3 of the FAA

Chapter 3 of the Federal Arbitration Act incorporates the UNCITRAL Model Law substantially in its original form, with limited modifications to accommodate the US federal legal system. It governs international commercial arbitration agreements and awards that are not exclusively domestic in nature, thereby filling a regulatory space not fully addressed by the New York Convention or domestic arbitration law.[12]

The legislative history of Chapter 3 indicates a clear intention to promote consistency with international arbitration practice and to enhance the attractiveness of the United States as a seat for international arbitration. By adopting the Model Law at the federal level, the US ensured uniform application across states, mitigating the potential fragmentation that could arise from divergent state arbitration laws.

4.2. Model Law Principles in US International Arbitration

The incorporation of the Model Law into the FAA has reinforced several fundamental principles governing international arbitration in the United States, particularly with regard to judicial intervention and the authority of arbitral tribunals.

[10] Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46.

[11] George Burn, Kevin Cheung, "Section 44 of the English Arbitration Act 1996 and third parties to arbitration," *Arbitration International* 37(1) (2021): 287–323.

[12] Thomas E. Carbonneau, *The Law and Practice of Arbitration,* 6th edn. (Juris Publishing, 2018), 367.

4.2.1. Judicial Non-Intervention and Federal Policy

The principle of limited judicial intervention, central to the Model Law, aligns closely with the longstanding pro-arbitration policy of US federal law. US courts generally adopt a restrained approach when reviewing arbitral proceedings, intervening only where expressly authorised by statute. Under Chapter 3 of the FAA, courts are guided by the Model Law's provisions in matters such as jurisdictional challenges, interim measures, and the setting aside of awards.

This approach reflects a balance between respecting the autonomy of arbitral tribunals and ensuring compliance with fundamental procedural safeguards. Judicial review remains available, but its scope is deliberately confined to prevent undue interference with the arbitral process.

4.2.2. Interim Measures under Article 17

Article 17 of the UNCITRAL Model Law, as incorporated into Chapter 3 of the FAA, empowers arbitral tribunals to grant interim measures unless otherwise agreed by the parties. These measures may include orders aimed at maintaining the status quo, preventing imminent harm, or preserving assets relevant to the dispute.

While the FAA does not explicitly regulate interim measures outside the Model Law framework, US courts have historically exercised their inherent equitable powers to grant provisional relief in support of arbitration. The incorporation of Article 17 has therefore provided a clearer and more structured basis for interim measures in international arbitration, complementing existing judicial practice and enhancing legal certainty.[13]

4.3. Case Law Applying the Model Law Framework

Judicial decisions in the United States demonstrate the practical application of the Model Law framework within the federal arbitration system. US courts have consistently recognised the authority of arbitral tribunals to rule on their own jurisdiction and have shown deference to tribunal decisions, subject to the limited grounds for review provided under the FAA and the Model Law.

Cases addressing interim measures, jurisdictional objections, and enforcement issues illustrate the courts' willingness to uphold the Model Law's principles while situating them within the broader context of federal arbitration policy. This jurisprudence confirms that the Model Law functions not merely as a legislative text, but as an operative framework guiding judicial and arbitral practice in international commercial arbitration in the United States.[14]

5. COMPARATİVE ASSESSMENT

The preceding sections have demonstrated that the United Kingdom and the United States engage with the UNCITRAL Model Law through fundamentally different legal techniques. While the United States has incorporated the Model Law directly into its federal arbitration framework, the United Kingdom has retained an autonomous statutory regime that nonetheless reflects many of the Model Law's underlying principles. This section offers a comparative assessment of these approaches, focusing on key areas where similarities and divergences are most pronounced.

5.1. Formal Adoption versus Normative Alignment

The most apparent distinction between the two jurisdictions lies in their mode of engagement with the Model Law. The United States represents a model of formal adoption, having incorporated the Model Law into domestic law through Chapter 3 of the Federal Arbitration Act. This legislative choice provides a clear and explicit framework for international commercial arbitration and ensures alignment with internationally recognised standards.

By contrast, the United Kingdom exemplifies a model of normative alignment rather than legislative adoption. The Arbitration Act 1996 operates independently of the Model Law, yet its foundational principles correspond closely with those articulated in the Model Law. This approach

[13] Ferhat Yıldırım, *Arabuluculuk ve Ombudsmanlık* (Seçkin Yayınları 2019), 27; Cemal Şanlı, *Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları*, 7th edn. (Beta Basım, 2019), 28.

[14] Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46: Lesotho Highlands Development Authority v Impregilo SpA [2005] UKHL 43.

allows the UK to preserve its established legal traditions while remaining compatible with international arbitration norms. The comparison illustrates that harmonisation may be achieved through different legal techniques, each reflecting distinct policy priorities and legal cultures.

5.2. Court Intervention: Scope and Limits

Both jurisdictions endorse the principle of limited judicial intervention, though they operationalise it in different ways. In the United States, judicial restraint is reinforced by the Model Law's explicit provisions and the federal policy favouring arbitration. Courts generally confine their intervention to circumstances expressly provided by statute, thereby safeguarding the autonomy of arbitral tribunals.[15]

In the United Kingdom, the principle of limited intervention is articulated more implicitly through section 1(c) of the Arbitration Act 1996. UK courts play a supportive yet supervisory role, intervening where necessary to ensure procedural fairness or to address jurisdictional and legal issues. Although this approach permits a slightly broader scope of judicial involvement, it remains consistent with the Model Law's underlying objective of preserving arbitral independence.[16]

5.3. Interim Measures: Discretionary versus Codified Approaches

A further point of comparison concerns the regulation of interim measures. In the United Kingdom, the Arbitration Act 1996 grants arbitral tribunals wide discretionary powers to order interim relief, supplemented by judicial assistance in cases of urgency. This flexible framework reflects the English legal tradition's emphasis on practicality and procedural adaptability.

