Prekarisierung und soziale Entkopplung –
transdisziplinäre Studien

Mehmet Okyayuz · Junxiang Mao ·
Letlhokwa George Mpedi ·
Peter Herrmann *Editors*

Human Rights in a Changing World

Reflections on Fundamental Challenges

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Prekarisierung und soziale Entkopplung – transdisziplinäre Studien

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Die Zunahme sozialer Unsicherheit und kultureller Verunsicherung in postfordistischen Gesellschaften erzeugt einen Status Quo, in dem Prozesse der Prekarisierung und der „sozialen Entkopplung“ (Robert Castel) verstärkt das Zentrum der Gesellschaft durchziehen. Der Verlust sozialer Garantien führt dabei zur Aushöhlung sozialstaatlicher Errungenschaften. Dadurch werden die Lebenskontexte und das Alltagsleben der Menschen stark verändert.
Das sozialwissenschaftliche Netzwerk S.U.P.I. beschäftigt sich auf europäischer Ebene seit Jahren mit den gegenwärtigen Formen von sozialer Unsicherheit, Prekarität und Ungleichheit. Die Reihe, herausgegeben von Mitgliedern des Netzwerks, präsentiert transdisziplinäre Forschungen zu den sozialen und kulturellen Transformationen in den sozialstaatlich geprägten Demokratien. Sie versteht sich als Forum für die Diskussion in nationalen, europäischen und auch globalen Kontexten. Ebenen einer kritischen Analyse aus multidisziplinären und feldorientierten Perspektiven werden dabei initiiert, aufgenommen und unterstützt. Überschreitung und Öffnung dienen programmatisch als Wegmarken für theoretisch-analytische Beiträge und empirisch-angewandte Forschung.

The increase of social insecurity in post-Fordist societies effect fundamental societal changes. As a consequence Precarity and Disaffiliation (Robert Castel) affecting increasingly the center of society. The loss of social guarantees leads to an erosion of the welfare state. As a result, living situations and everyday life are deeply changed.
The S.U.P.I.-Project (Social Uncertainty, Precarity, Inequality) is an European Research Group established by European and international scholars and experts. The network has been concerned with present forms of social insecurity, precariousness and inequality at European level for years. Edited by members of the network, the book series presents transdisciplinary research on aspects of social and cultural transformations in the democracies which are characterized by the welfare state. The book series opens a discursive space for discussions in national, European and global contexts. The contributions of the book series provide critical analyses from multidisciplinaryperspectives, theoretical-analytical reflections and empirical-applied research.

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Editors' Introduction

Writing and editing a book on such a topic as Human Rights has at least two sides: on one hand, we are confronted with a huge number of publications—these may be official documents by the United Nations and/or national governments, these may be academic and political analyses, all trying to contribute to contemporary debates.

As academic working in the field, being aware of the importance of further development, one is tempted to contribute from the own specific background, thus contributing to even more documents, making it in many cases difficult to move from words to action. On the other hand, remaining silent seems not to be an option—although the human rights development is by and large progressing, there is an increasing number of instances that make us worrying about the future of Human Rights in the context of an unequal globalisation. The situation reminds a bit of Dickens' tale of two cities, the tale of the best and the worst of all times being present at the same time and in the same place.

The reason for the present edition is simple: Whereas many books can be found dealing with Human Rights today, we hope that we offer a publication that adds value:

It brings scholars together from various professional backgrounds, from different countries and regions and most importantly it tries to contribute to contemporary debates by taking a fundamental, theoretically guided approach; and vice versa, by looking at contemporary debates it tries to enhance the theoretical and analytical work.

As editors we are grateful to the publisher and the series editors, having agreed to the project and offering there valuable support. And we are grateful to the contributors—the patience with which they accepted the various delays had been necessary for us to work in too many cases against the odds.

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Focussing on the History and Ideology of Human Rights

Philosophical-Theoretical and Material Origins of Human Rights

Mehmet Okyayuz

1 Introduction: Historical and Theoretical Outline

1.1 The Main Strands of Human Rights Conceptualizations

Human rights and their conceptualization have always occupied an important place not only in political and social debates and arguments, but also in philosophical-theoretical and scientific discourse. And this has been happening in an explicitly systematic way since antiquity at the latest, also in the sense that this topic was no longer just one 'among others', but was itself the focus of consideration.[1] Four thematic (main) strands can be identified, on the basis of and along which their determination and localization patterns run, intensified by the corona pandemic that has caused new social contradictions and upheavals for two years

[1] For example, in his work on the history of human rights, Andreas Haratsch locates a very early strand of ideas among the "Sophists, who taught as early as the fifth century BC. that natural law was superior to established law". ***Andreas Haratsch,*** 2010, Die Geschichte der Menschenrechte [The History of Human Rights], 11. Potsdam: Universitätsverlag Potsdam, 4th edition.

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and the attempts to deal with it. For a constructive approach, it seems essential to consider all these strands in all their ambivalences shown below, in all their continuities but also discontinuities, on the basis of their connecting and not their conflicting nature:

- The first strand concerns current human rights issues and their possible implementation in socio-political life in the various countries, but also obstacles that stand in the way of this implementation. The focus here is on human rights as part of a just and egalitarian organization of human coexistence. This aspect is particularly aimed at goals such as democratization. In view of the broader human rights framework, the latter could be understood as the state-free sphere of societal freedom. In addition to the historical-political dimension, which manifests itself in social movements for a 'better world', but also in the classical liberal concept of *negative rights*, it is also assumed in this context that "that a desire for rights (and democracy) among individuals is a constant across time and space".[2] It seems to be precisely this combination of structural and individual aspects that has developed its society-changing effect in the history of the development of human rights and the idea of human rights. In this way, the social-material *necessity* of egalitarian-social organization can be built on a *moral foundation*, which, however, is relieved of any form of abstractness in this combination. This means that morality should be understood here as the antithesis of moralization due to its social reference.
  A related approach, this time referring to the chronology, i.e. starting from the different phases of the development of human rights, but again from the perspective of specific rights, builds a bridge from civil and political rights, via economic and social rights to cultural rights. The constitution of South Africa is cited as an example of such a strand of development, in which ultimately everything flows together in an integrated manner. The central concept here is that of human dignity, again in structural and individual terms.[3]
- The second strand concerns human rights as part of a legal-political normative network system, which—embedded in institutional framework structures—requires transparency and accessibility for the public in order to then to be able to be instruments for those whose rights are severely endangered. Human

[2] ***Michael Mousseau/Demet Yalçın Mousseau,*** 2008, *The Contracting Roots of Human Rights*. Journal of Peace Research, May 2008, Vol. 45, No. 3, p. 329.

[3] ***Richard Buchanan,*** 2001, *Human Dignity and Human Rights: Thoughts on the Principles of Human-Centered Design*. Design Issues, Summer 2001, Vol. 17, No. 3, p. 36.

rights in this sense include not only the exercise of participation rights, but also the possibility of realizing economic and social freedoms and rights. The content and constitution of the transparency and accessibility of the law listed above is determined by its relationship to society and politics, and this from two levels: Whether and to what extent does law control social and political dynamics and processes and to what extent does it adapt to them? If the first level is the attempt to regulate and shape society "from above",[4] the latter is the attempt to take social demands into account.[5]

Within the framework of such an interlocking of law, society and politics, it may be possible to speak of the development of "legal morality", which might in turn refer to the political and jurisprudential debate about the relationship between the state of law (Gesetzestaat) and the constitutional state (Rechtsstaat). In this context, as already explained above, the focus is on a holistic determination of human rights as an authority that positively intervenes in the living and working conditions of people, which in a definite way redefines and redetermines the relationship and the tension between individual freedom and social order. The technical-formal, normative legal system transforms itself into a kind of "moral universalism" that advances what has been achieved so far in human rights issues in a very concrete way with regard to the possibility of establishing global social justice.

In the social science debate, the unity of the social and political spheres is generally emphasized in the sense of complementing the political with the social. In the context of the human rights debate, in which legal provisions have always been important, the addition of the law to the social now plays a decisive role. This insight represents a qualitative new dimension in the holistic human rights debate. Preventing it can in turn be in the context of power relations, but it can also be the result of an "inadequate institutionalization",[6] which means, among other things, a "crisis of institutions of solidarity".[7]

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[4] ***Klaus Lenk,*** 1976, *Zur instrumentalen Funktion des Rechts bei gesellschaftlichen Veränderungen [On the Instrumental Function of Law in Social Change]*. Verfassung und Recht in Übersee, Vol. 9, p. 155.

[5] Ibid.

[6] ***Amartya Sen,*** 2004, *Elements of a Theory of Human Rights.* Philosophy & Public Affairs, Autunm 2004. Vol. 32, No. 4, p. 320.

[7] ***Stefan Ludwig Hoffmann,*** 2016, *Human Rights and History*. Past & Present, No. 232 (August 2016), p. 304.

- The third strand concerns human rights in the context of increasing globalization, with a tendency to exacerbate inequalities between different socio-economic formations, which may ultimately call into question some of the fundamental assumptions of the 1948 Universal Declaration of Human Rights. On the other hand, alongside these negative results, it should be noted that on the theoretical-legal level, international rights, or better: "the right of peoples, minorities and related communities, has resurfaced, constituting a new moment and challenge in the development of human rights in the contemporary world."[8]

  For the purposes of implementing this approach, the term *Humanitarian Intervention Practice* has been used since the early 1990s, which is often interpreted in legal literature as a more or less necessary addition to the charter. According to Christian Tomuschat, this term means "the military intervention of a state to secure the basic rights of a population group against their own government".[9] Attempts are being made here to take into account the growing importance of human rights at international level with all the potential for conflict inherent in them. The "diffuse character" of such approaches naturally harbors—even more than "in the national space"—"the danger of political abuse".[10] To state ambivalences of this kind is part of an objective approach to the theoretical and practical level of human rights. Only from such a point of view is it possible to reformulate and redefine human rights with all their distortions.
- Finally, the fourth and last strand concerns human rights definitions and conceptualizations as an attempt to understand human rights in their universal and inalienable nature. For Amartya Sen, this aspiration results in a "need for a theory",[11] although it would probably be more nuanced to understand this as

[8] ***Sumner P. Twiss,*** 2004, *History, Human Rights, and Globalization*. The Journal of Religious Ethics. Spring, 2004, Vol. 32, No. 1 (Spring, 2004), pp. 42–43.

[9] ***Christian Tomuschat,*** 2009, Humanitäre Intervention—ein trojanisches Pferd? [Humanitarian intervention—a Trojan horse?] In: ***Herfried Münkler/Karsten Malowitz,*** (eds.), Humanitäre Intervention. Ein Instrument auβenpolitischer Konfliktbearbeitung. Grundlagen und Diskussion [Humanitarian Intervention. An Instrument of Foreign Policy Conflict Management. Basics and Discussion]. Wiesbaden: VS Verlag für Sozialwissenschaften, p. 66.

[10] ***Hermann-Josef Blanke,*** 1989, *Menschenrechte als völkerrechtliche Interventionstitel [Human rights as a title of intervention under international law]*. Archiv des Völkerrechts (September 1989), pp. 280–281.

[11] ***Sen,*** 2004, p. 315.

a restatement, definition and evaluation of existing human rights ideas since antiquity. One of the difficulties of this strand is that, for example, there is by no means a consensus as to what is to be understood by the concept of dignity, which is always associated with human rights.[12]

Can human dignity be seen as the foundation of human rights, or is it rather the case that the historical process of the human rights debate and the gradual implementation of human rights in their various aspects determine what human dignity is or should be? These two categorical aspects of the consideration of human dignity do not represent a contradiction to the fact that three periods or lines of the philosophical-theoretical human rights discussion can generally be stated:

The first line leads from antiquity to the seventeenth century, in which human dignity in concrete terms and human rights in general are understood as moral-philosophical principles. In this way, the original natural law has an oppositional character, which assumes the freedom and equality of all, but still remains in the individual-moral space and is not yet political because it lacks a social basis for implementation in socio-political existence.

From the middle of the nineteenth century, people's living and working conditions were included in the discussion about human rights and dignity. A concretization, i.e. also socialization of the human rights question takes place without negating the universal nature of the human rights question. The classically liberal division of rights into positive (participation) rights and negative (protective) rights that had dominated until then is now completed by the inclusion of social rights as a result of the emergence of the European bourgeois class societies that began their worldwide triumph after the French Revolution. Wage labor on the basis of production based on the division of labor, intensified as Taylorism in the course of the nineteenth century, forms the material basis of the above-mentioned socialization and concretization of the human rights question, without losing sight of previous debates about human rights in their inalienability and universality.

From the middle of the twentieth century, neo-colonialist resistance and the fight for social justice against new forms of institutional racism were included in the human rights debate,[13] also within the framework of a broad-based

[12] ***Gan Shaoping/Zhang Lin,*** 2009, *Human Dignity as a Right*. Frontiers of Philosophy in China. Vol. 4, No. 3 (September, 2009), p. 372.

[13] ***Samuel Moyn,*** 2018, Not Enough. Human Rights in an Unequal World. Cambridge Massachusetts and London England: Harvard University Press, p. 98.

fascism research that was coming back onto the agenda.[14] The United Nations Charter of 1945,[15] the Universal Declaration of Human Rights of 1948,[16] and regional codes such as the European Convention on Human Rights[17] continue to represent attempts to make all of the different approaches and conceptualizations mentioned manifest themselves in a generally binding code.[18] Sen's focus on the need for the formation of a theory of human rights lies precisely in this apparent ambivalence of approaches and attempts to confront them. The aim is to create a far-reaching philosophical-theoretical framework on the basis of which human rights can be brought to the level of an indispensable dimension of human interaction on a global level.[19]

1.2 Ambivalence of Contemporary Developments

These four strands, which are inextricably intertwined, must be evaluated against the background of—on the one hand—historically contemporary developments and—on the other hand—a political-ideological level.

For example, the Universal Declaration of Human Rights of 1948 reassessed the principle of the nation state that emerged from the Peace of Westphalia

[14] Ibid, p. 372.

[15] https://www.un.org/en/about-us/un-charter/full-text (Accessed July 25, 2022).

[16] https://www.un.org/en/about-us/universal-declaration-of-human-rights (Accessed July 25, 2022).

[17] For the full text of this convention see also: https://www.echr.coe.int/documents/convention_eng.pdf. (Accessed July 25, 2022). For a more in-depth look at the topic see also: ***Stephen Wheatley,*** 2019, The Idea of International Human Rights Law, Oxford: Oxford University Press.

[18] ***Gan Shaoping/Zhang Lin,*** 2009, p. 372.

[19] Whether and in what way such a far-reaching theoretical-philosophical framework can be created has been a debate between representatives of the 'egalitarian' human rights tradition since the October Revolution at the latest. One of the most outstanding representatives of this tradition is Ernst Bloch, who in his work Natural Law and Human Dignity connects human rights in general and human dignity in specific, i.e. the connection of general principles and their concrete historical-social manifestation(s), as a prerequisite for promoting a just world. Such is then "human dignity … […] … not possible without the case of human rights" or "with economic priority we find humanistic primacy". ***Dennis J. Schmidt,*** 1996, Translator's Introduction: In the Spirit of Bloch. In: Ernst Bloch, Natural Law and Human Dignity. Cambridge, Massachusetts/London, England: MIT Press (third printing), p. xi.

in 1648. Accordingly, the originally very broad conception of national sovereignty, which grants the states almost limitless legal scope for political action, is restricted.[20] In the further course, universal sets of rules are to be established, the aim of which is to create international standards for the living and working conditions of global humanity. With advancing globalization since the 1990s, however, this universal *right to justice* has become more and more obsolete and has been relativized in the factual validity of a large number of specific legal sub-regulations (such as the law on foreigners as an exceptional right that stands outside of liberal civil legal norms).

The steps towards the aforementioned universal regulations were decisively prepared by important developments. One is characterized by the strong push, particularly by the United States of America, to stabilize the hegemony of the capitalist world system as a result of the new world order after World War II. Related to this is the systemic conflict that began in the late 1940s and continued until the early 1990s between the socialist vision structured and thus also dominated by the Soviet Union and the concept of the "free world", led by the USA. This bi-polar world order and its manifestation in the Cold War was challenged by large streams of refugees as a result of the Second World War: migration movements in which hundreds of thousands of people—including forced labourers employed in the fascist war economy and those liberated from the concentration camps—had to be resettled in new homes. From a human rights perspective, this was accompanied by practical political attempts to (re)structure the socio-political order in the late 1940s and early 1950s, which took place on the basis of political and legal regulations such as the Geneva Convention. This 1951 convention[21] marks an important point in the obligation of states to protect refugees from persecution. Along with this, the leeway for a purely national approach was restricted in favour of universal criteria. A development that began in the seventeenth century found its first major conclusion here. At present, precisely this tension between the competences of the nation states and their universal-global guidelines for action is one of the main areas of concern with human rights.

The migration movements listed above as a result of the Second World War are just one of the countless events that humanity was confronted with after 1945 in the form of violence and destruction in all areas of life on an unprecedented scale.

[20] ***Twiss,*** 2004, p. 52.

[21] For the history, the content(s) and the modifications of this convention visit the website of the UNHCR: https://www.unhcr.org/1951-refugee-convention.html (Accessed July 25, 2022).

In the end, 70 million people died as victims of terror and war policies initiated by fascist Germany and its vassal states in Europe and the Far East. Against this background and even earlier against the background of the First World War, the founding of the League of Nations in 1919 and later the United Nations in October 1945 were the first institutional attempts to formulate formal legal mechanisms that were intended to ensure that something like this never happened again would; furthermore, attempts were made to firmly anchor the principle of national sovereignty. The aim of all these developments is the construction of binding domestic legal norms and regulations as well as their practical implementation, anchored in the framework of a general human rights discourse. The manifold ruptures and discontinuities, for example in the above-mentioned debate about human dignity and its different views, as well as the systemic conflicts after 1945, point to an ideological layer that is inherent in this discourse and makes it difficult to formulate and implement generally valid and accepted human rights norms. In a bi-polar world, it was associated with almost insurmountable obstacles to "maintain a real interest in the universality of human rights".[22] For the current political and social debates on the relationship between social order and individual freedom and on that of authoritarian political structures and social participation, this could still manifest itself as a step backwards. Once again, it seems necessary to create a global consensus on the content and provisions of human rights and their legal norms.

With the acceleration and intensification of globalization processes, in close connection with the dissolution of the socialist bloc under the leadership of the Soviet Union and the parallel dissolution of a very specific political culture, a second, political-ideological, level of human rights discourses and practices can be stated. While on the one hand the thesis of the end of history (Fukujama) has been proclaimed since then, a general core of the debate on human rights remains, which emphasizes the search for a new world order. In the context of globalization we can increasingly observe (again) attempts to construct a "new" free world, in the sense of creating the notion of "freedom and democracy" through information production and dissemination, often with interventionist politics, complemented by the creation of a consensual public—a strategy very similar to that of Gramsci and his reference to the "two wars". The initial situation can be seen in the fact that the principle of the nation state or nationality has experienced a tendency to decline over the past thirty years and the political

[22] ***Wolfgang Huber,*** 1994, *Menschenwürde und Menschenrechte als Grundelemente einer zukünftigen internationalen Ordnung [Human dignity and human rights as basic elements of a future international order]*. Leviathan, March 1994, Vol. 22. No. 1, p. 49.

economy has also taken on new forms: on the one hand, global hegemony has allowed—and even demanded—unbridled capitalist activity,[23] while on the other hand creating the same globalization tendencies are the prerequisites which enabled the countries of the Global South to take a big step towards a reorganization of international relations. All of this has resulted in a fundamental shift in the global social structure, the most significant manifestation of which has been the emergence of information societies in which production, consumption, distribution and exchange have been redefined, redefined and revalued. In this "new" political-ideological framework of the globalized world, the current issue is to soften material injustice via a redefinition of rights, which—as already mentioned above—reconstitutes their social and political reference. Of course, economic aspects are part of society and politics, as these largely determine the extent of material inequality, which has worsened since the beginning of the corona pandemic. In this context, the current human rights debate is being restructured from two sides: one concerns the economy and, within this framework, the reinterpretation of use and exchange value, as well as the redefinition of the role and function of finance capital in the globalized world; of greater relevance in the current context is the determination of people as "human capital", not least as a result of the changed role of the state: while its power is by no means dwindling, we find different mechanisms of privatization, in the sense that private operators take on formerly statutory tasks: for example, security services are increasingly taking on border control and looking after public spaces; education and training, but also legally regulated processes such as legislation are now increasingly (quasi) privatized. These globalization tendencies are closely intertwined with the human rights issue in theoretical and practical terms, as well as in its philosophical-theoretical, political-social, legal, economic and cultural dimensions.

2 Origins of the Idea of Human Rights

2.1 The Determinants of Human Rights

Despite the above-mentioned ambivalences and distortions inherent in human rights thinking, the human rights narrative has always been largely presented as a consensual concept in terms of its value and content. Those who argue that

[23] For a more in-depth look at the topic see also: ***Thomas Pogge,*** 2002, World Poverty and Human Rights. Cosmopolitan Responsibilities and Reforms. Cambridge: Polity Press in association with Blackwell Publishers.

human rights are universal and inalienable, and that every human being is born free and equal, do so on the assumption that a universally accepted "truth" is being expressed in this way. Insofar as this assumption deals with the question of the *nature* of human rights, such a consensus is of constructive significance to the extent that on this basis, especially after 1945, the necessity was seen and generally recognized to implement human rights as a structuring principle of coexistence. In other words, a "worldwide appeal to human rights"[24] has taken place, which at least enables further worldwide cooperation in this area, even if this "common in the dispute between world powers and ideologies"[25] is repeatedly called into question. However, there are differences with regard to the assessment of the significance of material, on the one hand, and philosophical-theoretical formation conditions, on the other hand, of the idea of human rights. These differences will be discussed further below. First of all, however, it seems necessary to draw a framework within which the—in the most general sense—*nature of human rights in the most general sense* is to be defined. In this context, the term *nature* should be understood to mean the definition of human rights, which also includes their location in various areas such as the legal system and international institutional networks. Ryffel (1984) speaks here about a "consistent idea",[26] which manifests itself in four points.

The first point relates to human rights as a legal conglomerate belonging to the human species per se. Reference has already been made earlier, in connection with the concept of human dignity, but it is treated there in its ambivalence within the historical continuity/discontinuity. However, the consensual aspect should be emphasized here, which will then form one of the main foundations of the systematic philosophical-theoretical treatise on the idea of human rights since antiquity.

The second point relates to the integration of the idea of universality and inalienability as an ethical principle in positive law, also due to the need to adapt to social, political, economic and cultural changes since early Renaissance humanism. This adaptation also took place beforehand on the basis of Roman law, through a *politicization* of natural law and its incorporation into Roman constitutional law. The extent to which this *lucidification* of the human rights concept

[24] ***Hans Ryffel,*** 1984, *Philosophische Wurzeln der Menschenrechte [Philosophical Roots of Human Rights]*. Archiv für Rechts- und Sozialphilosophie (ARSP), Vol. 70. No. 3, p. 400.

[25] Ibid.

[26] Ibid.

present in natural law with its very early, albeit still moral, understanding of freedom, equality and fraternity modified its oppositional character into a status quo attitude will be dealt with later when referring to the interaction between theoretical conceptualization and material development.

The third point refers to the location and manifestation of human rights in national and international regulations. The main aspect here is the implementation of legal norms in people's living and working environments, which in the current world order is (still) the task of the nation states, despite the diversity of international institutional associations. Human rights are referred to as basic rights within the framework of national constitutions. The more far-reaching concept of human rights is thus reserved for a universal, in a certain respect also utopian-visionary view, as an idea of entire mankind. The philosophical-theoretical origin is also based on this universality. In a way, a certain kind of constructive productivity is immanent to this limitation, since in this way the motivating thrust of the utopian meaning of human rights is retained.

Closely related to the previous point is, fourth, the definition of human rights as civil rights, which are in fact reserved for citizens of a certain state. On the one hand, this limitation is understandable from a historical and social point of view, since the establishment of civic relationships is also the result of social struggles, which have been closely linked to the replacement of traditional relationships of belonging since the late Middle Ages and Renaissance humanism. In this way, civil rights certainly have a special status, also because these struggles are closely linked to the development of the principle that everyone is equal before the law. On the other hand, the universal principle that everyone has inalienable rights, regardless of their nationality and place of residence, is violated here. The debates on this point were and are a constant (controversial) point in the human rights discourse. As explained above, this debate is being conducted in particular within the framework of legislation on foreigners and within the framework of the question of the implementation of human rights.

Overall, there is a far-reaching consensus in the global institutional-legal debate on the human rights determinants outlined above. However, there is dissent above all in the theoretical debate between representatives of the various scientific disciplines, which points to different political and ideological localizations, to different regional traditional patterns, and then ultimately to different concepts of terminology. The history of human rights has always been defined by divergences of this kind; at least, however, there is currently an awareness of the need for global agreements, even if these threaten to break down from time to time, especially in times of crisis.

2.2 The Moral-Universal (Re)Conceptualization of the Image of Man

The image of man based on the appreciation of his mere existence as a sufficient reason to respect him was first systematically worked out as part of the theory of natural law in Greek and Roman antiquity. This "first epoch"[27] of human rights thinking was later developed further in this sense that "Graeco-Roman thinking and Christian elements meet and finally lead to a Stoic-Christian justification of natural law".[28] In this way, a historically very early philosophical-ethical alternative to the existing structures of slave-owning societies is being drafted. Of course, such beginnings by no means appear on the stage of political thought as a tradition of thinking that overturns existing living and working conditions. These conceptualizations are not yet linked to social dynamics, i.e. the latter are not yet able to develop socio-political driving forces. The socialization of the idea of human rights is still rudimentary, and definitions remain tied to the philosophical-theoretical level. The moral sense for a better world, the most radical manifestation of which is the Sophists' rejection of slavery,[29] is not yet capable of being transformative. However, later formulations, for example of the Enlightenment philosophy, that reason is the measure of all things, further still that all "epochs are to be brought before the judgment seat of reason",[30] are already conceptually anticipated in Plato and Aristo. According to this, only laws that "can be proven to be the result of reason"[31] are binding. Cicero, who according to widespread opinion was the first to introduce the concept of *dignity* into the human rights debate,[32] defines it as the result of reason. The latter in turn forms the decisive difference between man and animal, between man and the beast.[33] When viewed

[27] ***Wilhelm Ernst,*** 1984, *Ursprung und Entwicklung der Menschenrechte in Geschichte und Gegenwart [Origin and Development of Human Rights in the Past and Present]*. Gregorianum, Vol. 65, No 2/3, p. 232.

[28] Ibid.

[29] Ibid.

[30] https://www.staatslexikon-online.de/Lexikon/Geschichte,Geschichtsphilosophie (Accessed July 25, 2022).

[31] ***Ernst,*** 1984, p. 233.

[32] ***David Luban,*** 2015, Human Right Pragmatism and Human Dignity. In: ***Rowan Craft/S. Matthew Liao/Massimo Renzo*** (eds.), Philosophical Foundations of Human Rights. Oxford: Oxford University Press, p. 274.

[33] Ibid. And in particular footnote 28.

positively, these approaches—even if their conceptual interpretations harbour the danger of generality and abstractness—do not reveal the vision of a universal implementation and thus avoid a positivistic legal interpretation that is too restrictive of what constitutes our inalienable human existence.

In all of these early human rights conceptualizations, equality plays no part. Up until the sixteenth century, their thematization was largely reserved for the sphere of artistic production. Morus' *Utopia* and Campanella's *City of the Sun* deal with the question of equality within the framework of social and political ideas of (re)ordering. Philosophical-theoretical conceptualizations of the human being *as such*, which had previously dominated, are now prescribed in social reality, which represents a paradigmatic change in the history of the origins of the idea of human rights. This will be dealt with explicitly further below.

The path to this change is also reflected in concepts such as *universal individualism*, a kind of very early understanding of world citizenship. This idea, already formulated in antiquity, especially in the Graeco-Roman Stoa,[34] was developed further by Dante centuries later, in the time of Renaissance humanism which had prepared the actual Renaissance, in the form of his reflections on a world government. It may also be at this time that the idea of human rights also led to far-reaching material changes or, conversely, material changes began to integrate the idea of human rights into institutional systems.

2.3 Early Attempts at Locating the Idea of Human Rights in the Socio-Political and Legal Sphere

Without doubt, the (re)conceptualization of human rights thought discussed above had a formative character for the implementation of human rights in the differentiated sets of rules of early and contemporary modernity. The prehistory of these sets of rules can be found in the Roman state and legal constitution. Natural law in its oppositional nature, but nonetheless—as explained above—not yet going beyond ethical protest,[35] is incorporated into Roman constitutional law. In the sense that Cicero "makes natural law the criterion … [… for the constitution

[34] ***Hasso Hofmann,*** 2001, *Menschenrechte und Demokratie—oder: was man von Chrysipp lernen kann [Human Rights and Democracy—or: what you can learn from Chrysipp]*. JuristenZeitung, 5. Januar, 56. Jahrgang, Nr. 1, p. 2.

[35] Concerning this aspect see ***Ernst Bloch,*** 1996, Natural Law and Human Dignity, and in particular Chapter 4: The First Opponents of Institutions, pp. 7–9.

…] […and …] for right and law.[36] The humanitarian narrative of the utopia of a society of the free and equal in the early doctrine of natural law now becomes part of the political-ideological status quo and thus loses—on the one hand—its potential transformative explosive power, but on the other hand fixes the "comprehensive idea of humanity"[37] of the Stoa, which extends "the basic demands for justice and philanthropy … […also to …] slaves and barbarians"[38] in a set of rules and thus makes it somehow questionable. The material necessity for such an institutional localization of the idea of human rights is based on the fact that the Roman Empire contained many different groups of people on its soil who had to be held together by a common narrative of human dignity and legal equality. This functionalization of the idea of human rights points to a very early origin of modernity in the Roman Empire, without us being fully within it historically. The incorporation of the idea of human rights into the socio-political and legal sphere, as described above, is a paradigm shift in such a way that conditional theory and practice, idea and material necessity begin to interlock. Which ultimately plays an essential role for the important point of the implementation of human rights. This history of intertwining is nevertheless an appropriation of the idea of human rights (or at least an attempt at appropriation). This is also the case today, especially when particular interests call into question the universality of human rights, or when human rights are determined by regional or cultural particularities. This contradictory side of the human rights discourse—described above as ambivalence—is and remains one of the central points within the ongoing debate about human rights. If you look at it from the constructive side, you can see that the more clearly and pointedly these ambivalences are expressed or brought to light, the easier it is to develop strategies to counteract them. At this point, the author reserves the right to call this the *dialectics* of the idea of human rights.

Following the modification of the idea of human rights by Cicero and its functionalization within the Roman state apparatus, beginning in the third century, with the partial assimilation of the doctrine of natural law into the teaching of the apostles, the connection of the idea of humanity with Roman state and legal

[36] ***Jürgen Blänsdorf,*** 1976, *Griechische und römische Elemente in Ciceros Rechtstheorie [Greek and Roman Elements in Cicero's Theory of Law]*. Würzburger Jahrbücher für die Altertumswissenschaft, Vol. 2, p. 143.

[37] ***Haratsch,*** 2010, p. 14; quoting ***Hans Joachim Störig,*** 2002, Kleine Weltgeschichte der Philosophie. p. 219, footnote 11, 3rd edition, Frankfurt/M.: Fischer Taschenbuchverlag.

[38] ***Haratsch,*** 2010, p. 14; refering to: ***Hofmann,*** 2001, p. 1.

practice came to their graduation.[39] At this point it should be kept in mind that the originally Greek and also later Hellenic-Roman natural law of the Stoics was built on a secular foundation. The cosmopolitan kingdom of natural law was on the one hand a philosophical-theoretical construct, a historical speculation so to speak, but on the other hand this kingdom was originally assigned to the material world, quite different from the later Christian modified natural law doctrine of Augustine, for example. For example, Roman law attempted to formulate criteria for establishing an orderly socio-political order with regard to rights and duties, for setting limits on the power of enforcement and, in general, for determining the relationship between the individual and It is in the nature of things that the impact(s) of these early conceptualizations on daily life has not yet come to fruition; the social practice of individuals remained largely unaffected by this idea.

The acceptance of human rights as a real social value and their transformation into a universal reference point for the socio-political order has only been achieved at the end of long-lasting social and political dynamics together with centuries of material changes as a result of painful efforts. However, it is possible to put this fight and the gains made after it into a conceptual framework, which is what we intend to do with this.

It was argued above that the Stoic secular natural law came to its end with and after the rise of Christianity. However, what was continued and had to be continued due to material changes was the still existing need to incorporate certain image determinations of man systematically determined by natural law into one's own thought systems. Thus the original natural law remained in the determination of what man is and is to have, what his position in the material (and as far as religious interpretations are concerned: spiritual) world is and is, reference, and that to this day.

Thus, in his dualistic doctrine of the *lex aeterna* (the eternal world of God) and the *lex naturalis* (the natural world), Augustine adopts concepts from the Stoics. But for him, the stoic (of course not yet to be read in the sense of monotheism; author's note) "divine world reason" is no longer the reason for all things, but God himself.[40] And he also conveys to people the image of man as a species. A universality limited to creation, which spiritualizes human nature, whereby the monopoly of definition of the divine ground is handed over to the church leaders. Such a human right continues in an even more explicit way the political-ideological character that has been immanent to natural law since it was located in the Roman state and legal system.

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[39] ***Hofmann,*** 2001, p. 2.

[40] ***Ernst,*** 1984, p. 236.

As a result of the social, political, economic, and cultural changes that occurred during the thirteenth century, Christian believers began to reinterpret natural law concepts of human rights. In this context, Aquinas reform efforts are focused on three important issues: human freedom and dignity (homo est naturaliter liber et propter se ipsum existents)[41] in their philosophical-theoretical dimension, freedom rights of property, the person and life, and the right of resistance. According to Ernst 1984, "the theologically based attempts at legitimation are … […] … decisive for this entire period of Christianity. […] But the thought of the equality of all people before God had hardly any influence on the real social conditions at this time."[42] They are attempts to adapt to the changing material conditions in which, in the course of the rise of the early European bourgeoisie, property, for example, increasingly takes on a constitutive value in sociopolitical life.

In a certain way—in connection with the topic of secularism—Aquinas already made a necessary and well-developed mental separation of religion and state. In chronological terms, however, this development can be traced back to the Investiture Controversy (1057–1122). The all-encompassing proclaimed Christian unity of the universe in unity with the far-reaching dominance of religious traditions of thought was shaken during this period, later continuing in the anthropocentric thought systems of Renaissance philosophy and the incipient materialism of Enlightenment thinkers such as Thomas Hobbes. Structures are beginning to assert themselves in which the individual (the later citizen!) is granted the right to profess a religion or not. The principle of tolerance, freedom of conscience and freedom of religion is outlined here as civil rights introduced in later legal regulations. The Edict of Nantes of 1598 represents a very early attempt at this; in it the Huguenots were assured of these civil rights. Another very early set of rules that opens the door for certain population groups to participate in political decision-making processes and guarantees freedom rights, thus regulating class relations and placing them on a legal basis, is the English Magna Carta of 1215.[43]

[41] Ibid, p. 237.

[42] Ibid.

[43] Later sets of rules are the English Bill of Rights of 1689 and the American Bill of Rights of Virginia of 1776, which served as models for the French Declaration of the Rights of Man and of the Citizen of 1789. But even with these, large groups of people, such as women or residents of European colonies, were excluded from the rights to freedom.

See also: ***Corinne Wohlgensinger,*** 2014, Behinderung und Menschenrechte: Ein Verhältnis auf dem Prüfstand [Disability and Human Rights: A Relationship under Scrutiny]. Leverkusen: Budrich UniPress, pp. 20–21.

These rights, which were determined in early sets of rules, are not yet described as "personal liberties" by Ernst, but as "corporate rights", i.e. "concrete freedoms of individual strata and groups".[44]

2.4 The Concept of Human Rights in Modern Times

The locations listed above represent balancing acts that seek to combine universal provisions of human rights and their implementation both in social life and in legal regulations. These localizations were neither significant in a practical sense, nor did they have a liberal and egalitarian character in society as a whole. With the development of modern humanism, this connection becomes more visible. It is possible to trace the origins of systematic modern human rights thinking as an expression of both the need for philosophical-theoretical conceptualization and the demand for social practice to universal Erasmusian humanism and the Spanish practical thinking of the sixteenth century Golden Age.[45] The ideas of the humanist thinker Erasmus enabled Spanish theorists to analyse and critically question the new conditions that arose with the discovery of the American continent from a human rights perspective. Erasmus' influence goes to two important new elements in his thinking. One relates to the question of how a "Christian" should live "without becoming entangled in the meshes of excessive ritual worship".[46] The second important element of Erasmus humanism is his concept of peace, "derived immediately from his espousal of religious tolerance and evangelical charity to be practiced towards all peoples".[47] This is the beginning of a concept of human rights that seeks to combine descriptive and analytical definitions of the image of man with future projections for a free, egalitarian order. This now goes beyond the state and legal localization level and designs concrete models of

[44] For this topic see ***Ernst,*** 1984, and in particular Chapter 5: Korporative Rechte der alteuropäischen Gesellschaft als Vorläufer der Menschenrechte [Corporate Rights of the Old European Society as Precursors of Human Rights], pp. 237–238.

[45] "The Spanish Golden Age (*Siglo de Oro* in Spanish) was a period of high artistic activity and achievement that lasted from about 1580 to 1680. During this time period, El Greco and Velázquez painted their masterpieces, and Cervantes wrote his famous, satirical novel Don Quixote.".
Source: https://www.nps.gov/cham/planyourvisit/spanish-golden-age.htm

[46] ***Rudolph Schevill,*** 1939, *Erasmus and Spain*. Hispanic Review, Vol. 7, No. 2, p. 96.

[47] Ibid.

new forms of living and working together. Erasmus' approach to different political systems such as monarchy or the republic is the basis for such models. His political preference crystallizes on the basis of his *respublica* interpretation. His conception of the state, which was already subsumed under this term by Cicero in the Roman Republic, has the content that the state can be led by a prince, but ultimately belongs to the people, and that political leadership can only then become a true "public affairs"[48] in this way. The Dominican and Jesuit priests, influenced by these ideas, in the period of the Spanish conquest of Latin America in the sixteenth century, counted the members of indigenous peoples among the people.

The Spanish invasion marks the beginning of the massive destruction of civilizations, annihilation of indigenous peoples, exploitation of human labour and natural wealth of Latin America. On the other hand, certain clerics, particularly of the Jesuit and Dominican sects, have opposed this policy of the Spanish kingdom, trying to combine consistent theoretical efforts with practical considerations. According to Bartolomé de Las Casas, it is natural characteristics such as reason and sociality that distinguish man, who is a creation of God, from other beings. These intelligent and social creatures have been born free since the dawn of mankind. Freedom is the most basic human right, so the Spanish king must order the liberation of all enslaved indigenous peoples. This idea culminated in Las Casas' idea that "the harmonization of the recognition of the Indian religious freedom with the Jesuan commission for the mission […] can only succeed through a peaceful proclamation of the Christian faith, namely "through the conviction of the understanding with reason, and by the gentle enticement and encouragement of the will."[49] Other missionaries acted directly, establishing settlements called Reduction or Mission where the locals could live in safety.[50] Some even took up arms to protect these settlements from the attacks of the Spanish conquerors, even at the risk of being excommunicated. It is precisely this tension between material conditions and the effort to overcome these conditions in order to integrate human rights ideas into social and political structures that is meant by social and political dynamics.

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[48] ***Marcos Eduardo Melo dos Santos/Weber Suhett de Oliveira,*** 2019, *State, consensus and legitimacy in the Political Philosophy of Erasmus of Rotterdam*. Revista Portuguesa de Filosofia. T. 75, Fasc. 3, Teorias Politicas Medievais/Medieval Political Theories, p. 1913.

[49] ***Matthias Gillner,*** 1989, *Bartolomé de las Casas und die Menschenrechte [Bartolomé de las Casas and Human Rights]*. Jahrbuch für Christliche Sozialwissenschaften 39, p. 155.

[50] Centuries later, then under completely different socio-political conditions, similar experiments of free and equal coexistence and work were put into practice by utopian socialists like Robert Owen.

Later efforts can be identified under the heading of legal and political equality, which came to the fore in early classical political liberalism. In John Locke's political philosophy, as a modified form of natural law, the individual is born free and equal; it is this individual who from now on is granted the right and competence to build up the state and to continuously develop it further—on the basis of reason and experience. Divine conceptions of the state are replaced by an understanding of the state as a functional unit. Here you can already see the quintessence of classical political liberalism, according to which the artificial, the created, is the natural. The idea of the working creative person, the *homo faber* of the pre-Renaissance and Renaissance culminates here in the concept of *homo economicus*. From now on, the work of art, the state and the world itself is the work of man, and with it his idea of himself as a rational being endowed with inalienable rights. At this point, however, it should be emphasized that John Locke deals with the freedom of the individual in particular in the context of property rights, which is not particularly surprising since the social carrier of modern secular-anthropocentric ideas since the early or pre-Renaissance has been the early European bourgeoisie whose rise was based on their property-based economic power. In this regard, Aquinas had already emphasized the importance of property as a constitutive element of the political order, as explained above. Even more than this tension between freedom and property, which is nowadays still making it difficult to create humane conditions, there is another tension that is worth mentioning in Locke's political philosophy, namely that between freedom and order. In contrast to the contemporary discourse on civil society as the sphere of a state-free society from which the democratic struggle against the authoritarian and monolithic state is to be waged, in Locke the state to be created via contract is the guarantor of civil liberties. According to Locke, the state-free sphere of society mentioned above does not exist. Locke's civil society is a *Bürgergesellschaft*[51] in which the state is a socially created appendage, but without whom 'nothing works'. One creates the state, but at the same time subordinates oneself to it to a maximum extent. In Thomas Hobbe's political philosophy, this ambivalent relationship is worked out even more clearly in favor of state power. Hobbes justifies this with the view, which seems paradoxical nowadays, that internal politics

[51] The distinction between civil society and the citizens' society (bürgerliche Gesellschaft) is not reflected in English language, which might result in perception difficulties when it comes to translations. Translating Hegels' *Bürgerliche Gesellschaft* into civil society immediately brings into mind the contemporary use of the term civil society in Political Science. However, this is not what Hegel meant with *Bürgerliche Gesellschaft*.

could only "achieve peace if their feuding citizens empowered the state to rule."[52] Thus, it was important "to empower the state, not to limit it".[53] At this point, the political class character of the modern thought traditions, which have hitherto been listed in the broadest sense as human rights ideas, comes to the fore. Moyn expresses this situation in the following words: "And one clear motivation for this act of empowerment was that states of the era were, aside from providing disciplinary pacification in a time of civil war at home, pursuing unprecedented colonization of worlds elsewhere."[54]

In some texts on human rights, this ambivalence is interpreted in such a way that the beginning of statehood after the democratic revolutions in America and France both promoted and negated the "possibility of twentieth-century human rights doctrines".[55] Above, this element of non-simultaneous development of the idea of human rights was called the *dialectics* of the idea of human rights.

2.5 Political and Legal Rights vs. Social Rights: Tension and Chance

The philosophical-theoretical conceptions of human rights presented so far since antiquity and their incorporation into legal regulations have entered a qualitatively new phase since the French Revolution,[56] manifesting themselves in debates about the relationship between the individual and the state as a legal relationship. Using Hobbes and Lockes as an example, it was shown above that this

[52] ***Samuel Moyn,*** 2010, The Last Utopia. Human Rights in History. Cambridge Masschussetts: Harvard University Press, p. 23.

[53] Ibid.

[54] Ibid, pp. 23–24.
Moyn's choice of words refers to texts by authors such as Tuck, Pagden and Ivision:
Richard Tuck, 1999, The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant. Oxford: Clarendon Press.
Anthony Pagden, 2003, *Human Rights, Natural Rights and Europe's Imperial Legacy*, *Political Theory* 31, 2 (2003): pp. 171–99.
Duncan Ivison, 2006, The Nature of Rights and the History of Empire. In: David Armitage (ed.), British Political Thought in History, Literature, and Theory, 1500–1800. Cambridge: Cambridge University Press.

[55] ***Moyn,*** 2010, p. 23.

[56] Ibid, p. 34.

is by no means new in the history of human rights thinking. What is new in the nineteenth century is the complementation with the *social question*, which since the 1830s at the latest in the course of the national and international organization of the working class has represented a central driving force for shaping society. Thus, the liberal notion of participatory (positive) and defensive (negative) rights as an issue of liberty was expanded to include social rights as an issue of equality. As already noted in the historical-theoretical outline of human rights, the idea of human rights was integrated into the concrete living and working conditions of the population, became embedded in the conception of civil and fundamental rights. And in such a way that this new political style began to incorporate "the language of social security based on citizenship".[57] Legal inclusion as legally and politically free citizens within the framework of civic positioning in the new nation states could only make sense in combination with social equality. The idea of equality in the utopian novels of the Renaissance already mentioned is now finding its way into a new pre-Marxist political thinking. Last-generation utopian French socialist Charles Fourier and Briton John Thelwall "tried to extend natural rights to work and income".[58] The concept of work was added to the concept of human rights. The European revolutions of the 1840s, especially those in France, proclaimed the right to work (often also in the very contemporary-sounding formulation as satisfactory work!; Author's note). In this context, the utopian socialist Victor Considerant emphasizes the priority of social over political rights.[59] Although these egalitarian human rights provisions are still based on natural law thinking, they began to be re-evaluated. Fourier wrote in this regard in 1806 "By these words 'natural rights,' I do not mean the chimeras known as 'liberty' and 'equality.' … Why does philosophy jest with these poor creatures by offering them the rights of sovereignty when they demand only the rights of servitude, and the right to work for the pleasure of the idle?"[60] From these explanations it

[57] Ibid.

[58] Ibid, pp. 34 ff.
Refering to: ***Charles Fourier,*** The Right to Work Denied. In: ***Jonathan Beecher/Richard Bienvenu*** (eds. and. trans.), The Utopian Vision of Charles Fourier: Work, Love and Passionate Attraction, Boston: Beacon Press, 1971, p. 137. On John Thelwall, see: ***Gregory Claeys,*** 2007, The French Revolution Debate in Britain: The Origins of Modern Politics. New York: Red Globe Press (RGP) and Bloomsbury.

[59] Ibid, Refering to ***Jonathan Beecher,*** 2001, Victor Considerant and the Rise and Fall of French Romantic Socialism, p. 143.

[60] Ibid, p. 35. Refering to ***Beecher/Bienvenu,*** (1971).

becomes clear that legally anchored provisions of the relationship between the individual and the state, that is to say civic relations, for which rationalization of political and legal relations and for the introduction of criteria in the legal treatment of citizens are important; nevertheless, they "often do not represent an adequate mechanism for protecting the individual from a repressive or authoritarian state".[61] The ambivalence of the idea of human rights and the difficulty of using it as a regulatory instrument in a free and egalitarian order prompted many social scientists who joined the human rights debate after the philosophers and legal scholars in the second half of the nineteenth century to develop a sceptical view based on the assumption that a general definition of human rights is not possible without a basic "universalistic human ontology".[62] The interpretation of the human rights question in the early workers' movement, based on the criticism that concrete living and working conditions were not included, is placed on a scientific basis here. What has begun to be concretely criticized is the understanding in liberal teaching, that the principle of legal equality is also understood as an element in the realization of natural rights and freedoms. However, as a result of the notes above, it would not be appropriate to understand the concept of social equality, which is supported by the principle of equal opportunities in addition to legal equality, as an expression of "absolute" equality. Of course, the principle of equality can by no means be separated from the principle of freedom, but the difficult thing is to balance out their mutual meanings. Thus, the principle of equality before the law is not sufficient to guarantee freedom. It is not possible to speak about the existence of freedom if it is not accessible to all. On the other hand, the principle of equality includes the "right to be different". This right means that no one who thinks differently from others, has different tastes, beliefs, behaves differently, etc. will not be judged or punished; it can also be referred to as a "ban on discrimination". In a democratic society, nobody should be treated differently because they have values outside of generally accepted values, behave outside of generally accepted social behaviour, have beliefs other than generally accepted religious or political beliefs.

I think that these explanations of the historical development of the concept of human rights and its possible present-day content have given a first idea of the extent to which human rights are intertwined with almost all areas of everyday life. Human rights have arisen in history in the search for solutions to the

[61] ***Bryan S. Turner,*** 1993, *Outline of a Theory of Human Rights*. Sociology, Vol. 27, No. 3, p. 502.

[62] Ibid, p. 496.

concrete demands of human life and have developed in parallel with societal developments. Nowadays, people of modern society enjoy a right and a freedom in almost every moment of their daily life and come into contact with the concept of human rights in almost every action and behavior they perform.

The thesis that human rights are universal expresses that the essence of human rights cannot be changed or interpreted differently depending on culture, belief and historical experience. Otherwise that would mean, that people living in India will have different rights, those living in Iran will have different rights, and those living in Germany will have different rights; and this because of the history, culture, language, religion etc. of these countries. There may be differences between these countries in terms of recognizing, realizing and respecting human rights in practice. These differences are the result of very different development processes in the different countries, but this does not change the fact that human rights are universal and must be implemented in all regions of the world equally, with the same content and at the same level. It is not possible to speak of a concept called human rights without imagining a concept of human rights that does not contain any element of universality.

Despite all the above-mentioned incorporations into the socio-political and legal sphere, the concept of human rights remained largely theoretical until World War II and could not be put into practice. However, mechanisms to protect human rights began to be established at the global level with the establishment of the United Nations Organization in 1945, and at the regional level with the establishment of the European Council in 1949. These new protective mechanisms fulfil a double function, on the one hand to eliminate the problems that arise in practice in individual states structured according to the principle of the "constitutional state" and on the other hand to realize the universality of human rights.

These new mechanisms to protect human rights are called supranational. The term "supranational" implies that human rights cannot be restricted by the principle of "national sovereignty". In the twenty-first century, human rights are not only protected at the national level, but also by supranational bodies. It is generally accepted that "non-interference in internal affairs", which is still one of the main tenets of international law, loses its validity when human rights are violated.

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Human Rights and People of Colour—A Historical View from the South

Krish Chetty and Augustine Hungwe

1 Introduction

The history of the human rights discourse is imbued in Eurocentrism. It is epistemologically and ontologically ideological because it continues to privilege the views, values and priorities of the privileged white male. This acerbic tradition of placing the privileged white male and whiteness at the centre of the human rights discourse has its modern roots in the European Enlightenment. Therefore, the marginalisation of people of colour from the global South in the human rights discourse is both historical and ideological and is still reflected in the letter and spirit of the discourse. This epistemic marginalisation reflects the epistemic racism, ontological capture and epistemic violence deeply embedded in the human rights discourse in relation to the people of colour. Therefore, the socio-economic experiences from post-apartheid South Africa highlighted in this chapter succinctly capture some of the fundamental challenges that are still faced by people of colour in the global South in the post-colonial period.

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2 The History and Ideology of Human Rights

2.1 The European Enlightenment, Race Theories and the Human Rights Discourse

The European Enlightenment did not only give birth to the concept of human rights but also to virulent modern theories of race. Thus, while the doyen of the European Enlightenment, Kant was eruditely extolling the virtues of the European Enlightenment in his seminal essay, *"What is Enlightenment?"*, he was also iniquitously actively developing pestiferous theories of race, essentially making the deleterious intellectual argument as to why non-Europeans, that is, people of colour, especially Africans, were incapable of rational thought and hence incapable of pedantically epistemic engagements.[1] ***Voltaire***, another eulogised thought leader of the European Enlightenment, wrote perspicaciously about freedom of expression and freedom of religion but also banefully argued that Africans were primitive savages[2] with no intelligence and hence incapable of generating any tenable ontological, anthropocentric, metaphysical, pedagogical, methodological and epistemological phrenic frameworks.

The legacy of these mephitic views by ***Voltaire*** and ***Kant***, among other luminaries of the European Enlightenment, raises fundamental questions about the way that the self-proclaimed European Enlightenment has generally been venerated as sacrosanct without profoundly questioning its problematic malignant legacy of race theories and racism, which have had serious implications on how human rights are conceptualised, on who controls the human rights narrative and on who is excluded and not taken seriously in the human rights discourse. The nocuous case for placing the privileged white male at the epicentre of the human rights discourse was made during the European Enlightenment by its intellectual titans ***Kant*** and ***Voltaire***, among others. Compendiously, the fundamental question becomes: has that character of the human rights discourse changed since then and what are the implications of this on the purported universalism of human rights?

Therefore, the European Enlightenment not only laid the foundation for the modern human rights discourse, but it also instituted the epistemic foundation

[1] ***Kant, I***., Observations on the feeling of the Beautiful and the Sublime, translated by ***John. T. Goldthwait***, Berkeley: University of California Press, 1960, p. 110.

[2] ***Voltaire***, *Essai sur les mœurs,* 1756, Tome 1, p. 7.

for acerbic race theories of what became known in the nineteenth century as Scientific Racism and Social Darwinism. Thus, the Westernized epistemic system internalised from its origin, the acetous racist epistemic structures created by the intellectual foundation laid through the epistemicides of the sixteenth century, making these Eurocentric structures of knowledge "commonsensical."[3] This constitutes the caustic epistemic normalisation of the hegemony of the privileged white male in academia in general and in the human rights discourse in particular. Indeed, when the Westernized university transformed in the late eighteenth century from a Christian theological university into the secular Humboldtian university, it used the pestilential Kantian anthropological idea that rationality was embodied in the privileged white man north of the Pyrenees mountains while classifying Black (Africans), Red (Latinos) and Yellow (Asians) people within the realm of the irrational world.[4] Indeed, Locke[5] perniciously argued that skin colour is an essential property in defining humanity. Locke's acetic thinking amounts to the cantankerous view that white skin is equivalent to the essential skin, while the black skin is considered to be less important in defining humanity. In essence, the worthy of existence of the so-called people of colour from the global South was questioned as well as their very humanity. They essentially belonged to the Fanonian "zone of non-being" or to the Dusselian "exteriority."[6]

2.2 An Anatomy of the History and Ideology of Human Rights

Therefore, ***Mutua*** percipiently argues that the human rights movement is neither non-ideological nor post-ideological.[7] Thus, the intonation of universal principles tends to disguise the deeply ideological, political and racial comportment of the

[3] ***Grosfoguel, R***., Human Architecture: *Journal of the Sociology of Self-Knowledge*, XI, Issue 1, Fall 2013, 2013, pp. 73–90 p. 76.

[4] ***Grosfoguel, R***., Human Architecture: *Journal of the Sociology of Self-Knowledge*, XI, Issue 1, Fall 2013, 2013, pp. 73–90, p. 85.

[5] ***Locke, J***., *An Essay Concerning Human Understanding,* Oxford: Oxford London: Heinemann, 1995 [1689], p. 24.

[6] ***Grosfoguel R***., Epistemic Racism/Sexism, Westernized Universities and the Four Genocides/Epistemicides of the Long Sixteenth Century. In: Araújo M., Maeso S.R. (eds) Eurocentrism, Racism and Knowledge. London: Palgrave Macmillan, 2015, p. 82.

[7] ***Mutua, M,*** Human Rights: A Political and Cultural Critique. New York: University of Pennsylvania Press, 2002.

human rights discourse. Indeed, over the last seventy years the international law of human rights has gradually attained an ethical-high status seldom associated with the law of nations. According to ***Mutua***, in the shadow of the Second World War, United Nations member states adopted on December 10, 1948, the Universal Declaration of Human Rights (UDHR), G.A. Res. 217 A(III). U.N. Doc. A/810, at 71 (1948), and with it a cornucopia of norms, processes, and institutions to define, promote, and protect human rights.[8]

Even though the UDHR was adopted without objection by a vote of forty-eight to zero, it was the subject of eight abstentions mainly on ideological grounds imbued in the 'Cold War' era, mostly by the then Eastern Bloc Countries: Byelorussia, Czechoslovakia, Poland, Soviet Union, Ukraine, Yugoslavia, Saudi Arabia and the white minority-ruled apartheid South Africa.[9] It is significant to note that the majority of Western countries who sconceptualised the UDHR had colonies in the global South at that time. Indeed, these colonies, which were predorminantly in Africa and Asia, did not participate in the UDHR's inception. Thus, for example, the French, in spite of the UDHR, the French Declaration of the Rights of Man and of the Citizen, 1789 and their self-proclaimed commitment to the ideals of liberty, equality and fraternity, went on to commit some of the worst atrocities in human history in their colony in Algeria.[10]

Indeed, Western epistemic supremacy persists in the human rights discourse because the history of modern human rights remains Eurocentric in content, context, spirit and letter. Thus, typically, reference is made to Western-centric documents asserting individual rights, such the Magna Carta (1215), the English Bill of Rights (1689), the French Declaration on the Rights of Man and Citizen (1789), and the US Constitution and Bill of Rights (1791) as the written antecedents to many of today's human rights documents.[11] ***Pollis*** and ***Schwab*** sapiently argue that the appliance of the notion of human rights dictated by the experience and philosophy shared only by the Western countries, on a universal level, is not

[8] ***Makau w. Mutua***, The Ideology of Human Rights, 36 Va. J. Int'l L. 589, 1996, pp. 589–657 p. 590.

[9] Makau w. Mutua 1996, pp. 589–657 p. 598.

[10] ***An-Na'im, Abdullahi Ahmed,*** "Problems of Universal Cultural Legitimacy for Human Rights," in ***Abdullahi Ahmed*** An-Na'im and Francis M. Deng (eds.), Human Rights in Africa: Cross-Cultural Perspectives (Washington, DC: Brookings Institution), 1990, p. 40.

[11] ***K. Quashigha***. "Philosophical Bases of Human Rights and the Relation to Africa: A Critique", The Journal of Human Rights, Law and Practice, Vol. 2 No. 1 and 2, November 1992. p. 23.

realistic or even adequate considering the diverse nature and texture of cultural and ideological philosophies which are not necessarily consistent with the intrinsically Western concept.[12]

Therefore, it is imperative to note that the standard Eurocentric theory of human rights is sometimes expediently situated in no context at all and it is kept entirely distinct from the Eurocentric historical and geographical circumstances in which it was constructed. Thus, ***Barreto*** aptly observes that the monolithic Eurocentric human rights theory is usually presented as "the" theory of rights as such, or as the "universal" conception of rights.[13] Having its intellectual ancestry in Medieval ecumenical theology and still presently influential as a cog in the European mind-set and theory, the allegory of universal concepts was pedantically nurtured by the transcendental philosophy of consciousness in its diverse renderings, among others those of ***Descartes***, ***Kant***, ***Hegel*** and ***Husserl***.

Hence, ***Mutua*** meticulously asserts that the human rights discourse incongruously positions itself as the cradle of interminable verities without whichh human civilisation is impossible. ***Mutua*** eloquently argues that,

> "…in fact, the human rights corpus, though well-meaning, is a Eurocentric construct for the reconstitution of non-Western societies and peoples with a set of culturally biased norms and practices."[14]

Indeed, ***Hountondji*** agnostically contends that generally both the exceptionalism and lucidity of Western civilisation is overrated:

> "Europe certainly did not invent human rights, any more than it invented the idea of human dignity."[15]

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[12] Pollis, A and Schwab P, "Human Rights: A Western Construct with Limited Applicability,", Human *Rights: Cultural and Ideological Perspective* (Adamantia Pollis & Peter Schwab eds.) New York: Praeger, 1–18, 1979, p. 2.

[13] ***Barreto, José-Manuel*** (Ed.), *Human Rights from a Third World Perspective: Critique, History and International Law,* London: Cambridge Scholars Publishing, 2013, p. 41.

[14] ***Mutua, M***, *Human Rights: A Political and Cultural Critique*. New York: University of Pennsylvania Press, 2002 p. 53.

[15] ***Hountondji, P. T***. "The Master's Voice – Remarks on the Problem of Human Rights in Africa" In Paul Ricceur (ed). *Philosophical Foundations of Human Rights*, Paris: UNESCO, 1986, p. 318–332, p. 319.

Mapaure judiciously propounds that,

> "…these Western ideas promote the notion that all legal systems, whether unitary or plural, are obliged to conform to all so-called universal standards of human rights."[16]

Hence, ***Ibhawoh*** cogently insists that,

> "…if the emerging universal culture of rights is to develop a taproot in Africa and other non-Western societies in a sustainable way, the association of human rights with Western thought and worldview in the public imagination constitute a hindrance to a deeper knowledge and understanding of the concept."[17]

Thus, ***Marasinghe*** studiously maintains that:

> "It is a popular myth to assume that traditional societies of Africa are devoid of any conception of human rights and that when one refers to human rights, the modern societies of the West are the exclusive custodians of this universal concept."[18]

Thus, ***Agozino***[19] efficaciously asserts that Eurocentrism dominates and distorts the human rights discourse. The assumption is that human rights are Western values with the best architypes of the tradition to be found in Western liberal democratic states based on theoretical and legal-philosophical ideas spawned by the European Enlightenment and by those congenital Western scholars who inherited that tradition. By ignoring, maligning, pillorying and vilifying the global South's interpretation of the human rights discourse, Eurocentrism contributes to the stunting of progressive social thought and asphyxiates the growth of vibrant, alternative intellectual traditions.

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[16] ***Mapaure, C***., Reinvigorating African values for SADC: The relevance of traditional African philosophy of law in a globalising world of competing perspectives, *SADC Law Journal*, Volume 1, 2011 pp. 149–173, p. 170.

[17] ***Ibhawoh, Bonny,*** *Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in African History.* New York: State University of New York Press, 2007 p. 27.

[18] ***Marasinghe, L***. "Traditional Conceptions of Human Rights in Africa" In Claude, E. Welch & Ronald, L. Meltzer (eds) *Human Rights and Development in Africa.* Albany: State University of New York Press, 1984, p. 2.

[19] ***Agozino, B***., Contributions of Africana Scholars to the Theory of Human Rights in Sociology, Theoria & Praxis: *International Journal of Interdisciplinary Thought,* Vol 2, No 1, ISSN: 2291–1286, 2014, p. 94.

As a consequence, ***Bragato*** astutely contends that,

> "…human rights are conventionally claimed as an offspring of culture and political effort in the West, which implies that these rights have little or nothing to do with the history and with the rationality of non-Western peoples."[20]

Indeed, ***Bewaji***[21] persuasively argues that,

> "…when we make a critical examination of the diversity of human beliefs in various parts of the world, it seems clear that even the simplest-looking belief system must be acknowledged to have developed from some form of critical examination of events, things and beliefs."

Thus, ***Abdullahi Ahmed An-Na'im***[22] punctiliously asserts that to be legitimate, the universality of human rights must also rely on the norms and institutions of non-Western cultures, predominantly of people of colour in the global South. Therefore, ***Mutua*** tenaciously argues that due to the inherent absence of global South countries, their intellectual traditions and their cultural paradigms, it was audacious, conceited, impertinent and ethnocentric for the UDHR to refer to itself as the "common standard of achievement for all peoples and all nations."[23] Indeed, despite its defective architecture, the intrinsically Eurocentric UDHR remains the unsatisfactory primary source of generic human rights jurisprudence.

It is important to note that the drafting of the Universal Declaration of Human Rights was assigned to the Human Rights Commission, which then gave the duty to people who were from Western Europe or the Americas or were non-Europeans educated in the West. These people were: ***Rene Cassin*** of France, ***John P. Humphrey*** of Canada, ***Eleanor Roosevelt*** of the United States, ***Hernan Santa Cruz*** of Chile, ***Charles Malik*** of Lebanon, ***P. C. Chang*** of China, and ***Fernand Dehousse*** of Belgium. Although this group appears culturally diverse-three from

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[20] ***Bragato, F***., *Human Rights and Eurocentrism: An Analysis from the Decolonial Studies Perspective, Global Studies Journal,* Volume 5, Issue 3, 2010, pp. 49–56.

[21] ***Bewaji, J. A. I***., Language, culture, science, technology and philosophy, *Journal on African Philosophy*, Vol. 1, No. 1., 2002, pp. 1–19, p. 17.

[22] ***An-Na'im, Abdullahi Ahmed***, "Problems of Universal Cultural Legitimacy for Human Rights," in ***Abdullahi Ahmed An-Na'im*** and ***Francis M. Deng*** (eds.), *Human Rights in Africa: Cross-Cultural Perspectives* (Washington, DC: Brookings Institution), 1990, p. 48.

[23] Makau w. Mutua, 1996, pp. 589–657, p. 596.

the Americas, two Europeans, and two Asians-it was in reality Eurocentric.[24] In essence, this core group of seven was dominated by people of European descent (white people), that is, one European-American, one European-Canadian and two Europeans. So the group of seven people had four white people, one person of Arabic descent (Middle East) and one person of Hispanic/Latio descent (South America) and one person of Asian descent. Signficantly, this group had no person of African descent. Therefore, the group, as is typical in the human rights discourse, was dominated by the privileged white male. It is also important to note that all the UDHR drafters had received their education predorminantly from Western academic institutions.

Indeed, a closer scrutiny of the rights itemised in both the UDHR and the International Covenant on Civil and Political Rights (ICCPR) clearly reflects that both documents, which are considered as the two most significant human rights instruments, are infernal attempts to universalise civil and political rights recognised in self-proclaimed Western liberal democracies.

In essence, a plethora of articles in the Universal Declaration reverberate aspects of the United States Constitution and the jurisprudence of Western European countries such as former colonial powers, France and the Britain. Contextually, ***Mutua*** brilliantly argues that the UDHR prohibits "cruel, inhuman or degrading treatment or punishment;" which strongly resonates with the U.S. Constitution which proscribes the infliction of cruel and unusual punishments.[25] Other similarities include due process protections, speech rights, and privacy.

Mutua meticulously observes that during the drafting of the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both of which were opened for signature in 1966, there was some perceptible influence from the newly independent states of Africa and Asia, though the ICCPR kept its conspicuously Western demeanour. Thus, although the ICESCR is imbued in the trilogy referred to as the International Bill of Rights, it is the least prominent of the three and it has been consigned to the backwoods of the human rights discourse, yet it is the most important for countries from the global South.

The ICCPR replicated, almost literally, with the exception of the right to property, most of the civil and political rights highlighted in the UDHR. The most discernible manifestation of the presence of predorminantly newly independent states of Africa and Asia was the insertion of Article 1, common to both the ICCPR and the ICESCR, on the group right to self-determination.

[24] Makau w. Mutua 1996, pp. 589–657, p. 662.

[25] Makau w. Mutua 1996, pp. 589–657, p. 641.

Indeed, ***Mutua*** asseverately distinguishes four schools of thought in the human rights discourse, namely:

> "(i) conventional doctrinalists, (ii) constitutionalists or conceptualizers, (iii) cultural agnostics or multiculturalists, and (iv) political strategists or instrumentalists."[26]

Despite some differences, these schools of thoughts all subscribe to the notion that there are basic human rights which should be promoted and protected by the state.

Therefore, the core tradition of the human rights movement stems from that strain of Western liberalism which atomises and alienates the singular individual from both the state and the society.[27] According to Outlaw,[28] the Western epistemological paradigm is a complex, multifaceted, projected self-image of the Graeco-Roman or European rational man. The ideas are raised to the level of paradigm through the efforts of the towering figures of Western philosophy, such as ***Hegel*** and ***Kant***, and tries to identify itself with the human essence. In that regard, rationality was linked to Enlightenment which created a self-understanding of reason and progress. It is imperative to note that the construction of the self-image has sources in the works of ***Plato*** and ***Aristotle***, and it is revised and continued by ***Descartes***,[29] ***Kant***[30] and ***Hegel***.[31]

Indeed, the so-called universalist perspective in the human rights discourse is based on European culture, with its roots in the European Enlightenment. Due to the power of epistemic racism, whiteness, white privilege, Eurocentrism and Western hegemony in the human rights discourse, European culture is presented as neutral, universal, normal and the standard. Like whiteness, it is unnamed, unquestioned and normalised.

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[26] Makau w. Mutua 1996, pp. 589–657, p. 650.

[27] ***Sharon Sliwinski,*** "The Childhood of Human Rights: The Kodak on the Congo", *Journal of Visual Culture* 5(3), 2006; p. 16.

[28] ***Outlaw, L.,*** African Philosophy: Deconstructive and Reconstructive Challenges, in ***H.O. Oruka*** (ed.) *Sage Philosophy: Indigenous Thinkers and Modern Debate on African Philosophy,* Leiden: Brill, 1991, pp. 221–245, p. 224.

[29] ***Descartes, R.,*** *Discourse on Method and The Meditations,* London: Penguin, 1998 [1637], p. 68.

[30] ***Kant, I.,*** (1978 [1798]) *Anthropology from a Pragmatic Point of View* (translated by ***M. J. Gregor***), The Hague: Nijhoff, p. 29.

[31] ***Hegel, G.W.F.,*** *Phenomenology of Mind* (translated by ***M. Baillie***), London: ***George Allen*** and Unwin, 1931 [1807], p. 52.

Hence, hiding crucial aspects of their genealogy, the egregious Eurocentric theories of rights afford little or no significance to the history of the relations between slavery, modern empires and colonies and the global South. This predisposition is accompanied by a tendency to give a notoriously unfair weight to the events occurring in Europe. This is the case in ***Hegel's*** philosophical notion of universal history, from which Asia, Africa and the Americas are excluded. Therefore, this contumelious racist Hegelian schema vituperates, calumniates and deprecates people of colour, their culture and their collective history.

Thus, ***Barreto*** diligently contends that,

> "By framing human rights in conceptions of history based exclusively on European milestones, the theory of rights remains within a Eurocentric horizon of understanding."[32]

Hence, having been born out of the experience of bourgeois revolutions, European theories of human rights deal mainly with relations between state and society, or between governments and individuals, thus marginalising and minimising the historically problematic interactions between Western powers and their former colonies in the global South.

Thus, the fact of the matter is that the universalism narrative is cultural relative because it is based historically on European culture. Indeed, Western philosophy pretends to be universal, but it is historically situated and develops values that are specific to Western culture. These values cannot be applicable to all people at all times. ***Asante***[33] conscientiously maintains that the odious unquestioned and unproblematised acceptance of the European perspective as universal should be challenged. This view resonates with ***Grosfoguel's*** assiduous contention that the problem with Western epistemology is that it is imperialist and patriarchal, where one cultural point of view defines what is good for the rest.[34]

So, a more universal position is necessary in the human rights discourse which respects all cultures. Therefore, the universalism vs. cultural relativism debate is

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[32] ***Barreto, José-Manuel*** (Ed.) *Human Rights from a Third World Perspective: Critique, History and International Law,* London: Cambridge Scholars Publishing, 2013, p. 35.

[33] ***Asante, M. K.***, Kemet, *Afrocentricity, and Knowledge.* Trenton, NJ: Africa World Press, 1990, p. 60.

[34] ***Grosfoguel, R.,*** Decolonising Post-Colonial Studies and Paradigms of Political Economy: Transmodernity, Decolonial Thinking and Global Coloniality, Transmodernity: *Journal of Peripheral Cultural Production of the Luso-Hispanic World Vol. 1, No. 1*, ISSN: 2154–1353, e-ISSN: 2154–1361 2011, pp. 1–36, p. 14.

a flagitious epistemic fallacy that privileges European culture, ontology, epistemology over non-European culture. It essentially preserves Western hegemony in the human rights discourse and perpetuates whiteness, epistemic racism and Eurocentrism and the continued domination of the human rights discourse by the privileged white male- a phenomena that has its roots in the very foundation of the human rights genesis in the European Enlightenment. Indeed, Code[35]sees inherent epistemic pathologies in the schema and praxis of Western epistemology in the sense that the epistemological subject has been construed as abstract, ahistorical, universal, disembodied and faceless.

Succinctly, this coloniality of epistemic power is based on a Eurocentric system of knowledge where production of knowledge is assigned to Europeans while people of colour are positioned as uncritical consumers of that knowledge.[36] Hence, any form of knowledge that lies outside this Western framework is contemptuously dismissed as myth. This process results in the institutionalised marginalisation of global South knowledge systems. The use of Western ways of knowledge production is prioritised. This results in the creation and perpetuation of a global ontological, pedagogical and cultural systems that revolve around a Eurocentric hierarchical nexus of centres and margins- with the West placing itself as the centre while the global South is positioned as the margin of knowledge production. This is the essence of ontological capture. These epistemic adumbrations tend to universalise and prioritise knowledge, phenomena and schema from one culture instead of seeing knowledge production as a pluralised configuration.

2.3 The Problem of Epistemic Racism in the Human Rights Discourse

In essence, the vile Western epistemic racism is characterised by the process of rancorously and derisively projecting non-Western epistemologies, ontologies and cosmologies as inferior. Thus, by privileging Western epistemology as the superior form of knowledge and as the only source to define human rights and democracy, this corrosive epistemic racism result in the deprecating disqualification of

[35] ***Code, L.,*** *Epistemic Responsibility.* Hanover, NH: University Press of New England, 1987, p. 24.

[36] ***Quijano, A.,*** *Coloniality of Power, Eurocentrism, and Latin America,* Views from the South 1(3), 2000, pp. 533–580, 535.

non-Western societies as incapable of producing democracy, justice, human rights and scientific knowledge systems. This is grounded in the iniquitous racist essentialist idea that reason and philosophy lie in the West while the global South is the fulcrum of non-rational thinking. This is the toxic epistemic legacy of the European Enlightenment.

Therefore, for ***Spivak***, to commit 'epistemic violence' is to actively obstruct, traduce and undermine non-Western methods or approaches to knowledge.[37] This racist imperialist subjugation of non-Western understanding is an impugning way of constituting the colonial subject solely as a heterogeneous 'Other'. The dominant Western narrative, according to Spivak, is 'palimpsestic': that is, it aims to alter the historical and social native consciousness; to delete all traces of the original and overwrite it with something considered more appropriate.[38] In essence, non-Western epistemology is derisively dismissed as inadequate, exiguous, insufficiently elaborated and naïve.

Thus, the West is considered to be the only legitimate tradition of thought able to produce knowledge and the only one with access to universality, rationality and truth. In essence, Eurocentrism prioritises the views, concerns, and ideas of the privileged white male, and pejoratively malign, denigrate and disparage other ontologies, methodologies, pedagogies and epistemologies as particularistic, unscientific, primitive, ethnic and therefore inferior, antediluvian and anthropophagus.[39]

Therefore, ***Barreto*** encyclopaedically contends that,

> "The critique of Eurocentrism and the challenge to its hegemony do not just schematise the question of the "what"—human rights as the object of reflection; it is also and mainly concerned with interrogations about the "for whom", "what for" and "from where"—the geopolitical context in which human rights theories are elaborated—and develops a self-understanding of the historical framework in which they are enunciated— Twentieth century or Post-Conquest history."[40]

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[37] ***Spivak, Gayatri Chakravorty,*** "Can the Subaltern Speak?" in *Colonial Discourse and Post-Colonial Theory: A Reader*, eds. ***Patrick Williams and Laura Chrisman***. New York: Routledge, 66–111, 1993, p. 69.

[38] ***Spivak, Gayatri Chakravorty***, 1993, pp. 66–111, p. 72.

[39] ***Ramon Grosfoguel,*** Decolonizing Post-Colonial Studies and Paradigms of Political Economy*: Transmodernity, Decolonial Thinking and Global Coloniality*, Volume 1, Issue 1, ISSN: 2154–1353, e-ISSN: 2154–1361, 2011, pp. 1–36 p. 26.

[40] ***Barreto, José-Manuel*** (Ed.), *Human Rights from a Third World Perspective: Critique, History and International Law,* London: Cambridge Scholars Publishing, 2013, p. 17.

Indeed, what is white is rendered normal, mainstream, unremarkable, universal, standard and unquestioned. The concept of white is a self-proclaimed Eurocentric social construct that is the foundation for whiteness and white privilege. Thus, ***Amin*** lucidly contends that Eurocentrism, illegitimately appropriated Greek rationality and Christianity to legitimise and justify its newly created capitalistic social order; its economic, political, cultural, and military conquest of the world; and its exploitation of non-European humanity (people of colour) in the global South.[41]

This primal Eurocentric epistemological paradigm can also be construed as the view expressed by ***Descartes***,[42]***Locke***,[43]***Hume***,[44]***Kant***[45] and ***Hegel***[46] that Western philosophy, Western European values, norms, ethics and culture are the standard through which humanity is measured. The acerbic assumption here is that Western European values, culture and philosophy are qualitatively superior to all non-Western philosophical values and culture.[47] This execrable position also entails that the Western privileged white male provide the norm of what humanity is. Indeed, the conceptualisation, production, publication and distribution of human rights knowledge products (books, journals etc.) is still dominated by the privileged white male since the European Enlightenment days of ***Kant***, ***Locke***, ***Rousseau***, ***Montesquieu***, ***Smith***, ***Grotius***, ***Bacon***, ***Spinoza***, ***Diderot***, ***Beccaria***, ***Leibniz***, ***Hume*** and ***Voltaire***.

Therefore, Eurocentrism remains at the epicenter of the human rights discourse.[48] This is the decoction of the contemptible epistemic whiteness in the

[41] ***Amin, S.*** *Eurocentrism,* New York: Monthly Review Press, 2010, p. 48.

[42] ***Descartes, R.***, *Discourse on Method and The Meditations,* London: Penguin, 1998 [1637], p. 19.

[43] ***Locke, J.,*** *The Second Treatise of Civil Government and A Letter Concerning Tolerance,* Gough, J (ed.) Oxford: Basil Blackwell, 1946 [1690], p. 28.

[44] ***Hume, D.,*** *Enquiries Concerning Human Understanding,* Oxford: Claredon Press, 1975 [1739], p. 41.

[45] ***Kant, I.***, *Observations on the Feelings of the Beautiful and the Sublime,* (translated by. J.J. Gold-Thwaite), Berkeley: University of California Press, 1960 [1764], p. 16.

[46] ***Hegel, G.W.F.,*** *Phenomenology of Mind* (translated by M. Baillie), London: George Allen and Unwin, 1931 [1807], p. 35.

[47] ***Serequberhan, T.,*** *The Critique of Eurocentrism and the Practice of African Philosophy,* in P.H. Coetzee and A.P.J Roux (eds), The African Philosophy Reader, Cape Town: Oxford University Press of Southern Africa, 2003, p. 53.

[48] ***Hopgood, S***. *The End-times of Human Rights.* Ithaca, New York: Cornell University Press, 2013, p. 5.

discourse. The first cataclysmic consequence of this hegemonic Eurocentric paradigm is epistemological racism, which is the fallacious corrosive view that the West is the only legitimate source and perspective of thought able to produce and develop standard knowledge and the only one with access to universality, rationality and epistemic truth.[49] Laconically, epistemic racism generally considers non-Western knowledge generated by people of colour in the global South to be inferior to the Eurocentric Western knowledge. In essence, Euro-centric thinking systematically displaces and distorts the knowledge systems of people of colour by negating the applicability of the concept of rationality to them. This is the essence of epistemic violence, ontological capture, epistemic racism and methodological injustice in the human rights discourse.

2.4 The Ethical and Epistemic Imperative to Decolonise the Human Rights Discourse

Succinctly, the human rights discourse is still embedded in the reprobate whiteness institutional culture, privileging Eurocentric ideas, concepts, views, values and orientations and marginalising and maligning any idea, paradigm, theory, concept that does not easily fit into this monolithic Eurocentric narrative at the epicentre of the discourse. Therefore, it is vital to demonstrate how outside the West, there also exists a vibrant, coruscating, erudite intellectual tradition imbued in the historical global South's resistance to slavery, colonialism, imperialism and to the violence of the state in which natural law and human rights are central. This must be done intransigently by resolutely and unapologetically decolonising the human rights discourse. This is a generational ethical and epistemic imperative.

