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Jurnal haqqında

Bakı Dövlət Universiteti Tələbə Hüquq Jurnalı BDU Hüquq fakültəsi Tələbə Elmi Cəmiyyətinin nəşri olmaqla tələbələr tərəfindən təşkil olunan və müvafiq akademik yoxlama qaydası ilə redaktə edilən yeganə jurnal olub milli, beynəlxalq və müqayisəli hüquqda mövcud olan müasir hüquq problemlərinə akademik səviyyədə peşəkar yanaşmanı təbliğ edir. Jurnalın əsası 2014-cü ilin noyabr ayında qoyulmuş və 2015-ci ildən başlayaraq dünyanın ən böyük hüquqi araşdırma bazası olan HeinOnline bazasında yerləşdirilməkdədir. Nəzəri fikirləri, dünya dövlətlərinin məhkəmə və qanunvericilik təcrübəsini ümumiləşdirərək mübahisəli məqamlara aydınlıq gətirmək, hüquq cəmiyyətinə həm elmi, həm də praktiki müstəvidə yaradıcı düşüncə və hüquqi tənqid qabiliyyətini, hüquq mədəniyyətini aşılamaq Jurnalın əsas prinsipidir. Jurnal tərkibindəki məqalələr vasitəsilə aktual məsələlərə hüquqi əsaslandırmaya istinad etməklə mümkün həllərin irəli sürülməsini və yenilikçiliyi prioritet məqsəd kimi müəyyənləşdirir. Hüquq tələbələrinin hüquqi yazı və hüquqi düşüncə bacarıqlarını üzə çıxararaq inkişaf etdirməklə onları akademik araşdırmaya həvəsləndirmək və bunu sağlam elmi rəqabət ənənəsinə çevirmək Jurnalın daimi məramını təşkil edir.

About the Review

Baku State University Law Review is the only student-run and peer-reviewed academic journal in Azerbaijan and a publication of Student Academic Society of Baku State University Law School. It was founded in November 2014 and has been placed in HeinOnline since 2015. The Review promotes academic and professional approach to contemporary legal issues which exist in national, international and comparative law. Clarification of debatable issues with induction of theoretical concepts, judicial and legislation practice of foreign countries, foster legal criticism skills, creative thinking, and legal culture on both academic and practical sphere are basic principles of the Review. With its published articles, the Law Review promotes possible solutions to actual legal issues with reference to legal reasoning and opportunities given by legal scholarship and determines avoiding repetition as prior purposes of Review. Encouraging law students to academic research with making them improve their legal writing and legal thinking skills and make this as a fair competition are permanent goals of the Review.

Amil Jafarguliyev*

FLIPPING A COIN FOR COPYRIGHTABILITY OF ILLEGALLY PLACED STREET ART

Abstract

Street art is visual art usually placed in public locations, such as on buildings or train cars. Once upon a time, this concept was being treated very stringently within the borders of criminal law. So that, graffiti used to be scrutinised as criminal behaviour or vandalism. We all know how the "Subway Surfers" game starts, do not we? However, tables have turned, and graffitti are now under the umbrella of a concept called an art – street art. Even discussions were commenced on the copyrightability of street art. The uprising role of this concept took this debate to another level, granting copyright protection to even illegally placed street art. But the runner in "Subway Surfers" still runs because the act of painting surfaces unsolicitedly is still considered illegal. That is why granting copyright protection for illegally placed street art is controversial, especially when the "unclean hands" doctrine is on the other side of the scale. Furthermore, if illegally placed street art gets copyright protection, the discussions will potentially extend to what economic and moral rights street artists can have. This article will address the issues of copyright protection for street art (both legally and illegally placed) and the potential economic and moral rights of street artists.

Annotasiya

Küçə sənəti, adətən, ictimai yerlərdə, məsələn, binaların və ya vaqonların üzərində əks etdirilən təsviri incəsənətdir. Bir vaxtlar bu anlayışa cinayət hüququ çərçivəsində çox sərt yanaşılmışdır. Belə ki, qraffitilər cinayət əməli və ya vandalizm kimi dəyərləndirilmişdir. "Subway Surfers" oyununun necə başladığını hamımız bilirik, elə deyilmi? Bununla belə, son dövrlərdə bu məsələyə yanaşma dəyişmişdir və qraffitilər artıq incəsənət – küçə sənəti adlanan bir konsepsiyanın çətiri altındadır. Hətta artıq küçə sənətinin müəlliflik hüquqları ilə qoruna bilməsi barəsində müzakirələr mövcuddur. Bu konsepsiyanın yüksəlişi mövcud müzakirəni başqa səviyyəyə qaldırmışdır: qanunazidd olaraq həyata keçirilən küçə sənətinin müəlliflik hüquqları ilə qoruna bilməsi də artıq müzakirə mövzusuna çevrilmişdir. Bununla belə, "Subway Surfers"dəki oyunçu hələ də qaçır, çünki divarların icazəsiz rənglənməsi qanunazidd əməl hesab edilir. Buna görə də qeyri-qanuni şəkildə yaradılmış küçə sənətinin müəlliflik hüquqları ilə qorunması, xüsusən də "çirkli əllər" doktrinasını nəzərə aldıqda böyük mübahisələrə səbəb olur. Bundan əlavə, qanunazidd olaraq yaradılmış küçə sənəti müəlliflik hüquqları ilə qorunma hüququ əldə edərsə, müzakirələr küçə rəssamlarının sahib ola biləcəkləri iqtisadi və mənəvi hüquqlara qədər genişlənəcəkdir. Bu məqalədə küçə sənətinin (həm qanuni, həm də qanunazidd şəkildə yaradılan) müəlliflik hüquqları ilə qorunması, eləcə də küçə sənətkarlarının əldə edə biləcəyi iqtisadi və mənəvi hüquqlar araşdırılacaqdır.

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Introduction

"Street art" is a special type of art, and its forms are widely spread worldwide. A. Young refers to graffiti artists as citizens who have a special connection to cities, and they make cities better than they are right now.[1]

Just a quick look at the walls of our cities is enough to understand how common these phenomena are. Even sometimes popular street artists' works can be sold for six-figure amounts, and the value of street art can outstrip the wall on which it is painted.[2]

The conventional approach to this type of art has tended to depict it as an issue better dealt with under property or criminal law. This did not necessarily pose an obstacle for street artists, many of whom opt to locate scrutiny of their work outside of the law. One of them even went the extra mile by stating that "copyright is for losers". This statement belongs to the well-known street artist Banksy, who is least interested in copyright protection for his artwork. Banksy tried to obtain trademark protection for his famous graffiti named "Monkey Sign", a drawing of a monkey with a board that reads "laugh now, but one day we'll be in charge".

In May 2021, this was first rejected by the European Union Intellectual Property Office (EUIPO). However, in November 2022, the Fifth Board of Appeal reversed the previous decision, providing that just because a trademark might be subject to copyright protection, it should not mean it cannot act as a trademark.[3] This means Banksy has obtained a trademark for his graffiti. But what about potential copyright protection for graffiti? Can the same result be reached if the matter is examined under copyright law?

One thing is for sure that copyright protection for street art can ensure economic gains for authors. It is also common practice for some corporations to use these art forms in their commercial activities without the artists' permission. Therefore, a significant rise was observed in the number of cases dealing with street artists suing companies in wide-ranging fields, namely

[1] Alison Young, *Cities in the City: Street Art, Enchantment, and the Urban Commons*, 26 Law & Literature 145, 156 (2014).
[2] Aislinn O'Connell, *The writing on the wall: street art and copyrigh*t, 14 Journal of Intellectual Property Law & Practice 530, 530 (2019).
[3] EUIPO, Decision of the Fifth Board of Appeal, R 1246/2021-5 (2022).

food, entertainment, fashion, real estate, cars, etc.[4] For some, copyright may be the exact legal tool that street artists require.[5] Nowadays, there are a lot of street and graffiti artists who operate within the scope of the law.[6] Considering all these, it is possible to emphasise that the issue of copyright protection for street art is becoming more important as street artists' interest in this protection grows. Therefore, there is a need to analyse this topic in detail.

In the first part of this work, it will be assessed whether copyright rules can protect street artworks, especially graffiti. The examination will be done for both legally and illegally placed graffiti, and the light will be shed on the different domestic jurisdictions. In the second part, it will be discussed what economic rights artists can have under copyright protection, and then the issues dealing with the moral rights of artists will be covered. In this part, the paper will mainly concentrate on illegally placed graffiti since the problems are related to their illegality element. Having no case from the EU courts – both The Court of Justice of the European Union (hereinafter CJEU) and The General Court (hereinafter GC) in dealing with the copyright and street art issues occurred to be the main difficulty for achieving the purposes of this paper. However, relevant CJEU copyright precedents and legal tests will be used to accomplish specific assessments. The different EU member states' practices and cases from national courts will also be analysed, as well. Other jurisdictions, such as the UK and the USA, will also be examined to assess issues comparatively. Additionally, international and regional legal documents alongside academic articles, theories, and opposing views from the legal doctrine will be used.

I. Copyright protection for street art (graffiti)

In this part of the paper, possible protection under the copyright rules for street art (for both legally and illegally placed ones) will be investigated.

A. General legal framework for the copyright protection of street art

Under this section, it will be analysed whether street art can be subject to copyright or not. As mentioned before, there is no EU court practice on this matter. For that reason, this issue remains hotly debated with some unanswered questions.

1. Relevant statutory authority under international and EU level

The provisions of some international treaties will be first considered to find relevant provisions for copyright protection. The CJEU consequently treats them as the starting point for its interpretation of all statutory instruments in

[4] Enrico Bonadio, The Cambridge Handbook of Copyright in Street Art and Graffiti, 1 (2019).
[5] *Id*., 3.
[6] *Ibid.*

the copyright and related rights field.[7] For example, in the case of *Pelham GmbH and Others v. Ralf Hütter and Florian Schneider-Esleben,*[8] the CJEU, in its interpretation of the concept of "copy" within the meaning of Article 9 (1) (b) of Directive 2006/115,[9] used different international conventions to define the term.

Looking at Article 2 of the Berne Convention for the Protection of Literary and Artistic Works (1979), it will be possible to identify the protected categories of "literary and artistic works" as follows: *"scientific and artistic domain, whatever may be the mode or form of its expression, such as ...* ***works of drawing, painting, architecture, sculpture, engraving, and lithography*** *...."*.[10] By borrowing the words of W. Paula, it can be stated that "this is a broad category into which graffiti and street artworks, as either artistic or perhaps even literary works, can in theory perfectly fit".[11]

At the EU level, this definition is entrenched through[12] the different laws requiring member states to ensure copyright protection for all protected works within Article 2 of the Berne Convention.[13] Also, Article 1 (1) of the Community Directive 2006/116/EC establishes that "the rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention shall run for the life of the author and 70 years after his death".[14] Subsequently, there is an expansive definition of the subject matter[15] that European states must protect the copyright, extending to all authorial works or expressive (intellectual) creations, whatever may be the mode or form of expression.

2. Requirements and a legal test to be fulfilled under the EU dimension

In EU jurisdictions, the subsistence of copyright and related rights occurs in any subject matter that:

(1) is of a protectable type;

(2) is sufficiently connected to the territory of the protecting state;

(3) satisfies any applicable formalities.[16]

[7] Justine Pila and Paul L.C. Torremans, European Intellectual Property Law, 225 (2nd ed. 2019).
[8] Pelham GmbH and Others v. Ralf Hütter and Florian Schneider-Esleben, C-476/17 (2019).
[9] Directive of the European Parliament and of the Council on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property, 2006/115/EC (2006).
[10] Berne Convention for the Protection of Literary and Artistic Works, art. 2 (1979). Available at: https://www.wipo.int/wipolex/en/text/283698 (last visited Dec. 20, 2022).
[11] Bonadio, *supra* note 4, 62.
[12] *Supra* note 10.
[13] Tanya Aplin and Jennifer Davis, Intellectual Property Law: Text, Cases, and Materials, 251 (2nd ed. 2013).
[14] Directive of the European Parliament and of the Council on the Term of Protection of Copyright and Certain Related Rights, 2006/116/EC, art. 1 (1) (2006).
[15] This will be better observed when some member states' practices such as France, Germany, Italy, and the Netherlands will be examined.
[16] Pila, *supra* note 7, 277.

An association of international and EU instruments and relevant case law has largely harmonised the principles governing each of these requirements.[17] A few things about the second and third requirements have to be mentioned shortly. The second condition enshrines that a sufficient connection to the territory of the protecting state must exist to require protection through its domestic laws.[18] As for the third condition, Article 5 (2) of the Berne Convention provides "the enjoyment and the exercise of [authors'] rights shall *not be subject to any formality* other than, at the discretion of individual countries".[19]

Turning to the first condition, the requirements for any work gaining copyright protection are established by the CJEU's judgments in the cases of *Infopaq International A/S v. Danske Dagblades Forening,* and *Eva-Maria Painer v. Standard VerlagsGmbH and Others*. Beginning with Infopaq, the CJEU established a two-step test that any authorial work is subject to copyright if:

i) Creation of which leaves scope for free and creative choices;[20]

ii) The extent, if any, to which that scope has been exploited by its alleged author in the course of creating it such that the work bears the author's personal mark.[21]

This shows the CJEU's confirmation of the expansive definition of "authorial work", which covers any expression that its creation leaves scope for the exercise of free and creative choices. By this, the CJEU means that different categories of subject matter are taken on their terms, only subject to the parameters set by their protection as authorial works. As for now, we have a few examples from the CJEU's case law that certain types of subject matter that fail to pass this test and are not protectable by copyright. To illustrate, the CJEU went on to say that the nature of football games and other sporting events[22] and tastes[23] deprive them of having copyright protection since there is no room for free and creative choices for the authors.

Applying this test to graffiti or any other form of street art will depend on the factual background of each specific case (case-by-case approach). When it is generally considered, the Infopaq case conditions will be presumed to have been fulfilled for our hypothetical consideration. It would be impossible to say that no street art could meet the requirement of originality since there are a lot of examples of street art exhibited in galleries and museums.[24]

[17] *Id*., 276.
[18] *Id*., 269.
[19] *Supra* note 10, art. 5 (2).
[20] Infopaq International A/S v. Danske Dagblades Forening, C-5/08, para. 45 (2009).
[21] Eva-Maria Painer v. Standard VerlagsGmbH and Others, C-145/10, para. 92 (2011).
[22] Football Association Premier League Ltd and Others v. QC Leisure and Others, C-403/08 and Karen Murphy v. Media Protection Services Ltd, C-429/08 (2011).
[23] Levola Hengelo BV v. Smilde Foods BV., C-310/17 (2018).
[24] Emma C. Peplow, *Paint on Any Other Canvas: Closing a Copyright Loophole for Street Art on the Exterior of an Architectural Work*, 70 Duke Law Journal 885, 899 (2021).

Nonetheless, it can be very easily argued how much space the use of stencils[25] leaves for the artists' free and creative choices, given that stencils are used to leave their design on the surface by just painting on them. In this case, claiming copyright protection for the stencils might be a good idea.

Coming to the second step of this test, the CJEU ruled that the authors needed to stamp their works with their "personal touch", and by doing so, it created the personality element in the case of *Painer*.[26] Street artists are likely to comply with this element as well, even if they leave pseudonyms behind them. In the second part of this work, we will later discuss that, even when artists decide to stay anonymous, it will potentially not hinder them from getting paternity right.

Therefore, we do not see any obstacles for legally created street art to gain copyright protection. This view is also supported in the literature by a lot of authors, E. Bonadio, A. O'Connell, and S. Cloon, just to name a few. For some, *it is even straightforward* that a legally created mural would satisfy all the requirements of copyright protection.[27]

3. The requirement of fixation for "artistic works" and different domestic jurisdictions

Article 2 (2) of the Berne Convention provides that "works in general or any specified categories of works shall not be protected unless they have been fixed in some material form".[28] When different jurisdictions are examined, it is found that the application of the "fixation" requirement is not the same under domestic laws. As it will be further depicted, most of them do not explicitly have this requirement for artistic works. Nevertheless, it can still be argued that artistic works should be fixated permanently in a medium to be considered copyrightable.[29] Some even point to case law which requires the permanency of the tangible medium.[30]

Before turning to them separately, we should clarify the issue from the graffiti perspective in general. Whether legally or illegally; artists draw their graffiti on different surfaces, namely walls, trains, cars, etc. Given this, it can be said that they are indeed fixed in a tangible form. During the research on the topic, it was observed that some sprays and other methods used by artists lead to their works vanishing quickly because of weather elements. However, we will see cases in which even "hairstyles" and "bouquets of flowers" got copyright protection. Also, we came across a lot of examples in the literature

[25] Stencils are pieces of metal, plastic or paper that has a design cut out of it. Stencils are placed on a surface and are painted so that paint goes through the holes of them and leaves a design on the surface.
[26] Eva-Maria Painer v. Standard VerlagsGmbH and Others, C-145/10, para. 92 (2011).
[27] O'Connell, *supra* note 2, 532.
[28] *Supra* note 10, art. 2 (2).
[29] Enrico Bonadio, *Copyright Protection of Street Art and Graffiti under UK Law*, Intellectual Property Quarterly 1, 5 (2017).
[30] *Supra* note 9, 83.

where authors confidently stated that street art "is tangible, fixed (though often temporary due to eradication efforts)".[31] Another author, Peplow, is also confident on this matter: "Walls are inarguably a tangible medium; therefore, as long as the street art passes the originality requirement, it should be eligible for copyright protection".[32]

Section 1 (1) (a) of the UK's Copyright, Designs, and Patents Act (hereinafter CDPA) provides that copyright exists in any artistic work.[33] Section 3 (2) establishes the fixation requirement for the literary, dramatic, and musical works.[34] This is in line with Article 2 (2) of the Berne Convention.[35] Although there is no express statutory fixation requirement for artistic works in CDPA, in the *Merchandising Corp. of America Inc. & others v. Harpbond Ltd & others* case,[36] it was denied copyright protection for the facial make-up as it could not exist independently of Adam Ant's face (permanent materialisation).[37] However, UK courts do not seem to be unanimous to this end. It was suggested in the *Metix Ltd v. G.H. Maughan Ltd* case[38] that an ice sculpture (not permanent apparently) can be protected as it is a three-dimensional work made by an artist. Maybe that is why some scholars keep their positivity for the copyrightability of street art in the UK. Dr. Marta Iljadica believes photographs of street art and graffiti can potentially help to fulfill the fixation condition to get a copyright.[39]

Moreover, the French Intellectual Property Code (hereinafter IPC) defines artistic works as "all works of the mind, whatever their kind, form of expression, merit, or purpose" (Article L 112-1).[40] There is no trace of the illegality of the creation of work in this code. France has traditionally granted a broader protection to artistic works.[41] Previously, French courts held that "wrapping of a Parisian bridge with canvas",[42] "bouquets of flowers",[43] "hairstyles"[44] can be protected by copyright law. When this approach is applied to street art, courts can also grant protection for graffiti.

Furthermore, Article 2 of the Italian Copyright Act gives a broader definition for artistic works and provides a list of subject matter that can be

[31] Jamison Davies, *Art Crimes? Theoretical Perspectives on Copyright Protection for Illegally-Created Graffiti Art*, 65 Maine Law Review 27, 30 (2012).
[32] *Supra* note 14, 901.
[33] Copyright, Designs and Patents Act of United Kingdom, section 1 (1) (a) (1988).
[34] *Id*., section 3 (2).
[35] *Supra* note 10, art. 2 (2).
[36] Merchandising Corp. of America Inc. & others v. Harpbond Ltd & other., FSR 32 (1983).
[37] *Id*., FSR 46.
[38] Metix Ltd v. G.H. Maughan Ltd, FSR 718 (1997).
[39] M. Iljadica, Copyright Beyond Law – Regulating Creativity in the Graffiti Subculture, 103 (2016).
[40] Code de la propriété intellectuelle, art. L 112-1 (1992).
[41] *Supra* note 4, 180.
[42] *Ibid.*
[43] *Ibid.*
[44] *Ibid.*

protected.[45] There is no fixation requirement, and artistic works can be protected if they have a creative character.[46] Italian courts extended the boundaries of copyright protection to even "a television reports on sport events",[47] "a character",[48] "a floral composition",[49] etc. The paper assumes that such case law will likely grant street art copyright protection.

There is a non-exhaustive list in the Dutch Copyright Act (hereinafter DCA) providing copyright protection "for literary, scientific or artistic works".[50] Under Dutch law, a form of expression does not affect the copyrightability of the work. However, to get copyright protection, a work must have an aesthetic character.[51] It cannot be considered that street art cannot meet this requirement, for example, mosaics can easily fulfil this condition. An interpretation from the Dutch Supreme Court makes us believe that street art can be protected under Dutch law. It reads as follows: "Works that are perceptible by senses other than audio and visual, in particular taste, feel and smell, fall within the scope of protection".[52] Given the fact that street art and its types are always visible to one's eyes in a visible sense, they are likely to fall within the scope of this interpretation.