In the United States, interim measures in international arbitration are more explicitly regulated through Article 17 of the Model Law as incorporated into Chapter 3 of the FAA. This codified approach provides greater clarity regarding the types and purposes of interim measures available to arbitral tribunals. While both systems aim to ensure the effectiveness of arbitration, they do so through different regulatory techniques, illustrating the Model Law's capacity to accommodate varying legal preferences.[17]

5.4. Setting Aside and Enforcement of Arbitral Awards

With respect to the setting aside and enforcement of arbitral awards, both jurisdictions demonstrate a strong commitment to finality and enforceability. In the United States, the ground for setting aside awards under the Model Law and the FAA are narrowly defined and closely aligned with the New York Convention. Judicial review is therefore limited, reinforcing confidence in the arbitral process.

Similarly, the United Kingdom restricts challenges to arbitral awards under the Arbitration Act 1996, allowing review only on specific statutory grounds. Although the possibility of appealing on points of law represents a distinctive feature of the UK framework, its application is subject to stringent conditions. In both jurisdictions, the overall approach supports the Model Law's objective of promoting certainty and reliability in international arbitration.[18]

5.5. Comparative Observations

The comparative analysis demonstrates that the effectiveness of the UNCITRAL Model Law does not depend solely on formal legislative adoption. Both the UK and the US have developed arbitration regimes that align with the Model Law's core principles, albeit through different legal mechanisms. The US model prioritises clarity and uniformity through incorporation, while the UK model emphasises flexibility and continuity through autonomous legislation.

These findings suggest that the Model Law functions not only as a legislative template but also as a broader normative framework capable of influencing domestic arbitration regimes in diverse ways. This adaptability contributes to the Model Law's enduring relevance in the evolving landscape of international commercial arbitration.

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[15] Alan Scott Rau, Edward F. Sherman, and Scott R. Peppet, *Processes of Dispute Resolution: The Role of Lawyers* (5th edn, Foundation Press, 2016), 290.

[16] Deniz D. Çelik, "Judicial Review under the UK and US Arbitration Acts: Is Arbitration a Better Substitute for Litigation?" *ISLRev* 1(1) (2013): 13; Maria Frederica Moscati, Micheal Palmer, and Marian Roberts, *Comparative Dispute Resolution* (Elgar Publishing 2020), 4.

[17] Christa Roodt, "Autonomy and Due Process in Arbitration: Recalibrating the Balance," *Eur JL Reform* 13(3) (2011): 413.

[18] *İbid*.

6. IMPLİCATİONS FOR INTERNATİONAL ARBİTRATİON PRACTİCE

The comparative analysis undertaken in this article highlights the continued relevance of the UNCITRAL Model Law in shaping international arbitration practice, even in jurisdictions that have not formally adopted it.[19] The examination of the United Kingdom and the United States demonstrates that the Model Law operates not only as a legislative template but also as a flexible normative framework capable of guiding the development of domestic arbitration regimes across different legal traditions.[20]

One significant implication of this finding concerns the adaptability of international arbitration standards. The coexistence of formal adoption in the United States and normative alignment in the United Kingdom suggests that harmonisation does not require uniform legislative techniques. Instead, shared principles such as party autonomy, limited judicial intervention, and the effectiveness of arbitral proceedings can be realised through diverse legal structures. This flexibility enhances the Model Law's capacity to accommodate evolving commercial practices and jurisdiction-specific policy considerations.[21]

The analysis also underscores the importance of domestic legal culture in shaping arbitration frameworks. The UK's emphasis on procedural flexibility and judicial support reflects its common law tradition, while the US approach prioritises statutory clarity and federal uniformity. Both models illustrate how the Model Law's principles may be adapted to suit local institutional arrangements without undermining international coherence.[22]

Finally, ongoing developments in international arbitration practice present challenges that may influence future engagement with the Model Law. The increasing use of digital technologies, the expansion of third-party funding, and the growing complexity of cross-border disputes place pressure on existing arbitration frameworks to evolve. In this context, the Model Law continues to provide a valuable reference point for assessing potential reforms and ensuring that domestic arbitration regimes remain responsive to contemporary needs.

7. CONCLUSİON

This article has examined the role of the UNCITRAL Model Law on International Commercial Arbitration through a comparative analysis of the United Kingdom and the United States. By focusing on different modes of engagement rather than formal implementation alone, the study has demonstrated that the influence of the Model Law extends beyond jurisdictions that have adopted it as binding legislation.

The United States represents a model of formal incorporation, having adopted the Model Law through Chapter 3 of the Federal Arbitration Act to govern international commercial arbitration. This approach promotes clarity and uniformity within the federal system while aligning US arbitration law with internationally accepted standards. In contrast, the United Kingdom has maintained an autonomous arbitration regime under the Arbitration Act 1996. Although the UK has not adopted the Model Law, its arbitration framework reflects a close correspondence with the Model Law's core principles, achieved through normative alignment rather than legislative enactment.

The comparative assessment illustrates that both approaches support the fundamental objectives of international arbitration, including party autonomy, limited judicial intervention, and the finality and enforceability of arbitral awards. The findings suggest that the effectiveness of the Model Law lies in its flexibility and its capacity to function as a shared reference point rather than a rigid regulatory instrument.

In conclusion, the UNCITRAL Model Law continues to play a significant role in the development of international commercial arbitration by providing a coherent set of principles adaptable to diverse legal systems. The experiences

[19] David S. Caron, and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd edn, Oxford University Press, 2013), 486.

[20] Ceyda Süral, "Hakem Kararlarının İcrası ve İptal Davası," *Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi* 16 Özel Sayı (Prof. Dr. Hakan Pekcanıtez'e Armağan) (2014): 1382.