According to ***Barreto*** this alternative canon includes the life and works of global South human rights luminaries such as, *inter alia*, ***Bartolomé de las Casas***, ***Antonio de Vieira***, ***Simón Bolívar***, ***Guamán Poma***, ***Otobah Qugoano***, ***Toussaint L'Ouverture***, ***Gandhi***, ***Nelson Mandela***, ***Rigoberta Menchú*** and ***Upendra Baxi***.[50]

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[49] ***Grosfoguel, R.,*** Decolonising Post-Colonial Studies and Paradigms of Political Economy: Transmodernity, Decolonial Thinking and Global Coloniality, *Transmodernity: Journal of Peripheral Cultural Production of the Luso-Hispanic World Vol. 1*, No. 1, 2011, pp. 1–36, p. 27.

[50] ***Barreto, J.***, *Western domination of human rights-Can we decolonise human rights?* Retrieved on 26 March 2021 from, https://www.opendemocracy.net/openglobalrights/jose-manuel-barreto/can-we-decolonise-human-rights 2013, p. 2.

They are the true human rights champions of the decolonisation of the global South through wars of independence and liberation struggles from the oppressive, brutal, undemocratic, illegitimate and violent (mis) governance of Western powers such as France, Britain, Spain, Portugal, Germany, Netherlands and Belgium in Africa, Asia, the Middle East and South America. Through their kleptocratic colonial governance systems in the global South, Western powers such as France and Britain left a legacy of gross human rights abuses, systemic corruption, autocracy and crimes against humanity concomitant with their brutal treatment and abuse of people of colour from Cape to Cairo (Africa), from Kuala Lumpur to Mumbai (Asia), from Baghdad to Beirut (the Middle East) and from Rio to Caracas (South America).

In fact, the very year in which the UDHR was adopted, 1948, the British were actually embarking on a brutal campaign to violently supress Malays who were fighting for their human rights and human dignity and demanding the end of British colonial rule in Malaysia. This was the beginning of the so-called Malay Emergence 1948–1960.[51] The barbaric British response was led by ***General Sir Harold Briggs***, which resulted in the death of almost 7000 Malays.[52] Indeed, as part of ***Briggs'*** Plan, 500,000 people (roughly ten percent of Malaya's population) were violently removed from their land.[53] Tens of thousands of homes were destroyed, and many people were interned in guarded internment camps called "new villages".[54]

During the Malayan Emergency, Britain was also the first country in the world to employ the use of poisonous herbicides and defoliants to destroy bushes, food crops, and trees to deprive the Malay freedom fighters of cover and as part of the food denial campaign in the early 1950s.[55] It is also important to note that Britain voted in favour of the UDHR in 1948. Perhaps, even more alarming and deeply disturbing is that the British delegation, while voting in favour of the Declaration, had expressed frustration that the proposed document had moral obligations

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[51] ***Jackson, R.,*** *The Malayan Emergency.* London: Pen & Sword Aviation., 2008 p. 10.

[52] ***Stubbs, R***., *Hearts and Minds in Guerilla Warfare: The Malayan Emergency 1948–1960*. Philadelphia: Eastern University. ISBN 981–210-352-X, 2004, p. 35.

[53] ***Christopher, P***., "Malaya, 1948–1955: Case Outcome: COIN Win". *Paths to Victory: Detailed Insurgency Case Studies*.2013, pp. 51–63, p. 62.

[54] ***Hack, K***, "'Iron claws on Malaya': the historiography of the Malayan Emergency". *Journal of Southeast Asian Studies*. 30 (1): 99–125. doi: 10.1017/S0022463400008043, 1999, p. 101.

[55] ***Comber, L.***"The Malayan Security Service (1945–1948)". *Intelligence and National Security*, 18:3. 2003, pp. 128–153, p. 129.

but lacked legal force! This coming from a country that was busy poisoning, killing and torturing innocent Malays who were fighting for their human rights and human dignity at the very same time is remarkable! It is a perfect example of epistemic ignorance, Western cynicism, Eurocentric sanctimony, white arrogance and cold-blooded racism.

Furthermore, France also committed gross human rights violations in Malagasy between 1947–1948 during the Malagasy Uprising. The French violently suppressed the independence movement that was demanding the human rights of the colonised people with killings and village burnings; and, the French killed over 90,000 Malagasies.[56] All these gross violations of human rights were happening in Malagasy the very year the UDHR was adopted on Friday 10 December 1948 in Palais de Chaillot, Paris in France!

The Algerian War of Independence between 1954–1962 also further reflects this Western hypocrisy. It is important to note that this war took place a few years after the adoption of the UDHR in 1948. France, the colonial ruler of Algeria, brutally responded to this quest by Algerians to regain their human rights and human dignity which they had lost during the brutal French colonial rule in Algeria- indeed, the notorious French Legion was unleashed on Algerians. The French ***General Raoul Salan*** oversaw and directed this brutal response in which over 1,5 million people were killed.[57] Indeed, war crimes have been broadly defined by the Nuremberg Principles as "violations of the laws or customs of war," which includes massacres, bombings of civilian targets, terrorism, mutilation, torture, and the murder of detainees and prisoners of war and additional common crimes include theft, arson, and the destruction of property not warranted by military necessity.[58]

It is also important to note that the Netherlands committed gross human rights violations in Indonesia between 1945–1949 during the Indonesian War of Independence. In this war, Indonesian freedom fighters fought the Dutch colonisers in order to gain their independence and restore their human rights and human dignity. The war was brutal and during the South Sulawesi Campaign, about 4,500

[56] ***Travis, Hannibal***, Genocide, Ethnonationalism, and the United Nations: Exploring the Causes of Mass Killing Since 1945. Routledge. 2013, p. 142.

[57] ***Windrow, M***. and ***Chappell, M.***, The Algerian War 1954–62, Oxford: Osprey Publishing, ISBN 9,781,855,326,583, 1997, p. 11.

[58] ***Solis, G.D***., The Law of Armed Conflict: International Humanitarian Law in War. Cambridge: Cambridge University Press. pp. 301–303. ISBN 978–1-139–48,711-5, p. 302.

civilians were killed by the Dutch Colonial forces (KNIL)[59]; and, during the Rawagede massacre, about 431 civilians were killed by Dutch forces.[60] Overall, 97,421 Indonesians were killed by Dutch Colonial forces.[61] Indeed, all this was taking place in the same year the UDHR was adopted in 1948. It is imperative to note that the Netherlands was one of the 48 countries that voted in favour of the Declaration in 1948 yet it had no problem denying people of colour their human rights and human dignity in Indonesia through violence, murder, torture and massacres.

This is the real ugly history of the Netherlands, France, Britain and other Western colonial powers that needs to be written and included in the human rights narrative because it factually reflects and epitomises the long, disturbing, mendacious history of Western hypocrisy and racism on issues of human rights especially when it comes to people of colour in the global South. It seems as if the life of people of colour in the global South is cheap compared to white lives. Indeed, Western powers like France have never been held accountable for all such war crimes they committed against people of colour in the global South.

Therefore, all these omitted human rights historical landmarks and experiences of people of colour from the global South in their fight for human rights against the repressive and abusive colonial Western regimes in Asia, Africa, the Middle East and Latin America should also feature prominently alongside the landmarks of the dominant but incomplete Eurocentric history and theory of human rights. This will greatly assist in developing a more accurate, truly universal, objective and nuanced history of the human rights discourse. In essence, there is need to obdurately decolonise human rights in order to face the challenges of globalisation and neo-colonialism. One of the ways forward is to categorise the mainstream theory of rights as Eurocentric, and to elaborate a more corollary complex theory through a critical dialogue between Eurocentric and global South perspectives, one that is concomitant with the historically strong and longstanding South-South dialogues and cooperation.

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[59] ***Kahin, G.M.,*** Nationalism and Revolution in Indonesia. Ithaca, N.Y.: Cornell University Press. ISBN 0–8014-9108–8, 1952, p. 13.

[60] ***Ricklefs, M.C.,*** A History of Modern Indonesia Since c.1300. San Francisco: Stanford University Press. ISBN 978–0-8047–2195-0, 1993, p. 42.

[61] ***Taylor, Jean Gelman,*** Indonesia: Peoples and History. Yale University Press. p. 325. ISBN 0–300-10,518–5, 2003, p. 26.

Hence, according to ***Barreto***,

> "The dominant theory is no longer "the" theory of human rights, but just a theory born in the background of the history of Europe and, as a consequence, has no claim to be universally compelling."[62]

Therefore, critically contextualising the theories of human rights means showing the pernicious genealogical connection that ties the Eurocentric theory of rights to the historical setting in which it was elaborated. Indeed, sagaciously unveiling this nexus to the site of the emergence of knowledge, weakens and even destroys the legitimacy of the pernicious Eurocentric claims to universality and disencumber the human rights discourse from the suffocating stranglehold of Eurocentrism. This would be the genesis of the long overdue indispensable process of decolonising the currently moribund and increasingly extraneous and anachronistic human rights discourse.

Indeed, ***Mutua*** studiously calls for a multicultural approach to reimagine, reorient and reform the human rights regime so as to make it more universal.[63] In this regard, the historical, longstanding African philosophy of human rights, *Hunhu/Ubuntu*, can therefore also make significant contributions in enriching and diversifying the predorminantly Eurocentric human rights corpus with an infusion of a truly global South ontological intellectul strand. Hence, within the context of *Hunhu/Ubuntu*, the prolific African academic, ***Chivaura*** argues that:

> "Indigenous peoples of Africa share a common religion, philosophy of life and culture. They have the same concept of god and view of the universe."[64]

Indeed, ***Kunene*** asserts that in the African ontology:

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[62] ***Barreto, J***., Human Rights from a Third World Perspective: Critique, History and International Law, London: Cambridge Scholars Publishing, 2013, p. 18.

[63] ***Mutua, M.,*** The Ideology of Human Rights, 36 Va. J. Int'l L. 589, 1996, pp. 589–657, p. 591.

[64] ***Chivaura, Vimbai Gukwe,*** "Hunhu/Ubuntu: A Sustainable Approach to Endogenous Development, Bio-cultural Diversity and Protection of the Environment in Africa" in ***Haverkort, Bertus*** and ***Stephan Rist*** (Eds.) Endogenous Development and Bio-cultural Diversity, Center for Development and Environment (CDE), Hallersrasse, Bern, Switzerland. 2007, pp. 229–240, p. 230.

> "There are other worlds in the Universe. Some are at the stage of completion, some at the stage of unfolding and some at the stage of annihilation. Each is complete and sufficient in itself."[65]

The emphasis here is on coexistence. Therefore, the principles upon which *Hunhu/Ubuntu* is built are harmony, peace, balance, love and justice. Hence, as a worldview, *Hunhu/Ubuntu* is characterised by such basic values as humanness, caring, sharing, respect and compassion, warmth, empathy, giving, commitment, love, sympathy, care, sensitivity to the needs of others, respect, consideration, patience and kindness.[66] In essence, *Hunhu/Ubuntu* is a standard of measure by which the members of a community evaluate individual and collective behaviour or conduct in the dimension of humanness. Indeed, the philosophy and values of *Ubuntu* played a major role in shaping the ideological and human rights context of the anti-apartheid struggle in South Africa as well as the post-apartheid dispensation in that country.

Indeed, South Africa's experiences with Anglo-Dutch colonialism and the subsequent apartheid era highlights some of the worst historical experiences of human rights abuses of people of colour by Western powers and their proxies in the global South. Thus, the anti-apartheid struggle was premised on the philosophy of restoring the dignity *(Ubuntu)* and the rights of people of colour in South Africa in the face of extreme racism, acerbic whiteness and virulent white privilege, as diligently explored below.

3 The South African Freedom Struggle

3.1 State Oppression

Within the South African context, the struggle against apartheid was a long and painful one, leaving the country's population segregated along racial lines, spatially and psychologically. The Freedom Struggle advanced non-racialism and was waged against the unjust Apartheid government. The anti-apartheid struggle was violent, and the advent of the country's first democratic elections did not restore economic and social balances. The trauma of 40 years of an apartheid

[65] ***Kunene, M***., Anthem of the Decades: A Zulu Epic, Heinemann, London, 1981, p. 24.

[66] ***Msila, Vuyisile,*** Ubuntu and School Leadership. *Journal of Education* 44:67–84, 2008, p. 69.

government and 350 + years of Dutch and British occupation left a deep scar on the psyche of all people of all races. The apartheid system of governance produced several disparities in the country. Firstly people of colour were physically separated in terms of government representation, marriage, labour market opportunities, travel and residency. The education system was manipulated to push a political agenda and consolidate white dominance over other races. Black people were discouraged from pursuing formal education and trained to despise their culture. The school curriculum was an instrument of the state to institutionalise oppression and racism.[67] In effect, people of colour suffered from social exclusion, economic marginalisation and were stripped of their dignity, land and political rights. The legacy of these factors provided the foundation for the country's current levels of inequality, poverty and high unemployment.[68]

In 1950, the National Party government passed the Group Areas Act, which institutionalised the banishment of people of colour away from prime real estate areas near city centres or beaches. In neighbourhoods that were historically racially mixed, the government evacuated people of colour, forcing relocations to racial zones. The policy further separated racial groups privileging certain races relative to the African population group. The city of Cape Town, for example, was arguably the most racially integrated city in the country and experienced drastic rezoning and segregation.[69] In addition, the land dispossession created trauma in communities. People often fought against the forced relocation, with some survivors recalling how their homes were bulldozed over and then attempting to relocate within the neighbourhood, only to relive the experience, having to face down another bulldozer. Some survivors described family members committing suicide, preferring death to dispossession, while others explain how such anguish translated into physical health concerns.[70]

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[67] ***Mavis B Mhlauli, End Salani,*** and ***Rosinah Mokotedi,*** 'Understanding Apartheid in South Africa through the Racial Contract', *International Journal of Asian Social Science*, 5.4 2015, 203–9 <https://doi.org/10.18488/journal.1/2015.5.4/1.4.203.209>.

[68] ***Ndwakhulu Tshishonga,*** 'The Legacy of Apartheid on Democracy and Citizenship in Post-Apartheid South Africa: An Inclusionary and Exclusionary Binary?', *AFFRIKA Journal of Politics, Economics and Society*, 9.1, 2019, 167–91 <https://doi.org/10.31920/2075-6534/2019/9n1a8>.

[69] ***Henry Trotter,*** 'Trauma and Memory: The Impact of Apartheid-Era Forced Removals on Coloured Identity in Cape Town', in *Burdened by Race - Coloured Identities in Souther Africa*, ed. by ***Mohamed Adhikari,*** Cape Town: UCT Press, 2010, XLVII, 47–7169-47–7169 <https://doi.org/10.5860/choice.47-7169>.

[70] ***Trotter.***

Apartheid took on a new spatial form in the city of Durban following the co-existence of racial groups during the colonial past. People of colour were again forcibly relocated to the city's fringes and often forced to live in dormitory-type townships. As a trading post, Durban experienced rapid economic growth between 1870 and 1890, benefiting mercantile interests, mainly from the White community. People of colour filled the labour requirements in the city, with the British colonialists introducing people of Indian descent to provide a form of migrant indentured labour on the sugarcane plantations within the province. The colonial system struggled to support people of colour's growing population, resulting in disease outbreaks due to unsanitary conditions and crime.[71]

Post-British colonial rule, the apartheid system exacerbated these tensions, institutionalising racial segregation, introducing systems of domination and control, which took advantage of the cheap labour pool and people with little to no rights. The apartheid system promoted ethnic competition and conflict between African people and those of Indian descent. As people of Indian descent transitioned from cheap labourers to traders, disputes arose between Indian and African traders. Indian and African workers competed for jobs in urban areas, while there was a great demand for unskilled labour.

Indian people gradually began to settle in Cato Manor, a large plot of land outside of the jurisdiction of the Durban City Council. They leased the land and built low-cost substandard homes. Due to the location and economic opportunities, African people followed the Indians. They started to rent land from the Indian occupants after getting removed by the Durban City Council from other areas in their jurisdiction. Over time, the area became overcrowded, worsening tensions between race groups. The apartheid government's policies of forced relocations added to these tensions, resulting in the 1949 race riots.[72] The riots resulted in the deaths of 142 people, with several more injured.[73]

The apartheid regime brought in a continuum in the relationship between oppressors and the oppressed. By introducing differential privileges among races, the system raised psychological tensions between races, redirecting anger away

[71] ***Brij Maharaj, Sultan Khan,*** and ***Ashwin Desai,*** *Durban-Between Apartheid and Neoliberalism, and Its Discontents,* Durban, 2017,<https://idl-bnc-idrc.dspacedirect.org/handle/10625/56500>.

[72] ***Brij Maharaj, Sultan Khan,*** and ***Ashwin Desai.***

[73] ***Surendra Bhana*** and ***Bridjlal Pachai,*** 'The Durban Riots, 1949', in *A Documentary History of Indian South Africans*, ed. by Surendra Bhana and Bridjlal Pachai, Durban: SA History, 2019 <https://www.sahistory.org.za/archive/documentary-history-indian-south-africans-edited-surendra-bhana-and-bridglal-pachai>[accessed 23 April 2021].

from those who truly had power and control. The systematised oppression redefined people's identities, with many believing their racial inferiority and powerlessness. By internalising these negative views, people felt they were undeserving of more resources or political participation.[74] The trauma from racial segregation and ongoing oppression has shattered the lives of individuals, families and communities, due to feelings of *"helplessness, despair and anger due to the injustice, humiliation and marginalisation."*[75] In light of the dehumanising effect of the apartheid system, the anti-apartheid freedom fighters required a steadfast resolve to persevere against the system. Many made the ultimate sacrifice in the fight for freedom.

3.2 Sacrifices

In 1955, the Freedom Charter was drafted at a public meeting in Kliptown Johannesburg. On the second day of the meeting, the police broke up the gathering charging 156 activists with High Treason. Following a four year trial, they were acquitted. Many of these activists went on to play key roles in the struggle against the apartheid system. Some spent decades in prison, like **Nelson Mandela** and **Walter Sisulu**, while others like ***Ruth First*** were jailed, forced into exile, and then assassinated.[76] On 21 March 1960, people in Sharpeville protested against the law to carry a pass. In response to the demonstration, the police opened fire on the group of demonstrators, killing 69. In the aftermath of this violence, the government banned the African National Congress (ANC) and the Pan Africanist Congress (PAC) and declared a State of Emergency. In response to this state terror, the ANC launched the armed wing – Umkhonto we Sizwe (Spear of the Nation), which led a campaign of sabotage against state institutions.[77]

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[74] ***Christopher C. Sonn*** and ***Adrian T Fisher,*** *Identity and Oppression: Differential Responses to an In-between Status*, *Population* (Perth & Melbourne)<https://core.ac.uk/download/pdf/10827957.pdf>.

[75] ***Ileana Carmen Rogobete***, 'Reconstructing Trauma and Recovery: Life Narratives of Survivors of Political Violence during Apartheid' University of Cape Town, 2011, p. 8<https://open.uct.ac.za/bitstream/handle/11427/10884/thesis_hum_2011_rogobete_i.pdf?sequence=1>.

[76] CJPME Foundation, 'Blacks under Apartheid', *Cjpmefoundation.Org*<https://www.cjpmefoundation.org/blacks_under_apartheid_south_africa>[accessed 23 April 2021].

[77] ***David M. Sibeko***, *The Sharpeville Massacre of 21 March 1960: Its Historic Significance in the Struggle against Apartheid* (New York, 1976,<http://psimg.jstor.org/fsi/img/pdf/t0/10.5555/al.sff.document.nuun1976_09_final.pdf>.

In 1963, several ANC leaders were arrested at Lilliesleaf Farm, where they had been hiding out, evading the security police. The government labeled the arrests as a breakthrough in the fight against terrorism. Leaders such as ***Walter Sisulu***, ***Govan Mbeki*** (father of ***Thabo Mbeki***) and ***Ahmed Kathrada***, among others, were arrested on that day. ***Nelson Mandela***, at this stage, was already imprisoned.[78] Collectively, a group of 11 accused were placed on trial for reasons such as guerilla warfare, conspiring with foreign militaries and advancing communism. 8 out of the 11 received life sentences.[79] ***Mandela***, a lawyer, in his closing statement, facing a potential penalty stated:

> During my lifetime, I have dedicated my life to this struggle of the African people. I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons will live together in harmony and with equal opportunities. It is an ideal for which I hope to live for and to see realised. But, my Lord, if it needs to be, it is an ideal for which I am prepared to die.[80]

Following the ANC's banning and imprisonment of the Rivonia trialists, political activism relented under the pressure of the state until the emergence of a new generation of new activists in the 1970s. Their actions culminated in the Soweto uprising in June 1976, where Black high-school students protested against forced teaching in the Afrikaans language. This protest was dealt with forcefully by the police, who again opened fire on protestors killing 176 (officially), wounding 1228, with 1298 arrested and detained. Many spent months in jail and tortured for their actions.[81]

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[78] South African History Online, 'Police Arrest Members of Umkhonto We Sizwe (MK) High Command at Lilliesleaf Farm', *SAHistory.Org*, 2011 <https://www.sahistory.org.za/dated-event/police-arrest-members-umkhonto-we-sizwe-mk-high-command-lilliesleaf-farm>[accessed 29 April 2021].

[79] ***Lionel Bernstein,*** *Rivonia: Telling It as It Was*, *Historical Papers Research Archive* (Johannesburg, July 1988) <http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/A3299/A3299-C6-2-4-001-jpeg.pdf>.

[80] ***Nelson Mandela,*** 'I Am Prepared to Die, Nelson Mandela's Statement from the Dock at the Opening of the Defence Case in the Rivonia Trial', *Db.Nelsonmandela.Org/*, 1964 <http://db.nelsonmandela.org/speeches/pub_view.asp?pg=item&ItemID=NMS010&txtstr=prepared to die>[accessed 29 April 2021].

[81] Mandela.

Carmel Chetty explores two groups of revolutionary activists' motivations and actions in the 1970s, from Cape Town and Durban. These young people grew up in the political climate of the 1960s and were born either in the 40 s or 50 s. Their lives were inextricably linked to a resistance against the apartheid legislation, having grown up in shockingly oppressive conditions. These young people did not capitulate to the oppressive legislation but embarked on resistance and information campaigns within their communities. Their efforts attracted the attention of the authorities, resulting in harassment from the apartheid government. Some were detained, interrogated by security police or banned.[82] Their experiences highlight their trauma living in a police state. Many adopted the position taken by ***Steve Biko***, who stated.

> In a true bid for change, we have to take off our coats, be prepared to lose our comfort and security, our jobs and positions of prestige, and our families, for just as it is true that 'leadership and security are basically incompatible', a struggle without casualties is no struggle.[83]

The Cape Town and Durban groups had similar experiences resisting the government, participating in political campaigns and their relative struggles. Ultimately, activists in these groups suffered several traumas in the form of detainment, bannings and exile. In exile, they lived their lives separated from loved ones, forming new lives as agents of change. Nevertheless, they lived lives of purpose and sacrifice following a strict set of values and convictions.

3.3 Struggle Values

Nelson Mandela is often revered as a role model for good leadership, reconciliation and as a champion of marginalised poor people. ***Mandela*** dedicated himself to the work of the ANC, a party intended to act as a vehicle to establish equality, humanity and democratic society. Shortly after his release from prison in 1990,

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[82] ***Carmel T.M. Chetty,*** 'Young, Gifted and Black. Oral Histories of Young Activists in Cape Town and Durban in the Early 1970s' (University of Kwazulu-Natal, 2007)<https://www.sahistory.org.za/sites/default/files/archive-files/young%2C gifted and black.pdf>.

[83] ***Steve Biko***, I Write What I Like, ed. by Aelred C.R. Stubbs, 2nd edn, Heinemann, 1996, p. 108.

Mandela described the ANC as a home for all who subscribe to the principles of a free, democratic, non-racial and united South Africa. The united South Africa was meant to set an example for democracy for all other countries.[84]

During the First National Consultative Conference of the ANC in 1969 in Morogoro, Tanzania, the party deliberated its positions on freedom and democracy. The focus of its democratic principles dealt with issues of domination, echoing ***Mandela's*** statement during the Rivonia Trial. The conference further clarified its position on the Freedom Charter, adopted in 1955 by the Congress of the People. This Charter was intended to act as a clear statement reflecting the desires of ordinary South Africans, with each section reflecting the intent of the programme, viz.[85]:

> The people shall govern!
> All national groups shall have equal rights!
> The people shall share in the country's wealth!
> The land shall be shared among those who work it!
> All shall be equal before the law!
> All shall enjoy equal human rights!
> There shall be work and security!
> The doors of learning and culture shall be opened!
> Education shall be free, compulsory, universal and equal for all children.
> There shall be houses, security and comfort!
> There shall be peace and friendship![86]

The Congress of the People was a non-racial gathering attended by leaders such as ***Mandela*** and 3000 other delegates. The event brought together a range of organisations across racial lines that opposed the government's unjust policies. The final section of the programme was adopted shortly before a police raid that

[84] ***Godson S. Maanga,*** 'The Relevance and Legacy of Nelson Mandela in the Twenty-First Century Africa: An Historical and Theological Perspective', *African Journal of History and Culture*, 5.5, 2013, 96–113<https://doi.org/10.5897/AJHC12.022>.

[85] African National Congress, 'The Freedom Charter Revolutionary Programme of the ANC', in *First National Consultative Conference,* Morogoro: African National Congress, 1969<https://renewal.anc1912.org.za/assets/Documents/Morogoro Conference 1969 on the Freedom Charter.pdf>.

[86] Congress of the People, *The Freedom Charter* (Johannesburg, 1955)<https://doi.org/10.1080/01436598708419993>.

detained all delegates, confiscating several thousand copies of the document.[87] The ANC and its alliance partners regard the document as a product of people participation. It was used to galvanise activists across racial lines in their struggle for political liberation as it articulates ideals of freedom, equality and democracy. Using universal language had broad appeal, allowing the Charter to act as a banner for multiple organisations, unifying races and people of different classes against the apartheid state.[88]

The Black Consciousness movement, which was far more active in the 1970s, was grounded in teaching activists the value of revolutionary consciousness, which did not entertain any reformist strategies to overcome the apartheid state. It was an all-or-nothing approach, which differentiated these activists from the ANC.[89] In addition, Black Consciousness philosophy promoted 'black' pride and solidarity among people, uniting various groups to a common ideology – rejecting racial politics and sectarianism. The movement did not emerge from a vacuum but followed a period of despair after the Sharpeville massacre of 1960. Young people of the 1970s were inspired by Martin Luther King, Malcolm X and the Black Panther Movement. The rise of the Black Power message resonated with the youth, who began circulating underground literature about the American Civil Rights movement. Snail[90] argues that the Black Consciousness Movement in many ways continued concepts of Negritude established by Aime Cesaire and Leopold Senghor, which stressed the question of blackness linked to an attitude or state of mind.

This Black Consciousness philosophy helped activists discover their collective non-racial identity and African values, which the apartheid government had fervently conspired to destroy. It challenged the slave-master relationship and the idea that being 'black' was inferior to being 'white.' These were views that the apartheid system entrenched in the minds of people of colour. At the time, these radical ideas helped unite activists in their stand against the system. Thus, a

[87] Department of Education, *Celebrating 50 Years of The Freedom Charter – June 26 1955 – 2005 – Guidebook for Schools,* Pretoria, 2005<https://www.sahistory.org.za/sites/default/files/Freedom Charter-reduced.pdf>.

[88] ***Mochekoe Stephen Rametse***, 'The Significance of the Freedom Charter in the Ideological Debates Within the Ruling ANC Alliance in South Africa', in *38th AFSAAP Conference: twentyfirst century Tensions and Transformation in Africa* (Deakin University: African Studies Association of Australasia and the Pacific, AFSAAP), 2016<https://afsaap.org.au/assets/Mochekoe_Stephen_Rametse_AFSAAP2015.pdf>.

[89] ***Chetty*** p. 183.

[90] Snail (2008).

critical aspect of Black Consciousness political work was to free oppressed minds from accepting their oppression and the thinking it produced.[91]

These philosophies and principles resonated with activists and strengthened their commitment to fighting against the apartheid system. ***Harold Dixon***, a Cape Townian activist, recounts his community work, stating:

> My first major, major thing was conscientising the people of Bonteheuwel. They were busy building some kind of maisonettes. Some people didn't realise why the maisonettes were happening so we went out there campaigning against the maisonettes in the area. It was an overpopulated area already and then they would bring people in from District Six where the group area act… group areas declared white District Six … then they wanted to bring this people in from District Six and Plumstead. So they decided this is a built up area let us just put in new houses. And then we decided to campaign in conscientising the people against the maisonettes.[92]

Roy Chetty, an activist from Durban, explains his link to Black Consciousness philosophy and its impact on his life:

> I think I am fortunate enough to say that my consciousness of my youth - in my view has stayed with me for the rest of my life, and it will stay with me for the rest of my life. It has made me a principled person. The principles that I had then of not collaborating with the SAIC[93] or anything to do with the SAIC or with the state structures then still remains with me. The principle of committing one's life in so far as one can to the betterment of society and for eradicating oppression still remains with me.[94]

The political activists of the 1970s rejected racial labels inherited from the apartheid system, viewing these terms as insults. As ***Algonda Perez***, a Cape Townian activist, reflected:

> …when I joined the ANC years later - that was a very important part of it - people came and said to me 'coloured', and so forth that was the worst insult because we grew up in a different era of course. You're supposed to be proud of this coloured… I'm proud of being black![95]

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[91] ***Chetty*** pp. 20, 41, 44–46.

[92] ***Chetty*** p. 107.

[93] SAIC refers to South African Indian Congress.

[94] ***Chetty*** p. 121.

[95] ***Chetty*** p. 126.

The struggle for political and economic freedom was a very personal one for the activists. Their experiences and sacrifices shaped their identity, and their efforts were carried out to improve the lives of ordinary South Africans. Yet, twenty-seven years after the first democratic elections, many activists believe their struggle is incomplete. ***Roy Chetty*** articulates this belief:

> In my view there is still a need for a concerted and a consolidated… a very definite struggle for… to bring about equality that we all struggled for - economic, social equality - even political equality. It was also in the days of struggle… it was unthinkable for us that we could have the kind of leaders we have… The leaders in this country don't think of themselves as being servants of the people. We struggle and everything we learnt of in the early days of our youth with Paulo Freire and the writings of and readings of the list - lessons and lectures - Malcolm X and so on were on an egalitarian society. For us that always meant leaders should always be part of the people, with the people and their earning power and their fortune should be pegged at the same level as ordinary people…[96]

3.4 South Africa, After Mandela, Attempting to Implement the Freedom Charter

Several groups have contested the meaning of the Freedom Charter due to the text's imprecision, which was produced under challenging conditions.[97] Often the Charter's language is invoked by pro-capitalist interests advocating for de-racialisation, while also cited by a socialist branch, seeking greater opportunities for the working class. These divergences in its understanding are cited as reasons for party factionalism in the post-2010 period in the ANC.[98]

Following the Charter's 1955 formulation, leaders within the ANC and South African Communist Party (SACP) gradually shifted their interpretation of the principles from its radical pronouncements. ***Nelson Mandela*** in an article published in 1956, called for the monopolies to be *"smashed up and the national wealth of the country turned over to the people."*[99] However, in 1962 the SACP believed the Charter could inform the programme of a developmental state, estab-

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[96] ***Chetty*** p. 126.

[97] Raymond Suttner, 'The Freedom Charter @ 60: Rethinking Its Democratic Qualities', *Historia*, 60.2, 2015, 1–23 <http://www.scielo.org.za/pdf/hist/v60n2/01.pdf>.

[98] ***Rametse***.

[99] ***Rametse***.

lished within a predominantly capitalist economy.[100] Going further to the political right, in 1984, then SACP General Secretary ***Joe Slovo*** argued that the Freedom Charter *"is not, in itself, a programme for socialism, even though it can provide a basis for uninterrupted advance to a socialist future."*[101]

In 1992, ***Mandela*** expanded on the Freedom Charter's use of the term Nationalisation, explaining their policy position involved reviewing enterprises on a case-by-case basis to determine if their investment and job-creation strategies suited the country's development agenda.[102] This position later changed to a policy of deracialising the management of the private and public sector, providing equity ownership to a select group of people of colour. This policy acted as a vehicle to transfer wealth to marginalised people.[103] These positions were supported by the ANC's alliance partners in the trade unions and SACP.

From the transition from ***Mandela*** to ***Thabo Mbeki***, South Africa entrenched neoliberal policies under the "Growth-Employment and Redistribution" (GEAR) policy framework, in which the idea of the developmental state was transformed to represent a programme to restructure the economy by engaging private capital strategically. Thus, the government's role was to regulate the socio-economic environment and allow economic growth to drive social development.[104] Economic transformation was to be achieved by enabling marginalised people to act as independent traders.[105] However, ***Dube*** argues that the ANC government found itself in a difficult position. By finding limited financial support from the private sector, the ANC was bound to accept financial support from Western liberal states, forcing it to adopt similar policy positions in the interests of national development.[106]

South Africa's negotiated settlement essentially allowed 'white' interests to maintain economic power. These interests, therefore, continued to control the land and industry. Political power was transferred through a free and democratic

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[100] ***Rametse***.

[101] ***Rametse***.

[102] ***Rametse***.

[103] ***Rametse***.

[104] ***John Dugard,*** 'Transition to Democracy', in *Confronting Apartheid,* Jacana Media, 2018, <https://www.facinghistory.org/confronting-apartheid/chapter-4/introduction>.

[105] ***Rametse***.

[106] ***Felix Dube***, 'Neither Adopted nor Borrowed: A Critique of the Conception of the South African Bill of Rights', *Potchefstroom Electronic Law Journal*, 23, 2020, 1–26 <https://doi.org/10.17159/1727-3781/2020/V23I0A8794>.

election. However, this settlement ensured that South Africa's democratic transition failed to deliver a fundamental shift in social and economic power, entrenching the stark inequalities between a 'black' majority and 'white' minority.

Affirmative action policies have advanced racialised politics, continuing with apartheid-era labels as tools for redistribution.[107] In effect, the pressures of 1955 provided an opening for divergent interpretations of how freedom and a democratic transition of power should take place. In the period post-1955, a neoliberal policy approach replaced the original radical social views for which many activists sacrificed a great deal. It was by design that economic power did not accompany the transition of political power. Even though the government can introduce new educational programmes or employment opportunities, the original design of the democratic South Africa entrenched the racial segregation of people. This design leaves a large majority that is uneducated or poorly educated, living in poor communities with few opportunities to access higher-paying jobs.[108]

4 Conclusion

There is a debate whether South Africa's Constitution and Bill of Rights adopt a western framework of human rights within the South African context. Dube believes the South African Bill of Rights conception was an evolution and consequence of the local liberation movement. The ANC, for example, defined its first Bill of Rights in 1923, and various political campaigns led to the articulation of the Freedom Charter.[109] The Charter was a foundational document explaining the movement's beliefs, which later informed the framing of the Constitution.

However, as the South African Freedom Struggle evolved, the imprecise language of the Freedom Charter produced multiple interpretations, particularly among ANC's alliance partners and perhaps provided a source of party factionalism. In an effort to overcome racial domination, the economic transformation was neglected. In forming the new democratic South Africa, the ruling party was under pressure to affirm its support of human rights. The South African Constitution and Bill of Rights demonstrated that the new government was a proponent of human rights and not simply interested in attaining power.[110]

[107] ***Dugard***.

[108] Mhlauli, Salani, and Mokotedi.

[109] ***Dube***.

[110] ***Dube***.

However, ordinary poor South Africans and many political activists remain unsatisfied by the political transition or the results of the country's economic policies. As ***Roy Chetty*** mentioned, the struggle must continue to *"… to bring about [the] equality that we all struggled for - economic, social equality - even political equality.*[111]*"* The Freedom Charter perhaps offers a caveat to challenge the policies of the current South African Government. It invites criticisms through the following statement:

> That South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of all the people.[112]

Thus, if the current government acts in a way perceived not to follow the people's will, the government acts in contravention of the Freedom Charter. Critics of the ANC led government have described the organisation as betrayers of the revolution's ideals and the Freedom Charter, highlighting obvious service delivery gaps in education, housing, land access, wealth distribution and security. The question remains whether the ideals of 1955 are realistic 65 years later.[113] Ultimately, the state is responsible for delivering services to the people and enacting policies that will achieve the principles for which freedom fighters struggled and sometimes died.

Steve Biko once said that it was not enough to believe in and fight for freedom. Instead there is a need for psychological transformation to overcome the trauma of decades, if not centuries, long 'white' oppression. Such transformation in thinking is needed to abandon apartheid-era racial labels. This transformation must be accompanied by development campaigns as carried out by Biko and others in Black Community Programmes focusing on literacy, development and entrepreneurship.[114]

However, within the South African context, transformation will be incomplete unless proactive steps are taken to rebalance the economy. At present, the ANC, South Africa's ruling party, takes advantage of the language used in the Freedom

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[111] ***Chetty,*** p. 126.

[112] Congress of the People.

[113] ***Mcebisi Ndletyana***, 'Focus on Charter Takes Eyes off Political Elite', *The Sunday Independent* (Johannesburg, 28 June 2015)<https://mistra.org.za/wp-content/uploads/2019/10/Focus-on-the-Charter_M-Ndletyana.pdf>.

[114] FunDza, 'Steve Biko and Black Consciousness', *FunDza Literacy Trust*<https://live.fundza.mobi/home/library/resources-education/facts-with-fundza-learning-from-the-past/steve-biko-and-black-consciousness/>[accessed 29 April 2021].

Charter to hold both pro-Capitalist and pro-Socialist positions. It publicly embraces rhetotorical populist views held by the working class, while simultaneously enacting neo-liberal policies, which continue to disenfranchise the ordinary poor South Africans.

Therefore, the anti-apartheid struggle and the post-apartheid socio-economic justice issues in South Africa highlight the broader human rights challenges in the post-colonial era in the global South. Indeed, people of colour in countries across Asia, Africa, the Middle East and South America, continue to struggle with the legacy of the brutal Western colonisation which denied them of their basic human rights. It also highlights the history and ideology of the human rights discourse, which still remains Eurocentric, imbued in whiteness, epistemic racism, epistemic violence and continues to privilege the views, priorities, concerns and opinions of the privileged white male. Therefore, the human rights discourse needs to be decolonised so that it becomes more sensitive to the views, values, perspectives, realities and history of the people of colour in the global South.

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Morality—Ideology—Objectivity: The Pre- and Post-juridical Dimension of Human Rights in the Era of Digitisation and Artificial Intelligence

Peter Herrmann

1 Instead of an Introduction

MACHEATH: You gentlemen who think you have a mission
to purge us of the seven deadly sins,
should first sort out the basic food position,
then start your preaching! That's where it begins.
You lot who preach restraint and watch your waist as well,
should learn, for once, the way the world is run:
However much you twist, whatever lies you tell,
food is the first thing, morals follow on.
So first make sure that those who now are starving
get proper helpings when we all start carving.
VOICE OFF-STAGE: What keeps mankind alive?
MACHEATH: What keeps mankind alive? The fact that millions
are daily tortured, stifled, punished, silenced, oppressed.
Mankind can keep alive thanks to its brilliance
in keeping its humanity repressed.
CHORUS: For once you must try not to shirk the facts:
Mankind is kept alive by bestial acts.
(Brecht 1928)

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2 Introduction

Debates in jurisprudence are in general confronted with a paradox that must be seen as permanent tension between the four angles of a square:

- the *ius strictum* (also *lex perfecta* and in part *lex loci executionis)*
- the juridical interpretation
- the moral standard of the time and region
- the moral standards of a utopia that is still striving for acceptance, i.e. morals *avant la lettre* and with this *lex posterior derogat legi priori* or even the suggestion that future law overrules present law.

At certain points legal debates escape this field, referring to morality as some kind of last resort, putting supposed 'general and generally accepted values' to the fore. Two core issues can be put forward:

First, one is wondering if and—if at all—in which sense it is correct to refer to morality as this opens a field to a highly contested field of 'statements' and norms that are inclined to be (i) subjective and (ii) power-based and thus (iii) in principle affirmative. However, as Eugène Pottier phrased it: 'There are no supreme saviors/ …. Let us fan the forge ourselves/Strike the iron while it is hot'.[1] Both parts are important, especially if taken together: Criteria are human practices, and these must be taken as matter of power.

Second, suggesting such perspective results in contradicting several of the core principles of legal thinking as for instance the *ius cogens*—in any case, it must be seen that jurisprudence is in fact never clear; instead, contradictions between different legal 'principles' are characterising the foundations of the system. As such it is proof of the centrality of power and practice as determining factors not only of adjudication but equally of legislation.

One of the core problematiques of any legal system is revolving around the role of morality and with this the possible obligation to act against what is legal, following 'common sense' and twisting law towards some natural law interpretation. In particular Gustav Radbruch, after the second world war, rejected an unconditional absolute validity of positive law, stating that.

[1] From The International.

> [t]here are principles law, therefore, weightier any legal enactment, so that a law in conflict with them is devoid of validity. These principles are known as natural law or the law of reason. To be sure, their details remain open to question, but the work of centuries has in fact established a solid core of them, and they have come to enjoy such far-reaching consensus in the so-called declarations of human and civil rights that only the dogmatic sceptic could still entertain doubts about some of them. (Radbruch 1945: 14 f.)

Already much earlier, both, Rudolph von Jehring and Oliver Wendell Holmes highlighted the fact that we are dealing with *The Struggle for Law*—taking the title from Jhering's work (von Jhering 1915).

Of course, this opens the need to define what moral is. It is easy to say what it is about, namely some abstract 'good society' and people's obligation to realise and foster it; but this leaves the question of scope open and, moreover, doesn't even allow seeing this question.

As main trains of thought we find teleological and deontological approaches—while this distinction may be for first considerations useful, we must acknowledge that both approaches are heavily actor blind: as far as actors play a role, they are defined as rational individuals, owning themselves and relating to the environment and world via appropriation, thus underlining the reference to oneself. John Locke makes this especially clear, stating:

> Though the earth, and all inferior Creatures, be common to all Men, yet every Man has a Property in his own Person: this no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joined to it something that is his own, and thereby makes it his Property. It being by him removed from the common state Nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other Men. For this Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.
> (Locke 1689: 287)

Such view omits—at least for today, though even for earlier stages of human development—that any production and reproduction is bound to the human being a social animal. Thus, the question of morality is in fact a question that is immediately concerned with the social character of human beings, and can subsequently only be understood by taking a relational and processual approach. As a result, it is necessary to consider on the one hand the restrictive binary model—defined by

the property relationship; on the other hand, this makes only sense, if it is properly considered with its irresolvable contradictory loop. Niklas Luhmann expressed this, writing.

> The original state of nature was lawful, its change was lawful, the resulting difference of right and wrong, splitting at individual property, is also lawful. I can legally exclude others from my property, and if they do not accept this, they are in the wrong.
> (Luhmann, 1991: 47; translation P.H.)

We see a distinction, or even more: a separation of two moral standards, namely one that is concerned with internal consistency, another that is going beyond this limited scope, including both an extension of scale and scope of the criteria and the opening of space for alternative action.—Depending on the position taken, the moral standards are different, and we arrive at the conclusion that immoral behaviour is, depending on the perspective taken, highly moral. Thus, it may well be questioned, if speaking of moral standards is correct—the present author suggests a different approach, aiming on the objectivation of morality by linking it to the development of productive and reproductive praxis and related property structures as core of the distribution of power.

3 Polarisations

Making another contribution to an obviously never-ending story seems to be reasonable, as it is about taking up the challenge especially in the context of digitisation. Here, the final answer may be found in the ultimate presumption of permanent change and—going beyond processuality—a relational pattern of which we can say.

> Tu sei fatto di tempo, di incessante
> Tempo. Sei ogni solitario istante.
> (Borges 1982)[2]

[2]You are made from time, the non-stopping time. You are every single moment. (translation, P.H.)

This underlines the uniqueness of every single moment which is characterised by its contingency: Everything exists as it is, but it is equally valid that everything could be different.[3] Such interpretation goes beyond modernist views of society as functionally differentiated entities, emphasising the perspective of networks (Castells), where not individual actors are paramount—the role of the individual actor is shifting even beyond multiple individuals and collectives, being qualitatively changed, arriving at a web of non-located collective contributions. This does not only change the parameters of the setting; instead, we are witnessing an overall change of both, accumulation regime, mode of regulation, life regime and mode of living. These are characterised by an ambiguity: on the one hand we have seemingly endless possibilities, as decisions are not limited to functional relations within quasi-closed systems (politics communicating about politics in the language of politics; jurisprudence talking about legality in the language of law …—outlined in the theory of general media as presented by Niklas Luhmann, each of them establishing a binary system); in technical terms we are increasingly limited by the binarisation of communication: functions and functionality are the only relevant criteria—the 'on' and 'off', not allowing anything else; this is, however, requiring making reference to substantial aspects. Such substantial reference can be derived from the tradition of Western Enlightenment and the corresponding understanding of rationality though we have a limited validity of meaning—the juxtaposition of Gauss, the mathematician, and Humboldt, the explorer, both *Measuring the World*, being one expression of it; some kind of *Eclipse of Reason* can be found in many instances, not only brought forward by the Frankfurter School where it is even expressed in the title just mentioned. A hermeneutic understanding of the world is already since long time emerging from the mechanical reductionist understanding of truth—and speaking of understanding of the world is not only referring to the universal questions of humankind but also concerned with what became known as functional systems. Probably the most pronounced area is the economy: whereas the ancient tradition does not really deal with the economy in today's understanding—instead we find the oikos as matter of managing resources[4]s for a good life—we find first a move towards a solely gain oriented economic system, Karl Polanyi grasps this, writing.

[3] Of course there is some repercussion of Luhmann's dictum that 'everything could be different—but nearly nothing that I can change' (Luhmann 1969: 44; Luhmann 1969: 35 ff.; translation P.H.).

[4] Including the oikos and the actors themselves, thus being reflexive and relational.

> The assertion appears extreme if not shocking in its crass materialism. But the peculiarity of the civilization the collapse of which we have witnessed was precisely that it rested on economic foundations. Other societies and other civilizations, too, were limited by the material conditions of their existence—this is a common trait of all human life, indeed, of all life, whether religious or nonreligious, materialist or spiritualist. All types of societies are limited by economic factors. Nineteenth-century civilization alone was economic in a different and distinctive sense, for it chose to base itself on a motive only rarely acknowledged as valid in the history of human societies, and certainly never before raised to the level of a justification of action and behavior in everyday life, namely, gain. The self-regulating market system was uniquely derived from this principle. (Polanyi 1944: 31)

At this stage, the capitalist gain orientation had still been linked to some extent to use value, while we find a later shift towards an understanding of capitalism that we know from the Medieval and the Renaissance: trade- and finance capitalism, the latter in the extreme case completely disjoint from reality and executed by algorithms.

Instead of blaming contemporary developments and in particular artificial intelligence, we should not forget that much of this development is in fact a continuation of the line of Kantian thought presented in his short reflection About a supposed right to lie out of human love. There we read.

> Truthfulness in statements that cannot be avoided is the formal duty of man towards everyone, no matter how great a disadvantage may result for him or for somebody else; and although I do not do injustice to the one who unjustly compels me to make a statement, if I falsify it, I nevertheless do injustice in the most essential part of the duty in general by such a falsification, which can therefore also be called a lie (although not in the jurist's sense): i.e. I do, as much as is in me, that statements (declarations) find no credence at all, consequently also all rights, which are founded on contracts, cease to exist and lose their force; which is an injustice done to mankind in general.
> (Kant 1797: 426: line 14–24; translation P.H.)

It is exactly the outline of de-hermeneutisation of ratio—later for instance critically reflected upon by Max Weber in his analysis of forms of government and especially his critique of the emerging and tightening bureaucracy. Later this problematique had been issued by the Frankfurt School, in particular issued in the book by Max Horkheimer mentioned earlier, titled Eclipse of Reason.

4 Today's *cui bono* and *quid pro quo*

So far we had been by and large looking at an important formal aspect of Human Rights, locating them by way of analysing their communicative localisation. While this emphasises the relational perspective, it is equally important to add a substantial understanding—otherwise Human Rights remain an empty envelope: not engaging in an attempt of substantialisation, we arrive at an arbitrary completion. While it will be impossible to overcome arbitrariness completely—one may also speak of arbitrary use of power as means of governing—it is important to look for criteria that go beyond group interest and vested interests and provide at least some historical reasoning for what Human Rights are. Even being aware and necessarily accept power as definiendum, it means that we must confront ourselves with the necessity to define power in order to have criteria for its limitation. Today we are confronted with the problem that Amartya Sen tries to circumvent by suggesting that Human Rights are at their very core not asking for a reflection in juridical terms (see Sen 2004: 318). Aiming on a general framework for defining the substantial dimension of Human Rights, two guiding questions are proposed for assessing the determination of a framework that allows determining the balance between utopian opportunities and existing power structures. These questions are first *qui bono* and second *quid pro quo*. Going back to the ancient origin of the cui bono, taking Cicero's speech as point of reference, it will be clear that this is not simply a matter of finding a legal perspective that is in line with the Roman law, allowing to define guilt of one side or the other; instead, the cui bono is clearly defined as social fact, thus requiring a relational perspective. When arguing in a legal perspective, it should also be clear that the proposal is not limited to a simple definition of one party being responsible for granting rights and the other party being defined as claimant. It is, however, about an unfolding system that is not defined by a limited concept of tit for tat; instead, we are dealing with a socio-legal field of tensions across which morality is becoming permanently defined as matter of historically concrete contest. Universality shrinks to contest and the possibility to assert oneself the highest possible level of socialisation of economic processes, that is the concern with production and reproduction of daily life, thus going much beyond and being even different from the production and distribution of commodities. That is to say that what is produced in material terms cannot be limited to commodities; also, it must be considered that production is concerned with establishing and maintaining social relationships. Importantly, we must recognise a multitude of different forms of distribution and exchange—only a short useful hint is made to the

work of Karl Polanyi and Eleanor Ostrom, both highlighting that another world is not only possible but in fact existed and still exists. Mark Fischer in his work on 'Capitalist Realism' discusses the problematique of '[t]he world that it [i.e. the alternative presented in the film Children of Men, standing for new utopias] projects seems more like an extrapolation or exacerbation of ours than an alternative to it.' (Fisher 2009: 8) This applies to much celebrated economic alternatives, supposedly suggesting completely new and original patterns of (re-)production of daily life—relevant terms are, first of all, sharing economy, collaborative economy, digital capitalism (Schiller), accompanied by big data economy, surveillance capitalism (Shoshana Zuboff), Zero Marginal Cost Society (Riffkin), unscarcity capitalism (Staab), collaborative consumption, prosumer economy (Toffler), distributive economy (Arthur).

This allows us to determine the material constellation that defines Human Rights under condition of the • digitalised, • capitalist, • national and • globalising • network society.

This characterisation seems to be sufficient although the characterisation along the line of the status of production-dependency,[5] financialisation, servicialisation, miniaturisation and overall dematerialisation is missing—the reason for accepting this is given by the fact that we find on the global level the different characteristics being prevalent, existing in parallel, while nationally one or the other is dominant.

Looking at the actor perspective, moral guidelines must reflect the different actors' kind and scope of socialisation, namely looking at primitive/original communism with a very low degree of socialisation, though of immediate kind; slave societies, also with a low level of socialisation, while highly mediated, one may say dividing society in humans and non-humans; peasant societies, again with direct forms of socialisation, thus with a limited scope of socialisation, though large scope of action; early and late merchant societies, the socialisation of scale and action relatively high, while the socialisation of scope remaining relatively low; early capitalist societies, the socialisation of scale relatively high, while the socialisation of scope and action remaining relatively low; the socialisation of scale and scope relatively high, while the socialisation of action remaining relatively low.

[5] This refers on one hand to Clark's/Fourastié's three sector model and on the other hand Marx' distinction between two departments, later enhanced by Rosa Luxemburg who added the finance department, later again by my own work, adding two departments, each specifically employed with the provision of services (see Herrmann 2014).

Today we reach another mode of production and are thus witnessing a change of the level of socialisation. While digitisation plays an important role, the development is surely going beyond this—or better said: is founded in a previous setting, digitisation being only a perfecting tool: on the one hand we find an increasingly close relationship between people, coined by cooperation in both, production, consumption, distribution and exchange as outlined in Marx' manuscripts preparing *The Capital*. At the very same time, we are witnessing an increasing scrutiny, or even design of behaviour: Armin Nassehi sees processes of digitisation a long time before today's digital instruments and industries came into being, suggesting that 'the reference problem of digitalisation is the complexity and especially the regularity of society' (Nassehi 2019: 28). Proving his argument, he refers to early social statistics, for instance the work of Adolphe Quetelet, undertaken in the first half of the nineteenth century.

We can turn the notion of universal validity of Human Rights to a more realist perspective—not by way of assessing certain rights as historically determined. This does not support a relativist approach. On the contrary, it suggests the need to understand Human Rights as systematically expanding, thus following an equally systematic development of the process of socialisation of production. This is without doubt a somewhat problematic approach—it would be easily possible to argue on this basis in favour of the lower level of Human Rights in countries with the lower socio-economic development. However, we may turn this around by arguing for the need to support countries in the process of socialisation, maintaining at the same time the right for self-determination. As such, it is an argument against private appropriation of collective means and the results of their collective use as much as it is an argument in favour of the self-determination of people, unfolding their potentials in favour of the use for further collective development. Already the technical development is pointing into the direction that digitisation and AI suppose an immediate 'physical' push towards socialisation, or even more: digitisation and AI are technically matters of socialisation. It is true, indeed, that this applies in some respect also to the large-scale production of industrial capitalism—however, the difference is given by the fact in the case of digitisation is characterised by the multi-directional aspect of production and consumption and ownership (legal and factual).

Disentangling the broad field, as presented so far, we arrive at the following different dimensions of development and reference for development:

- the individual sui generis—for instance the German Civil code emphasises the right to self-determination
- the individual acting for others—here we may refer to the German Basic Law, underlining the responsibility of proprietors
- the individual established and defined through others/by togetherness—see below, Sect. 5.4, the reference to guangxi and ubuntu.

Bringing the different levels together, we must determine which potentials are given for the different societal groups and society to enhance both [and this *both* is crucially important], individual and collective performance. The basic—and universal—assumption is that Human Rights are concerned with the enhancement of control over the own life which is here understood as social matter. We may also say that Human Rights are about the enhancement of the process of socialisation, defined with reference to the understanding of the social as

> outcome of the interaction between people (constituted as actors) and their constructed and natural environment. Its subject matter refers to people's interrelated productive and reproductive relationships. In other words, the constitutive interdependency between processes of self-realisation and processes governing the formation of collective identities is a condition for the social and its progress or decline. (van der Maesen and Walker 2012: 260)

5 Digitisation—But What for?

To limit the scope of the contribution, the questions are:

a) what is the purpose of digitisation?
b) what are the different actors and what are their interests?
c) how can the power balance be optimised to make digitisation enhance the process of socialisation?
d) how can the tension between the simple medium (binarisation) and complex forms (digital processes being universally applicable—for controlling the heating in a tiny room to a most complex surgery thousands of kilometres between surgeon and patient) be managed and controlled?
e) (how) can we establish stopping rules, controlling digital processes that have as such no inherent rule of self-control? Set once into motion they will move on according to the established rule until an intervention from outside interrupts or redefines the process

5.1 Ad a.: Purpose of Digitisation

Generally, we can see the purpose of digitisation as the same as the purpose of any other regulation: it is concerned with the double-orientation, on the one hand saving time, optimising the use of time and increasing comfort and on the other hand doing so in order to maximise gain. Maximisation of gain must be understood with two references, namely the increase of monetary or material gain on the one hand, gain in the sense of enhancing control and freedom on the other hand (benefit). In addition to these general aspects, another important issue is about assessing gain on the one hand as private gain of individuals, on the other hand as societal gain, which itself may take different forms (collective property/commons (see e.g. Ostrom 2010: 645, cooperative control, state control, administered in the spirit of general/public interest, regulated e.g. as corporation established under public law/independent public law institution …)—in the second case we may speak of welfare.

While these are general issues of regulation—production and distribution –, gains in connection with digitisation are specifically characterised by the fact that production and processing of data are following very specific ways, being genuinely socio-public by their very existence, their value being strictly defined by reaching beyond private processes—or as Armin Nassehi says: Individual transport is … no longer an individual matter (Nassehi; op.cit.: 123).

5.2 Ad b. Actors and Their Interests

We can continue by looking simply at actors/agency. At least four features are outstanding, namely.

- the network effect, meaning that the production and utilisation of data depends on a substantial number of actors involved—as boring as a soccer game is if every player has a ball for his/herself, as boring is a telephone network or membership in social media if only one person has a telephone or uses the media in question
- the near-to zero-marginal cost of the extension production of additional units and their distribution, i.e. the fact that the cost of the production and distribution of any additional unit is near zero (if 1, 100 or 1,000,000 user(s) stream files or open a network account does not make a (major) difference

- the production of data and the use are intrinsically tied together: using maps for driving, means producing uno actu new data for further development and use of the maps; streaming music or films produces at the same time data of consumer and consumption patterns, that may be used for other purposes. The idea of prosuming (Toffler) can surely help to better understand the relational character of what is going on. In addition to the relational character, it is important to emphasise the processuality: such processes cannot be established immediately in one act, but they are evolving over a long period of time and for the early users it means to be patient as the expected gain will not show up immediately.
- in some way we can speak of the uno actu principle, here this goes beyond the basic unity and ties different actors and different interests together as it is presented in the following matrix:

	Saving time		Optimising time		Optimising use of resources	
	Individual	Social	Individual	Social	Individual	Social
Maximising gain						
Maximising benefit						

Importantly, all these aspects are characterised by the multi-level character of time. We usefully may refer to the French *École des Annales* and their understanding of history, distinguishing between three planes. Fernand Braudel characterises this aptly, writing.

> La multiplicité évidente des explications de l'histoire, leur e´écartèlement entre des points de vue différents, leurs contradictions mêmes s'accordent, en fait, dans une dialectique particulière a` l'histoire, fonde´e sur la diversité des temps historiques eux-mêmes : temps rapide des évènements, temps allonge´ des épisodes, temps ralenti, paresseux des civilisations. On peut rester dans les limites de tel ou tel temps historique chaque fois qu'il s'agit d'une étude particulière. Par contre, toute tentative d'explication historique globale – telle que l'histoire des civilisations – oblige à multiplier ces photographies, diverses par leur temps de pose, puis à ramener ces multiples temps et images à l'unité, comme les couleurs du spectre solaire dûment mêlées restituent, obligatoirement, la lumière blanche.
> (Braudel 1963: 35/37)

This qualifies the view on the actor: without denying the importance of strong institutions/actors, it allows us to see as well the interaction—not to say symbiosis—between the different agencies involved in the processes. We are not only concerned with mutual dependencies as for instance that between slave and patron as described by Hegel. The establishment of the new economic features and possibly the development of a new accumulation regime can only be understood as interplay between strong actors who are able to—and only will—take up on a specific need as it evolves in society.[6]—One may say 'all have different interests, but are pulling in the same direction', with the help of skilful steering, possibly helping the cunning of reason to prevail. As such it is also, though partially, a repercussion of theories of power as for instance put forward by Michel Foucault, here directly applied to socio-economic structures and the accumulation regime.

5.3 Ad c. Optimisation of Power Balances to Enhance Socialisation

Being serious about the historical and relational character means that thinking about the possibility to rebalance power is not mainly concerned with single issues of protecting Human Rights—we may think in this case about data protection, privacy, working conditions in connection with newly developing strategies etc.; instead, we have to take a larger picture and consider the wider society issue that is involved in applying—and as well not applying—certain strategies of digitisation. Mainstream debates are mostly looking at technical aspects or/and aspects of privatisation; however, the present is commencing from the fundamental assumption that digitisation and artificial intelligence are first and foremost part of the secular process of socialisation. As such, two aspects are of special importance:

First, (living in) society requires an increasing number and a deeper quality of information. At first glance this seems to contradict realities. However, the reason for this impression is due to the second aspect, namely the fact that information is increasingly mediated and increasingly carrier of tentative or real knowledge, imputations, cultural framings etc.—even rejection of norms etc. means first engaging with their affirmation. We can arrive directly at the question dealing with.

[6] Though it may be that this need itself does only exist as reaction of some kind of 'stimulation' by the potential provider.

5.4 Ad d. The Tension between the Simple Medium and Complex Forms

Approaching this matter, we must see at the outset that processes of mediatisation are by no means new: even if we can justifiably say that mediatisation increased over time, allowing us to speak of today's society as mediated entities—Luhmann's understanding of society as system of communication comes necessarily to mind—we have to recognise that nearly every relation is mediated: beginning with language or even bodily nearness and touch, this carries the interpretation of each participant's/actor's personal experience is carried with it.

The problem of complexity can be best understood by referring to (i) Schroedinger, (ii) Heisenberg'sche uncertainty principle and (iii) the butterfly effect—these hints have to do suffice.

The fundamental question is about validity. As much as a formal approach fails to define meaning, we can say that the same is true for moral standards: moral/morality per se remain empty phrases, by and large subjective, while loosely linked to at a time generally accepted standards; in order to tighten und substantiate the link, it is necessary to establish a connection to matters of societal praxis. One way of doing so is by establishing a link to fundamental tensions that are characterising what we may call a *mine field of Human Rights*—Human Rights questions must be hermeneutically checked against the relevant poles, and substantially filled. This way they can provide criteria for judgements and criteria for checking the acceptability of certain matters and measures. This is introduced as systematised soci(et)al discourse. The systematique is presented as tentative outline for a debate on morality—ideology—objectivity of Human Rights and the relevant pre- and post-juridical dimension of Human Rights in the era of digitisation and artificial intelligence. The following are far-reaching tensions, the poles standing for archaic forms of socialisation on the one hand and advanced forms of socialisation, not least characterised by far-reaching mechanisms of mediatisation on the other hand. The proposed poles are as follows:

- activity/action capturing the immediate socio-spatial environment versus praxis as conceptualisation of moving in a complex relational field
- behaviour as adopting to a given situation, analogue with respect to time and location versus staging/enactment, transcending immediate dependency from time and space
- imputability/accountability in the real sphere versus "overcomplex" communicative network involvement allowing to set own standards and truths

- traditional actor identity along the line of a more or less traditional social allocation versus changing and chosen roles
- informational self-determination as ultimate protection of privacy versus maximisation of access(ibility), including transcendence of time and space, translating into redefining privacy.

The fundamental aspect and conclusion are concerned with the need of discussing Human Rights today in the perspective of a new generation thereof: Speaking of social rights as central part of the entire debate must be revisited in order to arrive at a clearer understanding. Although the history of the strive for Human Rights cannot be thought of without at least implicitly referring to social rights—in the understanding of the social recognition of the need of societal (re-)structuration in order to recognise that all human beings should be seen as human beings, thus being at least in general terms 'equal', the debate had been fundamentally flawed by the work of Thomas M. Marshall (Marshall 1950) who proposed three stages: civil, then political and finally social rights. While the separation of stages is problematic, another problem is the proposed sequence: it overlooks that the strive for what he sees as civil rights, had been in actual fact a claim against the feudal class, asking for the right to be socio-economically active—civil rights had been instrumental but this should not be considered as quest for such rights as end in themselves. The historical development resulted in a misinterpretation—to be more precise: mis-conceptualisation. Capitalist structures had been taken for ineluctable, for us importantly characterised firstly by the new definition of class conflict and secondly by the establishment of the modern individual, entailing the separation of a private sphere. This can be seen as another aspect of the coin of the separation of the use value and exchange value of commodities: as much as we find an alienation between the two values, we see the alienation between the individual, now reduced on the market actor and the citizen as social being—even if the latter is at some stage absorbed by the first, remerging as market citizen. Part of this process had been the redefinition of the social, degrading it to a mechanism of providing means to people who cannot obtain of the necessities to constitute themselves as individuals—we may also speak of a twofold annexation of the social. Looking at the Universal Declaration of Human Rights, we recognise the tension and contradicting character although we see at the end the dominance of the capitalist mode of production. Especially in article 23, making reference to employment, not to work, pointing on pay, thus referring to wage labour confirms said separation seen as ultima ratio of human societies: it is what the right to engage and be engaged in the capitalist wage labour, no attention is paid to other forms of production and reproduction. Obviously, this stands in stark contrast to

the development of the social existence and also if we look at the development of the means of production. Talking about socialisation should be taken further by pointing out that in fact the character of the private and the public fundamentally changed in nearly all societies, and in particular in those where digitisation is going to rise to the core of the productive processes. Decisive is not that the private sphere is coming under severe pressure—even to an extent that allowed Scott McNealy to say already in 1999 "You have zero privacy anyway—Get over it" (Sprenger, JAN 26, 1999 12:00 PM). Another question, reaching much further, must clarify what privacy is, now looking for the answer in a different perspective: the emergence of the modern individual meant that the original concept of individuality and personality had not been maintained: the immediate encapsulation into the societal context had been dissolved and replaced by more indirect and mediated forms: Instead of being controlled by mechanical solidarity (Durkheim), status (Maine), Gemeinschaft (Toennies), Lebenswelt (Lookwood) etc., we find different forms, one being the *confession,* especially as practiced until today in the catholic church, utilised to present oneself. Such forms of self-presentation are today for instance blogs, facebook, twitter, tiktok and the like.

All this draws our attention to fundamental changes, suggesting a different perspective on the question of individual, society and rights: modernisation and the emerging capitalism went hand in hand with the ideology of individualisation, here to be understood in a societal perspective. Subsequently we arrive at the conceptualisation of society as fiction, consisting of individuals, being on the one hand an aggregate and on the other hand standing—for instance as Leviathan—against individuals/people. Such individual-centred approach stood diametrically against the classical understanding, where we find the emphasis on the social character of human beings. In the light of such concept it is obvious that the protection of individuals is of utmost importance. However, emphasising that human beings are at the very core of their existence social beings, changes the overall view: now it is not the individual contributing to society and/or receiving from society; instead, the individual is "result" or "product" of society where society is a "body" that is constituted by the interaction of the thus constituted personalities—another formulation of the definition of the social which had been presented earlier (Sect. 4). In this light, the focus is not the individual that has to be protected from intervention by society which in this light does not exist sui generis; instead it is now about protecting and regulating a space to which everybody can contribute and of which everybody is—nolens volens—part. While there are strong repercussions of the Chinese guanxi (關係 / 关系; see in this context Fei Xiaotong 1947) and the African ubuntu (see critically Eze 2010), the present understanding does not refer to these traditional approaches. Instead,

it starts from the presumption of development towards increasing socialisation, understood as movement characterised by relationality and processuality, going hand in hand with the development of the means of production. Important is in respect of the latter the tendency towards

- a de-materialisation of parts of the production and products,
- the closely linked change of value, in short to be grasped under the terms zero-marginal cost (Riffkin) and network effects, in both cases a massive push by which the organic composition of capital is changed.

This can be summarised by an increasing role of information, both as raw material and product. Importantly, such change leads to the situation where growth results in an overall gain—we are here concerned with non-rivalry items and in addition items, that are likely losing value if they are handled as excludable. Part of the explanation is that production and consumption are in a complex way interwoven—occasionally we find the interpretation of such information-focused systems as commons. However, more important than looking at the production/consumption side is in the present context to look more in general at the actor perspective, namely the shift mentioned earlier, talking about the alienation between the individual, now reduced on the market actor and the citizen as social being—even if the latter is at some stage absorbed by the first, remerging as market citizen. We witness the death of the subject as it emerged from the enlightenment, being replaced by the *informational self* (Belliger and Krieger 2018a). This new identity—as reaction of insecurity[7]—transcends the 'classical' identity which had been geared to individuals, constituting society via aggregation, insisting on quasi-autarky and self-amplification and, moreover, constitutes itself as emerging and concretising itself from being interwoven with a network with which it interrelates in a kind of perpetuum mobile formation: there is 'energy' that it draws from the network and there is 'energy' it feeds back into it, in a relational way each side depending on the other. As much as this relationality is based on information, thus producer and consumer merging into one agency, we are confronted

[7] Zygmunt Bauman suggests that "One thinks of identity whenever one is not sure of where one belongs; that is, one is not sure how to place oneself among the evident variety of behavioural styles and patterns, and how to make sure that people around would accept this placement as right and proper, so that both sides would know how to go on in each other's place. 'Identity' is a name given to the sought escape from that uncertainty." (Bauman 1995: 82).

with the impossibility of privacy in the traditional understanding—insisting on privacy would undermine the functioning of the system. Moreover, the private individual replaces itself by becoming public player to the extent to which we can say in the theory of media that the sender had been traditionally playing a public role, the receiver being left to the private—a distinction which cannot be upheld today. In other words, the problem is not the need to protect individuals against possible invasion of their 'private realm'—instead, the challenge is the lack of transparency and the lack of the protection within the public sphere. We are facing the need to have spaces that allow what Habermas interpreted as public space—a space being occupied by citizens who make their private opinion known (Habermas 1990). Andréa Belliger and David J. Krieger expand this, contending

> that democratic processes do not consist of votes and elections alone. There must be public discourse, debate and opinion before voting. Citizens must stand up and say loud and clear how they will vote and why. If no one declares publicly what he or she stands for on political issues, democracy collapses.
> (Belliger and Krieger, August 2018b, op.cit.: 17)

In other words, the problem is not the invasion but the resistance against transparency—including personal disclosure. Another (dimension of the) problem is that—distracted by focusing on protection of individual data, it is easily overlooked that the often referred to privacy-paradox (e.g. Barnes 2006; Norberg et al. 2007; Brandimarte et al. 2012) can also be reinterpreted, suggesting that the readiness to give data away is in fact not appropriately reflecting by whom and how data are processed. It is at the end just another instance of social production and the private appropriation of the results. When it comes to the discussion of polities, one must take into account that 'free and secret elections' may well be important when it comes to Human Rights, though importantly one has to acknowledge that privacy is in some respect a peril for democratic systems. Put differently, we are witnessing

> a countervailing trend away from privacy and secrecy and toward openness and transparency, both in the corporate and government sectors. And on the web, we have had several major steps forward in social tools that suggest at least the outlines of a complement, or opposite, to privacy and secrecy: publicy.
>
> The idea of publicy is no more than this: rather than concealing things, and limiting access to those explicitly invited, tools based on publicy default to things being open and with open access.
> (Boyd, Dec 30 2009)

Obviously, the question of Human Rights is now as well different to the well-known traditional standards: it cannot be directed on the protection of individuals and their privacy. Having all what had been said in mind, the orientation is now geared towards protection of social space.

> Digitalisation makes possible the phenomenon of interactivity, simultaneity, direct participation of the user. That, too, is a completely new element. In addition, there is the unlimited possibility of documenting, breaking down, recording and passing on things in an immeasurable space.
> (Doepfner 2019: 8; translation P.H.)

5.5 Ad e. How Can Stopping Rules be Established

All this results not least in process of restructuration—at this stage an equation with too many unknowns and thus a challenge for the Human Rights debate. In short, we can say that the traditional understanding, as especially reflecting the UDHR and related discourses, is increasingly problematic. It considers a clearly defined structure of actors and regulations as given and not to be questioned. However, this is highly problematic. The foregoing clearly shows that especially the actor perspective changed fundamentally. This, as part of a 'socio-technical process' (Dolata and Schrape 2014), means in respect of the Human Rights debate that we are approaching a consolidated reflection of the processes that are already prevailing since some time, perhaps even germinated at the end of the 1940, though not being reflected upon. In very simple terms, the traditional Western approach can be seen as follows:

- an abstract understanding of human beings
- fundamentally reflecting
  - the capitalist
  - corporatist
  - parliamentarian
  - 'constitutionalist'
- status quo as ultimate standard
- positioning the state as defender of Human Rights
- while maintaining in part the original orientation on Human Rights as instruments
  - operating as protection against arbitrary intrusions by the state

  - directed against individuals
  - where the social is approached in terms of aggregation of individuals
  - at times 'bundled' by specific 'general characteristics', as ethnicity, gender …

The following tries to highlight some changes, simply by qualifying the single aspects

- an abstract understanding of human beings
  while this is by and large maintained, human beings are more seen as self-determining subject
- fundamentally reflecting
  - the capitalist—**without considering changes of capitalism, and only reacting on negative consequences, without reflecting (sufficiently) structural conditions**
  - corporatist—**where corporations nowadays reach economies of scale, of scope and action that are state-like**
  - parliamentarian—**supplemented by aspects of participatory polities**
  - 'constitutionalist'—**while the rule of law is still highlighted, critical aspects, dealing with problems of juridification, bureaucratisation and polities becoming bodies that are increasingly independent from daily social realities**

  status quo as ultimate standard—**however, globalisation and the in tendency weakening of the US-hegemony and not least the progressing demands from the side of periphery-countries and regions it is becoming problematic to consider one standard for all**
- positioning the state as defender of Human Rights—**while this had been already problematic from the outset as it had been frequently the state that breached Human Rights, large corporate are increasingly centre-stage: the one hand as institutions breaching Human Rights, on the other hand being defender: CEOs being in relevant statutory bodies or presenting themselves as philantropists** (Porter and Kramer 1999; Planck 2017)
- while maintaining the original orientation on Human Rights as instruments
  - operating as protection against arbitrary encroachments by the state
  - directed against individuals,
  - where the social is approached in terms of aggregation of individuals
  - at times 'bundled' by specific 'general characteristics', as ethnicity, gender …

Law—also and perhaps especially Human Rights law—faces the new, twofold challenge: on the one hand the operational field is in part dissolving. This is a matter of general societal development characterised by increasing functional differentiation, going hand in hand with emerging specialised fields that aim on integration, cross-systemic communication and coordination etc.—all this results not least in increasing opportunities, including possibilities of mal-communication and misunderstanding. Hand in hand goes the blurring of borders and 'fields': the apparently clear distinction between—and even separation of—private and public (taking the sender of message as public, the recipient as private) loses meaning if we consider that with modern information technology and digitisation many-to-many communication gains ground; the privacy-paradox loses is resolved, considering that people are not socially allocated to firmly defined roles but the 'general crisis of meaning' evokes streams of identity search, including the putting oneself into scene. Klaus Pake, in the Handbuch Fernsehforschung, grasps the overall situation pretty well, contending that.

> [t]he perception of reality is inextricably linked to an interpretation of what is perceived. Images of reality and worldview constructions are the result of communicative action. The prerequisite for certainty of action is intersubjectivity and interaction in the lifeworld, i.e. the permanent understanding of the meaning of what the participants do with each other. The media also do not depict an external reality, but are themselves actors in a social field of forces that they influence and by which they are influenced. (: 99)

Taken beyond the media-analytical perspective, we can easily make out the challenge for Human Rights: instead of being bound to abstract principles—they are commonly seen as universal, inalienable, indivisible, interdependent and interrelated—they are now replaced by an actor perspective and a matter of ongoing action of socialisation. In conclusion I suggest to approach the definition and assessment in a way that is different from those that are prevailing:

• Initially, Human Rights had been defined in a positive and static way, commencing from the situation after the holocaust of WW II: it seemed to be clear that some fundamental rights should be established, standing up against the extremes the then recent history. One can say that the UDHR had been understood as bulwark against evil—in this interpretation the evil had been seen as outbreak of extreme irrationality, inhumane loss of control and, as far as it had been seen as matter of societal relevance, a matter of return to barbarism. In turn, this means that the structural dimension had been denied, at least not recognised—Hannah Arendt's view on the banality of evil (Arendt 1963) did not

fit into this interpretation, nor did the statement that the real catastrophe must be seen in the fact that everything goes on as it went previously (Adorno, passim). And of course, a sound socio-economic analysis had been completely missing. • An attempt to sharpen the analytical perspective had been given by the proposal of three stages of Human Rights—Karel Vasak who came up with such proposal (see Vasak 1977), elevating very much Marshall's proposal on the international and global level. • Another development of interpretation emerged not least from claims suggesting a second declaration—one that reflects the Islam. The supposed reply consisted in what may be called a quasi-discursive approach, aiming on defending Western hegemony by accepting at least the fact of different possible interpretations, paradoxically insisting that the Western interpretation would be superior due to its more universalist approach. The paradoxical character is given by the fact that such claim meant at the same time that this view would be by and large without substance (see the later quote from Marx; Sect. 6). • Here it is proposed that, without absolute rejection of the foregoing approaches, that we arrived latest now[8] at a stage where we must be serious about the need of a praxeological approach. Referring to Wittgenstein's notion that the limits of our language define the limits of our world and applying it in a wider sense, taking societal praxis as universalised language, it is suggested that Human Rights can only be defined and put forward by arriving at a common societal praxis, and praxis refers in the widest sense to the production and reproduction of daily life. Non-interference, as it is part of such conceptualisation, has to acknowledge the dialectic of 'leaving alone' and 'cooperation with(in) different frames'. In other words, a Human Rights agenda cannot be reduced to its own 'juridical realm' but is in need of an external reference without which it would remain a self-referential system, not being able to reflect the wider societal reality. In other words, we face the need to fully acknowledge the importance of interference.

One major consequence is the explicit acknowledgement of the fact that Human Rights, notwithstanding the need to put them into a proper juridical frame, such frame cannot serve as procrustean bed. The trend to 'tighten' the meaning of such rights by new regulative documents can easily lead to a distraction—the involvement by an endless chain of defining rules, exceptions, contributing to the destruction of the spirit of law.[9] The problem with such closure is obvious: insofar as we are witnessing the establishment of a societal subsystem

[8] This formulation wants to suggest that such shift is for a long time overdue.

[9] Not alluding to Montesquieu.

that is not able and not willing to leave the limited space to others although this limitation results in the dissolution of its own functioning. In society as a whole and even more so at the level of its subsystems we must accept what is accepted in science: the impossibility of a true perpetuum mobile—at some stage the energy is exhausted.

The Human Rights debate must look for the 'breakeven point' at which the clarity that is gained turns in the loss of 'generalised meaning'. We must maintain a permanent shift between law—as an instrument of individualisation of societal norms—and the political economy, understood in the widest sense—as expression of socialisation. Digitisation is not more and not less than a rupture of this process of socialisation, and as such confronting us with the necessity of rebalancing public and private.

More recent debates, taking in particular the perspective of sociology of law, highlight the importance of interference, going even so far to redefine the juridical system, supposing a strategic role especially for non-governmental organisations in the legislative process (see e.g. Teubner 2010, 2011; Teubner and Willke 1984). Leaving a detailed discussion of this thesis aside, it is easily agreeable that it is a matter of internalising the 'noise' that Niklas Luhmann brought into the debate as factor of stabilisation. The suggestion is that we face at points of rupture, as the one we witness now, characterised especially by digitisation and a new stage of globalisation,[10] the need to open the borders or even redefine territories.

6 Conclusion I: Digitisation: The Danger of Losing what Defines Humanity, Not Only Rights

One of the major problems is based in the fact of a blurring border between a prelegal and juridical approach to the definition. As Amartya Sen contends:

> The present inquiry on the foundations and cogency of Human Rights does not have any direct bearing on the obvious legal status of these "Human Rights laws," once they have been properly legislated. As far as these laws are concerned, the relevance,

[10] Characterised in particular by way of a new stage of independence of former colonies and/or countries of the periphery.