Under the German Authors Rights Act (hereinafter ARA), a non-exhaustive list of protected artistic works is also available.[53] German law also does not require any fixation or form of creation. By pointing out this, some authors state that protected work can be even made of any perishable material and even ice.[54] Copyright may exist in a work that is simply performed without being recorded under German law.[55]

While examining the fixation requirement, it was observed that the definition of artistic works is broad in those domestic laws. This can easily let the street art fall within those provisions' scope. I would like to conclude the discussion on this requirement in the words of E. Bonadio: "Under EU law and in particular, in light of the Infopaq decision, anything that constitutes an intellectual creation should be protected by copyright".[56]

B. Copyright and illegally created street art

The illegality of street art can refer to both its content (hate speech) and the form of its establishment (trespassing or vandalism). The first matter will not

[45] Protezione del diritto d'autore e di altri diritti connessi al suo esercizio, art. 2 (1941).
[46] *Id*., art. 1 (1).
[47] Radioincontro S.r.l. v. Emi Music Italy S.r.l. (2007).
[48] Luca Faraci v. Interteam S.r.l. and Premium S.r.l. (2002).
[49] Banti Pereira v. Gorlich, Temi (1967).
[50] Auteurswet, art. 1-10 (1912).
[51] Screenoprints v. Citroën, NJ 1987 (1985).
[52] Kecofa v. Lancôme, No. C04/327HR (2006).
[53] Urheberrechtsgesetz, art. 2 (1965).
[54] Hartwig Ahlberg and Horst Peter Götting, Kommentar Urheberrecht, Beck'scher Online, 24 (21st ed. 2018).
[55] *Supra* note 4, 190.
[56] Bonadio, *supra* note 29, 6.

be covered since it would not fit within the purposes of this article. Therefore, this paper will focus on the illegality in the establishment of graffiti, meaning that when they are placed without the consent of property owners.

In the words of Marta Iljadica, "illegality is one of the attractive and defining sides of graffiti practice".[57] Artists need a surface to draw their graffiti. Therefore, sometimes, or maybe most of the time, they choose their spots and create their works without the property owner's permission. This is the main challenge of the issue. Copyrightability of such graffiti becomes a dispute topic when the property owner opposes that or third parties use graffiti for commercial purposes.

Some might argue from a moral perspective that nobody should profit from their wrongdoing (the "unclean hands" doctrine).[58] One can even say, "providing copyright protection for works created illegally could create an extrinsic incentive for individuals to engage in illegal behaviour, or weaken the disincentives created by the criminal law".[59]

However, it will be argued whether the copyright for illegal graffiti is all about benefiting from wrongdoing, or is there more to consider? The outcomes of this research revealed that it is common law jurisdictions where public policy requirements and the "unclean hands" doctrine can potentially deprive protection of illegal graffiti. Nonetheless, civil law jurisdictions tend to grant protection for illegal graffiti despite its very nature.

1. Illegal street art under common versus civil law jurisdictions

The matter will first be analysed in common law jurisdictions, and then the light will be shed on civil law jurisdictions. Let us have a short glance at one case that took place in the UK jurisdiction. In the *Creative Foundation v. Dreamland* judgement (this was a property dispute that a wall with Banksy mural belongs to whom), the judge, Justice Arnold stated: *"For the avoidance of doubt, I am not concerned with the copyright in the artistic work, which prima facie belongs to Banksy"*.[60] Some even read this case as a presumption that not only recognises the copyright in work belonging to Banksy but *ipso facto* presumes that copyright exists in the illegally placed work.[61] Nevertheless, this is a mere assumption from the judge, and it is not enough to confirm protection.

Looking at the USA practice, it can be found a lot of cases in which matters dealing with illegal graffiti came before the courts. The main argument for opposing the protection was the illegality element of graffiti in these cases;

[57] *Supra* note 4, 55.
[58] Ned Snow, *Copyright, Obscenity, and Unclean Hands*, 73 Baylor Law Review 386, 395-396 (2021). To explain in a short way, the unclean hands doctrine allows courts to prevent wrongdoers from employing the legal system to support their wrongful acts. When it comes to specifically copyright matters, the doctrine entails if the copyright owner acts unlawfully in creating the work or in exercising rights to the work, courts may deny enforcement of the copyright.
[59] *Supra* note 31.
[60] *Supra* note 2, 538.
[61] *Id.*, 9.

Jason Williams and others v. Roberto Cavalli SpA,[62] *H&M GBC AB v. Williams*,[63] and *Villa v. Pearson Education*,[64] just to name a few.

Unfortunately, in all cases, parties settled before the final judgement, leaving scholars in difficulty in this debate. Nevertheless, in *Villa v. Pearson Education* case, it is *obiter dictum* stated by the judge that granting copyright protection for illegal graffiti *"would require a determination of the ... circumstances under which the mural was created"*.[65] For D. Schwender, this is an implicit statement; if it is proven that the mural was created illegally, the copyright would be invalid for that mural.[66] However, for another author, "this [D. Schwender's reading] overreads the court's decision substantially".[67] This paper agrees with the latter interpretation of D. Schwender's reading of *Villa v. Pearson* case. Because the court just dictated circumstances under which work is created should be assessed. It was not explicitly stated, but finding illegality in the creation can cease copyright protection. It can be suggested that read in a reverse way, Villa doctrine explicitly confirms copyright protection for legally created murals. Some also think that in the *Villa* case "if a court were to consider the question directly, illegally created graffiti art probably would receive copyright protection".[68]

Whereas the paper analysed literature from the USA doctrine, one approach drew our attention. Some authors compared the copyrightability of illegal graffiti with the copyrightability of obscene and fraudulent works.[69] For example, in *Mitchell Bros. Film Group v. Cinema Adult Theater* case,[70] it was held that "there is not even a hint in that the obscene nature of a work renders it any less a copyrightable writing". Moreover, the Copyright Act should be content-neutral with "no stated limitations on taste or government acceptability".[71] By examining decisions from this line of judgements, those authors draw attention to the fact that the illegality element (with regards to different laws) in those cases did not hinder gaining protection under copyright rules. When this type of argumentation is applied to the issue in question, it suggests copyright protection should not be rejected for illegally placed graffiti. This point of view seems convincing.

Turning to civil law jurisdictions, W. Paula states that countries in these jurisdictions "tend to grant copyright protection regardless of whether the graffiti is done illegally and attempt to resolve issues by balancing the

[62] Jason Williams, and others v. Roberto Cavalli SpA, CV 14-06659-AB (2016).
[63] H&M GBC AB v. Williams, 1:18-cv-01490 (2018).
[64] Villa v. Pearson Education, № 03-C3717 (2003).
[65] *Supra* note 31, 29.
[66] Danwill Schwender, *Promotion of the Arts: An Argument for Limited Copyright Protection of Illegal Graffiti*, 55 Journal of the Copyright Society U.S.A. 257, 268-269 (2007).
[67] *Supra* note 31, 31.
[68] *Id.*, 30.
[69] *Supra* note 2, 535.
[70] Mitchell Bros. Film Group v. Cinema Adult, 604 F.2d 852, 854 (5th Cir. 1979).
[71] *Id.*, 856.

competing interests".[72] Whereas those jurisdictions were examined, this finding was also observed in the relevant case law.

Looking at the French experience, the *Tribunal de Grande Instance de Paris*, in the *Space Invader*[73] case, *de facto* recognised copyright protection for illegally placed street art. Although the main issue there was about the originality of the mosaic, which was mainly based on some previous video games, the court also provided that "the nature of the pool tiles attached to urban walls, the choice of the location of their placement bears the imprint of the personality of the author".[74] It is also mentioned that it "did not appear to regard illegality as an obstacle when considering the originality of the work".[75] For some, it is maybe not perfect, but a strong precedent for the copyrightability of illegal graffiti.[76]

In Germany, the *Pictures on the Berlin Wall* case provided: "It is not in principle relevant to the possibility of copyright protection by statute for the creation of a work that how it was produced is unlawful - in this case, by an act of damage to property subject to civil and criminal sanctions".[77] Deriving conclusions from this statement, being placed illegally is not in principle to reject copyright protection for the street art considered as ground since even damaging the property is not considered as ground. Therefore, it seems convincing that this reasoning can grant copyright protection for unsolicitedly placed street art.

2. Illegal street art and human rights perspective

Article 15 (1) of the United Nations International Covenant on Economic Social and Cultural Rights (hereinafter ICESCR) 1966 provides that everybody has a right to:[78]

"(a) take part in cultural life;

(b) enjoy the benefits of scientific progress and its applications;

(c) benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author".

Article 15 (3) adds that "the States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity".[79] Thus, contracting states would be found in violation of this convention if they failed to provide an appropriate system of enforcement for everyone to actively participate in cultural life and benefit from the results of their creative works. With this, it can be argued that by depriving street artists of copyright protection for their works by just referring to their

[72] *Supra* note 4, 57-58.
[73] Tribunal de grande instance de Paris, Chambre civile 3, 06/12982 (2007).
[74] *Supra* note 2, 534.
[75] *Supra* note 4, 58.
[76] *Supra* note 2, 535.
[77] *Supra* note 4, 58.
[78] United Nations International Covenant on Economic Social and Cultural Rights, art. 15 (1) (1966).
[79] *Id*., art. 15 (3).

illegality element, states can be found breaching this provision. Some even go further and state that "discriminating against illegal graffiti and street artists to deny copyright protection may also arguably conflict with the principle of non-discrimination in the ICESCR".[80]

3. "Fairness" related arguments and illegal street art

From this point of view, considering copyright protection for illegally placed street art as an encouragement of vandalism would not be fair. It can also be pondered as means of ensuring fair treatment for a varied portion of the artistic community, as Iljadica states: "a normative claim might usefully be made here for the protection of graffiti writing in order to promote a diverse culture".[81]

Copyright protection for this kind of street art can also ensure the economic interests of artists as it can help to put a curb on the commercial misappropriation of their works (this will further be discussed). Therefore, copyright protection can open career paths[82] for graffiti artists and pave the way for them out of criminality.[83]

Moreover, artists' choice of a place for their works is an issue of great importance. Artists need places that can be visible to the public, and getting permission to draw over some places is not always possible. For many writers, illicit venues remain more culturally and symbolically lucrative for artists.[84] Therefore, sometimes artists do not have an option but to unsolicitedly paint those surfaces.

4. Concluding remarks on the copyrightability of illegally placed street art

What is discussed here is the basic level of protection. Given the importance of graffiti artworks to creativity and culture, leaving graffiti works unprotected would be contrary to the goals and ethos of international copyright law, such as ensuring justice for authors.

This view is also heavily supported in the legal doctrine. A. O'Connell concludes her thoughts on the same discussion by stating that "the doctrine of illegality would not prevent copyright from arising in an artwork that was created through criminal damage".[85] Additionally, S. Cloon considers that the theory of copyright requires protection for graffiti, even though there is no explicit statement from the courts.[86] C. Lerman also agrees that illegal street art should be protected by copyright regardless or by remaining neutral

[80] *Id.*, 6.
[81] *Supra* note 39.
[82] Gregory Snyder, Graffiti Lives: Beyond the Tag in New York's Urban Underground, 3-4 (2009).
[83] Susan A. Phillips, Wallbangin': Graffiti and Gangs in L.A., 313 (1999).
[84] Laura MacDiarmid and Steven Downing, *A Rough Aging out: Graffiti Writers and Subcultural Drift*, 7 International Journal of Criminal Justice Sciences 605, 612-616 (2012).
[85] *Supra* note 2, 538.
[86] Sara Cloon, *Incentivizing Graffiti: Extending Copyright Protection to a Prominent Artistic Movement*, 92 Notre Dame Law Review 54, 65 (2016).

towards the means of creation.[87] W. Paula, in her turn, firmly believes that "copyright could (and should) protect illegally created graffiti regarding both subsistence and enforcement".[88] This paper shares the same conclusions on the debate as described opinions. Therefore, a mere reference to street arts' illegal placement would not probably deprive them of copyright protection. Choosing to conclude this discussion on the other side of the debate would contradict the arguments mentioned on the human rights, fairness, and civil law jurisdictions perspectives. And there is still no final judgement in common law practice where the "unclean hands" doctrine and public policy doctrines hinder copyright protection at the time of writing.

II. Economic and moral rights of street and graffiti artists, balancing conflicting interests

The debate on the copyrightability of illegal street art will surely involve the following parties:

a) commercial users;

b) property owners.[89]

In this part, the economic rights of artists will first be examined with regard to the unauthorised commercial exploitation of their works. Then, the moral rights of street artists and their conflicting interests with property owners will be addressed.

A. Economic rights of street and graffiti artists

The dispute starts when companies in different sectors, such as food, entertainment, and fashion, use street artworks in their commercial activities without the artists' permission. Using street art in this way is common as some emphasise: "many companies use graffiti advertising campaigns because they create a "spectacle" that gains attraction on social media".[90] This also happens when somebody takes pictures of graffiti and publishes them in a book. When artists oppose the unauthorised exploitation of their works, the other side uses the illegality element as an argument to justify their potential breach of copyright rules. In the light of further discussions, it will be examined what economic rights street artists can have and how one can make "fair use" of their works.

[87] Celia Lerman, *Protecting Artistic Vandalism: Graffiti and Copyright Law*, 295 NYU Journal of Intellectual Property & Entertainment Law 295, 295 (2013).
[88] *Supra* note 4, 60.
[89] *Id.*, 56.
[90] Madylan Yarc, *Mural Mural on the Wall: Revisiting Fair Use of Street Art*, 19 UIC Review of Intellectual Proptery Law 267, 267 (2020).

1. Economic rights of street and graffiti artists under EU law

Article 2 of the Infosec Directive provides one of the exclusive rights of copyright holders - right to reproduction.[91] This provision gives authors an "exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part". Article 3 of the abovementioned Directive ensures the right of communication to the public of works and right of making available to the public other subject matter.[92] The list of any exceptions and limitations is dictated under Article 5, and that list is exhaustive.[93] According to the CJEU, no other exceptions can be considered under the domestic laws other than those stated in Article 5.[94] Although the article entails "exceptions and limitations", it also confers some rights to users. To illustrate, in the case of *Funke Medien NRW GmbH v. Bundesrepublik Deutschland*, the CJEU stated that the rights of the users are derogated from Articles 5 (3) (c) and (d). After mentioning "any derogation from a general rule must, in principle, be interpreted strictly",[95] the CJEU went on to say:

"*To ensure a fair balance between, on the one hand, the rights and interests of rightsholders, which must themselves be given a broad interpretation and, on the other hand, the rights and interests of users of works or other subject matter*".[96]

After mentioning the importance of striking this balance, the CJEU rules that the rights of users should be interpreted broadly.[97] With this, the CJEU establishes how to make fair use of copyrightable work. This can only be made while that balance is maintained.[98] From the street art point of view, this fair balance can be potentially achieved by using quotations as it is stated in Article 5 (3) (d).[99]

Therefore, commercial exploitations without quotations, including the author's name, leave no space for speaking about the fair use of street art.

2. Balancing conflicting interests

The issues related to the "fair use" of illegally placed graffiti are directly addressed under this subheading. It will be argued that where the work was used commercially by other stakeholders, the protection of copyright for street art should not be refused on the ground that it was created illegally.

[91] Directive of the European Parliament and of the Council on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001/29/EC, art. 2. (2001).
[92] *Id*., art. 3.
[93] *Id*., art. 5.
[94] *See* Funke Medien NRW GmbH v. Bundesrepublik Deutschland, C-469/17 (2019); Pelham GmbH and Others v. Ralf Hütter and Florian Schneider-Esleben, C-476/17 (2019); Spiegel Online GmbH v. Volker Beck., C-516/17 (2019).
[95] Funke Medien NRW GmbH , 69.
[96] *Id*., 70.
[97] *Id*., 76.
[98] *Id*., 70.
[99] *Supra* note 91, art. 5 (3) (d).

In the *Mercedes Benz* case,[100] it is mentioned that to determine whether Mercedes satisfied the fair use test four issues should be considered:

"(1) the purpose and character of the use, including whether such use is commercial or is for non-profit educational purposes;

(2) the nature of the copyrighted work;[101]

(3) the amount and substantiality of use;

(4) the effect of the use upon the potential market for or value of the copyrighted work".[102]

Under these conditions, it is inexcusable to reject copyright protection to authorise pure commercial exploitation of street artwork without any payment to artists. In the first part, *Jason Williams and others v. Roberto Cavalli SpA, H&M GBC AB v. Williams,* and *Villa v. Pearson Education* cases are mentioned.[103] In all these cases, there was an unauthorised commercial use of street art and the cases were settled after the alleged parties accepted to make payments to artists.

E. Bonadio considers that it is "unfair to allow persons other than the artist to rely on the illegal nature of a street artwork to copy and exploit it for their commercial purposes".[104] The paper tends towards this statement. Because otherwise, the monetisation of artists' creative activity would let financially strong parties (who are not seeking permission or remuneration for authors) take advantage of them.

Some argue that the "unclean hands" doctrine should not be applied to commercial misappropriation of graffiti since the illegal behaviour of artists does not hurt the individual or organisation which has misappropriated the illegally placed art.[105] By doing the same, another author goes further and states that the application of the unclean hands to unlawful commercial use of street art can have a bizarre effect on its legitimising co-option.[106]

Having arguments mentioned in the first part of this paper in rewind, I would conclude that the material interests of artists have to be satisfied to fairly use their artistic creativity. Without adequate remuneration for authors, allowing third parties to do commercial misappropriations cannot strike a fair balance. Peplow also agrees with this as she states copyright law should protect "authors' interest in realising the commercial value of their work by

[100] Mercedes Benz, U.S. v. Lewis, No. 19-10948 (E.D. Mich., 2019).
[101] The second criteria focuses on originality than the alleged infringement.
[102] *Supra* note 67, 274-275.
[103] Central California District Court, Jason Williams, and others v. Roberto Cavalli SpA case, CV 14-06659-AB (2016); East District of New York District Court, H&M GBC AB v. Williams case, 1:18-cv-01490 (2018); Northern District of Illinois District Court, Villa v. Pearson Education case, 03 C 3717 (2003).
[104] E. Bonadio and N. Lucchi, Non-Conventional Copyright: Do New and Atypical Works Deserve Protection?, 105 (2018).
[105] *Supra* note 4, 68.
[106] *Supra* note 31, 51.

prohibiting and providing an opportunity to recover for the commercial exploitation of the work".[107]

B. Moral rights of street and graffiti artists

Article 6bis of the Berne Convention entails moral rights for authors of artistic works.[108] This provision provides that "the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action about, the said work, which would be prejudicial to his honour or reputation".[109] So, the text contains both the right to paternity (or attribution) and integrity. Paternity right allows authors to claim authorship[110] and integrity right lets them prevent derogatory treatment of their works.[111] However, different pictures emerge when the matter is examined from the illegal street art perspective, especially concerning integrity rights. Also, the transposition of this provision into national laws is not unanimous. These issues will be separately examined in this section.

1. Right of attribution/paternity: Can street artists stay anonymous?

The right of attribution or paternity provides authors with a chance to be recognised as the authors of their works with regard to the use and reproduction of their works.[112] Speaking from the street art perspective, there might be some difficulties. It is a fact that most of the time street and graffiti artists do not use their names to mark their works. They usually use pseudonyms or tags.[113] Anonymity is an even bigger challenge than this.[114] To avoid legal consequences such as being prosecuted, sometimes artists place their works anonymously on the streets. Since moral rights are not harmonised at the EU level, the paper will now turn to different member states and other jurisdictions to see how paternity right is regulated.

According to Article L.113-6 of the French IPC, authors of pseudonyms and anonymous works should benefit from copyright protection.[115] This provision further stipulates that such authors must be represented by their editor or publisher concerning the exercise of their rights so that their identity is not revealed.[116]

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[107] *Supra* note 14, 901.
[108] *Supra* note 10, art. 6bis.
[109] *Ibid.*
[110] Joseph Zuber, *Do Artists Have Moral Rights*, 21 Journal of Arts Management and Law 284, 284 (1992).
[111] Susan P. Liemer, *Understanding Artists' Moral Rights: Primer*, 7 Boston University Public Interest Law Journal 41, 50 (1998).
[112] Zuber, *supra* note 110, 290.
[113] *Supra* note 29, 15.
[114] *Supra* note 1, 149.
[115] *Supra* note 40, art. L 113-6.
[116] *Ibid.*

It is also allowed for artists to remain anonymous and enjoy the full scope of copyright protection under German law.[117] The German Federal Court of Justice (hereinafter GFCJ) in *the Pictures on the Berlin Wall* decision has held that the street artist who drew the mural over the premises of the UN city could still rely on his moral rights even if he did not sign his work as it would usually be required.[118]

In the Netherlands, Article 25 (1) (a) and (b) of the Dutch Copyright Act gives authors the power to stay anonymous and disclose their works to the public with a name other than their own.[119] Thus, artists are not required to be identifiable to get paternity right. Under the Dutch law for artists: "using their real name, a pseudonym or initials, or creating artworks anonymously, does not raise issues: the paternity right is always available".[120]

Additionally, under the UK's Copyright, Designs, and Patents Act,[121] if it is impossible to identify an author's identity, the unknown authorship will be considered. Section 12 clearly states that such unknown work will still be protected under copyright.[122] This approach of the UK law is beneficial for artists who can choose to present themselves afterwards.

Henceforth, not using their names does not constitute a hindrance to getting paternity rights for artists. They can even choose to remain anonymous to avoid being prosecuted. Nevertheless, those risks will no longer exist after the expiration of the statute of limitation[123] (duration may differ from country to country).