[21] G. Burn, and K. Cheung, "Section 44 of the English Arbitration Act 1996 and third parties to arbitration," *Arbitration International* 37(1) (2021): 287–323.

[22] Gary B. Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International, 2021), 1125.

of the United Kingdom and the United States demonstrate that meaningful engagement with the Model Law may take different forms, each capable of contributing to a stable, efficient, and internationally compatible arbitration framework.

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ADİ ŞİRKET VE HAK EHLİYETİ SAHİPLİĞİ

ORDİNARY PARTNERSHİP AND THE OWNERSHİP OF THE LEGAL CAPACİTY

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ÖZ

Adi şirket, en az iki gerçek ve/veya tüzel kişinin ortak bir amaca ulaşmak için emek ve mallarını birleştirdiği bir sözleşmedir. Bu ortaklık, şahıs, sözleşme, sermaye, ortak amaç ve ortak amaç uğruna aktif ve eşit çaba gösterme gibi unsurlardan oluşur. Adi şirket bir elbirliği mülkiyet yapısı arz etmektedir. Adi şirketin amacı kar sağlayıp ortakları arasında bunu dağıtmaktır. Tarihsel gelişim eğrisine baktığımızda Roma hukukundaki societas kavramında adi şirketin ilk izlerine rastlarız. Adi şirket sözleşmesi salt manada bir borçlar hukuku münasebeti teşkil etmekte olup, korporasyonel bir yapı arz etmemektedir. Türk hukukunda adi şirketin tüzel kişiliği bulunmamaktadır. Dolayısıyla adi şirketin bu hukuk çevrelerinde hak ehliyeti de bulunmamaktadır. Almanya'da Adi şirketin düzenlemeleri, İsviçre Borçlar Kanunu'ndan etkilenmiş olup, 01.01.2024'te yürürlüğe giren Şahıs Şirketleri Hukukunun Modernleştirilmesi Hakkında Kanun ile modernleşmiştir. Bu değişikliklerle adi şirketlere hak ehliyeti tanınmış ve şirketler sicili oluşturulmuştur. Değişen dünyaya uyum sağlamak ve alacaklıları korumak amacını taşıyan bu gelişmeler, Türk hukukunda da dikkate alınmalı ve benzer düzenlemeler yapılmalıdır.

Anahtar kelimeler: *Adi Şirket, Ortaklık, Hak Ehliyeti.*

ABSTRACT

An ordinary partnership is a contract by which at least two natural and/or legal persons combine their labour and assets in order to achieve a common purpose. This partnership consists of elements such as the personal element, contract, capital, a common objective, and the active and equal contribution of efforts toward that objective. An ordinary partnership is characterized by a joint ownership structure. The purpose of the ordinary partnership is to generate profit and to distribute it among the partners. From a historical perspective, the earliest traces of the ordinary partnership can be found in the concept of societas in Roman law. The ordinary partnership agreement constitutes, in the strict sense, an obligation-law relationship and does not possess a corporate structure. Under Turkish law, the ordinary partnership does not have legal personality; consequently, it also lacks legal capacity in this legal system. In Germany, the regulation of the ordinary partnership has been influenced by the Swiss Code of Obligations and was modernized by the Act on the Modernization of the Law of Partnerships, which entered into force on 1 January 2024. Through these amendments, ordinary partnerships have been granted legal capacity, and a partnerships register has been established. These developments, aimed at adapting to a changing world and protecting creditors, should also be taken into account in Turkish law, and similar regulations should be adopted.

Key words: *Ordinary Partnership, Partnership, Legal Capacity.*

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1. GİRİŞ

Adi şirket en az iki gerçek veya tüzel kişi[3] ortağın meydana getirdiği ortaklıklar hukukunun temel formudur. Adi şirketin Türk hukukunda tüzelkişiliği bulunmamaktadır. Buna bağlı olarak adi şirket Türk hukukunda hak ve fiil ehliyetine de sahip değildir. Buna karşılık içtihat Alman hukukunda adi şirkete hak ehliyetini kısmen de olsa tanımıştır.[4] Adi şirkete hak ehliyeti tanınmasıyla birlikte ihtiyari olarak sicile tescil müessesesi de doğmuştur. Çalışmada ortaklık ve adi ortaklık kavramı, unsurları ile hak ehliyeti tanınma hususları tartışılacaktır.

2. GENEL OLARAK ORTAKLIK VE ADİ ORTAKLIK KAVRAMI

2.1. Genel Olarak Ortaklık Kavramı

İnsan, doğası gereği ortak bir amaç için birleşme eğilimdedir. Bu doğrultuda yapılması planlanan bir iş için sarf edilmesi gereken imkanların tek bir kişi tarafından sağlanmasının mümkün olmadığı hallerde birden fazla kişinin birleşerek ve imkanlarını birleştirerek başarıya ulaştıkları ve sonuçtan beraber faydalandığı haller çoğunlukta olduğunu belirtmek isabetli olacaktır.[5] İnsanların belirli bir amaç uğruna bir araya gelmeleri iradeleri doğrultusunda ya da tesadüfen olabilmektedir. İlkel toplumlarda babanın vefatı sonrasında yalnız kalan aile üyelerinin hayatta kalmak için ya da malvarlıklarını korumak gibi ekonomik sebepler dolayısıyla bir araya gelmeleri ortaklık ilişkisinin ortaya çıkışı olarak belirtmektedir. Burada babanın vefatı tesadüfi bir olay olmakla birlikte kalan aile üyelerinin birleşmeleri tesadüfi ya da iradi olarak kabul edilebilecek bir eylem olup ilkel toplumlardaki aile üyelerinin birleşmeleri günümüzdeki ortaklıkların kaynağı olarak kabul edildiği söylenebilir.[6] Ancak geçmişten günümüze geçen zaman diliminde ortaklığa sebebiyet veren amaçlarda "ihtisaslaşma" olmuş ve birleşmelerde bu yönde meydana gelmiş olup hukuki yansımasında da özel hukuk ile kamu hukuku birleşmeleri oluşmuştur.[7]