> if any, of this study would lie, rather, in the motivation that leads to the enacting of such laws, which builds on the pre-legislative standing of these claims.
> (Sen, 2004: 318)

But it is not only the blurring of borders that causes problems; more important is the fact that the problematique of the definition occurs with the supposed necessity to overcome the normative approach. This implies that the pre-legal or pre-legislative understanding must commit itself to a concretisation, going beyond moral and/or ideological standards. This brings us easily to the standard assessment of a sequence, that reaches from civil to political and finally socioeconomic rights. However, even if it is standard, the broad implications are not yet thought thoroughly through. The point in question is given by the fact of a misinterpretation of the origin and the original meaning of civil rights. While these appeared to be a matter of freedom of assembly and speech, concerning a broad concept of participation in the process of political decision making, the actual background is given by the claim of the emerging bourgeoisie against the ancient regime, asking for the right to be economically active on their own behalf, not for the enrichment of the nobility. Seen in this light, we are concerned with socio-economic rights, depending on the recognition and acknowledgement of the bourgeoisie as—at the time—new social and political force. With this in mind, there is good reason to contradict Sen or at least qualify his statement that

> pronouncements of Human Rights are quintessentially ethical articulations, and they are not, in particular, putative legal claims despite considerable confusion on this point, generated not least by Jeremy Bentham, the obsessive slayer of what he took to be legal pretensions.
> (ibid.: 321)

Instead, it is the developmental stage of the means of the productive forces that determines the existence of different classes and the power relationships. From here, the concrete definition of the substance of Human Rights finds its formulation, be it in philosophical, political or legal terms. This implies the rejection of any institutionalist approach—at least if it is taken in a reductionist way. Suggesting that Human Rights are defined by reference to morality, means, then, the denial of the objectivity of class contradictions and class struggle. Here Karl Marx' argument on the one hand and Jeremy Bentham on the other hand merge in the rejection of abstract definitions of (Human) Rights. Marx contends that

> [t]his sphere that we are deserting, within whose boundaries the sale and purchase of labour power goes on, is in fact a very Eden of the innate rights of man. There alone rule Freedom, Equality, Property and Bentham. Freedom, because both buyer and seller of a commodity, say of labour power, are constrained only by their own free will. They contract as free agents, and the agreement they come to, is but the form in which they give legal expression to their common will. Equality, because each enters into relation with the other, as with a simple owner of commodities, and they exchange equivalent for equivalent. Property, because each disposes only of what is his own. And Bentham, because each looks only to himself. The only force that brings them together and puts them in relation with each other, is the self-ishness, the gain and the private interests of each. Each looks to himself only, and no one troubles himself about the rest, and just because they do so, do they all, in accordance with the preestablished harmony of things, or under the auspices of an all-shrewd providence, work together to their mutual advantage, for the common weal and in the interest of all.'
> (Marx 1867: 185 f.)

The following statement by Jeremy Bentham can be interpreted in the same line of thought:

> Right, the substantive right, is the child of law; from real laws come real rights; but from imaginary laws, from "law of nature" [can come only] "imaginary rights."
> (Bentham, quoted in Sen 2004: 325)

Taking a wider perspective on the difference between the two, we must point on Marx' emphasis of revolutionary praxis, whereas Bentham's position is simply pragmatic, resulting in an overall affirmative position.

This difference is crucial because we can now see from a Marxian perspective that natural rights are not the parents of law as suggested by Sen; also we can agree with Niklas Luhmann, that society can only be analysed from within, the important part of the argument is here that he rejects ethical standards:

> Every assertion of criteria, every assertion of starting points, premises and so on or of theory structures always creates people who do not agree.
> Yes, they say: that is not so.
> It is not like that or it is unacceptable to write it like that.
> (Luhmann: 43)

It is the concrete action of human beings in their class struggle as it unfolds in reflection of the development of the productive forces, always being considered as asocial relationship.

7 Conclusion II

SHEN TE: Shen Te, yes. Shui Ta and Shen Te. Both.
Your injunction To be good and yet to live was a thunderbolt: ...
I can't tell how it was.
But to be good to others
And myself at the same time
I could not do it. Your world is not an easy one, illustrious ones!
When we extend our hand to a beggar, he tears it off for us.
When we help the lost, we are lost ourselves ...
Since not to eat is to die.
Who can long refuse to be bad?
As I lay prostrate beneath the weight of good intentions.
Ruin stared me in the face
It was when I was unjust that I ate good meat. And hobnobbed with the mighty
Why?
Why are bad deeds rewarded? Good ones punished?
I enjoyed giving
I truly wished to be the Angel of the Slums
But washed by a foster-mother in the water of the gutter
I developed a sharp eye
The time came when pity was a thorn in my side And, later, when kind words turned to ashes in my mouth And anger took over
I became a wolf
Find me guilty, then, illustrious ones,
But know:
All that I have done I did
To help my neighbor
To love my lover
And to keep my little one from want
For your great, godly deeds, I was too poor, too small.

****

SHEN TE: Oh, don't go away, illustrious ones! I haven't told you everything ! I need you desperately!

The GODS sing.

THE TRIO OF THE VANISHING GODS ON THE CLOUD.

Unhappily we cannot stay More than a fleeting year.
If we watch our find too long It will disappear.

Here the golden light of truth With shadow is alloyed Therefore now we ask your leave To go back to our void.

SHEN TE: Help!

Her cries continue through the song.

Since our search is over now Let us fast ascend!

The good woman of Setzuan Praise we at the end!

As SHEN TE stretches out her arms to them in desperation, they disappear above, smiling and waving.

(from Brecht, 1943/1953).

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Hollowing out the Principle of Nation Building—Condition or Stumbling Block on the Way of Defining Human Rights

Global Governance of Human Rights: Dilemmas, Divergences and the Way Out

Junxiang Mao

1 Global Governance of Human Rights: Concepts and Categories

As a form of governance, global governance is also necessarily conducted under the guidance of values, and governance values must be realized through various institutional designs and behaviors as well. The values of global governance must be based on universalism and emphasize the values shared globally, i.e. global values. Advocates of global governance call for global-scale compliance with the core cultural values of global governance. From the perspective of these advocates, these values should be the consensus values of all mankind beyond divisions of nations, races, religions, ideologies and levels of economic development. Leaders in both the East and the West believe that those values such as human rights, democracy, freedom, rule of Law, and justice are universal and could be regarded as the values of global governance.

Global governance of human rights is not about how to govern human rights, but a global governance way which regards human rights as the value objective and the code of conduct. It includes the governance of global human rights issues and the governance of global issues that affect the realization of human

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rights.[1] Therefore, the global governance of human rights should be distinguished between a strict sense and a broad sense. Strictly speaking, the global governance of human rights refers mainly to the normative development and operation of mechanisms in pursuits of promoting human rights and fundamental freedoms on a global scale after World War II. Among them, the normative system of global governance of human rights is mainly formed by the UN Charter, international human rights treaties and soft law documents such as human rights declarations and resolutions, the institutional system of global governance of human rights is mainly based on various international human rights mechanisms established by the UN Charter and international human rights conventions. Broadly speaking, the global governance of human rights mainly refers to the governance of issues closely related to human rights in a global context, such as trade and human rights, climate and human rights, war and human rights, counter-terrorism and human rights, etc. The full realization of human rights on a global scale depends not only on the practical respect and guarantee of human rights by the international community, but also on the realization of an equitable and just trade system, a global ecological environment and international peace and security.

Global governance of human rights is not one with States as its sole subject. Traditional theory holds that human rights are an appeal of the individual to the State, and the State undertakes the primary responsibility for protecting human rights. This theory was clearly emphasized by the Vienna Declaration and Programme of Action adopted by the Vienna World Conference on Human Rights in 1993. Chinkin argued that human rights are important because they are only related to gross abuse of State power.[2] However, a theory of horizontal human rights obligation has emerged in recent years, which asserts that non-State actors also undertake human rights obligations.[3] As Andrew Clapham pointed out, international human rights obligations may fall on the States, individuals and

[1] Jian Chang, The Community of Common Destiny for All Mankind and New Pattern of Global Governance, ***Frontiers***, No. 12, 2017, pp. 35–41.

[2] C. Chinkin, International Law and Human Rights, in T. Evans (ed.) ***Human Rights Fifty Years On: A Reappraisal***, Manchester University Press, 1998, p. 115.

[3] John H. Knox, Horizontal Human Rights Law, ***American Journal of International Law***, Vol. 102, No. 1, 2008, pp. 1–47. See also H.W.R. Wade, Horizons of Horizontality, ***Law Quarterly Review***, Vol. 116, No. 2, 2000, pp. 217–224. B. Markesinis, Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany, ***Law Quarterly Review***, Vol. 115, 1999, pp. 45–88. M. Hunt, The Horizontal Effect of the Human Rights Act, ***Public Law***, 1998, pp. 423–443.

non-State actors.[4] This perspective can be supported by international norms and practices from World War II. Articles 1 and 55 of the UN Charter stipulate that the United Nations has an obligation of "universal respect for, and observance of, human rights and fundamental freedoms for all". Under the promotion of the social responsibility of transnational corporations, the Second Revised Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises was adopted by the UN Human Rights Council, to bring the human rights responsibilities of transnational corporations into the context of legal regulation.[5] In recent years, a trend has also been seen for bilateral and multilateral investment agreements to include provisions on the social responsibility undertaken by transnational corporations. This shows that in the context of globalization, the subject of the obligations to promote human rights, or the subject of global governance of human rights, is no longer limited to States, but extends to non-State actors.

Given that the global governance of human rights is a very broad subject, this article will only discuss it in the strict sense. Many scholars, especially non-Western scholars, have in recent years paid increasing attention to the conceptual rethinking of human rights, involving the mechanisms, norms and cultures of global governance of human rights. For example, assessing the operation of the global human rights regime and exploring the paths of reform,[6] paying attention to the interpretation and application of international human rights norms,[7] deconstructing the Euro-American-centric global human rights mechanisms from other cultural perspectives, or finding the compatibility between universal human rights

[4] Andrew Clapham, ***Human Rights Obligations of Non-State Actors*** (Chinese Version), translated by Chen Huiping et al., Beijing, Law Press China, 2013, p. 74.

[5] OEIGWG, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Second Revised Draft, 2020. https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx, access on 25 July, 2021.

[6] Gráinne de Búrca, Human Rights Experimentalism, ***The American Journal of International Law***, Vol. 111, No. 2, 2017, pp. 277–316. Mark P. Lagon., and Ryan Kaminski, Bolstering the UN Human Rights Council's Effectiveness, Council on Foreign Relations, 2017. Edward McMahon, and Marta Ascherio, A Step Ahead in Promoting Human Rights? The Universal Periodic Review of the UN Human Rights Council, ***Global Governance***, Vol. 18, No. 2, 2012, pp. 231–248. Rahmani-Ocora, Ladan, Giving the Emperor Real Clothes: The UN Human Rights Council, ***Global Governance***, Vol. 12, No. 1, 2006, pp. 15–20.

[7] Jacob Dolinger, The Failure of the Universal Declaration of Human Rights, ***The University of Miami Inter-American Law Review***, Vol. 47, No. 2, 2016, pp. 164–199.

and regional cultures.[8] This article proposes to systematically sort out the dilemmas, divergences, and the way out of the global governance of human rights on the ground of existing research findings, so as to provide a macro perspective for reflecting on the concept of human rights.

2 Global Governance of Human Rights: Dilemmas in Reality

Since the end of World War II, the global governance system built and led by Western countries, especially the human rights normative and mechanism system, has although effectively promoted the international movement of human rights protection, while it has increasingly been marked by its inherent injustices and irrationalities as well. As Andrew Hurrell stated, there is indeed growth in international law and institutions, but flaws and failures are also evident, and the robustness of many existing limited systems is a matter of concern.[9]

(i) Unbalanced Development of International Human Rights Norms

The major legal norms for global governance in the field of human rights have been the international human rights conventions, but currently, there is still an imbalance in the development of international human rights norms. Firstly, the development of the norms between liberal rights and social rights is uneven. While the discourse of social rights has been recognized by some European countries since the twentieth century, the discourse of liberal rights has become internationally mainstream with the overwhelming influence of the United States in the post-WWII international community. The international remedies system and norms adopted for the two categories of rights have developed in a profoundly uneven way. In 1966, the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) provided an individual communication procedure, through which the Human Rights Committee makes decisions on

[8] Hakimeh Saghaye-Biria, Decolonizing the "Universal" Human Rights Regime: Questioning American Exceptionalism and Orientalism, ***ReOrient***, Vol. 4, No. 1, 2018, pp. 59–77. T. Jeremy Gunn. Do Human Rights Have a Secular, Individualistic & Anti-Islamic Bias?, ***Daedalus***, Vol. 149, No. 3, 2020, pp. 148–169.

[9] Andrew Hurrell, ***On Global Order:Power, Values and the Constitution of International Society***(Chinese Version), translated by Xi Lin, Beijing, China Renmin University Press, 2018, p. 1.

individual complaints, which greatly enriches the international jurisprudence on civil and political rights. In comparison, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights was not adopted by the General Assembly of the United Nations until 2008 and has remained in a state of relative stagnation, which has undoubtedly inhibited the development of jurisprudence on economic, social and cultural rights. Secondly, there is an asymmetrical development between individual and collective rights norms. The rights system set up by the core UN human rights conventions focuses mainly on individual rights, including liberal rights and social rights. Under the impetus of the broad spectrum of developing countries, the UN General Assembly, the Human Rights Council and other bodies have adopted a series of declarations and resolutions on collective human rights such as the right to self-determination, the right to development, the right to peace and environmental rights. However, due to the opposition of some Western countries, the above-mentioned declarations and resolutions on collective human rights have not yet turned into legally binding international covenants.

(ii) Disorderly Development of International Human Rights Mechanisms

The international human rights mechanisms have been developed considerably in both vertical and horizontal dimensions since the 1950s, forming human rights mechanisms based on the UN Charter and the UN human rights conventions respectively, as well as regional human rights mechanisms as represented by the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court of Human and Peoples' Rights. These mechanisms do not constitute an organic and functional system among themselves, and rather than constituting a mutually adaptive or reinforcing relationship, the different mechanisms are often opposed to and constrained by each other. In terms of legal status, the global governance mechanisms centered on the United Nations are not superior to regional mechanisms,[10] which consequently leads to a disorderly development of mechanisms. In the realm of human rights, this disorderly development is manifested in the following aspects: firstly, conflicts and coordination between the Charter-based mechanism and the Treaty-based mechanism remain a challenge for the reform of the UN human rights regime; secondly, the expansion of UN human rights bodies and the increased self-sufficiency of regional human

[10] Jie Liu, The International Order and Its Governance in an Era of Globalization, ***Journal of Social Science***, No. 4, 2003, pp. 27–33.

rights institutions have tended to result in divergent positions on the same normative issues, leading to the fragmentation of human rights jurisprudence. At present, the international community does not have a vertical and systematic central organ similar to that of the domestic one, nor does it have an adjustment norm that is in a fundamental position as the domestic constitution. Therefore, in light of the trend towards the parallel development of international and regional human rights mechanisms and the increasing self-sufficiency of regional human rights regimes, the international community has not yet found a way to reconcile the conflicts among the various human rights mechanisms. The fragmentation of international and regional human rights mechanisms has exacerbated the unsystematic development of international human rights norms and caused the normative uncertainty of global governance of human rights.

(iii) Politicization Tendency in International Human Rights Mechanisms

Since World War II, human rights have gradually become an essential issue in international law and international relations. Respecting and protecting human rights has become one of the main basic purposes of the United Nations, and the movement of mainstreaming human rights has been launched in the field of the United Nations. Human rights have been clearly declared by some Western States as an important issue in their foreign policies since the 1970s. However, the humanitarian interventions and human rights diplomacy conducted by the major powers in the name of human rights have often alienated the value of human rights, i.e. the politicization of human rights. David Forsythe argued that the United States' human rights diplomatic policies have applied double standards to some "authoritarian regimes".[11] Some other scholars, based on human rights diplomacy practice in the Netherlands, suggested that human rights diplomacy could not always be non-selective and impartial. In the international human rights arena, the politicization of human rights shows in the following three aspects.[12] In the first place, the international human rights arena is full of politicized manipulation and confrontation, and human rights have become a justification for humanitarian intervention by some big powers and a condition attached to their economic assistance. Second, within the international human rights

[11] David P. Forsythe, ***Human Rights in International Relations***, Cambridge University Press, 2000, p. 141.

[12] Peter R. Baehr, Monique C. Castermans-Holleman and Fred Grünfeld, Human Rights in the Foreign Policy of the Netherlands, ***Human Rights Quarterly***, Vol. 24, No. 2, 2002, pp. 992–1010.

mechanisms, the lack of conceptual inclusiveness among geographically or culturally bound groups of States constrains the development of human rights norms. The politicized manipulation of multilateral human rights mechanisms breeds formalism that deviates from normative values and has nothing more than rituals.[13] The positions of regional groups are homogenized within multilateral mechanisms such as the Human Rights Council, and States belonging to the similar regional groupings are not likely to criticize one of their own, but often make statements praising the human rights situation.[14] There has also been a growing trend towards politicization of the Human Rights Council's Universal Periodic Review mechanism, which is aimed at de-politicization.[15] Thirdly, international human rights mechanisms have undergone a shift from focusing on normative development to emphasizing the implementation of regulations, from being concerned with systemic human rights violations towards being keen on State-specific monitoring, while some monitoring mechanisms lack impartiality and conflict rigidly with State sovereignty. This tendency of politicization in international human rights mechanisms undermines the effectiveness of global governance of human rights, in contradiction to the basic purposes of protecting and promoting human rights.

(iv) Equity Predicament of International Human Rights Mechanisms

Global governance based on the universally recognized international law rules inherently requires equity in the governance system. Nevertheless, there is still a problem of unfairness in the current global governance framework. Many developing countries have been involved in the global governance system in a largely passive manner, while the West occupies a controlling position in the global governance mechanisms and frequently adopts double standards in the process of global governance to meet their own national interests. Developing countries are

[13] Hilary Charlesworth, Emma Larking, Introduction: the Regulatory Power of the Universal Periodic Review, in ***Human Rights and the Universal Periodic Review: Rituals and Ritualism***, edited by Hilary Charlesworth, Emma Larking, Cambridge University Press, 2014, p. 10.

[14] Allehone Mulugeta Abebe, Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council, **Human Rights Law Review**, Vol. 9, No. 1, 2009, pp. 1–35.

[15] See Rosa Freedman, New Mechanisms of the UN Human Rights Council, ***Netherlands Quarterly of Human Rights***, Vol. 29, No. 3, 2011, pp. 289–323.

demanding a paradigm shift in the monopoly and manipulation of the global governance mechanisms imposed by the West.[16]

In the field of human rights in specific, equity predicament is reflected in the democratic deficit in the international human rights system. Currently, some members of the international community are unable to participate equally in the construction and implementation of the international human rights mechanisms, and developing countries still do not have the discourse power in the international human rights mechanisms that matches their rising global influence. In today's international human rights system, States' power has always been asymmetrical, and the centre-periphery structure of the system remains quite clear. In varying degrees, some States have resisted international human rights mechanisms for fearing of sovereignty erosion. This makes it difficult for international governmental organizations to gain the authority necessary for effective governance of global issues, especially when they are generally plagued by a democratic deficit and have difficulty in getting rid of the influence of power politics. Meanwhile, those weak, small and poor countries are even more cautious and reserved about these organizations exercising their authority over global governance.[17]

(v) Legitimacy Crisis for International Human Rights Mechanisms

The legitimacy crisis is firstly embodied in the erosion of State sovereignty. Interventions based on human rights or humanitarianism are susceptible to conflict with State sovereignty and the principle of non-interference in domestic affairs. Similarly, the monitoring of human rights affairs by international human rights regimes towards States can easily develop to substitute a State's choices on domestic public policy, and the boundary between the two is blurred. International intervention is a coercive action carried out by a community of States against a government or rebellion that violates international norms and opposes the recognized will of the international community.[18] In general, the premise of international intervention is that it must conform to the norms of international

[16] Mingguo Wang, New Situation of Global Governance Architecture and Its Impact on International Order, ***Teaching and Research***, No. 5, 2014, pp. 32–40.

[17] Hui Sun and Yu Yu, International Governmental Organization and Global Governance, ***Journal of Tongji University(Social Science Section)***, Vol. 15, No. 5, 2004, pp. 48–53.

[18] Xiaoyun Yang, The Challenges to State Sovereignty from Globalization, Neo-Interventionism and Self-Determination, ***Contemporary International Relations***, No. 12, 1999, pp. 18–21.

law. However, there are many gaps in the regulations of international law regarding international intervention, which cause many operational difficulties.

This legitimacy crisis is also manifested as a dilemma regarding the cognitive understanding of the international human rights regime. Although the construction and improvement of international human rights mechanisms and norms are based on the common consent of the international community, such common consent cannot conceal the discrepancies in the attitudes and positions of various States. Given the differences in international status, strength, value orientation and strategic goals, the positions and starting points of different types of States vary from here and there. This has both led to the fact that the current construction of the international human rights regime is full of contradictions and disagreements, and also to a large extent it is difficult for the norms of the relevant mechanisms to come into play and get active cooperation from the target countries.[19] The realist attitude of the major powers towards the international human rights mechanisms has triggered an identification crisis towards it. The most typical example is the withdrawal of the US from the UN Human Rights Council in 2018.

3 Global Governance of Human Rights: Debates on the Paths

(i) Liberalism versus Developmentalism

The global governance oriented by the value of human rights, such as the operation logic of the international human rights mechanisms and the path selection of domestic human rights governance, is inevitably impacted by different conceptions of human rights. The global governance of human rights is currently facing a divergence between liberalism and developmentalism. Developed countries tend to consider that their own development is originated from the superiority of their culture when they look at their development experience and the future of developing countries, assuming that the critical reason why developing countries have many problems with respect to development is that they lack the culture and free will that characterize Western countries.[20] In fact, the complete replication of the

[19] Jie Liu, The International Order and Its Governance in an Era of Globalization, ***Journal of Social Science***, No. 4, 2003, pp. 27–33.

[20] Yong Liu and Huaixin Wang, Community of Human Destiny: China's Plan for the Change of International Speech Power in Global Governance, ***Probe***, No. 2, 2019, pp. 32–40.

Western concept of democracy, free market and liberal rights, while ignoring the specific conditions and national characteristics of developing countries, has not brought prosperity to developing countries. On the contrary, the liberal concept of rights has deconstructed the inherent social structure and concept of rights in developing countries, which is an influential factor in their development predicament. More recently, some scholars have gradually rethought and criticized neoliberalism and the Washington Consensus, and some even believe that American liberalism has come to its end.[21]

In recent years, in response to the increased emphasis on other forms of rights, such as economic, social and cultural rights, in developing countries, Chinese scholars have summarized the developmentalist view of rights.[22] The developmentalist view of rights emphasizes that: human rights policies should be formulated with a focus on people and the development of human beings; human rights protection is closely associated with development and peace, and it should be upheld that peace facilitates development while development promotes human rights. The developmentalist view of rights emphasizes as well on establishing an effective governance order, improving social governance domestically, and maintaining a peaceful development environment conducive to the implementation of human rights internationally. The developmentalist view of rights has gained the attention and recognition of the international community, especially the UN system and developing countries. For example, on 22 June 2017, 12 July 2019 and 12 July 2021, the UN Human Rights Council adopted three resolutions on "the contribution of development to the enjoyment of all human rights", explicitly introducing the concept of "development for human rights" into the global governance system of human rights.[23]

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[21] Yong Jiang, The Impact of the Financial Crisis and China, ***World Economics and Politics***, No. 12, 2008, pp. 11–14.

[22] Research Group of the Center for the Study of Human Rights of Nankai University and Jian Chang, The Practical Basis and Theoretical Innovation of Human Rights in Contemporary China —— Theory of Human Rights Structure Moving towards Developmentalism, ***Human Rights***, No. 1, 2021, pp. 22–48. Jian Chang, Human Rights Implications of Bringing the Building of a Moderately Prosperous Society in All Aspects to a Successful Completion —— From the Prospective of the Developmentalism of Human Rights, ***Human Rights***, No. 2, 2020, pp. 18–34.

[23] See A/HRC/47/L.24 (47th Regular Session of the Human Rights Council), A/HRC/41/L.17/Rev.1 (41st Regular Session of the Human Rights Council), A/HRC/35/L.33/Rev.1 (35th Regular Session of the Human Rights Council).

(ii) Universality versus Specificity

In terms of international human rights, the universality and specificity of human rights are reflected in the debate over the question of whether the human rights development model should be universal or specific. The context of this debate is the emergence of a worldwide movement of political self-awareness, which has given a growing number of States more freedom in their development paths and models. They have committed to exploring development paths that are appropriate to their national circumstances. This process has inevitably brought about changes in normative systems, manifested in the emergence of various alternative interpretations and claims to the established understandings of human rights, democracy, order, etc.[24]

The basic claim of some West countries in international relations is to promote a universal model of human rights based on the recognition of the universality of human rights. This ecumenical model of human rights development is founded on the grounds of the Western democratic system. In the view of some Western countries, Western-style democracy, with separation of the three powers, judicial independence, constitutional protection of individual rights, representative government and market economy at its core, is the foundation of the global governance order. Certainly, the development model of human rights advocated and sought to be promoted by some Western countries has encountered resistance from some developing countries. In 1993, The Regional Meeting for Asia of the Vienna World Conference on Human Rights adopted the Bangkok Declaration, which recognizes that "while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds".[25] In addition, The Beijing Declaration adopted by the South-South Human Rights Forum in December 2017 clearly emphasizes that "each State should adhere to the principle of combining the universality and specificity of human rights and choose a human rights development path or guarantee model that suits its specific conditions."[26]

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[24] Changhe Su, International System in Global Governance Transformation, ***Contemporary World***, No. 11, 2015, pp. 34–37.

[25] Bangkok Declaration, ***Human Rights***, No. 5, 2006, p. 25.

[26] Full text of Beijing Declaration adopted by the First South-South Human Rights Forum, http://www.scio.gov.cn/ztk/dtzt/36048/37445/37451/Document/1613070/1613070.htm, visited on September 20, 2021.

(iii) Multilateralism versus Unilateralism

The issue of whether unilateralism or multilateralism should be adopted in global governance has been the subject of debate in various international relations theories and foreign policies of States. For instance, there has been a policy debate within the US since the 1990s on which is more suitable for achieving its interests, unilateralism or multilateralism.[27] Undoubtedly, the international human rights mechanisms based on multilateral collaboration have certain disadvantages in terms of efficiency in decision-making and implementation, and there are problems in collective action and being vulnerable to being constrained by hegemonic States. Despite this, multilateralism remains the path consensus on global governance. Multilateralism is supportive to the democratization, equal participation, consultation and cooperation of international relations. It provides an institutional legitimacy that unilateralism lacks and can sustainably enhance the acceptability of the international human rights mechanisms. Over recent years, unilateralism, protectionism and populism have been rising, challenging the order of international law and the global governance system, with multilateralism facing the crisis of authority, effectiveness and legitimacy. Some powerful States have increasingly shown their distrust of the multilateralism governance system. The world is confronted with a critical choice between unilateralism and multilateralism, confrontation and dialogue, and closure and openness, and is at a crossroads on which way to go.[28]

(iv) Dialogue and Cooperation versus Political Confrontation

During the post-Cold War era, a confrontational and antagonistic working atmosphere prevailed within the UN human rights mechanisms. Some Western countries constantly made use of multilateral human rights mechanisms to publicly criticize and accuse developing countries of their human rights situation by "naming and shaming" them, thus triggering confrontation among blocs within the international human rights mechanisms. In this regard, developing countries have criticized such Western practices as double standards and political confrontation, and have emphasized that international cooperation and dialogue should be included in the construction of the international human rights mechanisms,

[27] Jianjun Yu, American Hegemony's Multilateralism Behaviors and Motives, ***Teaching and Research***, No. 7, 2009, pp. 64–69.

[28] Jiechi Yang, Working for a Community with a Shared Future for Mankind by Promoting International Cooperation and Multilateralism, ***China International Studies***, No. 2, 2019, pp. 1–5.

making it a guiding principle. For example, the Position Paper of the People's Republic of China on the United Nations Reforms issued by the Ministry of Foreign Affairs of China in 2005 stated that "China is in favor of and supports the reform of UN human rights bodies. The essence of the reform is depoliticizing human rights issues, rejecting double standards, reducing and avoiding confrontation and promoting cooperation".[29]

The Human Rights Council, established in 2006 and pushed ahead by developing countries, has reaffirmed the concept of international cooperation as defined in the Charter of the United Nations. Article 4 of the General Assembly Resolution 60/251 which established the Human Rights Council states that the work of the Human Rights Council shall uphold universality, impartiality, objectivity and non-selectivity as well as constructive international dialogue and cooperation. Nevertheless, in the sessions of the Human Rights Council held in recent years, one would often find political struggles around human rights issues between different groups of States. On 10 July 2019, for example, Canada, Japan and 22 other States published an open letter to the UN High Commissioner for Human Rights and the President of the Human Rights Council, criticizing China's governance in Xinjiang.[30] This provoked strong opposition from China.[31] Such actions indicate that the debates and practices around international cooperation or antagonistic confrontation in the international human rights arena will continue for a long time to come.

(v) Respecting Sovereignty versus Overriding Sovereignty

The relationship between human rights and sovereignty has always been controversial in the global governance of human rights. The global governance of human rights presents contradictions between upholding and challenging the sovereignty regime. First, the practical conundrum over the relationship between sovereignty and human rights. The rationale for humanitarian intervention conducted by the West is that human rights are superior to sovereignty and that the principle of non-interference in domestic affairs and State sovereignty should

[29] The Position Paper of the People's Republic of China on the United Nations Reforms, ***People's Daily***, 8 June 2005.

[30] https://edition.cnn.com/2019/07/11/asia/xinjiang-uyghur-un-letter-intl-hnk/index.html; https://www.theguardian.com/world/2019/jul/11/more-than-20-ambassadors-condemn-chinas-treatment-of-uighurs-in-xinjiang, visited on Dec, 12th, 2021.

[31] http://www.xinhuanet.com/english/2019-07/11/c_138218748.htm, visited on Dec, 12th, 2021.

be subject to international protection of human rights. However, some developing countries oppose this claim, arguing that sovereignty is still a fundamental principle of international law and that arbitrarily humanitarian intervention in the name of the supremacy of human rights over sovereignty actually infringes on State sovereignty and violates the principle of non-interference. Consequently, the issue of the correlation between human rights and State sovereignty, as well as the legitimacy of the principle of non-interference and humanitarian intervention, has become a significant issue in the global governance of human rights. Second, international monitoring and State sovereignty are improperly coordinated. As an essential manifestation of the growing expansion of international regimes, international human rights monitoring mechanisms are also in the process of gradual expansion. Such an expansion not only includes the continuous expansion of institutions, but also the extension of their mandates. In the course of their functions, international human rights monitoring mechanisms have continuously expanded their reach, intervening in the domestic public policy-making through the oversight of individual cases concerning individual complaints, and gradually reducing the 'reserved scope' of State sovereignty. It is obvious that international human rights mechanisms cannot be a substitute for the State's choices in relation to domestic public policy issues. When it comes to the domestic public policy of a State party, international mechanisms need to preserve the sovereign character that the State party upholds.[32] After all, the formulation of domestic public policy on human rights has to be considered in the context of specific situations. For example, when reviewing whether France's 2010 headscarf act violated individual rights, the European Court of Human Rights respected France's margin of discretion,[33] while the UN Human Rights Committee assumed a rather strict position towards scrutiny,[34] thus presenting a contradiction with France's choice of public policy on this issue, and a conflict of positions between different international monitoring mechanisms.

[32] See Robert Spano, The European Court of Human Rights and National Courts: A Constructive Conversation or a Dialogue of Disrespect? ***Nordic Journal of Human Rights***, Vol. 33, No. 1, 2015, pp. 1–10. See Effie Foka, Directions in Religious Pluralism in Europe: Mobilizations in the Shadow of European Court of Human Rights Religious Freedom Jurisprudence, ***Oxford Journal of Law and Religion***, Vol. 4, Issue 1, 2015, pp. 57–74.

[33] Case of S.A.S. v. France, ECHR, (Application no. 43835/11), Judgment of July 1st, 2014.

[34] UN Human Rights Committee Communication No. 1928/2010, CCPR/C/108/D/1928/2010.

4 Global Governance of Human Rights: The Way Out

(i) Holistic Thinking on Global Governance of Human Rights

It is necessary to adhere to holistic thinking in order to promote the global governance of human rights. The reason for upholding this holistic thinking is that whether the international circumstance is peaceful or the world is in war, whether the global economy is developing or deprived, whether there is mutual respect for sovereignty or abused interference between States, and whether it is cooperative or confrontational in international relations are all closely related to the successful promotion of global governance of human rights. In terms of holistic thinking, the fundamental premise of global governance of human rights is to maintain world peace, the primary principle is to respect State sovereignty, the code of conduct is the international normative system, the mode of operation is dialogue and cooperation, the realization path is to promote common prosperity, the social foundation is a new type of international relations, and the development prospect is to build a community with a shared future for mankind.[35]

(ii) Reshaping the International Human Rights Discourse with a Developmentalist Rights Perspective

Historically, the Western discourse has been dominant in the international governance of human rights. It has been proved in practice that the libertarian view of rights has not been able to effectively deal with the risks in global governance, but has in some ways exacerbated the global governance deficit. Developing countries should step up the establishment of developmentalist view of rights. In this regard, they shall break away from the traditional Western paradigm of human rights theory, review the traditional dichotomy between democracy and non-democracy, human rights and non-human rights, and develop theories of democracy and human rights based on their traditional concepts of human rights and contemporary development practices, applying such discourses as comprehensive human development, effective political order, good governance and the best choice of society, so as to advance the developmentalist rights concept into the foundational concept of global governance of human rights.

[35] Junxiang Mao, China's Approach to International Governance of Human Rights, ***Guangming Daily***, 25 October 2019.

(iii) Advancing the Inclusive Development of International Human Rights Norms on the Basis of Pluralism

International human rights norms are the embodiment of the core values of the international community and the fundamental legal basis for the global governance of human rights. In the current world, specific international human rights norms are constantly being formulated, and regional human rights norms are also being developed successively. Given the unbalanced development of various rights norms and regional human rights norms, the international community should adhere to the principle of inclusiveness and treat them equally, so as to promote the common development of various human rights norms and regional human rights norms. In dealing with international human rights norms, it is a necessity to respect the diversity of the world and to acknowledge the plurality of civilizations. Back in 2005, the World Summit Outcome adopted by the UN General Assembly stated that „In order to promote international peace and security, we commit ourselves to advancing human welfare, freedom and progress everywhere, as well as to encouraging tolerance, respect, dialogue and cooperation among different cultures, civilizations and peoples."[36] Advancing the inclusive development of international human rights norms on the basis of pluralism is thus also an embodiment of the common understanding of the value of global governance with equity at its core.

(iv) Improving the Democratic Governance of International Human Rights Institutions

The criteria for legitimacy of the global governance regime are complex and diverse, but various doctrines tend to focus on democratic criteria. The global governance mechanisms are considered legitimate only when it is of a democratic nature. Therefore, it is essential for developing countries to participate actively in the structural reform of global governance, whereby the benefits of global governance would be shared by all countries and the global order would be built on a fair and rational basis. The international community shall promote democracy and broad participation in international human rights bodies, adhere to the principle of cultural diversity, further strengthen the principle of equitable geographical participation in international human rights bodies, and enhance the representation of developing States within various international human rights mechanisms.

[36] Sixteenth Session of the General Assembly, 2005 World Summit Outcome, A/RES/60/1, paragraph 14.

In parallel, developing States ought to raise their participatory awareness in the international human rights system, cultivate professionals in the field of human rights, and increase their influence in agenda setting, norms development and system operation.

(v) Enhancing the Performance Effectiveness of the International Human Rights Mechanisms' Governance through Proactive Regime Interaction

First, adopting the principle of dialogue and cooperation to facilitate a transformation in the operation logic of the international human rights mechanisms. At present, there exists a confrontational working atmosphere within the international human rights mechanisms. Such confrontation has interrupted the effective interaction among participators, which has severely undermined the performance effectiveness of the human rights mechanisms. The international community ought to forge a consensus to promote procedural reforms of the international human rights mechanisms and upgrade the principles of dialogue and cooperation to the fundamental principle of the operation of the international human rights mechanisms.

Second, increasing the performance effectiveness of the international human rights mechanisms through regime interaction. It is necessary to strengthen positive interaction among multiple human rights regimes which are full of fragmentation. This is because an effective system cannot function in isolation. Instead, it requires the coordination of other systems, at least including interaction and coordination among the UN human rights treaty bodies, coordination between the UN human rights treaty bodies and the UN Charter mechanisms, and that between the UN human rights mechanisms and regional human rights mechanisms. As regards interaction among human rights mechanisms, it is also important to focus on the effects of interaction to enhance the performance effectiveness of the system by strengthening legal functional links and political connections.[37] The institutionalized interaction could contribute to the formation of a more unified human rights jurisprudence among the UN human rights mechanisms and between the UN human rights mechanisms and regional human rights mechanisms, which would undoubtedly contribute to the orderly development of global governance of human rights.

[37] Jing Lu, Institutional Predicament and Reform of Global Governance, ***Foreign Affairs Review***, Vol. 31, No. 1, 2014, pp. 107–121.

(vi) Coordinating the Balance between International Monitoring and State Sovereignty by the Principle of Subsidiarity

International law does not delineate clearly the power boundary between States and international mechanisms in the field of human rights, and therefore the international human rights mechanisms have always had an impulse to extend their authority, which inevitably encountered resistance from State sovereignty. Arguably, in contrast to many other issues that have been brought under the jurisdiction of international law, such as tariffs, human rights are closely related to domestic public policy, involving various aspects of domestic politics, economy, society, and culture. Therefore, international human rights monitoring mechanisms should adhere to the principle of subsidiarity as practiced by regional mechanisms and respect the States' primary responsibility to protect human rights, with international monitoring mechanisms playing only a subsidiary role. This principle is based on the proposition that the relevant institutions of a State have more direct access to the domestic situation than international bodies and are better able to assess the necessity of restrictions. The principle of subsidiarity suggests that the role of international mechanisms is to facilitate, promote and provide assistance, rather than to substitute for, directly intervene in, or forcefully interfere with a State's domestic policy formulation and implementation, and that international monitoring mechanisms cannot substitute domestic authorities in public policy decision-making. State sovereignty remains the cornerstone of international human rights law and a fundamental principle that must be respected by the international human rights mechanisms. In terms of the relationship between human rights and sovereignty, sovereignty remains a principal and fundamental concept. In the process of international human rights monitoring, international juridical bodies ought to maintain self-effacement in the interpretation and adjudication of the legal norms. International human rights institutions should take a relatively self-refrain position, with full consideration of the factors of difficulty and the autonomy of policy decisions made by each State in the development of human rights. This could avoid the negative resistance to international bodies from States that results from excessive interference of international bodies in domestic public policy affairs.

5 Conclusion

As an important component of global governance, the global governance of human rights accentuates the pursuit of global values such as human rights, democracy, equality and so on. However, as the norms and mechanisms of global

governance of human rights emerged from the global order dominated by Western countries, they are inherently plagued with structural dilemmas, which are manifested in normative imbalance, mechanism disorder, human rights alienation, equity predicament, legitimacy crisis and so on. Currently, there are also controversies and disagreements among the international community on how to promote global governance of human rights in terms of concepts, paths and regimes, which reveal the impacts of different human rights philosophies. This article argues that the promotion of global governance of human rights requires approaches in concepts, norms, regimes and mechanisms. Specifically, it should reshape the international human rights discourse with the developmentalism view of rights, promote the inclusive development of international human rights norms based on pluralism, improve the democratic governance of international human rights institutions by adopting the representation rights and discourse power as the entry point, promote the transformation of the operation logic of the international human rights mechanisms with the principle of dialogue and cooperation, enhance the performance effectiveness of the international human rights mechanisms through active institutional interaction, and coordinate the balance between international monitoring and State sovereignty by the principle of subsidiarity.

Determining Effects of Authoritarianism on Executive Power and Public Administration in Turkey

Zeliha Hacımuratlar

1 Introduction

The increasingly authoritarian regime in Turkey has been the subject of many studies in constitutional law and political science. While some study authoritarianism in Turkey from the perspective of "competitive authoritarianism", as conceptualized by *Levitsky* and *Way* (Levitsky and Way 2002) and populism (Özbudun 2015; Özbudun 2019, pp. 136–146; Esen and Gümüşçü 2016; Esen and Gümüşçü 2018; Esen 2020; Mueller 2014; Yabancı 2018), there are also those who suggest that the notions of "competitive authoritarianism" and "populism" fall short of fully explaining the political and legal developments in Turkey (Köker 2020) and that the Turkey of 2016 and later, especially, should be analysed by means of the notion of "dual state", which Ernest Fraenkel used to examine national socialism (Zeybekoğlu 2019; Köker 2020; Çavuşoğlu 2021). Another approach propounds that it would be impossible to understand the process in Turkey without considering that the state model espoused by neoliberalism nurtures a structurally authoritarian administration (Doğru 2021, p. 53).

Investigating the process of authoritarianism, it can be said that the developments in respect of the approaches listed above have all together, and at times in an interwoven manner, created the structure today. As per the planned neoliberal policies put into action, the role of the state was redefined in 2001 and new elements were added to the administrative structure to play that role.

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Additionally, all the traits of "competitive authoritarian" regimes have become dominant in the political regime and legal order of today's Turkey. The traits that Levitsky and Way identify as the distinctive qualities of competitive authoritarian regimes can clearly be seen in today's Turkey, namely, 'the system is competitive because the incumbents come to power through elections but they abuse the state agencies and public and private resources in such a way that the possibility of the opposition coming to power becomes too restricted to be possible in a democratic regime, the elections are unfree and unfair due to the incumbents' widespread control on the media and dissent, the opposition's fundamental rights and freedoms are persistently violated, the incumbents have uneven access to the law due to their hold on the judiciary and other referee mechanisms and because they have been made dependent upon the governing party in various ways' (Levitsky and Way 2010, pp. 5–12).

Authoritarianism in Turkey also displays anti-elitism and anti-pluralism as well as the discourse that only one person/political group can represent the people, which *Müller* identifies as the 'qualities of populism' (Müller 2017, pp. 3–4). It is usual to see competitive authoritarianism intertwined with populism (Köker 2020, p. 6). Competitive authoritarianism and populism meet on the common ground of opposing the freedom and plurality of liberal democracies (Özbudun 2020, pp. 178–181). Furthermore, populist rhetoric serves as a very useful tool to maintain power in competitive authoritarian regimes.

Although authoritarianism was being experienced with all these aspects in Turkey, a threshold was crossed especially with the experience of the state of emergency of 2016–2018. Indeed, the period following the passage of this threshold can only explained by means of the notions of dictatorship and "dual state", a distinct way of analysing dictatorships. In analysing the power practice of national socialism between 1933 and 1938, *Fraenkel* used the term "dual state" to explain that a "normative state" and a "prerogative state" co-existed in the same state order and complemented one another. According to *Fraenkel*, what ensures the perpetuality of dictatorship is this dual structure within the same state. While legal norms continue to operate in the "normative" part of the national socialist state, a process that is not at all limited by law and therefore is out of the realm of norms takes place in the "prerogative" part of the same state. In other words, in a dual state, there is a realm whose boundaries are drawn by the ruling party alone and that is excluded from the legal order. The ruling party has the authority to "act" in this realm without any restrictions (Fraenkel 2020). Being a distinct kind of dictatorship, the national socialist government's description of "political sphere" and its approach to "law" also appear, strikingly, in Turkey's relationship with "emergencies".

Clearly, Turkey can no longer be described as a constitutional democracy after the thresholds it has crossed on the way to authoritarianism. It should be pointed out that what made this transition easy is the legacy of the political regime/culture and public law that has carried on from the past. An investigation of the authoritarian structure, which has always been inherent in the political regime and legal order in Turkey, would go beyond the scope of this section. However, in summary, it can be said that even if Turkey's shortcomings in terms of organization in line with the requirements of a pluralist, participatory, and deliberative democracy, and the rule of law during the time of the 1982 Constitution did not render today's authoritarian order mandatory, it has certainly made it possible. Noting the necessity of keeping in mind the past roots of today's authoritarianism, I will examine the transformative effects of the authoritarianism that Turkey has experienced since the 2000s on the executive and administrative organization in the context of the rule of law and pluralist, participatory, and deliberative democracy.

1.1 2000s: Establishment of the Neoliberal-Authoritarian State Organization

The 2000s coincided with a very important turning point in terms of the restructuring of the state in accordance with neoliberal policies in Turkey. The basic idea on which this restructuring is based is to produce public decisions in accordance with the market logic and to ensure the cooperation of the state and capital. This required a reorganization that would enable capital to be directly and effectively involved in policy-making processes. Hence, necessary arrangements were made so that the capital could directly affect the policymaking and regulation processes of the executive. In addition, while the administrative organization was reorganized according to the logic of the private sector and the market, it became centralized to take effective and quick decisions in line with the interests of capital. The state, which was restructured in line with neoliberal policies, became authoritarian both due to the political centralization and subsequent administrative centralization that resulted from the narrowing of the political space that different interest groups in society would influence.

Capital's Domination of the Legislative Realm through the Executive

In the classical parliamentary system, the executive has always participated in the legislative process by bringing draft laws before the parliament. It is known that a majority of the laws start to originate from the government over time in parliamentary systems. One may obviously think that the draft laws prepared by the

executive would be debated at the parliament by the representatives of different social classes and all interests would affect the law-making process, and therefore this would not be problematic in terms of democratic principles. However, considering that the legislative bodies become weaker and weaker, and the parliamentary processes turn more and more into a symbolic proceeding of voting, it becomes apparent that the preparation stage under the auspices of the executive becomes more important than parliamentary enactment.

The "Regulation on the Principles and Procedures of Drafting Legislation", which was put into effect in 2005, regulates the legislation drafting process of the executive. In accordance with this regulation, relevant ministries, local administrations, universities, trade unions, public professional organizations, and civil society organizations shall be consulted in legislative drafting. Neither does the regulation set out in a detailed and binding manner how the consultation process needs to take place, nor does it contain any provisions that guarantee that the opinions collected are influential on the draft laws. That is why it is difficult to say that it provides for an effective participation. Nevertheless it lays down the legal ground for the representatives of different classes and interest groups to know about the process and present their opinions in line with their interests.

However, this regulation, which came into effect during the AKP period, was made ineffective in a sort of hocus-pocus, so to speak. This 'deception', to borrow a phrase from *Bakırcı*, materialized in the form of submitting to the parliament "draft laws in the guise of private members' bills". The AKP government drafted laws, which should have been prepared as draft laws of the Council of Ministers, without following the procedural rules stipulated by the aforementioned regulation and submitted them to the parliament as 'private members' bills' with an MP's signature. Thus, the ministries and other public organizations were blocked from deliberating on the draft laws and democratic mass organizations and civil society organizations were prevented from getting informed about the process and expressing their opinions in favour of their interests (Bakırcı 2018, pp. 152–157).

While bypassing the regulation that allowed for participation and deliberation, albeit in a limited manner, the AKP government laid the institutional structure for internationalized capital to be influential in the preparation of draft laws. It became possible for internationalized capital to become involved in the legislative sphere of the executive branch through the Coordination Council for the Improvement of Investment Environment (YOİKK) that was established by a Council of Ministers resolution in 2004. YOİKK is composed of representatives from certain ministries as well as members of organizations that represent highly competitive and internationalized capital. Through the YOİKK, "demands coming from

various fractions of the capital are relayed not to the legislative branch through political parties but directly to the executive. Such a setup defunctionalizes the parliament as regards its representation of social classes. This is not simply a sceptical attempt at understanding ulterior motive. Almost all the laws passed since the second half of the 2000s had been prepared at YOİKK technical committees" (Cebeci 2018, p. 121).

Reorganization of the Administration in Line with the Neoliberal-Authoritarian State Order

The reorganization of the administration in 2001 and subsequent years was undertaken in accordance with the programme envisaged for late capitalist countries by the Post-Washington Consensus during the second stage of neoliberalism. According to this, the market and the state do not oppose but complement each other (Doğru 2021, p. 46). While the liberalization and privatization of 'public service areas' prescribed by the Washington Consensus continue, the state, in its new role, create independent regulatory agencies that would protect the market from collapse (Doğru 2021, p. 26). Regulatory-supervisory agencies set up in Turkey with this mission in mind laid down the organization foundation for economically and socially crucial matters such as energy, communication, and banking to be removed from the realm of politics. This way, "the market-friendly active state paved the way for authoritarianism to the extent that it fostered a supra-political institutional setup for the market" (Doğru 2021, p. 28).

The design of the administrative structure in line with neo-liberal requirements was not limited to the establishment of regulatory-supervisory agencies. 2011 is considered a milestone for the political system in Turkey going authoritarian (Özbudun 2019, p. 120). An indication of this in administrative organization is the more centralized administrative structure made possible through a series of legislative decrees. The ministries reorganized this time around did not only collect the powers previously vested in different public organizations. Additionally, their mandates were redefined as per the expectations of the internationalized capital and in line with an entrepreneurial perspective (Cebeci 2018, p. 119; Ercan 2011). To give an example; the Ministry of Environment and Urbanization was given the power to create plot-based zoning plans, enabling it to have capital investments, which meant that the zone planning power of local administrations diminished. Transferring these powers, which were previously vested in local authorities, to the centre also eliminates the possibility of democratic intervention in decisions related to zone planning.

The centralization at this juncture did not only transform the state once again in line with neoliberal tenets, thereby weakening local administration, but it also

assumed an important function in terms of a competitive authoritarian regime because these powers enabled the governing party to establish and maintain clientelistic relations with capitalist groups. In this context, when we look at the zone planning authority given to the Ministry of Environment and Urbanization and for what purposes this authority is used in favour of capital, we can clearly see the power-capital relationship inherent in competitive authoritarian regimes (Alkan 2015).

Another piece of legislation that completed the centralization was the law no. 6360, which became effective in 2012 and is known in the literature as the "Whole-City Law" (pun on *büyükşehir* (metropolitan municipality)). Following the entry into force of this law, the legal existence of special provincial administrations, sub-district municipalities, and villages was terminated in 30 provinces and local administration organization was limited to metropolitan and district municipalities within these provinces. The boundaries of the metropolitan municipalities were extended to cover the whole province. This adjustment effectively organized metropolitan municipalities as the only layer of local administration in a very large part of Turkey. Following this amendment, the legal existence of villages, the local administration closest to the people, was terminated (with this law, the legal entity status of 16,580 villages came to an end). Hence, the right to self-government of the villagers was terminated in violation of the constitution.[1] Following the enactment of this law, almost half of the local administrations were incorporated to metropolitan municipalities, which meant that the people were prevented from participating into the administration. This is because it was almost impossible to enable citizen engagement in the administration of the metropolitan municipality which was extended to cover the whole of the province.

The justification for this amendment was presented as more efficient delivery of local public services by increasing the scale. The emphasis on 'local public services' is important because this indicates that local administration is not considered from a local democracy perspective but from a public service perspective only.[2] This perspective is now supplemented with the requirements of the neoliberal era which introduced a market-oriented approach. *Özlüer* argues that "this legal transformation heralded a local administration model that would rule

[1] The Constitutional Court rejected the annulment request in its judgment of 12/09/2013 no. E.2013/19, K.2013/100.

[2] *Keleş*'s argument, with respect to the founders of the Republic of Turkey, that „the aim […] was not to make cities more democratic but to make them clean, modern, healthy, and nice-looking" (Keleş 1988, p. 291) still holds true.

supreme in the towns. In this local administration practice, municipalities were turned into a supply-side business operation that provided services, enabled access to services, and both identified and organized local needs. This transformation defined local administrations as an actor in the market and put an end to their role as an administrative unit where the (common good is) determined with the citizens" (Özlüer 2019, p. 99). Furthermore, with this amendment, the governing party disabled the local administrations, which might have become a hindrance the ruling party' full enjoyment of its clientelistic relations with the capitalist groups: "The legal entity of the village and the villagers were no longer a political counterpart for the capitalist who wanted to invest in projects over the village's pasture and water resources to deal with" (Özlüer 2019, p.100).

The Administration's Use of the Public Force and "Exceptional Powers" in Accordance with Neoliberal Authoritarianism

If one distinct quality of the neoliberal authoritarian state is the organization of the administration in line with the interests of the dominant capitalist ranks, the other is the use of the public force to suppress the social dissent that the resulting deep inequality would create. Indeed, while adopting a 'hostile' discourse against the opposition since 2011, the political power responded with 'police violence' to the exercise of democratic rights[3] as was the case in the Gezi Park Protests[4] in 2013. This administrative practice that dates back from before the Gezi Park Protests has been repeated for almost all opposition protests.

This practice, developed by law enforcement authorities in favour of capitalist groups and against the rest of the society, also appears in certain administrative proceedings. Increasingly, the Turkish administration has been using the 'exceptional powers' it has been given without waiting for the exceptional conditions necessary to use such powers to materialize. In this regard, the fact that 'urgent expropriation' and 'negotiated tendering' have stopped being exceptional methods but have superseded regular expropriation and open tendering is especially remarkable.

[3] Following this development, administrative authorities and law enforcement were given new powers by a law called the "Homeland Security Package" that restricted fundamental rights and freedoms. The law was enacted on 27 March 2015.

[4] Gezi Park Protests started as a demonstration against a project that aimed to turn the only green space in İstanbul's Taksim Square into a shopping mall. Over time, they evolved into protests against the neoliberal authoritarian system and spread to many cities in the country.

The Council of Ministers—the President as of 2018—has taken 'urgent expropriation' decisions about privately-owned property since early 2000s for especially such projects as mining businesses, energy investments, and urban transformation in favour of the capitalist who would make the investment.[5] The reason why this exceptional power has been used so extensively and in violation of the law is to discard the procedural safeguards enshrined in the Expropriation Law with a view to protecting the right to property of private persons, and hence expedite the process in favour of the investor. A truth uncovered through this practice in the Turkish administration is that 'law' itself is regarded as a hindrance that needs to be cleared out from the direction of the capital (Kaya 2011). The Council of State has not managed to develop a consistent court practice in the lawsuits filed against 'urgent expropriation' decisions, which have turned into a 'weapon' used for the interests of the capitalist groups. When this practice first became widespread, the Council of State passed judgments that limited the power of the Council of Ministers. In these judgments, the Council of State restricted the grounds on which such power could be exercised in reference to the purpose specified to use urgent expropriation and made the following observation: 'If there exists a substantial reason that the public order would be disrupted and the public would incur a large loss should the regular procedure of expropriation be employed, then this exceptional power can be exercised'.[6] However, in many of its later judgments, the Council of State considered the existence of public interest with respect to the investment to be undertaken sufficient to take an 'urgent expropriation' decision and green-lit the non-observance of provisions of the expropriation law that enshrine the right to property.[7]

[5] After 2018, the President continued this practice that superseded the regular expropriation procedure. According to a news story from 10 June 2021, the President had signed 39 urgent expropriation decisions into action in the preceding six months. https://www.cumhuriyet.com.tr/haber/saraydan-6-ayda-39-acele-kamulastirma-istisna-genel-uygulamaya-donustu-1843357.

[6] An exemplary judgment is the judgment of 19.4.2012 no. E.2009/1936, K.2012/500 of the Council of State Plenary of Administrative Law Chambers, www.kazanci.com.

[7] It is of note that this change in the jurisprudence of the Council of State took place after the law of 02/12/2014 no. 6572, which altered the composition of the Council by setting up new chambers and memberships therein as part of the ruling part's *court-packing* attempt (Özbudun 2019, pp. 128–129).

Exemplary judgment, Council of State Sixth Chamber, judgment of 23.12.2016 no. E.2016/4201, K.2016/935, https://ezproxy.mef.edu.tr:2070/ictihat/danistay/6-d-e-2016-4201-k-2016-9351-t-23-12-2016.

Whereas the interest of the investor was prized above that of the private person in urgent expropriation decisions, the interest of a certain capitalist group started to be put above that of others in negotiated tendering. In its original form, article 21(b) of the Public Procurement Law gave the administration the power to invite to the tender the company they identified and decide in their favour in cases of 'natural disasters, epidemics, risk of losing lives or properties or events that could not be predicted'. However, despite the lack of any extraordinary events, many authorities, primary among them the Directorate-General for Highways, started giving out the works contracts to businesses they themselves picked. In fact, a total of 316 public contracts with very high contract amounts were executed in this manner between the years 2013 and 2019 and the contracts were divided amongst 19 companies (Toker 2019, pp. 254–295; Akman and Sevinç 2021, pp. 212–213).

Urgent expropriation and negotiated tendering practices are striking in that they reveal the relationships the ruling party has built, as is usual for competitive authoritarian regimes, with certain capitalist groups. However, these two practices carry even more weight in terms of administrative law: Use of extraordinary powers in regular situations has become routine for the administration. All provisions of the laws that aim to safeguard' fundamental rights and freedoms and serve public interest in the best manner possible become in effect 'null and void' in the face of one exceptional clause.

1.2 Immediately Before the 2017 Constitutional Amendments: State of Emergency as the 'Dual State' Takes the Stage

Turkey's authoritarian political regime and legal order reached another level with the state of emergency declared on 21 July 2016 and the emergency legislative decrees that followed. The emergence of a situation that the state cannot overcome by means of its regular powers creates a ripe ground for the relation between the state and the people to turn more authoritarian. However, the relation that the state has with law in this context determines whether the state of emergency means the end of the rule of law.

Schmitt divides the state of emergency regimes into two, based on the relation the state has with law and the grounds of legitimacy emergencies are based on: 'commissarial dictatorship' and 'sovereign dictatorship'. In a 'commissarial dictatorship', the executive body authorized with extraordinary powers by the constitution in times of crises is authorized temporarily until the situation goes back to

normal. These extraordinary powers being defined by the constitution. A 'sovereign dictatorship' is also a temporary administration. However, this time, the aim of the temporary administration is to build a new political order and in doing that it is not bound by any legal tenet (Köker 2020, pp. 17–18; Tekin 2020, pp. 182–183; Arato 2000, p. 927). *Schmitt* especially focuses on the 'sovereign dictatorship' type of state of emergency in his Political Theology, remarking that "there is no place for any understanding of the rule of law in a state of emergency" and states that although the constitution determines who is to use extraordinary powers, these powers are not subject to review (Schmitt 2005, pp. 14–15).

At first glance, the 'state of emergency regime' specified by the 1982 Constitution may be described as a 'commissarial dictatorship' because the constitution specifies the crises that may require the declaration of a state of emergency, which authorities would be authorized in an emergency, and the boundaries for restriction of fundamental rights and freedoms and provides for a requirement that the powers to be exercised during a state of emergency must be set out in a law. This gives the impression that the state of emergency would take place in a constitutional framework. However, this is only an impression because the lack of the judicial review, which is the safeguard to ensure that the state of emergency falls within the boundaries of the rule of law. Article 148 of the Constitution stipulates that the Constitutional Court would not review the emergency legislative decrees that set out the measures to be taken during a state of emergency. Although the Constitutional Court has remedied this deficiency to some extent in accordance with the requirements of the rule of law in judgments[8] it passed in 1991, it modified its case law in 2016 by refusing to review the emergency legislative decrees issued between 21 July 2016 and 19 July 2018.[9] Thus, it allowed the government to operate as a 'sovereign dictatorship', as described by *Schmitt*, in that the political power, which declared the state of emergency was 'not limited by law' (Çavuşoğlu 2021).

The state of emergency regime of this period diverges from 'sovereign dictatorships' in certain ways. Political and legal developments have shown that the

[8] Exemplary judgment, Constitutional Court judgment of 10/01/1991 no. E.1990/25, K.1991/1.

[9] *Fraenkel* states that "Devoid of the tradition of taking the lead in constitutional law, German courts were never successful in assuming or claiming authority in these especially difficult cases" (Fraenkel 2020, p. 37). The Constitutional Court's judgment of 12/10/2016 no. 2016/166 E. and 2016/159 K. is interesting in that it constitutes a voluntary waiver of the 'previous power demand and claim'.

state of emergency is not 'temporary' in Turkey. Moreover, it can be argued that the ruling party is not a 'constituent power' in the sense that *Schmitt* means and that the state of emergency in question is more akin to *Fraenkel*'s depiction of a 'dual state' in that a 'permanent' state of emergency regime was created outside the constitutional framework despite the continuing effectiveness of the Constitution. Undoubtedly, it is also not possible to argue that the 'dual state' analysis used originally for national socialism is a perfect fit for the example of Turkey. However, it is true that some of *Fraenkel*'s explanations cast light on Turkey's today in certain aspects. Especially, the 'prerogative state', which he defined as "total arbitrariness unrestrained by legal guarantees" (Fraenkel 2020, p. 27), manifests itself in many of the measures taken through the emergency legislative decrees issued at this time.

Building Block of the Prerogative State: Terrorism

The state of emergency declared in compliance with the Constitution and international law in the aftermath of the failed coup attempt of 15 July 2016 in Turkey turn into a 'prerogative state' practice. The first step in this direction was taken by breaking off the relationship between the measures taken due to the state of emergency and reason of the state of emergency. The state of emergency was declared in the aftermath of a bloody coup attempt by an illegal group within the Turkish Armed Forces to neutralize this group. However, the purpose of the measures taken via emergency legislative decrees was scoped in a way that far exceeds the reason for the state of emergency declaration. Article 1 of the emergency legislative decree no. 667, which entered into force on 23 July 2016, stated that the measures taken would not only be concerning the attempted coup but also counterterrorism. However, the legal meaning of 'counter-terrorism' was not specified. On the contrary, the decree stated that extraordinary measures would be taken about organizations and persons that are 'affiliated or connected with' the organization called FETÖ/PDY[10] that is considered to be behind the coup attempt. Furthermore, the emergency legislative decrees of the time stipulated that extraordinary measures would be taken about terrorist organizations apart from FETÖ/PDY (without explicitly stating which terrorist organizations), with the National Security Council stating that extraordinary measures would be taken about 'all

[10] FETÖ is short in Turkish for *Fethullahçı Terör Örgütü*, meaning Fethullahist Terrorist Organization, more commonly known in English as the Gulenist Organization. PDY is short in Turkish for *parallel devlet yapısı*, meaning "parallel state structure" in English, used to refer to the Gulenist Organization before its designation as a terrorist organization.

who are ascertained to be members of, or affiliated or connected with structures, formations, and groups that are determined to be acting against the national security of the state'. The terms mentioned in all these provisions are not defined either in the Turkish Criminal Code, Anti-Terrorism Law,[11] or the disciplinary provisions regarding public officials. Through these ambiguous terms not specified in any legislation in force in Turkey, the ruling party was given, in *Fraenkel*'s words, 'total arbitrariness unrestrained by legal guarantees'. Numerous educational institutions, dormitories, private health centres, foundation universities, trade unions, associations, foundations, media, and broadcasting organizations were closed and over 130 thousand civil servants, judges, prosecutors, and university staff were dismissed from public service never to be able to return (Akman and Sevinç 2021, pp. 204–206).

No criminal investigation/prosecution was launched, and no criminal lawsuits were filed against many of the people who were banned from public service for life. While it is possible to dismiss people from public service through an administrative proceeding, an administrative proceeding did not take place about these people either. They were dismissed from public service after their names were listed in the annexes to the emergency legislative decrees (Altıparmak 2016). Therefore, they did not have any idea what actions of theirs caused them to be sanctioned this way. To borrow *Fraenkel*'s words, in the order to which these people have been subjected, "there are no legal guarantees, universally valid procedural provisions, or determined competences. In short, there is no administrative law that imposes responsibilities on the concerned and entitles them to certain rights" (Fraenkel 2020, p. 36).

In this period, lack of legal guarantees was not confined to the administration. Persons dismissed from public service lodged applications with the administrative judiciary, the Constitutional Court, and the European Court of Human Rights with no results in the short term due to various legal reasons.[12] In the end, the

[11] It must also be remembered that the definition of terrorism in the Anti-Terrorism Law no. 3713 is overly broad and is not in accordance with the principle of legality, international human rights, and counterterrorism standards.

[12] The administrative judiciary rejected these applications on grounds that it could not review legislative decrees, which functionally qualified as laws; the European Court of Human Rights rejected them because domestic remedies had not been exhausted; and the Constitutional Court rejected them on grounds that the applicants should have instead lodged applications with the Inquiry Commission on the State of Emergency Measures (Altıparmak et al. 2018).

only viable option for them was to apply to the Inquiry Commission on the State of Emergency Measures (Emergency Commission), established via the emergency legislative decree no. 685. However, due to its dependence on the administration and inquiry/working method that is not in line with the right to fair trial, the decisions of the Emergency Commission cannot be deemed an effective legal remedy (Altıparmak 2017; Akman and Sevinç 2021, p. 207).

The fact that the commission is not an effective legal remedy was clearly witnessed in the applications of 'Academics for Peace'. 406 academics that signed a statement which drew attention to the grave rights violations experienced during the 2015 Southeast Anatolia curfews and government responsibility therein were dismissed from public service through emergency legislative decrees (Pişkin 2020). Criminal lawsuits were filed for many of them on 'terrorist organization propaganda' charges as per article 7(2) of the Anti-Terrorism Law. What is interesting is that the Constitutional Court judged in the "Zübeyde Füsun Üstel and Others Application judgment"[13] that the conviction to prison sentence of academics for peace was unlawful and that their 'freedom of expression' had been violated. Later, in many of the criminal cases lodged at assize courts, the courts ruled for acquittal. However, the Emergency Commission did not investigate, despite a lapse of four years, the application of even one of the academics that applied against 'dismissal from public service', apart from the 15 academics that withdrew their signatures from the statement.[14] As this is unthinkable in a state of law, there is no reason not to argue that the 'dual state' practice is involved here. As *Fraenkel* states, "The co-existence of law-abiding authorities and non-law-abiding ones affects daily practice in the following way: When it is politically desirable, police authorities amend court rulings and confine the acquitted to concentration camps indefinitely. They invalidate court rulings and establish professional conduct rules based on the judgment of the German Labour Front" (Fraenkel 2020, pp. 88–89).

Violations that the persons dismissed from public service experienced are not confined to the 'right to enter public service'. Despite the Constitutional Court judgment to the contrary, the Ministry of Justice attempted to prevent these

[13] Zübeyde Füsun Üstel and others application, app. no. 2018/17635, 26/07/2019.

[14] According to the news in the press, Inquiry Commission on the State of Emergency Measures, with its very recent decisions, started to reject the applications of these academics one after the other. https://www.birgun.net/haber/ohal-komisyonu-siyasi-karar-aliyor-363836.

people from practising law, which is a form of self-employment.[15] Additionally, although there was no judicial decision to restrict them from traveling abroad, they were not given passports for a long time. Moreover, these violations spread to other areas of their lives: They were prevented from buying and selling property, adopting children, being foster parents, withdrawing their deposits from the bank, obtaining loans from banks, and standing as guarantors.[16] Persons close to the ruling party stated that these people were convicted to 'death while alive' in an affirming tone (Akman and Sevinç 2021, p. 207).

Persistence of the State of Emergency: Spread of the Mechanisms of the Prerogative State to the Normative Realm

The continuous nature of Turkey's state of emergency experience is another aspect that matches 'dual state'. Indeed, Turkey did not return to 'normal' on 19 July 2018, when the state of emergency was 'officially' discontinued. On the contrary, the state of emergency has become the norm in different ways. As mentioned above, the measures taken about persons and organizations has become perpetual. However, the methods were not limited to this. The developments that will be described below ensured the permanence of the state of emergency by transferring the mechanisms of the 'prerogative state' to ordinary law.

The Law no. 7145 on the Amendment of Some Laws and Legislative Decrees entered into force on 31 July 2018 and set out that administrative authorities would continue to exercise emergency powers in certain matters until 31 July 2021 on grounds of 'counterterrorism' which was another development that perpetuated the state of emergency. As 31 July 2021 drew closer, the parliament extended the period for the exercise of these powers once more. One among these powers is the authority to dismiss public officials from office on grounds that they have been determined to be 'affiliated/connected with terrorism' not to be able to return. Moreover, the parliament enacted this law in full knowledge that, one month before the debate on this law in the parliament, the Constitutional Court had annulled provisions with a similar content on grounds that only the courts would be authorized to make any determination as regards persons' "membership or affiliation with structures, formations, and groups that are determined to be

[15] Tamer Mahmutoğlu Application, app. no. 2017/38953, 23/07/2020.

[16] https://www.khkliplatformlaribirligi.org/istanbul-khklilar-platformundan-basin-aciklamasi-ohal-ve-khklar-ile-gasp-edilen-haklarimizi-almak-icin-birlikte-mucadelemize-devam-edecegiz/

acting against the national security of the state" in the absence of a state of emergency[17] (Akman and Sevinç 2021, p. 208).

Another method is that emergency legislative decrees have brought about permanent changes in regular laws. The incorporation of the wording "affiliated with terrorism" allows the government to follow the state of emergency logic in regular times. For instance, people determined to be affiliated with terrorism are prevented from practicing certain activities such as mediation or notary public.

Another striking example is the addition to the Municipality Law by virtue of emergency legislative decree no. 674 of a provision that would end the modicum of autonomy that municipalities had against the central administration. A provision added to article 45 of the Municipality Law clothed in legality and rendered permanent the practice of appointing trustees, which was carried out during the state of emergency in complete contravention of the constitution. Article 45 of the Municipality Law provides for the election of an acting mayor by the municipal council, made up of elected officials, in cases where the mayor has been dismissed from office, detained, or barred from public service. However, an exception was introduced to this procedure through a clause added to this article by emergency legislative decree no. 674. According to this exception, should the mayor, deputy mayor, or municipal council members be dismissed from office, detained, barred from public service, or no longer hold the offices in question on charges of aiding and abetting terrorism or terrorist organizations, the Minister of the Interior or governors can appoint persons to the aforementioned positions. Additionally, according to this provision, the municipal council may also be disabled in such municipalities. While, until the state of emergency, the debate about the problems of municipalities in Turkey focused on the absence of autonomy and participation, this provision called even the existence of municipalities into question (Akman and Sevinç 2021, pp. 208–209). It becomes ever clearer how this can be instrumentalized by the ruling party when one recalls the arbitrary 'terrorism' charges. Indeed, immediately after the 31 March 2019 local elections, provincial and district governors were appointed as trustees to 48 of the 65 municipalities that HDP had won in the Southeast Anatolia region heavily populated by Kurds.[18]

[17] Constitutional Court judgment of 03/06/2021 no. E.2020/18, K.2021/38.

[18] https://www.evrensel.net/haber/415521/hdpnin-65-belediyesinden-48i-kayyumla-6si-mazbata-verilmeyerek-gasbedildi

All this shows that the 'dual state' set up in Turkey during the state of emergency has attained a certain level within itself. As *Tekin* states, *Fraenkel* implicitly describes three stages of the 'dual state' in his work. *Tekin* argues that in these stages the mechanisms to turn the tension between the 'normative state' and the 'prerogative state' into adaptation operate. The last of these mechanisms is the "changing the realm of norms through amendments of the legislation based on which the normative state operates in accordance with its own principles and therefore ensuring the coordination of the normative state with the prerogative state" (Tekin 2020, pp. 177–178).

As a result, the practice of arbitrariness and considering oneself above the law, which has also left its mark on Turkey's past periods of state of emergency administration, has been reinforced with the recent experience of the state of emergency. Issuing the emergency legislative decrees, the executive, with the contribution of the legislative and the judiciary, encircled the state with the spirit of the 'prerogative state'. During this period, the arbitrary and unlawful measures applied to those deemed to be "affiliated with terrorism" spread to such a wide section of life that almost all administrative authorities became the implementers of these measures and the bearers of the spirit of the "prerogative state". Furthermore, with the invasion of the normative realm by the "prerogative state", this situation became a permanence. Ultimately, the state's relationship with law was radically transformed.

1.3 2017 Constitutional Amendment: Concentration of Powers of the Authoritarian State within the Person of the President

Undoubtedly, one of the most important developments that took place in Turkey during the state of emergency was the extensive amendment of the 1982 Constitution in 2017. With the stated purpose of switching to a new governmental system, this constitutional amendment was in fact a political regime change (Köker 2020, p. 6), which many scholars describe as the end of constitutional democracy. For instance, *Gözler* studies this constitutional amendment, the referendum, and its codification in his book *Elveda Anayasa* (Farewell, Constitution) (Gözler 2021(a)).

However, it would be misleading to suggest that only the 2017 constitutional amendments constituted a 'farewell to the constitution'. The fact that Turkey was already on this path was discussed prior to the constitutional amendment. Since the Gezi Park Protests, the political and legal developments in Turkey have

been addressed within the framework of the concept of 'deconstitutionalization' (Kaboğlu 2013; Gözler 2016). It is impossible consider this amendment as independent from the 'deconstitutionalization' process and the relationship the state built with law during the state of emergency. The 2017 constitutional amendment grew out of the 'deconstitutionalization' practices of the state bodies and at the same time laid the institutional foundations for these practices.

On this new ground, the relationship between the legislative and the executive was set up in such a way that if the legislative could not fulfil its fundamental function, then the executive would overtake it. For example, according to article 161(4) governing the budget, the most primary and fundamental power of the legislative, if the parliament cannot put into force the budget law in due period, a provisional budget law shall be enacted. If the provisional budget law also cannot be enacted, the budget of the previous year shall be applied, increased as per the revaluation rate, until the new budget law is adopted. It seems that the ruling party, which carried out the amendment, wanted to ensure that the legislative and the executive are in the same political camp so that the legislative can put this scenario into action. It is not implausible to think that this was the idea behind having the parliamentary and the presidential elections on the same day according to article 77 of the Constitution.

The 2017 constitutional amendments also did great damage to the independence of the judiciary and its function as a safeguard of constitutional democracy. In fact, this function was never actually fulfilled in the 1982 Constitution era. The judiciary was not organized independently because of the authority of the President for appointments to higher judicial bodies and the structure of the Supreme Council of Judges and Prosecutors (SCJP). However, the 2017 amendments reinforced the dependence of the judiciary on the executive. This is not only about the quantitative increase in the President's power of appointing members to the Council of Judges and Prosecutors (CJP), formerly Supreme Council of Judges and Prosecutors (SCJP), or to higher judicial bodies. It is also about the new position of the President in the 2017 Constitution. As a matter of fact, the reason why the authority to appoint members to the judiciary was given to the President, not the Council of Ministers, when the 1982 Constitution was put into effect in its original form, was that the President constituted the unauthorized and unaccountable wing of the executive and bore the title of an impartial head of state (Sevinç 2017, p. 61). After 2017, both reasons disappeared. The President now exercises executive powers and many administrative powers alone, and his actions using these powers are reviewed by the judicial bodies most of whose members he appoints. In addition, the fact that the president does not have to disaffiliate from their party once elected in the new system makes it impossible to talk about the

president's impartiality. We cannot assume that the President, who is currently the head of a political party, will exercise these powers impartially.

Nonetheless, it is not possible to argue that the end of constitutional democracy in Turkey was a result of the 2017 constitutional amendments alone. There is also the problem of the state bodies not exercising their powers in line with constitutional democracy principles (Gözler 2021(b)). Without keeping that fact in mind, it is difficult to comprehend the system-transforming characteristic of the President's executive and administrative functions.

Monist Executive: President and Primary Regulatory Power

The 2017 constitutional amendments restructured the organization of the executive branch. The existence of the prime minister and the cabinet of ministers was terminated, with all executive power being vested in the President. As a result of this arrangement, not only did the dualist structure of the executive branch come to an end, but also the possibility of taking executive decisions by negotiation in a council disappeared. The President alone was positioned to set the executive policy.[19]

Furthermore, the 2017 constitutional amends equipped the President with a primary regulatory power that was not present in the original version of the 1982 Constitution. This means that the President, without being authorized or reviewed by the legislative branch, can regulate many issues 'first-hand' through presidential decrees. Granting this power to the President by bypassing the legislature damaged the democratic legitimacy of the decrees. The opportunity for different political views and interests represented in the legislature to negotiate and influence these regulations has completely ceased. However, not all interest groups shared the same disadvantageous position when it comes to influencing presidential decrees. YOİKK maintained its existence and the Vice-President became its chair.

[19] It is important to note that the 2017 constitutional amendments were only about institutionalizing the de facto functioning of the executive branch, which it had been for some time, thereby rendering it *de jure*. Indeed, Erdoğan, who was elected President by popular vote in August 2014, formed a "shadow cabinet" that allows him to run the country from the presidential palace by side-lining the cabinet of ministers, composed of members of his own party, of which he was a member until one day before the election[#] (Zengin 2019, p. 3). In summary, the *fait accompli* created by Erdoğan and AKP was institutionalized by the constitutional amendments under emergency conditions.

Let us look at the 'primary regulatory power' assigned to the President more closely:

Article 104(17) of the Constitution sets out that the President may issue presidential decrees on matters regarding executive power. However, it does not provide an explanation as to the content of the matters regarding executive power. Content restrictions of the presidential decrees are set out in the same provision: Fundamental rights, individual rights and duties, and the political rights and duties cannot be regulated by a presidential decree. No presidential decree shall be issued on the matters which are stipulated in the Constitution to be regulated exclusively by law or already explicitly regulated by law. This provision also governs the relationship between the legislative and the executive in terms of first-hand regulation of a matter and assigns supremacy to the law. The Constitution equips also the President with the power to issue decrees on matters such as setting up and abolishing ministries and regulating their functions and powers. Finally, Article 123(3) states that public corporate bodies can be established by law or by presidential decree.

Provisions about presidential decrees contain a great deal of uncertainty. Indeed, since the day the 2017 constitutional amendments became a topic of discussion, this issue has been discussed intensely within the doctrine. Especially the issue of whether the regulatory power of the legislative branch has been eliminated as regards matters that would be exclusively regulated by presidential decrees has divided the public law literature.

It is important to "interpret narrowly" the powers given to the President by the Constitution, to ensure that the ruling party is limited by law and the imbalance between the executive and the legislative is obviated to some extent. However, apart from the legal discussions, it is also meaningful to investigate with what purpose and in which direction the President uses these powers to see what kind of function 'law' has assumed at the hands of the ruling party. Therefore, in addition to studying what the ruling party can legally do, it is also important to focus on what the ruling party does under 'legal act' guise and how it has destroyed, one by one, the pedestals on which constitutional democracy stands. That is why I dedicate the section below to an assessment of the power of the President to issue decrees and their use in terms of the administrative legality principle.

Is the principle of legality of administration still valid in the age of presidential decrees?

The main source of the principle of "legal administration" in Turkey is article 123(1) of the Constitution. This provision sets out that the formation and functions of the administration are governed by law, which was left unchanged in the

2017 amendments. However, the 2017 amendments gave the President the power to form the central administration (ministries and provincial organization), regulate its functions and powers, and to establish public corporate bodies. Therefore, exceptions were created in the principle of legal administration. At first look, one may think that this exceptional power, created for the President, might only be used in a very limited area because article 104(17) of the Constitution stipulates that the President cannot regulate issues already regulated by law. When the 2017 amendments entered into force, there was already a broad legal acquis regarding the formation and the functions of both central and other public bodies. Therefore, one might think that the President cannot regulate this area already regulated by law and legislative decrees, and this power is only to be used when there is a need to establish new administrative units.