To wrap up the discussions related to right to attribution, the artists are likely to be recognised as the authors of their works, even in the cases if they decide to stay anonymous. If this discussion is extended to the "personal touch" element of *Painer* case (as it is discussed in the first part of this paper), a pseudonym or initials can potentially help street artists to fulfill this requirement as they are likely to be able to leave their personal marks by using these means.

2. Street artists' right to integrity versus property owners' rights to property, balancing conflicting interests

As mentioned, the right to integrity will allow artists to oppose any derogatory treatment against their works. This treatment can include

[117] *Supra* note 4, 199.
[118] *Ibid.*
[119] *Supra* note 47, art. 25 (1) (a) and (b).
[120] *Supra* note 4, 231.
[121] Copyright, Designs and Patents Act, art. 9 (4) and 9 (5) (1988).
[122] *Id.*, section 12.
[123] A statute of limitation is a law that sets the maximum amount of time that parties involved in a dispute have to initiate legal proceedings from the date of an alleged offense, whether civil or criminal.

completely erasing murals (whitewashing),[124] and removing or selling[125] the wall over which street art is created. In the case of unsolicited graffiti, the interests of property owners who did not want to have those drawings on their walls in the first place and artists will collide, and there is going to be a need to balance those interests. This collision will involve the provisions of the laws governing the protection of private property and the moral rights of authors.[126]

In the doctrine, street art is referred to as site-specific works.[127] This derives from the fact that street artists choose specific locations to exhibit their works for the reasons of publicity and visibility. Therefore, some authors by referring to this nature of street art state that "any removal of the work from its site would significantly dilute the artistic meaning and importance of the work".[128] The other one considers that the place specifically chosen by artists turns out to be a part of the artistic concept and representation, "therefore, removing these works from their natural environment and bringing them into galleries or other closed venues would often be, as also stressed by Banksy, akin to locking wild animals in zoos".[129]

However, the right to integrity itself is not enough for artists to oppose the removal of their works from the surfaces on which they are painted due to the illicit nature of their works and the property law provisions. Since the right to integrity is not harmonised at the EU level, different jurisdictions will now be examined to see how this right is regulated and find possible remedies for balancing conflicting interests.

When the paper scrutinised civil law jurisdictions (for example, France and Germany), it was observed that they were more likely to grant protection for illegal graffiti. The presumption would be that these jurisdictions would ensure regimes with stronger protection for the moral rights of copyright owners. However, the approach of balancing conflicting interests is applied to the disputes between property owners and authors in those jurisdictions. Interestingly, this kind of balancing does not seem to favour moral rights against the private property rules.

To illustrate this in a better way, in the *Space Invader* case (mentioned in the first part), the court said that "the work in question could be detached from the wall without causing its destruction".[130] This illustrates that the balancing view has a limited application to illegal street art.

[124] Mary Daniel, *Not a VARA Big Deal: How Moral Rights, Property Rights, and Street Art Can Coexist*, 94 Southern California Law Review 927, 942 (2021).
[125] *Supra* note 14, 917.
[126] Tatiana Flessas & Linda Mulcahy, *Limiting Law: Art in the Street and Street in the Art*, 14 Law, Culture & Humanities 219, 222 (2018).
[127] *Supra* note 29, 16.
[128] Griffin M. Barnett, *Recognized Stature: Protecting Street Art as Cultural Property*, 12 The Chicago-Kent Journal of Intellectual Property 204, 213 (2013).
[129] *Supra* note 29, 16-17.
[130] *Supra* note 4, 62.

Moreover, paragraph 946 of the German Civil Code provides that "when a movable good is combined with a plot of land in such a way that it becomes an essential part of this plot of land, then the ownership of the plot of land extends to the movable good".[131] This abstract provision means that when it is impossible to remove moveable goods (in our case that would be a mural on it) from the building, the property owner has a right to destroy that work since his property rights extend over the painting. This is exactly what the court ruled in the *Pictures on the Berlin Wall* case: "self-evident that the owner of the property must also remain free to destroy a work of art that is thrust upon him against his will".[132]

According to the CDPA, the right to integrity is not able to prevent artwork (no matter if it is legally or illegally created) from being destroyed in the UK.[133] This is also held in *the Hyde Park Residence Ltd v. Yelland* that the right to integrity "should not be interpreted to interfere with a private property right without compensation".[134]

Protection from any derogatory treatment for graffiti seems likely to be ensured under the Visual Artists Rights Act (hereinafter VARA) of the USA. Paragraph 106 (A) 3 of VARA provides that the moral rights of authors of visual works allow them to prevent any intentional distortion, mutilation, or other modification of their works.[135] It is also enshrined in paragraph 113 (d) (2) that "the real property owner is required to show a good faith effort to notify of his intent to destroy the work; if the artist does not do the removal or pay for the removal within 90 days, the property owner may proceed for destroying the work". By referring to this some might argue that the protection of VARA from destruction can be extended to illegal graffiti to solve conflicts with the property owner. However, this view is not supported by the case law, because the illegality element allows the courts to reject applying these VARA provisions in favour of the moral rights of artists. In the case of *English v. BFC,*[136] it was held that measuring moral rights against the property owners in the case of illegal graffiti can potentially defy rationality and it is not what is intended by Congress in passing VARA.[137] Therefore, those provisions of VARA protecting the works from derogatory treatment could not be applied to illegally placed graffiti.[138] The same is held in *Pollara v. Symour* that the property owner has a right to remove or destroy the unsolicited work "incorporated in or made a part of a building in such a way that removing the work from the building will cause the destruction,

[131] *Id.*, 195.
[132] *Supra* note 4, 62.
[133] *Supra* note 29, 22.
[134] Hyde Park Residence Ltd v. Yelland, Ch. 143, 3 WLR 215 (2001).
[135] The Visual Artists Rights Act, 17, U.S.C. § 106A (a)(3)(A) (1990).
[136] English v. BFC & R East 11th Street LLC, WL 746444 (1997).
[137] *Id.*, 2.
[138] *Id.*, 4.

distortion, mutilation, or other modification of the work".[139] To this extent, one can bring about the Brooklyn Supreme Court´s recent ruling in favour of artists in the whitewashing of their works in the *5Pointz* case.[140] However, it was not against the property owner, it was against the company which destroyed the work.[141]

Now the paper continues with the discussions on how to balance the conflicting interests of artists and property owners.

As can be seen, the illegality element constitutes a significant hindrance to the right to the integrity of artists when it is weighted against the property right of owners. There are also some arguments in favour of property owners allowing them to exercise their rights on the property by removing unsolicited works.

"First sale" doctrine is also able to limit integrity rights. This doctrine entails that the rightful owner of a particular physical copy of a work may lawfully sell or otherwise transfer that copy.[142] Therefore, commentators agree that the artist retains the copyrights to the work. However, "if a piece is painted onto a building owned by another, the building owner is the rightful holder of that particular "copy" of the work".[143]

It should also be considered what the point of having all those laws for protecting private property is. Those are the basic rights of property owners to exclude any other parties from the use and possession of their property, including but not limited to reaping any potential benefits steaming from it. This is an obvious reason why vandalism and trespassing are criminalised under domestic laws. Therefore, it is not difficult to comprehend why some scholars consider "rights that may be associated with art affixed to the private property of another without the property owner's consent are secondary to the rights of the property owner to control the use of the property".[144]

Having fairness-related arguments mentioned in mind, this time it would not be fair to heavily measure integrity right against property rights. However, artists should still be able to prevent any other third parties from committing derogatory acts against their works. Moreover, available remedies should be applied while balancing conflicting interests. Artists, at least, should be given a chance to remove their works if possible in any given case. Alternatively, as others also propose,[145] if the owner wants to sell the property itself, artists can also be offered to purchase it, earlier than anyone. Last but not least, artists should also be given a chance to document their

[139] Brittany M. Elias and Bobby Ghajar, *Street Art: The Everlasting Divide between Graffiti Art and Intellectual Property Protection*, 7 Landslide 48, 50 (2015).
[140] *See* Castillo v. G&M Realty L.P., 950 F.3d 155 (2d Cir. 2020).
[141] *Supra* note 124.
[142] Barnett, *supra* note 128, 207.
[143] *Ibid.*
[144] *Supra* note 128, 208.
[145] Marta Madero, Tabula Picta: Painting and Writing in Medieval Law, 6 (2010).

works (through picturing)[146] before the possible whitewashing or destruction. In the worst-case scenario, where applying the other remedies is not possible, it is fair to grant artists a chance at least to document their works.

It is eventually logical to conclude that street artists' right to integrity will not be enough to oppose the derogatory treatment by the property owners. Case law and the legislation in the jurisdictions that were analysed, fairness point of view, the first sale doctrine, the basic logic and purpose of property law, and most importantly the illegality element in the placement of the street art are the grounds to conclude in this way. However, street artists' integrity right will still possibly protect their work from the derogatory treatment of other third parties.

Conclusion

To conclude, if street art can comply with the requirements and the existing legal tests (which is highly likely), it can easily get copyright protection. Assessing the originality will however be dependent on the factual background with regard to each specific street art (meaning that case-by-case approach). Interestingly, it would be impossible to say that no street art could meet the requirement of originality since there are a lot of examples of street art exhibited in galleries and museums. It is also discussed that street art is highly likely to fulfill fixation requirements as it is at least fixed in a tangible medium. Therefore, this paper did not see any hindrances for legally placed artworks failing to get copyright protection.

Turning to illegally placed street art, as it is heavily supported in the doctrine, the reference to the mere fact of being placed as unsolicitedly would hinder the street art from getting copyright protection. This view is also adopted in the examined civil law jurisdictions and there is still no final judgement in common law jurisdictions where the "unclean hands" doctrine hinders copyright protection for illegally placed street art at the time of writing. Copyright protection for illegally placed street art and graffiti is also supported by human rights and fairness-based arguments.

When it comes to economic rights-related issues, the paper went on to strongly oppose unauthorised commercial use of street and graffiti works by economically strong third parties, whose excuse is an illegality element of those works. Therefore, it is concluded that commercial exploitations cannot be done without quotations. It is considered that any commercial use should satisfy the "fair use" test meaning that the material interests of artists should be fulfilled. Concluding in this way also serves to achieve a balance between street artists and commercial stakeholders and support the arguments related to granting copyright protection for unsolicited street art since remuneration

[146] *Supra* note 14, 928.

will potentially ensure fairness, career path for street artists and their participation in cultural life.

Shedding light on potential moral rights that street artists can have, they are likely to be recognised as authors of their artistic creativity even when they decide not to reveal their identity. Staying anonymous did not seem as a ground to reject copyright protection as it is depicted in this paper. Thus, street artists are likely to be attributed as authors of their works even when they decide to hide their identity, and the use of pseudonyms or initials can better serve to get the right to paternity. However, their right to integrity would not be enough to oppose derogatory treatment regarding their works by the property owner. To this end, the paper tried to identify beneficial remedies for authors with the help of the balancing interest approach. Speaking of balancing the conflicting interests of artists and property owners, the paper further stated that available remedies should be applied even though the intervention by the property owners cannot be abolished. Artists should first be given a chance to remove their works if it is possible in the first place. When this is impossible, maybe applying other remedies mentioned can strike a balance, for example, documenting the work or priority in the property's purchase.

As the last remarks before the dead stop, this paper tried to discuss issues related to the copyrightability of street art from scratch. It tried to spill ink on the matters from copyrightability of legally placed street art to illegally placed ones together with possible economic and moral rights that artists can get. Nonetheless, whatever is being done here is more of a coin flipping even though presented arguments and other means support all findings. Because it will be up to the courts in relevant jurisdictions to do all those assessments and apply legal tests, most importantly weighing the "unclean hands" doctrine against the copyrightability of illegally placed street art. However, it will not be in line with the context of this paper to conclude it in a pessimistic way. On the contrary, the uprising role of street art within today's societies will hopefully support the growth of jurisprudence encouraging copyright protection for street art, maybe even illegally placed ones.

Nazrin Hasanova[*]

THE ELECTRONIC APOSTILLE IN WORLDWIDE CIRCULATION OF PUBLIC DOCUMENTS

Abstract

Already in the beginning of the 21st century, the electronic apostille emerged. It still confronts a number of challenges in its application. These problems of legal and technical character are the main reason for the states being reticent with it. The main question here is whether the adaptation of the Apostille Convention and establishment of uniform standards for applicability of the electronic apostille could ensure its smooth implementation in member states. To answer this question, the article provides an overview of the forms of verification of foreign public documents, namely legalisation and (e-) apostille. It then examines the regulation of verification of foreign public documents under German law, as well as touches on the problems that hinder the application of the e-APP in the member states. In the last part, the possibility of adaptation of the Apostille Convention to the actual situation and the establishment of uniform requirements for the application of electronic apostille are discussed.

Annotasiya

XXI əsrin əvvəllərindən etibarən elektron apostil müzakirə obyektinə çevrilmişdir. Onun tətbiqi ilə bağlı isə hələ də bir sıra çətinliklər mövcuddur. Dövlətlərin bu məsələdə ehtiyatlı davranmasının əsas səbəbi hüquqi və texniki xarakterli problemlərin mövcud olmasıdır. Burada əsas sual ondan ibarətdir ki, Apostil Konvensiyasının qəbulu və elektron apostilin tətbiqi üçün vahid standartların müəyyən edilməsi onun üzv dövlətlərdə rahat tətbiqini təmin edə bilərmi? Sualı cavablandırmaq üçün məqalədə xarici rəsmi sənədlərin təsdiq olunma formaları, yəni onların leqallaşdırılması və apostili haqqında məlumat verilir. Daha sonra isə Almaniya qanunvericiliyinə əsasən xarici rəsmi sənədlərin təsdiqlənməsinin tənzimlənməsi, eləcə də Konvensiyaya üzv dövlətlərdə "e-APP" layihəsinin tətbiqinə mane olan problemlər müzakirə olunur. Sonuncu hissədə isə Konvensiyanın cari vəziyyətə uyğunlaşdırılması və elektron apostildən istifadə üçün vahid tələblərin müəyyən edilməsi imkanlarına toxunulur.

CONTENTS

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Introduction

In an increasingly globalised world, international civil procedure is very important as more business and private relationships emerge. Questions about the digitalisation of processes have arisen in recent years, focusing on the procedure of electronic authentication of foreign documents in international civil procedure law.

The apostille, as a special form of authentication of foreign public documents, was replaced by legalisation in the middle of the 20th century. It was of great importance for facilitating the verification process for documents in international document circulation.

The electronic apostille arose in the twenty-first century and has seen a new surge in light of the COVID-19 pandemic. The Secretary General of the Hague Conference on Private International Law (hereinafter the HCCH) emphasised a greater need for electronic authentication and recognition of public documents during the pandemic.[1] The events recently organised by the Conference demonstrate the need for digitalisation while issuance of apostilles.[2]

The electronic apostille is relatively new and has not yet been the subject of in-depth research in German law. The article aims to answer the following question: Could adaptation of the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents ("Convention")[3] and establishment of uniform standards for applicability of the electronic apostille ensure its smooth implementation in member states? The first part of the article provides an overview of the forms of verification of foreign public documents, namely legalisation and (e-) apostille. The second part addresses the current legal regulation of the respective topic in Germany and related problems that hinder the application of the e-APP in member states. The final section discusses possible solutions to current challenges by adapting

[1] Hague Conference on Private International Law, Annual Report, 2 (2021). Available at: https://assets.hcch.net/docs/af309929-bc6c-4a38-ae7b-ddf5ec3ddb94.pdf (last visited Nov. 14, 2022).
[2] *See generally* Annual Report of the HCCH, Part III (2020).
[3] Hague Conference on Private International Law, Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (1961). Available at: https://assets.hcch.net/docs/b12ad529-5f75-411b-b523-8eebe86613c0.pdf (last visited Nov. 14, 2022).

Convention to contemporary demands and by ensuring uniformity of standards for electronic apostille. The work primarily relates to German legislation, while the experience of some member states in the use of electronic apostille is also considered.

I. Force of foreign public documents

Documents are evidence in court proceedings. Some are of the opinion that these have great reliability in proceedings.[4] The argument behind this view is the power of written text and a personal signature.[5] According to another view, documents do not play a major role in decision-making.[6] The reason is that the written or signed paper does not always correspond to the actual intention of the person. It means that the manipulation over intention cannot be excluded and that is the court to decide over the existence of such intention.[7]

Nevertheless, there is no argument that the aim of a document is to bring some advantage to a party in the proceedings. This could be mainly observed in the example of the civil status acts. However, not all the civil status acts as well as other types of documents have evidential value and in order to gain it, the documents must first be authentic. In this sense, the recognition of the authenticity of foreign documents could not be on the same level as domestic documents. The physical impossibility of reading and understanding every language in the national courts, and knowing the laws and competence of the issuing authorities is the reason for that.

A. Requirements for authenticity

According to § 437 (1) of the Code of Civil Procedure of the Federal Republic of Germany (Zivilprozessordnung) (hereinafter "ZPO")[8] the public legal documents issued in Germany by public authorities (for example, the Marriage Registry Office) or public persons or entities (for example, notaries) are presumed to be authentic.[9] This presumption covers only the issuer of the document, meaning that the specific document originates from the alleged issuer and does not cover the competence or content of the document, which falls under the regulation of different norms.[10]

Compared to domestic public documents, the authenticity of a document issued by foreign public authorities must be proven in accordance with § 438

[4] Michael Huber, Hans-Joachim Musielak, Wolfgang Voit, Zivilprozessordnung, § 415, para. 7 (19th ed. 2022); Christian Balzer and Bianca Walther, Beweisaufnahme und Beweiswürdigung im Zivilprozess, B. Die Beweismittel und ihre Erschließung im Einzelnen, para. 245 (4th ed. 2018).
[5] Huber, Musielak, Voit, *supra* note 4.
[6] Alexander Krafka, Volkert Vorwerk, Christian Wolf, BeckOK ZPO, § 415, para. 5 (40th ed. 2021).
[7] *Ibid.*
[8] Zivilprozessordnung, § 437 (1) (2005). Available at: https://www.gesetze-im-internet.de/englisch_zpo/index.html (last visited Nov. 14, 2022).
[9] *Supra* note 4, § 415, para. 8.
[10] *See supra* note 8, § 415 ZPO; *See also* Klaus Schreiber, Münchener Kommentar zur Zivilprozessordnung, § 437, para. 4 (6th ed. 2020).

(2) ZPO.[11] After the foreign public documents have gone through the recognition process, German law grants them authentication. This gives documents evidential value in German courts.

B. Types of authentication of foreign public documents

According to § 438 (2) ZPO, the legalisation of the foreign documents by a consul or envoy of the Federal Government is sufficient to prove their authenticity.[12] After the Convention came into force in Germany (1966), for its member states a simplified Apostille procedure replaced the legalisation procedure specified in § 438 (2) ZPO.[13] As a result, legalisation and apostille became independent procedures for the recognition of the authenticity of public documents issued abroad.[14] With the digitalisation of governmental services worldwide, the electronic apostille has been actively introduced as a type of apostille.[15] Therefore, it could not be considered an independent form.

1. Legalisation

Legalisation means the authentication of foreign public documents by the diplomatic or consular representation of the country in which the document will be presented.[16] According to § 13 of the Law on Consular Officers, their Functions and Powers, legalisation confirms the authenticity of the signature, the capacity in which the signatory of the document acted and, if applicable, the authenticity of the seal with which the document is provided.[17] Legalisation is a lengthy procedure. Before the document is legalised at the representation of the respective country, it has to go through the long processes of pre-authentication and sometimes final authentication.[18]

2. Apostille

The Convention concluded in 1961, pursued the goal to ease the provision of evidence in international document circulation.[19] With this in force, the apostille took the place of the lengthy legalisation procedure.

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[11] *Supra* note 8, § 438 (2).
[12] *Ibid*.
[13] Apostille Convention is not the only means to exempt foreign documents from legalisation. The exemption is sometimes achieved through numerous bilateral, consular or multilateral agreements. *See* Adolf Baumbach, Wolfgang Lauterbach, Peter Hartmann, Monika Anders, Burkhard Gehle, Zivilprozessordnung: mit GVG und anderen Nebengesetzen, § 438, para. 5–7 (79th ed. 2021).
[14] Harald Wilsch, Armin Hatje, Peter-Christian Müller-Graff, Europäisches Rechtsschutz- und Verfahrensrecht, § 26, para. 41 (2nd ed. 2021).
[15] Hague Conference on Private International Law, Implementation Chart of the e-APP. Available at: https://assets.hcch.net/docs/b697a1f1-13be-47a0-ab7e-96fcb750ed29.pdf (last visited Dec. 20, 2022).
[16] Julius Forschner & Philipp Kienzle, *Die e-Apostille – de lege lata und de lege ferenda*, 10 Deutsche Notar Zeitschrift 724, 724 (2020).
[17] Gesetz über die Konsularbeamten, ihre Aufgaben und Befugnisse (KonsG) (1974). Available at: https://www.gesetze-im-internet.de/konsg/BJNR023170974.html (last visited Nov. 14, 2022).
[18] Wilsch, Hatje, Müller-Graff, *supra* note 14, § 26, para. 15–20.
[19] Christian Hertel, Georg Meikel, Roland Böttcher, Grundbuchordnung Kommentar, Part G. para. 349 (12th ed. 2021).