2.2. Adi Ortaklık Kavramı

İsviçre hukuk sistemi hukukumuz açısından kaynak olması dolayısıyla önem arz etmekte olup "adi ortaklık"a dair düzenlemeler İsviçre Borçlar Kanunu'ndan iktibas edilmiştir, ancak İsviçre Borçlar Kanunu, Alman ve Fransız hukukunu gözeterek ve İsviçre'nin kanuni düzenlemelerin yapıldığı zamanki özelliklerini kapsayan, kantonlar üstü federal kapsayıcı bir biçimde hazırlanmıştır.[8] Bu hususlarla birlikte ticaret ortaklıklarının ticaret siciline tesciline kadar olan zaman diliminde kurucu ortaklar arasındaki ortaklık da adi ortaklık olarak kabul edilmektedir.[9]Adi ortaklık gündelik yaşamın her alanında oldukça sık karşılaşılabilen bir kavramdır. Bu doğrultuda kırsal yaşamda yaygın olan yarıcılık işletmeciliği de büyük bir şirketin hisse senetlerini satabilmek adına birden fazla bankanın bir araya gelmesi de adi ortaklığa örnek teşkil etmektedir.[10] Yine Fikir ve Sanat Eserleri Kanunu'nun 10. maddesi uyarınca birden fazla

[3] İsviçre hukukunda adi şirkete gerçek ve tüzel kişiler yanında bu hukuk çevresinde tüzel kişiliği olmayan kollektif ve komandit şirketlerin de ortak olabileceği kabul edilmektedir. (Druey, Jean Nicolas, Eva Just Druey, and Lukas Glanzmann. *Handels- und Gesellschaftsrecht*. 11th auflage. Zürich: Schulthess, 2015, para 3 rz 9; Schütz, Jürg, *Gian Staempflis Handkommentar Personengesellschaftsrecht* Bern: Stämpfli 2015, n 6) Yine İsviçre hukukunda kabul gördüğü üzere adi şirketlere kamu hukuku kurum ve kuruluşları da üye olabilir. Ancak bu hukuk çevresinde bir adi şirketin diğer bir adi şirketin üyesi olamayacağı, adi şirketin üçüncü şahıslara karşı kendi namına hak iktisap etmek ve taahhüt altına girmek noktasında ehliyetinin noksan bulunması gerekçesiyle reddedilmektedir. (Fellmann, Walter, and Karin Müller. *Berner Kommentar: Kommentar zum schweizerischen Privatrecht. Die einfache Gesellschaft, Art. 530–544 OR*. Bern: Stämpfli, 2006, n 19; Handschin, Lukas, and Reto Vonzun. *Zürcher Kommentar*. 4th auflage. Zürich: Schulthess, 2009, n 233; Schütz, n 7.) Alman hukukunda ise yasalaşan Mauracher Taslağına göre (MoPeG- Alman hukukunda şahıs şirketleri hukuku alanında reform yapan kanunun kısaltmasıdır), adi şirkete aynı zamanda bir adi şirket de ortak olabilir (707 I BGB yeni düzenleme). Yine bu kanuna göre adi şirkete hak ehliyetine sahip bir şahıs şirketi de ortak olabilir.

[4] O. Jauernig, R. Stürner, *BGB Kommentar,* 18. Auflage (C.H. Beck Verlag, 2021), 1406.

[5] Reha Poroy, Ünal Tekinalp, Ersin Çamoğlu, *Ortaklıklar ve Kooperatif Hukuku*, Gözden Geçirilmiş 2. Baskı (İstanbul: Fakülteler Matbaası, 1982), 3.

[6] *Ibid*, 3.

[7] *Ibid*, 4.

[8] *Ibid*, 10-11.

[9] Mustafa Yasan, *Ortaklıklar Hukuku*, 3. Güncellenmiş Baskı, (Ankara: Seçkin Yayıncılık, 2024), 37.

[10] Soysal Özenli, *Uygulamada Adi Ortaklık ve Neden Olduğu Davalar* (Ankara: Kazancı Hukuk Yayınları, 1988), 2.

kimsenin bir araya gelmesiyle meydana getirilen eser ayrılmaz bir bütün teşkil ediyorsa, eser sahibi, eseri meydana getirenlerin birliği olup birliğe adi şirket hakkındaki hükümler uygulanmaktadır.

Mukayeseli hukukta kabul gördüğü üzere (bilhassa Alman hukukunda) adi şirketler çeşitli sosyal ve iktisadi platformlarda zuhur edebilirler. Örneğin adi şirket özel alandaki bir araya gelmelerde karşımıza çıkmaktadır (bir ev idaresinin müştereken işletilmesinde-konut ortaklığında (*Wohngemeinschaft*). Yine adi şirket serbest meslek erbablarının (avukatların, mali müşavirlerin, yeminli defter denetmenlerinin, vergi danışmanlarının) müşterek yazıhane işletmelerinde ve doktorların müşterek muayenehanede hizmet vermelerinde gündeme gelmektedir. Ticaret siciline kayıtlı olmayan ve bu nedenle Ticaret Kanunu anlamında tacir statüsünde bulunmayan küçük işletmecilerin (*Kleingewerbebetreibende*) oluşturdukları birlikler (büro birlikleri) de adi şirket çatısı altındaki örgütlenmelere örnek gösterilmektedir.[11]