However, that did not happen in practice. The lawmaker authorized the Council of Ministers to make the arrangements necessary for compliance with the 2017 amendments days before the entry into force of the amendments. The last Council of Ministers of Turkey, based on this authorization, issued the legislative decree no. 703,[20] which abolished most of articles of several laws and legislative decrees that established and regulated the functions and powers of many public corporate bodies.

In other words, the final action of the last Council of Ministers was to eliminate the Turkish administrative organization (apart from a few exceptions such as local administrations, universities, and public professional organizations, which are explicitly stipulated to be established by law) and give room to the President to legislate. The President issued the Presidential Decree no. 1 on Presidential Organization one day after the entry into force of legislative decree no. 703 and several other presidential decrees in the following two weeks, through which he effectively rebuilt the Turkish administrative organization (Kanadoğlu et al. 2018).

That a large part of the Turkish administrative organization is not established by law or legislative decrees can be questioned from the perspective of the legality of administration principle. However, while arguing that the legality of administration was almost completely eliminated by means of the presidential decrees in question, I would like to draw attention to a different aspect of the issue, which is the following: As is known, an element of the legality of administration under rule of law is that the administration cannot assign its own powers without legal

[20] With the legislative decree amended 203 laws in total (Kanadoğlu et al. 2018, p. 25).

authorization (Sever 2019). Authorization of the administration by the parliament is also a requirement of democratic administration. In Turkey, however, while the President regulating the organization and functions of the organization, he also assigns himself new administrative powers The common feature of these powers is that they make the President dominate the administrative organization. Furthermore, some of the presidential decree provisions whereby the President authorized himself were about matters that could only be regulated by the lawmakers according to the Constitution (Akman and Sevinç 2021, p. 215).

One of the most striking powers that the President has 'given himself' is the establishment of the posts for public officials who will work in the whole administrative organization, except for independent regulatory agencies, by the President, by means of a presidential decree (presidential decree no. 2, art. 5). It is also striking that the President gave himself the power to institute the posts in universities and for members of the judiciary who will function in higher judicial bodies. The President's regulating this area is flagrantly in contravention of the independence of the judiciary as well as the constitutional provisions stipulating that the employment rights of public servants and the establishment and organization of universities shall be regulated by law. However, in the action filed against this regulation, the Constitutional Court rejected the annulment request by a majority of 8 to 7.[21]

Another important power the President gave himself is the power to supervise all regulatory acts of all authorities in the administrative organization (presidential decree no. 10, art. 6). According to this article, the President reviews the regulations, communiqués, and other regulatory acts that are drafted and presented to the presidency for publication in the Official Gazette by ministries and public organizations in terms of their compliance with the Constitution, law, presidential decrees, general legal norms, the presidential programme, and development plans and programmes, and sends back those that he does not deem to comply with the aforementioned. In the same provision, the President also assigned himself the power to review the regulatory acts of universities and public professional organizations in terms of their constitutionality and compliance with other norms. However, the Constitution (art. 130(9)) also stipulates that the procedures of state supervision over universities shall be governed by law. It appears that these clear

[21] Constitutional Court judgment of 03/06/2021 no. E.2018/119, K.2020/25. However, the Constitutional Court later annulled the presidential decree no. 65, which established staff posts in universities in its judgment of 29/04/2021 no. E.2020/71, K.2021/33.

provisions of the Constitution are not considered binding for the President, seeing as these regulations that are completely in violation of the Constitution.[22]

The President does not determine his functions and powers only through the presidential decrees but also regulations. One such case is the President appointing himself as the chair of the board of directors of the Turkey Wealth Fund, Inc. by amending a provision of a regulation. This has created a situation that is impossible to explain in administrative law because the President was given in the Law on the Establishment of the Turkey Wealth Fund supervisory powers over some of the actions of this organization and these provisions are still in force. In summary, the President collected in his person both the decision-making and supervision authority by appointing himself as the chair of an organization over which he has tutelary powers (Gözler 2019).[23]

The destructive effect on the legality of administration principle of the presidential decrees that form the administrative organization is not limited to the President himself identifying his own powers. While establishing the administrative organization with the presidential decrees, the President also violated the provisions of the Constitution which specifically protects the principle of legality of the administration. Despite the views in the literature that the organizational power of the President should be interpreted narrowly (Sever 2019; Ülgen 2018), while forming the administrative organization, the President did not only determine the organizational structure and division of functions between the units in the organization. He also regulated the functions and powers of the administration. Assignment of duties to the administration and the authorizations in relation to those duties usually has an impact on fundamental rights and freedoms. In this case, the constitutional guarantee that fundamental rights and freedoms can only be restricted by law becomes disabled (Günday and Sever 2020, p. 644).

Another constitutional guarantee for the legality principle is that administrative tutelage can only be regulated by law. However, by regulating the powers of the ministries over local administrations in presidential decree no. 1, in which he set out the organization, functions, and powers of the ministries, the President also restricted local autonomy in violation of the Constitution. For instance, article 260(1)(c) of presidential decree no. 1 gave the Ministry of the Interior "the

[22] Constitutional Court has dismissed the annulment case against this presidential decree, judgment of 18/03/2021 no. E. 2018/127, K.2021/18.

[23] Moreover, the Turkey Wealth Fund, Inc., aims to develop publicly guaranteed financing models (Akçay 2017) and is of critical importance because of the power of disposition it provides on large public resources.

power to review, probe, and investigate the elected and appointed organs of local administrations, their members, and other public officials".

Another method employed by the President to invalidate the legality of administration principle is his giving the power to other administrative bodies to self-organize. With the President transferring his power of forming the administrative organization in violation of the Constitution, other administrative authorities have also become actors in the abolishment of the legality of administration principle. Now, as *Sever* argues, we are faced with an entity with parthenogenetic powers (Sever 2019).

President's dominance over administrative organization and actions

In the administrative structure, which was redesigned after the 2017 constitutional amendments, there are continuities with the old structure on the one hand, and important breaks on the other. What has carried on is authoritarianism, centralization, and opposition to autonomy in all their senses. The institutions embodying centralization and opposition to autonomy, inherent in the administrative structure of the 1982 Constitution era have passed on to the new era. In addition, the central structure designed in accordance with neoliberal authoritarianism has largely transferred to the new system. Regulatory and supervisory agencies, which have been set up according to the state definition of neoliberalism since the 2000s, and the ministries reorganized in this direction in 2011, took their place in the new administrative structure with their functions and powers designed in line with the neoliberal order.

However, this centralist and authoritarian administrative structure has gained another feature that it did not have in the past. In addition to centralization, the power has been 'personalized'. The 'personalized' power in the person of the President represents the most important break in the administrative structure. The 'personal power' of the President in this period takes the form of 'pure personal power', so to speak. This is ensured by both the organizational form of the presidency and the powers gathered in the hands of the President.

Firstly, the presidency, which was established via presidential decree no. 1, is organized in such a way as to dominate the central organization like the premiership of the previous period. This time, however, the President's hegemony over other authorities in the central administration is much more direct. Firstly, ministries are organized as sub-units within the presidency's own organization (Zengin 2019, p. 12). The President is equipped with a hierarchal administrative authority over the ministers. In this new organization, the ministers are not policymakers regarding the issues falling within the scope of their own ministries. Moreover, the power of ministers in the ministry organization is also limited. For example,

the President appoints and dismisses deputy ministers, who are hierarchically below the minister and have a very important function in terms of the ministry organization, and the minister does not have any say on the determination of these public officials with whom the minister will work very closely.

In the new structure, the powers of the State Supervisory Council (DDK), which is triggered into action by the President and exercises a wide supervisory power over both the administrative organization and private legal entities, have also increased. The 'administrative investigation' authority, which turns into a very effective weapon in the hands of DDK, is regulated in article 108 of the Constitution following 2017 constitutional amendments. Moreover, in article 5(1)(ç) of the presidential decree no. 5, the President gave DDK the authority to suspend officials of all levels and ranks from office or to request the authorities to suspend them during an inspection. The reasons for suspension are based on as broad and vague concepts as possible. It should also be mentioned that these powers can also be exercised over local administrations, other public institutions, and public professional organizations, which should actually be autonomous.

Another issue that reinforces the hegemonic structure of the presidential organization is that administrations with critical duties and functions such as the Religious Affairs Administration, the Secretariat-General of the National Security Council, the National Intelligence Organization, the Presidency of Defence Industries, the Presidency of Strategy and Budget are directly subordinated to the Presidency.

The dominance of the President in the administrative structure has not occurred only through the presidential organization. At the same time, the President was equipped with very broad powers over all public legal entities other than the central administrative organization and in all areas of administrative activity. In this context, the powers given to the Prime Minister and the Council of Ministers in the legislation in line with the legislative decree no. 703 were transferred to the President. Therefore, it has now become possible for a single person to use the powers that were previously used in a council and with the participation of all ministers. Moreover, in most of the provisions repealed by legislative decree no. 703, the recommendations of other administrative authorities were required for the actions to be taken by the Council of Ministers, while the recommendation procedure was abolished when the powers were transferred to the President (Öztürk 2019, p. 26).

It is not possible to convey these changes in an exhaustive manner, but it is useful to briefly mention the regulations regarding universities, which are critical for democratic society building.

With the amendment made in article 5(1)(f) of the CoHE Law with the legislative decree no. 703, the authority for higher education planning was taken from CoHE and given directly to the President. Moreover, the legislative decree no. 703 amended article 13(a) of the same law and set out that the President would directly appoint university rectors. The emergency legislative decree no. 676 abolished the authority of the universities to hold elections for rector nomination, and therefore, their minimal impact on rector appointment, and set out that the President would appoint a rector from among the three nominees CoHE would propose. In the legislative decree no. 703, CoHE was excluded from the process of appointing the rector, and the sole authority was given to the President.

Legislative decree no. 703 is not the only decree that expands the powers of the President. The President has also given himself many powers by presidential decrees. For instance, the President broadly defined his appointment powers for senior public administrators with presidential decree no. 3. It was also set out that a very important part of these appointment powers would be used by the President himself. Among those to be appointed directly by the President, there are high-level public administrators who are equipped with the authority to make decisions on behalf of the administration within the central administration, as well as the hierarchical top supervisors and boards of directors of many public institutions and organizations outside the central administration (Akman and Sevinç 2021, p. 216). Among the posts to which the President can appoint persons on his own are the administrators of organizations that are important for democratic society building and could act as a brake against an arbitrary use of the political power at the hands of the incumbents and that ensure 'horizontal accountability' (Özbudun 2019, pp. 28–29, 90).[24]

Apart from his appointment powers, the President has also gathered in his own hands the powers of making critical decisions on numerous issues that fall within the scope of the administration. One of the important ones is the power related to privatization. He gathered the authority to determine the scope of public institutions and public services to be included within the privatization process and to approve both the privatization method and the privatization tender decisions. It is important who has this authority, because for a long time, privatization has been a tool for the government not only to marketize these areas by removing the state

[24] Among them, I can count the Turkish Radio and Television (TRT) Directorate-General, TRT chair and members of the Board of Directors, the Governor of the Central Bank of the Republic of Turkey, the Chief Public Prosecutor of the Court of Accounts, the President and members of the Human Rights and Equality Institution of Turkey.

from a sphere of providing public services but also to reward the companies close to itself (Esen 2020, p. 165). Therefore, the authority using these powers both ensures the influence of the neoliberal state on administrative activities and holds one of the tools necessary for the continuation of the competitive authoritarian regime.

The powers of the President cannot possibly be exhaustively listed herein, but lastly; I can count the authority of urgent expropriation, the authority to open the rangelands to urban transformation projects, the authority to decide on the areas to be taken out of the forest borders, the authority to decide on the establishment of health facilities on the coasts, and the declaration of treasury property, including forested lands, and other land under the disposition and authority of the state as tourism centres.

The administrative organization and powers designed in accordance with the hegemonic position of the President in the new political regime ensure that the authoritarian state structure in Turkey manifests itself in all aspects of the administrative functions.

Substitution of Public Interest with Authoritarian Regime Purposes in the Use of Administrative Powers

It is possible to suggest that the aim of the administrative actions carried out by the President himself or through his ministers is to reinforce the authority of the political power within the political and social order. While the 'public interest', which is the general purpose of administrative actions, gradually fades away, 'another benefit' whose content is determined by the political power that be emerges. The use of public power, which is legitimized by the idea of public interest, thus, loses its legitimacy. The aim of the administrative proceedings of this period can sometimes be neutralizing the administrations which are indispensable elements of democracy, and which can be centres of opposition even under current conditions, sometimes creating new investment areas for capital owners, and sometimes suspending fundamental rights and freedoms by disabling the guarantees stipulated by the constitution.

One of the examples in this context is the preliminary investigation which was initiated by the Ministry of the Interior on grounds that Ekrem İmamoğlu, the Mayor of İstanbul Metropolitan Municipality, had a poster prepared against the 'Canal İstanbul' project by using municipal resources. This was covered in the media in November 2020. The statement made by the Ministry of the Interior upon the news coverage is striking. In the statement, it was stated that this preliminary investigation was carried out within the framework of the principle of the integrity of administration stipulated in the Constitution. Moreover, it

was stated that İmamoğlu went beyond his function of protecting the rights and interests of the city and the municipality on grounds that "opposing an issue that has an international law dimension and concerns politics and the 'sovereignty of the state' by using public resources is in contravention of the principle of the integrity of administration and the law". The preliminary investigation initiated cannot be based even on existing provisions that severely limit the autonomy of local governments and is clearly unlawful. The Ministry of the Interior, claiming that a project that will have an impact on İstanbul in many ways cannot be discussed locally, seems to want to narrow the local political space of the opposition, which won the İstanbul Metropolitan Municipality in the last local elections and to confine the political sphere to the centre. Worse still, the statements that the Canal İstanbul project "concerns politics" and that it is a matter relating to "the sovereignty of the state" do not only attempt to distance the issue from the field of local democracy but also serves to separate a legal issue out of the sphere of norms, just like in the 'dual state'.

Another recent example in which the authoritarian state takes to the stage with its administrative powers was the appointment of Prof. Melih Bulu, who had never taken office at Boğaziçi University, as the rector of that university on 1 January 2021, through the President's decision. It is clear that a university's inability to select its own administrators and decision-making bodies in a democratic state structure is in itself contrary to university autonomy and is an authoritarian state practice. However, in this case, the authoritarian state practice was not limited to this. Boğaziçi University students and academic staff displayed a very strong democratic reaction against the appointment of Prof. Melih Bulu with complete disregard to the will of the university. Thereupon, the President decided to establish a faculty of law and a faculty of communication at Boğaziçi University with his decision of 5 February 2021 to provide staffing that would support the new university administration. However, Boğaziçi University Senate had not made a proposal to CoHE for the establishment of these two faculties. In addition, these faculties were established by the President without the approval of CoHE, and the CoHE Plenary put the issue on the agenda and discussed it 22 days after the President's decision. This action, which the President undertook by completely disabling the procedural and authority-related provisions in the legislation, undoubtedly aims to establish full dominance over Boğaziçi University, which claimed its own will through democratic methods in a way that was not expected of a university that is not even allowed to organize autonomously in the legislation. This shows that the President would like to impose his power on all administrative and social spheres, without exception.

Recently, the relationship between the government and the law has become even more interesting in the Covid-19 pandemic. As part of the fight against the pandemic, the President (who is the sole authority after the 2017 constitutional amendments) has not chosen to declare a state of emergency. However, in this period, measures that severely limited or suspended individuals' fundamental rights and freedoms were taken, with no legal basis, even in a manner that is not stipulated in the State of Emergency Law. Moreover, a significant part of these measures was either unsuitable in terms of combating the Covid-19 pandemic or were unlawful because they were disproportionate. The most striking of the restrictions that were clearly unlawful in that they were not related to the pandemic was the prohibition of the sale of alcoholic beverages in the markets that would be open to meet the needs of the public on the days when curfews were applied. The will to shape public life and society in accordance with a certain ideology, which manifested itself in the laws and regulations[25] that were gradually put into effect during the AKP rule and that limited the sale and advertisement of alcoholic beverages, has reappeared during the pandemic. However, this time, the ban on the sale of alcoholic beverages was intended to be put into effect without the need to put it in a form of legal act. As a matter of fact, when it was first implemented, this ban was a de facto prohibition.[26] Because this decision was implemented based solely on the statements of the Minister of the Interior and without being published.

Another striking example of unlawfulness during the pandemic shows the 'dual state' in action again. However, this time the dual state wheel turns in the opposite direction, creating the same result. Opponents are in the 'realm of norms', while the elements of political power are outside. During the pandemic, while the AKP held conventions in closed halls without any restrictions and with the attendance of large crowds, not following the social distancing rules, the governors did not evoke any restriction provisions. During the same pandemic, governors decided to use their power to postpone the demonstrations of opposition groups wishing to protest the government's policies and actions or the workers who were made redundant and whose union rights were violated, which could have very easily taken place in open space and in compliance of social distancing

[25] Law on Spirit and Spirit Beverages Monopoly (art.6), Regulation on Business Establishment and Operation Licenses (art. 5(1)(ı), art. 32(6)).

[26] https://www.evrensel.net/haber/432162/gun-gun-icki-satisi-yasagi-zaten-var-denilen-karar-neden-tekrar-tekrar-alindi

and other measures. In these decisions, governors cited 'health concerns' in article 17 of the Law on Meetings and Demonstrations.[27]

As mentioned in the sections above, prior to the 2017 Constitutional amendment, there was an authoritarianism with different aspects in Turkey. The President was de facto the main figure of the authoritarian structure and functioning. The effect of the 2017 Constitutional amendment was to institutionalize the de facto status of the President. Indeed, the transition of the executive to a monist structure and the fact that the President was equipped with a very wide primary regulatory authority provided the necessary constitutional ground for the authoritarian state structure to be dominant on its own. Legislative decree no. 703 and the presidential decrees issued afterwards did not only make the President the sole authority on many issues, but they also eliminated legal predictability. Indeed, the presidential decrees enacted in this period demonstrated that the limit set by the Constitution on the President's primary regulatory authority may not be of consequence, and that with the assistance of the Constitutional Court, the President can also regulate matters falling within the jurisdiction of the legislature, in flagrant violation of the Constitution. Thus, an order was established where talking about division of powers among different state bodies or the hierarchy of norms has become meaningless.

2 Conclusion

The political regime in Turkey, especially during the 1982 Constitution period, was plagued with important structural problems in terms of constitutionalism and democracy. However, at the present juncture, authoritarianism has largely disabled the rule of law mechanisms that are enshrined, albeit imperfectly, in the constitutional system. In addition, although the ruling party tries to create the perception that it has the basis of democratic legitimacy by frequently referring to the will of the nation in a populist-competitive authoritarian rhetoric, the basis of legitimacy based on representation has lost its validity as the minimum requirements for representative democracy have disappeared. In this process, while constitutional democracy has gradually vanished, 'dual state' practices have taken to the stage. The executive body and the administrative structure, which

[27] https://m.bianet.org/bianet/insan-haklari/242924-pandemi-bahane-eylem-ve-gosteri-hakki-yok-sayiliyor

have emerged as the dominant powers in the current state administration, were designed as the carriers of this political regime with both their organization and powers and fulfil this function accordingly.

Putting an end to the current authoritarian political regime and establishing constitutional democracy does not seem to be possible with a simple reform or a return to the parliamentary governmental system in the original form of the 1982 Constitution. As *Köker* states, "the way to do this is the creation of a new constitution with a view to constituting a new polity" (Köker 2020, p. 7). Building a modern constitutional democracy with a new constitution will only be possible by coming to terms with the authoritarianism and centralism inherent in the state tradition and political culture, and espousing a sincere will to build a liberal, participatory, and deliberative political regime as a result of this reckoning.

In such a period of reconstruction, the main issue will be the balanced relationship to be established between constitutionalism and democracy. At a time when authoritarianism has become so widespread on a global scale through 'elected' governments, it has become clearer that constitutionalism is not an obstacle to democracy, but an indispensable element for the modern democratic regime itself. Therefore, in the making of a new constitution in Turkey, I think it is essential that institutions of constitutionalism must be freed from their previous deficiencies. However, it should be kept in mind that this alone will not be adequate. At this point, it would be useful to recall the analogy of the "seat belt" that *Sancar* uses to describe the fragility of the formal guarantees of rule of law. The author, in the context of protecting society against the state, draws attention to the fragility of formal institutions such as the principle of legality, judicial review, and the independence of the judiciary, without diminishing their importance. The realization of these guarantees that serve to limit the state from within and on which the state organs are built is ultimately dependent on the will of the state organs. According to the author, this seat belt protects society in "accidents that are not too big or severe" that may happen in ordinary times when the government and state organs are not so reckless as to disable the rule of law. However, when the political power completely breaks away from constitutionalism and the judiciary largely supports it, society cannot benefit from the formal guarantees of the rule of law in the face of unlimited power (Sancar 2000, p. 41).

What can protect society from such a scenario is democracy itself. What I mean by this is the organized of both the political order and social life on the basis of human rights and around an understanding of democracy that is pluralist, participatory, and deliberative. Democracy must go beyond its 'representational' characterization to which today's authoritarian regimes deliberately confine it. In a political regime where a pluralistic social structure is allowed to flourish, active

participation of different interest groups within this pluralist structure in public decision-making processes is ensured, and decisions are made as a result of deliberative processes, the political power will not easily be able to ignore the constitutional guarantees.

However, the widespread adoption and internalization of these values in Turkey requires a laborious and long process. I believe that the political and administrative field is ideal to initiate such a transformation. The structural and operational organization of the state organs and administrative organization on the basis of these values as well as the use of participatory and deliberative methods in political-administrative decision-making processes will be transformative for the individual and society. The civic consciousness strengthened by the deliberative processes will act as a catalyst for the construction of a democratic society. However, for this organization of the political and administrative realms to perform a function, there must be a concept of 'public interest' that will be negotiated and agreed upon and will not exclude individual interests. Interest groups in society should be strong enough to participate effectively in these processes (Uygun 2014, pp. 394–398). The condition for this is that the social, political, and administrative areas are not designed entirely according to the 'capital benefit'. If this can be realized, the imposition of fast-track decision-making processes in line with the needs of capital will also come to an end.

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Violence Against Women on the Axis of the Istanbul Convention and Its Monitoring Mechanisms After the Denunciation: From Populism to Where: A Comparative Analysis on Turkey and Poland

Işıl Kurnaz

1 How International Law has been Protecting Women: Violence Against Women (Vaw) and The Politics of Discrimination Against Women in International Law

The Istanbul Convention has been targeted for many reasons throughout the world. The main reason behind this is that the terms of "sexual orientation and gender" have been enshrined in the Convention literally. However, it is understandable that women shall be protected from violence regardless of their sexual orientation or gender identity. In some cases, even the perception of homosexuality, "other" sexual identity or transgender identity puts women at risk. Universality, interdependence, indivisibility and interrelatedness of human rights are enshrined in the Universal Declaration of Human Rights (UDHR) and

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consequently elaborated in other human rights instruments, such as the ICESCR, ICCPR and other relevant core human rights instruments.[1]

The UDHR affirms that all human beings are born free and equal in dignity and rights. The UN General Assembly[2] stated that the Human Rights Council should be responsible for promoting the universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind, and in a fair and equal manner. They express their concern at discrimination, committed against individuals because of their sexual orientation and gender identity.

Human rights concerns and problems central to LGBTİ+individuals and communities arise from discriminatory laws and practices against individuals based on their sexual orientation and gender identity. As O'Flaherty stated, "*Members of sexual minorities are highly vulnerable to human rights abuse*." (2014:303) Since the greater the difference, the greater the risk, sexual minorities are at risk who always experience violence and discrimination.

1.1 Identification, Discussion and Interpretation of the Article

The Istanbul Convention is not the first or only convention that protects "gender" rights. Therefore, in this chapter I'd like to examine the intersections of the Istanbul Convention and other international documents to understand history of the concept sets used. For example, article 23 of the ICCPR is from a legal diversity perspective of sexual orientation and gender identity which enshrines the diversity with regards to sexual orientation. To begin with, we should mention how we classify and understand sexual orientation and gender identity. O'Flaherty has understood "*Sexual orientation as each person's capacity for profound emotional, affectional and sexual attraction to, and intimate sexual relations with, individuals of a different gender or the same gender or more than one gender.*"

[1] The Human Rights Commission has two major documents: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

[2] UN General Assembly Resolution, 60/251.

(2014:304) It is highly important that sexual orientation and gender identity are individual and internal experience. In addition to this one should explain the conception of family irrespective of heteronormative understandings because the right to marry should be enjoyed by everyone regardless of their sexual orientation or gender identity.

Understanding the legal conception of "gender identity" is crucial since much discussion on the Istanbul Convention has been stemmed from the understanding of "gender identity." Legally, Article 23/2 of the ICCPR and article 12 of the ECHR speak out about how the right of men and women of marriageable age to marry and to create a family shall be recognized. Thus, it is highly important that the ICCPR does not mention the sole right of heterosexual couples' right to marry and they do not assume that the family consists of a man and a woman in a heterosexual framework. But, in practice, the right of men and women to marry and found a family can only be claimed by heterosexual couple. In the Joslin Case, Ms. Joslin was unsuccessful in arguing the claim that Article 23 extended protection to same-sex relationships on the same basis as heterosexual relationships.[3] The Human Rights Committee stated that the 'use of the term "men and women" rather than the general terms, has been understood as indicating that the treaty obligation of states parties is to recognize as marriage only the union between a man and a woman wishing to marry each other'. However, article 23/1 states the fundamental importance of the family and its entitlement to protection by the State, without reference to the form of family under consideration. It is less clear whether the Covenant recognizes the rights of same-sex unmarried families. Only in Article 23/ 2 do we find reference to the right of men and women to marry and found families. It is important to mention that article 23/2 does not restrict the meaning of the word "family" (O'Flatherty and Fisher 2008: 224). In this regard, it may acknowledge the existence of other forms of family. However, it is explicit that the general characteristic of the ICCPR is based on non-discrimination. As the Secretary-General expressed his concern, "*We reject discrimination in general, and in particular discrimination based on sexual orientation and gender identity … Where there is a tension between cultural attitudes and universal human rights, rights must carry the day.*"[4]

[3] Joslin v New Zealand, supra n. 48 at paras 8.1–8.3.

[4] Human Rights Council Annual Report, 19.41, p. 3.

1.2 Interpretation and Applicable International Standards and Obligations

1.2.1 State Obligations under International Human Rights Law

In 1994, in the case of Toonen v. Australia,[5] the Human Rights Committee held that States are obligated to protect individuals from discrimination on the basis of their sexual orientation. We should consider the right to privacy, which is enshrined in article 12 of the UDHR and article 17 of the ICCPR, when we try to interpret article 23 of the ICCPR. Since the Human Rights Committee held in the Toonen case that laws were used to criminalize private, adult, consensual same-sex sexual relations, they therefore violate rights to privacy and to non-discrimination. The Committee has rejected the argument that criminalization may be justified as "reasonable", noting that the use of criminal law in such circumstances is neither necessary nor proportionate.[6]

States have an obligation to protect everyone from discrimination on the grounds of sexual orientation and gender identity. The fact that someone is lesbian, gay, bisexual or transgender does not limit their entitlement to enjoy the full range of human rights.

1.2.2 Discriminatory Laws

Wintemute describes a transition from the approach in the 1970s, when sexual activity between men was illegal in some European countries and stigmatized in many others (2005:191) Wintemute talks about sex rights which refers same-sex sexual activity and love rights which is legal recognition and equal treatment of the relationship between LGBTİ+ individuals and their partners. As Gross stated that "*When they choose to love rights, they will often want the same opportunities as heterosexual individuals to be treated as a 'couple', as 'spouses', as 'parents', as a 'family*" (2008:187).

The Human Rights Committee has urged State parties to "guarantee equal rights to all individuals, as established in the Covenant, regardless of their sexual orientation."[7] States have a legal obligation to ensure to everyone the rights recognized by the Covenant without discrimination on the basis of sexual orientation.

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[5] Toonen v. Australia, communication No. 488/1992 (CCPR/C/50/D/488/1992).

[6] Toonen Case, paras. 8.3–8.7.

[7] On Chile (CCPR/C/CHL/CO/5), para. 16.

1.2.3 Evaluate and Identification

While the Human Rights Committee has held that States are not required, under international law, to allow same-sex couples to marry,[8] they also insisted that the obligation to protect individuals from discrimination on the basis of sexual orientation extends to ensuring that unmarried same-sex couples are treated in the same way and entitled to the same benefits as unmarried opposite-sex couples. However, there is an important gap between married opposite-sex couples and same-sex partners who are not able to marry.

1.3 Gender Equality and Feminist Theory in the Ünal Tekeli v. Turkey Judgment[9] of the European Court of Human Rights

The theory which will be used to scrutinize the Ünal Tekeli v. Turkey judgment by the European Court of Human Rights, is feminist theory from the perspective of gender equality. The European Court of Human Rights has consistently stated that the "equality of sexes is one of the major goals of the Member States of the Council of Europe."[10] It is very important to mention that international human rights law also prohibits discrimination against women in respect of human rights and fundamental freedoms. The wording of Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[11] and article 1(3) of the UN Charter[12] both recognized the principle that human rights and fundamental freedoms should be enjoyed by everyone. However, in reality, it is very easy to see the exclusion of women from mainstream human rights norms, processes and institutions (Edwards 2011: 36). Feminist legal theory criticizes the international

[8] Joslin v. New Zealand (CCPR/C/75/D/902/1999), 10 IHRR 40 (2003).

[9] Application Number: 29865/ 96, Date of Decision: 16 November 2004.

[10] Abdulaziz, Cabales and Balkandali v. UK (1985) Series A, No. 94, at para. 78.

[11] Wording of the article 1 of the CEDAW: "For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or **exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field**."

[12] Wording of the article 1(3) of the UN Charter: "encouraging respect for human rights and for fundamental freedoms for all **without distinction** as to race, **sex**, language, or religion;"

human rights legal system as well as the position of the national legal systems. The definition of feminism and feminist critiques are very important in this respect (Halley 2004: 57–61). According to the Janet Halley's three-tiered definition of feminism, feminist arguments can be understood to take the following form:

a) Firstly, the distinction between man/male/masculine (m) and woman/female/feminine (f).
b) Secondly, there is a subordination between m and f.
c) Finally, f is the disadvantaged or subordinated element. Thus, feminism caries a brief for f who is subordinated.

The world has been shaped and constructed by men. They have power and privilege in all fields of life by domination. For this reason, feminism is an important to disclose this asymmetric relationship between men and women. Feminists believe that women and men should have political, social and economic equality and equal rights. Feminist theory is a philosophical discourse which aims to comprehend the nature of gender inequality and questions gender roles, women's social roles, experiences and interests. The issue of women's inequality requires our full attention from feminist perspective to enable the eradication of this subordination and unequal treatment. Feminist critiques on law is also important in this respect because law is not safe from this asymmetric relationship between m and f/ or w(oman) and (m)an. Law also reproduces this gender inequality as we will see from the Case of Ünal Tekeli v. Turkey by the ECtHR. Legal norms contributes to this inequality and/or does not do enough, or do the right things to remedy this. The following four key aspects of feminist critiques of international law and human rights are made by feminist theory (Edwards 2011: 43).

- The absence of women and women voices: A focus on under-representation of women in international decision-making bodies. This is very important because this under-representation and the absence of women is the consequence of male hegemony and male-protected hegemonic law, which it is necessary grasp in order to understand the cases that we will deal with here.
- Human rights as men's rights': Feminist theory criticizes law that privileges the realities of men's lives while it ignores or marginalizes women. We can easily recognize this from the case in which the law and justification given by the national court embody a patriarchal perspective in terms of Ünal Tekeli Judgment of the ECtHR which will be reviewed.
- The public and private dichotomy: The position of the national court which emphasizes that refusal to allow women to bear only their maiden name after their marriage relied on the "legitimate aim" of reflecting public order.

- Essentialized women: It means that there is a collective female identity which all women are gathered under the same roof by constructing only one "woman's" identity. It is also important to mention in our case because both national court and legislation reiterate that women should be protected because they have a more delicate[13] nature than men.

1.3.1 Case of Ünal Tekeli v. Turkey from Feminist Theory and Gender Inequality Perspectives

The applicant alleged that the refusal by the domestic courts to allow her to bear only her maiden name unjustifiably interfered with her right to protection of her private life and she had been discriminated against in those only married men could continue to bear their own family name after they married. She relied on article 8 and article 14 of the ECHR.[14]

Article 14 is the main provision on non-discrimination which prohibits the different treatment of individuals unless there is a "reasonable and objective justification" that requires legitimate aim and proportionality. It is very important to understand and implement these principles. The Ünal Tekeli v. Turkey case is important because it challenged the prohibition on women using their surnames as the family name even though this option was available for men. While this obviously constitutes different treatment between married men and women, the national court's position is also important to analyze from a perspective of feminist discourse analysis. The language used in the judgement of the National Court is instructive as to how the law embeds patriarchal norms that stand in stark contrast to the universal equality enshrined in the Istanbul Convention. I will undertake a discourse analysis to uncover some of the assumptions that govern the National Court's ruling and demonstrate how this is against the spirit of gender quality.

The National Court dismissed her complaint for the following reasons:

- *The rule according to which married women bear their husband's name derives from certain social realities and is the result of the codification of certain customs that have formed over centuries in Turkish society. According to the thinking behind family law, the purpose of the rule is to protect women, who are of a more delicate nature than men, strengthen family bonds, nurture the prosperity of the marriage, and preclude bicephalous authority within the*

[13] Ünal Tekeli v. Turkey, paragraph 16.

[14] Turkish National Court applied the article 153 of the –former- Turkish Civil code which said as in force at the material time "*Married women shall bear their husband's name…*".

same family.  This clearly parties in an essentialist discourse as all women are considered more delicate than men. This essentialized woman is dependent on men both individually and collectively. Female subordination is seen as a natural and maintained by patriarchal interests, ideology and institutions. It reinforces hierarchical structures of the family by over-emphasizing family structure at the expense of women rights.

- *For the sake of protecting family unity the legislature has recognized the primacy of the husband's name over the wife's. Considerations of public interest and policy have been decisive*.[15]  This clearly shows that the value and worth of women's lives within the law are understood from a male-centered perspective (Edward 2011: 46). As the law-making process is a socially constructed enterprise, it is not safe from the hegemonic patriarchal and heterosexist system which is embodied within the ideology of the states. In the Government's ideology, family unity was a public policy consideration and private life ceased where the individual entered into contact with public life. From the feminist perspective regarding the gendered nature of the public /private dichotomy, women are rendered invisible "mothers-wives" or as the property of their husbands as soon as they married and started a family.
- *The principle of equality within the meaning of Article 10 of the Constitution does not mean that everyone is subject to the same rules of law. The special characteristics of each person or each group of persons may reasonably justify the application of different rules of law*.  Human rights are seen as men's rights in this respect because the legislature has recognized the primacy of the husband's name over the wife's. The justification behind this gender-based inequality and discrimination only reinforces privileging patriarchy and ignores women.
- *Change in the system, involving a transition from the traditional system of family name based on the husband's surname to other systems, will be a huge problem and inevitably cause confusion for keeping registers of births, marriages and deaths. * It is necessary to mention the ECtHR position in this respect. The Court does not underestimate the important

[15] In compliance with the new amendment of the Turkish Civil Code, "Married women acquired the right to put their maiden name in front of their husband's surname." However, the applicant preferred not to make use of that possibility because, in her view, the amendment in question did not satisfy her demand, which was to use her maiden name alone as her surname.

> repercussions which may result from a change in the system. However, it considers that society may reasonably be expected to tolerate an inconvenience to enable individuals to live in dignity and worth in accordance with the name they have chosen.

It can be seen from this case that the objective of reflecting family unity through a joint family name is realized primarily through the use of the husband's surname. However, this rationale cannot provide justification for the gender-based difference in treatment highlighted by the complainant. It is very important to remember that family-related provisions in law have overemphasized the woman as homemaker as well as overemphasizing family unity.[16] This strong interrelation should be taken into consideration from the perspective of gender equality and feminist theory. This legislation related to woman's maiden name and the tradition behind it, derives from an understanding of the man's primary role and the woman's secondary role in the family. The outcome of the ECtHR, which held that there was a violation of article 14 (the prohibition of discrimination) and, in conjunction with this, a violation of article 8 (the right to respect for private and family life), reflects the applicability of feminist theory and gender-based perspectives on the law when dealing with specific legal issues. It enriches the understanding of the principle of equality and non-discrimination as a social matter as well as legal issue. This is because it is important to remember that both gender roles and law are socially-constructed fields which feminist theory can subject to critique.

Prior to the Istanbul Convention, gender equality, gender identity and the family dissolution have been discussed in international law in those cases previously mentioned. First of all, the disquieting term of "gender", "gender identity" have been used in international law and legal instruments other than Istanbul Convention. Removal of the term gender equality from national action plans, and all official and legislative policies shall be also emphasized (Alsalem 2022: 3).[17] Furthermore, as the Unal-Tekeli case shows us, the dissolution of family did not start

[16] It is both seen in the law provisions and jurisprudence such as Family Courts and Court of Cassasination. For further reading: Ayşe Aydın Şafak, Feminist Bir Bakışla Türk Aile Hukukunda Kadın Bedeni On İki Levha Yayıncılık, 2014.

[17] Press Release on Turkey visit of the UN Special Rapporteur on violence against women and girls was held between 18–25 July 2022. In this release, Alsalem speaks about her concerns on removal of the term gender equality from the political statements.

with the Istanbul Convention, it is more than related to traditional social roles that were attributed to women in a family.

Before the Istanbul Convention, international human rights law already tried to protect women and gender identities with its international instruments and resolutions. For example, in 1992, during its 11th session, General Recommendation No. 19 of the CEDAW identified gender-based violence in, as a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on the basis of equality with men. In 1989, the Committee recommended that States should include in their reports information on violence and on measures introduced to deal with it. At its 10th session, in 1991, it was decided to allocate part of the eleventh session to a discussion and study on violence towards women and the sexual harassment and exploitation of women. That subject was chosen in anticipation of the 1993 World Conference on Human Rights, convened by the General Assembly by its resolution 45/155 of 18 December 1990. The Istanbul Convention can be seen as the sum of the historical gains and acquisition of rights by women throughout the world, particularly the women in international human rights movements.

The debates on the Istanbul Convention and its protection of "gender" are expired and irrelevant discussions, since international human rights movements had already been ahead of those arguments. What the Istanbul Convention brings us, is a new perspective on the State's positive obligations, the responsibility between legislative and executive power, and a recognition of the gendered nature of the violence against women, and of domestic violence as a specific form of criminal violence. Therefore, states must ensure a fully gender-sensitive approach to domestic violence cases (Leeuwen 2016).

2 The Reason Behind the Disputes on Istanbul Convention

The Istanbul Convention is based on a human rights framework since it insists that party states shall take the necessary legislative and other measures to promote and protect rights for everyone. The Istanbul Convention has been an important part of international human rights law and its obligations are still subject to international monitoring mechanisms. The Istanbul Convention monitoring body, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), is an independent body mandated to monitor the implementation of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence ("the Istanbul Convention") by the parties to the

convention. It is composed of ten independent and impartial experts appointed on the basis of their recognized expertise in the fields of human rights, gender equality, violence against women and/or assistance to and protection of victims.

The Istanbul Convention aims to combat domestic violence and to protect the victims of domestic violence. However, it is debated that whether the term "survivor" rather than victims of domestic violence is more appropriate.[18] Since domestic violence by definition occurs between private individuals, *it did not fall within the scope of the traditional interpretation of human rights law* (McQuigg 2019: 10). In the earliest human rights treaties, such as the European Convention on Human Rights (ECHR), issues such as violence at home were not seen as being within the scope of such instruments. The main objective of those treaties was to protect the individuals from abuse perpetrated by the state itself; the ECtHR, highlighted this objective in its decision on the landmark Opuz case. The aim of the case was to guarantee that there would be an area of activity or an act in which the individual would be 'left alone', in which the state would not interfere. Such a delineation necessarily leads to a public/private dichotomy being made and, following this, a division in human rights law emerges which is not politically and legally justified, as the private sphere should be also considered as a potentially political arena for the struggle over the attainment and exercise of human rights. This contention is related to the insistence that "the private/personal is also political" and bargaining over human rights obligations by deploying a rhetoric of the private sphere is not in line with human rights advocacy (Boyd: 37–61). When applied to the issue of domestic violence, not only is such an approach deficient but arguably it perpetuates the conditions that allow violence in the home to occur (Uygur: 194). The lack of perception of domestic violence as constituting a human rights and public issue can also be seen in the fact in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) includes no explicit mention of domestic violence.[19] However, in spite of this, domestic violence did not fall outside of the scope of the interpretation of international human rights law because of the given definition of human rights, the public/private dichotomy, and rights developed in such a way as to create a public/private divide by which human rights norms operate. It means that they were applied in the public sphere, in which the state was involved, but they were

[18] First GREVIO Group of Experts on Action against Violence against Women and Domestic Violence Activity Report, covering the period from June 2015 to May 2019, p. 11.

[19] CEDAW (1249 U.N.T.S.13), adopted by UN General Assembly on 18 December 1979.

not applied in the private one (McQuigg: 19). The reason behind this not only stems from the fact that the public and private dichotomy does not solve the problem with regard to domestic violence, but also because rhetorically and practically human rights may enter into the private sphere and public sphere at all. It means that domestic violence is not private issue between partners, it is public issue in terms of positive obligations of the state which requires that international human rights law provisions shall interfere with it.

The Istanbul Convention contains 81 articles separated into 12 chapters and all the articles are vital gains women achievements.[20] It is important to mention that the Convention states that the provisions shall apply in time of peace and also in situations of armed conflicts where violence against women and domestic violence is practiced. GREVIO reports also show that in the time of conflicts, armed or not-armed, the Istanbul Convention's requirements and tools still hold. Another point about the Convention are the key-terms that are articulated therein: For the first time, violence against women has been described as all types of violence in public or private life. According to the convention, violence against women is,

> violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violation that result in, or are likely to result in physical, sexual, psychological, or economic harm or suffering to women including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. (Article 3 of the Convention)

Domestic violence had been recognized for the first time as "all acts of physical, sexual, psychological or economic violence that occur with the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim."

Another important key term is "gender" because the convention articulates a social gender approach. Gender is defined as "the socially constructed roles, behaviors, activities and attributes that a given society considers appropriate for women and men." And finally, the convention recognized a gendered concept of violence by using the term "gender-based violence against women". This is taken to mean "violence that is directed against a woman because she is a woman or that affects women disproportionately."

[20] Latest version of the Convention https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e?module=treaty-detail&treatynum=210.

The implementation of the provisions of this convention by the Parties, in particular measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, gender, race, color, language political or another opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or another status. There is also an important requirement for the prohibition of discrimination on the above-mentioned grounds.[21]

Another important point is that the Istanbul Convention provides for very strong protection mechanisms such as administrative sanctions, restraining orders, as well as their rapid application, in order to protect women. GREVIO is the monitoring mechanism to the Convention and monitoring to state parties whether Istanbul Convention applies or not.[22] This means that those sanctions and legally binding protection tools exist not only on paper, but they are legally executed by the monitoring mechanism (GREVIO).

3 Legal Background to the Istanbul Convention: The Case Behind the Istanbul Convention

Having previously discussed the intersectional legal framework between women and gender, especially with regard to perceptions of women and the family, I would like to scrutinize the Istanbul Convention in the legal and historical context of Turkey. Turkey is an important example because the similar patterns play out in countries that are under populist regimes. Conceptions of femininity and perceptions of gender roles, which are often presented as traditional, will be demystified.

There is a huge history behind the new legal framework in Turkey. As early as the 1990s, within the legal framework, for example, honour killings, meaning that women are slaughtered in the name of virginity, was a cause of remission and an extra good time in the criminal proceedings (Sancar: 87–171). Women organizations and feminist groups had been together in a rally called "March against violence" and then started to get to work to make some gain in the legal sphere.

[21] Article 4 of the Istanbul Convention

[22] GREVIO Reports: https://www.coe.int/en/web/istanbul-convention/grevio https://rm.coe.int/horizontal-review-study-2021/1680a26325

Right now, women-hater and misogynist articles of the Criminal Code have been changed, honour killings have punished with harsh penalties, article on equality in our constitution is specifically contain the article on gender equality. More importantly, Turkey is the first signatory state of the Istanbul Convention which is a human rights treaty of the Council of Europe against violence against women and domestic violence and it was opened for signature on 2011, in Istanbul, Turkey. The convention aims at prevention of violence, victim protection and to end the impunity of perpetrators. In March 2012, Turkey became the first country to ratify the Convention, followed by 33 other countries. It was the first country to ratify it the Opuz v. Turkey[23] case of the ECHR created the impetus for the convention. This landmark case marked the first time the Court recognized that the failure of states to address gender-based domestic violence can amount to a form of discrimination under the Convention. However, the achievements of the women's[24] movements have been under threat in Turkey because anti-gender movements, supported by the conservative government, have been pushing for withdrawal from the treaty. This is the case not only Turkey, but in Poland, Slovakia, Hungary and Bulgaria far-right movements are trying to do the same.[25] For instance, the Polish government's pitches Warsaw Convention as alternative to the Istanbul Convention – would ban abortion and same sex marriage. There have been other backslashes from other countries one by one. Eastern European countries are trying to turn their back on the Convention, claiming it will erode their "family values." Poland has challenged the agreement with other countries such as Hungary, Bulgaria and the Czech Republic, signed the document, but haven't translated its provisions into law. A Hungarian-Polish initiative had been founded and protesting against the ratification of the Istanbul Convention. They open a campaign and it has reached over 60,000.

Relation to populism is not only related to ongoing developments by governments, but also replacing international treaties to national ones, such as Ankara Convention. International mechanism and bodies have been ignored in order to be released from international obligations. In a Turkish Government counter-attack

[23] Opuz v. Turkey Case, https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22003-2759276-3020932%22]}

[24] https://hungarytoday.hu/hungarian-polish-initiative-istanbul-agreement-gender-women-rights/

[25] https://emerging-europe.com/news/poland-pitches-warsaw-convention-as-turkey-exits-istanbul-version/; https://www.politico.eu/article/istanbul-convention-europe-violence-against-women/

against the Istanbul Convention, a national treaty called the Ankara Convention may supersede Istanbul Convention, like Warsaw Convention of Polish Government. The basic question is here: What is the reason for enabling the same rights written in the Istanbul Convention in a specifically national convention? The answer is multi-layered however and consists in an attempt to lift international supervision mechanisms, avoid accountability mechanisms and the entrenchment of arbitrary decision-making as a technique of governance.

The Convention had been written after the tragic Nahide Opuz Case v. Turkey case before ECHR. In 2009, the Court announced its judgment on a complaint brought by a victim of domestic violence against the Turkish government for failing to protect her and her mother from attacks perpetrated by her husband. Ruling for the plaintiff, the Court found that the Turkish government violated three articles of the European Convention on Human Rights: the right to life; the prohibition of torture and inhuman treatment; and the prohibition of discrimination. Critically, the Opuz decision holds governments accountable for the first time for failing to take adequate steps to protect victims of repeated domestic violence, even absent any active malfeasance on the state's part. Additionally, the decision marked the first time the Court recognized that the failure of states to address gender-based domestic violence can amount to a form of discrimination under the Convention. Although Opuz lodged about 36 complaints against her husband, authorities did not take any steps and the violence finally came to a climax when Opuz's mother attempted to move to another place in March 2002. The husband confronted Opuz's mother, and in plain view of a witness, took out a gun and shot the mother. She died instantly. These tragic events can be argued to form the beginning of the process that led to the Istanbul Convention.

4 The Populism Effect on the Istanbul Convention: Governments' Repercussion on the Istanbul Convention

Populism has different types and variations and these variations necessarily affect the relationships between different types of populism with authoritarianism and constitutionalism (Ozbudun 2020: 175–186). In spite of the different types of populisms, the main axes of populism are the same: it paves to way for changing the liberal democratic constitutional system to an authoritarian one (Halmai: 296–313) There is no single formula to define populism since it differentiates country to country. Mudde and Kaltwasser who define populism as a "*thin-centered ideology that considers society to be ultimately separated in two homogeneous and*

antagonistic camps, 'the pure people' and the 'corrupt elite,' and which argues that politics should be an expression of the 'volonté générale' (general will) of the people." (2017: 6). It means that some forms of populism have been combined with authoritarianism and nativism (Halmai: 298).

The general aim of the analysis of the relationship between the İstanbul Convention and populism is also related to how constitutions and national and international courts, deal with gender equality and women's rights issues. It represents a necessary dimension to assess the quality, scope and limits of contemporary populism within constitutionalism. Protection of women's rights, equality in marital relations, sustaining of women's autonomy and independence, sexual and reproductive rights, especially the right to abortion, states' commitment to end specific gender-related physical, psychological and sexual violence is not outside the scope of the constitutional politics. Because of this, those rights cannot be left to the mercy of populist governments. The constitution and Istanbul Convention focuses on the issues as substantive gender equality, intersectional discriminations, representation of women and LGBTİ+in the legal profession, the role of women and LGBTIAQ+in constitution-making, access to public services, the right to political participation, as well as sexual harassment and gender-based violence, reproductive rights, the impact of religious norms on the enforcement of patriarchal hetero-normativity, women's rights in war and post-conflict situations, and transitional justice.

5 A Case Study on Turkey: From Istanbul Convention to Populism

On 20 March 2021, the President of the Republic of Turkey announced Turkey's withdrawal from "The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence" (the Istanbul Convention) through a presidential decision.[26] Latest decision of Turkish Council of State, 10th Chamber found this withdrawal constitutional on July 21, 2022, ruled in a 3–2 decision to uphold president's unilateral decision to withdraw from a binding convention.

The president's decision was based on the authority granted to the president by Presidential Decree No. 9 to ratify, implement, cease implementation, and terminate international treaties. The relevant presidential decision enabled a

[26] The Presidential Decision No. 3718, published in the Official Gazette on March 20, 2021.

previously enacted presidential decree (nr.9) that enabled the President, among other competencies, to "terminate" international agreements.[27] In the context of Turkish law, this decision is not compatible with the internationally agreed principles of human rights law, the protection of women against violence, and gender equality, to which Turkey has contributed as the first signatory state during their formation while enacting the Istanbul Convention as binding on Turkey. This should be considered as a set back from the constitutional achievements protecting women by developing their rights and freedoms against violations by the state and third parties since the 2001 constitutional amendments in Turkey.[28] It is a backward step from the common values system set out in the human rights treaties of the Council of Europe, by which Turkey is bound as a founding member of the Council of Europe. Within this framework, the termination of the Istanbul Convention is a violation of the prohibition of discrimination. This particularly true of article 90 of the TCC which prioritizes international conventions and provides for legal primacy to be given to treaties on fundamental rights and international law for the protection and improvement of human rights and international conventions on fundamental rights and freedoms shall prevail over the Turkish national legislation (Scotti 2021).

It is crucial to show how much good the Istanbul Convention has done and how much bad its denunciation would create because this Convention has been implemented and applied in first instance courts and the Turkish Constitutional Court as a constitutional standard (Kurnaz 2020).[29] The fact that women have been using the slogan: the Istanbul Convention let you live, shows that the Convention is a concrete thing that is tangible through the lives of women in Turkey. This Convention imposes positive obligations on states regarding "all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."[30]

The Convention protects the rights of the victims, without discrimination on any grounds such as sex, gender, race, color, language, religion, political or other

[27] The Presidential Decree No. 9, published in the Official Gazette on July 15, 2018. However it should be noted that this unconstitutional article of the Decree have not been sent to the Turkish Constitutional Court by the main opposition party.

[28] Statement from the association of research on constıtutıonal law (arcl) on the presidentıal decision on the İstanbul Convention.

[29] See reference section for the decisions: "**Turkish Constitutional Court Decisions refers to the Istanbul Convention".**

[30] Article 3 and 5.

opinions, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status. The Convention specifically underlines the duty of states to prevent domestic violence, particularly against women.

Convention obliges that the states are under the responsibility to develop comprehensive policies, including the obligation to condemn not only violence but all forms of discrimination against women, to prevent, investigate and punish violence, and to implement these policies in both public and private spheres.[31]

This requirement does not only means protective measures, but also preventive measures as well. Public and private dichotomy is being dissolved in terms of women's protection. Not only physical violence is amounted violence, but also psychological, economical, digital, political and cyber violence and any other forms shall be taken into consideration. However this presidential decision calls into doubt the political will of the Turkish government exists to protect women under the international monitoring mechanism and the victims of domestic violence; More precisely, the Turkish Government would like to redefine domestic violence and confine it to the national sphere which forecloses the possibility for international accountability. This means that it while it may be investigated on a national level, there is no international responsibility to hold them account for failing to do this.

The İstanbul Convention has also become a standard-setting document for Turkish Constitutional Court and action plan for the Turkish executive power as well.[32] Constitutional rights and principles in the İstanbul Convention include the right to life compatible with human dignity, the right to material and spiritual integrity, the right to privacy, the right to fair trial including women's access to justice, the protection of children against all forms of violence and abuse, and the right to equality and prohibition of discrimination. Supremacy of constitution is being also ignored by the withdrawal decision. Impunity for the perpetrators would be possibly occured since there is not international monitoring procedures.

This presidential decision came after a speech by the President of Religious Affairs in Turkey in which he stated that homosexuality is forbidden by Islam. Since then, LGBTİ+people in Turkey have been much more vulnerable (Türmen: 2020). The speech went further and stated the fight against LGBTİ+. Therefore, LGBTİ+people have not been only legally ignored but also socially at risk in Turkey. LGBTİ+hate and hate speech are much easier to handle for populisms. However, it

[31] Article 4 of the Istanbul Convention.

[32] See Decision *Z.A* (2015/6302); E.2015/68; E. 2019/2.

could not be said that this phenomenon is merely the result of government manipulation. The reason behind that the embitterment of LGBTİ+-hate is much more useful for the populist governments than the government policies on the false representation. This kind of disputes and agenda are also related to the Istanbul Convention since embitterment of LGBTİ+hate can be used as a flag to withdraw the convention. Hatred towards LGBTİ+people has been used by governments and other executive forces as an excuse to legitimize withdrawing from the Convention.

The linkage between this speech and government withdrawal from the Convention is clear. However, Turkey, like all countries, does not only consist of the government and the ruling party. There is a huge opposition group which refuses to be oppressed by the government despite their subjection to oppressive practices. The filing of cases against the withdrawal decision lodged by womens' rights groups is an example of opposition to oppression from civil society and public opinion. Many groups, including feminists, LGBTİ+community, leftists, women, children, civil society, academics have tried to revoke the decision and take Istanbul Convention back by using legal tools strategically.

The President's Directorate of Communications issued a press statement calling the "*normalisation of homosexuality*" as for the justification for withdrawal from the Istanbul Convention. This justification alone is an example of hate speech against which many international treaties, such as the Istanbul Convention, ECHR, ICCPR, and CEDAW aim to struggle (ARCL).

CEDAW Committee's General Recommendation No. 35 (2017) shall be mentioned since it is recognised that the prohibition of gender-based violence has become a norm of international customary law[33] that every state should respect. The current question is triggered here: How come this kind of hate speech becomes possible where the country bound by international agreements? This question also triggers the populism disputes around the world.

20 days after terminating the Istanbul Convention, the Government announced its New Human Rights Action Plan on 2 March 2021. It also specified "Increasing the Effectiveness of Combating Domestic Violence and Violence Against Women" as a peculiar goal for women. It shall be noted that there is a strong contradiction in terms of clash between termination and so called "ensuring justification" regarding international obligations.

On 9 March 2021, the Grand National Assembly of Turkey (GNAT) established a Parliamentary Investigation Committee to "Investigate All Aspects of the

[33] CEDAW Committee's General Recommendation No. 35 (2017).

Causes of Violence Against Women and to Determine the Measures to be Taken" (Decision No. 1280).[34] According to Article 70 of the Istanbul Convention, the Parliament has a competence to implement and monitor the Convention.

The Istanbul Convention envisages an independent expert body founded by the contracting states responsible for monitoring the implementation called GREVIO. Approximately 30 decisions of the Turkish Constitutional Court refer to the Istanbul Convention as a constitutional norm because article 90 of the Turkish Constitution refers to international agreements to be duly put into effect so that they carry the force of law. No appeal to the Constitutional Court can be made with regard to these agreements, on the grounds that they are unconstitutional.

GREVIO published its report on Turkey in October 2018. The report points out to the need of legal framework to prevent crucial issues of violence such as forced marriage and stalking. The latest criminal amendment in Turkey, 12.05.2022, enshrined the crime of "stalking" in the Turkish Criminal Code article 123/A. It could be counted as the positive step, however in terms of the GREVIO report it is not enough to protect women for this article. Istanbul Convention is much more protective since it is peculiar to gender based violence which requires prescinding from any such ranking of crimes. However, it is also important that Turkey, as a founder signatory state of the Istanbul Convention, send the government report to GREVIO, which states that the government take necessary measures in compliance with the Istanbul Convention as well.

By virtue of Article 90 (1) of the Constitution, international agreements are need to be adopted by the Turkish Parliament by a law approving ratification. The Grand National Assembly in Turkey also adopted the Convention by Law No. 6251. However, the Convention was terminated and Turkey withdraw from the convention by a presidential decision disregarding the "principle of parallelism" taken to mean a procedural safety for enactment and withdrawal procedures of international agreements. The Turkish Constitution requires that presidential decrees are only be issued for matters on the executive. By virtue of principle of legality, fundamental rights and freedoms and their limitations shall only be foreseen by laws which is strictly forbidden of the decrees doing so.[35] Therefore it should be noted that this presidential decision is unconstitutional in terms of Articles 90 and 104 of the Constitution because article 90 of the Turkish Constitution entails that the provisions of international

[34] The Association of Research on Constitutional Law Statement's: http://anayasader.org/anayasa-hukuku-arastirmalari-derneginin-cumhurbaskaninin-istanbul-sozlesmesine-iliskin-karari-hakkindaki-aciklamasi/

[35] Article 104 of the Turkish Constitution.

agreements on human rights shall prevail. Article 104 of the Turkish Constitution stipulates that the president may only issue presendital decrees, which is the legal basis for presidential withdrawal decision, on matters related to executive power.

The legal framework in Turkey has been shaped by numerous speeches by President Erdoğan and other members of the AKP. Since then, equality between men and women in Turkey has been at risk. Women's role inside the family is the main target of the debates since, according to AKP's populist ideology, the Istanbul Convention led to the dissolutions of family while legalizing LGBTİ+and practices. However, it is not at all clear that how this Convention was able to do this? Increase in the divorce rate in Turkey is also linked to the Istanbul Convention in AKP discourse. However, the correlation between those two did not reveal. It could not be said that they are mutually exclusive at that mutually inclusive as well. These attempts to discredit the Convention create doubts about the future implementation of gender equality in line with international standards in Turkey after the withdrawal.

Women and LGBTİ+face the violence and they have been losing their fundamental rights day by day. Article 40th of the Istanbul Convention prohibits mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence. After withdrawal, women have been forced to continue the marriage they have even there is a violence since family mediation tried to be built. Moreover, article 42 of the İstanbul Convention also prohibits "honour" as a justification for crimes and this is unacceptable to use "honour" to legitimaze crimes against women in terms of İstanbul Convention. Those safeguards are being lost in Turkish legal system which renders the crimes uncontrolled and unchecked.

One of the most important instance to show how women are left to the mercy of the arbitrariness can be shown through the legal sphere. The Judgment of the Ercan Şahin and Others in 22th April 2022 by Turkish Constitutional Court (TCC) shall be mentioned. By virtue of Law nr. 6284, no evidence or report proving the violence is required in order to take a cautionary decision. The preventive cautionary decision is taken without delay. Because those cautionary decisions shall be taken urgently without delay, otherwise they could be ineffective. However, TCC reached a verdict that cautionary decisions need to be reasoned, otherwise man's right to have reasoned decision will be violated. This judgment of the TCC compares the right to life of women and right to reach a reasoned decision of man which are not comparable because of the substance of the rights. TCC gave priority of right to reasoned decision over right to life which constitute a back-step.

Another tangible example of this back-step is a judgment of Hatice Kaçmaz, by Supreme Court Assembly of Criminal Chambers, has imposed sentence to

the perpetrator of the murder of a woman "reasonable," stating that he killed her "impulsively" and a "sentimental breakdown" he had after she rejected his marriage proposal. Gender inequality, misogyny and judicial passiveness are visible with this decision.

All those legal framework shows that Turkey has failed to implement the human rights obligation that is binding for Turkey and fail to address gender-based domestic violence, amount to a form of discrimination under the Convention.

6 A Case Study on Poland: From Populism to Where?

Turkey is not the only country which has serious concerns about the Istanbul Convention. Six members of the European Union (Bulgaria, Hungary, Czechia, Latvia, Lithuania and Slovakia) did not ratify the Istanbul Convention. Poland has taken steps to withdraw from the Convention, citing an attempt by the LGBTİ+community to impose their ideas about gender on the entire society. All the countries mentioned have used different arguments against the Istanbul Convention. For example, Poland's aim is to revoke the right to abortion which is in practiced rendered an unusable right in Poland. Bulgaria states that the convention would eventually lead to formal recognition of the third gender and same-sex marriage which is not acceptable for Bulgaria. Slovakia has not ratified the convention yet because it opposes the Convention's clauses concerning LGBTİ+rights, which are portrayed as an "extreme liberalism" that contradicts "traditional values" they felt needed to be protected. Hungary did not ratify either, but the interesting point is Poland which both signed and ratified the convention while the Polish government also criticized the treaty for stating that "culture, custom, religion, tradition or so-called 'honour' shall not be regarded as justification" for acts of violence against women.

The Istanbul Convention was ratified by Poland in 2015, just a few months before the present ruling party – Prawo i Sprawiedliwość (Law and Justice) came into power (Sękowska-Kozłowska 2021) The ratification of the Convention is a result of coalition of ruling parties. The Convention has been discussed since 2012, mainly by ultra-conservative and populist politicians and the Catholic Church, who initiated the war on gender politics which includes LGBTİ+(Sekowska-Kozlowska 2020: 275). There is strong similarity with Turkey here, since the anti-gender movement is supported by the government in Turkey who have been revoking some decisions based on "*fıtrat*/natality", which means that women and men are inherently different.

The Polish government is now therefore obliged to implement a treaty that it openly contests and declares its intention to withdraw from. Research on submissions of the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) of Poland shows that, the government of Poland submitted its first report to GREVIO in March 2020. It is quite contradictory and similar at the same time with that of Turkey. Since then, Turkey has submitted its counter-report by government side and monitoring report required by GREVIO without delay.

In the state's report, violence against women had been reductively labelled domestic violence. This kind of restricted, measurable, scanty and narrow understanding of violence against women contains the similarities between Turkey and Poland as well. Since violence has different variations and it does not only consist of domestic and homebased one. As mentioned above, restricting domestic violence to a private sphere excludes some of the violent acts and actions done by perpetrators. Domestic violence has not inherently occurred within the domestic sphere and when it is narrowed down within this dichotomy, states' positive obligation would eventually become invisible and seem to disappear under the mask of unaccountability. This conceptual comparison leads to the conclusion that the Istanbul Convention's clarification that domestic violence is only one form of violence and that there are many other types of violence against women, is the element that both Turkish and Polish governments would like to ignore.

One of the important similarities between Turkish and Polish authorities is responses from the government. Indistinguishably, the Turkish and Polish governments respond to GREVIO by stating that their national law such as the Act on Combating Family Violence of 2005 is enough to protect the victims of domestic violence. Another important correlation between populist governments' is to reply to their international obligations and accountability mechanisms by referring to national laws. However, looking deeply at those national laws referred to clearly demonstrates that in the descriptions of violence as well as the sanctions, national laws are clearly deficient when it comes to combatting violence against women. Poland's national law, for example, addresses domestic violence as harmful to the family and in so doing dilutes and eradicates its reality as a crime against women. Similar argumentation on the dissolution of family shall be considered in this manner. However, recognizing the vulnerable position of women as its major victims is a main view of the Istanbul Convention which protects women much more and tries to eliminate violence. As Sekowska-Kozlowska stated, this approach is visible even on a semantic level—in the state's report, the word "family" is used 775 times, almost seven times more than the word "women" (2020: 275).

Another point that should be revealed is that some important positive impacts and developments such as addressing emergency barring orders in Poland has

been instrumentally used by the government to question the Istanbul Convention. Emergency orders, proactive measures and precautionary warning measures are other comparison points. This is because the Turkish government has also targeted the measures by stating and justifying that these types of measures have led to the man/ perpetrator, "family man/pater familias" moving away and drifting apart from the home. However, in this scenario, this is not the home, rather it is a crime scene, just like it is not the family man, but rather the perpetrator.

While launching the new law, the Deputy Minister for Justice in Poland stated that the national legal protection to domestic violence victims is much more effective than the Istanbul Convention, before trying to render Convention as an unnecessary tool (Graff 2014: 431). Turkey's attempt to codify and sign the Ankara Convention instead of the Istanbul Convention shows parity between Poland's and Turkey's argumentations against international conventions.

Gendered dimension of violence recognized by the Istanbul Convention as "gender-based violence against women": means "violence that is directed against a woman because she is a woman or that affects women disproportionately." However, the Polish Government systematically denies gendered dimension of the violence, since there is no single reference to women in either law or state policies related to domestic violence (Sekowska-Kozlowska: 260) The state's rhetoric is, like that of the Turkish Government, that domestic violence is a harm to the family, ignoring women as a victim and men as a perpetrator. It can be considered as a gender blindness in relation to violence which is not gender-neutral in its essence.

The Government Plenipotentiary for Equal Treatment, a body which in the past promoted and coordinated Poland's accession to the Convention, left the Istanbul Convention to the mercy of the Government and does not engage in its implementation and promotion of gender equality. The Turkish government shows a similar tendency by changing the name of the ministry. Prime Minister Recep Tayyip Erdoğan[36] announced that the "Ministry for Women and Family" will be replaced by a "Ministry of Family and Social Policies."[37]

Another point in Poland related to the Istanbul Convention is the anti-abortion decision taken by the Polish Constitutional Tribunal in 2020. A near-total ban on abortion in Poland has taken effect and it means the Polish Government has replaced gender mainstreaming by family mainstreaming. According to the critics,

[36] In a that time, 2011.

[37] Turkey: Backward Step for Women's Rights.
https://www.hrw.org/news/2011/06/09/turkey-backward-step-womens-rights

the government's strategy is not only to push the Convention out of the Polish legal system, but also to replace it with new strategies based on so-called family values (Ciobanu 2021) such as use of "honour" as a cause of remission and an extra good time in the criminal proceedings. As these issues reveal, the Polish government's efforts are more directed towards diminishing the Istanbul Convention than in implementing it.

Violence against women does not exist within these populists' government's agenda, as they are more interested in LGBTİ+hate and setbacks from women rights under the mask of sovereignty and nationality. There are no systemic actions that have been taken in order to prevent violence against women, rather than those interested in creation and reproduction of the family.

An analogy based on conventions are much more needed in this respect. Therefore, culture, idiom, traditions, the family, fear from family dissolution, the third gender, anti-gender movements, abortion and LGBTİ+people are the common background for and conceptual comparison points in this regard. Therefore, the legal attempts and socio-cultural norms behind them have been articulated in this chapter. Prolong analysis between those two countries would be required, however under the limits of the Istanbul Convention's common grounds have its own parity within those conceptions such as woman, gender, discrimination, equality, violence.

6.1 Conclusion

Ergun Özbudun enumerates some reasons to define what populism is (Özbudun 2020:180–181). Factors that give rise to populism in Turkey are growing socio-economic inequality, the discrediting of the institution of representative democracy, changing international conjuncture and social media. Those times of the world is defined as "times of big regression" by Geiselberger (2017:10–15) asks that why is the right-wing populism rising almost simultaneously in many parts of world? There are some sociological and economic reasons behind there but state minding in policy shall be taken into account as well. Family mainstreaming has been playing a crucial role in various fields of state policy. Populist governments set up a coalition among countries which object to the Istanbul Convention, such as Poland, Turkey, Czechia, Slovakia, Slovenia, Croatia and Hungary. Reservations and declarations under the Istanbul Convention made by those countries show the relationship between populism and women rights at stake (Burek 2020: 288–290). However, there are some strong disconnections and ruptures within family mainstreaming since it is debated whether family unification and forming a family is a right in international law. The Istanbul Convention is not the first

international instrument to protect gender equality and the right to form a family has been debated and discussed in terms of gender-equality in other instruments that were mentioned at the beginning of this article. Therefore, withdrawal from the Istanbul Convention is not to be seen as a "win" for traditional understandings of family, while other instruments and jurisprudence on gender equality and new understandings of family have been enshrined and located into other national and international instruments in Turkey.

The countries mentioned in this article, under the high pressure of far-right populism, have tried to make political interventions that restrict the constitutional rights of women (such as right to abortion, LGBTI+rights) can be understood as forming a democratic backlash and big regression (Levitsky and Ziblatt 2018: 40; Geiselberger 2017: 9.). All the attempts are implied expression that crimes against vulnerable women are acceptable in some circumstances by populisms.

Even if these countries dispute the Convention, they all signed it even if some have not ratified it yet and one, Turkey, unconstitutionally withdrew from it. On 6 October 2021 the European Court of Justice gave its first decision on the Istanbul Convention and European Union membership. According to the Court, the Treaties do not prohibit the European Council from waiting, before adopting the decision concluding the Istanbul Convention on behalf of the European Union, for the 'common accord' of the Member States, but the "*Council cannot alter the procedure for concluding that convention by making that conclusion contingent*" on the prior establishment of such a 'common accord'.[38] The Istanbul Convention on preventing and combating violence against women and domestic violence comes within the competences of the European Union and, partly, within those of the Member States.

In Turkey, an emergency phone line administered by the Family and Social Policies Ministry for women when there is an emergency has been established for health emergencies during the pandemic. Therefore, in emergency times out of the pandemic, women are not able to reach this phoneline.[39] Another important point to be mentioned is related to the judiciary. In March 2020, judges are authorized not to give a "restraining order" to the perpetrators under the umbrella

[38] https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-10/cp210176en.pdf

[39] Becoming a Woman at the time of the Pandemic, Women for Women's Human Rights: New Ways, Kadının İnsan Haklarında Yeni Çözümler Derneği, Araştırma Raporu, 2020, p.11, https://kadinininsanhaklari.org/wp-content/uploads/2021/02/Salg%C4%B1nda-Kad%C4%B1n-Olmak-Uzun-Rapor-Final.pdf

of "protection" of public health even if for the situations that the Istanbul Convention required it to do so. Since there are travel restrictions, lockdowns and curfews, women are not able to run away from the crime scene to reach a women's shelter. And finally, extra legem and illegal, undue and unlawful withdrawal from the Istanbul Convention of which Turkey had a leading role in its creation. Not only Turkey, but Poland is also now planning to withdraw from the convention. However, the withdrawal decision is much more dangerous than public opinion. The steps taken by governments create unprotected women who are left to the mercy of men and the State's scruple, (the President of Turkey said "*we do not protect our women by laws, but with our scruple and conscience.*") However, women in Turkey make another point: "The Istanbul convention let you live." Given that GREVIO cannot make binding decisions, national law and political/diplomatic pressure on Poland and Turkey seems to be the only path forward.

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The Need for New Institutions—The Need for a New Institutionalism

Human Rights—Ethical Institutions/ Religious Bodies Between Foundation and Watering Down Legally Testified Rights

Letlhokwa George Mpedi and Theophilus Edwin Coleman

1 Introduction

Psalm 105:15 (King James Version) provides that "touch not mine anointed and do my prophets no harm." This oft-cited biblical quotation has for centuries served as the cornerstone for States and, to some extent private individuals to not persecute, rebuke or interfere in the activities of religious institutions and/or persons professing their faith. Arguably, the need to protect religious rights and freedoms crystallised after World War II. Since the aftermath of World War II, the protection of religious freedom has become an indispensable right codified in key international conventions.[1] The right and freedom to practice and profess one's

[1] See article 18 of the International Covenant on Civil and Political Rights (ICCPR), Adopted by the United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966; article 18 of the Universal Declaration on Human Rights (UDHR), Adopted by General Assembly Resolution 217 A(III) of 10 December 1948. See generally also, Daniel Wehrenfenning, 'The Human Rights of Religious Freedom in International law' (2006) 18(3) *A Journal of Social Justice* 403; Hans-Georg Ziebertz & Ernst Hirsch Ballin,

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religious faith has been adopted as part of the fundamental rights in the constitution of many countries.[2] Indeed, the right or freedom of religion is one of the cardinal pillars of democratic societies, especially liberal democracies.[3] In Africa, religious freedom and the liberty of religious institutions to implement activities that promote their religious beliefs constitute an important part of the socio-economic development of most African societies.[4]

The significance of religious institutions in modern societies cannot be underestimated. Some academics suggest that there is a relationship between the moral and ethical foundations of a society, on the one hand, and the practice of a

Freedom of Religion in the twenty-first Century: A Human Rights Perspective on the Relation Between Politics and Religion (2015 Leiden Brill); Heiner Bielefeldt, Nazila Ghanea & Michael Wiener, *Freedom of Religion or Belief: An International Law Commentary* (2016 Oxford Oxford University Press) and Javaid Rehman, 'Accommodating Religious Identities in an Islamic State: International Law, Freedom of Religion and the Rights of Religious Minorities' (2000) 7(2) *International Journal on Minority and Group Rights* 139.

[2] For instance, there are provisions in various constitutions in Africa that seeks to protect the right and freedom of religion. See for instance, Section 15 of the Constitution of the Republic of South Africa (1996), article 21(c) of the Constitution of the ZA of Ghana (1992), article 38 of the Constitution of Federal Republic of Nigeria (1999); article 32 of the Constitution of the Republic of Kenya (2010) and article 19 of the Constitution of the United Republic of Tanzania (1977).

[3] John Witte & Green M. Christian, 'Religious Freedom, Democracy, and International Huma Rights' (2009) 23(2) *Emory International Law Review* 583 at 583; Peter G. Danchin, 'The Emergence and Structure of Religious Freedom in International Law Reconsidered' (2007/2008) 23(2) *Journal of Law and Religion* 455 at 455; Michael J. Perry. 'Liberal Democracy and the Right to Religious Freedom' (2009) 71(4) *Review of Politics* 621 at 621–622; Natalia Vlas & Sergiu Gherghina, 'Where Does Religion Meet Democracy? A Comparative Analysis of Attitude in Europe' (2012) 33(3) *International Political Science Review* 336 at 337–339; Thomas Buegenthal, 'The Evolving International Human Rights System' (2006) 100(4) *The American Journal of International Law* 783 at 783 and Anthony Pierson Xavier Bothwell, 'International Standards for Protection of Religious Freedoms' (2019) 23(1) *Annual Survey of International and Comparative Law* 1 at 1.

[4] Obaji M Agbiji & Ignatius Swart, 'Religion and Social Transformation in Africa: A Critical and Appreciative Perspective' (2015) 114 *Scriptura* 1 at 1; Chidiebere C. Obi, 'Religion and Societal Development: A Philosophical Appraisal of African Situation' (2012) 13(2) *Unizik Journal of Arts and Humanities* 149 at 149 and Gerrie Ter Haar & Stephen Ellis, 'The Role of Religion in Development: Towards A New Relationship Between the European Union and Africa' (2006) 18(3) *The European Journal of Development Research* 351 at 352.

particular religion or faith on the other hand.[5] The basic legal texts in most countries somewhat operate to strike a balance between the freedom to practice one's faith and the need to respect and protect the fundamental human rights of other people. The practical manifestations of one's religious rights and the activities of religious institutions, bodies or organisations are circumscribed in the constitutional and legislative frameworks of states. The constitutional dispensation in many countries has thus made inroads into the activities of religious organisations and the liberty for an individual to profess his/her faith. Essentially, therefore, the activities of religious institutions and religious freedoms are not *carte blanche*. Religious institutions or organisations are required to act and operate in a manner that does not offend the fundamental human rights of others. Unfortunately, there have been many instances where the activities of religious institutions/organisations have somewhat breached and violated the constitutional rights of other people.

The purpose of this contribution is to reflect on the extent to which the operations and activities of religious bodies and other ethical institutions limit and/or water down constitutional rights and freedoms. This is with specific reference to the position in Africa. In achieving the above-mentioned purpose, this contribution discusses the meaning of religion and the constitutional framework that protects religious freedom in Africa. The contribution reflects on key issues where the activities of religious organisations have proved to limit the fundamental human rights of individuals. From a broader perspective, this contribution acknowledges the interconnectedness of language and cultural values with religious rights. It also reflects on the importance of constitutional and parastatal

[5] William A. Galston, 'Public Morality and Religion in the Liberal State' (1986) 19(4) *Autumn* 807 at 807–808; James A. Reichley, 'Democracy and Religion' (1986) 19(4) *Autumn* 801 at 801; Uwaezuoke Precious Obioha, 'Ethics, Religion and Humanity: Rethinking Religion in *twenty-first* Century Africa' (2009) 8(1/2) *Global Journal of Humanities* 27 at 27 and Emmanuel Kelechi Iwuagwu, 'The Relationship Between Religion and Morality: On Whether the Multiplicity of Religious Denominations have Impacted Positively on Socio-Ethical Behaviour' (2018) 6(9) *Global Journal of Arts, Humanities and Social Sciences* 42 at 43. For further discussion on the relationship between religion and morality, see Vincent McNamara, 'Religion and Morality' (1977) 44(2) *Irish Theological Quarterly* 105; William J. Wainwright, *Religion and Morality* (2016 London Routledge); PJ Nel, 'Morality and Religion in African Thought' (2008) 2008(2) *Acta Theologica* 34; Patterson Brown, 'Religious Morality' (1963) 72(286) *Mind* 235; David Steinberg, *The Multidisciplinary Nature of Morality and Applied Ethics* (2020 Springer Nature Switzerland) and Donald M. Broom, *The Evolution of Morality and Religion* (2003 Cambridge Cambridge University Press).

institutions that promote and protect linguistic, cultural, and religious rights. The contribution concludes with a call for a balance in the activities of religious institutions and the necessity to respect, protect and uphold the rights of other people.

This contribution is organised in six main sections. The first section reflects on the general meaning of religion and contextualises it from an African perspective. It further highlights the relationship between the meaning of religion and culture as understood under African traditional religion. The second section discusses the constitutional foundation of religious freedom and the liberty for religious institutions to promote their religious belief under some constitutions on the African continent. Due consideration is given to the protection of the right of self-determination (the right for religious communities to promote and protect their culture or religion without state interference or restriction) in Africa. The third section provides a highlight of the three main religious traditions and groupings in Africa namely, African traditional religion, Christianity, and Islam traditions. It also discusses the relationship between the state and the three religious' groups in Africa. The fourth section briefly discusses the significance of religious bodies and ethical institutions in the development of the African countries. The fifth section addresses the issue of religion and activities of religious institutions *vis-à-vis* the protection of fundamental human rights in Africa. The section provides examples of situations where activities of religious institutions or religious organisations limit the fundamental human rights of others. The sixth section concludes with a call for a balance of religious rights and activities of religious institutions, and the need to respect and protect the rights of others.