Compared to other international conventions of global importance, it contains only 15 precise articles. To answer questions about the applicability of its clauses in practice, the HCCH has published the Handbook on the Practical Operation of the Apostille Convention.[20] Ten years after the second edition of the document named "the Practical Handbook on the Operation of the Apostille Convention" was published (hereinafter the "Handbook").[21] The Handbook covers information since the establishment of the Convention up to the new form of apostille within the Program, the e-APP, and provides contemporary advice on its implementation.[22]

a. Definition and applicability

Apostille takes the place of legalisation holding the same functions: confirmation of the authenticity of the signature, the capacity in which the person signing the document acted and, if applicable, the authenticity of the seal or stamp with which the document is provided.[23] Apostille, thus, as legalisation,[24] does not confirm the documents´ content.[25] However, in comparison to legalisation, it requires just a one-step procedure,[26] in which the documents are to be authenticated by the competent authorities of the state in which they were issued.[27]

The apostille can be affixed to the document itself or be attached to it as an additional sheet. In addition, it must correspond to the template form that is the part of Convention.[28] This template is mandatory for use, as it enables to check the apostille quickly and requires no knowledge of a foreign language.[29] According to Article 4 of the Convention,[30] the foreign authorities issuing the apostille may do it in their own official language, but the title must always be in French.[31]

It has to be mentioned that the Convention and the apostille procedure are limited in their application with regard to requirements of membership and types of documentation. To date, 124 countries have become members of the

[20] *See* Hague Conference on Private International Law, Apostille Handbook: A Handbook on the Practical Operation of the Apostille Convention (2013); *See also* Forschner, Kienzle, *supra* note 16, 725.
[21] Hague Conference on Private International Law, Apostille Handbook: Practical Handbook on the Operation of the Apostille Convention (2nd ed. 2023). Available at: https://assets.hcch.net/docs/a19ae90b-27bf-4596-b5ee-0140858abeaa.pdf (last visited Jan. 24, 2023).
[22] *Id*., 11.
[23] *Supra* note 3, art. 3, para. 1.
[24] Felix Fuchs, *Der internationale Urkundenverkehr 4.0: Die elektronische Apostille*, 40 Praxis des Internationalen Privat- und Verfahrensrechts 302, 302-303 (2020).
[25] Apostille Handbook: Practical Handbook on the Operation of the Apostille Convention, *supra* note 21, para. 22–23.
[26] Fuchs, *supra* note 24, 302.
[27] Forschner and Kienzle, *supra* note 16, 724–725.
[28] *Supra* note 3, art. 4.
[29] *Ibid.*
[30] *Ibid.*
[31] The apostille title must always include: "Apostille (Convention de La Haye du 5 octobre 1961)".

Convention.[32] In order to benefit from eased authentication procedure, the states have to obtain membership. It should also be mentioned that even in the case of membership there is an exception to consider – if one state is against the accession of another, the Convention does not come into force between these particular member states. Therefore they stay attached to the legalisation procedure.

Another limitation of the Convention is the requirement of its applicability over public documents defined in the Convention itself.[33] This is the general list and divides documents based on their issuer (courts, notaries etc.), which does not give the legal definition of a public document. This term has wide room for interpretation, so the question of whether a document is to be regarded as such must be answered by the country of origin and it is the law of the producer-country, which gives the legal definition[34] and attaches the public status to documents.[35]

b. Development and functioning of the electronic apostille

The spread of technology worldwide led the states to start offering numerous governmental (e-government) and notarial (e-notary) services online. As a result, electronic documents were established. Since they did not correspond to the usual (paper) form, a new international regulation was needed. The Meeting of the Special Commission (2003) was a great platform for discussion on technological innovations.[36] In the meeting the member states emphasised the positive influence of emerging technologies on the implementation of the Convention.[37] In 2006, the e-APP was already made available to the member states.[38]

The related term – electronic apostille was not mentioned in the Convention itself, but in publications on its practical application.[39] The publication from 2013 had first provided detailed information on the use and functioning of the electronic apostille. Its second edition provides more

[32] Hague Conference on Private International Law, Status Table of Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents. Available at: https://www.hcch.net/en/instruments/conventions/status-table/?cid=41 (last visited Dec. 20, 2022).
[33] *Supra* note 3, art. 1.
[34] *Supra* note 8, § 415 (1).
[35] *Supra* note 2120, para. 105-107.
[36] HCCH, *supra* note 20, para. 31.
[37] *Ibid.*
[38] The e-APP was first launched as a pilot program and only in 2012 its name was changed to "Electronic Apostille Program". *See supra* note 21, para. 314.
[39] *See* Hague Conference on Private International Law, The ABCs of Apostille, How to Ensure That Your Public Documents Will be Recognized Abroad (2010). Available at: https://assets.hcch.net/upload/abc12e.pdf (last visited Nov. 14, 2022); Hague Conference on Private International Law, How to Join and Implement the Hague Apostille Convention, A Brief Guide for Countries Interested in Joining the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (2011). Available at: https://assets.hcch.net/docs/0cfe4ad6-402d-4a06-b472-43302b31e7d5.pdf (last visited Nov. 14, 2022); *See supra* note 20.

structured information on questions about its implementation on contemporary level.

The e-APP consists of two components, also called elements.[40] These are the "Electronic Apostille" (e-Apostille) and the "Electronic Register" (e-Register). The e-Apostille contemplates an apostille in electronic form, which is produced with the help of software or hardware and transmitted via email or downloaded.[41]

The e-Register is an electronic register for apostille. The special feature of the e-Register is that the recipients of the certificate can access it to check the authenticity of the submitted documents online. Depending on the basis information, there were previously three categories of the e-register: those that provide the basic information such as number and date of the specific apostille (Category 1); those which, in addition to the basic information, provide information about the underlying document and apostille (Category 2) and those allowing the digital verification (Category 3).[42] The actual edition of the Handbook does not categorise e-Registers. With reference to Article 7 of the Convention, it obliges member states to define in the operated e-Registers the name, number and date of the apostille, the name and capacity of the person signing the public document.[43]

II. The problems de lege lata: legal regulation of the e-APP

In the early 2000s, the HCCH, in cooperation with some member states, developed the concept of the electronic apostille and the program e-APP.[44] The organs of the HCCH, namely the Special Commission[45] and the Permanent Bureau,[46] made a significant contribution to its development with their recommendations and publications.

Currently, 51 member states use e-APP to various extent (one or both elements of the e-APP) for the verification of public documents to be executed abroad. This means that only a third of the contracting parties can offer the electronic apostille and only half have implemented both elements of the e-APP in their national legislation.[47] Thus, despite its advantages, it could not be implemented in all member states of the Convention. In order to

[40] *Supra* note 21, para. 315; *See also supra* note 24, 304.
[41] *Id.*, para. 346.
[42] *Supra* note 16, 727; *See also supra* note 20, para. 354.
[43] *Supra* note 21, para. 341.
[44] *See* Hague Conference on Private International Law, The First International Forum on the e-Notarization and e-Apostilles. Available at: https://assets.hcch.net/upload/concl_forum.pdf (last visited Nov. 14, 2022); *See also supra* note 20, para. 324.
[45] For the role of the Special Commission *see supra* note 20, para. 38–39; *See also supra* note 21, para. 34-36.
[46] For the role of the Permanent Bureau *see supra* note 20, para. 33–37; *See also supra* note 21, para. 29-33.
[47] Implementation Chart of the e-APP, *supra* note 15.

understand the obstacles in front of electronic apostille, it is necessary to view the legal texts, where the electronic apostille originates, and observe their legal power.

A. Competence of the HCCH's organs

The Permanent Bureau is an organ of the HCCH that secures the progress of its work.[48] According to Article 6 of the Statute of the HCCH,[49] the Permanent Bureau is responsible for preparing and organising sessions and meetings of the Conference, the Council and the Special Commissions. It also acts as the secretariat for the sessions and meetings and carries out all the duties pertaining to the secretariat's activities. The Permanent Bureau conducts primary research for each Conference topic to be discussed. It also develops and maintains contacts with national authorities, experts and member state delegations.[50] Furthermore, it responds to requests made by users of the Conventions.[51] Besides this it deals with preparing guides and manuals, which it publishes afterwards.[52]

The aforementioned editions of the Handbook, that were published by the Permanent Bureau, as a manual, aim to explain the application of the Convention to its users by communicating practical information. The Special Commission presented its view with regards to electronic apostille in the first edition of the Handbook.[53] According to it, the electronic apostille and the program for the electronic apostille (e-APP), do not impede "neither the spirit nor the letter" of the Convention, since the "operation of the Convention" could be improved with the application of the new technologies.[54]

This opinion makes sense since our society is in constant development. It was of course at the time of the first negotiations on the implementation of the apostille difficult to imagine the future significant role of the computer and the digitalisation growing with it. Just because the authors of the Convention only thought of the paper form and did not mention the electronic apostille shall not mean the member states have to be hindered from its use.[55] The idea behind is that the law always follows a rapidly developing society in all areas

[48] Hague Conference on Private International Law, Statute of Hague Conference on Private International Law, art. 4, para. 2 (1955). Available at: https://assets.hcch.net/docs/d7d051ae-6dd1-4881-a3b5-f7dbcaad02ea.pdf (last visited Nov. 14, 2022).
[49] *Id*., art. 6.
[50] Dieter Martiny, *Hague Conference on Private International Law*, Max Planck Encyclopedias of International Law, para. 34 (2009).
[51] *Ibid*.
[52] Members of the Permanent Bureau, *The HCCH: A Global Player in a Shrinking World*, 3 International Law: Revista Colombiana de Derecho Internacional 483, 491 (2004).
[53] Hague Conference on Private International Law, Permanent Bureau, Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions, 3 (2003). Available at: https://assets.hcch.net/docs/0edbc4f7-675b-4b7b-8e1c-2c1998655a3e.pdf (last visited Nov. 14, 2022).
[54] S*upra* note 20.
[55] *Supra* note 21, para. 8, 313.

of our lives. Actions that were previously not even regulated by laws now fall under national, regional and international legal regulation (e.g. cybercrime, cryptocurrencies) and this process is endless. Therefore, it can be concluded that the electronic apostille does not present a model that is against the idea of functioning of the Convention. It does not violate its fundamental purpose, namely facilitating the international circulation of public documents.

B. No obligation to recognise the electronic apostille

To find application in contracting states, the Convention has to be ratified. This requirement is stipulated in Article 10 of the Convention.[56] Such a provision on ratification included into an international treaty renders it ineffective in the member state unless it has been ratified.[57] Ratification means confirmation of the international agreement through a domestic legal act.[58] In Germany, the ratification process follows the enactment of a respective law and is valid with the participation of the Federal President, Bundestag and Bundesrat of the Federal Republic of Germany.[59] Pursuant to § 59 (2) s. 1 of the Basic Law for the Federal Republic of Germany,[60] treaties that regulate political relations within the Federation or relate to subjects of federal legislation require the consent or the participation of the bodies responsible for federal legislation in the form of a federal law. Because of these requirements, the Convention was ratified by Germany on June 21, 1965[61] and has been in force since February 13, 1966.[62]

Compared to the Convention, the Handbook produced by the Permanent Bureau does not need to be ratified as it is only the product of the recommendation of the HCCH's meetings. It follows from this the Handbook cannot trigger the will of member states to be legally bound to the Convention and must be accepted by each contracting state as a mere practical guide to the states' activities within the Convention.

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[56] *Supra* note 3, art. 10.
[57] Hans Jarass, Bodo Pieroth, Grundgesetz für die Bundesrepublik Deutschland Kommentar, § 59, para. 4 (16th ed. 2018).
[58] Stefan Ulrich Pieper, Volker Epping, Christian Hillgruber, BeckOk Grundgesetz, § 59, para. 20 (46th ed. 2021).
[59] Jarass, Pieroth, s*upra* note 57.
[60] Basic Law for the Federal Republic of Germany, § 59 (2) s.1 (1949). Available at: https://www.gesetze-im-internet.de/englisch_gg/index.html (last visited Nov. 14, 2022).
[61] Gesetz zu dem Haager Übereinkommen vom 5. Oktober 1961 zur Befreiung ausländischer öffentlicher Urkunden von der Legalisation, BGBl. II, 875 (1965). Available at: https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F*%5B%40attr_id%3D%27bgbl265s0875.pdf%27%5D#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl265s0875.pdf%27%5D__1675680854068 (last visited Nov. 14, 2022).
[62] Bekanntmachung über das Inkrafttreten des Übereinkommens zur Befreiung ausländischer öffentlicher Urkunden von der Legalisation, BGBl. II, 106 (1966). Available at: https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F*%5B%40attr_id%3D%27bgbl266s0106.pdf%27%5D#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl266s0106.pdf%27%5D__1675680880285 (last visited Nov. 14, 2022).

The problematic side is not the Handbook itself, but its content. The inclusion of new terms into the Handbook, namely the e-APP and other related terms, is the source of confusion in the work of the Convention. Similarly, the e-APP program and the apostille system established differ significantly from the fundamentals of the Convention, as they only applies to paper-based public documents. The new terms and procedures are often incompatible with the states' current laws and regulations. The result is the states to refrain from application of electronic apostille. This leads to the problem in achievement of the Convention's main purpose – facilitating the process of authentication for all member states, as some member states improve, others still act under conservative approaches. It follows that not all users can benefit from the eased authentication process associated with digitalisation.

Germany has not yet implemented either of elements of e-APP. In Germany, only the paper apostille and paper certificate were recognised by the ratification law.[63] It is argued that the Handbook could go beyond the scope of the Convention.[64] As stated in a judgement by the German Constitutional Court: "Significant deviations from the treaty's provisions or changes affecting the identity of the treaty are therefore no longer covered by the original act of approval".[65] This means that even if some documents are issued in Germany electronically, for the purpose of electronic apostille the German legislator has to pass a new law.[66]

To conclude, because the e-APP has its own regulatory area, its application has been quite problematic to this day. The Handbook, as a collection of practical recommendations for the contracting states, does not establish any obligation to recognise and use the e-APP. Morever, even the participation in the e-APP does not create any binding effects on members.[67]

C. Obstacles created by electronic documents

More and more documents in many states are issued in electronic form.[68] They serve the purpose of "process efficiency"[69] and facilitate the process of evidence provision.[70] They can be easily ordered through e-government platforms, since instead of visiting an authority, one only shall visit the necessary website and order the document in electronic form. The competent authority then issues the document in a few hours or days. The states regulate

[63] *Supra* note 16, 728.
[64] *Id.*, 729.
[65] BVerfG, Leitsatz zum Urteil des Zweiten Senats vom 03. Juli 2007 - 2 BvE 2/07-, para. 44 (2007). Available at: https://www.bundesverfassungsgericht.de/e/es20070703_2bve000207.html/ (last visited Nov. 14, 2022).
[66] *Supra* note 57, § 59, para. 10.
[67] *Supra* note 21, para. 323.
[68] *Id.*, para. 170.
[69] Gehle, *supra* note 13, § 371a, para. 2.
[70] *Supra* note 4, § 371a, para. 1.

these activities by domestic laws and regulations. The same scheme applies to electronic apostille. The developers did not set uniform requirements or standards for its work and left the wide space to appliers. So the states should decide themselves, which includes establishing and financing all the technical side of electronic apostille and its standards. In the second edition of the Handbook the HCCH once more excludes any centralised technical support within implementation of the e-APP.[71] The problem of absence of uniformity acts as a restraint to implementation of electronic apostille in member states.

The member states that already use the e-APP (one or both of its elements) does not have uniform mechanisms to rely on and apply numerous methods for its functioning. As a result, serious difficulties with the recognition of electronic documents verified with electronic apostilles occur. Both the country of origin and the country of destination are affected by that. The views of the HCCH on electronic documents are just as controversial as the applicability of the Convention to the electronic Apostille.[72] According to the Handbook, electronic documents are within the scope of the Convention.[73] The same applies to the digitalised copy of a paper document. When a paper document is converted to a digital form, resulting in a digitalised copy, it falls within the scope of the Convention.[74]

1. Problems with verification of electronic signatures

The electronic documents are usually provided with an electronic (digital) signature. Many member states use it to sign an electronic document when issuing an e-Apostille. The states may use numerous electronic signatures. The electronic signature and the technical methods associated with it, is one of the problems on the way of implementation of the e-APP.

Not all states recognise electronic signatures as a substitute to handwritten. Another issue is the existing requirements for recognition as qualified electronic signatures. The national laws of each country set different security and qualification requirements for electronic signatures. This leads again to problems when checking the originality of issued electronic apostille. To check the authenticity of apostille signed with an electronic signature, the recipient scans the QR or barcode on the document. Then the recipient is directed to the respective webpage, namely a specific website dedicated to verifying the authenticity of documents. Nowadays, websites of this kind are not complicated to self-program.[75] The receiving state authorities cannot check the validity of electronic signatures of every state for falling under country's

[71] *Supra* note 21, para. 323, 324.
[72] *Supra* note 16, 728.
[73] Philipp Kienzle, *Nachweis der Echtheit ausländischer öffentlicher E-Dokumente im Zivilprozess*, 24 Neue Juristische Wochenschrift 1712, 1715 (2019); *See also supra* note 21, para. 154-156, 220.
[74] *Supra* note 21, para. 146.
[75] *Supra* note 16, 727.

internal security requirements.[76] Therefore, the electronic document produced in one country and signed with an electronic signature certified under national law (country of origin) may not be accepted in another member state (country of destination).

2. Differences in the application of the electronic apostille

Some Contracting Parties offer electronic apostille for electronic documents only.[77] Others issue electronic apostille for paper documents, too.[78] Some peculiarities are observed in states that provide the paper documents with an electronic apostille. It could be that the digital copy of paper documents that have already been issued is not in itself a public document. However, it could also be the case that a digital copy would only be treated as a public document if the competent authority digitalised it. Some contracting states, for example, accept a digital copy as a public document and place an electronic apostille on the copy after it has been certified by a notary.[79]

The process is more problematic in member states that do not offer electronic apostilles but already issue electronic documents. This is because the electronic documents issued there must first be converted into paper form in order to enable a paper apostille to be placed on them.[80]

3. Foreign public electronic documents in German law

The traffic of public electronic documents is regulated in § 371a (3) and § 371b ZPO.[81] According to the norms, public documents created by public authorities or public persons or entities and signed with a qualified electronic signature, are presumed to be authentic.

The § 371a and § 371b ZPO do not directly address the foreign public documents.[82] According to the prevailing opinion, the lawmaker had no intention to extend the applicability of this norm to foreign public electronic

[76] *Ibid*.
[77] *See* Hague Conference on Private International Law, Response of Austria to Questionnaire from January 2021 relating to the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, para. 28.5. Available at: https://assets.hcch.net/docs/c1d754e7-0fec-41a6-b203-f93c2a688c26.pdf (last visited Nov. 14, 2022); *See also supra* note 21, para. 154, 156.
[78] *Supra* note 16, 726; *See also supra* note 21, para. 217-219.
[79] *Supra* note 21, para. 146-148, 217.
[80] *Id*., para. 216; *See also* Response of United Kingdom to Questionnaire from January 2021 relating to the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, para. 28.2 (2021). Available at: https://assets.hcch.net/docs/64a34e62-be5a-4f2f-ad42-bc25f5cf62c8.pdf (last visited Nov. 14, 2022); Response of Italian Republic to Questionnaire from January 2021 relating to the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, para. 28.5 (2021). Available at: https://assets.hcch.net/docs/5fa9b07e-5315-4588-9a26-4a3d0116cce4.pdf (last visited Nov. 14, 2022).
[81] *Supra* note 8, § 371.
[82] *Ibid*.

documents.[83] Moreover, German law does not directly regulate the status of foreign public electronic documents with regard to possible proof of their authenticity.[84]

All the aforementioned shows the crucial importance of national laws in the implementation of electronic apostille. The law of the country of production defines what is implied by public document and whether the electronic documents are recognised as public documents, whether they are on the same level as paper documents and have evidential value in legal procedures. Furthermore, the Handbook leaves it up to the member states to determine the conditions under which the digital copy is recognised as a public document.[85]

In view of the discussed flexibility and possibilities that the Handbook has opened for the member states, it should be noted that the decisions of the receiving states on the requirements for the recognition of an apostille are nevertheless limited. First, the member states should not reject an apostille because it was created in electronic form.[86] For the reason that this statement does not derive from the Convention, but from the Handbook, there is an exception envisaged.[87] The recipient state is not prevented from rejecting the submitted electronic document if according to its law, any document is only to be submitted in paper form or the electronic signature is not regarded the same status as the handwritten in the legal sense.[88] In other words, refusing should be justified only in cases when electronic documents do not replace paper, as well as when the electronic signature does not replace the handwritten under the recipient´s national law.

In comparison, the Convention does not place any requirements on the issuing country. This means that each member, as the country of produce, has the right to determine "the borders of public documentation" independently, but as the recipient country each member is obliged to comply with the requirements of the Convention within the terms directly included into it.[89]

III. Options de lege ferenda: solutions for implementation of the e-APP

The development of the electronic apostille can be evaluated efficiently from the users' point of view. However, the majority of states delay it and some face numerous complications in its application. Therefore, several

[83] Kienzle, *supra* note 73, 1713–1714; Krafka, Vorwerk, Wolf, *supra* note 6, § 437, para. 8 and § 438 para. 1; Julian Sander, Stefan Görk, BeckOK Bundesnotarordnung mit Dienstordnung und Richtlinienempfehlungen der Bundesnotarkammer, § 20, para. 20 (4th ed. 2021).
[84] *Supra* note 16, 730.
[85] *Supra* note 2120, para. 217.
[86] *Id.*, para. 299.
[87] *Supra* note 16, 729.
[88] *Supra* note 21, para. 301; *Supra* note 16, 728–729.
[89] *Supra* note 16, 730.

options for the "integration" of the e-APP into the national laws of the member states should be proposed.