Adi ortaklık bir şahıs ortaklığı olup en az iki gerçek ya da tüzel kişi ortak ile kurulabilmektedir. Hukukumuzda esasen vekalet ve temsil ilişkileri üzerine kurulan adi ortaklıkta ortaklığın tüzel kişiliği bulunmamaktadır.[12] Şöyle ki bir kişi veya mal topluluğuna tüzel kişilik tanınması ve düzenlenmesi kanun koyucu tarafından belirlenmektedir ve tipe bağlılık prensibi mevcuttur. Aynı zamanda tüzel kişilik sayısı bakımından sınırlı sayı ilkesi geçerlidir.[13] Diğer bir anlatımla özel hukukta kazanç amacı güden tüzel kişiler, kooperatifler ve Türk Ticaret Kanunu'nda düzenlenen kollektif şirket, komandit şirket, limited şirket ile anonim şirkettir. Kazanç paylaşma amacı gütmeyen tüzel kişilikler ise dernekler ve vakıflardır ve adi ortaklık hakkında bu kapsamda bir düzenleme bulunmamaktadır.

Tüzel kişiliğe sahip olmanın önemli sonuçları ortaklığın ortaklarından ayrı hak ve fiil ehliyetine, malvarlığına, ticaret unvanına, yerleşim yerine ve vatandaşlığa sahip olmasıdır.[14] Ancak bu sonuçların uygulanabilirliği genel olarak mevzuatımızdaki adi ortaklığa ilişkin düzenlemeler gereği söz konusu olmamaktadır. Şöyle ki adi ortaklığın kendisinin mal varlığı bulunmamakta olup ortaklar, ortaklığın mallarına kural olarak elbirliği ile mülkiyet rejimi uyarınca sahiptir. Elbirliği mülkiyet halinde ortakların belirli bir payları olmamakta, ortakların her biri ortaklık mallarının tamamında hak sahibi olmaktadır. Bu itibarla ortaklık süresince ortaklar tek başlarına belirli bir pay hakkında tasarrufta bulunamamaktadır.[15] Bu hususlarla birlikte adi ortaklık taraf ve dava ehliyetine sahip değildir. Adi ortaklığın tüzel kişiliği olmaması dolayısıyla tacir sıfatı da bulunmamaktadır[16] ve dolayısıyla unvan kullanma zorunluluğu bulunmamaktadır, ancak adi ortaklık tüzel kişiliğe sahip olmasa da aynı zamanda tüzel kişiliğe ait nitelikler de taşımaktadır. Adi ortaklığın konusunun bir ticari işletme işletmek olması halinde tacir kabul edilerek bir ticari unvan kullanma gerekliliği bu duruma örnek olarak verilebilir. Bu halde ortaklar müşterek unvan bir belirleyebilmektedir.[17] Bu halde unvan ortaklıkla ilgili olan ve gerçekliğe, kamu düzenine aykırılık teşkil etmeyen bir unvan olmalıdır. Bir diğer örnek de yerleşim yerine sahip olma haline ilişkindir. Adi ortaklık gerçek kişilerden oluşabileceği gibi tüzel kişilerden de oluşabilmektedir. Tüzel kişilerden oluşan adi ortaklığın bir ticari işletme işletmesi halinde ticari işletmelerin tescilinin istenmesi gerekmektedir. Bu sebeple gerekli olan ortaklığa dair yazılı ve noterden onaylı sözleşmede olması gerekli asgari unsurlardan biri de yerleşim yeri kabul edilen işletme merkez adresidir.[18] Örneklendireceğimiz son husus ise vergi yükümlülüğüne ilişkindir. 5520 sayılı Kurumlar Vergisi Kanunu uyarınca iş ortaklıkları kurumlar vergisine tabidir. Bu kapsamda tüzel kişiliğe sahip olup olmamasına bakılmaksızın iş ortaklığı

[11] Wolfgang Kallwass, Peter Abels, Olaf Müller Michaels, *Privatrecht*, 26. Auflage, (München: Verlag Franz Vahlen, 2023), 445.
[12] Poroy, Tekinalp, Çamoğlu, 54.
[13] Şaban Kayıhan, *Kişiler Hukuku*, 1. Baskı (Ankara: Seçkin Yayınları, 2022), 115.
[14] Mehmet Bahtiyar, *Ortaklıklar Hukuku*, 11. Baskı (İstanbul: Beta Yayınevi, 2016), 48.
[15] Kemal Oğuzman, Özer Seliçi, Saibe Oktay Özdemir, *Eşya Hukuku,* Yenilenmiş ve Mevzuata Uyarlanmış 18. Baskı, (İstanbul: Filiz Kitabevi, 2015), 341.
[16] Yasan, 37.
[17] Poroy, Tekinalp, Çamoğlu, 51.
[18] Fahri Özsungur, "Adi Ortaklık Kavramı ve Ticaret Şirketlerinin Tüzel Kişiliği Bulunmayan Bir Ortaklık Yapısı İle İşlettikleri Ticari İşletmelerin Ticaret Siciline Tescili", *Anadolu Üniversitesi Hukuk Fakültesi Dergisi* I(5) (2017): 50.

vasfındaki adi ortaklığın kendisi kurumlar vergisi yükümlüsü kabul edilmektedir.[19]

3. ADİ ORTAKLIĞIN UNSURLARI

Türk Borçlar Kanunu'nun 620. maddesi uyarınca ortaklık, en az iki kişinin emek ve mallarını ortak bir amaca ulaşmak için birleştirmeyi üstlendikleri bir sözleşmedir. Bu kapsamda tanımdan hareketle adi ortaklığın unsurları; şahıs, sözleşme, sermaye, ortak amaç ve ortak amaç uğruna aktif ve eşit çaba gösterme (*affectio societatis)* olarak sınıflandırılmaktadır.