2 The Meaning Of Religion: Perspective From An African Context

There is no universal definition for the term religion. However, some academics have described the key features of religion. The meaning of religion as captured by Koenig and agreed by many scholars is that religion comprises belief, rituals and practices that relate to God, the mystical, or the supernatural.[6] Schuurman also describes religion to be an integral part of human life that concerns

[6] Harold G. Koenig, 'Research on Religion, Spirituality and Mental Health: A Review' (2009) 54(5) *Canadian Journal of Psychiatry* 283 at 284.

the deepest root of human existence.[7] Religion encapsulates the beliefs of humans and their opinion(s) about the existence, nature, and worship of a deity(ies). The term religion is derived from three Latin words namely, *ligare*, which means 'binds', *relegere*, which refers to 'unite or to link', and *religio*, which means relationship. The etymology of the term "religion" therefore indicates a relationship between two persons.[8] The foregoing deduction on the historical foundation of religion is corroborated by Omoregbe who argues that the history of the term religion denotes a "relationship, a link established between two persons, namely the human person and the divine person believed to exist. It is something that links or unites a man with a transcendent being, a deity, believed to exist and worshipped by man."[9] Omoregbe's position is further consolidated by the explanation proffered by Bouquet, who defines religion to mirror a "fixed relationship between a human self and some non-human entity, the sacred, the supernatural, the self-existent, the absolute, or simply, God."[10] Ellis and Ter Haar succinctly capture the meaning of religion as construed by most people, including Africans to refer to the "existence of an invincible world, distinct but not separate from the visible one, which is home to spiritual beings that are deemed to have effective power over the material world."[11] This definition creates a dichotomy in terms of the

[7] E Schuurman, 'Technology and Religion: Islam, Christianity and Materialism' (2011) 76(2) *Koers: Bulletin for Christian Scholarship* 373 at 373–374. See generally also, Thomas A. Idinopulos, 'What is Religion' (1998) 48(3) *CrossCurrents* 366; Ira W. Howerth, 'What is Religion' (1903) 13(2) *International Journal of Ethics* 185 and Arvind Sharma, *Problematizing Religious Freedom* (2011 Springer Science Business Media).

[8] Sarah F. Hoyt, 'The Etymology of Religion' (1912) 32(2) *Journal of American Oriental Society* 126 at 126–127. The etymology of religion is also referenced in Bernard Haring, *The Law of Christ: Moral Theory for Priests and Laity* (1964 New York: Newman Press); Bryan S. Turner, 'Religion' (2006) 23(2–3) *Theory, Culture and Society* 437 and Bruce Ellis Benson, 'Is There such a Thing as "Religion"? In Search of the Roots of Spirituality' (2020) 6(1) *Open Theology* 693 at 697–698.

[9] See Joseph I. Omoregbe, *A Philosophical Look at Religion* (1993 Lagos JOJA).

[10] AC Bouquet, *Comparative Religion* (1941 Middlesex Penguin Books) at 183. Also quoted in Christopher N. Ibenwa & Favour C. Uroko, 'Discourse Analysis of Religion and Inter-Communal Conflict and Its Causes in Nigeria' (2020) as per http://www.scielo.org.za/pdf/hts/v76n4/09.pdf (date accessed 01/09/2021) and Rotimi Williams Omotoye, 'The Historical, Political and Phenomenological Importance of Ori-Oke (Hills and Mountains) in South-Western Nigeria' in Soede Nathaniel Yaovi, Patrick U. Nwosu, Atiki G. Alamu, Lemuel E. Odeh & AY Mohammed (eds), *Ori-Oke, Spirituality and Social Change in Africa: Contemporary Perspectives* (2018 Langaa RPCIG, Cameroon) at 13.

[11] Gerrie Ter Haar & Stephen Ellis, *op cit* note 5 at 353–354.

existence of a spiritual world and a physical world. From a human rights point of view, religion is construed to include "theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief."[12]

According to Mbiti, religion in an African context is difficult to define.[13] However, Mbiti explains that, for Africans, the idea of religion is an ontological phenomenon that pertains to the question of the existence of a being.[14] Religion from an African perspective is deeply anchored in cultural tradition. From an African point of view, therefore, the meaning of religion (African traditional religion) has a direct connection or relationship with traditional culture.[15] Idang, quoting Aziza on the meaning of culture averred that the term culture refers to "the totality of the pattern of behaviour of a particular group of people. It includes everything that makes them distinct from any other group of people for instance, the greeting habit, dressing, social norms and taboos, food, songs and dance patterns, rites of passage from birth, through marriage to death, traditional occupations, religious as well as philosophical beliefs."[16] It is noteworthy that African society is

[12] Daniel Wehrenfennig, 'The Human Rights of Religious Freedom in International Law' (2006) 18(3) *Peace Review* 403 at 403 and Tarunabh Khaitan & Jane Calderwood Norton, 'Religion in Human Rights Law: A Normative Restatement' (2020) 18(1) *International Journal of Constitutional Law* 111 at 115.

[13] John S Mbiti, *African Religions and Philosoph*y (1999 2nd ed Oxford Heinemann) at 15.

[14] John S Mbiti, *ibid* at 15.

[15] Johan D van der Vyver & Christian M. Green, 'Law, Religion and Human Rights in Africa: Introduction' (2008) 8 *African Human Rights Law Journal* 337 at 338. See generally also, Omatseye BOJ & Emeriewen Kinsley Osevwiyo, 'An Appraisal of Religious Art and Symbolic Beliefs in the Traditional African Context' (2010) 4(2) *African Research Review* 529 at 530; Rotimi William Omotoye, 'The Study of African Traditional Religion and Its Challenges in Contemporary Times' (2011) 1(2) *Ilorin Journal of Religious Studies* 21; Elizabeth Bakibinga-Gaswaga, 'African Traditional Religion and Law -Intersections between the Islamic and Non-Islamic Worlds and the Impact on development in the 2030 Agenda Era' (2020) 14(1) *Law and Development Review* 1; Henri Mbaya & Ntozakhe Cezula, 'Contribution of John S. Mbiti to the Study of African religions and African Theology and Philosophy' (2019) 5(3) *Stellenbosch Theological Journal* 42; Chukwuma O. Okeke, Christopher N. Ibenwa & Gloria Tochukwu Okeke, 'Conflict Between African Traditional Religion and Christianity in Eastern Nigeria: The Igbo Example' (2017) 7(2) *Sage Open* 1; Mariam Rawan Abdulla, 'Culture, Religion and Freedom of Religion or Belief' (2018) 16(4) *Review of Faith and International Affairs* 102 and Enyinna Nwauche, *The Protection of Traditional Expressions in Africa* (2017 Springer International Publishing AG) at 25.

[16] Gabriel E. Idang, 'African Culture and Values' (2015) 16(2) *Phrominon* 97 at 99.

culturally pluralistic—accordingly, culture tends to differ from one ethnic group or society to another. As such, there is no approach to describe or characterise African traditional culture per se. That notwithstanding, some academics have hinted that there are some common denominators among African cultures or traditions. Mpedi on describing the common denominators of African traditional religion intimated that African traditional religion of the African people has:

> "A strong cultural base, the various groups have different rituals, but there are certain common features. A supreme being is generally recognised, but ancestors are of far greater importance, being the deceased elders of the group. They are regarded as part of the community, indispensable links with the spirit world and the powers that they control in everyday affairs. These ancestors are not gods, but because they play a key part in bringing about either good or ill-fortune, maintaining good relations is vital and they have to be appeased regularly by a variety of spiritual offering."[17]

The above description by Mpedi brings to bare some important characteristics of African traditional religion and they are, ancestor worship, rituals, and the recognition of supreme being. In terms of rituals, in Ghana among the Akans, there are situations where a cow or an animal is sacrificed to appease the gods against any misfortunes or for blessings. Suffice it to say, there are other aspects of African traditional religion, though, with a metaphysical component, that remains accepted in some African societies. For instance, in some African societies, witchcraft is widely entertained (some African countries have promulgated legislation to prohibit witchcraft as such practice is condemned mainly on the grounds of superstition).[18] In addition to these common denominators, there are key values that underlie the moral and social fabric of African society. For instance, in Southern Africa, there is a dominant communitarian ethic and value of *ubuntu*, broadly explained to mean that "an individual's humanity is expressed in his relationship with others and theirs in turn through the recognition of his humanity."[19]

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[17] Letlhokwa George Mpedi, 'The Role of Religious Values in Extending Social Protection: A South African Perspective' (2008) (1) *Acta Theologica* 105 at 106.

[18] Johan D van der Vyver & Christian M. Green, *op cit* note 16 at 340.

[19] Letlhokwa George Mpedi, op cit note 18 at 108 and Theophilus Edwin Coleman, 'Reflecting on the Role and Impact of the Constitutional Value of Ubuntu on the Concept of Contractual Freedom and Autonomy in South Africa' (2021) 24 *Potchefstroom Electronic Law Journal (PER/PELJ)* 1 at 8–16. The biblical foundation of expressing one's humanity through his relationship with others may be found in Galatians 5:13–14 (New International Version), which provides that, "You, my brothers and sisters, were called to be free. But do not use your freedom to indulge in the flesh; rather, serve one another humbly in love. For the entire law is fulfilled in keeping this command: 'love your neighbour as yourself.".

In South Africa, this communitarian value is expressed in many key legal documents, including some decisions of the South African Constitutional Court.[20]

Generally, the nexus between African traditional religion and culture continues to remain a point of academic discussion. While some academics in Africa have, on the one hand, suggested that culture and religion are inextricably intertwined and therefore impossible to distinguish between the two concepts. Suffice it to say, there are some commentators and judicial pronouncements in some African countries that, on the other hand, hold the view that culture and religion are distinguishable (even though they overlap at some point). Culture is understood to have a broader connotation as a person cannot live without culture but can live without religion.[21] Perhaps the distinction proffered by the South African Constitutional Court in *MEC for Education: Kwazulu-Natal & Others v Pillay & Others*[22] sheds light on the distinction between culture and religion and the circumstances where they can overlap. In that case, Langa CJ (as he then was) intimated:

> "Without attempting to provide any form of definition, religion is ordinarily concerned with personal faith and belief, while culture generally relates to traditions and belief developed by a community. However, there will often be a great deal of overlap between the two; religious practices are frequently informed not only by faith but also by custom, while cultural beliefs do not develop in a vacuum and may be based on the community's underlying religious or spiritual belief. Therefore, while it is possible for a belief or practice to be purely religious or purely cultural, it is equally possible for it to be both religious and cultural…Cultural convictions or practices may be as strongly held and as important to those who hold them as religious are to those more inclined to fine meaning in a higher power than in a community of people."[23]

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[20] Letlhokwa George Mpedi, *op cit* note 18 at 108 and Theophilus Edwin Coleman, *op cit* note 20 at 8–16.

[21] Johan D van der Vyver & Christian M. Green, *op cit* note 16 at 338–339.

[22] 2008 (1) SA 474 (CC).

[23] *MEC For Education: Kwazulu-Natal & Others v Pillay & Others* 2008 (1) SA 474 (CC) para 47–53. For further discussion on the relationship between culture and religion see generally, IT Benson, 'Can Law Avoid Creating Culture in it Own Image?: The Context for Diversity, Religion and Culture in MEC for Education & Others v Navaneethum Pillay: Reflecting a Decade Later' (2017) 42(2) *Journal of Juridical Science* 120; L Du Plessis, 'Religious Freedom and Equality as Celebration of Difference: A Significant Development in Recent South African Case Law' (2009) 12(4) *Potchefstroom Electronic Law Journal (PELJ/PER)* 10; Mtendeweka Mhango, 'Recognising Religion' (2012) 25(2) *Journal For the Study of Religion* 23 and Lourens Du Plessis, 'Affirmation and Celebration of the

In sum, religion denotes a relationship a person has with another being, a transcendent being. A similar understanding of religion exists under African traditional religion. However, the addition is that culture serves as the base of African traditional religion. Culture and religion overlap in several instances, but there are circumstances where culture is distinguishable from religion. Individuals, as stated, have the liberty to profess their faith and belief, whether such belief is anchored in traditional African culture or religion or not. In Africa, the liberty for individuals to profess their faith, religion or culture is deeply rooted in the constitutional and statutory imperatives.

3 Constitutional Foundation for Religious Freedom and Activities of Religious Bodies in Africa and Self-Determination

The freedom for an individual to freely profess their religious beliefs, as has been stated is an important human right in the constitutions of most countries, and African countries are not an exception. It is noteworthy that, the constitutional guarantee of the right to religious freedom in many African countries flow from an international obligation under key instruments such as the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981.[24] From the East, West, Central and Southern Africa, religious freedom is touted as one of the important fundamental rights. For instance, the Constitution of the Republic of Ghana of 1992 (hereinafter '1992 Constitution') provides

'Religious Other' in South Africa's Constitutional Jurisprudence on Religious and Related Rights: Memorial Constitutionalism in Action' (2008) 8 *African Human Rights Law Journal* 376.

[24] For further discussion on the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, see Nazila Ghanea, 'The 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief: Some Observations' in Nazila Ghanea (ed), *The Challenge of Religious Discrimination at the Daw of the New Millennium* (2004 Springer The Netherlands) at 9–31 and Donna J Sullivan, 'Advancing The Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination' (1988) 82(3) *The American Journal of International Law* 487.

in article 21(c) that all persons shall have the "freedom to practice any religion and manifest such practice."[25] The right for a person to profess his/her faith is re-emphasised in article 26 of the 1992 Constitution, which provides that a person is "entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion."

Similarly, under the Constitution of the Republic of South Africa of 1996 (hereafter the 'South African Constitution') provision is made for freedom of religion, belief, and opinion. Section 15(1) of the South African Constitution confers the right on everyone regarding the freedom of conscience, religion, thought, belief and opinion.[26] The state or state-aided institutions may conduct religious observances provided the observance follows the prescribed rules made by appropriate public authorities, conducted on an equitable basis, and the attendance of such religious observance is free and voluntary.[27] The 1996 Constitution of South Africa does not prohibit Parliament from enacting any legislation that recognises marriages conducted under any tradition, or a system of religious, personal or family law,[28] or a system of personal and family law under any tradition, or

[25] Article 21(c) of the *Constitution of the Republic of Ghana* (1992). See the following cases on the constitutional right to religious freedom in Ghana: *James Kwabena Bomfeh Jnr v Attorney-General* Write No J1/14/2017 (unreported); *Ernest Adofo & Another v. The Attorney-General and Another* [2003–2005] 1 GLR 239; *Owusu & Others v Amoa-Obeng* [1992] 2 GLR 293 and *Tyron Ras Marghuy (Suing by Next Friend and Father Kwame Marghuy) v Board of Governors, Achimota Senior High School & the Attorney General* Suit No. HR/0055/2021 (unreported).

[26] Section 15(1) *The Constitution of the Republic of South Africa* (1996). For further discussion on the nuances of religious freedom in South Africa, see generally Radley Henrico, 'Proselytising the Regulation of Religious Bodies in South Africa: Supressing Religious Freedom?' (2019) 22 *Potchefstroom Electronic Law Journal (PELJ/PER)* 1; Nico Vorster, 'Religious Freedom and State Neutrality. The South African Experiment in Religious Rights' (2010) 19 *Freedom of Religion* 67; Georgia Alida du Plessis, 'Apartheid, Religious Pluralism and the Evolution to Religious Freedom in South Africa' (2016) 40(2) *Journal of Religious History* 237; P Pratap Kumar, 'Religious Pluralism and Religious Education in South Africa' (2006) 18(3) *Method & Theory in the Study of Religion* 273; Rosalind IJ Hackett, 'Regulating Religious Freedom in Africa' (2011) 25(2) *Emory International Law Review* 853 and Pieter Coertzen, *Grappling with Religious Differences in South Africa: A Draft for A Charter of Religious Rights* (2013 London Routledge).

[27] Section 15(2), *The Constitution of the Republic of South Africa* (1996).

[28] Section 15(3)(a)(i), *The Constitution of the Republic of South Africa* (1996).

adhered to by persons professing a particular religion.[29] Any of such legislation is required to be consistent with the provisions of the South African Constitution.[30] The practical manifestation of religious freedom is re-emphasised in section 31 of the South African Constitution, which deals with the right of cultural religious and linguistic communities. Section 31 provides that persons belonging to a cultural, religious, or linguistic community may not be denied the right, with members of that community to enjoy their culture, practice their religion and use their language, and form, join and maintain cultural, religious, and linguistic associations and other organs of civil society.[31] However, the exercise of such a right may not be inconsistent with the constitutional provisions, particularly, the Bill of Rights.[32]

In Kenya, the foundation for respect for religious freedom is provided in article 32 of the Constitution of the Republic of Kenya of 2010 (hereafter '2010 Constitution of Kenya'). Article 32 of the 2010 Constitution of Kenya provides, among other things, that a person has the right, either individually or in community with others, in public or private, to manifest any religion or belief through worship, practice or observance, including observance of the day of worship. Under the 2010 Constitution of Kenya, a person cannot be compelled to act or engage in any act that is contrary to that person's belief or religion.[33] A person, per the provisions of the 2010 Constitution of Kenya shall not be denied access to any institution, employment facility, or the enjoyment of any rights because of the religion or belief of that person.[34] The respect for religious freedom is re-echoed in article 45 of the 2010 Constitution of Kenya, which confers power on the Parliament to enact any legislation that recognises any system of personal and

[29] Section 15(3)(a)(ii), *The Constitution of the Republic of South Africa* (1996).

[30] Section 15(3)(b), *The Constitution of the Republic of South Africa* (1996).

[31] Section 31(1), *The Constitution of the Republic of South Africa* (1996).

[32] Section 31(2), *The Constitution of the Republic of South Africa* (1996).

[33] Article 32(4), *The Constitution of the Republic of Kenya* (2010). See the following cases on religious freedom under the 2010 Constitution of Kenya: *ABH v Board of management [Particulars Withheld] Girls' High School & 3 Other Interested Party National Cohesion & Integration Commission* [2016] eKLR; *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 Others* [2014] eKLR; *JWM (Alias P) v Board of Management O High School & 2 Others* [2019] eKLR; *Nyakamba Gekara v Attorney General & 2 Others* [2013] eKLR and *Mohamed Fugicha v Methodist Church in Kenya (Suing Through Registered Trustees) & 3 Others* [2016] eKLR.

[34] Article 32(3), *The Constitution of the Republic of Kenya* (2010).

family law under any tradition or adhered to by persons professing a particular religion.[35]

Similar provisions are found in the Constitution of the Federal Republic of Nigeria of 1999 (hereafter the 1999 Constitution of Nigeria) confers on every person the freedom of thought, religion, conscience, including the freedom of a person to change his religion, and freedom either alone or in community with others to manifest and propagate the religion or belief, worship, teaching, practice and observance.[36] A person is however not entitled by the 1999 Constitution of Nigeria to form or take part in the activity or to be a member of a secret society.[37] Under the 1999 Constitution of the Federal Republic of Nigeria, a religious community or denomination is not prevented from providing religious instruction for members of that community or denomination in any place of education maintained wholly by that community or denomination.[38]

Religious freedom is also protected in the Constitution of the United Republic of Tanzania of 1977 (hereafter '1977 Constitution of Tanzania'). The 1977 Constitution of Tanzania provides that every person has the right to the freedom of conscience, faith, and choice in matters of religion.[39] The exercise of religious freedom under the 1977 Constitution of Tanzania includes the liberty and autonomy for a person to change his/her religion.[40] The 1977 Constitution of Tanzania also provides that the protection of religious freedom must be under the

[35] Article 45(4)(a) and (b), *The Constitution of the Republic of Kenya* (2010).

[36] Article 38(1), *The Constitution of the Federal Republic of Nigeria* (1999).

[37] Article 38(4), *The Constitution of the Federal Republic of Nigeria* (1999).

[38] Article 38(3), *The Constitution of the Federal Republic of Nigeria* (1999).

[39] Article 19(1), *The Constitution of the United Republic of Tanzania* (1977). For further discussion on the nature of religious freedom in Tanzania, see generally David Westerlund, 'Freedom of Religion under Socialist Rule in Tanzania' (1982) 24(1) *Journal of Church and State* 87; Peter G. Forster, 'Religion and the State in Tanzania and Malawi' (1997) 32(304) *Journal of Asian and African Studies* 164 and Freddy Safieli Manongi, *Religious Phenomenology, Socio-Demography and Ecology in the Rural Mt Kilimanjaro, Tanzania* (2012 Unpublished PhD Thesis, Bangor University. Also see the following cases: *Zakaria Kamwela & Others v The Minister of Education & Vocational Training & Another* Civil Appeal No. 3 of 2012 [2013] TZCA 167; *Rev Petter Makalla & Others v Rev Jacob Mameo Ole Paulo & Others* Civil Case No 195 of 2019 [2020] TZHC 2526 and *Fayaz Shamji v The Registered trustees of Khoja Shia Ithnasheri Jamaat Mwanza & 5 Others* Civil Case No 05 of 2019 [2021\ TZHC 3847.

[40] Article 19(1), *The Constitution of the United Republic of Tanzania* (1977).

provisions prescribed by law, which are of importance to a democratic society for security.[41]

Generally, ethnic groups, religious institutions and linguistic communities in Africa have the right to self-determination. This right is constitutionally and statutorily protected in many African countries. The right to self-determination refers to the liberty a person has to promote one's culture, or practice one's religion and speak one's language without interference (undue interference) by the state, and as highlighted above various constitutions in Africa afford ethnic groups, religious organisations, among others the right to promote, maintain, support their culture, religion or belief.[42] The right to self-determination is very important to religious freedom, especially in countries or continents where culture is pluralistic, such as Africa. Even though the right to self-determination is vital to the practice of religious freedom and cultural liberty, there are several countries on the African continent whose constitution does not explicitly refer to the right. For example, the Constitution of Botswana of 1996 (hereinafter '1996 Constitution of Botswana') does not explicitly provide for the right to self-determination by religious institutions, cultures, and linguistic communities.

Nevertheless, there have been instances where the question of self-determination has been presented to courts in Botswana. For instance, the High Court of Botswana in *Kamanakao I & Others v Attorney-General & Another*[43] was approached to deal with the issue of cultural self-determination. In that case, an action was brought on behalf of the Wayeyi tribe. The Wayeyi tribe promotes the Sheyi culture and language. The action was about the fact that certain constitutional provisions precluded the Wayeyi tribe from representation at the House of Chiefs. The High Court of Botswana decided that they did not have the power to amend the provisions of the constitution and accordingly decided against the

[41] Article 19(2), *The Constitution of the United Republic of Tanzania* (1977).

[42] See generally JD van der Vyver, 'The Right to Self-Determination of Cultural, Religious and Linguistic Communities in South Africa' (2011) 14(4) *Potchefstroom Electronic Law Journal (PELJ/PER)* 2 at 7–9 and S. Kwaw Nyamekye Blay, 'Changing African Perspectives on the Right of Self-Determination in the Wake of the Banjul Charter on Human and Peoples' Rights' (1985) 29(2) *African Law Journal* 147 at 150; Henrik Angerbrandt, 'Religion, Ethnicity, and Citizenship: Demand for Territorial Self-Determination in Southern Kaduna, Nigeria' (2015) 33(2) *Journal of Contemporary African Studies* 232 and Mtendeweka Mhango, Governance, Peace and Human Rights Violation in Africa: Addressing the Application of the Right to Self-Determination in Post-Independence Africa' (2012) 5 *African Journal of Legal Studies* 199.

[43] [2001] 2 BLR 654.

action.[44] Indeed, there are other countries in Africa whose constitution explicitly refers to the right of self-determination. For instance, in South Africa, Ghana and Kenya, the right to self-determination is explicitly provided in their respective constitutions as a fundamental entitlement of every person.

As stated already, the right to profess one's faith must be within the confines of constitutional order. The liberty for a person to profess, promote or propagate his/her religion must not be inconsistent with constitutional provisions. Accordingly, there are many African countries where certain practices, rituals or religious beliefs have been outlawed or held to be inconsistent with constitutional provisions. For instance, hitherto, many African communities relied on the grounds of religious freedom/cultural liberty to subject women through Female Genital Mutilation (FGM). Even though FGM was perceived to have some cultural and religious connotation, most African countries through their constitutions and by their respect for the dignity of individuals have outlawed such practice. The Trokosi system in Ghana is another cultural practice that has been outlawed under Ghana's current constitutional dispensation. Under the Trokosi system, young virgins were sent to the shrine of the gods to serve as slaves to appease the gods for wrongs committed by a family member of that young virgin.[45] Even though the Trokosi system had a religious and cultural underpinning, it has been outlawed by the current constitutional and legislative regime in Ghana. It is noteworthy that, the constitutional guarantee of the right to freedom in most African countries includes the freedom to manifest, promote, profess, and maintain one's religion or belief. The manifestation of such religious rights may be through the establishment of a religious body, institution, or organisation/society) to organise,

[44] *Kamanakao I & Others v Attorney-General & Another* [2001] 2 BLR 654. See a contrary decision in *Sesana & Others v Attorney-General* [2006] 2 BLR 633 where the High Court of Botswana upheld the principle of self-determination. See also the Nigerian case of *Safiyatu v Attorney-General of Sokoto State* (2003) NNLR 439–464. See generally, Abdulmumini A. Oba, 'Judicial Practice in Islamic Family Law and its Relation to 'Urf Custom' in Northern Nigeria' (2013) 20(3) *Islamic Law and Society* 272 and Enyinna Nwauche, 'Law, Religion and Human Rights in Nigeria' (2008) 8 *African Human Rights Law Journal* 568.

[45] Alice Boateng & Cynthia A. Sottie, 'Harmful Cultural Practices Against Women and Girls in Ghana: Implications for Human Rights and Social Work' in Vishanthie Sewpaul, Linda Kreitzer & Tanusha Raniga (eds) *The Tensions Between Culture and Human Rights: Emancipatory Social Work and Afrocentricity in a Global World* (2021) at 105–121 and Sandra E. Greene, 'Modern 'Trokosi' and the Abolition in Ghana: Connecting Past and Present' (2009) 66(4) *The William & Mary Quarterly* 959 at 959.

propagate, promote, and maintain the belief or religion of individuals. Again, the religious freedom accorded to individuals in constitutions of most African countries also applies to religious institutions or bodies.

4 Religious Traditions and Groups in Africa

The most practiced religion in Africa can be categorised into three main traditions namely, African traditional religion, Christianity, and Islam.[46] Each religion or religious tradition has different historical development. African traditional religion can be traced since the beginning or emergence of the African people, Christianity may be traced to the first century or beyond and the Islamic religion, around the seventh century.[47] Notwithstanding the three main categorisations, there are instances where other religious traditions are noticeable. For instance, in South Africa and Ethiopia, there exist a Jewish community. In African countries where there is a populous or significant Indian Community, Hinduism and Buddhism are noticeable. The Christian religion in Africa includes Roman Catholicism and protestant religions. Roman Catholicism is very dominant in most African countries, especially the Democratic Republic of Congo. Other Christian churches include the Methodist Church and the Anglican Church. Within the protestant religion, there are various Christian groupings including the African Independent Churches (AICs).[48] The AICs were spread mainly in the western, eastern,

[46] Ibigbolade S. Aderibigbe, 'Religious Traditions in Africa: An Overview of Origins, Basic Beliefs, and Practices' in Ibigbolade S. Aderibigbe & Carolyn M Jones Medine (eds), *Contemporary Perspectives on Religions in Africa and the African Diaspora* (2015 Palgrave MacMillan New York) at 7–28; John Sodiq Sanni, 'Religion: A New Struggle for African Identity' (2016) 17(2) *Phrominon* 1 at 1–2; John Pobee, 'Aspect of African Traditional Religion' (1976) 37(1) *Sociological Analysis* 1 at 1–2; Johan D van der Vyver & Christian M. Green, *op cit* note 16 at 338–339; Letlhokwa George Mpedi, *op cit* note 18 at 106.

[47] Ibigbolade S. Aderibigbe, *ibid* at 7.

[48] Letlhokwa George Mpedi, *op cit* note 18 at 107. For discussion on the historical origins of AICs, see GC Oosthuizen, 'African Independent Churches in South Africa: A History of Persecution' (2000) 14(2) *Emory International Law Review* 1089; Jose Antunes da Silva, 'African Independent Churches: Origin and Development' (1993) 88 *Anthropos* 393; CM Pauw, 'African Independent Churches as a 'People's Response' to the Christian Message' (1995) 8(1) *Journal for the Study of Religion* 3; Victor EW Hayward, 'African Independent Church Movements' (1963) 15(2) *The Ecumenical Review* 192; Edmund Ilogu, 'Independent African Churches in Nigeria' (1974) 63(252) *International Review of Missions* 492; Birgit Meyer, 'Christianity in Africa: From African Independent to Pentecostal-Charismatic Churches' (2004) 33 *Annual Review of Anthropology* 447; Kakwata Frederick, 'The Pro-

and southern parts of Africa. In west Africa, the West African Aladura Movement, the Celestial Church of Christ and the Cherubim and Seraphim Societies. In Eastern Africa, the spread of the Roho or Akurinu Churches and in southern Africa, the Apostolic and Zionist churches. The AICs constitute the largest church grouping. One of the key reasons for the formation of AICs was the pursuance of self-determination.[49] The underlying motivation for the formations AICs is rightly described by Mpedi in the following manner:

> "The AICs constitute the largest groupings of Christian churches. Their existence is attributed to various non-exhaustive factors. First Africans have cultural beliefs (e.g. beliefs in divinities, spirit and ancestors) and customs (e.g. polygamy), practised in African traditional religion, which were to a large extent perceived as unchristian or unbiblical by the western churches and missionaries. The desire to incorporate local beliefs and customs into the church motivated the establishment of AICs. It could be argued that AICs endeavour to combine African traditional values and Christian principles. Secondly, mainstream churches neglected the physical and spiritual needs of their members. The AICs are geared towards fulfilling African aspirations and meeting African needs."[50]

In most African countries, churches have been an agent for socio-economic development. One of the sectors of the African system that churches have heavily invested in is the establishment of schools and universities. Especially through the establishment of mission schools. For instance, in Ghana, the base of second cycle institutions and some tertiary institutions were established by Churches, such as the Methodist Church, Anglican Church, Catholic Church, among others.[51] There is also a rise of schools founded under the values of some of the

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gressive Pentecostal Conception of Development Within an African Context of Poverty' (2017) 3(1) *Stellenbosch Theological Journal* 159.

[49] Alan Gregor Cobley, 'The 'African National Church': Self-Determination and Political Struggles among Black Christians in South Africa to 1948' 1991) 60(3) *Church History* 356 at 356; Obed Kealotswe, 'The Nature and Character of African Independent Churches (AICs) in the twenty-first Century: Their Theological and Social Agenda' (2014) 40(2) *Studia Historiae Ecclesiasticae* 227 at 227–228.

[50] Letlhokwa George Mpedi, *op cit* note 18 at 107.

[51] John Kwaku Opoku, Eric Manu & Frimpong Wiafe, 'Religion, Education and Development in Ghana: A Historical Perspective' (2015) 3(12) *Global Journal of Arts, Humanities and Social Sciences* 6 at 13–15; Jill Olivier & Quentin Wodon, 'Faith-Inspired Education in Ghana: A Historical Case Example' (2014) 12(2) *The Review of Faith & International Affairs* 27 at 27; Ebenezer Yaw Blasu, 'Christian Missionaries and Education: Presbyterian

charismatic churches. To date, the influence of churches in the socio-economic development of schools is very immense.

In terms of African traditional religion, the characteristics of such a religion involves the recognition of a supreme being, belief in divinities, worship of ancestors, and belief in magic and medicine (rituals). In terms of recognition of the supreme being, in the Akan ethnic group, for instance, there is the belief in *Odomankoma*, the creator of the universe, and *Nyankopon*, the supreme being. The role of *Nyankopon* and *Odomankoma* in conferring grace and blessing the Akan people is variously presented in symbols and artistic or emblematic imagery, the *Adinkra*. The assistant to the supreme being, according to Aderibigbe is the divinities who are regarded as 'ministers' in the 'theocratic government' in African traditional religion.[52]

Further, there is the consciousness of the existence of spirits in African traditional religion. Spirits are usually considered to make natural phenomena their abodes. After spirits, there is a belief in ancestors, which in African traditional religion gives meaning to the immortality of humans, alternatively life after death.[53] Underlying African traditional religion is the belief that African society comprises both the living and the dead. Most importantly, in African traditional religion, there is belief in magic and medicine.[54] Even though the perception of the use of magic is attributed to evil and harmful things, generally, magic and medicine are used to offer protection to individuals.[55] It is noteworthy that, in most African societies, the depiction of the relationship among the supreme

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Educational Chaplaincy as a Holistic Mission Strategy for Transformational Development' (2021) 5(5) *International Journal of Research and Innovation in Applied Science* 167 at 168–169; Ransford Pinto, 'The Effect of Western Formal Education on the Ghanaian Educational System and Cultural Identity' (2019) 88(1) *The Journal of Negro Education* 5 at 5–10; Peter White, Religion, Mission and National Development: A Contextual Interpretation of Jeremiah 29:4–7 in Light of the Activities of Basel Mission Society in Ghana (1828–1918) and Its missiological Implications (2015) 36(1) *Verbum et Ecclesia* 1 at 5 and Edward H. Berman, 'African Responses to Christian Mission Education' (1974) 17(3) *African Studies Review* 527 at 528.

[52] Ibigbolade S. Aderibigbe, *op cit* note 47 at 10.

[53] Choon Sup Bae & PJ van der Merwe, Ancestor Worship—Is it Biblical?' (2008) 64(3) *HTS Theological Studies* 1299 at 1302; John Pobee, *op cit* note 47 at 1–5 and Letlhokwa George Mpedi, *op cit* note 18 at 107.

[54] Ibigbolade S. Aderibigbe, *op* cit note 47 at 10.

[55] Ibigbolade S. Aderibigbe, *op* cit note 47 at 10.

being, divinities, spirits, ancestors and magic and medicine is represented in art and images—folklore.[56] An important issue that is worth pointing out is the bastardisation and attack on the African traditional religion by the Christian religion. This attack and bastardisation flow from the burgeoning Pentecostal and Charismatic churches across Africa.[57]

Another religious tradition in Africa is the Islamic religion. The Islamic religion is one of the fastest-growing religious groups or traditions on the African continent. Islam religion holds a monotheistic view of a belief in a single indivisible God, known as Allah. The fast spread of the Islamic religion in Africa sometimes triggers inter-religious tension. This tension arises mainly because of the perception that most terrorist activities on the African continent have some Islamic undertone.[58] There have however been calls that the Islamic religion should not be equated with violence or terrorism as the very teachings of the religion promote peace and submission.[59] In most African countries, there is the co-existence of the three main religious traditions. For instance, in Ghana, the Muslim community showed its support towards the building of the National Cathedral (a Christian monument) through the donation of Fifty Thousand Ghana Cedis (GHS 50,000). It is important to note that, the three dominant religious groups or traditions have mostly coexisted in peace and respect in many African countries. Notwithstanding the peaceful co-existence of the three main religions in Africa, there have been many instances where in the pursuance of religious objectives of a particular state, there is a restriction if not neglect of other religions.

It is noteworthy that, many constitutions in Africa forbid governments to adopt a particular religion as a state religion. For instance, the 1999 Constitution of the Federal Republic of Nigeria explicitly provides that the Federal or State

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[56] Omatseye BOJ & Emeriewen Kinsley Osevwiyo, op cit note 15 at 530; Bridget OJ Omatseye & Kingsley O. Emeriewen, 'An Appraisal of the Aesthetic Dimension to the African Philosophy of Cloth' (2012) 3(2) *Journal of Language, Technology and Entrepreneurship* 57 57–60; SA Shokpeka, 'Myth in the Context of African Traditional Histories: Can it be Called "Applied History"' (2005) 32 *History in Africa* 485 at 485. See generally also, Amanda M Rudolph, 'Images of African Traditional Religions and Christianity in "Joe Turner's Come and Gone" and "The Piano Lesson"' (2003) 33(5) *Journal of Black Studies* 562 and MY Mbofa, 'Blood Symbolism in African Religion' (1985) 21(3) *Religious Studies* 389 at 389.

[57] Johan D van der Vyver & Christian M. Green, *op cit* note 16 at 348.

[58] Johan D van der Vyver & Christian M. Green, *op cit* note 16 at 348.

[59] Johan D van der Vyver & Christian M. Green, *op cit* note 16 at 343.

Government shall not adopt any religion as a state religion.[60] Similarly, the 2010 Constitution of Kenya prohibits the creation of state religion.[61] Some academics have suggested that the explicit reference in constitutions in Africa prohibiting the declaration of religious states may be constitutional rhetoric. The criticism is anchored in the fact some activities/policies of the State and government institutions indirectly favour a particular religion.[62] This can also be seen in the observance of certain statutory holidays that designate, for instance, Christmas and Ascension days as public holidays. Suffice it to say, some African countries declared a religious state. For instance, the Preamble of the 1991 Constitution of Zambia was amended to proclaim the people of Zambia as a "Christian nation".[63] It must be stated that some countries however strive to achieve a balance by affording Muslims public holidays as well. In general, even though a country may be a secular state or religiously neutral in terms of the state adopting a particular religion, there is always a preference or inclination by that state.

5 The Role and Significance of Religious Bodies in Africa

Religious institutions or bodies have played a vital role in the socio-economic development of Africa. Generally, the significance of religious organisations or institutions is seen in many aspects namely, socio-cultural, economic, religious, education as well as protection of the moral fabric of society, among others. Historically, religious bodies have played an enormous role in the political emancipation and independence of most African countries. For instance, religious groups contributed to the liberation struggle against apartheid.[64] Indeed, some academ-

[60] Article 10, *The Constitution of the Federal Republic of Nigeria* (1999).

[61] Article 8, *The Constitution of the Republic of Kenya* (2010).

[62] Johan D van der Vyver & Christian M. Green, *op cit* note 16 at 344.

[63] Johan D van der Vyver & Christian M. Green, *op cit* note 16 at 344.

[64] Obaji M Agbiji & Ignatius Swart, *op cit* note 5 at 12; Tobias M. Masuku, 'Prophetic Mission of Faith Communities During Apartheid South Africa, 1948–1994: An Agenda for Prophetic Mission Praxis in the Democratic SA' (2014) 42(3) *Missionalia* 151 at 155; Tracy Kuperus, 'The Political Role and Democratic Contribution of Churches in Post-Apartheid South Africa' (2011) 53(2) *Journal of Church and State* 278 at 279 and Naiema Taliep, Sandy Lazarus, Mohamed Seedat & James R Cochrane, 'The Role of Religious Leaders in Anti-Apartheid Mobilisation: Implications for Violence Prevention in Contemporary Africa' (2015) 44(4) *Religion, State and Society* 331 at 332.

ics have suggested that the role of religious groups towards political liberation in most African countries is usually understated.[65] The historical account also reveal that in many African countries, the education system (mission schools) was utilised as a tool to educate people about nationalist consciousness. This was the case in South Africa.[66] As stated already, in many African countries, the very foundation of the education system is mission schools. As mentioned already, in Ghana, for instance, most second cycle and tertiary schools have a connection with the church, both orthodox and charismatic churches. Suffice it to say, there have been cases where mission schools, in furtherance and promotion of their faith, have been cited for human rights abuses (discussed in subsequent sections).

Aside from the traditional role played by the Church, several academics in Africa have extended and justified the role of religious values or religion in other areas such as social security law and sustainable development, among others. From a South African perspective, Mpedi has suggested that religious values (propagated by religious institutions) can be utilised to extend social protection to South Africans.[67] Further, the United Nations Environmental Programme (UNEP) has intimated that faith-based institutions (religious bodies) can aid propel the drive for sustainable development.[68] In terms of realising the agenda for sustainable development, some academics have suggested that religious institutions can serve as key actors in achieving those goals.[69] Generally, however, the

[65] Obaji M Agbiji & Ignatius Swart, *op cit* note 5 at 12.

[66] Obaji M Agbiji & Ignatius Swart, *op cit* note 5 at 12.

[67] Letlhokwa George Mpedi, *op cit* note 18 at 116–120.

[68] United Nations Environmental Programme (UNEP), 'How Faith-based Organisations are Restoring Nature' as per https://www.unep.org/news-and-stories/story/how-faith-based-organizations-are-restoring-nature (Date accessed 27/09/2021). See also the Report of United Nations Environmental Programme (UNEP) on, 'Environment, Religion and Culture in the Context of the 2030 Agenda for Sustainable Development' as per https://www.unep.org/resources/report/environment-religion-and-culture-context-2030-agenda-sustainable-development (Date accessed 27/09/2021).

[69] Michel Sidibe, 'Religion and Sustainable Development' (2016) 14(3) *The Review of Faith and International Affairs* 1 at 1–4; Evan Berry, 'Religion and Sustainability of Global Civil Society: Some Basic Findings from Rio + 20' (2014) 18(3) *Worldviews* 269 at 270; Emma Tomalin, Jorg Haustein & Shabaana Kidy, 'Religion and the Sustainable Development Goals' (2019) 17(2) *The Review of Faith and International Affairs* 102 at 102–103 and Chilongozi Mwawi Nyirenda, 'The Role of Religion in Sustainable Development: Theological Reflections on Sustainable Development Goals and Mother Earth' in Nobuntu Penxa Matholeni, GK Boateng, Molly Manyonganise (eds), *Mother Earth, Mother Africa & African Indigenous Religions* (2020 African Sun Media Stellenbosch).

role of religious institutions are multi-faceted and non-exhaustive. Perhaps the view expressed by Sachs J is helpful as it outlines the role of religious organisations and their relations with the state. In *Home Affairs v Fourie, Lesbian and Gay Equality Project v Minister of Home Affairs*,[70] Sachs J averred that:

> "Religious bodies play a large and important part in public life, through schools, hospitals and poverty relief programmes. They command ethical behaviour from their members and bear witness to the exercise of power by the state and private agencies; they promote music, art, and theatre; they provide halls for community activities; and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of the people's temper and culture, and for many believers a significant part of their way of life and accordingly have the right to express themselves to government and the court on the great issues of the day. They are active participants in public affairs fully entitled to have their say with regards to the way the law is made and applied."[71]

Notwithstanding the socio-economic role religious institutions or organisations play in the development of countries, in recent times, there have been concerns of lack of respect for fundamental human rights of individuals. In fact, with the spread of many charismatic and Pentecostal churches, one phenomenon that seems to characterise this fast spread is disregard/disrespect of fundamental rights (examples of disregard are highlighted in the next section).

6 Religion and Activities of Religious Bodies *vis-a-vis* Human Rights

Religion and religious institutions play an enormous role in the respect of fundamental human rights—both individual rights and collective human rights, such as cultural rights. Indeed, religion is one of the powerful weapons utilised by religious institutions to promote and ensure the sustenance of moral values and humane conditions within society. The respect for fundamental rights by religious organisations is not merely a constitutional or legislative imperative, for Chris-

[70] 2006 (1) SA 524.

[71] *Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 para 93.

tians, for example, such respect is anchored in the Holy Book. For instance, the freedom of individuals not to be subjected to slavery, servitude as provided in most key international legal instruments is reiterated in the Holy Book. Accordingly, the Book of Galatians 5:1 (New International Version) provides that "it is for freedom that Christ has set us free, stand firm, therefore and do not submit again to a yoke of slavery." Also, the respect for human dignity (both as a right and as a constitutional value) has biblical underpinnings. As is provided in Genesis 1:26–27 (New International Version), dignity originates from God and is of God as man is made of the likeness and image of God. The point worth stressing is that the respect of fundamental human rights is anchored in the biblical directions as found in the Holy Book. Even though respect and protection of fundamental human rights are deeply rooted in scriptures and religious teachings, there are many instances where there exists a tension between religion (religious freedom) and the respect for individual rights and personal liberties.

For instance, both Islam and Christianity in many African countries have mounted a strong opposition against homosexuality on the grounds of the act being immoral and ungodly.[72] Christianity and Islam in Africa have opposed legal reforms prohibiting discrimination against people on the grounds of their sexual orientation and same-sex unions. There is a movement in many African countries to sponsor legislation that imposes criminal sanctions against persons who are homosexuals. An interesting point worth highlighting is that some African societies through their chiefs have proclaimed homosexuality as a taboo against African traditional custom. For instance, in Ghana, the National House of Chiefs, the custodians of African traditional religion have claimed that homosexuality is an

[72] Sarah K Dreier, James D. Long & Stephen J. Winkler, 'African, Religious, and Tolerant? How Religious Diversity Shapes Attitudes Towards Sexual Minorities in Africa' (2019) 13(2) *Politics and Religion* 273 at 273; Ernest Yaw Ako, 'Domesticating the African Charter on Human and Peoples' Right in Ghana: Threat or Promise to Sexual Minority Rights?' (2020) 4 *African Human Rights Yearbook* 99 at 112; Raymond A. Atuguba 'Homosexuality in Ghana: Morality, Law Human Rights' (2019) 12 *Journal of Politics and Law* 113 at 117–118; Elias Kifon Bongmba, 'Homosexuality, Ubuntu and Otherness in the African Church' (2016) 4(1) *Journal of Religion and Violence* 15 at 15–20; Arthur K. Berliner, 'Sex, Sin, and the Church. The Dilemma of Homosexuality' (1987) 26(2) *Journal of Religion and Health* 137 at 138. For further discussion on non-discrimination in the African Union and the African Commission on Human and Peoples' Rights, see generally R Murray & F Viljoen, 'Towards Non-Discrimination on the Basis of Sexual Orientation: The Normative Basis and Procedural Possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 86.

abominable act against the gods, and thereby a taboo under most Ghanaian customs. Therefore, while on the one hand there is a global call for the respect of the fundamental rights of homosexuals, on the other hand, the three main religious traditions have mounted opposition against the respect for the fundamental rights of individuals.

Nigeria, for instance, has passed the Same-Sex Marriage (Prohibition) Act of 2013. This legislation, among other things, ascribed penal sanctions for various activities, including same-sex marriage and the registration of association and gay clubs. A similar Bill, the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill (2021) are before the Parliament of Ghana. In that Bill, persons belonging to the LGBTQ+Community will be sanctioned for engaging in acts prohibited by the Act or engage in advocacy, support, or sympathy for the LGBTQ+community. Criminal sanctions under the Bill extends to family members, friends, and work colleagues, among others. The Bill is anchored in the idea that Ghanaian culture and family values, and the three main religious traditions in Ghana oppose and characterise such acts as immoral and ungodly.

Most churches in Ghana, particularly the Church of Pentecost of Ghana have supported the position that the Bill must be passed and have also stated that any member of Parliament (government) that votes against the Bill shall be voted out of Parliament.[73] In other African countries, churches have openly stood against homosexuality as it is against scripture. The abhorrence of homosexual acts is also seen in judicial pronouncements in some African countries. For instance, in the Namibian case of *Chairperson of the Immigration Selection Board v Erna Elizabeth Frank & Another*,[74] the Supreme Court of Namibia overturned the decision of the High Court, which interpreted sex in the Namibian Constitution to encapsulate same-sex partners living together. The Namibian Supreme Court intimated that the term sex only applied to males and females and did not include sexual orientation.[75] South Africa has legalised same-sex relationships and same-sex unions are legal.

[73] Kenneth Awotwe Darko, 'We Will Vote any Government that Opposes the Anti-LGBTQ Bill—Church of Pentecost' as per https://www.myjoyonline.com/we-will-vote-out-any-government-that-opposes-anti-lgbtq-bill-church-of-pentecost/?param= (Date accessed 08/10/2021).

[74] 2001 NR 107 (SC).

[75] *Chairperson of the Immigration Selection Board v Erna Elizabeth Frank & Another* 2001 NR 107 (SC).

There are other issues regarding the respect for human rights that religious institutions have openly contested. These issues, among other things, include the question of abortion. Many religious institutions in Africa oppose abortion. The liberalisation of abortion in some African countries triggered immense opposition if not resistance, particularly from mainstream churches in Africa. In South Africa, abortion is legal. The legalisation of abortion was mainly informed by the state's effort and commitment to reducing abortion-related deaths—this led to the promulgation of the Choice in Termination of Pregnancy Act of 1996, therefore, gives women access to abortion services within the first twelve weeks of pregnancy.[76]

Other issues relating to the status of women in traditional African society remains uncontested by religious institutions in Africa, albeit the call for equality and respect for women's right. There are several rituals and ceremonies that subject women to egregious treatment. For instance, there are several rites a widow must undergo upon the death of her husband. Under Akan custom, for instance, widowhood rights are highly regarded as there is a belief in cutting the spiritual ties between the deceased husband and the widow. Also, issues have been raised against ceremonies that tend to subject women to an inferior position, such as the payment of dowry. Unfortunately, those questions remain uncontested by the mainstream religious institutions or organisations in most parts of Africa.

In the area of education, mission schools in some parts of Africa have been criticised for restricting the constitutional right of education and other religious beliefs of students. For instance, in Ghana, Wesley Girls Senior High School in Cape Coast, a mission school established by the Methodist Church of Ghana over a hundred and seventy years ago was recently in the news for prohibiting a Muslim student from participating (voluntarily) in the Ramadan. The school argued that the health of the student was paramount and therefore insisted on prohibiting the Muslim student from participating in Ramadan (which is an important aspect of Islam religion). The issue immediately triggered concerns about the rights of a Muslim child to voluntarily exercise her religious rights *vis-à-vis* the aim of the institution to promote Methodism in Ghana and uphold the ultimate interest of the Child. The overall claim was that the child must comply with the rules of the

[76] The Choice in Termination of Pregnancy Act of 1996.

institution since a choice was made by the child to attend that school. The fact however is that Wesley Girls High School is a public institution and not exclusively under the control of the Methodist Church—thereby necessitating the need to balance the religious rights of the student, among other considerations.

Another case in Ghana involved a Rastafarian student who was denied admission into Achimota Senior High School because of his dreadlocks. The issue ultimately ended up in the High Court of Ghana in the case of *Tyron Ras Marghuy (Suing by Next Friend and Father Kwame Marghuy) v Board of Governors, Achimota Senior High School & the Attorney General*.[77] The fact of the case centred around a Rastafarian student who had gained admission into Achimota Senior High School. Achimota School took the position that the child can only be allowed admission if he cuts the dreadlocks. On the grounds of religious belief, the child sued the institution, through his next friend, the father. The High Court held that the school admit the Rastafarian student as failure to admit the student will be a violation of the fundamental rights of the child.[78] Achimota school has currently appealed the decision of the High Court to the Court of Appeal of Ghana.

The practical manifestation and the nature of professing one's faith, particularly among the Christians have come under scrutiny in recent times is the conduct of "men of God". The conduct of men of God has come under immense scrutiny mainly because of the impact those conduct on the freedom and personal liberty of individuals. There have been cases wherein the name of spiritual direction by the Holy Spirit, detergent, insecticides are poured on individuals. Some prophets have resorted to unleashing physical injury onto members/followers, in the name of spiritual guidance and deliverance. It is noteworthy that the authors are not against the men of God performing their functions. However, as stated, the conduct and the way a person professes his/her faith must not be at variance with constitutional provisions. In the end, it is not within the authors to determine which spiritual direction is indeed from God, but when a direction impugns on the fundamental rights of individuals, it requires redress. For instance, in many

[77] Suit No. HR/0055/2021 (unreported).

[78] *Tyron Ras Marghuy (Suing by Next Friend and Father Kwame Marghuy) v Board of Governors, Achimota Senior High School & the Attorney General* Suit No. HR/0055/2021 (unreported).

African countries, especially Ghana, people with mental incapacity instead of receiving medical attention are sent to prayer camps (treated under inhumane conditions), to exorcise the spirit of 'madness' from the people.

In sum, it is admitted that religious institutions in Africa play an enormous role in development. Indeed, religious bodies can aid in ensuring respect for the fundamental rights of individuals. However, there are many instances where religious beliefs clash with many principles in human rights. Such clash has led to either neglect or an imposition of restriction fundamental human rights. Accordingly, rights that conflict with the beliefs and morals of religious institutions are openly opposed and contested. Because religious rights are key rights underlying the constitutions of many African countries and the limitation thereof ought to be justified under the law, it is suggested that the practical manifestation, promotion and sustenance of religious rights and beliefs must be within the confines of the constitutional and legislative order. Accordingly, respect for the rights of other people is a paramount factor that ought to be considered when professing one's faith. There is, therefore, the need to strike a balance between the enjoyment of the constitutional right to religious freedom against the legitimate constitutional rights of others.

7 Conclusion

This contribution reflected on the extent to which the operations and activities of religious bodies and other ethical institutions limit and/or water down the constitutional rights and freedoms of individuals. The contribution highlighted the meaning of religion and contextualised it from an African perspective. It also discussed the relationship between culture and African traditional religion. From a broader perspective, this contribution highlighted the interconnectedness of language, cultural values, art, and symbolism with religious rights, particularly African traditional religion. It discussed the significance of religious and ethical institutions in the development of African countries. Due consideration was given to the constitutional foundation of religious freedom in Africa and the protection of the right to self-determination. Furthermore, the chapter reflected on the three main religious traditions or groupings in Africa namely, African traditional religion, Christianity, and Islam traditions and their relationship with the

state. The contribution analysed key issues of human rights in Africa where religious bodies limit the rights of individuals. It provided examples of situations where activities of religious institutions or organisations limit the fundamental human rights of others. The contribution concluded with a call for a balance between the activities of religious institutions and the need to respect, protect and uphold the rights of others.

Resettlement Agencies as Faith-Based Organizations: Serving Refugees Between Philanthropy and Paternalism

Volkan Deli

1 Introduction

In our age, where natural and man-made crises are increasing day by day, the relationship between states and non-governmental organizations also leads to new collaborations and relations. These relations and cooperation now have a transnational meaning. While the developing literature on global governance points out the importance of developing new relations, it also emphasizes that this should be considered in terms of power and political balance. States, faith-based organizations, philanthropies, corporations, national and international non-governmental organizations, those operating at the local level, and those who identify themselves as non-governmental or non-profit organisations, all act with the aim of reducing human suffering, helping people, and contributing to processes such as peacebuilding (see Barnett 2013).

Studies that deal with this phenomenon under the theory of humanitarian governance have similarly focused on the growing global facet of the process. On the one hand, the presence of non-governmental organizations takes an active role at both local and global levels, and on the other hand, the fact that this process gains

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an institutional structure necessitates it to be seen as a kind of governance.[1] In the words of *Barnett*, "global governance of humanity" also enables us to identify how power and politics interact in humanitarian action implemented through states and non-governmental actors and to acknowledge the purpose of such governance to accomplish "the specific goal of saving lives, reducing the suffering, and enhancing the welfare of the world's most vulnerable and neglected population" (Barnett 2013: 380).

Further to this argument, *Barnett* develops a critical approach to the concept of humanitarian governance and poses a series of questions about who forms and governs humanitarian governance, what policies and which institutions are influential, and what sorts of coercion are imposed. Moreover, these questions are important in terms of understanding the difference between human rights and humanitarianism. Despite the common origin of the two terms, what is understood with humanitarianism also states that institutions, hierarchies, and power relations emerging in this field have the actives of helping people in faith tradition (Barnett 2013: 383) as different from the content of human rights.

The post-second world war period is an important breaking point to see how this global governance, or rather the global governance of humanity, has developed and formed a new area of discussion for the role of states. Although the definition of global governance is not one of the key points for this study, it is important to understand its relationship with humanitarian governance. When viewed from this angle, *Betts* underlines that global governance had a multilat-

[1] The concept of global governance discussed by both Barnett and Betts does not have any link to the concept of migration management used in the migration literature. To specify with reference to Barnett, as a comprehensive and broad concept, global governance of humanity refers to the whole process of humanitarian action by all institutions and organizations, actors and formations that are formed and embodied in the context of international relations M. Barnett (2013). On the other hand, Betts considers global governance as a process in which non-state actors assume greater roles and responsibilities than governments, and non-state actors manage the processes of "negotiation, implementation, monitoring and enforcement" A. Betts (2009) and explains that since the mid-1940s, the concept of global governance can be seen as a product of the efforts of states to act jointly on migration at the international level. In this respect, it is underlined that states have a constitutive and restrictive role on their policies in the field of migration. Therefore, it emerges as the governance where the sphere of influence of many institutions and organizations through rules and procedures has expanded. In this sense, while a decision mechanism is emerging beyond nation states, such a mechanism has a formal and informal structure and is dominated by sovereign states. Therefore, for each type of migration, such a governance functions with different institutions at different levels. See A. Betts (2011).

eral aspect at the beginning and that the relations developed by states after the second world war to regulate various areas from the scope of human rights to that of trade. The characteristic feature of this process is multilateral, migration is an embedded issue in international conventions and the statutes of institutions, and states establish partnerships at regional and interregional levels in cases where there is no formal multilateral structure (2011: 7–20).

Within this short framework, *Barnett* puts forward that a transcendental community has emerged, which has undertaken a mission on behalf of humanity, through institutions and organizations created by global governance. At this point, *Barnett* deals with the issue of global governance and humanitarianism together and argues that "the governance of humanity actually operates in the field of ethics (it is concerned with the needs of others)" (2013: 380). Therefore, it demonstrates a strong link between global governance and humanitarian governance. In this regard, Barnett points out that the issues of "rationalization", "bureaucratization" and "experts", as well as the principles of "value-neutral" and "objective", which are inherent in global governance, can be identified in humanitarian governance. However, while addressing these expertise and authority themes in global governance, *Barnett* highlights the importance of "moral authority" in humanitarian governance, which means "acting in the name of God or humanity" (2013:380, 390–391).

In this process, at the core of humanitarian identity, the idea of humanity has also grown in importance based on its relationship with religion. While it is possible to reach a common understanding of humanity as "sacred", it is difficult to find a solid ground for discussing the clear meaning of humanity due to the existence of different perspectives. While the contradiction between human rights and humanitarianism is explained by the tension between rights and needs, a common insight nevertheless points to a "universal category that takes the commonalities of human beings as its ground" (Feldman and Tictin 2010:3). The most important argument regarding the sacredness of humanity takes place in terms of humanitarianism. Barnett (2011:221). underlines the various meanings of humanitarianism when viewed from this perspective and accentuates that it is a mixture of "care" and "control" and that it needs the power to make the world a better place and "acts of compassion lift the givers toward the sacred".

In this context, regarding the link between humanitarian governance and humanitarianism, *Barnett* underlines the fact that "humanitarian governance is sustained by a holy alliance uniting humanitarianism, moral progress, and faith" (2011:224), adding that "humanitarianism begins and ends with faith… faith is more than religion, faith is a belief in the transcendental" (2011:237). At this point, the discussion of paternalism, with the way humanitarianism operates in global governance, is important. The similarity between humanitarianism and

paternalism is that both do not seek the consent of others when interfering in their lives. Therefore, paternalism emerges as a form of power (2011:233).

From this standpoint, this study argues that faith-based organizations cannot be separated from the overarching context of humanitarian governance. Parallel to the rise of the Christian right since the 1980s, the weight of the faith-based approach has increased in both domestic and foreign politics of the United States. More importantly, this faith-based politics has arisen in response to the increasing poverty and inequality in different regions of the world because of growing economic neoliberalism. The number of faith groups and faith-based organizations, in this process, proliferated in delivering certain services (Clarke 2008:19–20). In Christianity, the ethos of faith-based organizations can be seen in three main forms namely Catholic, Protestant, and Orthodox/Coptic (2008:24) in an examination of their historical origins, *Ferris* explains that

> "Catholic orders were established to provide charity to the poor… and hospitality to strangers" while "the Orthodox and Protestant traditions carry out Christian service to others that were based not only on Christian values of charity and mercy but also rooted in the belief in the absolute value of the human person" (2005:313).

Clarke provides five definitions of faith-based organizations which vary in the context of their vision and missions. For this study, the definition of "faith-based charitable or development organizations" represents the most appropriate one, that runs programs for the poor and those in need "to tackle poverty and social exclusion" (2008:25).

Based on the fact that the agencies examined here are faith-based, this study contributes to these debates by drawing attention to two important characteristics of faith-based organizations: One of which is philanthropy, and the other is paternalism. Recognition of the responsibilities of non-profit organizations by the federal state in the delivery of various services to the poor, refugees, unaccompanied children, etc. is one of the essentials for the third sector discussions in the United States. The plurality and diversity of non-profit organizations is a result of the plethora of community-based initiatives. Among non-profit organizations, the presence of faith-based organizations that have developed over volunteerism and philanthropy throughout American history is significantly dominant.

The faith-based organizations discussed here are two main agencies namely *Catholic Charities Community Services and Lutheran Social Services of the Southwest* operating in the state of Arizona in the United States. Drawing the results of in-depth interviews I conducted with the program directors, coordinators, and supervisors from both agencies and a volunteer who worked for them in

Arizona, this study explains how these organizations represent themselves within the non-profit sector. The characteristic feature of these organizations is that they also serve as refugee resettlement agencies, in other words, they both have refugee resettlement programs.

The functions of both institutions are based on care and compassion on the one hand, and admission programs funded by the federal state on the other hand, and their understanding of aiding and services to newly resettled refugees is important to grasp the debate on humanitarianism. However, such a debate has very special aspects in the context of the United States and considering the duration and purpose of the services provided to newly resettled refugees, it is key to include them in working life without focusing the attention on their painful or traumatic past experiences.

At this point, this study argues that the issues of philanthropy and paternalism take on another meaning with the politics of self-sufficiency in the context of refugee resettlement. The policy of self-sufficiency was enshrined in the US Refugee Act of 1980 and recommended that refugees be quickly included in the working life and that their dependence on the system should be eliminated with the provision of the existing programs. *Benson*, who presents a detailed review of the US Refugee Act of 1980 in the discussion of "devolution of authority, privatization, managerialism, and workfare", demonstrates that the rationale of the law cannot be separated from "the neoliberalizing policy environment of the early 1980s" and draws a conclusion that refugee policy serves "to promote neoliberal practice in refugee resettlement as poverty governance" (2016:541). In their comprehensive field analysis, *Benson and Panaggio* also examine the issue of self-sufficiency as the main tool of resettlement policy while discussing the processes of "job readiness and job placement" that lead to "deindividualization" since such a process does not focus on "the unique and nuanced needs of individuals" (2019:41).

From this perspective, this study proposes to argue that the most important role of the faith-based resettlement agencies in this sense is that they are regular implementing agencies of self-sufficiency policy, contributing to an understanding of the state that, in a sense, reflects the needs of the neoliberal economic order and functions in paternalism. Thus, this study demonstrates that these agencies' humanitarianism does not aim at defending a system that requires the development of refugee admission programs, rather, it does not prioritize such a purpose. Instead, the voluntary activities carried out by the agencies remain within the framework of religious references and do not develop free advocacy in terms of their relationship with the state. In the final analysis, the discussion this study is dwelling on here aims to show that these organizations operate to actively reproduce the self-sufficiency policy, which draws the limits of their humanitarianism.

2 A Historical Overview of the Agencies

In the United States, a considerable number of faith-based organizations in the non-profit sector operate in different sectors that help and serve people. Catholic Charities Community Services and Lutheran Social Services of the Southwest are also faith-based organizations and serve refugees by providing two important programs, namely "the Refugee Reception and Placement Program and the Matching Grant Program". The former is funded by the federal government while the latter by the U.S. Department of Health & Human Services. This is not just a funding relationship; it is also a kind of a relationship in which the state has the power to determine what type of services will be provided and how they will be delivered.

Both agencies have a long history before developing refugee resettlement programs. Such a historical process shows us the importance of the role played by both American society and the churches in the development of these agencies and enables us to understand how volunteerism and religious values come together and institutionalize. Lutheran Social Services of the Southwest has been running since the 1970s in Arizona. Its primary purpose was to develop "a coordinated response to the needs of their most vulnerable neighbors" and its motivation was to help vulnerable people "as an expression of God's love" (Lutheran Social Services of the Southwest 2021a). The organization upheld tradition and faith in Christianity to generate the rationale to organize support for the needs of low-income families. In the mid-1970s, they also launched a refugee resettlement program for refugees coming from Laos, Cambodia, and Vietnam and still resettles refugees from different countries (Lutheran Social Services of the Southwest 2021a).

Catholic Charities Community Services was also established in the shadow of the Great Depression of the early 1930s and devoted an effort to helping vulnerable children and families in need. The agency still supports vulnerable people in response to their basic needs, pursues producing permanent solutions, and serves in a wide range of actions such as sheltering the homeless and abused, protecting and nurturing children, strengthening and reunifying families, and welcoming and assisting refugees. The agency maintains its faith tradition as Catholic Social Teaching while serving people and emphasizes its equal approach to all clients regardless of background or religion (Catholic Charities Community Services 2021a).

Catholic Charities Community Services and Lutheran Social Services of the Southwest with Refugee Focus Program manifest their vision and mission by giving a strong reference to faith in Christianity. Catholic Charities is "one of the

major social services agencies of the Diocese of Phoenix" and their service is "founded in Scripture: Jesus called upon his disciples to feed the hungry, give drink to the thirsty, clothe the naked, care for the sick, welcome the stranger, and minister to the imprisoned" (Catholic Charities Community Services 2021b).

Catholic Charities and Lutheran Social Ministry Organizations were born in the unique faith tradition in the history of the United States, taking an entrepreneurial role to foster and promote a kind of solidarity between community members and society, and aimed to help and support the most vulnerable members of their communities. Operating like an umbrella organization led by the collective efforts of the Catholic and Lutheran Church, the agencies have expanded their humanitarianism to other states in the United States and pursued to disseminate 'care and compassion and 'love of neighbor' in society (Lutheran Social Services of the Southwest 2021b; Catholic Charities Community Services 2021c).

The agencies have used the key themes of care, compassion, and love of neighbors to mobilize community members around the spirit of solidarity since they appeared in the historical process. Although there is a discussion outside the boundaries of this study, the agencies have exhibited features that can be seen as autonomous movements within their history. In comparison with their current conditions, it is a fact that they still maintain their faith tradition with their values and principles, but their capacity to be autonomous in terms of their relations with the federal state has undergone a great transformation over time. The idea least affected by such a transformation is embedded in a tradition to act voluntarily and give voluntarily. Although the idea of reaching out to every single person in need in the community and relieving their pain is prevailing, the agencies have acquired qualities over time, which can be categorized as more rationalized, bureaucratic, and professional, and that they currently receive most of their funds from the federal state and the other part through volunteering. In the next section, the details of this subject will be discussed through the concept of philanthropy.

3 Philanthropy and Faith-Based Organizations

The Commission on Private Philanthropy and Public Needs points out voluntary giving as one of the most typical characteristics of American society during the history of the United States and underlines the role of voluntary organizations as the "third sector after government and business" in the report on Giving in America (1975:11). Being part of the third sector, voluntary organizations also present the diversity of individual and community initiatives and come into the picture as 'nongovernmental, non-profit associations and organizations' and "all philan-

thropic input - giving and volunteering - is transformed into a philanthropic output - goods and services for ultimate beneficiaries" (1975:31).

Institutionalization and transformation of non-profit organizations in relation to government and business have not changed the nature of philanthropic activities sustained by giving and volunteering in the US according to the statistics. Comparatively speaking, religious giving was the largest part, and the ultimate recipient of giving was religion in the 1970s (Commission on Private Philanthropy and Public Needs 1975:14–15). For today, the Giving USA 2021 report indicates that donations represent an increase of 1% for religious organizations in the United States in the year of 2020 (Stych 2021) and religious giving still has an important place even though the rates continue to decrease in years (King and Buttrey 2021). Catholic Charities Community Services and Lutheran Social Services of the Southwest with Refugee Focus Program have an online system of receiving donations through their websites. After federal and state grants, the second source of revenues for both organizations is private contributions, fundraising, congregational partners, corporations, individuals, and united way (see Catholic Charities Community Services Community Impact Report 2020:11; Lutheran Social Services of the Southwest Annual Report 2020).

Being a non-profit organization with refugee resettlement program, they also fall under the category of "a 501(c)(3) non-profit organization[2]" (Lutheran Social Services of the Southwest 2021b; Catholic Charities USA 2021). This legal code refers to the category of being a "charitable organization" and emphasizes that "the organization must not be organized or operated for the benefit of private interests" (US Internal Revenue Services 2021). Also, in the early debates of the 1970s, 'the public interests' came out as the sole purpose to be realized in the philanthropic process (Commission on Private Philanthropy and Public Needs 1975). All in all, serving 'public needs' in the public interests is seen to be a bridge between non-profits and government in a broad sense.

Philanthropic activity of faith-based organizations takes us to recognize the role of the third sector in the United States as truly explained by the Commission above. The non-profit sector serves in a wide range of areas such as counselling, housing, and the protection of unaccompanied children, veterans, and refugees. They keep abreast of public needs and develop their services in close conjunction with the government. Drawing from the Greek meaning of philanthropy as

[2]According to US Internal Revenue Services (IRC), churches and religious organizations are categorized under the provision of 501(c) 3 organizations that fall under exemption requirements to be tax-exempt, US Internal Revenue Services (2021).

"love for humankind", it is possible to say that their action is, in the definition of a philanthropic act, aiming "to enhance the well-being of humanity, relieve misery or improve the quality of life through personal acts of kindness, compassion, or financial support" (Anheier and List 2005:196). However, the difference between charity and philanthropy deserves to be emphasized since the latter, which is interchangeable with the term of the public interest, also indicates "a longer term, deeper commitment to public benefit that seeks to address the roots of social problems" (2005:196).

My interviews with resettlement agencies clarify such a division between charity and philanthropy in being a non-profit. During the interview with a program coordinator for Catholic Charities Community Services in Arizona, the structure of the agency is explained in the following way:

> "Catholic community services is a charity that provides human resources for individuals and families at no cost. The refugee program is a part of Catholic social service. Catholic community service is a non-profit organization under the umbrella of the Catholic Church. As a member of the Catholic Church, we call that Catholic Charity. We are a non-profit organization as well as a resettlement program."

The self-representation of the agency is essentially grounded on being a charity and non-profit organization. The coordinator solely focuses on the provision of services to refugees rather than identifying the roots of social problems or needs. The agency emphasizes its ambition as a service provider "to provide protection, basic needs, house, foods, etc. and the goal is self-sufficiency". Within these limits, the coordinator intends to address how the agency manages all the processes with its human and financial resources.

Another interviewee, who was a director from the Refugee Focus Program of Lutheran Social Services of the Southwest in Arizona, points out the operation of the agency in the following words:

> "The agency also receives private funds through churches and individuals in addition to fefderal funds and there is no difference between resettlement agencies and non-profit organizations. Refugee Focus is a resettlement agency, but Lutheran Social Services of the Southwest does a lot of programs working with homeless individuals, elderly populations, and disabled populations etc. One of these programs is [the] resettlement program"

In a similar vein, the director describes the agency as a non-profit organization and centres on the agency's programs and services. In terms of receiving revenues for the continuation of these services, the director underlines the agency's

dependency on private funds and donations since the funds received from the federal state are not found sufficient. Regarding the possible problems or needs which can be addressed in the system, the director clearly puts forward that the agency is also aware of problem areas such as "the need to modernize the resettlement program and to amend the Refugee Act of 1980"[3] in the United States but recognizes the success of the system based on the assumption that refugees have access to services and are on the way of becoming Americans as local integration is duly improved.

It is a salient fact that both agencies identify the need for more funding rather than exploring the roots of problems or needs in pursuit of improving their capacities and services. Both attribute great importance to the existence of private giving, contributions and volunteering by individuals and community members. *Payton and Moody* have a detailed debate on philanthropy by reference to its traditional meaning in terms of "moral obligation", which varies from one culture to another. The fact that philanthropic action is to be recognized as fundamentally voluntary does not mean that it is entirely divorced from a sense of moral obligation. Concerning the religious themes, philanthropy has an integral part like "a benign form of coercion" by the obligation to help a poor person or someone in need (2008:53). The importance of morality is still essential in the emergence of philanthropy as the third sector as voluntary activities are undertaken to create a better society (2008: 50). In this context, *Payton and Moody's* point is worth noting that "fund-raising on a large scale is more highly developed and more widely practiced in the United States than anywhere in the world" (2008:45). Indeed, the faith-based agencies, Catholic Charities Community Services and Lutheran Social Services of the Southwest reflect such a moral obligation in their religious call for helping others and require more funding by underscoring the importance of private giving and volunteering in the United States' large volunteer network.

At this juncture, it still deserves to be touched upon if it is feasible to purely define the agencies as philanthropic organizations to demonstrate attributes

[3] The purpose of this law is to implement the self-sufficiency policy as quickly as possible. Sect. 412 (1)(a) "makes available sufficient resources for employment training and placement in order to achieve economic self-sufficiency among refugees as quickly as possible" and (c) "insures that cash assistance is made available to refugees in such a manner as not to discourage their economic self-sufficiency and (6)(i) a description of how the State intends to encourage effective refugee resettlement and to promote economic self-sufficiency as quickly as possible, US Refugee Act of 1980".

of humanitarian action carried out by them. Relying on *Payton and Moody's* approach to philanthropy, first, is "an umbrella term for the entire spectrum of voluntary actions for the public good" and distinguishes philanthropic action from charity: The former aims to "improve the quality of life" while the latter "for acts to relieve suffering" (2008:38). Catholic Charities Community Services and Lutheran Social Services of the Southwest are charitable organizations in their legal status and the interviewees also clearly confirm these points in various aspects. Their action is, in this sense, closer to the nature of philanthropic action as their services are to improve the quality of life of refugees by providing basic needs and finding them jobs rather than being a purely voluntary charity act.

Secondly, the multiple uses and clarifications of terms such as philanthropy, third sector, or non-profit provide us with different insights, but the most important point to raise here is the distinction between philanthropy and non-profit in terms of market-oriented meanings. At this point, *Payton and Moody* underline the fact that "the impersonal and economistic term non-profit obscures the sector's charitable roots, its moral dimension" while "philanthropy is about more than money; it is about the mission, shared values, and organization" (2008:29–30). The economic dimension of the non-profit sector, in a sense, comes before its philanthropic goals. At this point, "voluntary giving, service, and association" as the constitutive components of philanthropy can be questioned in terms of "voluntary action" and "the public good" (2008: 52–55).

The interviewees from both agencies indicate the agencies are the recipient of private giving and donations as financial aid or goods. Also, both agencies are stated to work with volunteers in offering support to newly arrived refugees by welcoming them at the airport, placing them in their new homes, and providing basic needs, food and goods. Although they have voluntary giving and voluntary actions in the course of their services, the operation of resettlement agencies as part of the non-profit sector emerges as a dominant feature in their voluntary efforts. Considering that the amount of support received by these agencies from the federal government is higher than donations, they can be classified as non-profit and as part of the third sector. On the other hand, it is also correct to say that these organizations can easily be found successful because of their capacity for fund-raising in the way *Payton and Moody* point out: "the secret to a successful voluntary association and perhaps the real test of philanthropy are to be found not in giving or service but in fund-raising" (2008:45).

Lastly, "the three-sector society" constituted of "government, business and philanthropy" remains key to pinpointing all dimensions of non-profits. *Payton and Moody* also illustrate the purpose of government and philanthropy for "public good" by reference to their defining ideas as "power" and "morality" respectively

and highlight the fact that philanthropy also works similarly that the government aims to both achieve "the public good" and provide "public services" for everyone equally. It is an incontrovertible fact that "government funding is a primary source of income for the philanthropic sector" (2008:49, 51) in the United States and so governments always intend to work in partnership with philanthropic agencies. In this sense, there is nothing more to discuss that Catholic Charities Community Services and Lutheran Social Services of the Southwest offer core services in different areas for the public good. This relationship with the government makes the resettlement agencies a typical case and determines their boundaries in the field of humanitarian action.

The Department of State works with the resettlement agencies in a cooperative agreement, which is purely designed to provide the Reception and Placement Program for refugees resettled in the United States.[4] The program coordinator of Catholic Charities Community Service defines this agreement as

> "Cooperative agreement is the outline of reception and replacement service. Resettlement agency must provide for refugees. You have to do it. Know your way, design and request by the cooperative agreement we call that core service"

The coordinator also underscores that the Bureau of Population, Refugees and Migration (PRM) funds and manages the Reception and Resettlement Program for refugees. Resettlement agencies spend the money to meet the needs of refugees under the provision of the program according to the cooperative agreement. A refugee program supervisor from Lutheran Social Services of the Southwest explains that

> "Only ten agencies within the US are really able to contract with the federal government to be able to receive refugees; each one of us, a national agency, has a legal federal contract that PRM approved to be able to legally resettle refugees"

At this juncture, the distinctive role and responsibilities of resettlement agencies stem from a cooperative agreement, or a legal contract, with the federal government. Unlike other agencies in the non-profit sector, resettlement agencies are committed to provide several specific services to refugees, which are obligatory and include "meeting refugees at the airport upon arrival, taking them to their

[4] For detailed information, see the Reception and Replacement Program on the website of the US Department of State.

apartments with basic furnishings, appliances, clothing, and food" in a culturally appropriate way (US Department of State 2021).

The Reception and Placement Program lasts up to the first three months. During this time, resettlement agencies provide all available services for newly resettled refugees for a period up to five-year, which starts with pre-arrival arrangements. In the coverage of similar programs, the program coordinator of Catholic Charities Community Services calls the Reception and Placement Program an initial resettlement program for the first ninety days. Once this program is finalized, the program director underlines the availability of two other programs namely "Matching Grant" and "Social Service Program". With these programs, resettlement agencies are responsible for managing and following up on all individual cases for five years from the day of arrival. A summary of this process is given by the division director of Lutheran Social Services of the Southwest with Refugee Focus in the following words:

> "We prepare cases before their arrival, we get bio sheets from the US Department of State, and we prepare apartments, maybe sometimes with a system of Church groups, we have pre-arrival preparation to airport arrival, to five years after arrival day. Now, in reality, most of those services, most intensive services were done in the first six months, certainly within the first year depending on refugees' background, skill level and language level so forth"

The Department of State funds resettlement agencies and determines the amount to be spent on each refugee so that all essential services can be provided. This relationship between the state and resettlement agencies is a strong indicator of the government's power to provide the public good. Moreover, why the Department of State chooses to work with resettlement agencies to provide those services becomes evident in the following remarks by *Payton and Moody*,

> "Government relies on philanthropic and business 'partners' to provide services. Non-profit organizations are seen as good allies for the government because, on average, non-profits offer credibility and efficiency; they are close to the people, and they are committed to their mission" (2008: 51).

Notably, within this partnership, resettlement agencies have undertaken the committed mission of providing these services only to newly resettled refugees. Beyond that, they do not intend to touch upon the boundaries of the programs, criticize or problematize the design and operation of services to refugees in cooperation with the state, but they highlight the need for more funding for humanitarian action and modernizing the refugee admission program in the United States.

3.1 Limitations of Resettlement Agencies: Function of Self-Sufficiency Policy in Humanitarian Action

The programs explained so far and their implementation in the field by the resettlement agencies pinpoint the limits drawn by the US refugee resettlement policy in practice. Through the lens of *Payton and Moody*, resettlement agencies do not simply comply with the principles of voluntary work in terms of making decisions and acting freely while serving refugees. It is an obvious fact that they are committed to a cooperative agreement and the definition of voluntary philanthropic action as "relatively free, uncoerced actions that are uncompensated" (Payton and Moody 2008:55) is not in line with the obligations of the cooperative agreement.