A. Adaptation of the Convention

The drafters of the Convention have prepared an effective treaty text, which for many years benefits the users. Nevertheless, the legal situation is a subject of constant social development and is dependent on social demands, which can be observed very clearly in the regular changes in the national legislation of the states. The national legislators adapt the applicable laws to the requirements of society or pass new laws. This process is common in some areas of law but rare in others. The legal text of international character belongs to the second category. This is not surprising, as international lawmakers, such as international organisations of various purposes, may face complications adapting old conventions to contemporary needs. They have to count on lengthy discussions since all contracting states have to agree on proposed changes and new additions. In the case of the Convention, 124 member states are involved. Compared to the 20th century, most of them have already established substantive and procedural legal standards that could be incompatible with the new form of apostille. In addition, it should be taken into account, that the international law cannot be observed separately from politics. The fast changing and complicated political situations have a direct influence on decisions and actions of states within international organisations.

Even considering all the mentioned peculiarities in adaptation of international treaties, the most reliable option to ensure the comprehensive implementation of the e-APP in all member states is to adapt the Convention. If the members could agree on its applicability, their next step would be to ratify the amended Convention.[90]

The HCCH takes steps forward and organises panels for discussion among member states. In March 2021 the meeting of the experts for the e-APP and new technologies took place.[91] The result of the meeting was the best practices for the use of the e-APP brought in by expert groups ("The e-APP: Key Principles and Good Practices").[92] As its name suggests, the document has no mandatory effect on members. It contains five categories of good practices: ensuring accessibility of e-Apostille for all; preserving the integrity of the e-Apostille and the underlying documents; facilitating verification of the e-Apostille by e-Registries; the availability of systems for acceptance of e-Apostilles and the regular updating of the e-APP practices. Each category is

[90] *Supra* note 16, 731.

[91] Hague Conference on Private International Law, Meeting of the Experts' Group on the e-APP and New Technologies (2021). Available at: https://www.hcch.net/de/news-archive/details/?varevent=797 (last visited Nov. 14, 2022).

[92] Hague Conference on Private International Law, Report from the Chair of the Experts' Group on the e-APP and New Technologies, The e-APP: Key Principles and Good Practices, 3 (2021). Available at: https://assets.hcch.net/docs/b94fadf7-ba82-42d9-bdbb-f8088b040273.pdf (last visited Nov. 14, 2022).

divided into several subcategories. Later the HCCH annexed this document into the new edition of the Handbook. Now the HCCH has collected all the useful information on the operation of the e-APP in one document. This allows the members to gain structured and easily accessible information on the implementation of the e-APP.[93]

In addition, questionnaires were sent to the states (including non-member states). The Special Commission then used given answers in preparation for the 12th International Forum on the e-APP.[94] The difference between this questionnaire and the previous ones was that it includes questions about the specifics of using the e-APP. In order for the Handbook to respond to relevant problems confronted by states, they were invited to participate in its processing by submitting respective questions. It should be emphasised that the answers of the member states, provided in the questionnaire, allow to deduce that although the e-APP has not been applied everywhere, its main concepts are clear to the majority of members.[95] Moreover, those members, that have made the e-APP available for use in their territory, were already been able to gain enough practical experience.[96]

B. Establishment of a uniform technical procedure

The Convention remains one of the most actively used international treaties to this day. It owes this success not only to its short and precise content (15 articles), but also to the apostille template that is mandatory for use by member states.[97] This template has helped the work of recipient member states in the way that they do not have any need to conduct their own research on the form of apostille issued in other states. In addition, the mandatory template facilitated the development of international circulation of public documents. The experience of successful application of mandatory template should be considered by the developers of the Convention in implementation of electronic apostille. In the Handbook, the HCCH finally takes relevant steps towards the problem's solution. The users of the e-Apostille component of the e-APP program must use the Model Apostille template every time when issuing electronic apostille.[98]

Moreover, the introduction of unified technical solutions can exempt developers of an electronic apostille and its users. According to the prevailing

[93] *Supra* note 21, 139.
[94] Responses to Questionnaire from January 2021 relating to the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents (2021). Available at: https://www.hcch.net/en/publications-and-studies/details4/?pid=6910&dtid=33 (last visited Nov. 14, 2022).
[95] Hague Conference on Private International Law, Summary of Responses to the Apostille Questionnaire (2021). Available at: https://assets.hcch.net/docs/562ae0df-8797-47e6-85e6-6055e7689639.pdf (last visited Nov. 14, 2022).
[96] *Supra* note 21, para. 326.
[97] *Supra* note 16, 725.
[98] *Supra* note 21, para. 330.

opinion, the absence of uniform requirements for the form of an electronic apostille is an obstacle to its application.[99]

As mentioned above, the e-APP does not create any obligation for the member states to use it. E-APP is regulated in the Handbook, which has a recommendation character. Nevertheless, some contracting parties accepted the e-APP and actively use it. This is where the dilemma lies. The developers of the e-APP did not want to oblige the member states. They tried to avoid imperative language in the texts and did it in just few places in the Handbook. Therefore, they left almost everything related to the execution of the electronic apostille to the contracting states. As a result, the contracting states, who provided the e-APP for the use, have unwanted problems related to absent uniformity. This applies above all to the form of the electronic apostille, the electronic signatures used to issue the electronic apostille and electronic registers. It would make sense if the developers of the e-APP would solve the problems that have arisen by introducing a uniform regulation. Such could be as follows: Member states are not obliged to use the e-APP. They may decide to use it in whole or in part. However, once they have decided to use it, they have to apply uniform technical standards set by its developers.

1. Uniform format of electronic apostille

Some experts have emphasised the desire to use the apostille template for digitally issued apostilles. They exemplified the recipients having verification difficulties due to incompatibility with already-known apostille templates. The experts brought to the attention that it would be better to verify the electronic documents with the electronic apostille and to combine the electronic apostille with the underlying public document. They mentioned the importance of preserving the initial digital signature of the original public document, as well as the digital signature and e-Apostille in electronic format when presenting the documents to the receiving authority.[100]

Some of the problems highlighted by experts should no longer be a challenge. As mentioned above the new edition of the Handbook obliges the states implementing the e-Apostille component to use the mandatory template that is the same for paper apostilles. Furthermore, the HCCH requires member states to attach the underlying public document to the electronic apostille.[101]

The application of binding uniform technical standards cannot solve all the problems with implementation, but they can speed the process and more clearly define its frames. The developers of the Convention can thus continue to introduce small technical changes with obligatory effects. The practice of already introduced standards will show whether the states are willing to

[99] *Supra* note 16, 731; *Supra* note 73, 1715; *Supra* note 24, 305.
[100] Report from the Chair on the Experts' Group on the e-APP and New Technologies, *supra* note 92.
[101] *Supra* note 21, para. 330.

follow them in the near future. However, applying such standards would not be that complicated and would require some minor technical changes from their side.

2. Uniform electronic signatures for creating the electronic apostilles

The problem with e-signatures is more complex because e-signatures are governed directly by states' national laws. The questionnaires completed by the states make it clear that several states produce the electronic documents, but not all use the e-Apostille and point to security concerns and/or limitations in national law.[102] Despite the complex character, the situation is not hopeless, as there are already positive experiences in this area. The European Union requirements for the validation of qualified electronic signatures set in Article 32 of the EU eIDAS Regulation[103] could build the framework for the development of a uniform international electronic signature for the issuance of electronic apostilles.[104] Such qualified electronic signatures allow the receiving authority to check the responsibilities of the issuing authority and its employees through the certificate contained.[105] The developers understand the existing difficulties and suggest to the member states to use the digital certificates of high standards that originate from the well-recognised certificate authority to increase the probability of e-apostille to be accepted.[106] However, the HCCH refuses to establish any digital certificate as it will remain its "technology neutrality" and not interfene with the "flexibility" of the member states.[107] The HCCH may establish an international digital certificate – the must for setting up electronic apostilles in member states – for the qualification of electronic signatures, which every member state could receive. As an analog to license, this model would secure

[102] *See also* Response of Singarope to Questionnaire from January 2021 relating to the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, para. 28–28.1 (2021). Available at: https://assets.hcch.net/docs/d6aef5ea-5c8e-4fe3-a472-64aa76c3c816.pdf (last visited Nov. 14, 2022); Response of Brazil to Questionnaire from January 2021 relating to the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, para. 28–28.1 (2021). Available at: https://assets.hcch.net/docs/f77a5a24-afae-4dc5-8974-62390899d63f.pdf (last visited Nov. 14, 2022); Response of Italian Republic to Questionnaire from January 2021 relating to the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, para. 28–28.1 (2021). Available at: https://assets.hcch.net/docs/5fa9b07e-5315-4588-9a26-4a3d0116cce4.pdf (last visited Nov. 14, 2022); Response of United Kingdom to Questionnaire from January 2021 relating to the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, para. 28–28.1 (2021). Available at: https://assets.hcch.net/docs/64a34e62-be5a-4f2f-ad42-bc25f5cf62c8.pdf (last visited Nov. 14, 2022).

[103] Regulation of the European Parliament and of the Council on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market and Repealing Directive, 1999/93/EC, art. 32 (2014).

[104] *Supra* note 16, 731.

[105] *Supra* note 4, § 371a, para. 16.

[106] *Supra* note 21, para. 333.

[107] The Hague Conference on Private International Law, Conclusions and Recommendations, No. 29 (2021); *See also supra* note 21, para. 325.

partial uniformity in application and reduce the workload of member states on both sides of the process.

3. Unified electronic register for verification of electronically designed apostilles

According to Article 7 of the Convention, every authority issuing an apostille is obliged to keep a register in paper or electronic form. The electronic register, which must be publicly accessible, represents one of the components of the e-APP. Compared to other elements of the e-APP, the member states are more positive about e-Register.[108] The question here is: does the state provide the same amount of information in e-Register as it does for paper apostilles? The limit of accessible information is crucial as it sets the boundaries for proper verification of electronic apostilles. The Handbook recommends to run the same register for both paper and electronic documents.[109] It also encourages members to provide the information or image of the apostille and underlying public document.[110] According to the wording of the Handbook, members must follow the minimum standards and disclose the information about: the number and the date of apostille, the name and the capacity of the person, who signed the public document.[111] The wording of the Handbook in this sense is confusing. On the one hand, the Handbook requires that either form of apostille be "attached or logically associated" with the underlying public document.[112] On the other hand, it invites the member states to prefer e-Registers that opens information (or an image) of the underlying public document and apostille.[113] The second wording would set the electronic apostille in a lower position compared to its paper form. As paper apostilles are usually attached to the document, it means that the receiving authority can check both the apostille and the underlying document.

Sometimes an electronic apostille has a QR code. When the recipient scans it, the respective website opens or it refers the recipient to another website by click. The security issue arises because without an extensive research the recipient cannot verify whether the website belongs to a member state of the Convention.[114] The Handbook suggests using additional text on the apostille that provides information on the URL of the respective e-Register of an issued country.[115] It also gives some recommendations on how to avoid fishing.[116]

[108] S*upra* note 15; The table shows that every member state using the e-APP applies an e-Register even if it does not completely respond to the requirements of the e-APP, but not all the contracting parties use the e-Apostille; *See also supra* note 21, para. 315, 322.
[109] *Supra* note 21, para. 273, 319, 339.
[110] *Id.*, para. 342.
[111] *Id.*, para. 341.
[112] *Id*., para. 246.
[113] *Id*., para. 342.
[114] *Supra* note 16, 727.
[115] *Supra* note 21, para. 326.
[116] *Supra* note 21, para. 241.

The introduction of a common internet platform,[117] where all issuing apostilles could be consulted, would solve the security issue of e-Registers. Such an internet platform, designed by a single authority – the HCCH, could include all the information about the electronic apostille and its underlying public document, making the verification process easier.

Conclusion

The use of the e-APP is complicated by numerous aspects. Above all, the Handbook does not oblige the members of the Convention to use the e-APP, as it is only a manual and has a recommendation character. However, the e-APP should be observed as a new tool serving the main purpose of the Convention – to facilitate the circulation of international public documents. Although it would require long negotiations, adapting the Convention to actual demands would be the only comprehensive solution to ensure the smooth implementation of the e-APP in all member states.

HCCH cannot oblige member states to use the e-APP until the Convention is adapted. In addition, the HCCH could set a requirement for the contracting states that are already using or want to use the e-APP, according to which the members would have to follow uniform standards when issuing electronic apostilles.

Furthermore, the establishment of an international digital certificate for the qualification of electronic signatures could solve security issues during verification. The introduction of a common e-Register would be ideal for the accessibility of information on apostille and underlying public document.

Thus, introducing uniform technical solutions to various technical issues could partially speed up full implementation.

[117] *Supra* note 16, 732.

Türkan Kərimova*

PATENT VƏ *SUİ GENERİS* SİSTEMLƏRİ ÇƏRÇİVƏSİNDƏ BİTKİ MÜXTƏLİFLİYİNİN HÜQUQİ MÜHAFİZƏSİ

Annotasiya

Bitki müxtəlifliyinin hüquqi mühafizəsi əqli mülkiyyət hüququnun predmetinə sonralar daxil olsa da, müasir dövrdə iqtisadiyyatı kənd təsərrüfatından asılı olan dövlətlərin xüsusilə diqqət yetirdiyi sahələrdən birinə çevrilmişdir. Bu xüsusda, dövlətlər bir tərəfdən bitki müxtəlifliyinin qorunub saxlanılması, digər tərəfdən isə yeni bitki növlərinin hüquqi mühafizəsinə dair tədbirlər görürlər. Müstəqillik əldə etdikdən sonra Azərbaycan Respublikası da bitki müxtəlifliyinin hüquqi mühafizəsinin müxtəlif aspektlərinə dair qanunlar qəbul etmiş, bir sıra beynəlxalq konvensiyalara üzv olmuşdur. Bu konvensiyalara "Yeni bitki sortlarının mühafizəsi haqqında" (UPOV), Birləşmiş Millətlər Təşkilatının "Bioloji müxtəliflik haqqında", eləcə də "Bitki mühafizəsi haqqında" Beynəlxalq Konvensiyalar aiddir. Bununla belə, sui generis tənzimləmə tələb edən bitki müxtəlifliyinin hüquqi mühafizəsi Azərbaycan əqli mülkiyyət hüquq ədəbiyyatında tədqiq edilməyən sahələrdən biri olaraq qalmaqdadır.

Məqalədə Azərbaycan Respublikasında bitki müxtəlifliyinin, xüsusilə, seleksiya nailiyyətlərinin əqli mülkiyyət hüquqları ilə mühafizəsi rejiminin effektiv olub-olmaması sualına cavab axtarılacaq, "Yeni bitki sortlarının mühafizəsi haqqında" Beynəlxalq Konvensiya - UPOV Konvensiyasının sui generis mühafizə modeli tədqiq ediləcəkdir. Həmçinin məqalədə effektiv sui generis sistemi təmin edən məcburi lisenziya, patent barədə məlumatların açıqlanması, üçüncü şəxslərin patentə etiraz etməsi hüququ da araşdırılır. Sonda isə UPOV Konvensiyasının üzvü olan dövlətlərin təcrübəsindən nümunələr verməklə bu sahə üzrə milli qanunvericilikdəki mövcud boşluqlara diqqət çəkilir və onların aradan qaldırılması üçün təkliflər verilir.

Abstract

Although the protection of plant variety was later incorporated in the subject of intellectual property rights, it has become one of the areas that countries whose economy depends on agriculture pay particular attention to in modern times. Thus, states take measures to preserve plant variety while ensuring the legal protection of new plant species. After gaining independence, the Republic of Azerbaijan also adopted laws on various aspects of the legal protection of plant variety, signed and has become a member of numerous international conventions: the International Convention on the Protection of New Plant Varieties (UPOV), the Convention on Biological Diversity of the United Nations, the Convention on Plant Protection. However, the legal protection of plant variety, which requires sui generis regulation, remains one of the unexplored fields in Azerbaijani intellectual property law literature.

In the article, the regime of protection of plant variety, especially selection accomplishments with intellectual property rights in the Republic of Azerbaijan, the sui generis protection model of the International Convention "On the Protection of New Plant Varieties" - UPOV Convention will be studied. The article also examines the compulsory license that provides an effective sui generis system, the disclosure of information about the

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patent, and the right of third parties to challenge the patent. In the end, by giving examples from the experience of UPOV member states, attention is drawn to the existing gaps in the national legislation in this field, and proposals are made to eliminate them.

MÜNDƏRİCAT

Giriş

Birləşmiş Millətlər Təşkilatının Ərzaq və Kənd Təsərrüfatı Təşkilatının 2022-ci il tarixli hesabatına görə qəbul etdiyimiz qidaların 80%-ə qədərini bitkiçilik məhsulları təşkil edir.[1] Bitkilərin davamlı inkişafın əsas indikatorlarından biri kimi qida zəncirində bu cür mühüm paya malik olması bitki müxtəlifliyinin hüquqi mühafizəsini gündəmə gətirir. Azərbaycan Respublikası da (bundan sonra AR) bitki resurslarının mühafizəsini təmin etmək üçün BMT-nin 2015-ci il tarixli davamlı inkişaf Proqramının hədəflərinə uyğun olaraq məqsədlər müəyyən etmişdir. Həmin məqsədlərdən biri də 2030-cu ilədək becərilən bitkilərin və yabanı növlərin genetik müxtəlifliyini qorumaq, beynəlxalq səviyyədə razılaşdırılmaqla genetik resursların, eləcə də bununla bağlı ənənəvi

[1] Food and Agricultural Organization publications catalogue, 114 (2022). Burada bax: https://www.fao.org/3/cb9264en/cb9264en.pdf (son baxış 14 may 2022).

biliklərin istifadəsindən yaranan faydanın ədalətli və bərabər şəkildə bölüşdürülməsini təmin etməkdir.[2]

Bitkilərin hüquqi mühafizəsi bir sıra hüquq münasibətlərinin: mülki, inzibati, eləcə də cinayət hüququnun obyektini təşkil edir. Belə ki, bitkilər mülki hüquqda alqı-satqı münasibətlərinin obyekti olduğu halda, inzibati və cinayət hüququnda qanunla mühafizə edilən obyektlər sırasına daxil edilmişdir. Bitkilərin əqli mülkiyyət hüququ ilə mühafizəsi isə sonralar əqli mülkiyyət hüququ çərçivəsində *sui generis* mühafizə modelinin yaranması sayəsində mümkün olmuşdur.[3] Belə ki, sənaye mülkiyyətinin mühafizəsinə dair 1883-cü il tarixli ilk beynəlxalq tənzimləyici vasitə olan Paris Konvensiyasında bitkiçilik məhsulları sənaye mülkiyyətinin bir növü olaraq təsbit edilmişdir. Ümumilikdə, Konvensiya ilə patentlər, faydalı modellər, sənaye nümunələri, əmtəə nişanları, xidmət nişanları, firma adları, mənşə yerinin adları və haqsız rəqabət sənaye mülkiyyətinin mühafizəsi obyektləri sırasına daxil edilmişdir.[4] Həmçinin Konvensiyada sənaye mülkiyyətinin ən geniş mənada nəinki sənaye və ticarətə, eləcə də kənd təsərrüfatı istehsalı, mədən sənayesi, sənaye, o cümlədən təbii mənşəli məhsullara: çaxır, *dən, tütün yarpağı, meyvələr*, heyvan, faydalı qazıntılar, mineral sular, pivə, *çiçəklər*, una da şamil edilməsi təsbit edilmişdir.[5] Bitki müxtəlifliyinin əqli mülkiyyət hüquqları ilə mühafizəsinə isə 1961-ci ildə "Yeni bitki sortlarının mühafizəsi haqqında" Konvensiyanın (bundan sonra UPOV Konvensiyası) qəbul edilməsilə başlanılmışdır. Bununla bərabər, Konvensiya ilə eyniadlı Birliyin – UPOV Birliyinin də əsası qoyulmuşdur.[6]

1994-cü ildə qəbul edilmiş Əqli Mülkiyyət Hüquqlarının Ticarətlə Əlaqəli Aspektlərinə dair Saziş (bundan sonra TRIPS Sazişi) isə üzv dövlətlərin üzərinə bitki müxtəlifliyinin hüquqi mühafizəsini təmin etmək vəzifəsi qoymuşdur. AR TRIPS Sazişinin üzvü olmasa da, Paris və UPOV

[2] Azərbaycan - 2030: Minilliyin İnkişaf Məqsədlərindən Dayanıqlı İnkişaf Məqsədlərinə Doğru, Azərbaycan Respublikasının "Dünyamızın transformasiyası: 2030-cu ilədək Dayanıqlı İnkişaf Gündəliyi"nin icrası ilə əlaqədar ilkin addımları haqqında Könüllü Hesabat, 48 (2017).