Şahıs unsuru bakımından adi ortaklık gerçek veya tüzel kişi fark etmeksizin en az iki kişinin varlığı ile kurulabilmektedir. Adi ortaklıkta ortakların güven ilişkisi ve kişisel özellikler ortaklığın oluşumunda önem arz etmekte olup şahıs unsuru temel unsurlardandır.[20] Ortaklık için özel bir ehliyet şartı aranmamaktadır, ancak bazı meslek grupları için adi ortaklığa ortak olabilme açısından yasak söz konusudur. Şöyle ki, hakimler, avukatlar, noterler ve memurlar bakımından yasal düzenlemeler gereği ticaret yapmaları yasak olup, ticari işletme işleten bir adi ortaklığa ortak olmaları da yasaklanmıştır.[21]

Sözleşme unsuru adi ortaklığın diğer bir unsurudur. Adi ortaklık sözleşmesi Borçlar hukukumuzdaki klasik sözleşmelerden farklılıklar içermektedir. Şöyle ki klasik sözleşmelerde tarafların karşılıklı ve birbirine uygun irade beyanlarının açık veya örtülü olarak birbirleriyle uyumlu olmaları gerekmektedir. Bu doğrultuda sayıya bakılmaksızın sözleşmede iki taraf olup, tarafların iradeleri uyuşsa da menfaatleri zıt yönlüdür. Adi ortaklıkta ise ortakların amaçları aynı yönde olup çok taraflılık söz konusudur.[22] Bu hususlarla birlikte adi ortaklık sözleşmesi kapsamındaki edimler arasında denklik ya da karşılıklılık bulunmamaktadır.[23] Bu kapsamda örnek vermemiz gerekirse gabinin sonuçları ya da ödemezlik def'i hükümleri adi ortaklık sözleşmeleri bakımından işletilememektedir.[24] Tüm bu sebeplerle adi ortaklık sözleşmelerine Borçlar Kanunu hükümlerinin aynen uygulanması yerine uygun düştüğü ölçüde ve özel bir hüküm bulunmadığı hallerde uygulanması daha isabetli olacaktır.[25]

Adi ortaklığın konusu Türk Borçlar Kanunu'nun 27. maddesine aykırı olmamak şartıyla ticari işletme işletmek dahil her konu olabilmektedir. Ancak iradelerin açık veya zımni olarak uyuşması gerekmekte olup kişiler, iradeleri dışında bir hukuki sebeple bir araya geliyorsa adi ortaklığın kurulamayacağını söylemek isabetsiz olmayacaktır. Bu kapsamda birden fazla kişiden oluşmuş bir elbirliği mülkiyet halindeki miras ortaklığı adi ortaklık vasfında olmayacaktır.[26]

Adi ortaklık sözleşmesinin kurulması için öngörülmüş bir geçerlilik koşulu kaleme alınmamış olup Türk Borçlar Kanunu'nun 12. maddesi uyarınca kural olarak herhangi bir şekle tabi değildir. Bu kapsamda sözleşme ilişkisi sözlü olarak kurulabilmektedir.[27] İstisnai düzenlemeler ise kendini iradi şekil ve ortaklığa sermaye olarak taşınmaz veya devredilmesi özel şekle bağlanmış bir hakkın taahhüt edilmesinde kendini göstermektedir.[28] Bu doğrultuda ortaklar sözleşmenin belirli bir şekilde yapılmasını kararlaştırabilecektir. Adi ortaklığa sermaye olarak devredilmesi kanunen özel bir şekil şartına tabi tulumuş taşınmaz veya bir hak getirilmesi halinde sözleşmenin yalnızca sermayeyle ilişkili bölümünün kanunen öngörülen şekil uyarınca yapılması kâfi olacaktır.[29]

Sermaye, ortakların ortaklığa getirmeleri gereken bir şarttır. Sermayenin ortaklıktaki diğer adı sermaye payıdır. Ortak amacın gerçekleşmesi adına kanuna, ahlaka ve adaba aykırılık teşkil etmeyen elverişli olan her şeyin ortaklığa getirilebilmesi mümkündür. Öğretide Poroy, Türk Ticaret Kanunu'nun 127. maddesinde de sermaye olabilecek kalemler tahdidi olmayacak şekilde sayılmış olup işbu hükmün adi ortaklık bakımından da işletilebilecek olduğunu ileri sürmüştür.[30] Bu

[19] Yasan, 37; Özsungur, 48.
[20] Numan Tekelioğlu, "Adi Ortaklıkta Ortağın Ölümü Halinde Mirasçıların Hukuki Durumu", *Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi* XXV(3) (2021): 226-27.
[21] Poroy, Tekinalp, Çamoğlu, 33.
[22] Bahtiyar, 16-17; Yasan, 29.
[23] Esra Hamamcıoğlu, Argun Karamanlıoğlu, "Adi Ortaklık Sözleşmesinde Şekil", *Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi* 22(3) (2016): 1304-05.
[24] Bahtiyar, 18.
[25] *Ibid*, 16-17.
[26] Poroy, Tekinalp, Çamoğlu, 33.
[27] Hamamcıoğlu, Karamanlıoğlu, 1313.
[28] *Ibid*, 1316-7.
[29] *Ibid*, 1319; şekle ilişkin öğretideki görüşler için bkz: 1317-20.
[30] Poroy, Tekinalp, Çamoğlu, 55.

doğrultuda taşınır taşınmaz mal, para, hak, alacak gibi ekonomik değerler ile emek, ticari itibar gibi değerler sermaye olarak ortaklığa getirilebilecektir. Aksi kararlaştırılmadıkça sermaye payları, ortaklığın amacının gerektirdiği önem ve nitelikte ve birbirine eşit olmak durumundadır. Sermaye borcunun yerine getirilmediği durumda ise talep, dava, tazminat, gecikme faizi gibi yaptırımlar hakkında diğer ortakların ticaret ortaklıklarına ilişkin genel hükümlere başvurması mümkündür.[31]