Under the cooperative agreement, resettlement agencies primarily undertake pre-arrival preparations to meet basic humanitarian needs, from identifying accommodation to furniture, but this situation arises independently of the preferences and desires of refugees themselves. Second, determining the amount to be spent on refugees is based on a rationale that limits the recognition of refugees' needs and preferences. And most importantly, after the first three months, the path envisaged for refugees is entirely based on the self-sufficiency policy of the state, and the sole aim is to make refugees self-sufficient individuals in a reasonable period.

The refugee resettlement policy of the United States, which constitutes the backbone of the services provided by resettlement agencies, is framed by the Refugee Act of 1980, as mentioned before. *Benson* also demonstrates that the dominant neoliberal ideology formulates the Refugee Act of 1980 in a similar way it also shapes welfare policy or the governance of poverty (see Benson 2016). Although I have not dealt with it in detail within the scope of this study, *Benson* discusses "devolution of authority, privatization, managerialism, and workfare" to point out "neoliberal practice in refugee resettlement as poverty governance" (2016:541). The federal government transfers authority to local agencies to offer all the necessary services to refugees at the local level. Such a process takes place in the form of privatization and leads to the management of refugee resettlement (2016). At this point, this study puts forward that such devolution of authority implies the transfer of state paternalism to resettlement agencies as well. Such paternalism becomes a natural component of cooperation with the federal government.

Self-sufficiency policy is the area where the power of the state and the main expectation of the state in pursuit of the public good are embodied in the refugee

admission program. The relationship formed within the framework of the cooperative agreement should be considered a gateway to the implementation of self-sufficiency. The nature of humanitarian action carried out by resettlement agencies is not only philanthropic but also shaped in parallel with the influence of the state's power. However, such paternalism or devolution of authority is nevertheless not in conflict with philanthropy. As *Payton and Moody* state, the public good is not "a pre-existing and fixed standard to be achieved" and voluntary action has "the purpose of doing, advocating, or providing something that is seen by the actor as somehow for the public good" unlike philanthropic action "seeking someone's vision of the public good" (2008:59). In this way, the resettlement agencies do not have an understanding of a voluntary action that would evolve into advocacy or redefining the public good and eliminating the deficiencies of the refugee admission system.

While the resettlement agencies working for the construction of the public good embrace the vision of the federal government and the act, they also move within the confines of the dominant neoliberal ideology. Trudeau and Veronis also manifest the relationship between the state and NGOs developed within the provision of social services for refugees and state that "NGOs had achieved this position precisely because they demonstrated an ability to translate the state's agenda for economic self-sufficiency into the lives of local refugee communities" (2009:1122). In this regard, the policy of self-sufficiency is the most fundamental element in understanding both the limits of the humanitarianism of faith-based resettlement agencies and how their paternalistic rationale comes into existence. The matching grant program mentioned above should initially be evaluated on this subject. The program director of Catholic Charities Community Services explains it in the following manner:

> "Matching grant is more complicated than the reception and placement program and is an early employment program funded by the US Department of Health and Human Services… Refugees who do not have a major barrier to work are pleased with that program. You can start to work earlier."

The US Department of Health and Human Services also calls it a "voluntary agencies matching grant program" and explains that "the intent is for refugees to become financially independent in four or six months after arriving in the US without accessing cash assistance programs" (US Department of Health and Human Services 2021). The main aim of this program is to quickly include refugees in the labor market and ensure that they work and earn to support themselves and their families. For this purpose, resettlement agencies assist refugees in

finding suitable jobs. During my interview with a university student who worked for resettlement agencies as a volunteer for a long time, this issue was emphasized in the following remarks:

> "Resettlement agency tries to find work for them at the beginning. I observed that some of them did not want to work due to their educational background, that is, a Ph.D. holder does not want to wash dishes; in general, women work as cleaners for hotels or nursing centers while men also do the same work. Some employers, especially hotels and car wash companies, recruit refugees. But, in general, they do a back seat work which is not required of English knowledge, so, there is no need for them to communicate with clients."

The jobs that resettlement agencies find for refugees are mostly entry-level jobs and offering a better alternative for refugees other than these jobs is not an issue to be prioritized. Entry-level jobs do not require language skills, such as cleaning, housekeeping, caregiving, security, etc. Providing refugees with entry-level jobs is such as the inclusion of cheap labor in the labor market. From the resettlement organizations' point of view, self-sufficiency is recognized as an objective of the refugee admission program. For instance, the Program Coordinator of Catholic Charities Community Services explains that

> "The US refugee program is based on employment, that's the goal, self-sufficiency. Refugees who come here have to understand they have to work".

These organizations are working to complete this job placement process as soon as possible otherwise the aim of making refugees self-sufficient can be put at risk in a determined timeline. The process of eliminating refugees' dependence on the system as quickly as possible, as foreseen by the state, is started within a week or two of the arrival of refugees in the United States. As pointed out in the study conducted by *Frazier and van Riemsdijk*, there is a significant difference between the desired target and the practical operation, and this difference is revealed in the following words:

> "The notion of 'self-sufficiency', economically defined, provides a constrained vision of resettlement… On its face, the stated goal of 'self-sufficiency' implies a desirable level of general competency and independence for resettled refugees. In practice, however, self-sufficiency is narrowly defined as early employment and freedom from welfare dependence" (2021:10).

Similarly, *Benson and Panaggio* put forward in their analysis that considering self-sufficiency policy as job placement is to simplify the sustainability and continuity of self-sufficiency since it is said by refugees that finding a job has nothing to do with self-sufficiency (2019: 40). On the other side while noting the pace of this process, I must underline that the job opportunities offered by the agencies are minimum wage jobs and that refugees are included from the bottom up if we consider their social and economic mobility. In this sense, the procedures for this rapid process are explained to us most concisely by the refugee program supervisor from Lutheran Social Services of the Southwest:

> "We take them to the Social Security Office in the first week usually to get their Social Security Number. They have to have a social security number to seek a job. They usually have it within thirty days. We apply for a work authorization card as well. Usually, within thirty to forty-five days, they receive the legal document they need to be able to work. In Tucson, they start with entry-level positions with minimum wage. Most people in Tucson start at that level and it could be from a dishwasher, security guard, car detailing that means washing cars and cleaning them, to working at the resorts, caregiving jobs perhaps for females, or taking care of somebody."

The government's self-sufficiency policy, both legally and politically, is itself a predetermined system by which refugees must abide. Refugees' desire to have very good professional skills, to have diplomas, or to work in a more qualified job is not an issue that can be evaluated and realized within this system. Even if a newly arrived refugee is already a qualified person as of the date of arrival, the existing system requires him or her to work in return for the minimum wage to be self-sufficient quickly. Refugees who have a good education and professional skills such as medical and engineering diplomas are required to have English proficiency and obtain their equivalence to find a better job within the refugee resettlement system of the United States. It is important to underline that such a process to obtain a diploma or competency depends entirely on their efforts and financial power, not government support and contribution. They are obliged to allocate both time and money for the required courses and documents they need to reclaim and prove their professional competency. Apart from this, they have no alternative but to work for these entry-level jobs.

Parallel to this point, *Benson and Panaggio* manifest in their field research results that "deindividualization" through the resettlement policy takes place in the process of job placement, where the individual and unique needs of refugees are not taken into account. Regardless of their skills, talents, and professional achievements, they are constantly forced to work (2019:41–44). This situation

can also be grasped in the following sentence exactly: "There is a sense of urgency to place refugees in jobs, which translates into a callousness or insensitivity that comes with implementing a one-size-fits-all approach to refugee policy" (2019:42–43).

Discussing the "deindividualization" process and the necessity of "working" in entry-level jobs in the United States, especially considering the case of skilled and competent refugees, one of my interviewees, the refugee program supervisor from Lutheran Social Services of the Southwest, explains the situation as follows:

> "The hardest part honestly is getting skilled workers jobs quick enough, where they run out of money. They just take time to get. It takes time to apply for something to be interviewed. Depends on how strong their English is; if they have excellent English, they might be able to get something but rarely. Most people are starting at a level much below their experiences. I would say most people, this is the hard reality again to accept, most people accept the job in the way below their status and their experience level."

At this point, in parallel with all the conceptual explanations above, this study demonstrates that the philanthropic structure of faith-based organizations operates in a largely paternalistic manner in the refugee resettlement policy of the United States. This kind of paternalism indicates that, on the one hand, we can gain insight into other aspects of the humanitarian identities of these organizations. The practitioners of the refugee admissions program are talking about how the system works, only concentrating on how it works without an approach to the sustainability of self-sufficiency policy in the lives of refugees in the post-resettlement period. On the other hand, the agencies often underline the necessity of initially having entry-level jobs, saying that "refugees have to work" and that these jobs are "entry-level jobs" although there is no optional or alternative welfare mechanism in the delivery of services, and more specifically, either the consent of the refugees or their preferences is not taken into account in this process.

In one sense, this last point fits quite well with the ethical issue *Barnett* underlined: Humanitarians and practitioners also distinguish themselves from political engagements by assuming their work in ethics. The idea of sacredness exists behind their rationale as being the voice of vulnerable people in acting as apolitical agents. Keeping their distance from politics, many keep on helping others and developing aid networks for vulnerable groups. They have compassion without any reference to the consent of people (Barnett 2011:232–233) and Christianity also motivates many to own a humanitarian identity through the practice of compassion (Barnett 2013:228).

Although there is no political engagement other than the Christian faith and compassion in the way that both Catholic Charities Community Services and Lutheran Social Services of the Southwest present themselves, we can see in their mission and vision that they are committed to helping all people regardless of religion. But their limits in humanitarianism help us understand that the resettlement agencies examined here display a paternalistic tendency. While providing the services determined and budgeted by the state, they do not need the consent of refugees to help and make them self-sufficient from the day they arrive, and they do not question the nature of the state-oriented services designed for refugees. At this point, it would be appropriate to focus on the paternalism that emerges in the following section.

3.2 Faith-Based Paternalism

The practice of compassion is associated with the idea of "a shared humanity" and allows us to recognize how it bases "a moral authority" on the global form of humanitarian governance (Barnett 2011:234). We can find this issue of the shared humanity and moral authority in the understanding of faith-based organizations. For instance, Catholic Charities Community Services recognizes refugees as "brothers and sisters" who should be helped in "Christ". They find the reason in the history of their faith tradition as "Joseph and Jesus were seeking a better life away from prosecution and safety as well" (Catholic Charities Community Services 2021d). In a similar vein, Lutheran Social Services of the Southwest invites the public to help and support refugees in response to "the call to love thy neighbor" (Lutheran Social Services of the Southwest 2021c).

This type of humanitarian action does not involve questioning the nature of their humanitarian action or developing a critical approach to better advocacy, this does not mean that they are far from a political nature. But the source of the commitments of these agencies is primarily fed by faith-based paternalism which means in the words of *Barnett*:

> "Faith-based paternalism exists when confidence derives from preternatural commitments that leave little room for doubt, most obvious when claims to know better cannot be challenged by empirical evidence. These nearly foundational claims help orient the self in relationship to humankind and the cosmos. Religious theology has this characteristic." (2012:505)

If we take a closer look at the function of resettlement agencies as faith-based organizations through faith-based paternalism, two important facts appear within a framework in which the empirical facts behind problems and issues that refugees mostly likely face are rendered invisible in a religious form: First, in the process of constructing the effort to build volunteerism, refugees are seen as subjects who need help and deserve compassion within the structure formed by the religious moral authority referring to the call to love your neighbor. Second, in the relationship with the federal state, refugees emerge as subjects, whose consent is never taken into consideration before humanitarian action, who must be integrated into the labor market. What can be understood from consent here in terms of paternalism implies what is good for someone, who is under the influence of the authorities. In other words, paternalism takes the form of intervention for someone's good as *Barnett* explains here:

> "Paternalism is the form of power most familiar to humanitarians. Humanitarianism is the desire to relieve the suffering of distant strangers. Paternalism is the act of interfering in the lives of others, often without their permission, on the grounds that such interventions are for their own good." (2011:233).

As a point where the issue of public interest to which this study frequently refers to the philanthropy discussion, is related to paternalism, I can reach the following brief conclusion here: What is good for refugees in the eyes of the state and the religious moral authority is also good for the public good. In other words, the responsibility of the refugees in the envisage of the US refugee admission program and the provision of the public interest for the society pass through ignoring the consent of the refugees. Therefore, the political authority of the United States and its global paternalistic approach should be accepted by non-profit organizations and applied flawlessly in practice. This is where the power of the refugee admission program is decisive in the relationship between the federal government and faith-based organizations.

It is resettlement agencies as faith-based organizations that intervene in the lives of refugees and spend the money given by the state for them, identify where they will live before they arrive in America, and find them the job they will have and start the life to be self-sufficient in the United States. To put it succinctly, it is the state that knows what is best for refugees, and it is these organizations that implement what is best in the refugee admission program. On that note, it would not be incorrect to say that these organizations are vital organs of humanitarian governance, which function as "a machine of intervention on behalf of humanity" and which employ "an emancipatory ethic" in advocating "the interests of the target

community". In doing so, it takes for granted that "the consent of people" is not to be obtained since it is already based on the rationale of "serving their interests" or on the fact that "it is known what is best for them" (Barnett 2012: 486). At this very point, paternalism appears as care and domination, as *Barnett* (2012) points out, for any humanitarian aid or service done without asking for people's consent or considering their preferences in the form of an emancipatory ethic.

The programs, the reception and placement program, and the matching grant, provided by the hand of resettlement agencies and their efforts to support refugees through volunteering, can of course be handled through the variables of care and domination to a certain extent. However, in the context of humanitarian governance here, the point where their paternalistic character crystallizes is how the policy of self-sufficiency is implemented in practice. As *Barnett* points out, the intervening nature of paternalism is not compatible with the "consent principle", thus risking the dependence of institutions or humanitarian organizations on another authority or working with "implied consent" in the case of affected populations such as refugees (2012:495). Thinking through this last point, I should say that both organizations here are in a 'humanitarian effort' to assume and receive the tacit consent of refugees to ensure their participation in the labor market. They know that in this relationship with the federal state, they must do their due diligence to gain or build that consent.

4 Conclusion

This study presents an analysis of philanthropy and paternalism in scrutinizing the operation of the refugee resettlement system in the United States to contribute to the literature which examines the case of the resettlement agencies through the analysis of self-sufficiency policy in general. In doing so, the first of the underlined issues is that the resettlement agencies are essential organs of the non-profit sector and provide services to refugees and such an organizational operation is completely part of humanitarian governance in which 'humanitarianism, faith and moral progress' coexist (Barnett 2011).

As in the welfare policy indicated by *Benson* (2016), the purpose of the services by the resettlement agencies, which are promoted and sustained by both the state and the prevailing religious tradition, is to provide a public good. Meeting the requirements of the cooperative agreement and the moral obligation, the agencies also complete processes such as specialization, rationalization, and bureaucratization in the form of acquiring professional qualifications. Without the official

recognition of the origins of problems faced by refugees, the sole purpose of the agencies here arises to provide predetermined services to refugees in pursuit of maintaining the sustainability of funds provided by the state and voluntary activities. As such, they are actors in the practical logic of humanitarian governance which identifies and meets 'needs' rather than dealing with origins or problems.

On this basis, the charity activities and volunteer activities of the agencies gain importance in obtaining public support. It is a process that while serving the public good, the agencies construct refugees as subjects to be helped and supported and employs the components of moral progress as love, compassion, and care as part of religious discourse to call people for help. Along with there being no advocacy at the level of rights in nature of such action, voluntary contribution is essential to their philanthropic actions.

The funds provided by the state are important in recognizing both what is required of the resettlement agencies in practice and how the government-oriented demands place limits on their philanthropic action. To put it bluntly, the relationship between the agencies and the federal state exists to transfer the state's vision to the agencies in the implementation. As *Benson* (2016) indicates the term devolution of authority, also implies transferring authority to the agencies in the refugee admission program. Considering the spread of power in practice through such devolution of authority, the agencies also inherit paternalistic tendencies, and the area where they build their paternalism becomes the policy of self-sufficiency.

The self-sufficiency policy, whose conditions are determined within the framework of the Refugee Act of 1980, makes it necessary for refugees to be placed in entry-level jobs as soon as possible and to reduce their dependence on the state assistance. As *Benson* (2016), *Benson and Panaggio* (2019), and *Frazier and van Riemsdijk* (2021) underline, this is the impact of a general neoliberal expansion on refugee policy. In this regard, it is not incorrect to state that it is the process of inclusion of refugees in the labor market as cheap labor and that such a process takes place in a paternalistic form. As a requirement of the refugee admission program in the United States, the resettlement agencies refer and place newly resettled refugees in entry-level jobs to make them self-sufficient in the possible shortest timeline; in this way, refugees are expected to earn a minimum wage and to start their new life in the United States.

At this juncture, humanitarian governance comes out in a way that is essentially related to the issue of consent, which often manifests itself on a global scale. In another saying, refugees must work in entry-level jobs regardless of their personal preferences and priorities to become self-sufficient persons in the United States. Consent of refugees is not asked for and taken into consideration in any

phase of this process whereas they are free to refuse existing benefits and not to accept offered jobs, but this eventually pushes them to take the risk of not being able to create an alternative path to their new destination. Here, the state power turns into the power of the resettlement agencies in the humanitarian implementation and exists as a decisive force on refugees.

Refugees thus take their place and gain awareness of expected responsibilities in the system as subjects who need to be helped on the one side, and who are responsible individuals who must work to survive on the other side. This is precisely the process by which state paternalism is transformed into a faith-based paternalism in practice by the hand of the resettlement agencies since their humanitarianism can no longer be thought of without faith and moral progress, nor can it be thought of outside of this power relationship. With faith-based paternalism, the agencies become the nodal point where all these intertwined power relations are crystallized.

Last but not least, the boundaries of the resettlement agencies' movement between philanthropy and paternalism are determined by the policy of self-sufficiency. These agencies, which do not tend to develop an advocacy movement in terms of refugee rights as 'voluntary' and 'free' organizations, incline to make use of faith tradition to strengthen their paternalist tendencies and positions. In this sense, they welcome refugees, whom they call sisters and brothers, in the moral obligation of a faith-based paternalism that leaves no room for contradiction. On this basis, the agencies take a role not only as functional organs of the non-profit sector but also as actors to actively reproduce the self-sufficiency policy. However, the capacity of humanitarianism and humanitarian identities required for the development and renewal of the system is not dependent on the predetermined or fixed nature of faith-based paternalism, but on the contrary, it depends on the potential to build a voluntary and right-based movement that can express and represent demands more freely in favor of refugees and increase its effectiveness in the implementation.

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PhD Candidate at the University of Arizona and Volunteer for Resettlement Agencies, June 2015, Tucson, Arizona, the US
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The Unique Prosecution in the British Pitcairn Islands

Wang Zheng and Qin Bo

1 Introduction

Pitcairn is the last British Overseas Territory in the South Pacific. It is a quasi-state polity and the smallest political entity in the world. The Pitcairn Islands group lies in the South Pacific Ocean. The research focus of Chinese Area Studies has expanded to include areas like the South Pacific, Asia, Africa and so on, so this chapter has adapted to the research changes of domestic Area Studies, complementing ongoing research of the South Pacific.

Pitcairn's Unique Prosecution[1] revealed the long-term practice of sexual activity between adult males and underage girls on Pitcairn, bringing Pitcairn to worldwide attention. This event has become a major turning point in Pitcairn's history. Since then, Western academics have carried out research centering on the legal aspects of the prosecution. Therefore, this chapter selects Pitcairn' Unique

[1] Western researchers refer to this prosecution with different terms; some call it "Pitcairn's Sexual Abuse Prosecutions", others call it "Unique Operation", while this thesis will refer to it as "Pitcairn's Unique Prosecution".

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Prosecution as its research object to explore the clash of civilizations and the structure of relationships beyond the prosecution between the West and the non-West, mainland and islands.

A broader and more comprehensive understanding of Pitcairn's Unique Prosecution will be gained from this perspective through this thesis. This thesis may provide a new explanatory perspective on this issue and complement the doctrinal understanding of those relatively isolated and small human societies like Pitcairn.

Islands take on form through geology, take on life through biology and take on meaning through culture. (Fischer 2012) Pitcairn is a group of islands possessing a unique geographic location and a closed social culture. At the end of the twentieth century and the beginning of the twenty-first century, Pitcairn's Unique Prosecution drew much attention to Pitcairn from the wider world. This thesis will examine the research on Pitcairn's Unique Prosecution that has been done to date.

In terms of the legal issues of the prosecution, Western scholars have expressed their opinions from the following perspectives.

First, some have studied in depth the disputed legal issues arising in the process of the prosecution. For example, Sue Farran (2007a) clearly outlines the disputed points over this issue and critically considers problems within the prosecution, including, how the courts and the Privy Council determined that Pitcairn Islanders are British subjects, which law is applicable to Pitcairn, and what are the consequence of that. That is to say, Sue Farran objectively analyses the rationality and reasons for British to "interfere" in Pitcairn's issue by examining the legal premises of the issue. Meanwhile, Fran Wright (2008) discusses the three challenges in the prosecution process raised by Defense Counsel and the responses of Britain's Court to them. These questions all concern the legality of whether Britain had the right to judge Pitcairn's issues by British law. Thus, we can learn that the proceedings of the prosecution were not smooth due to issues around its legal foundations. Dawn Oliver edits eight papers in *Justice, Legality, and the Rule of Law: Lessons from the Pitcairn Prosecutions* (2008) from the legal point of view, including many related issues around Pitcairn's Unique Prosecution, including the nature of law, morality and the legal system; the nature and exercise of colonial power, authority and responsibility; and aspects of public international law, the rule of law, and questions of blame and liability in criminal law. What is worth mentioning particularly is that the contributors conclude that the academic enquiry should reach to all corners of the world, which is in line with the authors' idea about Pitcairn.

Second, during the Pitcairn Unique Prosecution, some outside journalists recorded the process of the Unique Prosecution on location. For example, Kathy Marks (2008, 2009) is one of the only six journalists to have gained access to the

island and she uncovered a Pitcairn society unknown to the international public, calling it a "paradise lost". As a result, many people gradually accepted Pitcairn as a "paradise lost" instead of a "paradise" due to the sexual abuse prosecution.

Third, due to the unusual facts around Pitcairn's Unique Prosecution, people are interested in examining the legal construction of Pitcairn. For example, A Preliminary Legal Bibliography of Pitcairn Islands (Eshleman 2014) discusses the legal construction and the related research on the legal aspects of Pitcairn, showing that more attention was paid to Pitcairn's law construction after the Unique Prosecution than before, which enriches our research materials and reflects the influence of the prosecution.

Fourth, and in contrast, some have questioned the fundamental legality of the law applied by Britain for the Pitcairn's Prosecution. For example, Fran Wright discusses how the prosecution was carried out in several papers on the disputed points in the proceedings and the shortcomings of British laws applied in the prosecution. In the paper *Pitcairn—the Saga Continues* (2005), Fran Wright outlines the judicial process during the prosecution and argues that the Court failed to adequately address what British law applied on Pitcairn and other issues arising from it. In 2008, Fran Wright continued to stand by Pitcairn by arguing that the reasons given for upholding the convictions were inadequate and the criminal law on Pitcairn is uncertain (Wright, F. 2008). In 2009, Fran Wright discussed the questions raised by the islanders regarding the laws used in the prosecution to further address the potential unreasonableness of the prosecution. From this perspective, we can see that the Unique Prosecution is different from many other criminal proceedings in the issue of its legal basis, which demonstrates the uniqueness of this prosecution and explains why so much attention has been paid to it.

Lastly, some scholars examine the legality of the prosecution from the perspective of human rights. For example, Sue Farran writes another two articles aimed at explaining the legal issues in relation to human rights on Pitcairn's Unique Prosecution. The first (2007), *The Case of Pitcairn: A Small Island, Many Questions* focuses on the human rights dimension to figure out the legality of this prosecution and suggests that the "interference" of Britain in Pitcairn's Unique Prosecution, reflecting the former's colonial control over the latter, shows the inequality of resources between the two sides. The second (2007), *Conflicts of Laws in Human Rights: Consequences for Colonies* evaluates the influence of the upgrade in Britain's human rights law on the British Overseas Territory of Pitcairn, such as the establishment of the Pitcairn judiciary, in the light of the European Convention on Human Rights. Anthony Trenwith (2003) seeks to examine the proceedings from the perspective of human rights law, taking into account those issues of procedure, fairness, constitutionality and custom. Trenwith has

observed that human rights laws have given everyone in the world a basic right to a fair trial and that the disputed issues arising from Pitcairn' Unique Prosecution should be considered under this principle.

Although a small and isolated islands group in the South Pacific Ocean, developing communication links to the outside world are enabling Pitcairn to becoming closer to other related political entities. Some researchers note that the relationship between Pitcairn and Britain is reflected in the Unique Prosecution. Sue Farran (2007c) further explores the nature of British dominion over Pitcairn and compares it to the Court's decisions over the Crown's exile of the native population of the British Indian Ocean Territory (the Chagos Islands). Maria Amoamo (2013) briefly narrates the historical development of Pitcairn and the treatment received by it from the British government but without a detailed discussion. As mentioned above, Sue Farran (2007) discusses the nature of British dominion over Pitcairn in terms of the prosecution process. Due to the influence and importance of Pitcairn's Unique Prosecution, these academics have considered the relationship between Pitcairn and Britain, demonstrating the need to consider the role Pitcairn plays on the world stage in light of the prosecution.

Separate to the ongoing discussion about the disputed legal points of the prosecution itself, other researchers have analyzed the main foreign media's opinions on the prosecution. Drawing on these, they put forward their opposition to the different aspects of Western opinions. Through the literature review, the author has found that most of the leading Western newspapers were questioning the validity of the prosecution out of consideration for the survival of Pitcairn. Keith Tuffin and Melanie Simons (2008, 2011) analyzed the attitudes of two leading New Zealand newspapers—The Dominion Post and New Zealand Herald—towards Pitcairn's Unique Prosecution through discourse analysis and discursive psychology respectively. They show that New Zealand's media field stood by the interests of Pitcairn in arguing the negative effects of the Unique Prosecution imposed on Pitcairn. For example, they believed that the prosecution would destroy Pitcairn's community and culture, and that the prosecution showed the power inequality between Pitcairn and Britain. However, they do not agree with the New Zealand media's opinions, instead supporting the legitimacy of the prosecution by Britain and emphasizing the immoral nature of the islanders' deeds. In addition, Lisa Fletcher (2008) examined how the Australian, New Zealand and British newspapers constructed an image of Pitcairn and its society, analyzed the reports of the prosecution, measured the force of linguistic and textual norms for people's cognitive construction of a place, and pointed out that the wide coverage of Pitcairn's Unique Prosecution increased its influence on Pitcairn. In contrast, a master's thesis (Robinson, 2004) also concentrated on the western newspaper

coverage of the Unique Prosecution from the perspective of feminism, arguing that the press often constructed the whole issue of Pitcairn sexual abuse as a matter of collective cultural deeds, rather than of individual sexual consent. So we see that the Unique Prosecution was widely covered by the foreign media, and the opinions of that media inclined to the view that Pitcairn was weak while Britain was strong by considering the cultural factors of the uniqueness of Pitcairn. Western researchers tend to stick to the position that Pitcairn islanders should be treated as any citizen under the standards of modern civilizations. The author will not support or discuss the nature of the sexual activity of Pitcairn's men but will analyze the underlying issues and consider the potential positive effects of the Unique prosecution rather than the negative ones.

As outlined above, the nature of Pitcairn's Unique Prosecution and its related coverage have raised the profile of Pitcairn around the world leading to the following research based on the Unique Prosecution emerging.

From one perspective, moving into the twenty-first century, the image of Pitcairn became more distinct due to the Unique Prosecution on Pitcairn in 2004 and people's sense that Pitcairn underwent a change from a "paradise" to a "paradise lost". As a result, there emerged some research on the image of Pitcairn in foreign countries after the prosecution. In the paper *(de) Constructing Place-Myth: Pitcairn Island and the "Bounty" Story*, Amoamo (2013) uses textual analysis to analyze how literary works have constructed the image of Pitcairn as a "utopia" or "paradise". Through the author's juxtaposition of the internal and external representation of place, the real image of the place is revealed by challenging the literary image of Pitcairn, showing the historically-rooted influence of literary works on human cognition. From this research, we can grasp the contrast between the literary image and the real image of Pitcairn. Moreover, Martin Gibbs and David Roe (2016) adopted Pitcairn's history as the basis for positioning the image of Pitcairn with a specific focus on the perceptions and responses of the colonists to their new home. In contrast, Christine K. Johnson's (2014) doctoral dissertation *The Identity of Place: Pitcairn Island in Cultural and Historical Geography*, holds the view that it is geography rather than history that has made Pitcairn into Pitcairn. She identifies a changing image of Pitcairn, with regard to western ideals and constructions, and is the first to make a definition of Pitcairn through its geographical features. This dissertation is of great referential value for positioning Pitcairn more accurately through its geographic position.

A second perspective, in the aftermath of Pitcairn's Unique Prosecution, is that Western academics now pay more attention to the influence of the prosecution on the sustainable development needs of Pitcairn Islands. For instance, Amoamo (2012) analyzed the form and development of Pitcairn. Additionally,

from the point of view of economic development, three articles have been written by Amoamo (2010, 2011 und 2017) analyzing tourism as the driving developmental force of Pitcairn. Terry Dawson (2012) emphasized the exploration of marine resources and plants around Pitcairn for economic reasons. In addition, faced with the population problem on Pitcairn, Amoamo (2015) studied the measures for encouraging its diaspora for Pitcairn's long-term development, but the results were not good. As a small community, the contribution of Pitcairn to the world's cultural diversity should be stressed. In addition, the language of Pitcairn was researched by Philip Baker and Peter Mühlhäusler (2013), especially the influence of the mutineer Edward Young on Pitcairn's language. Another paper *Inside(r)-Outside(r): Linguistics, Sociology and the Micro-territoriality of Maritime Space on Pitcairn Island* (Joshua 2018) explores the relationship between the Pitcairn language, spatial relationships and cognition. Philip Hayward (2006) investigates the development of music and dance cultures of the island and its expression of the broader issues of cultural identity. Other studies of the culture of dance and music on the island have led to calls for the protection of its cultural varieties (Hayward 2010). The Marine Biodiversity in Pitcairn Islands is also of great importance for local development (Alan 2014).

Pitcairn's Unique Prosecution and the Conflict of Civilizations

On 29 September 2004, the British state held one of the most unusual prosecutions in its history in the Town Hall of Pitcairn. Many of the Pitcairn's men had been accused of sexual crimes against children. This prosecution can be seen as a clash between different ways of life that has had long term implications on Pitcairn. The prosecution demonstrated the control exerted by the colonial power in shaping the ethics and jurisprudence of the frontier islanders in the most frontier regions of the former empire, and it was also an important part of the process of modernizing the island in the mind of the colonist. This section serves to elaborate the history of Pitcairn's Unique Prosecution, including the events that led to the prosecution, its process and result, and how the occurrence of the prosecution can be seen as a consequence of the conflict between Pitcairn and Britain.

Pitcairn was under the jurisdiction of senior British officials in New Zealand in 1999 who occasionally visited the island to conduct fieldwork. In 1999, Gail Cox, a female police officer from Kent in the United Kingdom, was sent to Pitcairn by the British government to organize community policing training for the islanders. Initially, in 1999, the 13-year-old daughter of an island outsider told her mother that two of her classmates, both minors, had had sex with a 25-year-old man but they were afraid to tell anyone else about it. The mother was shocked by this news and informed Cox of this allegation. After receiving this complaint,

Cox asked for help from the British authorities. Britain and the related countries pooled resources to investigate the issue. From then on, the indirect resistance of the two girls to the investigation revealed the long-term influence of events on Pitcairn, leading to the long and difficult investigation. In this way, the 200-year-old history of sexual activity between island males and underage girls on Pitcairn was discovered and Pitcairn's Unique Prosecution was launched (Watkin 2003).

Dilemma: The Long Prosecution Process

After the disclosure of the Pitcairn allegations, Britain launched an investigation into the allegations with the aim of uncovering the truth and prosecuting the offenders as they would in any British territory. However, during the prosecution process, many obstacles were encountered that prolonged the process and which demonstrated the conflicting factors at play in the prosecution.

The first dilemma concerned the men who had been accused. Through the investigation, allegations against seven adult men on the island were uncovered. These accused men comprised one third of the island's labor force at that time. The allegations related to 21 counts of rape, 41 counts of indecent assault and two counts of aggravated indecent assault on children, and all on girls who were under the age of 14. The primary economic activities on Pitcairn were related to the sea, and fishing in particular. Male labor was essential for these activities and so for the proper functioning and development of Pitcairn's society. This raised an issue for the prosecution of how to balance the decisive role of the accused island men in island life and yet deliver a fair judgement.

In addition to those seven accused men on the island, there were another six accused men who had left Pitcairn. They were subject to 32 charges, and some of which dated back over 40 years. (Angelo and Townend 2003) The number of accused men involved increased the difficulties facing the prosecution. In order to fully investigate this issue, the British, New Zealand and Australian governments all sent judicial officers to conduct a joint investigation, interviewing women who had lived on Pitcairn for over 20 years and all the men involved. They found that sexual activity between adult men and underage girls was a long-standing island 'tradition', a discovery that caused uproar in Western public perception.

Another dilemma the prosecution encountered were the controversies and difficulties raised over whether Britain should apply its own mainland law to Pitcairn.

For the prosecution, the UK applied the *British Sexual Offences Act 1956* to sanction the offenders as there was no comparable act in Pitcairn's law. However, due to the lack of British Government administration on Pitcairn, the Pitcairners were unaware of this Act before the discovery of the events leading to the pros-

ecution. Arguably, in relation to the principle of certainty, a person should not be charged with or convicted of a criminal offence if he or she had no knowledge of the criminal law or were uncertain about it. Although Wright analyzed that uncertain law is not always unenforceable, the reasons given to men of Pitcairn for upholding the convictions were inadequate. (Wright 2008). On that basis, the law applied in the prosecution has been questioned.

In a New Zealand parliamentary debate on Pitcairn's Unique Prosecution in 2002, MP Keith Locke argued for a restorative justice process in the prosecution to soften the impact of British criminal law on the island, given the vulnerability and future development of it. He stated that "with the Pitcairn community being so small and intimate, the combination of a healing and restorative justice approach with appropriate trials makes a lot of sense." (Angelo and Townend, 2003).

Restorative justice is the term used as a contrast to retributive justice. In criminal cases, the traditional approach is retributive justice where a person who is found to have broken the law is subject to punishment that is in proportion to the crime. This procedure is a widely accepted and recognized judicial process in almost all the countries and cultures. (Fletcher 1999) While retributive justice primarily takes the offender's crime and the corresponding punishment into consideration, restorative justice is a principle of justice that emerged later, emphasizing systems or practices meant to heal the wounds inflicted on the victims, the offenders and the communities. (Donald 2003) has discussed the nature of restorative justice, with some arguing that it is a process and others insisting it is a theory. However, both sides share the same methodology of involving all parties in the judicial process. The victims, the offenders and the community members are involved in a tripartite effort to find solutions that promote restoration, reconciliation and harmonious relationships, or the best way to compensate for the crime. (Christian 2013) Thus, the difference between restorative justice and retributive justice lies in the participants, the purpose of the trial and the manner in which it is conducted. In addition, Howard Zehr (2002) highlights the differences between the two trial processes in terms of those leading questions. For example, in restorative justice, the questions are: Who is injured? What do they need? Whose obligations are these? What are the causes? Who is involved in the situation? What is the appropriate process for involving stakeholders in addressing the causes and rectifying the problem? In contrast, retributive justice asks: What laws were broken? Who has done it? What punishment should the offender receive? (Howard 2002) Pitcairn's Unique Prosecution has therefore adopted a restorative justice process inconsideration of the weakness of the island.

In conclusion, due to the dilemmas encountered in the prosecution, Pitcairn's Unique Prosecution lasted seven years from the time of its initiation in 1999 until the failure of the Defendants' final appeal in 2006, during which time it faced other difficulties such as the location for sentencing and the choice of judicial personnel. Following official consideration, Britain decided to hold the prosecution on Pitcairn and a local prison was built for punishment.

Outcome: The Controversies Over the Prosecution

Britain eventually concluded the prosecution and, once pronounced guilty, punished the accused island men. The court case began on 30 September 2004 and lasted for seven weeks. The trial resulted in all but one of the seven men, Jay Warren, being convicted. Steve Christian was convicted on five counts of rape on dates between 1964 and 1972. He was sentenced to a total of five years in prison. Dave Brown was convicted of six counts of sexual offences. He was given a sentence of 400 h' community work and two years' supervision. Len Brown was convicted of two counts of rape on dates between 1969 and 1972. He was directed to serve two years in prison on each charge. Dennis Christian, who was convicted of ten charges of sexual offences against girls aged between 12 and 14 on dates between February 1972 and March 1974, was sentenced to 300 h' community work and two years' supervision. Terry Young was convicted of six counts of indecent assault and one count of rape against the complainant who was under 16 years of age. He was sentenced to five years' imprisonment for rape and six months' imprisonment for indecent assault. Randall Christian was convicted of four counts of rape and five counts of indecent assault. He was sentenced to six years' imprisonment for rape and 12 months' imprisonment for indecent assault (Fletcher, 2008).

The outcome of the prosecution showed that Britain had achieved its intention of investigating and punishing the activities on Pitcairn. At the same time, the sentences of the islanders also present as very lenient punishment. On the one hand, as the suzerain state, Britain had enforced the adjudication and suppression of a particular local activity that was incompatible with the supposed universalism of Western morality and justice. On the other hand, it could be argued that Britain's flexibility, by its own standards, in its ruling was in line with its ambition to retain a stronger political position in the South Pacific. As Fran Wright above argues that it was a logical legal interpretation balancing the competing rights of the local society and the victims.

There have been extensive discussions conducted over the process and results of this process by Western academics and these have resulted in some disputed interpretations. The controversies center on the two points. The first one is

whether, as a British overseas territory with a high degree of autonomy, Pitcairn should have been subject to the law of the suzerain state in respect of the events that occurred on Pitcairn. The second one is that many Western scholars argue that the sentences were too lenient, arguing that the events on Pitcairn should be judged by the standards of British or Western society. These controversies and differing standpoints, reflect the conflicting factors at the center of Pitcairn's Unique Prosecution.

The Conflict Beyond Pitcairn's Unique Prosecution

Socials conflicts are not only related to the visible opposition of economic or military competition, but also concern the invisible battles between thoughts, values and systems. Sociology has enriched people's understanding of conflicts caused by certain differences between two sides. However, since the world has entered an era of relative peace and development, conflicts in the traditional sense have become less prevalent, in particular wars between countries or regions. Instead, more conflicts are now hidden behind social events. According to Social Conflict Theory, conflict may be interpreted as a struggle over values, scarce status, power or resources (Coser 1989). Thus, having examined the process of Pitcairn's Unique Prosecution, we can argue that it is rooted in conflict over the local practice of sexual activity between adult males and female children. Britain judged behavior on Pitcairn from its viewpoint that such activity is morally and legally wrong.

From this perspective, the key issue in Pitcairn' Unique Prosecution, is whether the activity should have been judged by British legal standards or whether different legal standards should have applied on Pitcairn. The dilemmas and controversies that the prosecution has encountered demonstrate the conflicting factors between these two viewpoints. These different views led to a wider social conflict between Britain and Pitcairn.

The Roots of the Conflict Beyond Pitcairn's Unique Prosecution

According to the Functional Conflict Theory, Coser divides the causes for social conflicts into two types. One is the material root, which concerns to the struggle over rights, status and scarce resources. Another is the non-material root, which refers to the differences over values (Coser 1989). Having discussed the facts of Pitcairn's Unique Prosecution, the author argues that the prosecution is the result and reflection of the conflict between Pitcairn and Britain. This chapter now goes on to examine both the material and non-material roots of the conflict.

Material Roots

Coser believes that the roots of social conflicts are both material and non-material, but he does not say which one is fundamental and which one is secondary to the formation of social conflicts (Coser 1989). He believes that any one of those roots can be the source of social conflict in social interactions. Thus, when it comes to the conflict beyond Pitcairn's Unique Prosecution, the author holds the view that both the material and non-material roots are essential to the conflict between Pitcairn and Britain. Moreover, the material roots for the difference in the perception of sexual practice on Pitcairn between some Pitcairners and Britain can be seen in the following two aspects.

In terms of the material roots of social conflicts, one that Coser puts forward is the struggle over scarce resources (Coser 1989). Thus, when it comes to the roots for the conflict between Pitcairn and Britain, the marine resources that Pitcairn possesses as a result of its unique geography should be considered first.

Pitcairn is a remote and isolated group of islands deep in the South Pacific, located in the south-east of the Polynesian Islands. It is one of the most isolated places on earth, but its administrative area is not small. This area is the last remaining British Overseas Territory in the South Pacific and a Non-Self-Governing Territory. Geographically, the islands lie between 124° and 130° West longitude and 23° and 25° South latitude. Pitcairn are separated to the northwest from the capital of the French Polynesian Islands of Tahiti, to the southwest by 5310 km from New Zealand, 6600 km from Panama, to the west from Mangareva (French Polynesia), and to the east from Easter Island. The nearest groups of islands to Pitcairn itself are the Gambier Islands in French Polynesia, which lie some 540 km to the north-west, and Easter Island, which is over 2000 km to its east.

Pitcairn consists of four small islands—Pitcairn, Henderson, Ducie and Oeno—with Pitcairn Island being the main island. Of these, Pitcairn Island is now the only inhabited island. Henderson Island is the largest of the four, enjoying World Natural Heritage status and being an important breeding ground for seabirds. Pitcairn runs north-west to south-east, and its total land area is 43.25 km^2, although Pitcairn Island itself has a total land area of less than five square kilometers. The Pitcairn Islands have a total population of around 50 people, (2018), and are mainly the descendants of the mutinous crew of the British ship Bounty and Polynesians. The language spoken on the islands is Pitcairn, which is a mixture of English and Polynesian from the eighteenth century.

Pitcairn is not bordered by any country or region and sits alone in the South Pacific. It can be argued that due to Pitcairn's remote geographical location, Pitcairn's society is unusually isolated, which is the premise for Pitcairn's closed

"traditional" culture. These geographical conditions mean that Pitcairn is far away from other people and has had limited communication with the outside world, contributing to the social conflict with Britain.

Pitcairn is not a sovereign state; it is the least populated jurisdiction in the world, a quasi-state polity, and the smallest political entity in the world in the regard of population. The capital of Pitcairn Island is Adamstown where all the inhabitants are settled. Pitcairn's combined land area is only about 50 km^2, but its Exclusive Economic Zone extends over 836.108 km^2, which is more than three times the size of mainland Britain. Britain is aware of the strategic significance of Pitcairn and intends to maintain control of the scarce and significant marine resources located there. This control is a root cause of social conflict between Britain and Pitcairn.

Another classic material root of social conflict put forward by Coser is the unequal distribution of status and rights (Coser 1989). The following section looks at the history and development of Pitcairn's status and political rights.,

Historically, Pitcairn has been settled by humans twice in their history. The first settlement was by Polynesians on Pitcairn and Henderson and took place before the fifteenth century according to archaeologists but later became extinct (Diamond, 2005). The second settlement happened with the arrival of the British ship Bounty in 1790. Prior to this, Pitcairn was rediscovered in 1767 by Captain Carteret of the British expedition HMS Swallow and named after Robert Pitcairn, one of his crew. British interest in this area began at this time.

At the start of the twenty-first century, Pitcairn had little by way of judicial history or related legal texts. Roberts-Wray states, "It is permissible to wonder how far English law has in fact been effective and it seems likely that the island's magistrates have never known much about it and have formed their own written laws sufficient for most purposes." (Kenneth 1966). Historically, there were few disputes resulting in judicial activities in Pitcairn society since its settlement. One of the few criminal cases that can be traced is a murder on the island in 1897 (the murder of two other islanders by the descendant of one of the mutineers), and Pitcairn was later brought under the jurisdiction of the British High Commission in the Atlantic. (Inc. Ibp 2017) In 1897 the first and only case of serious crime was committed on the island. It was the murder of his wife and children by an Irishman, Harry Albert Christian. Under the rules of the Pacific Council, Hamilton Hunter, the Judicial Commissioner for the Western Pacific, was sent to Suva on the H.M.S. Royalist to try the case and, after a short trial, Christian was found guilty and sentenced to death. He was taken to Suva and subsequently hanged in Korovou prison in 1898. This incident and the speedy manner in which the con-

vict was dealt with had a beneficial effect on the Pitcairn community. (Their general behaviour had improved markedly by 1901, thanks to the influence of James Russell McCoy.) The interest of the Suva authorities was also aroused, and Mr Simmons of Tahiti consequently strengthened his links with the island. Thus, with the turn of the century, the Pitcairn Island community began to move once again into another new era in its affairs under the supervision and guidance of the High Commission for the Western Pacific, replacing the Royal Navy, on whose captains the Island had for many years relied for advice and guidance.

Pitcairn remains under Britain's governance, but for more than 200 years, Pitcairn's links with Britain were minimal. Based on the previous analysis and discussion of the political form of Pitcairn, it is clear that Pitcairn, as an independent democracy, has the right to set its own legal norms, in accordance with the British approach and policy towards the Overseas Territories. However, the political status and power of Britain has always been greater than that of the Pitcairn Islands, and this has led to power struggles and conflicts between them. Why were the islanders so surprised by the attitude of the outsiders and claimed that Britain had invaded by force? One of the main reasons for this is the long-standing British neglect and failure to reach out to the island politically and legally, which has led to the perpetuation of this behaviour, and secondly, the rejection of outside interference and correction by the islanders to protect the survival and development of the island. This is the basis for some on Pitcairn to claim that they had not received equal political status and treatment as other British subjects and for the idea that the Unique Prosecution represents a wider social conflict.

The political connection between Britain and the Pitcairn Islands can be divided into the following historical stages, from which it can be seen that Britain has long ignored Pitcairn's society. It began when the British mutineers landed on Pitcairn in 1790. It was only in 1808 that Pitcairn was rediscovered by the outside world, but it was not given much attention by Britain. Pitcairn's first Constitution, drafted by Captain Russell Eliott, was promulgated in 1838 to formally incorporate Pitcairn Island into the British Empire (Eshleman 2011). Furthermore, the implementation of the *British Colonial Act of 1887* officially classified Pitcairn as a colony of the British royal family. In 1897, the Western Pacific High Commission was created for governing the Pitcairn Islands due to its legal issues (Eshleman 2011). In this whole process, it can be seen that Britain had an established political affiliation with Pitcairn from 1838, but since then, British administration of Pitcairn had been minimal with little political or judicial training, if any, which is the basis of claims of the weak political status and rights of Pitcairn.

In conclusion, two material root causes can be identified for the social conflict between Britain and Pitcairn. One is the Pitcairn's unique geographical location

that contributes to its isolation from the outside world and Britain's interest in its scarce marine resources. The second is Britain's hands-off administration.

Non-material Root: Pitcairn's Value and its Historical Origin

Coser believes that the non-material root for social conflicts is the difference on values between groups (Coser 1989). Thus, this section will elaborate on the origins of Pitcairn's social values, which are unique to Pitcairn.

Pitcairn society is literally descended from the crew of sailors who deserted the British Navy more than 200 years ago. This handful of individuals created the social and ethical basis of society on Pitcairn that is at the root of the cultural conflict between Pitcairn and Britain.

As a small maritime island nation in Western Europe, Britain has historically taken good advantage of the fact that it is surrounded by the sea. As early as the ninth century AD, Britain has begun to build a navy to compete for maritime power and to expand the scope of its new Kingdom. From the sixteenth to the nineteenth centuries, the development of the Royal Navy played a decisive role in Britain's rise from a relatively weak island nation to a European power, and then from a European power to global hegemony (Ni 2015). In 1667, Charles II of England's first initiative of his reign was to rebuild the navy. Since then, the nature of the British Navy has changed from the personal property of the monarch to a national institution but is still called the 'Royal Navy'. The Royal Navy's service in naval warfare, maritime trade and geographical exploration helped Britain rise to global maritime supremacy. The Royal Navy was the key factor in Britain's global dominance from the seventeenth to nineteenth centuries. Other than money and weapons, the important factor in Royal Navy operations were its sailors.

The Bounty sailors' mutiny was arguably a forced choice at that time to a large extent. In a capitalist country where the weak are the prey of the strong and the classes are distinctly different, the ordinary sailor had always been in a position that the upper classes scorned. In the Age of Discovery, Britain adopted the inhumane practice of impressment (forced conscription) of sailors to ensure the proper functioning of the Royal Navy, a practice driven by hegemonic and capitalist interests. As the shortage of seamen in Britain became more pronounced after American independence, the British government extended its target to the American people, conscripting the maximum number of sailors within reach to ensure the maintenance of the vast Royal Navy system. (Liu 2016) The reasons for the lack of volunteer sailors are as follows. On the one hand, during their months at sea, sailors did not receive a steady supply of clean drinking water and fresh food, so they were susceptible to various diseases such as scurvy, dysen-

tery and tuberculosis due to the harsh conditions, resulting in illness and high mortality rates. On the other hand, in order to maintain discipline and ensure orderly operations on long sea voyages, the naval officers were very strict with their subordinates and the sailors in inferior positions on naval vessels were often subjected to horrific punishments (commonly the 'lash' or whipping) by their superior officers for the slightest mistake. (William Bligh, year unknown) As a result of the harsh living conditions, shipwrecks, and the brutal rule of ship's captains during the voyage, mutinies by sailors were common.

Secure food supplies have traditionally been a matter of national survival and development, playing a vital role in national governance. Food and related agriculture issues profoundly constrained and influenced the British Empire's social development and its global hegemony. As the Chinese saying goes, "Before the troops move, the food goes first", and this was applicable in the case of the British Empire's ascendancy in the eighteenth century. In its drive for maritime hegemony and the continuous growth of the Royal Navy, the United Kingdom defeated Spain's previously dominant fleets in the sixteenth century and then defeated the rival naval and colonial power the Netherlands in the seventeenth century. It was not until the mid-eighteenth century that Britain finally defeated France to become the dominant European power and achieve global maritime domination and hegemony. By this time the expanding British colonies had spread around the globe to become the 'Empire on which the sun never sets'. In the early part of this period, the Atlantic slave trade was at its height, and Britain profited handsomely from it, accumulating a large amount of raw capital, material and labor for the British Industrial Revolution of the nineteenth century. The market in Britain expanded dramatically after the Industrial Revolution and the demand for labor increased rapidly. Black slaves were active as cheap labor in the major British colonies and contributed to the success of British capitalism. The rapidly developing economy with a growing laboring class let to issues around food supplies for the laborers. During the eighteenth century, famine struck the British colonies in the West Indies and large numbers of black slaves had to survive on the sugar cane they grew, leading to a dramatic increase in the death rate of black slaves in Jamaica. In order to solve this kind of dilemma and at the suggestion of an English naturalist, Joseph Banks, Britain turned to Tahiti where there was a common kind of edible plant, the breadfruit tree (artocarpus altilis).

The breadfruit tree is a tropical crop native to the Pacific Islands and elsewhere, belonging to the mulberry family. It is evergreen in all seasons. It bears a large fruit crop and there are often hundreds or even thousands of 'loaves' hanging from a single tree at maturity as if it were baked yellow. The average weight of each fruit is between 0.5–1 kg, with the heaviest reaching over 10 kg. Its flesh

is full, sweet, and very nutritious, containing high levels of starch and rich in vitamins A and B with small amounts of protein and fat. When roasted and eaten, it tastes like bread, hence the name Bread Tree. Following Joseph Bank's advice, Captain William Bligh was appointed by the Admiralty on 17 August 1787 to be in charge of a mission to transport breadfruit tree saplings to the West Indies for transplanting. On 23 September of the same year,[2] the British Navy ship HMS Bounty was dispatched by the Admiralty to transport breadfruit saplings under the command of Captain Bligh. The Bounty set out on her mission with a crew of 46 (including Captain William Bligh, 11 non-commissioned officers, 32 sailors and 2 gardeners to look after the breadfruit saplings) and over 200 tons of supplies. However, unlike most ships that went to the sea, HMS Bounty did not return to Britain but disappeared in the South Pacific, ending up on the small and isolated island of Pitcairn.

With the mission of transporting a new food source to feed slaves, Bligh's original planned route was south-west through the English Channel, across the Atlantic and around South America to the South Pacific. However, due to the bad weather, the Bounty was at sea for about a year until she finally reached her destination in Tahiti, an island with a pleasant climate and abundant supplies, in October 1788 (Bligh, year unknown:). It took almost six months to locate and collect the breadfruit saplings. However, the crew had grown accustomed to the comfortable living conditions on Tahiti and was reluctant to return to the harsh life at sea. The captain was concerned for the success of his mission but decided to continue on 4 April 1789. The crew, unable to disobey his orders, reluctantly set off. The contrasting living conditions and the captain's brutal management led to an outpouring of resentment within the crew. On 28 April 1789, more than half of the crew mutinied and took the captain hostage under the leadership of the ship's second-in-command, Fletcher Christian. Captain Bligh and the rest of the 18 sailors who had not mutinied were thrown into a small boat and set adrift in the middle of the ocean.

The penalties for mutiny, assaulting an officer, and murdering or abandoning a crew member in Britain were quite severe. In view of this, Christian and his group drifted around the South Pacific for some time in search of a secluded and safe place to stay in order to avoid the discovery and punishment by the British

[2] The departure time is disputed, some say April 1787. [Philip Baker & Peter Mühlhäusler. The Creole legacy of a bounteous mutineer: Edward Young's Caribbean contribution to the language of Pitcairn and Norfolk Islands. Acta Linguistica Hafniensia, 2013: P171] The author uses the memoirs of Captain Bligh as the reference for the exact departure time.

authorities. During this time, they returned to Tahiti twice, where 16 of the crew remained, before the remaining 8 mutineers decided to follow Christian to search for an unknown refuge. After living with the Tahitian islanders for some time, some of the men had taken Tahitian women as partners, which formed the basis for the descendants of the Bounty crew on Pitcairn today.

Christian came across reference to a small island called Pitcairn in one of Bligh's books, so they set sail to find it in September 1789, accompanied by seventeen Tahitians—six male, eleven female and one female child. However, their search was unsuccessful for some months because the map had been incorrectly marked. It was not until January 1790 that they rediscovered the island. The Bounty was immediately anchored and the mutineers decided to settle there. In order to hide from British search parties, they burned the Bounty in a bay of Pitcairn Island, which since then is named Bounty Bay. This is one reason why the British government later failed to find the rebels, which allowed the mutineers to live in peace and isolation for some years. Meanwhile, by March of the same year, Captain Bligh and the remaining loyal crew of the Bounty had made their way back to Britain. When he returned, Captain Bligh presented a detailed record of the story of the Bounty mutineers to the British authorities.

Pitcairn was in complete isolation for nearly 25 years from 1790 until it was rediscovered by chance by a ship of American whalers and by the British Royal Navy, in 1808 and 1814 respectively. Yet the fugitives, who had escaped the British search, had not escaped death among themselves. Christian and his companions, having burned the Bounty, were never able to leave the island again. At first, they lived together peacefully. However, there was a numerical imbalance between men and women and if the nine British sailors wanted to settle permanently on the island, they would need to father children. The only women who on the island were the eleven Tahitian women who had come with the Bounty on her last journey from Tahiti. Inevitably, disputes arose between the men, British mutineers and Tahitian alike, over who would get to dominate the women. The disputes eventually resulted in murder, possibly worsened by conflict between the self-styled "civilized" white mutineers and the "barbaric" Tahitian men. The killings resulted in the deaths of five white mutineers and all six Tahitian men around 1793 (Robert Irving and Terry Dawson, 2012).

As a result of the mutual killing, only four British mutineers and ten Tahitian women remained after five years. The remaining white men continued to struggle with life on Pitcairn. Two became alcoholics, one of whom jumped off a cliff to his death, and the other was killed for threatening the other two surviving men. The only two male survivors left were Edward Young and John Adams, and Young became the leader of the tiny community until he died of asthma in 1799.

At this point, the only remaining survivor of the original mutineers was John Adams, who was the only adult male on the island at that time. John Adams led 10 women and 23 children to continue living on the island by using the original ship's Bible to teach them English and convert the group to Christianity. (Gibbs and Roe 2016) It was only then that a relatively peaceful and harmonious life was ushered in for Pitcairn.

As can be seen above, the problem of gender imbalance was central to the society on Pitcairn from the very beginning of the community's existence. The was to be later used as a possible explanation for the sexual activities on the island.

In conclusion, this history has become a source and a backdrop for the lives of successive generations of Pitcairn islanders. The secretive history and isolation of Pitcairn have allowed this microcosm of humanity to form and develop its own understanding of its place in the world. The history of the Bounty is at the heart of Pitcairn's relationship with Britain—local and central, subordinate and suzerain—and the way in which it has been governed by Britain has had an impact on Pitcairn's development. The Bounty is ultimately the cause of Pitcairn's Unique Prosecution, providing the historical and social background to it. The claimed historical sexual norms of Pitcairn were very different from the sexual values of Britain and the wider world, which became an issue of contention during the Unique Prosecution and the wider conflict between Pitcairn and Britain.

Conclusion

As the main and fundamental discipline of area studies, anthropology has always attached great importance to the study of islands, and there is a long tradition of concern for and study of island societies and communities (Ma 2008). This is well illustrated by the series of island studies carried out by early anthropologists such as Hutton, Rivers, Seligman, Malinowski, Radcliffe Brown, Margaret Mead, Redmond Firth and others. This study therefore focuses on the Unique Prosecution in Pitcairn and delves into the background of the case and the conflict beyond it with the suzerain state. The island regions in the South Pacific were all colonized by the West, but the development of regionalism in the South Pacific has facilitated the independence of most of the larger islands, with a few ultra-small regions like Pitcairn still under the control of the Western powers. This chapter discusses the invisible conflict beyond Pitcairn's Unique Prosecution on the basis of the relationship between Pitcairn and Britain, providing a new research direction for further studies.

This chapter has argued that the Unique Prosecution can be seen as a conflict between Pitcairn and Britain. From this perspective, a new interpretation and

understanding of Pitcairn's Unique Prosecution has been carried out. Inspired by social conflict theory, this chapter has looked at the roots of that conflict and revealed the inevitability of it. At the same time, the author have analyzed the background to the events on Pitcairn, and have found that the essence of the social conflict is the difference between Pitcairn's traditional culture and modern British society. Through researching this subject, some reflections have occurred to the author based on this study. The first point is in relation to how wider society should treat small human communities like Pitcairn. In addition to offering a new perspective for understanding Pitcairn's Unique Prosecution, this research also integrates the small human society of Pitcairn into a doctrinal context, examining the collision and confrontation of cultural values between such small human societies and larger powers. This article sees the weak position of the cultural and legal systems of small human society. Therefore, society should attempt to treat small non-mainstream cultures and human groups such as Pitcairn Islands with an inclusive attitude, treating their social operation logic objectively and rationally and refusing to adopt a one-size-fits-all method to understand the operating logic of all the human cultures in the world. This is the anthropological reflection from this study. Meanwhile, at a time when globalization is becoming increasingly inevitable, Pitcairn should pay more attention to the improvement and refinement of its basic social systems. At the same time, in the process of modernization, Pitcairn needs to preserve and protect the things that form its identity, such as the everyday life of Pitcairners, their unique celebrations, material symbols and inner sense of belonging that make them Pitcairn Islanders.

From another perspective, Pitcairn's Unique Prosecution can be seen as the outcome of applying the British Western democratic model within the scope of Pitcairn Islands. This process reflects the development dilemma facing traditional human communities like Pitcairn. This study of the conflict has demonstrated the cultural and legal imbalance between a Western power and a tiny frontier community. Pitcairn's geography and population are too remote to generate any threat of backlash against the suzerain state itself. From this perspective, the unique prosecution of Pitcairn itself shows that British control over non-Western areas such as Pitcairn was not always tight. Britain's failure to truly export its culture and legal system to the island, and Pitcairn's own geographical peculiarities and the small size of its population, led to the incident. Britain's export of its culture and institutions, as strong as it may be, can be subject to certain insurmountable restrictions, and Pitcairn is a case in point.

Although the Pitcairn affair is not tolerated by modern Western society, its unique legitimacy has been somewhat tacitly accepted, in the meantime, the island be completely isolated from the habitual resonance of an increasingly

interconnected world system and the resulting cultural interaction. Its isolation is becoming more and more unsustainable in today's world, making a complete disruption of Pitcairn's cultural interaction with the outside world all the more impossible. The example of Pitcairn reveals to itself and to wider society the need to create a system of cultural understanding on how to balance autonomous local cultural values with the increasingly ubiquitous, pervasive and interconnected globalization of cultural values. Globalization on the one hand dilutes the boundaries of nation states and regions, seemingly blurring the sharing of interests and destinies, but on the other hand there exists a path that transcends Western colonialism and imperialism. Such a development path requires that the construction of political and legal cultures that are rational, resilient and compatible with local cultures.

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Western researchers refer to this prosecution with different terms; some call it "Pitcairn's Sexual Abuse Prosecutions", others call it "Unique Operation", while this thesis will refer to it as "Pitcairn's Unique Prosecution".

The departure time is disputed, some say April 1787. [Philip Baker & Peter Mühlhäusler. The Creole legacy of a bounteous mutineer: Edward Young's Caribbean contribution to the language of Pitcairn and Norfolk Islands. Acta Linguistica Hafniensia, 2013: P171] The author uses the memoirs of Captain Bligh as the reference for the exact departure time.

Human Rights in the Age of "Deconstitutionalization" or "Law-Inversely", as the Erosion of Publicness

Kasım Akbaş

1 Introduction

Social scientists deal with concepts. Despite the fact that jurisprudence is not a science,[1] attorneys and jurists use concepts in their thinking and decision-making. What we call social science is the process of connecting concepts with social reality or events that we encounter. As I address the social reality that we are experiencing in Turkey in the 2020s with the idea of "deconstitutionalization", I see the constitution as a fermenting process of the formation of publicness (a term that will be discussed further down), and we regard human rights as one of the most important aspects of this process. The propensity of neoliberal conservative ideology -and its Turkish branch, the Justice and Development Party

[1] The debate over whether Jurisprudence is "science" is quite extensive and detailed. This issue will not be covered because it is outside the scope of this research. However, we might state that the notion of science needs be grasped as employing scientific procedures to arrive at cause-and-effect regularities known as laws. Indeed, Jurisprudence is a normative discipline in this sense. It purports to establish guidelines for how people in society should act.

The article is based on the main theme defended in the author's article published in Turkish in *Birikim*.

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(*Adalet ve Kalkınma Partisi*, AKP)- to deconstitutionalization or "law-inversely" will be characterized in this study as the practice of reducing the public sphere and experiencing major human rights violations, with Turkey as an example to emphasize the public dimension of constitutionalization processes.

The author of this work tends to deal with law and the course of law historically. Law, as a sociocultural entity, should be evaluated in the context of superstructural political fights formed by economic structure at a particular historical time. Rather than a single, monolithic legality, this will result in a legal conception that is in line with the political rivalry that has accompanied the degree of economic progress throughout history.

Duncan Kennedy uses the term "three globalizations" to describe the three phases of law and legal philosophy that occurred between 1850 and 2000. (Kennedy 2017). "The emergence of Classical Legal Thought between 1850 and 1914, and the rise of society-oriented social law thought between 1900 and 1968, and two distinct expansion processes toward the colonial world and newly independent nation-states […] Between 1945 and 2000, the third and shortest segment takes place. For the third globalization, it envisions a similar institutional and legal theoretical development" (Kennedy 2017, 35–36). The "private law" and its relationships are at the heart of classical legal philosophy. The relationships of private persons with other private individuals are governed by private law in its fullest meaning. In these conversations, people are supposed to be on an equal footing. Without a doubt, the economic realm and property relations are the bedrock of these interactions. Individual rights, particularly property-based rights, are so prioritized. Contract Law, often known as the Law of Obligations, and Commercial Law are the most common. The formal concept of equality reigns supreme. Everyone is "assumed" to be equal before the law when it is stated that everyone is equal before the law. Contracts are formed between these individuals of equal will, and the legal system is built on this foundation. During the "social law" period, social rights, which were added to individual rights, became the period's signature. Both the economic crises that occurred before and after the two world wars, as well as the dynamism of the working class, which is now poised to enter politics as a social subject, demonstrated that the legal order created by contracts based on individuals' so-called "free will" could not provide the freedom and equality promised. It is a time when the value of solidarity, as well as freedom, society, and the individual, is growing. This is also the time of the emergence of international organizations with mutual country states. The fields of business law, administrative law, and international law are at the forefront. Finally, the era from the Second World War to the 2000s, which Kennedy dubbed "neo-formalism," is characterized by a dominant rhetoric of "human rights," with

problems such as democracy, rule of law, and judicial independence, as well as freedom and solidarity, on the agenda. Supranational organizations were established, as well as a worldwide civil society. The importance of the Constitutional Law grows, while the content of the Constitution changes.

Mehmet Tevfik Özcan, meanwhile, depicts "the main components of the legal ideology of the three major periods of capitalism society" (Özcan 2011, 170). "Competitive capitalism," "regulated (monopoly) capitalism," and "neoliberal, post-modern capitalism" are the stages in Özcan's classification. "Freedom" emerges as the most significant notion throughout the competitive capitalist age, which spans the latter quarter of the nineteenth century and the first two decades of the twentieth century. The contract, which is founded on freedom of choice, reflects the legal concept of "Laissez faire" capitalism. However, on the one hand, this period was one in which the expectation of rationality for individuals who were predicted to be rational agents was not met, and on the other hand, monopolization gained strength rather than the liberalization and emancipation that was supposed to be brought about by economic competition. As a result, the state's relationship with the highly criminalized society and the monopolized capital that threatens the system via legislation has become increasingly important. This evoked a statist approach in which the state interfered on behalf of the public, as well as the notion that the state was recalled as a reallocation instrument via social rights. The sociopolitical climate of the 1980s, which Özcan attributes to the dissolution of the Soviet bloc and the onset of a new process of capital accumulation on the one hand, ushered in a return to competitive principles, with the concept of allocation being replaced by efficiency and productivity, and public administration being replaced by "governance." This process of breakdown of the law, a reasoning process that focuses on the result rather than predictability, is dubbed "transformation of publicness" by Jürgen Habermas (Habermas 1997).

It's worth noting, too, that each generation's concepts of rights and freedoms aren't always implemented. Because for liberal-capitalist jurisprudence, rights and freedoms are a method of promise or negotiation. As a result, the rights and freedoms allocated to a specific period in the history of law have begun to decay or become hollow from the moment they were created. Rights and liberties, like jurisprudence, have always had a paradoxical nature to them.

*

We are living at a time when international sovereignty relations and events in numerous countries point to a big shift. The theories we've used to explain social reality so far haven't worked. Human rights, freedom, justice, and democracy, which have been distilled from social activity and collective consciousness for

hundreds of years, are dissolving, changing shape, deforming, and maybe becoming empty of content.

"Crisis" refers to circumstances in which the present reality cannot be understood using old conceptions. While the concept of human rights and law has been under crisis for decades, recent economic, social, and political events have exacerbated the problem. Between 2017 and 2021, Donald Trump served as President of the United States, at a time when human rights and liberties were being questioned the greatest. To avoid losing his position after the presidential election, which he lost, Trump took acts that appear to be unprecedented in US history. As a result, it was hotly contested whether Trump would depart the White House voluntarily. Since 1999, Russia has been under Vladimir Putin's administration; when Putin's position changes (for example, prime minister or presidency), the allocation of political and legal authority is centred on his office. Recep Tayyip Erdoğan (and his party) have ruled Turkey (which he took over in 2002) for over two decades. While Erdogan was prime minister and the parliamentary system was in effect, when he became president, the system in issue was replaced with a system known as the "Turkish type" presidential system. Since 2010, Viktor Orban, the head of Hungary's ultra-conservative Fidezs Party, has been in power. In Poland, a conservative party with a similar agenda is at work. With the election of Lech Kaczyski, the party's leader, as president, the Law and Justice Party began to be controlled by Jarosaw Kaczyski after it was created by Lech Kaczyski and Jarosaw Kaczyski. After Lech Kaczyski died in an aircraft disaster, Jarosaw Kaczyski became the next presidential candidate, although he did not win the elections. Andrzej Duda, his successor, has been in charge since 2015. Since 2014, India's Prime Minister Narendra Modi has fiercely implemented his party's right-wing populist policies.

The table above shows that throughout the 2000s, there was a global political and legal movement. This movement is not toward more democracy or human rights, but rather toward authoritarianism, regressive policies, and the abolition of legal safeguards.

In political science, the contemporary period is referred to as fascism (Savran 2019: 11 ff.), post-fascism (Traverso 2020), neo-fascism, popularism, Bonapartism, or authoritarianism. On the other hand, jurisprudence is not very competent at relating to such unusual eras. When confronted with such scenarios, lawyers prefer to rely on political science notions. In truth, Carl Schmitt, a thinker from a different epoch, did something similar, substituting politics for opponents of legal positivism and political realism; he yearned to defend the "legitimacy" of the political will against the "legality" of legal positivism (Schmitt 2016: 7). Ernst Fraenkel favours the notion of "dual state" when referring to the same time as

Schmitt. Fraenkel gives an ethnographic description of the working of the law through direct observation as a lawyer who follows Nazi Germany's legal system from within as a lawyer day by day. Fraenkel describes the "climate" right at the start of the book: "In the present-day Germany … the state power operates not according to the criteria of the law aiming to achieve justice, but with the decisions made according to the necessity of the situation in each individual case. Whatever is defined as 'law' in the political sector serves exclusively to fulfil the political goals of the regime" (Fraenkel 2020: 35).

2 "Authoritarianism" in the Meaning of Restriction of Public Sphere

The contraction of the public sphere and the loss of opportunities for public debate and negotiation are two of the most fundamental signs of authoritarianism in politics. The public sphere is a place where people with different rights come together and reason together. The protection of human rights is a prerequisite of the public sphere. To put it another way, although human rights protect individual rights, they also protect the creation of publicness and collectiveness. As a result, rather than viewing human rights as a notion of "civil society", as bourgeois liberal legal theory has done, it should be viewed as a constructive conception of publicness. This should be taken into account as well: The antagonism of civil society (bourgeois society) as a wholly private domain to public authority and government (state), as Habermas correctly points out, is a doctrine incorporated in the teachings of two schools of thought on which liberalism is founded, natural law and Scottish moral philosophy (Habermas 1997: 28). By stating that the private realm "melts into the social" (Arendt 1994: 100), Arendt, for example, pits the social, not the private, against the public. The condition of democratic politics is public; the sphere of family and economics is social (Hansen 2018: 41). Negt and Kluge, on the other hand, "develop the notion of the 'proletarian' public sphere as a counter-concept to the bourgeois public sphere and the industrial-commercial public sphere" while Habermas describes the development of the bourgeois public sphere from the eighteenth century to its structural transformation in the twentieth century (Hansen 2018: 48).

Is it necessary to define the public sphere? "Whether an action is carried out in a private or public realm is in no way a matter to be overlooked," as Arendt puts it. The character of the public sphere must vary in accordance with the activities that are permitted to enter it, but the nature of the activity will alter dramatically" (Arendt 1994: 70). Yes, we do need a definition of the public sphere as

well as the defense of the public sphere. Because the public sphere is an open arena for "encounter," "relationship," and, indeed, reflection on this encounter. The public sphere is the arena in which we create our will in private or public concerns (Habermas 1997: 37) and where we contribute to the construction of others' will. The public sphere is the "common" (Arendt 1994: 74). The phrase has two connotations, according to Arendt: "…in the first, the term denotes that whatever happens in the public (field) is visible, heard, and has the greatest possible clarity… Second, the phrase 'public' in it expressly refers to us. It expresses a universe apart from our own, yet shared by all of us." (Arendt 1994, pp. 74–77). Similarly, Negt and Kluge define publicness as "the label assigned to the social collective process," which they describe as proletariat (Negt and Kluge 2018: 444). To put it another way, the public sphere is the arena in which we jointly act.

The order that establishes the game rules of this public sphere in which we operate collectively is known as law. As a result, we want the law to properly manage this domain, enlarging the commons while safeguarding our rights to create and actualize ourselves as free agents. The constitution, which defines the public sphere, is the primary means by which the law accomplishes this. To put it another way, the constitution is essential for the creation of a safe public sphere. Then, this time, law continues to contribute to the creation of the public sphere based on the notion of rights and/or human rights. Without a doubt, this is a dialectical process. Rights liberate the individual while expanding the public realm. This necessitates a rethinking of the constitution's structure. Law, the public sphere, the constitution, human rights, and freedoms all evolve and exist in a dynamic and dialectical fashion, sometimes by establishing each other, sometimes by drawing a border, and sometimes by adding substance. Because, despite a strong legal tradition that human rights are "natural" rights, human rights only become relevant when they acquire a political element, this publicness is the foundation of human rights. "They are not human rights in the state of nature; they are human rights in society" (Hunt 2021, 15).

3 Constitutionalism as Cause and Effect in the Construction of Publicness in Turkey

The process we're going through has been dubbed "deconstitutionalization" by some Turkish scholars. Deconstitutionalization refers to a regime in which constitutional safeguards for human rights and democratic institutions are absent. Of course, it was well recognized that the constitutional system has an ideological component in any event, but it is clear what we are up against when the consti-

tutional safeguards vanish, particularly in Turkey. For example, Kemal Gözler's fundamental contention is that several sections of the 1982 Constitution were ignored in any case, and that the situation may be described as "deconstitutionalization." Although Turkey's current constitutional norm "exists", it is "ineffective". Although the present constitutional norm in Turkey is "exist", it is "ineffective". "There is a 'Constitution' in force," Gözler says, "but the Constitution does not genuinely bind the essential organs of the state". Some of the state's essential organs do not feel obligated by one or more articles of this Constitution; they do not follow the substances' orders or conduct actions that the substances forbid." As a result, the constitution is unable to give the assurances that are required of it. When we consider the history of constitutional movements and recognize that constitutions are texts that record rights and freedoms, we can see that the process of deconstitutionalization represents a period in which the powers of those in positions of state power are unrestricted and rights and freedoms are violated almost without limit.

But, before we get into the subject of deconstitutionalization in Turkey, let's take a look at the country's constitutional past.

Constitutionalism has a lengthy history in Turkey. So much so that it may be regarded to have grasped the Western understanding of declaration-based constitutions. The Ottoman Empire's first constitution was written in 1876. There are undoubtedly political and social processes that led to the adoption of a "constitution" as early as 1876. If we continue with the idea that constitutionality is the source and outcome of the development process of a publicness, we can see that the Ottoman Empire was confronted with a new publicness throughout this era.

The Muslim and Turkish components that migrated to Anatolia to escape the Balkan crisis and the Russian-Ottoman conflict were to make up a large portion of this publicity (Anonymous 1995, 174). While this began to offer the demographic component of a future nation-state, it also introduced new languages, cultures, ideas, expectations, and, of course, difficulties throughout Anatolia.

The Ottoman Empire was mostly an agricultural state at this time. Agriculture's portion of the economy, the share of items "exported" outside of Anatolia, its share of national income, and lastly its share of taxation, all ranged from 60 to 85%. (Anonymous 1995, 178). Agricultural production, on the other hand, was done by tiny family enterprises that were technologically behind the times and separated into small pieces. The termination of the *timar* system, the Ottoman economy's dominance by European governments, and the creation of certain "families" who sought to take advantage of the quantity of fertile agricultural lands in places like as Cilicia, Adana, and İzmir, all contributed to the emergence

of large-scale land ownership. This points to the rise of the large-land-ownership phenomena.

Another significant development during this period was the influence of nationalist movements on some officers who were educated in Europe or returned from the Balkans war, and when they assumed command at various levels of the state, they formed a young generation military bureaucracy with a different consciousness than the traditional Ottoman state hierarchy. On the other side, there was significant "external" pressure on the ruling dynasty. The British Empire of the period, Russia, and even those provincial governors who had the chance to question the central government, such as Kavalalı Mehmet Ali Pasha, the ruler of Egypt, an Ottoman province, were all sources of oppression (Yerasimos 1986, 464). This pressure resulted in humiliation, which stoked nationalist sentiments among the younger generation of bureaucrats. These nationalistic impulses found public expression as well; one of the period's major innovations was the rise of the "press" as a new mode of communication (Lewis 1998, 145).

The Kanun-i Esasi (Constitution) of 1876 formed as a result of this confluence of numerous forces. In light of the events of the time, it was assumed that this was done primarily to relieve "external" pressure. "It would be a mistake to assume that the Kanun-u Esasi and prior reforms were nothing more than diplomatic ruses designed to fool foreigners while doing little to address the country's internal situation… By 1876, Turkey's reform movement had a hundred-year history, a steadfast tradition, a driving force, and a unique effort. Although the libertarian movement was still in its infancy, it created an intellectual literature that could not be overlooked, and it garnered deep and steadfast support within the Ottoman governing class" (Lewis 1998, 165).

The public approach to a country's formation process is reflected in the first two constitutions of the post-Ottoman Turkish state, the first of which likewise stresses the state. The 1921 Constitution is based on the premise that the people's will and the parliament's will are equal. Because the new Turkish state took a "national government" approach to the Ottoman *sultanate*, which had long demonstrated that it separated its own interests and fate from those of the land and people. In 1919, the state's nationalist policy was outlined in the Amasya Circular, which said, "The nation's determination and decision will safeguard the nation's independence". This phrase is codified in the first article of the 1921 Constitution, which states: "Sovereignty belongs to the country unconditionally. The type of governance is founded on the notion that people manage their own destiny individually and actively".

The 1921 Constitution lays out a political vision as well as a new concept of government formation. All the pieces that make up the public in question

are referred to as "*millet* [nation]," and this definition reveals that the Ottoman Empire had a totally distinct understanding of publicness, which was based on the "*millet* system" created by religious groups. On the other hand, this is a political goal, because it was evident throughout the conflict that there was no such thing as a monolithic "nation".

Only one of the components of a classical constitution, the basic basis of the state, is included in the 1921 Constitution. This constitution did not provide any rights or freedoms. There was no traditional separation of powers between the legislative, executive, and judicial branches. In reality, the Grand National Assembly, which was constituted under the guise of the parliament, was regarded to be one and the same thing as the state and the desire of the people. In that short paragraph, the parliament's administration, as well as its powers and responsibilities, were laid forth.

In terms of content, the 1924 Constitution reflected the executive branch's increasing independence from the Assembly, but not explicitly. But, more crucially, "in contrast to the 1921 Constitution, the 1924 Constitution included, albeit brief, passages on the judiciary and rights" (Parla n.d., 15). Even while the single-party system of the 1924 Constitution appeared to be somewhat "liberal" and "directed toward separation of powers," we know that the legislature was capable of resisting such initiatives. However, it may be claimed that, as now, the single-party administration of the time strove to run the country "without a constitution," relying instead on party policies. "During the single-party period (1923–1950), particularly after 1927, it was the CHP's statutes and programs, not the 1924 Constitution, that truly set the framework of the political regime" Taha Parla argues. (Parla n.d., 17). However, even during the aforementioned period, the single-party regime did not have a "deconstitutionalization" tendency; on the contrary, secularism and other basic principles were incorporated into the constitution precisely during this period, and the general trend was to try to incorporate the party's principles into the constitution rather than abolishing it.