[3] Latın sözü olan *"sui generis*" özünəxas, xüsusi növ mənasını verib, hər hansı instituta, fəaliyyətə və ya münasibətə xüsusi yanaşma tələb edən, dar çərçivədə tənzimləməni həyata keçirən modeldir. Əqli mülkiyyət hüquqları çərçivəsində isə ənənəvi mühafizə formasından (məsələn, patent, müəlliflik hüququ, əmtəə nişanı hüququ və s.) fərqli xüsusi mühafizə forması başa düşülür. Moni Wekesa, What is Sui Generis System of Intellectual Property Protection?, 3 (2006). Burada bax: https://atpsnet.org/wp-content/uploads/2017/05/technopolicy_brief_series_13.pdf (son baxış 14 may 2022). Lyria Bennett Moses, Sui generis rules, 2 (2009). Burada bax: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1526023 (son baxış 14 may 2022).

[4] "Sənaye mülkiyyətinin mühafizəsi haqqında" Paris Konvensiyası, mad. 1.2 (1883).

[5] Yenə orada, mad. 2.3.

[6] UPOV fransız dilində "Union pour la Protection des Obtentions Végétales" ifadəsinin akronimindən yaranmışdır. World Intellectual Property Organization, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Elements of a Sui Generis System for the Protection of Traditional Knowledge, 8 (2002). Burada bax: https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_8.pdf (son baxış 23 may 2022).

Konvensiyasına qoşulmuş, bitki müxtəlifliyinin mühafizəsini təmin etmək üçün "Seleksiya nailiyyətləri" haqqında Qanunu qəbul etmişdir.

Məqalənin birinci bölməsində bitki müxtəlifliyinin əqli mülkiyyət hüquqları ilə mühafizəsinin ümumi məsələləri, ikinci bölməsində isə bitki müxtəlifliyinin *sui generis* modeli və effektiv sui generis sistemin xüsusiyyətləri, habelə onların AR qanunvericiliyindəki təzahürünə nəzər salınmışdır. Növbəti bölmədə patentin keyfiyyəti konsepsiyası araşdırılmış və sonuncu bölmədə isə Qanunda Konvensiyadan fərqli qaydaların nəzərdə tutulduğu hallarda tətbiq edilməli hüquq müzakirə edilmişdir.

I. Azərbaycan Respublikasının qanunvericiliyində bitkilər patentin obyekti kimi

AR qanunvericiliyində bitkilərin əqli mülkiyyət hüquqları ilə mühafizəsinin əhatəliliyini müəyyən etmək üçün ilk növbədə anlayışlar nəzərdən keçirilməlidir. Buna görə də məqalənin bu hissəsində əqli mülkiyyət hüququnun beynəlxalq mənbələri və AR qanunvericiliyində bitki, bitki müxtəlifliyi və seleksiya nailiyyətinin leqal anlayışı və anlayışların mühafizə rejiminə təsiri məsələsinə toxunulacaqdır. Bundan əlavə, genetik modifikasiya olunmuş (bundan sonra GMO) bitkilərin AR ərazisində patentləşdirilə bilmə imkanı da cari qanunvericilik normaları çərçivəsində araşdırılacaqdır.

A. Bitki, bitki müxtəlifliyi və seleksiya nailiyyətinin mühafizə rejiminin determinantı

Əqli mülkiyyət hüququna dair beynəlxalq, regional və milli qanunvericilik sistemində bitki, bitki müxtəlifliyinin və GMO bitkilərin hüquqi mühafizə rejimləri fərqli xarakter daşıyır. Buna görə də AR qanunvericiliyində sadalanan 3 qrup canlı orqanizmin mühafizə rejiminin müəyyən edilməsi üçün, ilk növbədə, onların anlayışına nəzər yetirmək lazımdır.

Belə ki, "bitki" termini AR-in də üzv olduğu "Bitki mühafizəsi haqqında" Beynəlxalq Konvensiyada "canlı bitkilər və toxum da daxil olmaqla bitki hissələri" olaraq formulə edilmişdir.[7] Bitki müxtəlifliyinə isə Paris Konvensiyası, "Bitkilərin mühafizəsi haqqında" Beynəlxalq Konvensiya, o cümlədən TRIPS Sazişində hüquqi anlayış verilməmişdir. Bununla belə, bitki müxtəlifliyi UPOV Konvensiyasının 1991-ci il tarixli versiyasında *"ən aşağı dərəcəli botaniki takson daxilində* ***qruplaşma****"* kimi adlandırılır. Əlavə olaraq, Konvensiya bitki müxtəlifliyinin xarakterik cəhətlərinə onun müəyyən bir genotip və ya genotiplərin birləşməsi nəticəsində yaranması, ortaq xüsusiyyətlərə malik digər hər hansı bitki qrupundan fərqlənməsi, habelə çoxaldılması zamanı sabitliyi qoruyub saxlamasını da aid edir.[8] Oxşar anlayış

[7] "Bitki mühafizəsi haqqında" Beynəlxalq Konvensiya, mad. 2.1 (1951).
[8] "Yeni bitki sortlarının mühafizəsi haqqında" Konvensiya mad. 1 (vi) (1991).

Avropa İttifaqının (bundan sonra Aİ) qəbul etdiyi "İcmanın bitki müxtəlifliyi hüquqları haqda" qaydalarda da təsbit edilmişdir.[9]

AR-də isə *seleksiya nailiyyətlərinin* mühafizəsinə dair qanun qəbul edilmiş, "*bitki müxtəlifliyi*" ifadəsinin əvəzinə "*seleksiya nailiyyətləri*" ifadəsindən istifadə edilmişdir.[10] "Seleksiya nailiyyətləri haqqında" Qanun seleksiya nailiyyətlərinə "seleksiya işi nəticəsində yaradılmış, cəmiyyət üçün faydalı bitki sortları, heyvan cinsləri, onların hibridləri, xəttləri, krossları və klonları, bitki materialı isə sortu yaymaq məqsədi daşıyan **bitki toxumları, soğanaqları, yumruları, çubuqları və digər hissələri"** olaraq anlayış vermişdir.[11] Əlavə olaraq, həmin Qanunda seleksiya nailiyyətlərinin ixtira hesab edildiyi də göstərilmişdir.[12]

Bununla belə, "Patent haqqında" AR Qanununda bitkilər və heyvanların ixtira obyekti ola bilməməsinə dair norma təsbit edilmişdir.[13] Avropa Patent Konvensiyası da eyni qaydanı nəzərdə tutur.[14] Belə ki, bitkilər ixtira hesab edilməsə də, əqli fəaliyyət nəticəsində yaradılan bitki və ya heyvan hüceyrələrinin kulturaları məhsul hesab edilərək onlara patent hüquqi mühafizəsinə imkan verir.[15] Beləliklə, bitki hüceyrələrinin kulturaları və seleksiya nailiyyətləri ixtira hesab edilsə də, onların mühafizə şərtləri fərqlidir. Birincilər ənənəvi ixtira üçün nəzərdə tutulmuş 3 şərtə (yeni, ixtira səviyyəli olan (bəlli olmayan) və sənayedə tətbiq edilə bilən (faydalı),[16] seleksiya nailiyyətləri isə bitki müxtəlifliyinin *sui generis* modelinin şərtlərinə (yenilik, oxşarlıq, fərqlilik, sabitlik)[17] cavab verdiyi halda patentləşdirilə bilər.

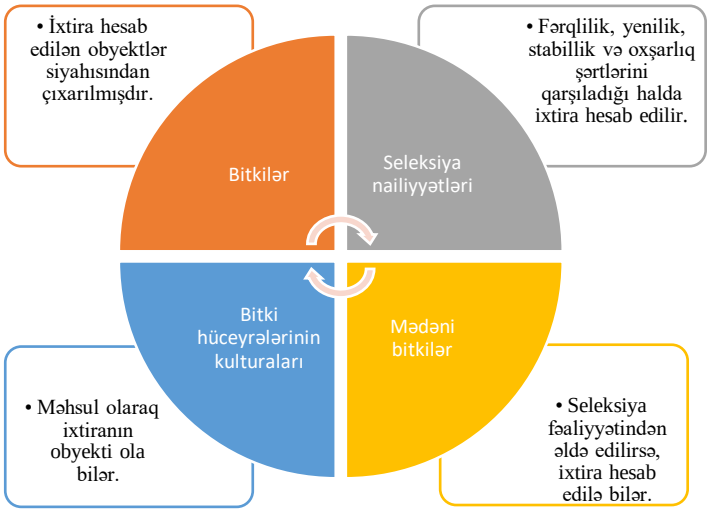
Yuxarıda qeyd edilənlərə əsasən, bitki müxtəlifliyi və bitki hüceyrələrinin kulturaları patentin obyekti kimi müəyyən edilsə də, bitkilər bu obyektlər sırasından çıxarılmışdır. Eyni qaydanın mədəni bitkilərə şamil edilib-edilməməsi isə sual doğurur. Belə ki, "Mədəni bitkilərin genetik ehtiyatlarının mühafizəsi və səmərəli istifadəsi haqqında" AR Qanununda mədəni bitkilərə *"insan tərəfindən ərzaq məhsulları, sənaye üçün xammal, yem, dərman, bəzək (dekorativ) məqsədi ilə becərilən bitki növləri, sort və formaları"* olaraq anlayış verilmişdir.[18] Mədəni bitkiləri bitkilərin bir növü olaraq qəbul etsək, "Patent

[9] Council Regulation (EC) on Community Plant Variety Rights, NO 2100/94, mad. 5.2 (1994).
[10] Vahid anlayışı bildirmək məqsədilə məqalədə "bitki müxtəlifliyi" ifadəsi "seleksiya nailiyyəti" ifadəsinin sinonimi kimi istifadə ediləcəkdir.
[11] "Seleksiya nailiyyətləri haqqında" Azərbaycan Respublikasının Qanunu, mad. 1 (1996).
[12] Yenə orada.
[13] "Patent haqqında" Azərbaycan Respublikasının Qanunu, mad. 7.8 (1997).
[14] Convention on the Grant of European Patents (European Patent Convention), mad. 53 (b) (1973).
[15] Yuxarıda istinad 13, mad. 1.
[16] Yenə orada, mad. 7.2.
[17] Yuxarıda istinad 11, mad. 3. Seleksiya nailiyyətləri seleksiya işi nəticəsində yaradılmış, cəmiyyət üçün faydalı bitki sortları, heyvan cinsləri, onların hibridləri, xəttləri, krossları və klonlarıdır. Bitki hüceyrələrinin kulturaları isə hüceyrənin bitkidən götürülərək əlverişli süni mühitdə böyüməsi nəticəsində alınan hüceyrələrdir. Cell Culture Basics Handbook, 2. Burada bax: https://www.vanderbilt.edu/viibre/CellCultureBasicsEU.pdf (son baxış 23 may 2022).
[18] "Mədəni bitkilərin genetik ehtiyatlarının mühafizəsi və səmərəli istifadəsi haqqında" Azərbaycan Respublikasının Qanunu, mad. 1.1.1 (2011).

haqqında" Qanuna görə onlar patentin obyekti ola bilməzlər. Bununla belə, anlayışda "bitki sortu"nun da ehtiva olunması seleksiya işi nəticəsində yaradılmış sortlara patentin verilməsinə əsas ola bilər. Buradan anlaşılır ki, mədəni bitkilərin seleksiya nailiyyəti nəticəsində yaradılmış sortu seleksiya nailiyyətləri üçün nəzərdə tutulmuş şərtlərə cavab verdiyi halda, ixtira hesab edilə və patent verilə bilər.

Beləliklə, AR ərazisində bitkilər ixtira hesab edilməsə də, bitki müxtəlifliyinin (seleksiya nailiyyətlərinin) və bitki hüceyrəsinin kulturalarının patent hüquqi mühafizə imkanı nəzərdə tutulmuşdur. Mədəni bitkilər isə seleksiya işi nəticəsində yaradılmış sort olduqda patentin obyekti ola bilər.

Əlavə 1 – AR-də bitki resurslarının əqli mülkiyyət hüquqları ilə mühafizəsi şərtləri



B. Genetik modifikasiya olunmuş bitkilər ixtira hesab edilirmi?

Bitki və bitki müxtəlifliyi ilə yanaşı, ayrı-ayrı dövlətlərdə GMO bitkilərin də patent hüquqi mühafizə imkanı mümkündür. ABŞ bu istiqamətdə qabaqcıl ölkələrdən biri hesab olunur.[19] Həmçinin Braziliya, Argentina, Kanada və Hindistanda da GMO bitkilərin mülki dövriyyəsinə icazə verilib.[20]

GMO orqanizmlər dedikdə *"müasir biotexnoloji və ya gen mühəndisliyi üsulları ilə yaradılan, ənənəvi seleksiyada alınması mümkün olmayan, genetik materialın yeni kombinasiyasına malik və bu kombinasiyanı irsən nəslə ötürmək qabiliyyətinə qadir olan canlı orqanizmlər (bitki, heyvan və mikroorqanizmlər)"* başa

[19] Elizabeth A. Rowe, *Patents, Genetically Modified Foods, and IP Overreaching*, 64 SMU Law Review 860, 866 (2011). Burada bax: https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1191&context=facultypub (son baxış 28 may 2022).
[20] Yenə orada.

düşülür.[21] Qanunvericilikdə GMO orqanizmlərə anlayış verilsə də, seleksiya işinin özündə hansı fəaliyyəti ehtiva etməsi təsbit edilməmişdir. İzahlı lüğətə əsasən, "seleksiyaçılıq" süni seçmə yolu ilə yeni bitki növlərinin yetişdirilməsi,[22] bitki növlərinin yaxşılaşdırılması,[23] həmçinin insan tərəfindən məqsədyönlü şəkildə həyata keçirilən təkamül prosesidir. Seçmə prosesinin məqsədi isə bitki və heyvanın əsas xüsusiyyətlərini qoruyub saxlamaqdan ibarətdir.[24] Qanunvericilik seleksiyaçılıq fəaliyyətinin nəticələrinə hüquqi təminat versə də, genetik modifikasiya ilə bağlı birmənalı mövqe yürütmək mümkün deyildir. UPOV Konvensiyasında da bitkilərin hansı metodlarla yetişdirildiyi halda hüquqi mühafizəsinin təmin edilməsinə dair müddəalar təsbit edilməyib: belə ki, bu metodlar genetik mühəndislikdən seleksiyaçılığa qədər müxtəlif metodları ehtiva edə bilər.[25] Bununla belə, "Mədəni bitkilərin genetik ehtiyatlarının mühafizəsi və səmərəli istifadəsi haqqında" AR Qanunu Respublika ərazisində **genetik modifikasiya olunmuş bitkilərin**, yaxud müasir biotexnoloji və gen mühəndisliyi metodları ilə **yaradılmış** kənd təsərrüfatı bitki materiallarının istehsalı, dövriyyəsi, rayonlaşdırılması, ölkəyə gətirilməsi və **dövlət reyestrinə daxil edilməsini qadağan edir.**[26] GMO bitkilərin, eləcə də müasir biotexnoloji və gen mühəndisliyi metodları ilə yaradılmış kənd təsərrüfatı bitki materialları elmi-tədqiqat, sınaq və sərgilərdə nümayiş etdirmək məqsədi ilə Azərbaycan Respublikasına idxalı isə müvafiq icra hakimiyyəti orqanının müəyyən etdiyi qaydada həyata keçirilə bilər.[27] Həmçinin "Toxumçuluq haqqında" AR Qanununa əsasən, GMO bitkilərin toxum istehsalında və dövriyyəsində istifadəsinə yol verilmir.[28]

Adıçəkilən qanunvericilik aktlarının normaları GMO bitkilərin mülki dövriyyəsinə, eləcə də reyestrə daxil edilməsinə dair qadağalar nəzərdə tutsa da, onların bilavasitə patent obyekti olub-olmaması ilə bağlı hər hansı bir tənzimləmə yoxdur. "Patentin alınması barədə iddia sənədinə aid Tələblər"də (bundan sonra Tələblər) ixtira obyektlərini xarakterizə edən əlamətlər sırasında transgen bitkiləri xarakterizə edən əlamətlər də göstərilmiş, genomda modifikasiyalı elementlərin mövcudluğu bu sırada yer

[21] "Qida təhlükəsizliyi haqqında" Azərbaycan Repsublikasının Qanunu, mad. 1.1.44 (2022).
[22] Azərbaycan Dilinin İzahlı Lüğəti, 56 (2006). Burada bax: https://ebooks.az/book_7yRJ3CIc.html (son baxış 28 may 2022).
[23] Yenə orada.
[24] Susan G. Sterrett, Darwin's Analogy Between Artificial and Natural Selection: How Does it Go?, 4 (2001). Burada bax: https://soar.wichita.edu/bitstream/handle/10057/7118/7118_DarwinsAnalogy.pdf?sequence=2&isAllowed=y (son baxış 24 iyun 2022).
[25] Introduction to the International Union for the Protection of New Varieties of Plants, 6 (2004). Burada bax: https://www.upov.int/export/sites/upov/publications/en/pdf/upov_data_bei_04_01.pdf (son baxış 24 iyun 2022).
[26] Yuxarıda istinad 18, mad. 21.1.
[27] Yenə orada, mad. 24.1.
[28] "Toxumçuluq haqqında" Azərbaycan Respublikasının Qanunu, mad. 26 (1997).

almışdır.[29] Tələblərdə adı keçən "transgen bitki" ifadəsinə anlayış verilməklə onların əsas xüsusiyyətlərinin qanunvericilikdə təsbit edilməli, "transgen bitkilər" ilə "genetik modifikasiya olunmuş bitkilər" arasındakı fərqlər göstərilməlidir.[30] Bu, Tələblərdə və "Mədəni bitkilərin genetik ehtiyatlarının mühafizəsi və səmərəli istifadəsi haqqında" AR-in Qanununda təsbit edilmiş normaların tətbiqi zamanı yarana biləcək sualları aradan qaldırmağa, eləcə də AR-in qanunvericilik sisteminin GMO bitkilərə dair patent siyasətini birmənalı müəyyən etməyə yardımçı ola bilər.

Ümumilikdə, dövlətlərin GMO bitkilərin patent ilə mühafizəsinə dair təcrübəsi iki istiqamətdə inkişaf etmişdir: birinci halda GMO bitkilərin ümumiyyətlə patentləşdirilə bilinməməsi, ikinci hal isə bitkilərin patent obyektləri siyahısında istisna edilməsi. Avropa İttifaqı Ədalət Məhkəməsinin mövqeyi Aİ üzvü olan dövlətlərdə GMO bitkilərin patentləşdirilə bilinməyəcəyi istiqamətindədir. ABŞ Ali Məhkəməsi isə patentin yeni, ixtira səviyyəsinə malik olan, faydalı, yetərli təsviri verilmiş və bioloji materialın depozitinin ictimaiyyətə çatımlılığı halında bitki müxtəlifliyinin patentləşdirilə biləcəyinə dair qərara gəlmişdir.[31] Təbii ki, bu qərarların qəbul edilmə səbəbi Aİ və ABŞ-də fərqli yanaşma sərgiləyən qanunvericilik bazasının olmasıdır.

AR qanunvericiliyində GMO bitkilərin patentin obyekti olub-olmamasına dair birbaşa tənzimləmənin olmaması hüquqi müəyyənlik prinsipinin pozulmasına səbəb olur. Nəzərə alsaq ki, bitkilər və heyvanların mahiyyət üzrə bioloji yetişdirilməsi üsulları ixtira sayılmasa da, qeyri-bioloji və mikrobioloji üsulları ixtira hesab edilir.[32] Qanunvericilikdə sonuncu üsulların anlayışı verilməsə də, nəzəri cəhətdən bioloji üsullar bitkilərin təbii çoxalmasını nəzərdə tutur, qeyri-bioloji üsullar isə genetik mühəndisliyin bir forması olaraq fərqləndirilir. Bu kontekstdə qeyri-bioloji *üsullar* ixtira hesab edilir, lakin həmin üsulla yaradılmış bitkilərin patentləşdirilə bilməyəcəyi

[29] "Patentin alınması barədə iddia sənədinə aid Tələblər"in təsdiq edilməsi haqqında Azərbaycan Respublikası Nazirlər Kabinetinin Qərarı, mad. 4.9.1 (2019).

[30] Məzmunca "transgen bitki" ilə "genetik modifikasiya olunmuş" bitki anlayışları eynidir. Transgen və ya Genetik modifikasiya olunmuş orqanizmlər (GMO) dedikdə müasir biotexnoloji üsullarla yaradılmış və genetik materialın yeni kombinasiyasına malik hər hansı bir canlı orqanizm (bitki, heyvan və ya mikroorqanizm) nəzərdə tutulur. Azərbaycan Respublikası Qida Təhlükəsizliyi Agentliyi, Genetik modifikasiya olunmuş orqanizmlər, 4. Burada bax: http://afsa.gov.az/uploads/info/warning/genetikmodifikasiyaolunmu__orqanizml__r_pdf1575621913.pdf (son baxış 24 iyun 2022). Transgen bitki sortları dedikdə isə ənənəvi bitki sortlarına digər canlı orqanizmlərdən təcrid edilmiş genin və ya genlərin köçürülməsi nəticəsində yaradılmış orqanizmlər başa düşülür. Rüştü Hatipoğlu, 25 *Transgenik Bitkilerin Dünü, Bugünü ve Geleceği*, Tarla Bitkileri Merkez Araştırma Enstitüsü Dergisi, 346, 346 (2016). Burada bax: https://dergipark.org.tr/tr/download/article-file/268120 (son baxış 24 iyun 2022).