Ortak amaç, adi ortaklık bakımından gerekli diğer bir unsurdur; ancak bu noktada adi ortaklık ile derneklerin ayrımına dikkat etmek gerekmektedir. Şöyle ki dernekler de müşterek bir amaçla kurulan şahıs birlikleridir. Dernekler adi ortaklığın aksine tüzel kişiliğe sahiptir ve çoğunlukla kazanç paylaşma amacı dışında bir amaçla kurulurlar. Tüzel kişiliğe sahip olmaları sebebiyle üyeler ikinci planda olup sorumluluk derneklerde dışarıya karşı tüzel kişiliğe ait olup malvarlığı ile sınırlıdır.[32] Adi ortaklıktaki temel ortak amaç kazanç paylaşmak olup, kârı ve zararı kural olarak eşit paylaşmaktır; ancak derneklerin kazanç sağladığı özel hallerde dahi kazanç derneğin amacı için harcanmakta olup, üyeler arasında paylaşılmamaktadır.[33]

Affectio societatis, ortakların ortak amaç uğruna eşit ve gayret ve özen göstermesi gereken bir unsur olarak tarif edilebilir.[34] Yerini öğretide bulmuş olup kendini güven duygusunun daha yoğun hissedildiği ve arandığı şahıs şirketlerinde göstermektedir.[35] Bu kapsamda rekabet yasağını aktif çaba göstermenin bir görünümü olarak belirtebiliriz.[36] Yine ortağın haklı sebebe dayanılarak ortaklıktan çıkarılması ya da ortaklığın haklı nedenle feshi taleplerinin bir sebebinin *affectio societatis* olduğu kanaatimizce isabetsiz olmayacaktır.

4. ADİ ŞİRKET VE HAK EHLİYETİ SAHİPLİĞİ

Almanya'da 1 Ocak 2024 tarihi itibariyle Şahıs Şirketleri Hukukunun Modernleştirilmesi Hakkında Kanun (MoPeG) ile adi şirkete dair düzenlemelerde de değişiklikler öngörülmüş, adi şirkete dair hükümlerin yer aldığı Alman Medeni Kanunu (BGB) 705 MoPeG ile yeniden ele alınmıştır. Öngörülen değişikliklerden biri de adi şirkete hak ehliyeti tanınmasına ilişkindir. Bu kapsamda adi şirkete hak tanınıp tanınmamasına göre bir ayrıma gidilerek adi şirketin hukuki işlemlere taraf olmasında ortakların iradesinin uyuşmasıyla, adi şirketin kendisi de hak ve borçlara sahip olabilecektir.[37] Diğer bir yenilik de sicil ile ilgili olup BGB 707'deki yeni düzenleme uyarınca ortaklar (adi) şirketi yetki çevresinde merkezinin bulunduğu yer mahkemesindeki şirketler siciline tescil ettirebileceklerdir. Bu kapsamda BGB 707 şirketler siciline (*Anmeldung zum Gesellschaftsregister)* ihbar kenar başlığını taşımakta olup, sicile yapılacak beyan şirketin adını, merkezini, şirketin bir Avrupa Birliği üyesi ülkesindeki adresini içermek zorundadır. Yine her ortağa ilişkin ortak bir gerçek kişi ise o takdirde adını (soyadını), doğum tarihini ve ikametgahını; ortak bir tüzelkişi veya hak ehliyetine sahip bir şahıs şirketi ise unvanını veya adını, şirket nevini; merkezini ve şayet kanunen öngörülmüş ise yetkili sicil ve sicil numarasını, ortakların temsil yetkilerine ilişkin beyanlarını ve şirketin halihazırda ticaret sicilinde veya meslektaş ortaklığı sicilinde tescilli bulunmadığına dair teminatını içermek zorundadır. Adi şirketin sicile tescili ihtiyari olup, ihtiyari tescile tabi kılınmasının amacı ise bir yandan alacaklılarının korunması iken diğer yandan da adi şirketin iktisadi faaliyetlerin enstrümanı olarak etki açısını iyileştirmektir.[38]

Bu köklü değişikliklere ışık olan dayanak ise Alman Federal Mahkemesi'nin 2001 tarihli kararı ışığında dışarıda ticari hayata katılan adi şirkete hak ehliyeti ve aktif ve pasif dava ehliyetini tanımış olmasıdır. (BGH NJW 2001,1056; NJW 2003,1043; NJW 2003;1445)[39] Alman Anayasa Mahkemesinin bir dairesi adi şirketin mülkiyet temel hakkını ve taraf ehliyetini Art. 101 I 2 ve 103 GG (Alman Anayasası) uyarınca usuli temel haklar bağlamında kabul etmektedir. (NJW 2002, 3533; kritize eden Stürner JZ 2003, 44)[40] 2024 yılında Bundestag'ın önünde duran Mauracher-Taslağının yürürlüğe girmesiyle birlikte 1900 yılından bu yana Alman

[31] *Ibid*, 59.
[32] *Ibid*, 38; Özenli, 11.
[33] Özenli, 11.
[34] Poroy, Tekinalp, Çamoğlu, 40.
[35] Bahtiyar, 22.
[36] Yasan, 31.
[37] Direnç Akbay, 136.
[38] Jauernig, Stürner, Art. 705.
[39] Bernhard Wieczorek, Rolf Schütze, ZPO, *Grosskommentare der Praxis*, 2. Band 5. Aufl. (Munich: C. H. Beck, 2022), 90, dn. 72.
[40] Jauernig, Stürner, 1407.