The political and social process that led to the 1961 Constitution is one of Turkey's most contentious topics in modern political history. The army's takeover of power on May 27, 1960, kicked off the process that led to the creation of the constitution. The social base and political atmosphere created by the Democratic Party (Demokrat Parti, DP) administration, which came to power shortly after the multi-party system was established and became the focus of tendencies "contrary to the state's founding ideology" over time, resulted in a conflicting process. Of fact, the idea of the state's fundamental philosophy is a contentious one. The collapse of the sultanate resulted in the establishment of a republican system, as well as secularism. Because the fundamental accusation of those who took power on

May 27 was that DP was working on a political agenda to reestablish the *sultanate* and caliphate. Theorists from the DP line, on the other hand, "viewed May 27 primarily in terms of its opposition to national will and sovereignty" (Tanör 1994, 9). On the other hand, it should not be forgotten that May 27, although clearly a military coup, was also precipitated by the DP's economic, social, and political opponents (Tanör 1994, 11). The most significant outcome of the Democrat Party's economic policies was a rise in foreign debt, economic reliance, and the eventual establishment of capital monopolies. As a result, although the major commerce and partially industrial bourgeoisie were reinforced, wage workers, bureaucrats, and small peasants faced acute dispossession. The military bureaucracy, without a question, was among the dispossessed groups (Tanör 1994, 11–12).

Tanör (1994, 19–28) highlights the key characteristics of the system established by the 1961 Constitution in three points: the Constitution's supremacy, the sharing of state authority, and the strengthening of fundamental rights and freedoms.

These characteristics, each of which is noteworthy and indicates a tipping point, indicate that we are seeing arguably the first—and only—process of true constitutionalism in Turkey's history. First, till now, the approach that might be described as "parliamentary supremacy" has been supplanted by "constitutional supremacy" and/or "rule of law." This second approach, according to Tanör (1994, 21), aims for a political democracy bolstered by constitutional protections. In terms of power allocation, this political democracy was also supported. Although the principle of separation of powers was included in previous and subsequent constitutions, the 1961 Constitution was not only the first to put it into practice by equalizing powers within the concept of constitutional supremacy, but it also had a significant impact on the decentralization opportunity for democracy by granting local government institutions autonomy in terms of location and service. While the judiciary has been reinforced by organizations such as the Constitutional Court, the executive branch's power has been spread through independent agencies. This is the lone counterexample to the assumption that Turkey's legal and political history has always favoured the strengthening and centralization of the executive branch. Finally, the fundamental rights and liberties that were protected in detail and explicitly completed this image.

The main aspects of the 1982 Constitution may be broken down into three categories: strengthening the executive against the legislative, strengthening the executive against the judiciary, and strengthening the president, who is the executive's head (Parla n.d., 48). With the regime of decree-laws, the executive branch has the capacity to issue broad norms such as acts, notwithstanding the concept

of non-transferability of legislative power. The presidency is no longer a position of representation, but rather an institution that wields power and authority despite being irresponsible. “An enormously authoritative (and once again “irresponsible”) Office of the President is joined by the Legislature, which was severely weakened in 1982” (Parla n.d., 59). Decentralized administrations’ autonomy has also been either explicitly eliminated or weakened to the point that it is no longer functioning.

4 Is There an Existing Constitution in Turkey?

It’s weird, but important, to inquire if a country with a lengthy history of constitutionalism, as we’ve discussed, has an existing constitution at the turn of the twentieth century. Despite the fluctuations that have occurred from time to time in Turkey’s constitutional evolution, which we have attempted to outline thus far, the following should be emphasized in terms of our subject: In Turkey’s legal and political history, almost all politically and socially controversial parties have shown sensitivity to the constitution. Even political arguments take place inside a “constitutional framework,” and political projects and programs are viewed as proposals for a new constitution.

The amendments to the 1982 Constitution made during the AKP period through referendums in 2010 and 2017 meant, first, to strengthen the executive branch to the point where it could even surpass the constitution, and second, to make the Presidency a legal entity in and of itself, this time the only institution/person with political authority within the executive.

The term “corporation sole,” which we aren’t used to hearing or reading, dates back to sixteenth-century England, and was brought to our attention by Frederic William Maitland at the turn of the century (Maitland 1900). To recapitulate, a corporation sole is a legal, religious, or political entity that derives from the personality of a single individual. The notion is usually associated with priests and the religious sphere. According to Maitland, a priest is referred to as a corporation sole in a book by Sir Richard Broke, who died in 1558. (Maitland 1900, 336). The institution’s core extends to church organization. Archbishops, high priests, and parish priests can all benefit from the notion (Maitland 1900, 341). Maitland also considers whether the royal throne may be called a corporation sole in another book (Maitland 1991). The corporation’s continuity or integrity as an institution is inherited. In reality, the notion may be traced back to what is known as “ecclesiastical property law” (Maitland 1991, 2). As a result, the management of church property is the first item that is attempted to be secured.

It is a corporation sole in the sense of administering the properties of a *Palace*-based organization that has developed in Turkey as a result of recent constitutional amendments, and it appears that corporation sole no longer has to comply with the constitution at this moment.

"The rule of law, which includes the obligation to comply with the constitution, is an important part of the process of creating consent from the top down," according to Özenç (2014), and citizens do not see oppression, inequalities, or exploitation because of the rights and order provided by the state of law. However, we begin to speak of a rule of law crisis when the neoliberal crisis becomes so severe that it is no longer worth waiting for legal assent.

Similarly, as the AKP government's situation worsens, we are increasingly seeing it as a legal catastrophe. Without a doubt, law, as a superstructure institution, reflects both crises and structural changes in the economy. However, it is important to remember that the economic structure is the society's subsistence system, or, in Marx's words, the extended cycle of social reproduction. As a result, all legal and political relationships are not always superstructural. They can even perceive some (infrastructural) functions in this manner. Superstructural legal and political interactions are shaped on a social foundation (Mısır 2015, 13). To put it another way, viewing the AKP's legal issue as a legal and political reflection of a simply economic catastrophe is insufficient to explain the situation we are witnessing. The AKP government and the Palace regime it has established believe that there is no need for legality to produce consent from the top down (the regime believes that emphasizing "nationalist prowess" or, more commonly, "locality and nationality" is sufficient to produce consent) or that the regime is in a crisis that is too serious to provide consent through law. However, when dealing with the current situation, it is also necessary to evaluate "properly" the relationship it has with the law. Although the law does not function as a means of obtaining consent, the AKP believes that it must continue to fulfill other purposes because at least some legal institutions wished to be abolished entirely, although in a reversed form. We are confronted with a scenario where "unlawfulness is done via the law," no matter how troubling we find it, no matter how "borderline" it is; the law is not simply taken away, not shelved entirely; we are confronted with a situation where "unlawfulness is done through the law."

Although there appears to be a formal constitutional system in place in the circumstances we are in, it does not give the "guarantees" that we anticipate from a constitutional order. Furthermore, we appear to be discussing something else than the "dual state" that Ernst Fraenkel coined to define the legal system in Nazi Germany, which we shall examine later. The "state of the norm" and the "state of action (or concession)" coexisted, according to Fraenkel. At the very least, it

meant that, in terms of norm state features, the legal certainty and predictability we may anticipate from law, and hence the sense of security and order, is achievable (although the transition from one to the other in this "dual" aspect is ambiguous). However, İn Turkey's current *Palace*-regime even in situations that we may anticipate to be dealt with in the sphere of the "norm state," there appears to be a "order" that we "mortals" cannot "predict".

"The removal of the 1982 Constitution is more vital than the writing of a new constitution," Ahmet Yimaya, one of the AKP's lawyers and deputies whose opinions were given enormous weight for a time, said during the AKP Narrowed Provincial Advisory Council meeting on April 2, 2016, "Even if we don't create a new constitution, this parliament's ability to destroy the present constitution within its originating authority would be a significant democratic victory. It is critical; we can go for 5 years, 2 years, or 3 years without a constitution. There are constitutional institutions, and there are rules that constitutional institutions must follow, in other words, there are organic laws, which are very significant" (İyimaya 2016). Not long after that, a coup attempt occurred just a few months later. Some constitutional safeguards, which were also safeguarded by international treaties, were severely curtailed. On July 21, 2016, it was announced that the fundamental rights and freedoms articles will be limited.

This condition, which İyimaya already briefed us about, is referred to as "deconstitutionalization" by those working in the field of constitutional law. "The chain of acts ranging from May 31 to June 16, 2013 might be defined as a form of 'deconstitutionalization' process," argues İbrahim Kaboğlu, reviewing the Gezi Park demonstrations. (Kaboğlu 2013). Dinçer Demirkent also indicated that he has been employing the notion of "deconstitutionalization" since 2014, influenced by Kemal Gözler (Demirkent 2018). Starting on April 17, 2016, shortly after the public reaction to İyimaya's words, Gözler authored a piece that he extended on several times, describing the scenario as "deconstitutionalization" (Gözler 2016). Gözler's major contention is that numerous provisions of the 1982 Constitution have been disregarded, resulting in "deconstitutionalization." Gözler argues a contrast between deconstitutionalization as a French notion and the present reality in Turkey. As a result, the French employ the word to describe the scenario that arose as a result of the uprisings. In Turkey, however, it was shaped by "internal systemic factors" and "clearly because of harmful activities of constitutional organs." Deconstitutionalization also refers to the devaluation of a constitutional norm and its status as a statute in the French context. However, even if the existing constitutional requirement exists in Turkey, it is "ineffective". "[There is] a 'Constitution' in effect," Gözler says, "but this 'Constitution' does not genuinely bind the state's fundamental organs. When an item of the Constitution does not

work for them, certain of the state's primary organs do not feel obligated by it; they do not perform what the articles demand or do what the articles prohibit."

The Constitution, on the other hand, is employed as an incredibly significant idea at the level of discourse. The Constitution provides "authority" to all legal entities. The Constitution is still valid, but it no longer has the same "influence" as the Queen of the United Kingdom. In the rhetoric of AKP administrators, for example, the focus on the "democratic state and rule of law based on human rights" is always there. One of the regime's main acceptances continues to be the emphasis on "democratic order". The State does not see the European Court of Human Rights' judgements as "essentially," but rather as "somehow" binding. The state spokespersons do not announce, "We will not execute this decision," but rather make a "counter-move" that leaves the decision open-ended. The Batasuna ruling of the ECtHR is cited in the case of HDP. When government leaders communicate globally, they frequently use terms like "democracy," "human rights," and "law". Even if it were feasible, we could force everyone to read the monitoring reports produced by Turkey under the auspices of several international human rights monitoring institutions. However, none of these concepts, such as human rights, judicial independence, and the rule of law, have any practical counterpart.

The terms "unconstitutionality," "violation of the constitution," "constitutional dereliction," "fraud against the constitution," and "abuse constitutionalism" can also be used, according to Gözler's study, which also includes a list of constitutional arrangements. However, these terms do not accurately describe the phenomenon we are dealing with. Because the phenomena we're dealing with is too large to be explained using these terms, it's "invisible." According to Gözler, deconstitutionalization can take four forms: "actually amending the articles of the constitution", "enacting unconstitutional laws" and the ineffectiveness of constitutional review, "administrative acts contrary to the constitution and the law," and "unconstitutional judicial decisions". Many examples of each deconstitutionalization method can be found in Turkey; this condition produces a large environment of terror, resulting in a spiral of silence among the people that continues to rise.

With Tolga Şirin's piece based on Peter Reichensberger's *Unrechtsstaat* (Şirin 2020), the notion of a "state of lawlessness" entered our agenda. According to Şirin, the notion is distinct from "not being a rule of law," and the condition of lawlessness is distinct from "not being a rule of law". "A state of lawlessness is a state that tolerates unlawfulness in its administrative actions, but beyond that, purposefully ignores or lays the framework for human rights in order to achieve its political aims," writes David Johst. As a result, unlawful actions in Turkey are defined as moving beyond a "deteriorated state of law" to a "state of lawlessness." Non-implementation of the Constitutional Court's decisions, the criminalization

of society to a large extent through crimes, the closure of tens of thousands of websites (despite court orders), violations that occurred during the State of Emergency and reached the level of "civil death" for tens of thousands of people, allegations of appointing a "party" judge-prosecutor, and the problem of impunity are among Şirin's examples. Although Şirin does not consider the current situation in Turkey to be a total "state of lawlessness", he believes there is a trend in that direction and that a counter-measure should be explored.

Ali Duran Topuz, on the other hand, has been working on the concept of "anti-law" since November 2018. "The new law is fashioned as an anti-law," Topuz claims (Topuz 2018). The concept is so stunning that we comprehend what it is attempting to communicate at first glance; nonetheless, it should be noted that Topuz did not give a definition for the concept for quite some time. Despite the fact that Topuz has been writing articles for a long time in which he has given examples of anti-law, it finally proposes a definition in March 2020, saying "anti-law, that is, 'using legal norms, mechanisms, and modes of reasoning to achieve the opposite of the fundamental benefit they protect'" (Topuz 2020). Anti-law, according to Topuz, is an activity that involves "turning over" the law and legal logic. The term, which I believe is influenced by physics' "anti-matter," conjures up the "opposite twin of law," just as it does in physics' "opposite twin of matter."

Antimatter refers to subatomic particles that have properties that are the opposite of normal subatomic particles. For example, matter atoms are made up of protons with a positive electrical charge, electrons with a negative electrical charge, and neutral neutrons, whereas antimatter atoms are made up of protons with a negative electrical charge and electrons with a positive electrical charge. Consider the President of the Supreme Court, whom Topuz gives as an example: "In a legal system where society does not trust the judiciary, the judiciary's independence and impartiality cannot be ensured." The judiciary, on the other hand, should be independent and impartial in order for society to have faith in it. The President of the Supreme Court delegated accountability to society by expressing a notion that reverses the cause-and-effect connection. "Anti-law operates similarly by inverting the underlying reality of everything" Topuz says. We'll continue with the inversion metaphor, but first let's look at another topic.

By an analogy of Nazi Germany, the present condition of law in Turkey has been increasingly likened to Ernst Fraenkel's notion of the "dual state" (see Tekin 2018, 2020; Zeybekoğlu 2019; Pekin and Akbaş 2020). Fraenkel's work itself has recently been translated into Turkish (see Fraenkel 2020).

As a lawyer who observes Nazi Germany's legal system from the inside and on a daily basis, Fraenkel creates an ethnographic transmission of the legal sys-

tem's operation from first-hand observation. "In today's Germany… governmental authority acts not according to legal principles aimed at attaining justice, but via judgments made according to the circumstances of each individual instance," Fraenkel writes at the introduction of the book. Whatever is described as 'legal' in the political sector [on the ground] works solely to achieve the regime's political purposes (Fraenkel 2020, 35).

By "dual state" Fraenkel means the simultaneous coexistence of two legal orders. One of them is the norm state and the other is the interventionist state/measure state or the "concession state" -meaning that takes the necessary measures. The concession state is a real judicial review where the sovereignty embodied in the person of the "Führer" is in question, the state is organized as a general law enforcement activity, all known elements of the rule of law (the principle of legality, hence the hierarchy of norms, the legality of crimes and penalties, the presumption of innocence) are destroyed. It is described as a structure that has disappeared. In this structure, where the judiciary is almost completely dysfunctional, the party has become a state organ. To ensure "material justice", "formal justice" has already been abandoned. Therefore, the main thing is not to follow the procedures, but to establish justice in accordance with the ideology of the Führer and the party, using all appropriate means (summarized from Fraenkel 2020, 35–101).

"The entire legal order is subject to the discretion of the political authorities. However, to the extent that the political authorities do not use their powers of power, private and public life gets an order according to the norms of traditional and established law" (Fraenkel 2020, 115). This part constitutes the "norm state" part of the dual state. Here, the law operates in the "known sense". Norm state refers to the functioning in the legal sense, which is expressed by the actions of court decisions and administrative bodies. From the outside, there is a functioning legal mechanism, albeit slowly, and it represents the norm state part of this dual state. But the legal guarantees or judicial decisions that make up this mechanism cannot dominate the political arena. In the political arena, there is the "concession state", which we have determined that the state easily goes beyond the ordinary functioning. Moreover, when deciding which issue is related to the "political field", the criteria of "concession state" are applied, not "norm state" criteria.

Fraenkel's results provide us with more vital insights concerning fascism's law than anything we've ever read or heard. In fact, it is sometimes argued that there is little research on fascist legislation (See, for example, Steinweis and Rachlin 2020, 9). This is either because it is assumed that fascist has nothing to do with law, or because it is assumed that by analysing other features of fascism, a judgment regarding its approach to law may be formed. Fascist governments made

little changes to the legal system in the nations they ruled, and they carried out "some" "legal" interventions. "Legal institutions remained to exist during the Nazi period since most of the laws of the Weimar Republic were in effect, and even a large portion of the Nazi ideology was implemented through new legal structures" (Akçabay 2020a, 127). Furthermore, there is an illusion of legal compliance, particularly in terms of form and appearance. "Regardless of how clear the verdict may be, the *Volksgerichtshof* [people's court] and the other *Sondergerichte* have stuck to the form and appearance required by law and due process over the majority of the court's eleven-year tenure. In reality, this gave the false appearance that everything was normal" (Rachlin 2020, 95).

The legal theory of fascism is described as "legal positivism" in research on fascism. Legal positivism is an approach to the source of the validity of legal norms (See Gülgeç 2020, 217 ff. As a study in which the concept of validity is discussed in detail, and especially for systemic validity as the main basis of legal positivism: 375 ff.). Legal positivism says that only the rules made by the legislative authority or mechanism that are considered legitimate for a legal system can be considered as legal rules. In addition to different main branches of legal positivism such as normativist positivism or voluntarist positivism, there are types such as hard positivism or soft positivism, which are positioned according to their relationship with moral principles, especially in terms of the validity of legal rules. Moreover, there are criticisms of each of them against each other, from natural law and other schools of legal thought to each branch and type of positivism (for example, for criticisms about hard positivism, see Arıkan 2019, 263 ff.). Given that only the norms of law were implemented throughout the Nazi era, can we argue that this complete legal approach is the basic legal philosophy of fascism?

It is impossible to concur with the assertion that fascism's legal theory is "legal positivism." Legal positivism cannot be clearly linked to fascist legal procedures. Roland Freisler, the head of the *Volkgerichtshof* (People's Court), for example, attacked the judges' adherence to written and publicized regulations as early as 1935. (Rachlin 2020, 89). This "means the rejection of the normative basis of positive law existing in civilized nations," according to Robert D. Rachlin (Rachlin 2020, 90).

We find a very fundamental criticism of legal positivism in Carl Schmitt, the legal and state theorist of Nazi Germany's fascism. According to Schmitt, "in terms of the primary areas of legal action (*Rechtsleben*) in reality, the concept of the judge's normative obedience to a law is philosophically and practically unsustainable" (cited in Rachlin 2020, 92). Schmitt devoted his life to defending political will's "legitimacy" against legal positivism's "lawfulness" (Schmitt 2016, 7).

As a result, it focuses on the political will that underpins the legislation. Schmitt forms the foundation for fascism's "legal system" by substituting political will for law or law, and then limiting political will to the authority that employs force on behalf of the people, alluding to the "parliament" crisis, which is the political will that is democratically valid. "The people," according to Schmitt, is a notion of public law that "might be articulated more democratically than popular suffrage with acclaim, acclamatio, and existence without resistance" (Mısır 2019, 238).

This is the key element of fascism's legal system: Politics has taken the role of law in fascism. "When it came to state authority, public law had to stay mute" (Mısır 2019, 240). Politics, on the other hand, no longer consists of "democratic politics," but rather of the authority's will being endorsed by the people with applause and salutations. Finally, the political choice takes on the form of a legal decision. As a result, the "law" is imposed by the person who symbolizes the political will (the Führer). As a result, the Führer's edict takes precedence over the law. Within the confines of his party's authority, the Führer can declare his desire as legislation, if necessary, as a mere edict. There are no constraints on legal or decreed rights or freedoms since it is now "political." Each of the legal tools is a political agenda, such as economic control, insuring the Aryan race's dominance over Jews, gypsies, and others. They've turned into tools for the annihilation of peoples. The ethnic focus is particularly crucial since the notion of ethnic identity is another cornerstone of Nazi public law. So much so that "German National Socialist Law could not be revealed, and its legal existence could not be envisioned" (Mısır 2019, 246) without the basis of racial identity.

There's one more thing to mention here. The Nazis regularly asserted during their post-World War II trials that "we implemented positive law." This is why fascism's legal ideology is referred to as "legal positivism." Legal positivism, on the other hand, is an approach to the origins and validity of law, as described above. Legal reasoning is the process of generating inferences from legal standards and expressing them as legal judgements. Legal formalism, not legal positivism, is the method that may be caricatured as the legal norm producing a "direct" legal consequence (Akçabay 2020a, 137). Legal formalism is the belief that a conclusion may be reached from a general standard for a disagreement in a specific scenario using a deductive process, and that legal judgements can only be acquired this manner (Akbaş 2006, 98). According to this concept, the norm is the large proposition, and the particular situation is the minor proposition; the conclusion, the legal judgment, is derived by applying the big proposal to the little proposition. As a result, the argument that the legal standard is "only" and "directly" the legal norm, which was frequently made during the Nazi trial, is closer to being called "legal formalism".

The legal practice of the fascist period, on the other hand, cannot be referred to as legal formalism. Because legal formalism is, first and foremost, impractical. In practically every system, legal conclusions are not reached in the form of a major proposition-minor proposition. A legal judgment is influenced by a variety of circumstances. While there is a huge literature on defining the meaning of the big proposition, the norm, it is not reasonable to define the entire judgment process as entirely mechanical. Furthermore, legal formalism's most basic premise is that it ensures legal certainty. The norm and its interpretation are objective and absolute in this approach. As a result, it is constant from one person to the next, from one event to the next, and from one scenario to the next. One of the most essential characteristics of fascism's law is that it is unexpected. In the legal practice of fascism, the interpretation assigned to the norm is subjective. "My Führer; while the people's courts are making a decision from now on, if you were evaluating the event that was the subject of that decision, if they believe how you would decide, they will try to make a decision in that direction," Roland Freisler, chief justice of the Nazi-era People's Court, said (as cited in Özenç 2016). To put it another way, the rule has no objective meaning; the only meaning it has is the one given to it by the Führer. The judge's job is to "guess" the Führer's intentions in this regard. This idea allowed many of the Weimar-period regulations to be applied to the Nazi era without having to modify them.

Contrary to common assumption, fascism is not a lawless dictatorship; the most significant legal achievement of fascism was the ability to effect a fundamental change based on the existing framework, but through a formal reversal. Fascism is a dictatorship that acts outside of the law. A simple political reference to "value" was enough to realize this turnaround. The survival of a nation, the preservation of a religious value, or the accomplishment of a noble goal might all be political values.

The contemporary Turkish landscape bears an unmistakable resemblance to the vision painted by Fraenkel: a centralized palace regime that begins with "Mr. (Beyefendi)" and embodies the indisputable nomenclature of "Reis (President)"; political trials; the labeling of every critical viewpoint as terrorism, the instrumentalization of law; the arbitrary distribution of rights and freedoms; a political and legal order in which the assurance of a judge no longer exists. However, as we previously said, there is an issue with Turkey's existing legal order for the "norm state" portion, which is one of the states in Fraenkel's dual state. To put it another way, Turkey's legal order has been turned inside out, much like a garment that has been washed inside out.

The hierarchy of norms, for example, is reversed. We all know the hierarchy of norms, which extends and lowers from the "fundamental norm" summit, with

the constitution at the top, laws below, statutes, regulations, and so on. In terms of both the field of regulation and the will that exposes the regulation, we are confronted with a body of regulations that evolve from broad to specific. The pyramid is turned upside down in Turkey's current Presidential government structure, with the President's directives at the top. Then, in accordance with these directives, ministries or general managers send circulars to administrative personnel. The idea of legislation has fully vanished as a result of the governmental system's structure. Regulations and laws are only followed if they are in accordance with instructions and circulars; in the event of a dispute, the instruction is used to interpret the law. Instructions, not legal regulations, govern the whole public administration system.

In today's Turkey, the judiciary's independence is in a worse state than it has ever been. So much so that individual liberty and institutional survival are regarded as achievements; the judiciary, from the high courts to the courts of first instance, does not perceive itself as "bound" by the European Convention on Human Rights or the Constitution. The decisions of the Constitutional Court, for example, are obligatory on the legislative, executive, and judicial organs, administrative authorities, and natural and legal persons, according to Article 158/last of the Constitution. However, in the landscape we are facing today, local courts do not see themselves bound by the decisions of the Constitutional Court. Similarly, it appears that Article 90 of the Constitution, which states that international treaties have legal force and that no law may be passed in violation of international treaties on basic rights and freedoms, is not binding even on the Constitutional Court. Without a doubt, this situation can be compared to the Nazi regime in Germany, which was established in 1933 by decrees that included the suspension of some fundamental rights and freedoms, as well as the government's power to make regulations that were contrary to international treaties and unconstitutional (changing them). However, there is an essential distinction to be made: in Turkey, there is no need for a decree for this circumstance to exist. A public statement by the President expressing his displeasure of a judicial ruling would suffice.

Without a doubt, Turkey's court has never operated under "universal principles of justice." The judiciary has been a component of a political agenda, or rather a "state strategy," from the early years of the Republic. It was not founded as an autonomous power in the early years, but rather as an instrument of the governmental bureaucracy. It was, nevertheless, a "power," albeit not totally "autonomous." This was power earned via alliances, divisions, disagreements, and disputes both inside the bureaucracy and between factions within the bureaucracy and other political organizations, as it was in every bureaucratic organ. As a governmental institution, this "power" was fighting "enemies of the country" (Ertekin

2020, 6). With the rise of multi-party politics, the court has also become a flashpoint where political rivalry is maintained in a different way (Ertekin 2020, 6).

The judiciary was, in fact, one of the key themes of controversy throughout the AKP's tenure. After experiencing severe tensions with the "old" regime's "judiciary" in the early years of its rule and being confronted with the closure case, the AKP quickly understood that the best approach to arbitrate its own regime was to guarantee that judicial rulings were issued in lockstep with its ruling. In this sense, the AKP's involvement in the court were "functional." However, abruptly reversing the judiciary's functioning was not conceivable. In the early years of his presidency, when the above picture of various parts of the judiciary appeared to be a danger, the possibilities for utilizing the judiciary as an instrument of "social engineering" were nearly manufactured out of thin air. The "Ergenekon" cases, which began in 2008 ("cases" and "main title" because we're talking about at least ten separate cases) and, more broadly, "the period of special authorized prosecutor's office and courts" (because socialists, Kurdish politicians, and all kinds of dissident opinions began to be prosecuted), left their imprint on the 2010s as judicial operations. This "enterprise" appeared to be in shambles from the outside. So much so that people who were involved in the prior operation's procedures may find themselves as defendants in the following circle of operations this time, and those who took part in these processes could find themselves locked in the next circle. Under the same indictment, the torturer police officials might be charged for founding an organization alongside the revolutionaries they tortured. In these trials, thousands of individuals were tried, and a considerable proportion of them were condemned to lengthy jail terms. However, once the procedure was done, we discovered that it was only one element of a larger scheme. The operation had a legal veneer despite the fact that the program was political.

The AKP and the Fethullahist organization (dubbed "*Cemaat*") collaborated to create the Ergenekon process. The *Cemaat*'s organized force in the courts and police had operated under the protection of the AKP. Following this procedure, the judiciary was once again witness to the conflict between these two political forces. The AKP's triumph over the competition, as well as the AKP's victory in the July 15 coup attempt, marked the start of the "domestic and national" legal era, which was arranged as a "permanent state of emergency" in both the political and legal fields. For the new period AKP, "local and national" has become a "principle" to which the legal system to be reversed would relate. "Locality and nationality" separates the AKP (and MHP) from other political parties, as well as the present power structure from past AKP periods. Although it appears to allude to a nationalist ideological framework, locality and nationality have a very basic definition: to be against the critical and opposing views towards this

regime, alongside the interests of the Palace-centred regime. In other words, the benefits of the Palace regime were legalized thanks to its local and national reference. Everything that is not local or national can easily become "terrorist". Thus, being tried or convicted on any "terrorism" claim is not a problem; the terror trial, which is decided not to be politically local or national, consists of the process gaining a legal appearance.

It is the central political will that is "sacred" to this legal order. When one considers that the anthropological definition of crime is "to defy what is considered sacred" (Can 2002, 31), it becomes clear why investigations into the crime of "insulting the president" (Turkish Criminal Code, art. 299), which were only conducted in the hundreds for previous presidents, have now been conducted in the tens of thousands per year for only one person in the last few years, in a sort of "law-inversely" practice. "Law-inversely," since the presence of insult is a presumption in such a trial, while proof of its absence is the exception. Through refresh your memory, in the period from 2014 when President Recep Tayyip Erdoğan took office to the end of 2019, 63 thousand 41 people were prosecuted for insulting the president, and 9 thousand 554 people were sentenced. To put it just as a simple comparison, for the presidents before Erdoğan, the number of persons who were prosecuted for insulting the president was 248 in Abdullah Gül's term, 168 in Ahmet Necdet Sezer's term, 158 in Süleyman Demirel's term, 207 in Turgut Özal's term and 340 in Kenan Evren's term, who came to this office with a military coup (Yüksel 2019). Since tens of thousands of people in Turkey cannot suddenly decide to insult the president, an inverse legal process is taking place in this new period; that is, probably in line with the determinations made through social media, a judicial decision is "obtained" for statements that are already judged to be insulting. "Law" is used to criminalize tens of thousands of people.

Although the judiciary functions to legalize the decision of the political will, there is no guarantee that its decision will be implemented. The resulting legalized political decision will or will not be implemented only when it will function as part of the political strategy. In the trials of Pastor Brunson or journalist Deniz Yücel, the judiciary decided both on detention and release; but it did so precisely when political strategy required it. In the case of a decision to release when the political strategy did not require it, for example, as in the trial of lawyers who are members of the Contemporary Lawyers Association, that decision was not complied with, and lawyers were arrested "thanks to" a new judicial decision.

On the contrary, I believe that the offense of "inciting the public to hate, animosity, or humiliation" is a strong illustration of the law-inversely characteristic (TCK art. 216). The major goal of the rule is to prohibit "hate speech," which is also seen in its worldwide counterparts. In reality, the lawmaker explicitly stated this circumstance in the article's reasoning, reminding readers that hate speech suppression is a universal ideal, and arguing that this legislation satisfies this democratic necessity. Three different types of crime are addressed in each paragraph of the article. In other words, the crime of inciting one part of the public to hatred and enmity against another is punished in the first paragraph, the crime of humiliating a part of the people is punished in the second paragraph, and the crime of insulting a part of the people's religious values is punished in the third paragraph. Because it is impossible to go into depth here, we may sum it up by noting that the article, with its sin and reward, is a plan to avoid prejudice. As a result, this article is designed to safeguard those who are likely to encounter discrimination in Turkey, notably the members of groups who are in minority in terms of race, religion, sect, region, gender and who experience discrimination very often in their daily life. Article 216, on the other hand, is used to penalize members of segments who are likely to be discriminated against on a regular basis; rather than being discriminated against, it is used against cartoonists, authors, artists, and Kurdish politicians to "defend" the dominating groups in social life.

This inverse mechanism emphasizes various properties that may be deemed common for law-inversely in general based on this example. To begin with, it does not appear conceivable to assert "there is no law" in this situation. Because there is a "law" that is -almost- suited for universal laws in the normative sense. As a result, we cannot simply call this scenario "unlawful". Second, there is a case that Fraenkel's "dual law" notion cannot address. Because the precautionary (or concession) state and the norm state do not differ at this moment. Perhaps we can argue that the norm state exists if we overlook a "small" aspect that is persistently skewed in the implementation of Article 216. The "small" aspect in question is the general trend or direction of societal prejudice. As a result, the transition from the norm to the cautious (or concession) stage is not truly a leap. Here, if we consider Topuz's definition within the framework of "using legal norms, mechanisms and modes of reasoning to achieve the opposite of the fundamental benefit they protect", there is anti-law, again in his words, a process that "works by reversing its fundamental line".

5 Conclusion

The constitution contains two parts in the traditional sense: the first is about the state's organization, administration, and functioning, and the second is concerning rights and freedoms. Whether it's state management or rights and freedoms, both themes include engaging in public discussion, speaking, and making decisions regarding the public's shared destiny. To put it another way, the constitution is the document that establishes the boundaries and regulations of the public sphere in a sociopolitical setting. The creation of a "democratic" public sphere is one in which borders are open, participation is open to everyone, and norms are administered equally to all. On the contrary, a framework in which the public sphere is restricted, involvement in decision-making and execution is prohibited, and "some" are "more public" is fundamentally anti-democratic. What if there is no longer a public sphere, and a process is dependent on the unpredictable judgments of a tiny group of individuals who are unable to engage in any manner, much alone block involvement in decision-making and implementation procedures… We attempted to label this condition as deconstitutionalization and/or law-inversely in this study.

What we're dealing with here isn't just "authoritarianism"; the law and/or constitution lose their power, publicity vanishes, and everything is replaced by the President's whim alone. This is similar to the situation experienced by kings prior to the Bill of Rights and the Constitutionalism movements. This is followed by a feeling of "uncertainty," which is exacerbated by arbitrariness.

This is exactly what "deconstitutionalization" is. We're no longer discussing an unlawful conduct, but rather the systemic failure to apply the constitution. Furthermore, this is done by ordinary organs, not as part of a transitional period following a revolution or coup. The exceptional is becoming the norm, and there is a perpetual state of emergency. When the judiciary's independence is completely lost, there is no longer any element in the concept of constitutionalism in the traditional sense. In reality, the situation in the legal area must be divided into two categories:

The first is that judicial independence has vanished. The interests of a small group of persons who are thoroughly politicized drive the process of appointing judges. Formal and informal intervention channels have been established, particularly in critical cases and when central political will is required to make decisions. Finally, if a surprising choice is taken, it is not carried through.

The second is that certain administrative boards make decisions instead of judges. Consider the condition of professional groups, bar associations, and local

administration organizations, which are all public legal bodies. The Bar Association is fundamentally a public authority, and their administration is established by election as independent entities. The central political will wanted the bar association elections, which were scheduled for 2020, to be postponed. While the delay of elections for an independent public institution could only be done under exceptionally unusual circumstances and with a judicial ruling, the elections for bar associations were halted by the Sanitation Board's decision (and accordingly the Election Board).

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Turkey is now debating whether or not to revert to a parliamentary system. A parliamentary regime that does not enlarge the public sphere and does not expose public decision-making procedures to the broadest possible involvement would surely slow the deconstitutionalization process, but much more effort will be required to repair the harm that has already been done.

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Freedom of Thought and Expression: Censorship on Media in Turkey

Hüreyye Özdemir

1 Introduction

Information institutions that house virtually all thoughts in the changing world, in different formats (printed, new trend media, audio and visual etc., fields) are in close contact with freedom of thought. These institutions side with expression and publishing of thought, and oppose censorship. Tools of communication such as writing and audio-visual media surface the freedom to access and express information. The finding that Freedom of Thought is a fundamental right stems from the existence of the right of freedom and its being among the fundaments of democratic life. Thus, wherever exists the freedom of thought, so does the freedom of press. In other words, they are branches of the same tree, and the hollering screams of democracy. Democratization of media, and the formation of an independent and civilian audit on politics and bureaucracy are important in order to secure the emerging of social demands in the public scene. However, in regimes of oppression, the opposite reigns. For example, Hitler in Germany, Mussolini in Italy, Franco in Spain, and Abdulhamit II in the Ottoman Empire

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restricted the freedom of newspapers by way of law and thus gagged the press.[1] In other words, it can be said that, there must be a legal basis for the limitation of fundamental rights and freedoms, and freedom of expression and freedom of media must be observed in all circumstances in accordance with democratic processes. A thought must be countered by a more powerful thought, and thus thoughts must not be destroyed by force.

The basic purpose of the thought of constitutionalism, as one of the ideological fundaments of modern democratic states, is the limitation the power of state in order to preserve human rights. As a result of the development of the aforementioned thought, efforts have been made to keep freedom of thought out of the domain of state interference, and it has taken its place in the constitutions and declarations of rights. In the Declaration of Human and Citizen Rights which was made public based on reasons of democracy and freedom, and which forms the foundation of the French Revolution, expressing and relaying of thought freely was indicated as one of the most fundamental human rights. In the first ten amendment articles of the United States Constitution, which is the first written constitution, and which is known as Declaration of Rights, no law could be passed that would restrict freedom of thought, thus securing this freedom.[2] The existence of the democratic state is only possible through the realizing of its actions and processes, its being rational, and being able to convince its citizens. These are subject to not only legal audit, but also the scrutiny of public opinion, politics and media. The state, as the source of decisions, has to "instill trust" with its legal system. Instilling trust is not an abstract concept. The administrators have to have their citizens feel the concepts that "trust = state". In a free country, individuals and media are free. There exist legal predictability and transparency. As indicated in the constitution, as long as it is not a secret of the state, the audit, by the public opinion, of the transactions and actions of the state cannot be prevented. In a free country, ethically based rules are prevalent. By implication, we should not do unto others what we don't want others to do unto us. The state must legitimize and substantiate transactions and actions, so that it can realize correct and factual public expression. Within this context, if principles are not heeded, actions will be arbitrary, and where arbitrariness reigns, there is no freedom,

[1] ***Mahmut Esat Bozkurt***, 1940, Atatürk İhtilali, Türk İnkılâbı Tarihi Enstitüsü Derslerinden, [Atatürk Revolution, from the Courses of the Institute of the History of the Turkish Revolution], İstanbul University Publications: pp. 172–173.

[2] ***Fazıl Hüsnü Erdem,*** 1988, Düşünce Özgürlüğü ve Demokrasi [Freedom of Expression and Democracy], Ankara: Ankara Bar Association Journal, 1988-1/54: pp. 9–10.

democracy or state of law. Freedom of media constitutes a special kind of freedom of expression. Thus, there are some limits to this freedom as well. These are categorized as: Protection of the state and public, protection of morality, and protection of the reputation and rights of others. In general, freedom of media can be defined as the disseminating, printing, and distributing of thoughts, analyses, criticisms, comments and news utilizing communication media and means. In the Turkish political arena, freedom of media always faced some constitutional and legal obstacles until recently. With the European Union Adaptation Process,[3] the domain of this freedom has in part been expanded through some constitutional and legal amendments.

Within the context of freedom of expression, the effort of forming the intellectual framework of the visibility of the concept of censorship on media in Turkey through presentation of a broad perspective regarding the freedom of media constitutes the foundation of this work. Following the slogan of Mustafa Kemal Atatürk, "Freedom and independence are my character", in article number 2 of the Constitution, the State of the Republic of Turkey is defined as: "With an understanding of the peace of the community, social solidarity and justice, the Republic of Turkey is a democratic, laic and social State of Law, respectful of human rights, loyal to the nationalism of Atatürk, resting on the fundamental principles stated above[4]". Thus, with these fundamental constitutional qualities, and in the ever-increasing and radicalizing globalization process that the country is going through, with her geo-strategic location, deep-rooted history, and hosting of interacting civilizations and cultures, the characteristics of communities of people she is housing in the center of Eurasia, Turkey is, by nature, is a key country in a framework with many players in the area. Legislation was used as an effective tool of disciplining in the process of the establishment of a nation-state and the ensuing process of modernization, and following the 1980 military coup, the structure of ownership in the media sector changed as a result of the economic liberalization policies applied. In 1990's, with the ending of state monopoly in radio and television broadcasting, big holding companies became dominant in

[3] ***Zeki Yıldırım,*** 2012, Türkiye'de İfade ve Basın Özgürlüğü Sorunu; Avrupa Birliği Uyum Sürecinde İfade ve Basın Özgürlüğü Alanında Yapılan Çalışmalar [The Problem of Freedom of Expression and Press in Turkey; Studies on Freedom of Expression and Press Freedom in the European Union Harmonization Process], EUHFD, C. XVI: p. 83.

[4] Constitution of the Republic of Turkey, Law Number: 2709, Date of Adoption, Oct. 18, 1982, Official Gazette Published: Date: Nov. 9, 1982, Number: 17863 (Repeated) Code of Published: Order: 5 Volume: 22: p. 3.

all areas of the sector through vertical and horizontal integration. In this process, the insufficiency of the existing legislation in safeguarding the freedom of press and its pluralism in the media, gave the big companies the courage to see themselves as legitimate political actors capable of bargaining with the government. Following the accession to power of the Justice and Progress Party (JPP) (Adalet ve Kalkınma Partisi: AKP) in 2002, the media was reshaped as "pro" or "anti" government. With the fundamental constitutional qualities specified above, the developments experienced since independence to present time indicate a tendency towards an authoritarian regime rather than a democratic institutionalization. In the popular vote effected on 16 April 2017, Turkey took the fundamental step in the transition to the new system, and endorsed the constitutional amendment package that would amend its administrative structure under the name of "Presidential System of Government". On 9 July 2018, the system of government was modified through the deep-rooted amendments in the Constitution of the Republic of Turkey, and a new system that would affect the political, economic, social, and even the daily life was installed as one of the most important steps in the history of the country. In this system, the legislation to be passed by the Turkish Grand National Assembly was reduced, the authority of the Assembly was restricted while increasing the authority of the President, thus paving the way for the President to exercise the legislative power through decrees or ordinances.

In the political history of Turkey, there has always been a struggle between the government (power) and opposition. All governments want the media to be theirs.[5] In practice, this political power that has a tendency towards censorship, wants to dominate the media. The government, by creating a "media" that will defend it, goes about taking measures against television stations, internet, newspapers, magazines and journalists that are opposed to their views, in fact, the government is trying to silence anyone with views opposing AKP. The efforts of regulatory administrative institutions like Radio and Television Supreme Council (Türkiye Radyo Televizyon Üst Kurulu: RTÜK), Press Announcements Institution (Basın İlan Kurumu: BİK)) and Presidential Directorate of Communication (Cumhurbaşkanlığı İletişim Başkanlığı) to restrict freedom of media through arbitrary penalties they issue, difficulties in accessing official press cards, unsatisfactory modifications of legislation and blockages targeting the internet find their place in the book as ongoing negativities. Furthermore, the government is

[5] ***Hüreyye Özdemir,*** 2018, Asker Hazır Ol Deyince: 12 Eylül 1980 Döneminde Sansür ve Oto-Sansür [When the Soldier Says Get Ready: Censorship and Auto-Censorship in the Period of September 12, 1980], İstanbul: Libra Publishing and Publishing Trade Inc.: p. 24.

keeping the opposition under pressure through the media it has created and by hindering the legislative efforts of the opposition parties. Citizens are suffering due to their deprivation of their fundamental rights of being informed and the disempowerment of Turkish Grand National Assembly (Türkiye Büyük Millet Meclisi: TBMM), which is the only and real representative of the nation and the only organ authorized to use the rights of sovereignty on behalf of the nation.

In public broadcasting and publishing, it is necessary for media organizations and their employees to be free as they have a role in the protection and development of the society. The overbearing shadow of the employers and government on editorial independence, the subjection of journalists to investigation and prosecution, and even assault, the oppression of their economic and social rights, and the allergy towards collective rights and freedoms, regretfully occupy a lot of space in this book. Especially, the transformation that the media has experienced during the process of monopolization has resulted in a new form censoring, i.e. the journalist exercising auto-censorship. This censor is forming internally in the organization or in the memories of journalists. Within this context, the interests of the boss, the relations with the business world, and a variety of political, social and economic groups tarnish the objectivity of media workers. This is the most dangerous type of censoring. If censoring stems from the state or some other institution, it is understandable. However, if the intervention occurs through the editor or the media boss, it is harder to render it understandable.

The freedom of thought that Roza Luxemburg defines as "the freedom of a person who is always thinking",[6] is being rendered visible through democratic, ideological instruments of pressure. The wealth of a community and the regime it sees as suitable for itself is dependent on the freedom, impartiality and quality of the public service broadcasting and publishing. Within this framework, some national and international non-governmental (NGO) and professional organizations have announced on 3rd of May World Free Press Day their views on BBC News and in a variety of reports that no person could say there is free press in Turkey. To cite a few, Journalists Association of Turkey (Türkiye Gazeteciler Cemiyeti: TGC), Journalists Syndicate of Turkey (Türkiye Gazeteciler Sendikası: TGS) and a Paris-based NGO that defends freedom of press, Reporters Sans Frontières (RSF), are among these organizations.[7] Furthermore, professional organizations have clearly

[6] ***Lucas Swain,*** 2018, Political Theory, London: SAGE Publications, Vol. 46, (3): pp. 406–407.

[7] ***Burak Abatay*** (News Ed.), 2021, Dünya Basın Özgürlüğü Günü: [World Press Freedom Day: We cannot talk about a free press in Turkey] BBC News /Turkish, May 3, 2021.

put forth in reports and declarations that Turkey lingers far behind in the freedom of press index ranking, and in democratic societies, in order for people to be able to make healthy decisions, it must be possible to relay to the public the actions that are not to the benefit of the society by those in power and their partners. Besides, the "2021 Freedom of Press Index" prepared by RSF announced that among 180 countries, Turkey ranks 153rd. Thus, the specific data provided by all three organizations clearly displays once again how extensive censoring is on Turkish media. However, one of the genuine aspects of this work is the research conducted 20 years apart by two media organizations serving at national and international levels: 1) The findings of a questionnaire conducted on some 300 journalists and press administrators selected as representatives from among local and national media on 30 April 2000 by The Pew Research Center with Columbia Review titled, Auto-Censorship: How Often and Why?[8] and, 2) in the 2019–2020 period, within the framework of "Freedom of Press Report"[9] by TGC, "The Censorship and Auto-Censorship Personal Experience Questionnaire" conducted, between 31 March–2 April 2020 with the participation of 141 employees of press. The similarity between the findings of these researches is significant. Public supervision, the must-have regarding the presence of democracy, is effected through the use of media and collective freedoms through instruments of press and broadcasting. In the digital age we are experiencing, all these items of supervision are parts of a whole, and one can talk about effective mechanisms only if they are all present. As a result, the fact that the boundaries of freedom of expression are being transgressed, the need for a new definition of the concept of "censorship" in the constitution, and the implementing of all kinds of measures to prevent "censorship" whatever the cause may be, increases the importance of this work further.

In the light of all this information, as especially personal enlightenment is a right, the freedom of securing "accurate and wide-spread circulation" of the media, which renders this right effective, and the analysis of data that some national and international democratic, ideological pressure instruments have caused to surface are being discussed. As a result, it must be remembered that history is full of examples of solidarity and organization being the antidote against all negativities. Consequently, interaction is the comparing of values with those of others, adding variety to and transforming of our values and their spreading. In other words, by assigning meaning, an individual can see herself/himself

[8] "Self Cencorship: How Often and Why" https://www.pewresearch.org/politics/2000/04/30/self-censorship-how-often-and-why/, Accessed May 20, 2021.

[9] Journalists' Union of Turkey, 2019–2020 Press Freedom Report, APPENDIX 3.

at a global level rather than in local belongings. What does this bring with it? Primarily, by bringing about openness to differences, solidarity, planning and transformation, with the togetherness of views and classes, a framework at an international level is established for the struggle towards a freer media.

2 Freedom of Thought

Freedom of thought is not just in cultural, social and political discussions, but is also a concept that prevails in theoretical rhetoric. For thought to be meaningful and functional, it must be externalized, in other words, conveyed to others. In this context, the most important characteristic of thought is that it is transitive and naturally communicational.[10] In a different way, Erdoğan Teziç's views on the importance of fundamental freedoms, in relation to the functional definition of freedom of thought, which is based on three fundamental founding principles as receiving news and learning, freedom to express opinion, and thought, are especially of instructional value. Teziç talks about the importance of freedom of thought as "a person's ability to choose or prepare the replies that s/he wants to give to all problems s/he faces by herself/himself, and the opportunity for her/him to match her/his individual and social actions to these."[11] Freedom of thought, which Tanör defined as, the freedom of a person to obtain freely an opinion, not being subjected to any criticism for the opinion or conviction that s/he has obtained, and having the opportunity and freedom to express these utilizing legitimate paths,[12] means her/his having the ability to express her/his thoughts and convictions as well as having them. Therefore, the two definitions that house all principles are functional as well as being encompassing. Further, as the freedom to access other thoughts, freedom of thought contains freedom of religion and conscience as well. As elements of this freedom, behaving or acting

[10] ***İbrahim Ö. Kaboğlu,*** 1996, Özgürlükler Hukuku İnsan Haklarının Hukuksal Yapısı Üzerine Bir Deneme [The Law of Freedoms, An Essay on the Legal Structure of Human Rights], İstanbul: Afa Publications, Revised 3rd Edition: p. 175.

[11] ***Erdoğan Teziç,*** 1990, Türkiye'de Siyasal Düşünce ve Örgütlenme Özgürlüğü: Anayasa Yargısı-7 [Freedom of Political Thought and Association in Turkey: Constitutional Judgment-7], Ankara: Constitutional Court Publication: p. 33.

[12] ***Bülent Tanör,*** 1969, Siyasi Düşünce Hürriyeti ve 1961 Türk Anayasası [Freedom of Political Thought and the Turkish Constitution of 1961], İstanbul: Öncü Publishing House: p. 15.

in congruence with thoughts, individually or in a structured way, reflects the importance of this fundamental freedom in terms of communication. Freedom of thought means a person's ability to access information or thought freely, not being accused -or criticized, her/his being able to express, defend or pass on to others her/his thoughts and opinions individually or collectively with other people using public means- associations, syndicates, meetings, etc., utilizing words, press, pictures, cinema, theater.[13] Because of this, bearing in mind the importance that bears in the individual's possibility to grasp and materialize other freedoms, freedom of thought earns a more superior and distinguished place in comparison to other freedoms.

3 Freedoom of Media

As an important component of freedom to express and disseminate thoughts, when freedom of thought is expressed through newspapers, books, magazines, etc., it becomes freedom of media, and when this done through organized institutions or collectively, it becomes freedom of associations, political parties, syndicates (unions) or freedom for meetings or demonstrations.[14] However, freedom of press is considered together with freedom of expression of thought in International Declaration and Contract[15] and many constitutions. Regarding formation, declaration and dissemination of thought, media is an important tool.[16] However,

[13] See: Turkish Academy of Sciences Report on Freedom of Thought (Prepared by: ***Ergun Özbudun, Adnan Güriz, Nevzat Toroslu***), Human Rights Center Journal, C. III, January 1995, 1, 3; TÜGİK, Freedom of Expression in Turkey: p. 19.

[14] ***Reyhan Sunay,*** 2001, Avrupa Sözleşmesi'nde ve Türk Anayasasında İfade Hürriyetinin Muhtevası ve Sınırları [The Content and Limits of Freedom of Expression in the European Convention and the Turkish Constitution], Ankara: Liberal Thought Community Publications: p. 129.

[15] According to Article 10 of the European Convention on Human Rights, 1950, "Everyone has the right to freedom of expression and expression. This right includes freedom of opinion and freedom to receive and impart information or ideas without interference by public authorities and regardless of national borders."; According to Article 11 of the Declaration of the Rights of Man and of the Citizen (1789), "The free communication and transmission of ideas and opinions to others is one of the most precious rights of man; Every citizen may speak, write and publish freely, provided that he bears the responsibility of this freedom in cases specified by law".

[16] ***Çetin Özek,*** 1978, Türk Basın Hukuku [Turkish Press Law], İstanbul: İstanbul University Press, No: 2381: p. 32.

freedom of media is a more recent concept than freedom of press, which emerged after the invention of the printing press.[17] This invention has furnished the individual with new tools and opportunities in using her/his right of expressing and disseminating of her/his thoughts. Therefore, the inclusiveness that printed press has supplied to the expression and dissemination of thought, has, in general, assisted in the birth of freedom of press along with expression and dissemination of thought.[18] The meaning of freedom of media[19] is not restricted to the expression of ideas freely. It also necessitates the establishment and operation of media organizations and institutions freely in order to use this freedom. Some limitations that could be imposed on the establishment and operation of these organizations and institutions may not damage the expression of thought; however, these limitations may inhibit the actual use of freedom of media. For example, we may mention imposing of conditions for permits on the establishment of printing houses or levying the burden of depositing warranty fees, and enforcing preprinting surveys on books to be published.

If freedom of media is held as being identical with freedom of expression and dissemination of thought, it becomes more difficult to combat the damaging tendencies like "monopolization". The reason for this is that "monopolization" is not about the freedom of expression and dissemination of thought. Monopolization is an action that threatens freedom of media and impedes media pluralism. On the other hand, that establishing a printing house cannot be associated with obtaining a permit and a depositing a warranty fee is solely an issue related to freedom of press. One of the most important and fundamental principles of freedom of press is the principle that "a journalist cannot be forced to disclose her/his source of information". Without this protection, the public role of press to supply the society correct and truthful information and secure an informed consensus will be in peril. Moreover, this principle is not for anyone wishing to express an opinion, only for journalists. Thus, in no way can it be possible for anyone giving information and/or expressing an opinion to refrain from disclosing its source by hiding behind this principle. In the light of these explanations, any dissemination

[17] ***Sulhi Dönmezer,*** 1976, Basın ve Hukuku [Press and Law], Enlarged and Revised Fourth Edition, İstanbul: İstanbul University Press, No: 2213: p. 42.

[18] ***Feyyaz Gölcüklü,*** 1970, Haberleşme Hukuku [Communication Law], Ankara: A. Ü. Faculty of Political Sciences Publications, No: 292: p. 6.

[19] In daily life, there is a situation where freedom of the press expands towards the media, rather than just the press. For this reason, the word "media" was preferred to be used instead of the word "press".

through printed, new trend media, audio and visual fields is a special kind of expression of thought; however, it forms a different category of freedom from freedom of expression of thought.[20] For this reason, it is necessary to subject freedom of press to a different legal category than freedom of expression of thought.

In a verdict passed by European Court of Human Rights (ECHR) in relation to freedom of press, it is stated that freedom of expression constitutes one of the important foundations of a democratic society and guarantees that must be supplied to the press possess a special significance. Press and other organs of media present to the public freedom of expression as one of the best ways of announcing and judging the views and actions of administrators. In the political arena and any other area than the public takes an interest in, press has the duty of relaying to the public the information and views that are in dispute. The right of the public to receive information and views complements this duty of press. In reality, freedom of press is, on the one hand, relaying all news and views that concern the public, and on the other, the right of the public to receive this information and reviews.[21] According to ECHR, only in this way can press can carry out the duty of "guard of the people", which bears crucial importance regarding the right of the people to receive information. If freedom of press is the issue, a limit is set on the right of discretion allotted to the national authority for the benefit of a democratic society. However, these principles that have been formulated at the ECHR primarily for printed media, encompasses, without a doubt, all audio-visual media.

In general, freedom of press includes the right to access news and thoughts, to comment on, analyze and criticize news and thoughts, print news and thoughts, and distribute them.[22] Furthermore, Çetin Özek, who assesses freedom of press within the scope of freedom to express thoughts, adds to these the "Right to Create". According to Özek, the right to create means, other than an event being disclosed or a subject being criticized and investigated, a person creating something new.[23] In article 3 of Press law number 5187, it is stated this freedom includes the right of "getting, disseminating, criticizing, commenting on information, and creating a work of art", and the right to create has been covered under freedom of

[20] ***Özek,*** 1999, Basın Özgürlüğünden Bilgilenme Hakkına [From Freedom of the Press to the Right to Information], 1st Edition, İstanbul: Alfa Publications: p. 204.

[21] ***Osman Doğru, Atilla Nalbant,*** 2013, İnsan Hakları Avrupa Sözleşmesi – Açıklama ve Önemli Kararlar [European Convention on Human Rights – Explanation and Important Decisions], Ankara: Potitive Printing, Vol. 2: pp. 206–207.

[22] ***Dönmezer,*** (1976, p. 94).

[23] ***Özek,*** (1978, p. 36).

press. As a result, for freedom of press, the "Right to Access" news, thoughts and information, the "Right to Comment on and Criticize" news, thoughts and information, the "Right to Print and Disseminate" news, thoughts and information, and the "Right to Create" have to be secured.

4 Legality—Legal Limitation

Currently, as it has been in the past, the subject of relaying thoughts to others and how they are going to be relayed is a subject that needs to be regulated by law. The main purpose of constitutionalism is to limit the power of state in order to preserve human rights. Coupled with this, freedom of thought, for which there are efforts to keep outside of the domain of intervention, has an important place in constitution and declaration of rights. One of the major texts in the "Declaration of Human and Citizens' Rights" that was issued on 26 August 1789, which was based on democracy and freedom, and which forms the foundation of the French Revolution, it is stated that freedom of declaring and disseminating of thoughts is one of the fundamental human rights.[24] Further, in the first of the compulsory ten amendment articles known as "Declaration of Rights"[25] of the United States Federal Constitution -the first written constitution ever- announced on 15 December 1791 states that no law can be passed that will limit the freedom of thought, thus securing this freedom.

In the twenty first Century, as a result of the very fast progress in knowledge and its communication, emerged the necessity of rendering more effective the restrictions on the fundamental human right of freedom of thought through the use of national and international laws. Information society is defined as: "a society with very high interaction and the structure of a network[26] in which information, as the most fundamental commodity, is expanding at an ever increasing rate in every field of life on a global scale every day, where concepts such as flexibility, variety, creativity, and novelty are determiners, and educated individual gain

[24] For Article 11 of the Declaration on freedom of thought, See: ***Burhan Kuzu,*** 1995, Türk Anayasa Metinleri ve İlgili Mevzuat [Turkish Constitutional Texts and Related Legislation], 5th Edition, İstanbul: Filiz Bookstore: p. 724.

[25] ***Yaşar Gürbüz,*** 1981, Anayasalar [Constitutions], İstanbul: Filiz Bookstore: p. 36.

[26] ***Seçkin Gültan,*** 2003, Bilgi Toplumu Sürecinde Avrupa Birliği ve Türkiye [The European Union and Turkey in the Information Society Process], Ankara: Ankara University Press: p. 47.

prominence". In this process, what makes the exchange of news, phenomena, ideas or messages is possible is communication. The special character of communication is its dynamism. As a result of this process, information makes its appearance as an important phenomenon.

In the communicative arena, where the internet network wrapping the world conveys information to people at the same moment, the speed of exchange of information and ideas become faster and more widespread, the relations among individuals, communities and nations become more intense and gain a new dimension. In the face of these developments, it is a recognized fact that human rights is no longer the problem of one nation, but when it cannot be preserved, international organizations enter the picture. Consequently, the world is ever becoming smaller, and the process called globalization becomes faster, individuals start forming communions transcending borders around common interests. Thus, the nation-state model is sliding towards rights-state. Right, in the official dictionary of Language Institution of Turkey (Türk Dil Kurumu: TDK), is used synonymously with the concept of "justice" and is defined as "nonmaterial authority stemming from effort spent". However, in the doctrine, right is described "as freedom rendered concrete". If that is the case, then what are thought and the right of freedom to express thought? Right of thought and expression, has been covered in subdivision 1 of article 26 of the Constitution of the Republic of Turkey,[27] and article 10 of European Convention on Human Rights[28] (ECHR). This right is in the common protection area of the Constitution of the Republic of Turkey and European Convention on Human Rights and against actions or operations that violates it, "personal appeals" can be made.

In fact, in order to expand the freedoms of individuals, the purpose of laws is, on one hand, to assist the society in sustaining its existence, on the other, to protect the freedoms of the individuals against unnecessary restrictions and interventions. As a result, since the freedom of thought and freedom to express thought are a right, for individuals forming the society, benefiting from equal rights can only be possible bringing under the roof of a "Community of Rights" formed by lifting of antidemocratic restrictions in laws and bringing the boundaries of laws into harmony with standards of international laws, thus securing the fundamental rights of all individuals.

[27] The Constitution of the Republic of Turkey, Adopted by Popular Vote on November 7, 1982, T.R. Official Gazette, November 9, 1982, Number: 17863.

[28] European Convention on Human Rights, text as amended by Protocols 11 and 14, Series of European Treaties, No. 5.

5 The Place of Freedom of Press in the 1982 Constitution of the Republic of Turkey

There are many articles in the 1982 Constitution that cover freedom of press. However, Articles 25 and 26 are the most important. In the constitution, as different from Universal Declaration of Human Rights (UDHR) and ECHR, freedom of press has been expressed as a different right from the freedom of expression of thought. In this way, the negativities created by being torn off universal law, emerged gradually and became more evident.

Some lawyers say that because of this arrangement, the way the constitution regards the freedom of thought and the freedom of expressing the thought is incorrect and consider the freedom of expression of thought and freedom of press as being identical.[29] The provision in the last subdivision of Article 25 of the Constitution[30] encompasses the right to express thought, and says no person can be forced to announce their thoughts and opinions, nor can they be criticized or indicted for their thoughts and opinions. This provision means, "You may think in any way you want, and as long as you keep your thoughts to yourself, it is not a crime!" In other words, naturally you may think in any way you please but not tell this to anyone, who will know what transpires in your head anyway? However, if you attempt to express your thoughts, it is a different story. If that is the case, it means you are now in the domain of Article 26 of the Constitution that covers the freedom of expression and dissemination of thoughts. In Article 26, with the definition of freedom of expressing of thought, in the first two subdivisions, after stating the freedom in this domain "will be exercised without the intervention of official authorities", in the 3rd subdivision, it is stated that "broadcasts made over radio, television, cinema and such may be brought under a permit system." Thus, with this provision, it can be seen that a door has been left open for a system of censorship. Again, the first form of this Article draws another path for stating and disseminating a thought and passes the provision "no language that has been banned by law can be used in expressing and disseminating thought".[31] We can say this article is in Kurdish as well. This provision is given in

[29] ***Özek,*** 1999, From Freedom of the Press to the Right to Information, İstanbul: Alfa Publications, 1st Edition: p. 204.

[30] The Constitution of the Republic of Turkey, Adopted by Public Vote on November 7, 1982, T.R. Official Gazette, November 9, 1982, Number: 17863.

[31] Republic of Turkey Official Gazette, Date: October 22, 1983, Number: 18199.

subdivision two of Article 28, where freedom of press is covered. What s banned here is not a thought, but expressing thoughts using banned language. Besides the fact that implementing such a ban in a modern democratic society cannot even be considered, it lacks both legal and sociological foundation. This ban, which also violates the Lausanne Peace Treaty, is stated in Article 39 as "no obstacle will be put in the path of any Turkish nationals using any language they wish in their private or commercial relationships regarding religious, press or any publishing subjects in open meetings".[32] As a matter of fact, what gives substance to the "Banned Language" levied on freedom of expressing and disseminating thought and freedom of press is the "Law on Publications in Languages Other Than Turkish" through Law no 2932 put into effect by the military regime of September 12. This law was suspended in 1991. This article in the Constitution was deleted from Article 26 in the amendment effected in 2001, and the conflict with Lausanne Peace Treaty was also dealt with, and thus, the expression and dissemination of thoughts in the Kurdish language was secured under the Constitution.

When we look at the articles on freedom of thought in the Constitution in detail, we see the negativities plaguing the regime of freedoms in the Constitution in Articles 27 and 28 as well. In Article 27,[33] it is stated that "the allowing into the country and distribution of foreign publications may be regulated by law", and without establishing any principles or restrictions, the subject has been granted to the discretion of the law-maker. Article 28 has been devoted to "Freedom of Press".[34]

In the first article of the above-mentioned law, the exemptions of the provision "Press is free, and it cannot be censored!" have been listed in the article itself, and thus, the boundaries of this freedom have been delineated. Considering freedom of press, these exemptions clearly indicate that the 1982 Constitution, in comparison to the 1961 Constitution is anti-democratic and open to censorship.

In words of Hıfzı Topuz, Tanör said, regarding the "Place of Freedom of Press in the Constitution": "If the Constitution had totally denied this freedom or if there were no Constitution in Turkey, would this freedom have been any less

[32] Lausanne Peace Treaty, https://www.ismetinonu.org.tr/lozan-baris-antlasmasi-tam-metni/, Accessed July 30, 2021.

[33] The Constitution of the Republic of Turkey, Adopted by People's Vote on 7 November 1982, T.R. Official Gazette, November 9, 1982, No: 17863.

[34] "The press is free, it cannot be censored…" The Constitution of the Republic of Turkey, Adopted by Popular Vote on November 7, 1982, T.R. Official Gazette, November 9, 1982, No: 17863.

safe? The answer to this question is vested in itself, because Turkish press is free within the scope of law". And this is not any securer than it was in the 1876 Fundamental Law (Kanun-u Esasi). If this is the case, two facts need to be delineated: First, "The function of the 1982 Constitution is not to preserve the freedom, but to legalize the restrictions and interventions." Second, The systematics of the Constitution makes it possible to restrict the freedom of press not only based on the related special articles, but also for general reasons and hard-to-explain concepts.[35]

In Article 22, The 1961 Constitution states that only for purposes of protecting national security or general morality, people's dignity, honor and rights, stopping encouragement of crime, and securing that the duty of executing justice in line with its purposes can freedom of press be restricted. With the amendment effected in 1971, the Unity of the country and nation of the state, "public order" and "confidentiality necessitated by national security" were added to the reasons for restrictions specified in the first form of Article 22. In Article 28 of the 1982 Constitution, in restriction of freedom of press, that Articles 26 and 27 would be applied was emphasized and thus freedom of press was restricted. In 1983 in the general field of communication, within the scope of Article 11 of Law number 2935 of Extraordinary Conditions, authority was delegated to Regional Governorships.[36] Further, Article 25 of the Constitution was amended to convict to imprisonment for three months to one year the offenders who, for special purposes, publish unfounded and exaggerated news to create public unrest and anxiety, and if these crimes are committed using mass media, double penalties were to de levied.[37] In brief, the following could be said: This freedom cannot be used to amend the unchangeable articles of the constitution, or The Form of the State of Turkey, the characteristics of the Republic, the Official Language of the State, the Flag, the National Anthem, and Capitol. However, in compliance with the purposes listed under the Fundamental Characteristics of the Republic,[38] freedom of press may be restricted.

[35] ***Hıfzı Topuz,*** 2003, II. Mahmut'tan Holdinglere Türk Basın Tarihi [Turkish Press History from II Mahmut to Holdings], İstanbul: Remzi Bookstore: p. 262.

[36] 6175 State of Emergency Law, T.C. Official Gazette, Oct. 25, 1983, No: 18204.

[37] Topuz, 2003, p. 263.

[38] The Constitution of the Republic of Turkey, Adopted by Popular Vote on November 7, 1982, T.R. Official Gazette, November 9, 1982, Number: 17863.

6 Media in Turkey Through Media Organizations

The regulatory audits of the operations and actions of the state are not only through legal means, but also public consensus audits must be possible. What we call state, if sovereignty unconditionally belongs to the people, uses the right of sovereignty that belongs to the people. While doing this, the state has the responsibility to its citizens to explain with justifications that it is doing the right thing. By implication, restriction of freedom of thought can be respected only if the restriction is based on a justifiable reason. If very overtly, an infringement of a personal or public right is the issue, justice may be sought. However, the functionality of justice is dependent on functionality of public opinion. Public opinion, the must-have condition of the existence of democracy, is effected through media and the utilization of collective freedoms. In the digital age we are experiencing all of these audits are a part of each other, and we can talk about effective mechanisms only if they are all present. Within this framework, some national and international non-governmental (NGO) and professional organizations have announced on 3rd of May World Free Press Day their views on BBC News[39] and in a variety of reports[40] that no person could say there is free press in Turkey. To cite a few, Journalists Association of Turkey (TGC), Journalists Syndicate of Turkey (TGS) and Reporters Sans Frontières (RSF) are among these organizations. Such professional associations especially point out that 90% of media organizations are under the supervision of the government, with the ruling of a single judge, publication is stopped, books are recalled, and, by implication, it is not possible to talk about the presence of a free press in Turkey. In addition, with the right to receive news being deemed non-existent and the enforcing of auto-censoring on journalists, the Press Announcements Institution (BİK) has abandoned its role as a support institution, and turned into a censoring tool, the incidents of cutting off of public announcements and using it as an economic stick, have all become visible through examples. The common scope of the two publications cited next is the violence and censorship used against journalists: the RSF Freedom of Press Index, and the reports and explanations announced in 2020–2021 are as follows.[41]

[39] ***Abatay*** (News Ed.), BBC News /Turkish, Accessed May 3, 2021.

[40] TGS, 2020–2021 Press Freedom Report and 2019–2020 Press Freedom Report.

[41] ***Abatay*** (News Ed.), BBC News /Turkish, Accessed May 3, 2021.

a. The Paris-based RSF, which defends freedom of press, and which has taken Article 19 of "Universal Declaration of Human Rights" as their most important foothold: "Every individual has the right to freedom of thought and announcing of thought. This right also contains the right to be free of disturbance from others because of their thoughts, not being bound by the borders of the country in their searching for, acquiring and disseminating of information or ideas using all means," ranked Turkey 153rd among 180 in their World Freedom of Press Index, and in the eyes of journalists, Turkey is termed "the greatest jailhouse in the world". In this index that RSF compiles and announces annually, freedom of media transgressions -murder or arrest of journalists, censorship, pressure, state monopolies in a variety of areas, penalizing of crimes of press and a reorganization of press are present. Rich countries that rank at the top of the list have no monopolies regarding freedom of press. In countries that rank lower, press is not independent or free. In such countries the only voice that can be heard is media that is scrutinized or tracked closely by the government. Independent journalists are always being pressured, imprisoned or made jobless by elements of power. In these countries, foreign journalists are banned, or allowed in minimum numbers and are always followed closely.[42]
   The reasons behind the accusations in the 2021 Index of RSF are the oppressive legislation in Turkey, widespread and vague legal arrangements and the paranoid justice system. RSF proposes, as a solution, the total review of all articles of Law for Fighting Against Terrorism and other articles of laws.
b. In the Freedom of Pree Report spanning the period 1 April 2020–1 April 2021, TGS, which defends all economic and social rights of journalists, tries to alleviate the pressures on their pens, and which is a member of all syndicates of journalists in democratic countries, the violations of the rights of journalists, obstructions of news and pressures directed towards journalists are ongoing are emphasized. In the report, it is stated that every new year is worse than the previous one, and that no talk can be made of any improvement, and the following results emerge: 43 Journalists are in prison for activities of journalism -almost all of the journalists are indicted and apprehended with accusations as attempts to abrogate the constitutional regime, membership with armed terrorist organizations and propaganda, and it is stated that 57 journalists have spent

[42] Reporters Without Borders publishes the first worldwide press freedom index, https://web.archive.org/web/20170730162620/https://rsf.org/en/news/reporters-without-borders-publishes-first-worldwide-press-freedom-index-october-2002, Accessed August 8, 2021.

a total of 144 days in detention, and 6 journalists are reported to have been battered while in detention. Again, in the report, it is announced that investigations have been initiated on 101 journalists, 274 journalists are on trial in 128 different lawsuits, and 226 years 8 months and 25 days of imprisonment have been passed in verdicts. This reflects also how much in jeopardy the freedoms and rights to security of journalists are.

In the declaration by TGS, titled "Press is in Trouble", it has been stated that media is not free in Turkey. Journalists are censored, fired, or put in prison. Thus, the society is losing its right to get news, and our country is losing its democracy. Because if press is in trouble, then democracy is in suspension. Declarations such as "If press is in trouble, everybody is in trouble" are being voiced more and more. In the past year, that 1411 news contents in 62 press sites have been denied access has also been reported. Further, that RTÜK has issued Administrative fines worth 7 million 488 thousand 851 Turkish Liras and 41 penalties of stopping broadcasts, 322 press cards have been canceled, and BİK has levied 212 days of deprivation of public announcements on newspapers are items of news that have gained prominence. Newspapers BirGün and Cumhuriyet have received curbing of public announcements totaling 55 days in November and December because of the news they have reported. However, in the report it is stated that non-existence of any court verdicts related to the news in question and the fact that there have been no denials of them, it is worrisome that they have been punished because of the language they have used. Further, whereas BİK, by virtue of the reason for its establishment, has to be a public institution that protects organs of press, the report states the peril that it has turned into a "censorship institution".[43]

The information presented in this report, the arguments carried out and the volume of the report, through its presentation of a broad perspective of freedom of press regarding the 2020–2021 term, are a concrete witness to Turkey's deviation from universal standards.

c. TGC has been established for the purpose of securing the acceptance, development, protection and pervasion of the "Declaration of Rights and Responsibilities of Journalists of Turkey", making it possible for everyone to be informed and to learn the facts, defending the rights of all for communication, expressing rights and promoting freedom of press, expressing views, utilizing the right to criticize and comment on issues, and to develop, advance and

[43] Journalists Union of Turkey, 2020–2021 Press Freedom Report.

heighten journalists in material and non-material ways.[44] TGC, on the World Press Day,[45] summons the government to set free journalists, to prevent physical assaults against journalists, to find and penalize the perpetrators of such attacks. In the summon, it was expressed that "We cannot talk about a free press in Turkey when 90% of media organizations are under the supervision of the government, 12 thousand journalists have been rendered jobless, thousands of lawsuits have been brought against them because of what they think and write, and 43 journalists are in prison."

With information deduced from the reports all three media organizations have produced based on numerical data, the widespread nature of censorship is for all to see once more. In addition, it is stated that with these interrelated obstacles, media in Turkey is in a vicious circle. Here, the investments of Media owners, political relations and government pressure are seen as the most important reasons that lead to censorship. Along with this, the political pressures on journalists and legal interventions form a pressure tool forcing auto-censorship. Furthermore, the deficiency of unity and solidarity among journalists is another reason behind the increase of fear and auto-censorship.

7 U.S.A. and Turkish Media: Applications of Censorship and Auto-Censorship

Article 26 of the1982 Constitution says, everybody has the right to announce and disseminate her/his thoughts and views through words, writing, pictures or other means individually or collectively. This freedom encompasses receiving news or opinions without the intervention of official authorities.[46] However, being able to print, relay—disseminate thoughts, opinions, information and news is a right. It is also necessary that criticism or comment directed towards this right should be possible to print and distribute without any prior examination. The non-existence of prior examination of media indicates there is no censorship and it is called ban on censorship. As exemplified in constitutions of U.S.A., Italy, Japan, Germany,

[44] Turkish Journalists Association, Institutional History, https://www.tgc.org.tr/kurumsal/tarihce.html. Accessed May 19, 2021.

[45] ***Abatay*** (News Ed.), BBC News /Turkish, Accessed May 3, 2021.

[46] The Constitution of the Republic of Turkey, Adopted by Popular Vote on November 7, 1982, T.R. Official Gazette, November 9, 1982, Number: 17863.

Greece, and Russia,[47] in Turkey too, on 24 July 1908 with the proclamation of 2nd Constitutionalism, censorship on press was annulled in Turkey. In other words, with the amendment made to Article 12 of the 1876 Constitution when it was reinstated in 1908, banning of censorship became a part of all subsequent constitutions. Just as it is in constitutions of other countries, Article 28 of the Turkish Constitution accommodates this ban, saying "Press is free, and cannot be censored". So, according to the Constitution, this means press has finally embraced its so-called freedom. Yet, theory and practice do not always overlap, and the gap between them is widening.

The word "censor" is of Latin origin, and gets its meaning from "censere", which means "assessment, appraisal". This concept, which is used as "censure" in French, and "censor" in English, was used to mean "person who is responsible for counting and morality"[48] in ancient Rome. In Turkish, the term censorship is used to mean "Prior revision of all kinds of broadcast/printing, works of cinema and theater.. showing of all kinds of broadcast/printing, works of cinema and theater being subject to permission, tight scrutiny",[49] and is a concept that, for the so-called public benefit, restricts or prevents the functionality of the principle of

[47] According to the 1st Addendum to the United States Federal Constitution (1787) added in 1791, "Congress cannot make laws limiting freedom of speech or the press"; According to Article 21 of the Constitution of the Italian Republic, which entered into force on 1 January 1948, "Everyone has the right to freely express his opinion, either orally or in writing, and through any other publication"; According to Article 21 of the Japanese Constitution, "Freedom of assembly, speech, press and all forms of expression are guaranteed." According to Article 5 of the Constitution of the Federal Republic of Germany, "Everyone has the right to express and write their opinion in words, writing and pictures, and to obtain information from sources open to everyone without any hindrance. Freedom of the press is guaranteed, with freedom to impart information via radio and film. No censorship"; According to Article 14 of the Greek Constitution, "Everyone can express his thoughts orally, in writing and through the press in accordance with the law and make propaganda. The press is free, censorship and all preventive measures are prohibited."; According to Article 29 of the Russian Constitution of 1993, "Everyone has the right to freedom of thought and speech… Freedom of mass media is guaranteed. Censorship is prohibited." See. ***Yaşar*** Salihpaşaoğlu, 2007, Freedom of the Press in Turkey, Ankara University, Institute of Social Sciences, Department of Public Law, PhD Thesis, Ankara: p. 26.

[48] ***Seven Nisanyan,*** Sözlerin Soyağacı, Çağdaş Türkçenin Etimolojik Sözlüğü [Genealogy of Words, Etymological Dictionary of Contemporary Turkish], Istanbul, Adam Publications, Revised 2nd Edition, 2004: p. 393.

[49] TC Atatürk High Council of Culture, Language and History, Turkish Dictionary of the Turkish Language Association (TDK), definition of "censorship".

"free circulation of information". In the historic and social process, naturally people have the right to bear feelings of distaste towards opinions that they don't like or that are opposed to them and the people who support those opinions. Censorship is this distaste that people take a stand against. In fact censorship is the product of seeing free press as a menace for the state in fifteenth Century. Censorship, which was put into effect by the "banning of thought" by the Catholic Church, passed on to political authorities in sixteenth and seventeenth Centuries, and the political authorities sustained it through their officials.[50] Naturally, the development and shaping of press occurs according to the distinctive conditions of the location. Even in the advanced capitalist countries that put mass communication means on the stage of history first, the historic development has been different. As a result, based on various social and political reasons where different conjunctures are needed, freedom of press fetches different comments in places that are different both conceptually and in social practice.[51] Currently, censorship is in the grip of international capital, owners of media and the political regime. As the source of censorship has changed with this change of ownership, the problem of freedom of press has become more significant.

The freedom of people to generate, disseminate and access information, be able to learn the facts and express their own views is one of their fundamental rights. In contemporary democratic societies where freedom of press is widely accepted, "censorship" is viewed as an instrument of pressure and finds progressively less area for application. Press, which is an institutional structure, is a whole with its workers. Therefore, freedom for press necessitates that people working for institutions of press be free as well. Especially, the transformation media experienced during the monopolization process has caused journalists to exercise auto-censoring, in other words subjecting themselves to self-induced censoring. In French, autocensure, in TDK Turkish Dictionary, auto-censuring, which means "individuals or institutions censuring themselves" forms within the organization or in the memories of journalists.

The process of media censuring itself starts with employees censoring themselves due to fear invoked systematically by the pressures the autoritarian structure in the system is inducing without intervention from the government. This

[50] ***W. S. Holdsworth,*** "Press Control and Copyright in the 16th and 17th Centuries", Yale Law Journal, Volume: XXIX, 1919–1920, pp. 841–858.