[31] Report from the Commission to the European Parliament and the Council, Development, and implications of patent law in the field of biotechnology and genetic engineering, 12-13 (2002). Burada bax: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0545:FIN:EN:PDF (son baxış 26 iyun 2022).

[32] Yuxarıda istinad 13, mad. 7.8.

qənaətindəyik.[33] Hesab edirik ki, "Patent haqqında" Qanunda ixtira hesab edilməyən obyektlər siyahısında bitkilərin də yer alması GMO bitkilərə də eyni tənzimləmənin tətbiq edilməsi üçün əsasdır.[34]

Bununla belə, yuxarıda adıçəkilən tələblərdə transgen bitkilərin patentləşdirilən obyektlər sırasına daxil edilməsi GMO bitkilərin patent hüququ çərçivəsində yerini sual altında qoyur. Qanunvericilikdə yuxarıda qeyd edilən iki anlayış arasındakı fərqlərin müəyyən edilməsi və bununla bağlı birbaşa tənzimləmənin həyata keçirilməsi zəruridir.

II. UPOV Konvensiyası: bitki müxtəlifliyinin mühafizəsində *sui generis* model

Müasir dövrdə bitki müxtəlifliyinin əqli mülkiyyət hüquqları ilə mühafizəsində tətbiq edilən başlıca model *sui generis* modelidir. Məqalənin bu bölməsində bitki müxtəlifliyinin mühafizəsində genişmiqyaslı tətbiq edilən *sui generis* UPOV modeli barədə məlumat veriləcəkdir. Daha sonra ədəbiyyatda effektiv *sui generis* sistemini xarakterizə edən meyarlar araşdırılacaq, həmin meyarların AR qanunvericiliyindəki təzahürünə nəzər salınacaqdır.

A. UPOV Konvensiyası: əqli mülkiyyət hüquqlarının inkişafında yeni era

Minilliklər ərzində bitkiləri becərən, toxum ehtiyatlarının saxlanılmasına nəzarət edən, eləcə də bitki ehtiyatlarının müəyyən formada dəyişməsində əkinçi təbəqəsi aparıcı qüvvə olmuşdur. XVIII əsrdən başlayaraq isə xüsusi araşdırmaçı qruplar süni seçmənin köməyilə bitki resurslarının təbii formalarına müdaxilələr etməyə və onları dəyişdirməyə başladılar.[35] Bitki resurslarının müəyyən dəyişikliyə uğraması yeni bitki sortlarının yaradılması ilə nəticələndiyindən araşdırma qruplarının hüquqlarının qorunması müzakirə mövzusuna çevrilmişdir. Beləliklə, 1930-cu ildə ABŞ-də bitki müxtəlifliyinin əqli mülkiyyət hüquqları ilə mühafizəsinə dair ilk aktın qəbul edilməsilə[36] toxumla çoxaldılmayan bitkilərin hüquqi mühafizəsinə başlanılmışdır. Bununla belə, taxılçılıq sahəsində monopoliyanın qarşısının

[33] Aqrar Xidmətlər Agentliyinin seleksiya nailiyyətinə patentin verilməsinə dair ərizə formasında ərizəçinin üzərinə seleksiya nailiyyətinin GMO sortu və ya hibridi olmamasını təsdiqləmək öhdəliyi qoyulmuşdur. Bax: Azərbaycan Respublikasının Kənd Təsərrüfatı Nazirliyi yanında Aqrar Xidmətlər Agentliyi, Seleksiya Nailiyyətinə Patentin Verilməsinə dair Ərizə, Forma 301, 2. Burada bax: http://www.axa.gov.az/uploads/files/services/seleks-1662720534.pdf (son baxış 26 iyun 2022).

[34] Yuxarıda istinad 11, mad. 3.

[35] Yuxarıda istinad 24, 2.

[36] Burada 1930-cu il tarixli "Plant Variety Protection Act"-dan bəhs edilir. Burada bax: https://www.upov.int/export/sites/upov/members/en/npvlaws/usa/uspvpa.pdf (son baxış 26 iyun 2022).

alınması məqsədilə bəzi bitki növləri hüquqi mühafizədən kənarda saxlanılmışdır.[37]

Bitki müxtəlifliyinin əqli mülkiyyət hüquqları ilə detallı tənzimləməsi isə məhz 1961-ci il tarixli UPOV Konvensiya ilə əlaqədardır. Konvensiyaya 1972, 1978, 1991-ci illərdə dəyişikliklər edilmiş,[38] hər bir yeni versiya isə bitki müxtəlifliyinin mühafizəsinə dair fərqli şərtlər müəyyən etmişdir.

UPOV Konvensiyası bitki müxtəlifliyinin *sui generis* modelini formalaşdırmış və bununla da, üzv dövlətlərin ərazisində bitki müxtəlifliyinin mühafizəsinin *sui generis* modelinin tətbiq edilməsinə başlanılmışdır. Konvensiyanın əsaslandığı s*ui generis* sistem patentə oxşar mühafizə,[39] yəni bitki müxtəlifliyinin sahibinə müəyyən müddətdə əqli mülkiyyət hüquqlarına xas olan müstəsna hüquqlar tanımışdır.[40]

Ümumiyyətlə, UPOV Konvensiyanın bitki müxtəlifliyinin *sui generis* modeli kimi qəbul edilməsi ənənəvi patent sisteminin bitki müxtəlifliyinin mühafizəsində yetərsiz olması ilə əlaqəlidir. Daha doğrusu, bu sistemin cansız varlıqlar üçün nəzərdə tutulmuş şərtlərinin canlı orqanizmlərə olduğu kimi tətbiq edilə bilməməsi ilə bağlı olmuşdur. Bu uyğunsuzluqlar bitki müxtəlifliyinin ixtira səviyyəsinə malik olmaması, iddia sənədində onun yazılı təsvir edilə bilməməsi, təbiətin məhsulu olması və yenilik tələbini qarşılaya bilməməsində özünü ifadə edir.[41] UPOV Konvensiyanın qəbul edilməsi nəticəsində bitki müxtəlifliyinin hüquqi mühafizəsini təmin etmək üçün patent sistemindəki yazılı açıqlanma tələbi aradan qaldırılmışdır. Bu, bitki müxtəlifliyinin canlı orqanizm olaraq texniki xüsusiyyətlərindən irəli gəlmişdir. Eyni zamanda Konvensiya ilə hüquq pozuntusunu istisna edən halların dairəsi də genişləndirilmişdir.[42]

Müasir dövrdə bitkilər və bitki müxtəlifliyi ayrı-ayrı dövlətlərin seçdiyi əqli mülkiyyət siyasətinə uyğun olaraq *sui generis* model ilə yanaşı, patent sistemi ilə də mühafizə oluna bilər. Bitki müxtəlifliyinin patentlə hüquqi mühafizəsində *Diamond v. Chakrabarty* (1980) məhkəmə işinin gətirdiyi konsepsiya əhəmiyyətli rol oynamışdır. Məhkəmə işi geniş mənada cansız ixtiralar üçün nəzərdə tutulan şərtlərin canlı orqanizmlər, eləcə də bitki müxtəlifliyinin təbtiqinə şərait yaratmışdır. Bununla da patentin sadəcə

[37] Biswajit Dhar, Sui Generis Systems for Plant Variety Protection, 2 (2002). Burada bax: https://quno.org/sites/default/files/resources/Sui-Generis-Systems-for-Plant-Variety-Protection-English.pdf (son baxış 26 iyun 2022).
[38] UPOV məlumat bazası: https://upovlex.upov.int/en/convention (son baxış 18 mart 2023).
[39] Mustafa Tüysüz, Sinai mülkiyet hakları çerçevesinde yeni bitki çeşitleri üzerindeki islahçı hakkının korunması, 17 (2006). Burada bax: https://dspace.ankara.edu.tr/xmlui/bitstream/handle/20.500.12575/28164/2166.pdf?sequence=1&isAllowed=y (son baxış 3 sentyabr 2022).
[40] Towards a Balanced 'Sui Generis' Plant Variety Regime: Guidelines to Establish a National PVP Law and an Understanding of TRIPS-plus Aspects of Plant Rights, 7 (2008). Burada bax: https://www.undp.org/sites/g/files/zskgke326/files/publications/TowardaBalancedSuiGenerisPlantVarietyRegime.pdf (son baxış 3 sentyabr 2022).
[41] Yuxarıda istinad 39, 44.
[42] Yenə orada, 40.

cansız varlıqlara verilə bilməsi fikrindən imtina edilmiş və "*Günəş altında insan tərəfindən yaradılan hər bir şey*"in patentləşdirilə biləcəyi ideyası qəbul edilmişdir.[43]

TRIPS Sazişi isə bitki müxtəlifliyinin *sui generis* və patentlə mühafizə olmaqla, hər iki rejimin eyni anda tətbiqinin mümkünlüyünü nəzərdə tutur. Bununla belə, inkişaf etməkdə olan dövlətlər ya UPOV Konvensiyanın 1991-ci ildə dəyişiklik edilmiş sonuncu versiyasını imzalayır, ya da bitki müxtəlifliyinin hüquqi mühafizəsini patent sistemi vasitəsilə təmin edir.[44] Aİ-nin müvafiq Qərarında isə yanaşma TRIPS-dən fərqli xarakter daşıyır. Belə ki, İttifaq daxilində bitki müxtəlifliyinin predmeti olaraq mühafizə edilən sort həmin sort üçün hər hansı patentin predmeti olmamalıdır. Bu müddəaya zidd olaraq verilən hüquqlar etibarsız hesab edilir.[45]

Beləliklə, UPOV Konvensiyası bitki müxtəlifliyinin mühafizəsində *sui generis* model formalaşdıraraq dövlətlərə patentin alternativ modelini təklif edir. Üzv dövlətlər UPOV Konvensiyasına və Birliyinə üzv olmaqla Konvensiyanın ayrı-ayrı dövrlərdə baxılmış və düzəliş edilmiş versiyalarına qoşula bilər. Bununla yanaşı, TRIPS Sazişinə üzv olan dövlətlər isə bitki müxtəlifliyinin mühafizəsində kumulyativ rejimi – *sui generis* və patent modelini yanaşı tətbiq edə bilərlər.

B. Effektiv sui generis sistemi nələri ehtiva etməlidir?

AR qanunvericiliyinə əsasən, bitki müxtəlifliyi patent hüququnun obyektləri üçün müəyyən edilmiş ənənəvi 3 şərtə (yenilik, sənayedə tətbiq edilə bilənlik və ya faydalılıq, ixtira səviyyəsinə malik olma) deyil, məhz bitki müxtəlifliyi üçün nəzərdə tutulmuş şərtlərə cavab verdiyi halda əqli mülkiyyət hüquqları ilə mühafizə edilə bilər.[46] Bitkilərin əqli mülkiyyət hüquqları ilə mühafizəsinin özünəməxsus şərtləri isə UPOV Konvensiyasında təsbit edilmişdir. UPOV Konvensiyası bitki müxtəlifliyinin mühafizəsinin *sui generis* sistemini formalaşdırsa da,[47] onu yeganə *sui generis* sistem hesab etmək yanlış olardı. Belə ki, TRIPS-də üzv dövlətlərin bitki müxtəlifliyinin mühafizəsini patentlər, effektiv *sui generis* sistem və ya onların kombinasiyası ilə təmin etmək vəzifəsi müəyyən edilsə də,[48] burada *sui generis* sistem kimi birbaşa UPOV-a istinad edilmir. Bu da üzv dövlətlərə öz *sui generis* sistemini formalaşdırmaq imkanı verir.[49] Bununla belə, genişmiqyaslı qəbul və tətbiq edilən *sui generis* model UPOV sistemidir.

AR qanunvericiliyində bitki müxtəlifliyinin əqli mülkiyyət hüquqları aspektindən mühafizəsinin təmin edilməsi seçilmiş mühafizə modelinin

[43] Yenə orada, 46. Konsepsiyanın ingiliscə orijinal versiyası: "Anything Under the Sun Made by Humans".
[44] Yenə orada, 2.
[45] Yuxarıda istinad 9, mad. 92.1
[46] Yuxarıda istinad 14, mad.3.
[47] Yuxarıda istinad 6, 9.
[48] Agreement on Trade-Related Aspects of Intellectual Property Rights, mad. 27.3 (b) (1994).
[49] Yuxarıda istinad 6, 9.

növündən asılıdır. Doğrudur, AR TRIPS Sazişinin üzvü olmasa da, hesab edirik ki, TRIPS-in təklif etdiyi kumulyativ mühafizə modelini mənimsəmişdir. Belə ki, TRIPS-in kumulyativ modeli eyni zamanda patent və *sui generis* sistemin tətbiqini nəzərdə tutur. Kumulyativ metodun məzmununa gəlincə, bu, bitki müxtəlifliyinin eyni zamanda həm patent, həm də *sui generis* mühafizəsinin mümkünlüyünü, eləcə də hüquqların qeydiyyatında hər iki sistemin elementlərindən istifadəni nəzərdə tuta bilər. Birinci halda dövlət bitki sortunun müəllifinə mühafizə modelini (patent yoxsa *sui generis*) seçməkdə sərbəstlik verə bilər. Bu daha çox ABŞ təcrübəsində tətbiq edilən modeldir.[50] Hesab edirik ki, "Seleksiya nailiyyətləri haqqında" AR Qanunu seleksiya nailiyyətlərinin hüquqi mühafizəsi rejimi kimi hər iki sistemin elementlərini ehtiva edir. Seleksiya nailiyyətlərinin mühafizə şərtləri (fərqlilik, yenilik, stabillik, oxşarlıq) "Patent haqqında" AR Qanununda nəzərdə tutulmuş ixtiranın patent qabiliyyəti şərtlərindən fərqlənərək *sui generis modelini* formalaşdırır.[51] Patent sahibinin hüquqları, seleksiya nailiyyətinin qeydiyyatı, məlumatların dərc edilməsi, eləcə də seleksiya nailiyyətinin istifadəsinə dair müddəalar[52] isə "Patent haqqında" Qanunun müddəalarını təkrarlayır.

Bütövlükdə, bitki müxtəlifliyinin hüquqi mühafizəsi modelləri – *patent və sui generis* seçilərkən həmin modelin hüquq sahibi, cəmiyyət və dövlətə gətirəcəyi faydaya diqqət yetirilir. *Sui generis* sisteminin effektivliyi hüquq sahibinə yaradıcılıq səylərinə adekvat olan ödənişlərin verilməsi və hüquq pozuntusu baş verdikdə mühafizə tədbirlərinin görülməsi ilə ölçülür.[53] S*ui generis* sistemin məqsədi 3 qrup: sort müəllifləri, fermerlər və araşdırma qurumlarının hüquqlarının balansda saxlanılması, qida təhlükəsizliyinin, kənd təsərrüfatının inkişafı və ənənəvi biliklərin mühafizəsini təmin etməkdir. Bu sistem, həmçinin dövlətlərin insan hüquqlarına hörmət etmək, qorumaq və yerinə yetirmək kimi öhdəliyinin icra olunmasını da təşviq edir.[54] Nəticə etibarilə, effektiv *sui generis* sistemi sort müəllifləri ilə yanaşı, bitki müxtəlifliyinin mühafizəsi nəticəsində mənafeyinə toxunan subyektlərin də maraqlarını nəzərə almalıdır.[55]

[50] ABŞ-də bitki müxtəlifliyinin mühafizəsi ilə əlaqədar müxtəlif hüquqi aktlara əsaslanmaqla flektiv rejim müəyyən edilir. Belə ki, 1930-cu ildə qəbul edilmiş "Plant Patent Act" vasitəsilə yeni bitki növlərinin sahibləri faydalı patentə oxşar müstəsna hüquqlar əldə edir. 1970-ci ildə qəbul edilmiş "Plant Variety Protection Act" isə bitki müxtəlifliyinin sahibinə müstəsna hüquqları təsdiqləyən sertifikatların verilməsini nəzərdə tutur. ABŞ-də bitki müxtəlifliyinin hüquqi mühafizəsi haqqında bax: yuxarıda istinad 19, 864.

[51] Yuxarıda istinad 14, mad. 3

[52] Yenə orada, mad. 16, mad. 12-13 və 23-25.

[53] Yuxarıda istinad 37, 7.

[54] Carlos M. Correa, Plant Variety Protection in Developing Countries a Tool for Designing a Sui Generis Plant Variety Protection System: An Alternative UPOV 1991, 11 (2015). Burada bax: https://www.apbrebes.org/files/seeds/files/ToolEnglishcompleteDez15.pdf (son baxış 14 sentyabr 2022).

[55] Yenə orada, 17.

Sui generis sistemin xüsusiyyətlərini AR qanunvericiliyinə münasibətdə tətbiq etsək, effektiv *sui-generis* sisteminin qurulması zamanı 3 qrupun: fermerlər, araşdırma institutları və bitki sortlarını yaradan şəxslərin hüquqi maraqları nəzərə alınmalıdır. Bu balansın təmin edilməsi məqsədilə məcburi lisenziyanın verilməsi əsaslarına, həmçinin hüquq pozuntusunu istisna edən halların dairəsinə yenidən baxılmalıdır.

1. Məcburi lisenziya effektiv sui generis sistemin ünsürü kimi

Patent hüquq sahibinə uzun müddətli leqal monopoliya – müstəsna hüquqlar verir. Bu halda patent sahibinin hüquqları ilə cəmiyyətin maraqlarını balansda saxlamaq üçün məcburi lisenziya mexanizmindən istifadə edilir. Məcburi lisenziyanın verilməsilə dövlət patentin ictimai rifaha təsirlərini də balansda saxlayır: bununla sərt monopolist qaydalar çərçivəsində istifadəçi yönümlü istisnalar müəyyən edilir.[56]

Seleksiya nailiyyətləri də qanunvericiliklə nəzərdə tutulmuş şərtlərə cavab verdiyi hallarda ixtira hesab edilir. Bu səbəbdən patentə aid məcburi lisenziya mexanizmi seleksiya nailiyyətlərinə də şamil edilir. Belə ki, "Seleksiya nailiyyətləri haqqında" AR Qanununda məcburi lisenziyanın verilməsi əsasları təsbit edilmişdir. Bu əsaslara aşağıdakılar daxildir:[57]

1. Məcburi lisenziyanın verilməsi haqqında ərizə patent verilən tarixdən 3 (üç) il keçdikdən sonra daxil olduqda;
2. Patent sahibi həmin şəxsin seleksiya nailiyyətindən istifadə etməsinə icazə vermədikdə və yaxud əlverişli şərtlərlə belə hüquqlar verməyə hazır olmadıqda;
3. Məcburi lisenziya almaq istəyən şəxs maliyyə və digər münasibətlərdə patent sahibinin hüquqlarından bacarıqla və səmərəli istifadə etməyə qadir olduğunu sübut etdikdə səlahiyyətli orqan məcburi lisenziyanı verə bilər.

Qanunvericiliyə əsasən seleksiya nailiyyətindən istifadə etmək istəyən şəxs patent sahibinin razılığını əvvəlcədən almalıdır.[58] Bu cür razılıq olmadan patentdən istifadə patent sahibinin hüquqlarının pozuntusu ilə nəticələnir. Bununla belə, məcburi lisenziyanın yuxarıda qeyd edilən əsasları vasitəsilə patent sahibinin hüquqları müəyyən mənada (patentdən istifadə üçün icazə verilməsi halında) məhdudlaşdırılır və üçüncü şəxslərin patentləşdirilmiş obyektdən istifadə edilməsinə şərait yaradılır. Bununla belə, bu əsaslar mahiyyətcə patent sahibinin öz hüquqlarından istifadə etməməsi halında onun icazəsi olmadan səlahiyyətli qurum tərəfindən üçüncü şəxslərə patentdən istifadə etmək hüququnu verir. Nəticədə, patent sahibi ictimai maraqlar naminə patentdən istifadəni məhdudlaşdırmaq hüququndan

[56] Carliene Brenner, Intellectual Property Rights and Technology Transfer in Developing Country Agriculture: Rhetoric and Reality, 38 (1998). Burada bax: https://www.oecd.org/dev/1922525.pdf (son baxış 15 avqust 2022).
[57] Yuxarıda istinad 11, mad. 25.
[58] Yenə orada, mad. 16.

məhrum olur. Bununla yanaşı, məcburi lisenziyanı patent sahibinin hüquqlarını pozan mexanizm olaraq qiymətləndirmək yanlış olardı: Qanun məcburi lisenziyada patent sahibinin seleksiya nailiyyətinin patentindən irəli gələn bütün hüquqlarının, o cümlədən lisenziyanı başqa şəxslərə vermək hüququnun saxlanıldığını təsbit edir.[59] Həmçinin məcburi lisenziya verilərkən lisenziat (məcburi lisenziyaya əsasən seleksiya nailiyyətindən istifadə edəcək şəxs) səlahiyyətli orqanın müəyyənləşdirdiyi haqqı patent sahibinə ödəməyə borcludur.[60] Həmin şəxs məcburi lisenziyanın şərtlərini pozduqda lisenziya ləğv edilir.[61]

Ümumiyyətlə, UPOV üzvü olan dövlətlərin qanunvericiliyində məcburi lisenziyanın verilməsi əsasları oxşar olub, adıçəkilən mexanizmin məqsədinə xidmət edir. Nümunə olaraq ayrı-ayrı dövlətlərin bitki müxtəlifliyinə dair aktlarına nəzər salmaq olar. Türkiyə Respublikasının "Yeni bitki çeşitlerine ait ıslahçı haklarının korunmasına ilişkin" Qanununa əsasən, əgər bitki müxtəlifliyinin istifadə edilməməsi iqtisadi və texnoloji inkişafa mane olarsa, cəmiyyətin maraqları üstün götürülərək məcburi lisenziya verilir.[62] Almaniya Federativ Respublikasının qanunvericiliyində də oxşar tənzimləməyə rast gəlinir. Lisenziyanın verilmə əsaslarına *ictimai maraqların* haqq qazandırması, hüquq sahibinin istifadə hüququnu lisenziya tələb edən şəxslərə verməməsi və ya sortdan istifadə hüququnu yetərsiz verməsi daxildir. Sadalanan hallardan birinin baş verməsi Almaniya Patent Ofisi tərəfindən bitki sortundan istifadə hüquqlarının müxtəlif şəxslərə verilməsi üçün əsasdır.[63] Konvensiyaya üzv olan digər bir dövlət – Fransa qanunvericiliyinə görə biotexnoloji ixtiranın sahibi sort hüququnu pozmadan ixtiradan istifadə edə bilmədiyi halda məcburi lisenziyanın verilməsi üçün müraciət edə bilər. Bu zaman bitki sortunun mühüm iqtisadi maraq kəsb etməsinə və texniki tərəqqiyə yol açа bilən olmasına diqqət edilir. Ərizəçi sort sahibindən istismar üçün lisenziya ala bilmədiyini, eləcə də sortu səmərəli və ciddi şəkildə istismar etmək iqtidarında olduğunu göstərməlidir.[64] Əlavə olaraq, İsveçrə qanunvericiliyi də *ictimai maraqlar* tələb etdiyi halda şəxsin məcburi lisenziyanın verilməsi üçün məhkəməyə müraciət etmək hüququnu nəzərdə tutur. Bu zaman məcburi lisenziyanın verilməsi üçün müraciət etmiş şəxsin müraciəti sort sahibi tərəfindən kifayət qədər əsas olmadan rədd edilməlidir.