hukukundaki şahıs şirketleri hukukunda gerçekleşen köklü reform sonrası artık adi şirkete hak ehliyeti tanınmış ve adi şirketin alacaklılarının korunması amacıyla temsil ilişkilerinin kaydedileceği bir şirketler sicili (*Gesellschaftsregister*) ihdas olunmuştur. Alman hukukunda adi şirketler bakımından bir sicil ihdas edilmesi aslında Alman Ticaret Kanunu Kısa Şerhlerinde Baumbach/Hopt'un ticaret sicilinin artık bir *konzern* siciline evrilmekte olduğu görüşünü de teyit eder niteliktedir. Aslında genel hatlarıyla söylenebilir ki, eskiden ticari işlerin sicili olan ticaret sicili artık genel manada bir işletmeler siciline evrilmektedir ve bu düşüncenin arkasında yatan fikrin temellerini de Alman ticaret hukukçusu Schmidt *Unternehmensrecht* başlıklı kitabında Alman hukuku bakımından tacirin özel hukukundan (Sonderprivatrecht der Kaufleute) Canaris'in dışadönük/haricen belli bir işletmenin hukuku (*Aussenprivatrecht der Unternehmens*) fikrine karşı çıkarak Alman Ticaret Kanunu'nun bir genel işletme hukukuna tahvil edilmesi ve hatta Alman Ticaret Kanunu'nun tasfiye edilmesi gereğini devrim niteliğindeki fikriyle atmıştır. Yine bu vesileyle şu tespitte de bulunalım, Alman hukuk literatürü ve kültüründe önemli bir yere sahip olan Münih Şerhinin Adi Şirket Bölümünün şarihi olan Prof. Dr. Carsten Schaefer'in vurguladığı üzere MoPeG ile adi şirketler hukuku kollektif şirketler hukukuna yakınlaştırılmıştır.[41]

Alman Hukuku'ndaki adi şirkete dair devrim niteliğindeki bu değişikliklerin modernleşme ihtiyacı ile mevcut düzenin günümüzün ticari ve hukuki işleyiş ve ihtiyaçlarını karşılamadığı gerekçeleriyle yapıldığını belirtmek isabetsiz olmayacaktır.[42] Çalışmamız ile bağlantılı olacak ve dayanak oluşturabilecek kanaatiyle kısaca değinmemiz gerekirse Alman hukukunda yapılan bir başka devrim niteliğinde düzenleme de 2019/770 sayılı Dijital İçerik Direktifi'dir.[43] 2019/770 sayılı Dijital İçerik Direktifi'nin amaçlarından biri de özellikle küçük ve orta ölçekli işletmeler ('KOBİ'ler) için gerçek bir dijital tek pazara ulaşmak, hukuki belirliliği artırmak ve işlem maliyetlerini azaltmak amacıyla, yüksek düzeyde tüketici koruması temel alınarak, dijital içerik veya dijital hizmetlerin tedarikine ilişkin sözleşmelere ilişkin belirli hususlar uyumlu hale getirilmesinin sağlanması yönündedir. Uluslararası alışverişlerde (RESITAL 3 DIRL), sınırları kaldırarak bir nevi dünya vatandaşlığı düşüncesiyle hukuki güvenirliği korumayı amaçlayan direktif de modernleşen ve gelişen düzene uyum sağlama ihtiyacını göz önüne sermekte olup KOBİ'lerin de adi şirket olduğu dikkate alındığında adi şirketler yönünden geleneksel düzenlemelerden ayrılmanın gerekliliğini vurgulamaktadır.

5. SONUÇ

Adi ortaklık Türk Borçlar Kanunu sistematiğinde yer almaktadır. Bu kanunun 620. maddesi uyarınca ortaklık, en az iki kişinin emek ve mallarını ortak bir amaca ulaşmak için birleştirmeyi üstlendikleri bir sözleşmedir. Bu kapsamda tanımdan hareketle adi ortaklığın unsurları şahıs, sözleşme, sermaye, ortak amaç ve ortak amaç uğruna aktif ve eşit çaba gösterme (*affectio societatis*) olarak sınıflandırılmaktadır.

Adi şirket müessesine dair düzenlemeler bakımından kaynak kanun dönemin Alman ve Fransız hukukunun esintilerinin olduğu İsviçre Borçlar Kanunu'dur. Alman hukukunda ise Federal Mahkeme'nin 2001 tarihli kararı ışığında 2024 yılında yürürlüğe giren MoPeG ile modernleşme ihtiyacı ve gelişen ve değişen dünyaya uyum sağlamak amacıyla adi şirketin geleneksel yapısında değişiklere gidilmiştir. Bu haliyle 1900 yılından bu yana Alman hukukundaki şahıs şirketleri hukukundaki köklü reform sonrası artık adi şirkete hak ehliyeti tanınmış ve adi şirketin alacaklıların korunması amacıyla temsil ilişkilerinin kaydedileceği de bir şirketler sicili (*Gesellschaftsregister*) ihdas olunmuştur. Değişime duyulan ihtiyaç örnek olarak değinmemiz gerekirse kendini güvenilir alışverişin yapılması bakımından amaçlarından birinin tüketiciyle birlikte küçük ve orta ölçekli işletmecileri korumak olduğu dijital içerik direktifi ile kendini göstermektedir. Değişime ayak uydurmak için kanaatimizce adi şirketlere hak ehliyeti tanınması ve sicile kaydolmaya dair

[41] Bkz. Carsten Schaefer, *Gesellschaftsrecht*, 6. Auflage, (München: C.H. Beck Verlag, 2022).
[42] Akbay, 132.
[43] Anılan bu direktif Alman hukukunda 01.01.2022 tarihinde "Dijital İçerikler ve Hizmetlerin İç Hukuka Tahvili ve Belirli Sözleşme Hukuku Yönleri Hakkında Kanunla" iç hukuka taşınmış ve Alman Medeni Kanunu (BGB) 327'de yer verilmiştir.

düzenlemeler hukukumuz bakımından da ele alınmalıdır.

KAYNAKÇA

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