[51] ***A. Raşit Kaya,*** 2016, İktidar Yumağı, Medya-Sermaye-Devlet [The Ball of Power, Media-Capital-State], Ankara, Imge Publishing House, 2nd Edition: pp. 98–99.

attitude, which becomes progressively internalized transforms into behavior and exhibits itself in media apllications. Through media employees themselves, with political tutelage, media ownership structure, being non-union, and the employees' worries about future, experiencing of auto-censuring rather than censuring results, on the one hand, in employees not performing their duties properly, and on the other, damages the impartiality of the media by violating openly the constitutional right of accessing information and news. This is the most dangerous form of censoring. Capital—government organization, and censorship that has turned into a political action, is actually in effect according to the research findings of the national and international media organizations cited below. Two representative media organizations that provide public service at international level and are followed as examples in censorship and auto-censorship, conducted two researches 20 years apart and produced noticeably similar results. First of the researches is the questionnaire conducted by The Pew Research Center and Columbia Journalism Review,[52] titled "Auto-Censorship: How Often and Why". The second one was conducted by Journalists Association of Turkey (TGC) and Auto-Censorship Personal Experience Questionnaire" within their 2019–2020 "Freedom of Press Report[53]" The findings are as follows:

7.1 U.S.A.—The Pew Research Center with Columbia Journalism Review-Self Censorship: The Questionnaire "How Often and Why?"

This questionnaire that was conducted to find out how often and why journalists shy away from the news they are about to report. 206 reporters and 81 administrators/editors from 150 local and 137 national press organizations participated in the questionnaire.

The antecedent questions this research sought answers for were:

- Shying away of journalists from the news they are to report: the complexity of the news, thinking the news is scrupulous or boring,

[52] Reporters Without Borders publishes the first worldwide press freedom index, "Self Censorship: How Often and Why" https://www.pewresearch.org/politics/2000/04/30/self-censorship-how-often-and-why / Accessed May 5, 2021.

[53] TGS, Journalists' censorship and self-censorship personal experience survey, APPENDİX-3.

- The probability that the news they are avoiding could be damaging to the news agency, or the advertiser advertising in the media channel, or to the immediate circle of the boss,
- To what extent does the news to be reported hurt the journalist (reporter): the source of the news, acting with other journalists, and career

According to the numerical data supplied, in U.S. media auto-censor is widespread, 25% of local and national journalists knowingly shy away from news worth reporting, almost just as many soften the tone of the news that could damage the interests of news agencies. Further, 41% of participants report that they are doing either or both. Thus, this data alone displays how widespread auto-censor in the media is. Although it can be seen that the participants are in general agreement with each other as to the extent and the main reasons of auto-censoring, pressures from the market are observed to be the most common factor among the reasons for shying away from news worth reporting because they are very objectionable or complex.

A majority of 52% in press and broadcasting accepts that they often or sometimes avoid news worth reporting because they are complex or unattractive to viewers. 35% of participants pointed out that they did not know the news that would hurt the financial interests of a news agency and 29% reported that they did not know about news that would harm the advertisers. Journalists also report that they do not decide alone about avoiding news worth reporting. 54% of those who think that news are sometimes ignored say that 30% of the time they get hints from their bosses, or 24% say that when they ponder how their bosses will react, they ignore the news. 75% of those who believe events worthy of being termed news are being avoided to protect the interests of media owners say that journalists receive hints from their superiors or wait for negative reactions, and the questionnaire shows that only 8% of journalists decide to avoid such news on their own accord. Just like journalism is an art rather than science, the process of determining when and why factual and correct news are avoided or not is defective as journalists themselves point out in the questionnaire. A heavy majority (58%) states that news are being covered up because of conflicts of interest. On the other hand, the questionnaire presents important proof that, at least for some journalists, commercial interests interfere with decisions of the newsroom openly. For example, 20% of local, 17% of national correspondents report that after writing an article that is thought to have caused damage to the financial interests of their institutions, they received criticism or pressure from their bosses.

When the responses of those that did not shy away from the news is examined, only 37% of national, and 35% of local journalists rated the profession with high

points, and both groups, thought most of the media did a fair job,[54] and that the institutions they work in are independent economically and politically is the most important obstacle in front of auto-censoring. It is seen that journalists who report that they are being censored, are censored due, to a great extent, to the political relations and financial interests, and in congruence, the broadcasting/publishing policy is one of the most basic reasons behind the censorship. Furthermore, that censorship and auto-censorship are not only limited to economic and political news, but can also spread to all kinds of fields, are among the important findings of the questionnaire. It is seen in the questionnaire that even if the institution that the journalist does not exercise censoring, the journalists are censoring themselves in some ways. Fundamentally, one of the points of worry underlying auto-censoring is, for example, the journalists being subjected to criticism or pressure by the media boss for the news that is considered to be the source of damage to the financial interests of the institution. Thus, the most important reasons underlying auto-censorship are institutional pressure, the fear of being fired, economic worries, the fear of solitude and the fear of harming the institution.

7.2 TURKEY—Journalists Syndicate of Turkey (TGS) -The Censorship and Auto-Censorship Personal Experience Questionnaire

141 journalists participated in "The Censorship and Auto-Censorship Personal Experience Questionnaire" conducted by TGS. The purpose of the questionnaire is to determine the presence of censorship and auto-censorship through personal experiences of journalists, to bring into light the underling reasons and to contribute to the discussion of the issue. This research is in quest of answers to the following questions:

- Are journalists subjected to censoring in Turkey?
- If they are censored, what kind of reasons are used and how does the censoring happen?

[54] Reporters Without Borders publishes the first worldwide press freedom index, "Self Censorship: How Often and Why" https://www.pewresearch.org/politics/2000/04/30/self-censorship-how-often-and-why/ Accessed May 20, 2021.

- Are journalists auto-censoring in Turkey? If they are what are the underlying fundamental worries?[55]

The findings of this questionnaire that declares that 80.8% of media workers are censored and 19.1% aren't, singly shows that censuring is widespread in Turkey. When the responses of those who stated that they were not being censored are examined, that the institutions that these media workers are working in are economically and politically independent emerges as the most important factor. Those who state that they are being censored say that this is happening mostly because of the political relations of the boss. In this sense, local and central government pressure are some of the most important reasons of censorship. In addition, the questionnaire shows that "cross-media ownership is a critical threshold that carries journalists to censorship". That censorship is not restricted to news on economy and politics only, and could spread in all directions are among the important findings of the questionnaire. When viewed in this light, both the expansion of the areas of investment of media owners and the increase in the interventions by legal institutions are significant.

The participants that were subjected to censorship became alienated with the profession and drifted towards auto-censorship, and 78.7% of participants did auto-censorship, and 21.2% didn't according to the research.

Among participants who said they were not subjected to censoring, 60% said they did auto-censoring, and 40% said they didn't. 82.8% of those who said they were censored, said they also auto-censored, 15.7% said they didn't. As a result of this survey, we can see that even if there is no censoring in the institutions participants are employed, a high percentage of participants are somehow censoring themselves.

What we really need to emphasize in the survey are the underlying reasons of auto-censorship, which are: facing trial, being taken into custody, being indicated as a target, being fired and not being able to find a job. The most important reasons underlying auto censure are: economic worries, solitude or being pushed into solitude, government pressure, fear of being fired, being arrested, and worry about causing damage to the institution. On the other hand, that the source of auto-censuring has expanded from elections to the writing of the news and the actual viewing ratings of the news are among the data the survey supplies.[56]

[55] TGS, Journalists' censorship and self-censorship personal experience survey, APPENDİX-3.
[56] ibid.

Before moving on to the comparison of findings of these researches, it will be useful to look at the placement of U.S.A. and Turkey in the 2002 and 2021 World Freedom of Press index of RSF.

7.3 RSF, 2002 World Freedom of Press Index: Turkey—U.S.A.

In the index, which was first conducted worldwide with the participation of 139 countries in 2002, U.S.A. ranks 17th, and Turkey 99th. The ranking of U.S.A. so high up is based on two reasons. First is the number of journalists that are in custody in the country. In other words, these journalists are in custody because they refuse to reveal the "source of the news". Second, many journalists have been arrested due to infringement of security in some official buildings.

In the index, why Turkey is below the red line is based on the fact that in spite of the many reform efforts of the government to facilitate admission to European Union (Avrupa Birliği—AB), many journalists are sentenced to imprisonment, and there exists the routine censoring of the media.[57]

7.4 RSF, 2021 World Freedom of Press Index: Turkey—U.S.A.

In the index, U.S.A. ranks 44th among 180 countries, and Turkey 153rd. Regarding U.S. media, in his first extensive foreign policy speech, Joseph R. Biden mentioned the feeling of security based on "The necessity of the existence of a free press for the health of democracy". RSF shows Donald Trump as an example, and in the Covid-19 period, pointed at the disinformation disseminated by various heads of state and government heads, and that leaders in many countries embarked on provocations against press and caused the emergence of aggressive and insecure conditions. Furthermore, in 2020, the last year of Trump's presidency, the assaults on 400 journalists, the taking into custody of more than 130 people, and that most of the assaults on members of media happened while they

[57] Reporters Without Borders publishes the first worldwide press freedom index, https://web.archive.org/web/20170730162620/https://rsf.org/en/news/reporters-without-borders-publishes-first-worldwide- press-freedom-index-october-2002, Accessed August 8, 2021.

were trying to report on the protests against countrywide systemic racism and police violence on non-whites, have been effective in the ranking.[58]

Turkey, which RSF qualifies as the country with the risk of imprisonment, facing trial or fear of confiscation of their passports of journalists, even if no longer the country with the highest rate of imprisonment of journalists, used the Syrian refugee crisis, political manipulation, and handling of the Covid-19 crisis to strengthen authoritarian policies towards İdlib and opposition media. Furthermore, the administration has used the judicial system for political ends. The government has under control 90% of national media using regulatory and auditory mechanisms. BİK, which allocates state announcements, Presidential Communication Directorate, which issues press cards, and RTÜK are undertaking overtly discriminatory activities to alienate and criminalize media. In the "New Turkey" where arbitrary decisions of judges and state institutions are now normal, internet censorship has attained unprecedented levels. It is now almost impossible to question the authorities and the privileged. International media platforms are subjected to such sanctions as progressively increasing fines and withdrawal of advertisements if they do not appoint legal representatives in Turkey and disregard the verdicts of Turkish courts.[59] Thus, the ranking of Turkey is ascertained based on these basic questions.

7.5 Evaluation

In this work, a comparison was made in order to understand how media employees visualize censorship and auto-censorship, and how much they display the reality of this, not by using one source of data, but by using a diversified variety of sources. In this process, because of the nature of qualitative work, bringing into light of the facts of censorship and auto-censorship with all their dimensions were made both by comparison and interrogating. In the light of research chosen representatively, we have observed that Turkey is under serious censorship and has progressively turned into a country which is losing its memory of political arguments. Auto-censoring, which is the most important problem of media, is an obstacle that has been created by media workers, barring the public the right of getting news. Unfortunately, through the doings of auto-censoring media workers,

[58] ibid.

[59] ibid.

the citizens are not informed about a lot of what is happening, the claims and discussions, and are deprived of the right of receiving news. Yet media is the essential force of circulating news if the news meets the criteria of responding to the wh-questions, thus covering all elements of the news. Furthermore, in this work, which takes as its basis the "freedom of thought and expression of thought", the findings of the questionnaires conducted by the PEW Research Center and Columbia Journalism Review, and the Syndicate of Journalists of Turkey are especially important. In order to visualize and grasp the extent of censorship that the media of U.S.A. and Turkey are experiencing, the table that displays the pressures that came out of the findings of research is as follows:

	TABLE MEDIA AVOIDING NEWS	
	U.S.A – 150 Local and 137 National Media Workers- **April 30, 2000**	**TURKEY** – 141 Media Workers- **April 2, 2020**
Media, Capital, State	The economic interests of the institutions where they are employed	Lack of poitical and economic independence of the institutions where they are employed
Media Owners	Their investments and political relations	Investments and political relations
Reservations	Institutional pressure, damaging the financial interests of their institutions, facing trial, fear of being fired, economic worries, isolation	Facing trial, being taken into custody, being targeted, fear of being fired and being unable to find a job, kurumlarının finansal çıkarlarına zarar vermek, damaging the financial interests of their institutions, economic worries
Reasons	Political and financial interests of the boss	The economic and political interests of the media owners
Censorship—Auto-Censorship	**Widespread (41%)**	**Widespread (80.8%)**

The Pew Research Center and Columbia Journalism Review: "Self Censorship: How Often and Why" and the "Censorship and Auto-Censorship Personal Experience Questionnaire" conducted by the Syndicate of Journalists of Turkey

As can be seen, this concrete situation is also an indication of how universal censorship and auto-censorship is. The medias of Turkey and U.S.A. are censored! Yet, in both countries the right to thought and expression of thought are safeguarded by constitution.

In the U.S.A., we observe that media that is trying to use this right is facing many obstacles and that these obstacles are interrelated. The investments and relations of media bosses are the main reasons that lead to censorship. Lack of solidarity among journalists and fear are other reasons of the increase of auto-censoring. Furthermore, the 2021 "Freedom of Press index" of RSF indicates that this cycle is still ongoing, and that the restrictions on this freedom will go on for quite a while. By implication, the historical progress of mass communication media varies from country to country, and freedom of media is peculiar to where it exists.

Turkey, on the other hand, is mentioned as the country where news cannot be accessed as indicated both in the Freedom of Press Report of TGS and the 2021 "Freedom of Press index" of RSF. The questionnaire in which distribution of participants is homogenous, significantly indicates that censorship in Turkish media is becoming ever more widespread and that there are many obstacles on the path of media effecting circulation of news.

8 Conclusion

Freedom of expression -the founding and inseparable component of democracy- is a constitutional right in the domain of fundamental rights and freedoms. Constitutions are social contracts that determine the fundamental order of the state and society. Laws, on the other hand, are the norms that organize the basic orders of the state, and their functioning regulate rights and responsibilities in the fields of the private and public legality of people. According to journalist-writer Çetin Özek, the freedom to express thoughts through press -generally to "express thoughts", specifically "express thoughts through other means"- is currently seen as an irrevocable value that secures the "right of people to be informed, to learn the facts". By implication, as personal attaining of information is a right, the freedom of media, which grants functionality to this right, to secure the freedom of" correct and widespread dissemination of news[60]" cannot be stopped. Moreover, the right to be informed secures a contemporary, direct democratic system and gains a functionality to prevent the despotic results of the concept of protection of state. The fundamental criterion of a democratic political system is the presence of "free circulation of news". No legislation that will hamper or restrict this

[60] ***Özdemir,*** (2018, p. 23).

criterion[61] can be passed, and no such arrangements can be put into effect. If there is an arrangement in which there is restriction or banning of free circulation of news, then it means there is no democratic political structure. Individuals have quite comprehensive means to immediately form, share or access information in virtual groups beyond borders without the impediment of language. However, the system continues to find ways of censuring by stopping access to information, and medieval ages are witnessed in information. Yet, democratization of information will bring with it more functionality of decision-making processes for everyone.

Following 1980's, there have been fast and deep-rooted changes in the field of media. The traditional media arrangements disappeared a new arrangement has been setup using neo-liberal policies. Specifically, with the dissolving of public monopolies on audio and visual through liberalization or privatization, a new structure of ownership emerged in media. One of the examples of this new media arrangement that is ever rising in the arena that brings together media, capital and government occurred in Turkey. In the work, a broad perspective on the picture of freedom of media was presented related to the new media arrangement that forms as a result of the bringing together of media, business world and political government and that sits on commercial and political gain. In addition, the visibility of media censoring in Turkey and how and in what way these changes alienated the media from presenting public service and its fundamental duty was examined. Public service broadcasting/press necessitates addressing the totality of public. The service public communication media presents is the service of receiving news. The publicness of media is the process of transfer, utilizing printed, audial and visual means, of what the state has to the society, and what the society has to the state, in other words from the furthest point. Democratic freedom, on the other hand, is being able to organize meetings and demonstration marches utilizing democratic methods, without resorting to violence, of course organizing for elections, putting wisdom to work and persuading the public through legal means. Therefore, there must be legal basis for restricting fundamental rights and freedoms. It is necessary to use the freedom of press through democratic means. Within this framework, when in national and international work the dimensions of censorship and auto-censorship present is examined, there is violation of free-

[61] ***Özek,*** 1994, İfade Özgürlüğü Hapiste, Demokratikleşme Sancısı [Freedom of Expression in Prison, Pain of Democratization], Ankara: Contemporary Journalists Association Publication, pp. 8–34.

dom of expression in Turkey. In Turkey, both citizens and journalists experience apprehensively auto-censoring while writing, thinking and expressing. Such that, the system chooses to walk down the path of using mechanisms of taxation and punishment in order to make individuals invisible, to deactivate them, and to prevent their messages from going anywhere.

In the first quarter of the twenty first Century, media in Turkey is not free or independent. 80.8% of journalists are unable to use their pens freely. The undemocratic applications by many state or regulatory institutions on grounds of illegality or harmfulness are in harmony with the system of administration but are against the law. Especially in the last decade, when the lowness in the rate of unionization in the sector comprising media workers, the pressure of unemployment on journalists who are working, the amendments in legislation made to the disadvantage of workers, and the legal sanctions on journalists are considered, it becomes evident that media is under heavy censorship in all vistas. The alleviation of all these negativities experienced is only possible through solidarity and organization, and sticking together of media in their struggle for independence and freedom.

As a result, with the implementation by state of ideological and pressure tools, the strongest bond between the state and the society has to be media. Unfortunately, with the conversion of a large portion of media into the position of official organ of the government, the materialization of a democratic broadcasting and publishing service becomes all the more difficult. And, again unfortunately, under increasingly difficult economic conditions coupled with unfair announcement distribution, and limitation to subscriptions, media workers are being forced into a struggle for survival almost like in a vice in the pressure atmosphere the government creates utilizing a variety of tools. With the contribution of some negative factors, censorship and auto-censorship problems exhibit their effect seriously in the country. It is observed that in the media ownership structure in Turkey, which set out to attain a free press but faced important issues commonly observed in the establishment of a democratic and liberalist country in congruence with its philosophy, auto-censorship is more severe than open censorship due to lack of unionization in the sector, the concern of the media workers for the future and political tutelage. Therefore, it is noted that the media workers in the country are unable to fulfill their duties, and their constitutional right to obtain information is violated. Media in Turkey is seen as a whirlpool, to be exact. In other words, the media has mainly turned into a political broadcaster that does not apply anything in its strategic field written in the constitution. In other words, exit from this vicious cycle of media, capital and state tangle, can only be possible through the increase of independent media institutions in the political conjuncture, securing of professional solidary and the utilization of constitutional rights.

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Arts, Aesthetics and Human Rights: A Psychosocial Perspective

António M. Duarte

1 Human Rights in the Art World

As expressed by the United Nations Human Rights Council, through its special rapporteur in the field of cultural rights (Benoune 2018, p. 3): "The exercise of cultural rights is fundamental to creating and maintaining peaceful and just societies and to promoting enjoyment of other universal human rights. Humanity dignifies, restores and reimagines itself through creating, performing, preserving and revising its cultural and artistic life. Throughout human history and in every society, people have improved their lives through engagement with creative and expressive forms.". In this way, the rights of arts and aesthetics are not just a specific area of human rights, but their respect is essential for the sustainability of universal human rights.

Human rights that are particularly relevant for the arts and aesthetics are the right to freedom of expression, expressed in the UN (1948) *Universal Declaration of Human Rights*, and the correlative rights both to cultural diversity, declared in the EU (2012) *Charter of Fundamental Rights*, and to participate in cultural life and enjoy the arts (UN 1948). In a more general approach, these rights are convergent with the right that arts should be free of constrain (EU 2012). Also, considering the creative and public nature of the arts and artists' role, both the right to intellectual property, stated in the *International Covenant on Economic, Social and Cultural Rights* (UN 1966), and the right to privacy (UN 1948) gain here particular importance. Moreover, considering

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the professional dimension of arts and artists, the rights to dignified work and to social protection (UN 1948) are also critical in this area.

As analysed in the following sections, these human rights are under pressure and often alienated in the area of arts and aesthetics by a variety of forces. Further, as then examined they lead to social and personal effects and specific reactions.

1.1 Freedom of Artistic/Aesthetic Expression and Appreciation

In an art project from 2013 titled *Censored*, Georgi Yamaliev display black and white oversize passport photos of artists with a black rectangle (symbol of censorship) covering their eyes. As explained by the artist, all the portraited artists participated in an International Biennial from which their works were removed or modified accordingly to the wishes of the organizers (Yamaliev 2013).

As far as they are taken as an area of creative freedom, the arts critically depend on the right of freedom of expression. This naturally involves the right to be divergent or against dogma, unpredictable, confronting, subversive and to explore different tastes, ranging from "beauty" to "ugliness" (FRA 2017a).

Nevertheless, arts and artists are worldwide targets of different limitations on the right to artistic freedom of expression in a variety of ways, regarding the orientation of artwork, censorship and gatekeeping, damage, and destruction of artistic works, along with threats, harassment, prosecution, imprisonment and even killing of artists. Most cases of these limitations are instigated by government authorities against artists' political or religious expressions, artistic or otherwise (Freemuse 2021), but such pressure is also exerted by corporations, audiences, arts institutions and even arts and artists themselves. In many societies this limitation can also be based on artists' (lower) social class (Nico et al. 2007), (female) gender, (homo) sexual orientation, and (minority) ethnic group, or on their addressing of these topics (Freemuse 2021). Moreover, such pressure can increase during crises, as Freemuse organization reveals in its annual report on the state of artistic freedom for 2021, during the recent COVID-19 pandemic crisis (Freemuse 2021). That report recorded 978 acts of violation of artistic freedom in 2020 in 89 countries and online spaces, a record so far. Beyond artists' victimization through censorship (289 cases), the report mentions the murdering of 17 artists, imprisonment of 82, detainment of 133 and prosecution of 107.

A first form of pressure on the right to artistic freedom of expression, exerted by a variety of social forces, acts upon the orientation artists can give to their artwork.

Since the start of their education, artists are compelled to work out problems determined by their general cultural and historical context (i.e., to convert this context's issues in an artistic format) and in the boundaries of a structure of principles approved by that context (DiMaggio 1991; Getzels and Csíkszentmihályi 1976). Artists are then hindered by the conventions agreed in their arts domains (e.g., painting according to certain norms), and/or represented by them, and which are strongly structured to assure their own maintenance based on habits, power interests, hierarchy, etc. (Becker 2008; Bourdieu 1996). Strong traditions in an art field can particularly inhibit and constrain new artists, maybe even unconsciously, to stick to the norms of a used language. For example, according to South Corean coreographer Eun-Me Ahn, the work of coreographer Pina Baush (1940–2009), creator of the leading *Tanztheater* style, became so influent that for new artists it became almost inevitable to integrate her language, which worked as a inhibitor ascendent on them (Frota 2017).

Artists can also be pressured by more authoritarian states to correspond to political programs, in the line of arts as propaganda (Becker 2008).

Artists can experience expectations regarding orientation of their works from patrons, like arts institutions, which might formulate demands on aspects like style, content, media, etc. (Becker 2008; Getzels and Csíkszentmihályi 1976).

Artists receive social pressures from intermediaries (e.g., art galleries), normally in minor artistic circles, where an ambiguous "gift/debt" dynamic organizes relationships, and where functionality is mingled with affection and control (Conde 2009). An indirect form of expectation can also be exerted by art distributors, like galleries, that pay in advance to artists for their upcoming works (Getzels and Csíkszentmihályi 1976).

Considering potential clients and based on a motivation to be successful and/or gain money artists might conform with social expectations trough their works, in a more or less conscious way (Habbing 2002). Artists might even receive pressure by actual clients that, having ordered their artwork, can even contractually require attributes of that work—e.g., certain architectural characteristics for an ordered building (Becker 2008).

Moreover, to achieve in the art world, novice artists can adjust their works accordingly to the judgments they receive from the critics, distancing form their genuine artistic program (Getzels and Csíkszentmihályi 1976).

Artists can also receive pressure from their audiences, regarding the orientation of their work, that translates in an external expectation that new works repeat previous ones that were liked. As testified by visual artist Leda Catunda: "(…) every time we do a work that people like very much, then they always want us to do the same thing. But we need to be free and risk." (Andrade 2017, p. 17, author's translation). Similarly, an artist might be pressured by an audience to conform to the style of a group with which he or she became identified with (Getzels and Csíkszentmihályi 1976). With the same functionality, an artist can arouse criticism if he or she does not replicate a personal style to which he or she habituated an audience (Becker 2008).

Nevertheless, parallel to all these forces that attempt to orient artists' work there is a contradictory social expectancy and compel that they should be unique, autonomous, inventive and transgressors of the rules (Becker 2008; Getzels and Csíkszentmihályi 1976). Paradoxically, artists are then expected to express the contemporary loss of firm symbolic cannons and to be praised for transformation, while they are censured, by the wide society, of not matching or even annihilating the arts (Getzels and Csíkszentmihályi 1976).

Another form of alienation of the right to artistic freedom of expression, manifests through censorship and gatekeeping, exerted by different actors.

In most cases censorship and gatekeeping of arts and artists is performed by the state and its institutions, mostly for political reasons. Although typical of autocratic states, this constrain is also registered in so-called democratic ones. For instance, during his 2017–2021 presidency of the United States, Donald Trump managed the approval of a decree that all federal buildings should have the neoclassic style (Pritikin 2021). Even in they are not actively censored, artists and their works can be subject to other forms of social gatekeeping that ideologically or instrumentally filter their integration in prevailing arts spheres (Conde 2009; Csíkszentmihályi 1999). Arts institutions might not only reject but also refrain from supporting works that diverge from recognized standards—for example, during the Vietnam War several American museums rejected the exhibition of political art (Becker 2008). Gatekeeping of arts and artists is also often exerted on the basis of different forms of *cultural absolutism* (Howard 1993)—that when applied to arts can be defined as the tendency to consider as universal the aesthetic patterns related to a *culture* (in terms of different criteria, like ethnical, geographical, historical, gender, etc.), that is considered as superior; and to neglect, filter, attack or devalue the arts of other *cultures* (e.g., ethnic minority or colonized culture; rural; ancient; female), as well as to interpret (usually in the wrong way) these arts in the light of the dominant culture. Moreover, in the context of

(neo)colonialism and imperialism, *cultural absolutism* expresses in terms of (neo) cultural colonialism and cultural imperialism (e.g., Said 1978).

In other cases, state alienation of artistic freedom of expression is more indirect. For instance, governments' increasing of regulation and censoring of "street art" might restrict a form of free exhibited art, like street performances and wall murals, that plays an important function of involving people with few resources and motivation to access art (FRA 2017a). Besides, copyright law, originally related with the right to artistic intellectual property, can be itself a source of limitation to the right to artistic freedom of expression. Effectively, the derivative use of primary artistic matterial by subsequent artists, to develop other artistic forms (e.g., "sampling" in rap music) can be constrained by copyright laws, whish, moreover, may be defending property that does not belong to artists but to companies (FRA 2017a). In addition, those subsequent artists can be constrained by threats of copyright litigation, which is complex and expensive (FRA 2017a).

In addition, considering that body adorning (i.e., dressing; perfuming; using jewelery and make up; tattoing; body marking; etc.) involves aesthetic decisions, which therefore turns every one that does it in a kind of a "body designer", social expectations, limitations and reactions on body adornment (e.g., fashion; body adornment codes; gatekeeping of people due to how they adorn their bodies; destructive criticism on body adornement or on people because of their adornments), are forms of pressure on aesthetic choices. For instance, the state, along with the school and the family, can try to impose policies on clothing (e.g., use of school uniforms) which can be confronted with individuals' opposition, noncompliance and strategies aimed to preserve personal freedom (DaCosta 2006). Another example is related to the use of the veil by Muslim women, as observed by Scott (2007): if, in some cases, the veil is imposed by the state or the family, against the possible desire of individuals; in other cases, the veil is forbidden by the same state institutions, alienating the personal expression of an aesthetic and identitary choice of some of those women that insist in wearing it.

Also, on many occasions, and increasingly as result of cuts in state funding, financing private companies exert power of censorship or gatekeeping over the arts. For instance, advertisers might press arts channels, like museums or radio stations, to avoid exposing or to exclude certain artworks (FRA 2017a). For example, partly pressed by advertisers, radio stations around the United States refused to broadcast music of Dixie Chicks band because the lead singer criticized then President George W. Bush in 2003 (FRA 2017a). Besides, arts' sponsors might exert control, subtle censorship or forced association of artists with businesses they reject (FRA 2017a). For example, sponsorship of the theatrical program

Shakespeare in the Park, was drawn after its representation of the assassination of a Julius Caesar that resembled President Donald Trump (FRA 2017a).

Another form of gatekeeping of the arts is utilized by cultural programmers, that sometimes filter arts and artists not based on true value, but on subjective aesthetic preferences or even of personal affects (Antunes 2021).

In parallel, since certain arts' producers and distributers are being bought by corporate conglomerates, more oriented to profit than to the arts, there is a decrease in the chances for a broader delivery of divergent and unfashionable artworks, or of low-profile artists' artworks (FRA 2017a). Besides, the expanding privatization of public space restricts the opportunities to "street art" (FRA 2017a).

Artistic freedom of expression is also threatened by moral campaigners and audiences (e.g., exclusion of works of art triggered by an audience's unfavourable responses) (FRA 2017a). Censorship is often attempted in so-called democratic societies on the basis of interpretations that claim that certain artworks defend inadequate values. For example, in 2017, a petition was launched demanding the removal, by the Metropolitan Museum of Art in New York, of the painting *Thérése Dreaming*, by Balthus 1938 (The Associated Press 2017). The petition claimed that the painting "depictes a young girl in a sexually suggestive pose" and that "Given the current climate around sexual assault and allegations that become more public each day, in showcasing this work for the masses, The Met is romanticizing voyeurism and the objectification of children.". Despite the thousands of signatures that support the petition, the Met has not complied with its demand. Artists' can also be suject to gatekeeping on the basis of public representations of their private life. For instance, in 2017, activists disrupted a retrospective of Roman Polanski's moovies at *La Cinémathèque Francaise*, on the basis of his being acused of rape in the United States (The Guardian 2017).

Furthermore, artists and their works can direct or indirectly support, and therefore be a factor of, action against the right of free speech (and other human rights). Examples are propagandistic and supportive art of totalitarian ideologies. This issue extends the "paradox of tolerance" to the area of free speech—the paradox consists in the notion that tolerance of intolerance leads to intolerance (Popper 1945). In so-called democratic societies this problem is approached in different ways: for example, if in the United States the tendency is to cover extremism speech in the right of freedom to speech, in European democracies the tendency is to forbid it (Rosenfeld 1987), extending here the solution for the "paradox of tolerance", proposed by Popper (1945), of limiting tolerance to intolerance.

More, artists can also exert censorship upon themselves in a self-regulated way in what is defined as self-censorship (Baltussen and Davis 2015).

In some cases, artists can just quit exploring specific provocative themes, based on the fear about negative official, non-state, and public reactions (FRA 2017a). Artists can also decide to avoid displaying or even destroy their works for the same reason, among several others, as analysed by Charney (2018).

In other cases, self-censorship manifests as a transformation of the work of art, to camouflage a more direct message that can be negatively evaluated. For example, accordingly to Davis (2015), this form of self-censorship was already used in antiquity and is illustrated by the use of mythological epic by roman poet Valerius Flaccus in his *Argonautica*, in order to indirectly reflect on then contemporary issues.

More extremely, self-censorship can even result from a kind of personal interiorization of social standards. Examples might be the concealment, by Toulouse-Lautrec, of his more evident brothel pictures, and by Mark Twain, of his pornographic texts, under the pressure of his wife nevertheless (Becker 2008). This is also near to a form of not conscious and involuntary "internalized oppression", exemplified, in aesthetic behaviours, by the (harmful) use of skin-whitening products by a large proportion of non-European women (David and Derthick 2014).

A radical form of censorship acted upon the arts is damage and destruction of works of art. In some circumstances, such destruction is performed by organized forces and results from ideological or religious motives. A recent example is the demolition of the gigantic *Bamiyan Buddha*s, unknown author, 4TH to 5TH century, by the Taliban Islamic fundamentalist group. Other attacks on art sites and items have been performed under war (e.g., to the ancient Syrian city of Palmyra by the "Islamic State" group), which in specific conditions are considered as war crimes accordingly to the laws of armed conflict and international criminal law (FRA 2017a).

In a more subtle way, works of art can be exposed to indirect damage or destruction through their neglection and non-conservation. If historically this frequently occurred because of political and religious reasons (Becker 2008), it can also happen non-intentionally. For example, in 2018, during an exhibition at the Chinese American Museum in Los Angeles, elements of an outdoor installation of David Lew, entitled *Year of the Shark Red Packet*, were thrown out (BBC 2020b). The outdoor installation comprises of decorated bags that are hanged on washing lines, referring to the laundry business work of many Chinese immigrants in the US. Having some of the bags felt down they were allegedly thrown out accidently by the city's maintenance personnel.

Sometimes works of art are also damaged or destroyed for commercial reasons. In some cases, sites with artistic value are destroyed in the process of properties' commercialization. Illustratively, the remains of a chapel from the 17th or eighteenth century were demolished in the process of building a hotel in 2021 in an area of Portugal (Dias 2021). According to this author, other archaeological and historical sites of the same area have been destroyed due to lack of registry and protection. Another form of destruction of art for commercial reasons is related with the so called "criptoart" market, that entails trades, with "criptocoins", of digital registries of works of art as "non-fungible tokens—NFTs" (Pequenino 2021). For instance, a print titled *Morons*, by Banksy, 2016, which sarcastically depict an art auction, was purchased, digitalized, and then destroyed as a way to raise the worth of its correspondent NFT (Criddle 2021).

Intentional damage and destruction of works of art can also be the result of, relatively rare, individual acts of vandalism (Silvia and Brown 2007), based on emotional motives, as illustrated by the repeated mutilation by two museum visitors of Barnett Newman's painting *Who's Afraid of Red, Yellow and Blue IV,* 1969–70. Sometimes, such vandalism is performed by groups, as in the wave of vandalism against public statues of figures represented as connected to racism, after the death of a black-American in 2020 under a police intervention. An example of this was the damage and removal by a crowd in Bristol of the statue of *Edward Colston* (a merchant involved in slave trade), from John Cassidy, 1895 (BBC 2020a). In parallel, at the same time, the statue *Padre António Vieira* (a Portuguese priest which defended the indigenous peoples of the now Brazilian territory, but is represented here in a way interpretable as symbolic of a paternalistic colonialism), by Marco Fidalgo, 2017, was also vandalized in Lisbon (Botelho and Pinto 2020). Nevertheless, although problematic, these cases of art destruction can be understood as reactions to a form of *art colonization*, that, as Procter (2020) deconstructs, is prodigal in monuments and museums of the western world. Aligned, refering to the right to memory, Sadowski (2021) sugests the right to remember though the arts coexists with the right to forget negative messages the arts might convey.

Destruction of works of art can also be performed by their own authors based on fear of external negative reactions (Charney 2018), or as a statement. An example of the last is the destruction of *Girl with Balloon*, a painting of anonymous artist Banksy, 2006. The destruction was performed by a shredder, concealed within the image framework, that, accordingly to a video posted in internet by the artist, was programmed to be activated in case the work would be sold in an auction (Reyburn 2018).

At another level, artistic/aesthetic freedom of expression is alienated through threat, harassment, prosecution, imprisonment and even killing of artists, appreciators, and other actors of the art world. In most instances this is performed for political or religious reasons, by states. An illustrative case is the one of Yahaya Sharif-Aminu, a Nigerian singer, that in 2020 was sentenced to death for distributing a song judged offensive of the Prophet Mohammad (Freemuse 2021). Another is the case of North Korean law that previews severe punishment for possession of foreign films or clothing (Bicker 2021). Nevertheless, artistic freedom is also threatened by non-state organized actors, like religious fundamentalists. Examples are the murder of the French *Charlie Hebdo* cartoonists, in 2015, for satirizing Islamic leaders, and subsequent murder, in 2020, of the French teacher Samuel Paty, because of his use of the same cartoons in a class on freedom of expression (Freemuse 2021).

Audiences can also threaten artistic freedom of expression by reacting with violence against artists and their works. An example of a violent reaction from the public is the premiere of the ballet *The Rite of Spring*, featuring Igor Stravinski's song and choreography by Sergei Diaghilev, 1913, where there has even been a fight among the audience (Taruskin 2012). The behavior of fans towards artists can also be a source of more or less intensive stress. Although not very frequent, audiences' reactions to an artist or interpreter can be in the worst case characterized as *dysfunctional fanaticism*, which can involve hysteria, stalking or even violent agression (Thorne and Bruner 2006), as testified by the tragic case of the murder of musician John Lennon by a fan. Sometimes, especially in cases where an artist becomes a celebrity, in the relationship with the audience his or her identity can become prevalent to the detriment of his or her work. In situations of public exposure this can lead to an experience of dissociation of the artist with himself (Rockwell 2004). This author illustrates how a situation experienced on stage by singer Bob Seger, who after completing a song felt that the applause was directed at him and not at the song, led him to feel "away from himself". According to Rockwell (2004), this type of experience can lead to a condition called *Acquired Situational Narcissism,* which can evolve into another form, namely that *of Narcissistic Personality Disorder,* involving an illusion of grandeur, a reduced empathy, and a need for admiration, which is associated with an alienation of interpersonal relationships. In some cases, the idolization of artists by their audiences can still give rise to a feeling of loss of authenticity, to which feelings of guilt and even suicide can be associated, as illustrated by the case of singer Kurt Cobain (Rockwell 2004).

Finally, regarding the right to a free artistic/aesthetic expression and appreciation a mention is due to some persons' possible limited accessibility to the arts due to their sociodemographic characteristics, like lower socio-economic and educational status (e.g., TNS Opinion and Social 2013), territorial region of residency (e.g., TNS Opinion and Social 2013), or special needs (e.g., Stringer 2014). For instance, people of limited mobility, blindness or deafness are still frequently obstructed by the absence of differentiated conditions (e.g., art buildings with wheelchair-accessible ramps), that would allow them full or even minimal contact with the arts.

1.2 Intellectual Property

In a novel titled *Based on a True Story* (form the French original *D'Aprés une Histoire Vraie*), Delphine de Vigan tells the tale of a fragile female writer that progressively becomes controlled by another woman, that starts to influence the content of her writing and at last even assumes her identity (de Vigan 2015).

Right of artist to their intellectual property is threatened not only by infractions to copyright and trademark but also in different ways, like usurpation of artistic property, instrumentalization of the arts, transformation of works of art and plagiarism.

Right of artistic intellectual property is directly alienated by infractions to direct copyright over reproductions of art works. Digitalization of such reproductions and their dissemination through Internet open the way to copyright infringement through downloading and dispensing of copyrighted contents, specially of cinema, literature, and music, in "online piracy". Nevertheless, copyright laws (grounded on western notions of individual possession) extended beyond the level of authors and artists, having for instance conferred the right of that property to companies (FRA 2017a). Now artists frequently transfer, sometimes under coercion, their copyright and control of the use of their work to those companies (FRA 2017a). Consequently, a work of art can be later instrumentalized (e.g., in publicity) in a way with which the artist does not agree (FRA 2017a). Actually, this problem might reflect a basic tension between artists' need to be free, independent and creative and their need to survive by selling their work.

Furthermore, right to intellectual property can also be threatened by infringements to trademark. For instance, in 2019, a company claimed the right to the Banksy brand, since it was not registered by that anonymous street artist, who defensively reacted by opening a shop in London that sells his products (Ípsilom 2019).

Besides, usurpation of artistic property, by plunder, theft and illegal buying, alienates not only the possible owners of works of art, but also their authors, and local audiences, potentially removing those works from circulation and local access (e.g., parts of the Parthenon are still in the British Museum). While there is a long history of pillage and robbery of art works since antiquity (Lindsay 2014), some still displayed in foreign museums and public places, modern art theft seems highly motivated by the inflation of the prices of prestigious art works in the art market (Houpt 2006).

In a broader sense, artistic intellectual property is also threatened by the fact that works of art are often instrumentalised by their owners, sponsors, exhibitors, or others and therefore alienated from their artistic purpose and authors.

The arts can be instrumentalised as propaganda by governments, which can result in non-intended (from the part of the artist) association with political messages (Segal 2016). As this author exemplifies, despite painter Barnett Newman's statement, during the cold war, presenting his art as a way to reject both American "state capitalism" and Soviet "totalitarianism", the American government included it in a traveling exhibition intended to promote the notion of the "openness" of the American Society. The arts had also been instrumentalized by the state as a device of inhuman treatment, as represented by the use of music during military bodily punishment and for military and camp discipline, and humiliation, or even for torture (Grant 2014).

The arts are also commercialy instrumentalized. Actually, a basic form of pressure over the artists, as originally analysed by Horkheimer and Adorno (2002) and Adorno (1991) is the need to comercialize or sell their art, formerly under the power of the aristrocracy and the church and presently in the context of a culture industry' marcket. Moreover, the social context promotes the transformation of works of art in commodities through specific mechanisms, like auctions (Apparadurai 1986), or as currency by investors (Thompson 2014), which can even result in its withdrawl from public circulation. For example, despite the fact that the guardian of Franz Kafka's writings—his friend Max Brod—had in his will that the originals should be left to the National Library of Israel (against the before mentioned wish of Kafka that they should be destroyed), Esther Hoffe, Brod's secretary, kept them, and in 1988 sold the manuscript of *The Trial*, for 2 million $. When she died her daughters refused a request of the manuscripts by the National Library, which only obtained them through legal proceedings (BBC 2019). More recently, a new form of commercial instrumentalization of the arts emerged with the appearance of the already mentioned "criptoart" market, which enables non-authorised use of digital art and of digital registries of works of art, or usage of valueless "criptocoins" in their deal (Pequenino 2021).

Occasionally, unauthorized use of a work of art is perpetuated by its infusion in advertisements or integration in products. An early example of such practice is the use of The Beatles' 1968 song *Revolution* by Nike in its 1987 *Air Revolution* TV ad. According to Rolling Stone (2018), George Harrison would have commented on the purpose that the spot created a precedent for the use of the band's songs to advertise everything from "women's underwear" to "sausages". Although works of art instrumentalized by publicity become disseminated, through mass consumption probably they lose their original symbolic value (Salcedo 1998).

Through "art tourism" or colonial plunder works of art originally made for face-to-face small communities might also find themselves dislocated in collections or large-scale economies (Apparadurai 1986).

More, as Benjamin (2008) first remarked already in 1935, the mechanical reproduction of the works of art through photography and film (and, more recently, through virtual technologies), can devaluate those works by taking them out of their original contexts of exhibition. A recent instance of this phenomena results from fact that the distribution of music, by *streaming platforms* (such as *Spotify*) is largely done, algorithmically, through *playlists* of similar or thematic songs. A consequence is that the process decontextualizes the songs of the original albums and the artists who created them (Lopes 2020).

Art can also be instrumentalised as symbol of status by collectors, in the framework of cultural snobbery (Becker 2008) or as simple decoration items by decorators, which can result in non-intended (from the part of the artist) association with contextual elements.

Another threat to artistic intellectual property is the possible transformation of original artworks by others than their authors. As director John Carpenter testified in an interview: "Anyone who wants to make a movie has to launch himself to work hard to maintain his vision. Because everyone's going to want to change it. That's what's so hard: to keep your vision. It's a struggle." (Nogueira 2021, p. 5).

Works of art can therefore be victim of direct transformations that alienate the original program or intentions of their authors, by interpreters, editors or even apreciators. For instance, the punctuation of some Emily Dickinson's poems was modified by editors that considered it "illiterate" (Johnson 1955, as cited in Becker 2008).

Besides, artworks can be problematically tranformed by art conservators and restorers working on their maintenance and recovery. If, on the one hand, this work has a critical role in preserving the identity of artists and their works, on the other hand, considering that it is not exempt from bias, it may also constitute a source of alienation from that identity. For example, as articulated by Marçal and

collaborators (2014), the decision-making that occurs in the preservation of works of art seems to be affected by certain cognitive biases, such as the "anchoring effect" (the tendency to decide in line with previous decisions, such as varnishing a painting that the artist did not want varnished), or the "asymmetric domain effect" (the tendency to decide more wrongly when the number of choice possibilities increases). Also controversial is the possibility of restoring some works of art transformed by time, to a supposedly original appearance in significant contrast with the representation that was gained of them (e.g., restoring of painting of ancient Greek statues).

Finnaly, artists can be victim of deliberate plagiarism by fakers, some of them artists themselves, and with a variety of motivations that include, according to Charney (2018), the drive to profitt, the need to enter the art world (as the case of Michelangelo that started by forgering Roman satues), the competition with the great masters, or the revenge against social rejection.

Besides, sometimes plagiarism is performed by other artists in a non deliberate way, on the basis of a process labeled as *inadvertent palgiarism* or *cryptomnesia*, whish consists in creating a product actually previously encountered, but under the belief that it is original (Defeldre 2005). This author exemplifies with the case of an amateur pianist that composed what he believed to be a new song, which in reality was based in a melody by musician Serge Gainsborough.

More radical is the virtual usurpation of the author of a work of art, as supposedly exemplified by the case of painter Margaret Keane (portraited in the movie *Big Eyes*, of Tim Burton 2014), which alleged that her husband, responsible for selling her paintings, was also signing them without her awareness on his claimed basis that this would sell better (Life 1970).

A more recent suposedly form of plagiarism has been pointed by artists that claim that their online art is being found, often trough automated systems denominated "bots", and posted on websites to be sold, infused on products (e.g., T-shirts), without the artists' identity and authorisation (Gerken 2019).

In certain situations, another artist can inadequately appropriate the work or the style of another artist. This might be illustrated by computer artist Scott Blake's creation of a Photoshop plug-in, named "Chuck Close Filter", which changes images into mosaics that resemble the mosaic paintings of the painter Chuck Close—nevertheless, under the threat of a lawsuit Scott Blake alleged fair use (Doctorow 2012). In the same line, sometimes works of art are employed, without authorization, to decorate design products, as illustrated by the controversial use of painter Jean-Michel Basquiat's works to decorate Valentino womenswear or Reebook trainers (O'Flaherty 2017).

1.3 Artists' Privacy

The topic of artists' right to privacy is complex, due to the fact that besides their need for privacy artists naturally seek public exposure of their work and themselves.

If alienation of artists' right to privacy is typical of more autoritharian societies, there are other ways of such alienation, also performed in so-called democratic contexts, related to the fact that artistic work involves a greater exposure.

Specifically, excessive, negative or even cruel exposure of artists in the media, marcked by invasion of their private life (e.g., paparazzi; gossip news), most often when they are celebreties, frequently acts as a source of stress and eventually of unbalanced behaviour. On the face of this constrain from the media, celebreties can experience loss of privacy, depersonalization ("entitization"), and mistrust towards others (Rockwell and Giles 2009). Celebreties tend also to a need of constantly maintaining a mask when in public situations (Giles 2000) and to repress the expression of resulting negative feelings (e.g., fear; sadness; rage) (Rockwell and Giles 2009; Wright 2008). This can lead to chronic stress, with possible symptoms of eating disorders, psychosomatic problems, insomnia, anxiety, anger and depression (Wright 2008). The evidence from the the study of Rockwell and Giles (2009) shows a four-phase experience of being a celebrity over time: love/hate; addiction; acceptance; and adaptation.

The potential negative impact of media on artists and their work helps to understand the strategy used by some of them to actively refuse media coverage. An illustrative example is that of the Portuguese poet Herberto Helder, who throughout his life has shied away from the focus of the media by systematically refusing his contacts and the awards he received, which, paradoxically, helped build a "myth" on him (George 2015). Surprisingly, shortly before his death, the artist accepted to unveil part of his private life to the media, which is read by that author as a coherent strategy to once again disappoint an imposed social image.

Moroever, intromission in artists privacy has also an impact on the audiences. Occasionally, audiences' reactions to the works of artists can be based or contaminated by public negative representation of their personalities, beliefs and private lifes, eventualy turning in a source of alienation and social pressure for the artists. For example, as reflected by Sherwin (2010), audience's appreciation of Picasso's work is often influenced by the information of his unstability regarding relationships.

Another form of alienation of the right to artists' privacy is the biographic publication of private life events, and the non-authorized posthumous publication of artists' private texts, like private letters, or sketches. If such material might be of interest and value in terms of knowledge about its authors as artists (e.g., Savig 2016), at least some belong to the sphere of privacy which they would not wanted to be public or broken. For instance, besides Franz Kafka' manuscripts, inumerous personal letters, travel journals and sketches of this author are now online (The National Library of Israel 2021), against his will that after death they should be burned.

Disrespect for the right of artists' privacy can also extend to the realm of their art products. Specifically previously mentioned artists' decisions of not exhibiting or editing some works of art can be alienated by the social context. For example, most of Kafka's texts were posthumously edited against his will that, after his death, they should have been destroyed (Becker 2008). Somehow equivalently, the civil rights to personal data privacy (including possible aesthetic data, like selfies) are under threat by hacking (Hirts 2014).

Finally, for performative artists (e.g., actors), due to the nature of their bodywork and their exposure in auditions and performances, in parallel to their unstable professional context, personal privacy can be particullarly threathened by harassment, performed by powerful figures (Cardoso 2021). For example, actress Uma Thurman revealed in an interview how she was sexually harassed by movie producer Harvey Weinstein, in paralell to the same allegation from other dozens of actresses (Dowd 2018). Also, as reported by director Bernardo Bertolucci, he and actor Marlon Brando planed a filmed take in *Last Tango in Paris*, 1972, where the main actress Maria Schneider was actually raped during a sex scene (Kahn 2016).

1.4 Dignified Artistic Work and Social Protection

In a photo-performance titled *Metronomu*, artist Xandra Popescu 2015, had two artists subserviently begging in front of two ATM machines.

The right to work (UN 1948) and to fair and just working conditions and remuneration (EU 2012; UN 1948), and correlative right to social security and assistance (EU 2012; UN 1948), are particularly constrained in the case of most artists, that typically live under work precarity.

Specifically, even though some artists get high revenues (Habbing 2002), and some are employed in arts institutions, like museums, orchestras, and cultural industries (Conde 2009), the majority are in a condition of underemployment,

or of sporadic, freelance, multiple work, under ephemerous contracts, and low or even absent payment (Becker 2008; Conde 2009; Frey 2011; Habbing 2002; Lazzarato 2011). Although this typical condition of the artist reflects the general work precarity of neo-liberalism, it seems more pronounced here than in other sectors. For instance, artists present greater levels of unemployment, self-employment, and multi-employment (Capiau and Wiesand 2006); and tend to earn less and with more inequality and variability than other equivalent workers (Maranda 2009). Most artists' low income often leads them to distribute work into several types of activities, as it happens with other professionals, but is typical in their case: many have one independent artistic activity, with which they identify and through which they express their style; and a secondary employment, peripherally or not connected to the arts, through which they survive (Bain 2005; Becker 2008; Getzels and Csíkszentmihályi 1976; Habbing 2002: van Maanen 2009). For instance, in an urban sociology study Zukin et al. (1995, p. 154) observed that in the big American cities artists often worked as waiters or bartenders, many in the new 1980s "new wave restaurants" that subsequently developed a reputation of being "centers of urban cultural consciousness". Other artists need to develop parallel work in marketing, as it happened even in the case of known artists like Jaspers Johns and Robert Raushengerg, who (under pseudonyms) created mannequin's background displays for Tiffany and Bonwitt Teller (Varnerdoe 1996); or Georgia O'Keeffe, who painted for Hawaiian Pineapple advertisements (Bogart 1996).

The typical unstable working conditions of artists constitutes a threat to a proper social security. Moreover, as previously mentioned, partly due to that instability, artists might be more subjected to certain degrading situations, like sexual harassment (Cardoso 2021).

Several factors explain artists' professional precarity. A first factor is the surplus of artistic training offer, of demand of (scarce) access to the artistic professions in a highly competitive context (Nico et al. 2007), and of artwork offers (Habbing 2002). Another factor is a social representation of the artist as eccentric, autonomous, dissident, extraordinary, and adapted to risk, and of the artistic work as a self-employed or self-planned project-oriented activity (Christopherson 2008; Getzels and Csíkszentmihályi 1976; Olsten 2011; Parker 2008; Ray 2011). One more factor is the difficulty numerous artists have in trading their artworks (Levine 1972, as cited in Becker 2008), due to their typical financial illiteracy (Becker 2008), and the slowness in developing a possible artistic reputation (e.g., Oatley 2011). Actually, an artists' success has much to do with his or her "sense of opportunity to be at the right time in the exact moment" (Nico et al. 2007, p. 54), and since in the art world proficiencies and workers are ranked in a "A list/B

list", young graduates in the arts tend to accept living with very low incomes while expecting to join the "A list" (Comunian and England 2020, p. 114). Furthermore, many art dealers have troubles in paying to artists and keeping contracts due to the high susceptibility of art business to economic variations (Becker 2008). Also, the few governmental subsidy programs to the arts instead of solving precarity in the field preserve it by enticing more people to the arts (Habbing 2002). Finally, it is not to be dismissed the future scenario of a substitution of human activity for machine work in some artistic tasks. A variety of models for computationally emulating human artistic creativity have been already developed in different artistic domains, allowing computers and robots to "create" art or to "participate" in artistic creation: music composition (e.g., Cope 2015); painting, and literature (e.g., Moura 2015). For instance, in a nightclub in Prague, the work of the usual DJ became performed by a robot in the automotive industry, adapted and reprogrammed for this purpose (Reuters 2017).

It is also relevant to point out that artist's professional precarity also makes them especially vulnerable to the more and more frequent economic, financial, and social crises, which typically act as a factor of increment of that precarity. Such precarity can also assume new variants, under those circumstances. Effectively, there is evidence of this in respect to two more recent social crises: the ones that resulted from the economic crisis of 2008 (e.g., Banks 2020) and from the COVID-19 pandemic of 2020–2021 (e.g., Milne 2020). For instance, during the crisis that resulted from this pandemic, and due to it, there was an escalation of artists' usual scarcity of work activity, and comparatively higher than in the general population (e.g., Kern 2020; OECD 2020). Consequently, this resulted in a fall in the income/revenues of the artists (Milne 2020), not properly compensated by state's support, for which many are also ineligible (Anheier et al. 2021). Consequently, there is a high probability of disruption in the preservation of artistic careers and vocational orientation due to crises, that also demand work adaptations (e.g., online shift of art exhibiting) for which not all artists are ready (Comunian et al. 2020).

1.5 Effects of and Reactions to Alienation of Human Rights in the Art World

Seen as a form of oppression, social pressures on and possible alienation of artists' rights can be expected to have a negative impact in artists' health and well-being. Actually, studies in the psychology of oppression (e.g., David and Derthick 2017) show that oppression in general naturally tends to act as a stressor with

significant negative impact of that kind. Specifically, depending on the specific oppressive conditions, and specific psychological and psychosocial reactions to them, the experience of oppression can have a variety of effects, like low self-esteem, anxiety, depression, suicide, substance use, stress-connected heart disease, poor school/work performance, and low life satisfaction (David and Derthick 2014, 2017).

Artists' professional precarity in particular can have significant negative implications for mental health. For instance, a British study on TV and cinema industry's workers (Wilkes et al. 2020) found that, partly due to work precarity, prevalence of mental health problems (e.g., depression, self-harming, suicide thought and attempts) was higher, and subjective wellbeing was lower, than across the national population. Convergently, an extended study on mental health in music industry (Gross and Musgrave 2020), revealed an higher incidence of anxiety and depression among music makers when compared with general population.

Also, in the case of artists, their difficulties in trading art-works, interpretable as a difficulty in having them recognized, seems related with hopelessness, resentment and evasion (Levine 1972, as cited in Becker 2008). Moreover, artists' long-term poorness might be read by them as a signal of professional incompetence (Habbing 2002).

Moreover, the typical negative impact of artists precarity in their mental health and well-being tend to increase during economic, financial, and social crises, since these tend to expand that precarity. For example, throughout the COVID-19 pandemic crisis many artists reported that its effects on work termination and postponement had a considerable effect on their life satisfaction and wellbeing (Visanich and Attard 2020), as well as in their mental health (Brunt and Nelligan 2020).

Nevertheless, while some artists perceive their professional precarity in a negative way, others take it as a fount of development and empowerment (Conde 2009).

The "reactance theory" suggests that the perception of restrictions on personal freedom motivates a reaction to counteract them (Brehm 1966), and that the perception of pressures for specific decision-making tends to trigger resistance by selecting an opposite perspective (Reber and Reber 2001). Convergently with this, artists can react to social pressures, like the ones to correspond to conventions or of receiving "unwelcome" social rewards, by dissenting and creating new artistic forms, even at the cost of decreasing dissemination of their work (Becker 2008; Habbing 2002). Actually, artists use their art in order to explore and counteract the social pressions that act upon their rights. An unique example of this

is testified by the sentence written on the famous paiting *The Scream*, of Munch (1983), almost invisible to the naked eye: "Could only have been painted by a madman!". A calligraphy analysis conducted in 2021 by the National Museum of Norway allowed to conclude the sentence, previously known, and first interpreted as an act of vandalism, was written by the artist himself (Gustavsen 2021). Following, curator Mai Guleng reinterpreted the sentence in a press comment as "(…) an ironic comment from the artist regarding the accusations [by some critics] about his mental health. He is trying to regain control over how he and his art are understood. (…)" (Salema 2021, p. 30).

Some artists also will try to cope with their professional precarity by becoming street artists. Moreover, the general conditions of precarious work (for artists and non-artists), combined with other forms of alienation of individual power and dignity (e.g., under-representation in governance) and with the need to leave a personal mark on something and thus affirm personal identity, might be on the background of street art manifestations like graffiti (Dalrymple 2015).

Artists may react to the loss of independence and the industrialization of their works by the cultural industry by controlling their publication (e.g., in restricted, non-commercial editions, with small, independent publishers). This strategy is exemplified by the practice of two poets: Baudelaire, who chose to associate with the family publisher Poulet-Malassis and Herberto Helder who, until shortly before his death, published with small publishers and prohibited reprints (George 2015).

More radically, an artist might respond to social pressures by keeping his or her work private and abstaining from publishing it, at least through editors (Johnson 1955, as cited in Becker 2008).

However, despite their reactance to the alienation of their rights, artists frequently negotiate with their social context, by attempting both to fulfil satisfaction in their artistic activity and appreciation and survival through it (Habbing 2002).

Besides, a variety of institutions have joined artists in their reaction to their rights alienation. In this line, several states have used a variety of ways of supporting artists, that go from more protective measures (e.g., assuming artists' initial phase of professionalization) to more indirect ones (e.g., tax benefits to artists) (Nico et al. 2007). Nevertheless, state funding of the arts and the artists, grounded in the defence of the right to culture, has been threatened by austerity policies and the possibility of being politicized, being for instance based more on the kind of art message than on artistic merit (FRA 2017a). Parallelly, several official and civil society organizations work in defence of arts and artists' rights (e.g., UN and UNESCO; Freemuse; PEN International; or The International Council of Refugees Network), by reporting on their status, recommending measures, campaigning, acting, and organizing events and activities.

2 Arts for Human Rights

The connection of arts/aesthetics and human rights involves not only the rights of arts, aesthetics, artists, and audiences, but also how arts and artists can contribute to the defence and promotion of human rights. Although this subject is not the focus of this chapter, a short reference to it is appropriate.

The use of arts for the defence and promotion of human rights is based on several arguments.

A first argument relates to the fact that, considering that threats to human rights has intensified and varied, the language of human rights professionals is not having the impact it aims, demanding a change that the arts might bring (FRA 2017a). As both psychology of the arts and marketing studies reveal, arts and aesthetics have a significant learning impact in changing, in a non-forcible way, perceptions, conceptions, attitudes, values, and correspondent behaviours (e.g., Hagtvedt and Patrick 2008). Therefore, arts and aesthetics can be used as efficacious mediums for mobilizing the defence of human rights. As arts give voice to perceptions and feelings, and therefore dignify human experience, they naturally serve as ambassadors of human rights (FRA 2017a). Actually, perceptions, emotions and narratives, arts' realm, might more easily promote decisions than factual claims and technical texts (FRA 2017a). Moreover, arts and aesthetics catch attention in a context of competitive messages, to which mass audiences are desensitized. Otherwise, the transforming capacity of the arts is equally evidenced by the need of political power to control it, and by the opposite use of the arts for the purpose of hate messages propaganda.

Besides, the use of the arts for representing human rights infractions and mediating human rights messages can restore some dignity to victims, help memorization of those infractions (Benoune 2018), and lighten a dark material (FRA 2017b).

The arts might be particularly efficient in testifying for human rights infractions, by theatrically integrating evidence with sensory-emotional involvement and ethical reflection (Simonsen 2021).

Moreover, the language of arts is more universal than national languages and not only reaches a wider public, is adaptable to many local contexts as it promotes communication between people from different cultures (Benoune 2018). Besides, as the same author refers, as artistic expressions tend to provoke several readings, they cultivate toleration to other's perspectives.

Finally, as arts often involve counter-discourse, and a challenge of dominant perspectives and narratives, they naturally lend themselves to be used as mediums for human rights defence, which involve confronting orthodox attitudes like prejudices based on ethnicity, culture, religion nationality, gender, and identity (FRA 2017a).

Specifically, the arts can contribute for the human rights cause in a variety of ways summarized below.

The arts can work in favour of human rights through the creation of works devoted to this thematic (in a more direct simple way or in a more subtle complex form), and so possibly inspiring people and governments to their defence. In the line of political or social art (e.g., Sholette 2014), a variety of artistic strategies have been used to mediate the human rights agenda (e.g., Herbst et al. 2014), questioning representations, attitudes, and behaviours incompatible with human rights, and proposing others that defend them (Benoune 2018). For instance, in the latest years, a variety of comics and graphic novels tell the stories of migrants and refugees. In some cases, this kind of artworks can even testify, narrate, and help to visualize relevant events related to human rights. As an example, in the context of the Israeli-Palestine issue, a photography project titled *Anti-Mapping*, by Miki Kraftsman and Shabtai Pinchevsky 2021, allows the visualization of places that "disappeared" or have enforced restricted visibility in online and in print official Israelian maps. In this sense the arts can even help in a dialogue, and eventual negotiation, between conflicting, and apparently irreconcilable, rights of rival groups.[1]

More indirectly, social marketing messages related with human rights can be *infused* with or in the work of art, to have a stronger impact. For instance, Amnesty International launched a campaign titled *Pain-ting*, where reproductions of several famous paintings that depict women (e.g., *Marylin Monroe*, by Warhol 1971), were altered to show them as victims of domestic violence. Moreover, several artists (e.g., actors, singers) have been using their popular image to promote human rights messages.

In the line of *Art-Based Learning*, which involves learning through the arts, the arts are also used as a resource in the field of *Human Rights Education*, which deals with learning and exercise of human rights taught through content and experience (e.g., McLeod and Reynolds 2010). More specifically, the arts are also used as a resource for training specialized groups in particular human rights areas. For instance, *Health Humanities* recurs to the arts for training health students and staff in attitudes and competencies of patient centred care (e.g., Charon 2006).

Arts can also be used to develop, through their appreciation, to foster perceptions and attitudes that are incompatible with human rights infraction (e.g., humanizing and developing empathy toward people from the outer group). For

[1] To see other examples of works of art committed to human rights, go to *Art for Human Rights—A Virtual Link Gallery* (https://sites.google.com/view/artforhumanrights).

example, the itinerary exhibition *The Bridge*, by the organization Caravan, shows works of Jewish, Persians and Arab artists that focus on the commonalities between their cultures.

Finally, arts constitute a resource for the human rights cause in its use, eventually in the line of art-therapy and art education, to help psychological trauma and problems of victims of human rights abuse, without denying the need of eradicating their causes. This can go from more formal initiatives, as art programs to alleviate suffering and bring education in refugee camps (Buriel et al. 2021), as arrangement, music performances for and with vulnerable groups, like refugee children, and human rights organizations by *Musicians for Human Rights*. In the same line, arts can help whole societies to articulate, mourn and go beyond collective trauma related with human rights infractions, besides imagining new futures where human rights are more respected (Benoune 2018).

3 Conclusion

Based in an interdisciplinary literature review, although with a special emphasis on psychology, this chapter explores the connection of human rights and the arts/aesthetics. This is done by mainly focusing on alienation of rights concerning the arts, artists, audiences, and aesthetics in general. Besides, it also tangentially addresses the role of the arts for the defence of human rights.

As analysed, the right of artistic/aesthetic freedom of expression/appreciation is coerced by a variety of social pressures that include attempts to influence the artwork's orientation, censorship and gatekeeping, damage and destruction of artistic works, and threats, harassment, prosecution, imprisonment and killing of artists or spectators. Artists' right of intellectual property is compromised by violations to copyright and trademark, usurpation of artistic property, instrumentalization of the arts, transformation of works of art and plagiarism. Artists' right to privacy is not only violated by political surveillance, but also by their inadequate or non-authorized exposure in the media and other publications, and different forms of work harassment. Artists' right to work, to fair and just working conditions and remuneration, and to social security and assistance is particularly limited by conditions of professional precarity. As mapped, such forms of alienation of arts/aesthetics' relate to different personal and social factors, and lead to a variety of psychological consequences, along to personal and social reactions. Besides, the analysis reveals that although infraction of arts/aesthetic rights tends to be more obvious, planed, and frequently more intense in non-democratic

contexts, it is not exclusive of them, being also observed in the so-called democratic states, mostly due to commercialization of the arts.

Without the opportunity here to go in much detail about possible recommendations to counteract the coercion of the analysed rights, a sketch of practical implications in this sense nevertheless follows.

A first need is to develop and support means to monitor the coercion of the rights of arts/aesthetics, artists, and art audiences, by mechanisms of observation of such alienation, like specialized journalism, auditing, and research (e.g., observatories on the condition of human rights in the art world).

A correlative way to reactively counter the alienation of the mentioned rights is reporting it and implementing actions that can eventually reduce or neutralize it (e.g., legal processes against infractions of rights of arts and artists).

Besides, it is necessary to assist victims of such alienation of rights, like supporting them materially, logistically, psychologically, and socially (e.g., housing, training, and psychotherapy of victimized artists). Moreover, the politicization of artists and audiences (e.g., associationism) could also be a way of developing forms of resistance to the coercion exerted upon their rights.

Finally, it is imperative to prevent alienation of artistic/aesthetic rights, through initiatives like promoting knowledge of such rights, increasing awareness of factors, dimensions, and consequences of infractions upon it, and previewing potential future threats to those rights (e.g., training of museum curators on the role of their institutions in the (dis)respect of the rights of arts, artists, and audiences).

Parallelly, as identified, the arts constitute an efficacious rich way of contributing to the defence of human rights in general. Specifically, this contribution operationalizes through the creation of works of art in this thematic, the infusion of arts in social marketing on the topic, a human rights art-based education, the development of perspectives that are opposite to human rights violations, and an art-based support of victims of human rights abuse. It is then recommendable to encourage and support such use of the arts as a resource in the defence for the human rights. Nevertheless, this should be done, as Benoune (2018) alerts, by balancing a top-down and a bottom-up use of the arts, that considers both the used arts' aesthetic quality and cultural veracity and its use by artists and local communities.

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Conclusion

Final Remark: The Constitutive Elements of the Book Contributions and Their Location in the Context of Thematic Approaches to the Human Rights Issue

Mehmet Okyayuz

1 The Idea (Again)

The philosophical-theoretical formulations and the systematic elaboration of the human rights idea and its practical formation by and its location in state and society can be traced back to the philosophy and art of Greek and Roman antiquity. At this time, concepts such as law, citizenship, authority, society, state and democracy were intensely debated; concepts that allow us to this day to understand certain inter-individual relationships, relationships between individuals and society and/or the state, as well as inter-state relationships as political-legal and social relationships. That made it on the one hand possible to raise their everyday general use to a categorical epistemological level, but on the other hand to concretise it conceptually. This methodology can be seen as an attempt at a holistic approach to the world, taking into account the interconnectedness of all aspects of life, which in turn is one of the prerequisites for later debates about the location of human life and its dignity within the framework of power relations in state and the society.

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These early foundations of the idea of human rights have always found their manifestation in the form of documents. Examples of such an early document-manifested form are the Declaration of Human and Civil Rights passed in the first parliamentary assembly shortly after the French Revolution in 1789 and the Bill of Rights of the US Congress in the same year. The historical forerunner of these forms can be seen in the development of Roman law from a two-part (ius gentium and ius civile) to a tripartite order (ius gentium, ius civile and constitutional law). Universal principles of natural law such as human liberty, brotherhood and human dignity were modified after long theoretical and philosophical debates and integrated into the legal body of the state.

2 Tendencies of Fragmentation and the Search for a Holistic Approach in General …

Talking about the origins of the idea of human rights includes the necessary mention of traditions of thought and their bearers such as philosophers, legal scholars and social scientists. With the transformations after the First World War, two opposing tendencies came to the fore in the context of human rights: on the one hand, there was a fragmentation in state and society, which is reflected, for example, in increasing scientific specialization; on the other hand, there was the need for a new synthesis, for restatements and redefinitions, such as can be observed in traditions of thought such as critical theory. The latter understood the need for social transformation in the sense of a need for self-realization, i.e.—in a broader sense—as a need for the realization of human rights in the new world of the twentieth and twenty-first century and its manifestation with all its continuities and discontinuities. An important point here is the question of the relationship between state and law, between social science and law, and ultimately between politics and ideology.

In the last three decades, in addition to the tendencies mentioned above, a fragmentation and specialization of human rights issues can be observed. Furthermore, in this context, the withdrawal of primarily legal scholars from the holistic debate can be noted, mostly in the form of a “legalistic” approach that neglects social reality. On the other hand, the contributions of the authors in this volume, can be evaluated as a renewed approach to social reality, as a critical look at the manifestations of the human rights issue under the historical conditions of the last 30 years, which tend to be defined as a retreat from egalitarian politics.

We assume that the “self-reflection” of the representatives of the legal branch in particular, but not only, in this volume is a necessary prerequisite for a new

interdisciplinarity or—better—multidisciplinarity in the processing of the topic. This multidisciplinary approach to the topic, i.e. the inclusion of the various scientific disciplines in the analysis of the human rights issue and its social implications, runs like a red thread through the book contributions, it forms their common thread and makes it possible to read "between the lines".

Against this background, the aim of this concluding article is to classify the concrete contents of the contributions from different countries at the level of theoretical and institutional areas, at the level of case studies and beyond that at the level of actors. But before that, it is important to review the topicality of this issue, based on the assumption that most current debates are based on developments after 1918 (as the first wave) and then after 1945 (as the second wave). During World War II, humanity was confronted with traces of blood, terror and destruction in all areas of life on an unprecedented scale. In the end, about 70 million people died as victims of the war policy initiated and practiced by German fascism. In this situation—after the founding of the League of Nations in 1919 and later the United Nations in 1945 in the form of formal legal mechanisms—practical political attempts to (re)structure the socio-political order, e.g. by channeling population movements of millions of displaced persons and the remapping of geographic spaces, particularly (but not only) in Europe.

These early processes of both formulating and putting into practice binding domestic legal norms and regulations are at the same time attempts to anchor them within the framework of a general human rights discourse. More recently, particularly after the collapse of the Soviet Union and the more or less parallel decline of related states, parties, and social movements, a third wave of human rights discourses and practices can be identified. In the context of globalization we can observe attempts to establish a "new" free world, on the one hand in terms of creating notions of "freedom and democracy" through information production and dissemination, on the other hand through practical politics, which means interventions in other countries as well as the creation of a consensus public. The theory and practice of this third wave of—let's call it—a human rights narrative involves more than ever institutional networks and civil society organizations as carriers of this narrative. The all-encompassing character of this narrative has meanwhile developed to such an extent that the specific interests and preferences of the different states and other actors on which they are based are also captured to a degree that (again) reflects the most diverse human rights assessments.

These remarks clearly show that both the theory and the practice of human rights had a political-ideological layer immanent from the beginning and—perhaps even to a greater extent in current times—still do, which points to the ambivalence between legality and justice. This aspect is a strand that runs more or less

explicitly through all book contributions. The book contributions are also characterized by the fact that both the historical and the current dimensions of human rights theory and practice are treated in their processuality, i.e. in their continuities and discontinuities based on current developments, specific debates and the implementation of their political-legal norms. Furthermore, in connection with the ambivalence of legality and justice, another field of tension is discussed here, that between a moral universalism on the one hand and national and individual particularisms on the other hand. All of this reflects the claim of a theoretical, multidisciplinary approach to the topic, involving different sectors and different geographical perspectives, which result from the specific locational background of the authors involved. These different perspectives, which also make up our methodology, should enable the reader to draw a relatively complete picture of both the public human rights discourse and its institutional and political implementation. Thus, in a comprehensive sense, it is aimed at creating to recognize the potential of human rights issues as a future driving force for a new political and social, liberal and egalitarian reorganization on a global level.

3 … and in the Context of Thematic Approaches to the Human Rights Issue in Concrete

Against the background of the constitutive elements of the contributions in this volume listed above, these are to be located in the following in the main areas of academic human rights literature on the base of selected texts. Doing this, the different approaches that exist between the mentioned literature and the book contributions as well as common grounds should be emphasized and pointed out. In this way, on the one hand, the necessity of future multidisciplinary approaches will become explicitly visible; on the other hand, the different approaches will be aimed at showing not in their separating but in their connecting nature. After all, no (re)constitution of the idea of human rights in the sense of a universality that overcomes historically determined particularities is conceivable without identifying differences in the approach to the topic or the necessary limitations of their processing. Ambivalences in the field of tension between politics and ideology, between individual freedom and social order, between freedom and equality, and ultimately between legality and justice, can only be raised to a qualitatively new level of consensus if they are analytically determined, elaborated in a multidisciplinary manner and critically discussed. The following approaches are covered by the book contributions in the above mentioned way.

We can proceed from five main strands of approach that form and structure the academic human rights debate in the literature.

1. *The General Normative Approach:* Jack Donnelly's book entitled 'Universal Human Rights in Theory and Practice' (2013) is one of the basic texts aiming at defining and determining the human rights issue. Essentially it has an introductory character reflecting the idea of the universal validity of Human Rights independent from particular interests may they be culturally or even ethnically justified. It is a defense of the idea of human rights as a manifestation of moral universalism within the continuity of the Declaration of Human Rights with the theoretical focus on the protection of human dignity. As important as this approach may seem as a guideline for policy implementation in order to establish structures of equality and freedom it nevertheless lacks to a certain extent the look to discontinuities and disruptions, i.e. the 'ideological' side of the Human Rights narrative. With this approach Donnely's book joins a widespread category of publications focussing on the description and analysis of legal mechanisms, legal documents, and of political networks, such as the UN Human Rights Council or the above-mentioned Declaration of Human Rights. The normative character of these publications cannot be overseen. But it is exactly the problem of discontinuity and rupture which, according to this volume, will bring the question of equality of freedom from a theoretical-abstract level to a more concrete social level reflected in issues such as social justice or power accumulation of political actors. This is also more important since the presence is determined by the Corona pandemic which makes latently existing social tensions immanent. The gap between different social groups is increasingly widening in a broad global context. Thus, the universal validity of Human Rights can be analysed and more than this: questioned by taking into regard continuities as well as discontinuities within the framework of the Human Rights issue. The contributing authors had this ambivalence in mind by formulating their specific findings.
   Related Book Contributions: Peter Herrmann: HR—An Attempt of their Social Re-Interpretation in the Light of Surveillance and Public Responsibility
   Mehmet Okyayuz: Final Remark: The Constitutive Elements of the Book Contributions and their Location in the Context of Thematic Approaches to the Human Rights Issue
2. *The Specific Approach:* While Donnelly's book is defined by its general normative character, another book, this time edited by Ellen Marrus/Pamela Laufer-Ukeles, narrows the issue of human rights to 'Global Reflections on Children's Rights and the Law' (2021). This approach focuses on a limited

topic, which is undoubtedly an essential methodological approach to disseminate information and implementation mechanisms to legal specialists, individuals and NGO activists. A kind of handbook that can essentially be used in the area of policy implementation rather then being a tool for understanding the development of human rights in their concretization of children's rights. With this approach, this book joins a widespread category of publications that focus on the analysis of the situation of specific groups (e.g. migrants) in the area of tension between general legal norms and practices on the one hand and extraordinary measures on the other. To put it more specifically: In this book children's rights are presented as one and perhaps the most essential aspect of human rights at issue, or in other words: the universality of human rights resides in a particular aspect of a particular area of human rights. In relation to our project, our starting point is categorically different, claiming multidisciplinarity and placing the specificity of specific human rights domains within the generality of human rights.

Related Book Contributions: Işıl Kurnaz: Violence against women on the Axis of the Istanbul Convention and its Monitoring Mechanisms after the Denunciation: A Comparative Analysis on Turkey, Poland and Hungary

Volkan Deli: The Self-Representation of Faith-based Organisations in the United States: Serving Refugees before the Discourse of Human Rights

3. *The Institutional Approach:* Another important publication focussing on the description of international legal systems and organizations, on institutionalized networks, is Rhona Smith's and Christien van den Anker's 'The Essentials of Human Rights' (2005). This book can be evaluated as the reflection of the fact that since 1918 the theoretical debate was 'enriched' by the establishment of institutions such as the United Nations and currently the institutional sub-organizations also on the semi-political or social level. Additionally, it focusses on categories of rights such as civil and cultural rights. The question of an institutional framework is without doubt an essential part of current Human Rights issues, and as such a non-neglectable part of any elaboration on this topic. In our book there will be contributions focussing on this aspect as one aspect among others. Responsibilities of state and social actors, of *states and non-state actors* as formulated in the 2015 published book 'Human Rights Protection in Global Politics' is thereby an aspect which will guide the book contributions in this field.

Related Book Contributions: Mao Junxian: The Dilemma and Future of Human Rights in Global Governance

Lethokwa Mpedi/Theophilus Edwin Coleman: HR—ethical institutions/religious bodies between foundation and watering down legally testified rights

Wang Zheng/Qin Bo: The Unique Prosecution in the British Pitcairn Islands

4. *The Philosophical-Ethical Approach:* In his book 'Making Sense of Human Rights' (2006) James Nickel focusses on the *idea* and the *ethical–political-legal culture* of Human Rights underlying their emergence, formulation and implementation in state and society. More than going into the flow of the material and mental roots of Human Rights Nickel debates the theoretical potential of this idea mostly on an individual level. The world of dignity is primarily the world of our self-perception of what justice ought to be. The general normative, sometimes abstract character of Donnelly's publication mentioned above this time has been modified—by preserving the generalities of Donnelly—to an individualistic, and at the same time hypothetical dimension. Concerning our book project it is our understanding that, even if the focus is on actors of Human Rights on any level, the structural dimension together with all the other constituting elements of our book mentioned in the first part of this text are taken into regard.
   Related Book Contributions: Mehmet Okyayuz: Philosophical-Theoretical and Material Origins of Human Rights
5. *Country Cases and Human Rights:* In 2019 an edited book called 'Expanding Perspectives on Human Rights in Africa' was published. It stands in the tradition of country-specific manifestations of the theory and practice of Human Rights. The treatment of certain groups in state and society reflecting contradictions between the ideal of Human Rights and its practice is at the same time the manifestation of the 'ideological' layer of this issue, something which is of essential interest also for our book project. Focus on specific countries and regions this layer is analysed in a multi-disciplinary and multi-regional manner.
   Related Book Contributions: Augustine Hungwe/Krish Chetty: HR and people of colour—a historical view from the South
   Mao Junxian: The Dilemma and Future of Human Rights in Global Governance
   Hüreyye Özdemir: Freedom of Thought and Expression: Social Media Censorship in Turkey

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