[59] Yenə orada, mad. 23.
[60] Yenə orada, mad. 25.
[61] Yenə orada.
[62] Yeni bitki çeşitlerine ait ıslahçı haklarının korunmasına ilişkin kanun, mad. 18 (2004). Burada bax: https://www.mevzuat.gov.tr/mevzuatmetin/1.5.5042.pdf (son baxış 14 iyul 2022).
[63] "Bitki sortlarının mühafizəsi haqqında" Qanun ("Sortenschutzgesetz"), § 12 (1) (2015). Burada bax: https://www.gesetze-im-internet.de/sortschg_1985/BJNR021700985.html (son baxış 15 avqust 2022).
[64] France Intellectual Property Code, mad. L623-22-1 (1992). Burada bax: https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/fr/fr467en.html (son baxış 24 avqust 2022).

Verilən lisenziya isə hüquqi təbiətinə görə qeyri-müstəsna (başqasına verilə bilməyən) xarakter daşıyır.[65]

UPOV Konvensiyasına üzv dövlətlərin təcrübəsinə əsasən məcburi lisenziyanın verilməsi zamanı nəzərə alınan amillərdən biri də ictimai maraq – "*public order"*dən yaranan ehtiyacdır. Bununla dövlətlər hüquq sahibləri və patentdən istifadə etmək istəyən şəxslərin mənafeləri arasındakı balansı, habelə cəmiyyətin patentə əlçatımlılığını təmin edir.

Müzakirə edilən məsələ ilə bağlı AR qanunvericiliyinə gəlincə, "Seleksiya nailiyyətləri haqqında" Qanunda ictimai maraqdan yaranan ehtiyaca görə məcburi lisenziyanın verilməsi əsası təsbit edilməmişdir. Buna baxmayaraq, "Antiinhisar fəaliyyəti haqqında" Qanuna əsasən, "patent sahibinin ondan istifadə etməməsi və bu patentə lisenziya verməkdən əsassız imtina etməsi" patent-lisenziya inhisarçılığının bir növü hesab olunur.[66] Hesab edirik ki, normadakı "patent" anlayışı AR-də bütün ixtiralar: canlı (seleksiya nailiyyətləri, mikroorqanizmlər) və cansız (qurğu) obyektlər üçün verilən patentləri ehtiva etdiyindən, bu norma seleksiya nailiyyətlərinə də eyni əsasla məcburi lisenziyanın verilməsinə səbəb ola bilər.

Bununla belə, "Seleksiya nailiyyətləri haqqında" Qanunda müvafiq əsasın olmaması Qanunun Konvensiyaya uyğunluğunun yoxlanılması zamanı aşkar edilən çatışmazlıqlardan biri olmuşdur. Qanunun təhlilinə dair sənəddə məcburi lisenziyanın verilmə əsasları sırasında ictimai marağın olmaması qeyd edilsə də,[67] Qanuna müvafiq düzəlişlər edilməmişdir. Bu kontekstdə "Seleksiya nailiyyətləri haqqında" Qanuna məcburi lisenziyanın verilməsinin hüquqi əsaslarına seleksiya nailiyyətinə dair patent aldıqdan sonra müstəsna hüquq sahibinin seleksiya nailiyyətindən istifadə etməməsi və ictimai mənafelər haqq qazandırdığı halların (məsələn, lisenziyanın verilməməsi texniki tərəqqiyə mane olarsa) da əlavə edilməsini məqsədəuyğun hesab edirik.

C. Hüquq pozuntusunu istisna edən hallar: "Fermerlərin imtiyazları" konsepsiyası

Dövlətlər UPOV Birliyi tərəfindən qəbul edilmiş təlimatın qaydalarına uyğun olaraq UPOV-a qoşula bilərlər. Təlimat Konvensiyanın 1991-ci il tarixli versiyasına qoşulmaq istəyən dövlətlərə və hökumətlərarası təşkilatlara qanun layihəsi hazırlamaqda yardım göstərmək üçün nəzərdə tutulub. Belə ki, dövlət ilk növbədə daxili qanunvericiliyini UPOV-a uyğun formulə

[65] Switzerland Federal Law on the Protection of Plant Varieties, mad. 22 (1975). Burada bax: https://www.upov.int/export/sites/upov/members/en/npvlaws/switzerland/ch_232_16_2008.pdf (son baxış 25 avqust 2022).

[66] "Antiinhisar fəaliyyəti haqqında" Azərbaycan Respublikasının Qanunu, mad. 12.1 (1993).

[67] Examination of the Conformity of the Law of Azerbaijan with the 1991 Act of the UPOV Convention, 4 (2000). Burada bax: https://www.upov.int/edocs/mdocs/upov/en/c/34/c_34_12.pdf (son baxış 1 sentyabr 2022).

etməlidir.[68] Azərbaycan Respublikası UPOV-a üzv olmaq üçün müraciət etdiyi zaman "Seleksiya nailiyyətləri haqqında" Qanunun Konvensiyaya uyğunluğu araşdırılmış, Qanuna bir sıra əlavə və dəyişikliklərin edilməsinin zəruri olduğu vurğulanmışdır: məsələn, seleksiya nailiyyətinə verilən anlayışın qısa olması, anlayışın genişləndirilməsinin zəruriliyi,69 həmçinin "cəmiyyət üçün faydalı" kriteriyasının əlavə şərt olması və bu şərtin Qanundan çıxarılması tövsiyə edilmişdir. Tövsiyələrin içərisində effektiv *sui generis* sistemin ünsürlərindən biri olan fermerlərin hüquqlarına dair müddəaların olmaması da əksini tapmışdır.[70]

"Fermerlərin imtiyazları" konsepsiyası fermerlərə öz şəxsi təsərrüfatlarında (əkin sahələrində) qorunan çeşidi becərmə yolu ilə əldə etdikləri halda ondan istifadə etmək hüququ verir.[71] Bu o deməkdir ki, hər hansı fermer müstəsna hüququn obyekti olan bitki sortunu özü əldə edərsə və onu becərərsə, bu bitki sortu sahibinin hüquqlarının pozuntusu hesab edilməyəcəkdir. Konsepsiyanın UPOV-da təsbiti fermerlərin tarixən əkinçilikdə üstün mövqeyi, bitki müxtəlifliyinin qorunması və növbəti əkin illəri üçün saxlanılmasını təmin etməkdən ibarət olmuşdur. Belə ki, qidaya olan tələbatın ödənilməsini təmin etmək məqsədilə əkinçilər tarix boyunca bitkilərə müəyyən müdaxilələr etmiş və bitki ehtiyatlarını öz ehtiyaclarına uyğunlaşdırmışdırlar. Fermerlər tərəfindən həyata keçirilən seleksiya fəaliyyəti isə daha çox müşahidəyə və əkinçilik təcrübəsinə əsaslansa da, nəticədə yeni bitki növlərinin meydana gəlməsi qaçınılmaz olmuşdur. Fermerlərin bu təcrübəsi bitki növlərinin yaradılması ilə yanaşı, toxum ehtiyatlarının rezervi, istifadəsi və mübadiləsinə də təsir etdiyindən,[72] ənənəvi bitki müxtəlifliyinin mühafizəsi fermerlərin imtiyazları və araşdırma istisnasını müəyyən etmişdir.[73] Həmçinin Avropada bu, *"kənd təsərrüfatı məqsədli istisna*", "*fermerlərin imtiyazları"* və ya *"toxum saxlama konsepsiyası"* adlanaraq bitki müxtəlifliyinin sisteminin sütununu təşkil edən, aqrar sektorda yeni növlərin inkişafını sürətləndirən mexanizm olaraq qiymətləndirilir.[74]

[68] Guidance for the Preparation of Laws Based on the 1991 Act of the UPOV Convention, 6 (2021). Burada bax: https://www.upov.int/edocs/infdocs/en/upov_inf_6.pdf (son baxış 1 sentyabr 2022).
[69] Yuxarıda istinad 67, 2.
[70] Yenə orada, 4.
[71] Yuxarıda istinad 8, mad.15 (2). Fermerlərin imtiyazı UPOV Konvensiyasının 1991-ci ildə yenidən baxılmış versiyasında sort sahiblərinin hüquqlarından istisnalar sırasında nəzərdə tutulmuş, Konvensiyanın 1961, 1972, 1978-ci illərdə qəbul edilmiş versiyalarında isə bu konsepsiyaya yer verilməmişdir.
[72] Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, The UPOV Convention, Farmers' Rights and Human Rights: An integrated assessment of potentially conflicting legal frameworks, 17-19 (2015). Burada bax: https://wocatpedia.net/images/c/cd/Giz2015-en-upov-convention.pdf (son baxış 26 dekabr 2022).
[73] Antonella Di Fonzo, Vanessa Nardone, Negin Fathinejad and Carlo Russo, *The Impact of Plant Variety Protection Regulations on the Governance of Agri-Food Value Chains*, 8 Social Science 1, 11 (2019). Burada bax: https://doi.org/10.3390/socsci8030091 (son baxış 26 dekabr 2022).
[74] European Union Intellectual Property Office, Impact of the Community Plant Variety Rights System on the EU Economy and the Environment, 20 (2022). Burada bax:

Konsepsiya UPOV üzvü olan dövlətlərin qanunvericilik aktlarında da təsbit edilmişdir. Nümunə kimi Sinqapur və Türkiyə qanunvericiliyini göstərmək olar. Sinqapur qanunvericiliyində hüquq pozuntusunu istisna edən hallar sırasına şəxsi, qeyri-kommersiya, eksperimental və araşdırma məqsədli istifadə ilə yanaşı, fermerlərin öz şəxsi təsərrüfatlarında mühafizə edilən bitki müxtəlifliyindən istifadəsi də daxil edilmişdir.[75] Türkiyə Respublikasında isə hüquq pozuntusunu istisna edən halların dairəsi daha geniş müəyyən edilmişdir: yeni sortların yaradılmasını təşviq etmək məqsədilə mühafizə edilən sortdan istifadə edə bilmək imkanı təsbit edilmişdir. Fermerlər üçün də istisna qayda müəyyən edilmişdir: əgər fermerlər öz şəxsi təsərrüfatlarında qorunan bitkinin çoxalma materialını (toxumunu) becərmə yolu ilə əldə edərlərsə, bitki müxtəlifliyindən sərbəst istifadə edə bilərlər.[76]

AR qanunvericiliyinin UPOV-a uyğunlaşdırılması tövsiyələri sırasında fermerlər üçün istisnanın olmaması qeyd edilmiş olsa da, bununla bağlı qanunvericiliyə hər hansı əlavə və ya dəyişikliklər edilməmişdir. Həmçinin bu Konsepsiyanın qanunvericilikdə təsbit edilməsinə dair öhdəlik "Bitki sortlarının hüquqi mühafizəsi haqqında" Sazişdə də nəzərdə tutulmuşdur. Belə ki, Sazişdə tərəflərin yeni bitki sortlarının mühafizəsi üzrə 1961-ci ildə qəbul edilmiş və 1972, 1978 və 1991-ci illərdə yenidən baxılmış Beynəlxalq Konvensiyanın (burada UPOV Konvensiyasına işarə edilib) tələblərini nəzərə alaraq bitki sortlarının hüquqi mühafizəsi sahəsində milli qanunvericiliklərinin hazırlanması və təkmilləşdirilməsi üzrə lazımi tədbirlər görməsi təsbit edilmişdir.[77]

Hüquq pozuntusunu istisna edən hallar dairəsinə fermerlərin imtiyazları ilə yanaşı sortun yeni bitki sortlarının yaradılması üçün qorunan bitki müxtəlifliyindən istifadə də aiddir. Bu istisna həm UPOV Konvensiyası[78], həm də "Bitki sortlarının hüquqi mühafizəsi haqqında" Sazişdə nəzərdə tutulmuşdur. Saziş mühafizə olunan bitki sortundan sınaq, yeni sortların yaradılması və şəxsi qeyri-kommersiya məqsədilə hüququ olan şəxsin (hüquq sahibinin) razılığı olmadan istifadə edilmə imkanını təsbit edir.[79]

Beləliklə, "Seleksiya nailiyyətləri haqqında" Qanunda hüquq pozuntusunu istisna edən hallar sırasında fermer-əkinçilərin imtiyazlarına dair hüquqi tənzimləmə əksini tapmamışdır. Buna görə də qanunvericiliyin Konvensiyaya uyğunlaşdırılması tövsiyəsini nəzərə alaraq Qanunda hüquq

https://cpvo.europa.eu/sites/default/files/documents/cpvr_study_full_report_0.pdf (son baxış 26 may 2022).

[75] The Republic of Singapore Plant Varieties Protection Act, mad. 31 (1) (a) (b) (c), mad. 31 (2) (2004). Burada bax: https://sso.agc.gov.sg/Act/PVPA2004?ProvIds=P15-#pr31- (son baxış 28 may 2022).

[76] Yuxarıda istinad 62, mad. 17.

[77] "Bitki sortlarının hüquqi mühafizəsi haqqında" Saziş, mad. 15 (2001).

[78] Yenə orada, mad. 15.1 (iii).

[79] Yenə orada 77, mad. 9.

pozuntusunu istisna edən hallar dairəsinin genişləndirilməsinə ehtiyac vardır. Bu əsaslar sırasına yeni bitki sortlarının yaradılması üçün mühafizə edilən seleksiya nailiyyətindən istifadə ilə yanaşı, fermerlərin (əkinçilərin) mühafizə edilən seleksiya nailiyyətindən şəxsi təsərrüfatında istifadə etmək imkanı da əlavə edilməlidir.

III. Patentin keyfiyyəti

AR qanunvericiliyində bitki müxtəlifliyinin hüquqi mühafizəsinin kumulyativ rejimi kimi *sui generis* modelin və onu xarakterizə edən elementlərə nəzər salınmışdır. Məqalənin bu hissəsində kumulyativ rejimin digər tərkib hissəsi olan patentin keyfiyyəti konsepsiyası və keyfiyyətli patent sistemini xarakterizə edən elementlər araşdırılacaqdır. Sonda isə patentin keyfiyyət meyarlarının AR qanunvericiliyindəki təzahürünə nəzər salınacaq və bununla bağlı müvafiq əlavələrin edilməsinə dair təkliflər veriləcəkdir.

A. Patentin keyfiyyəti konsepsiyasının məzmunu

Məqalənin ikinci bölməsində gəldiyimiz nəticəyə uyğun olaraq AR-də bitki müxtəlifliyinin – seleksiya nailiyyətlərinin mühafizə rejimi patent və *sui generis* rejimin kombinasiyasına əsaslanır. S*ui generis* rejimin effektivliyini təmin edən ünsürlərə mühafizə edilən bitki sortundan istifadə zamanı hüquq pozuntusunu istisna edən hallar, fermerlərin imtiyazları, məcburi lisenziya aid edilir. Kumulyativ rejimin ünsürü kimi araşdırılmalı olan digər məsələlərdən biri də patentin keyfiyyətidir.

Patentin keyfiyyəti dedikdə patent verilməsi üçün iddia edilən obyektin qanunla nəzərdə tutulmuş tələblərə (bu tələblər yuxarıda sadalanmışdır) cavab verib-verməməsi, eləcə də riayət edilməli olan inzibati prosedur başa düşülür.[80] Geniş mənada patentin keyfiyyəti isə bir-birilə əlaqəli olan texniki, hüquqi və kommersiya keyfiyyətini nəzərdə tutur. Texniki keyfiyyət ixtiranın qanunla müəyyən edilmiş şərtlərə (yeni, ixtira səviyyəli olan (bəlli olmayan), tətbiq edilə bilən (faydalı)) uyğunluğunu nəzərdə tutduğu halda, hüquqi keyfiyyət meyarı patent üçün ərizənin verilməsi və patentin verilməsi üçün həyata keçirilən tədbirlər sistemini ehtiva edir.[81] Patentin kommersiya keyfiyyəti isə onun maddi fayda gətirmək qabiliyyətini əks etdirir.[82]

Bununla belə, patentin keyfiyyətinin anlayışına dair vahid yanaşma mövcud deyildir. Belə ki, bu, dövlətlərin yürütdüyü patent siyasəti:

[80] R. Polk Wagner, Understanding Patent Quality Mechanisms, 4, (2009). Burada bax: https://www.ftc.gov/sites/default/files/documents/public_events/evolving-ip-marketplace/rwagner2.pdf (son baxış 29 iyun 2022).

[81] Chryssoula Pentheroudakis, Technical and Practical Aspects Related to Patent Quality in the Context of Standard Essential Patents, 15. Burada bax: https://www.wipo.int/edocs/mdocs/scp/en/wipo_is_ip_ge_18/wipo_is_ip_ge_18_a_study.pdf (son baxış 14 iyul 2022); Song Hefa, LI Zhenxing, Patent quality, and the measuring indicator system: Comparison among China provinces and key countries, 5 (2014). Burada bax: https://www.law.berkeley.edu/files/Song_Hefa_IPSC_paper_2014.pdf (son baxış 16 iyul 2022).

[82] Yenə orada.

qanunverilicik bazası, əmtəələrin dövriyyəsində patentin pay nisbəti, patent sahibi ilə üçüncü şəxslərin hüquqları arasında balansın saxlanılmasından asılıdır.[83] Anlayış formalaşdırmaq üçün patentin keyfiyyətinə bu formada tərif vermək olar: "Patentin keyfiyyəti patentin verilməsi və onun istifadəsi zamanı ayrı-ayrı şəxslərin maraqlarına cavab verə bilən sistemdir.[84]

Yekun olaraq, patentin keyfiyyəti dövlət daxilində patent sisteminin xüsusiyyətlərini ehtiva edir. Patentin maddi və prosedur şərtləri patentin keyfiyyət meyarları qismində çıxış edir: buraya axtarış sistemləri, patent ekspertlərinin fəaliyyəti, ixtira barədə məlumatların ictimaiyyətə açıqlanması və patent barədə üçüncü şəxslərin etiraz etmək hüququ aid edilir.[85]

B. Açıqlama tələbi patentin keyfiyyət elementi kimi

Patentin keyfiyyət göstəricilərindən biri də patent barədə məlumatların kifayət qədər açıqlanmasıdır (sufficient disclosure).[86] Patent ekspertinə açıqlanmış məlumatlar iddia edilən obyektin qanunla nəzərdə tutulmuş tələblərə uyğunluğunu müəyyən etmək üçün əhəmiyyət kəsb edir.[87]

Ümumiyyətlə, patent haqqında qanunvericilikdə məlumatların iki növ: dövlət orqanına və ictimaiyyətə açıqlanması nəzərdə tutulur. Səlahiyyətli orqana açıqlanan seleksiya nailiyyətlərinin qeydiyyatı, istifadəsi və mühafizəsinə dair məlumatlar bülletendə dərc edilir.[88] Açıqlamanın məqsədi patent sistemində şəffaflığın təmin edilməsidir. Birinci halda məlumatların açıqlanmasını təmin edən patent almaq üçün müraciət edən ərizəçi, ikinci halda isə ərizəçidən seleksiya nailiyyətləri haqqında məlumatları alıb ictimaiyyət üçün dərc edən səlahiyyətli dövlət orqanıdır. Qanunvericiliklə bərabər, UPOV Konvensiyasında da dövlətlərin üzərinə bitkilərə dair müraciətlər və təsdiq edilmiş patentlər haqqında məlumatların müntəzəm dərc edilməsi, bununla da ictimaiyyətin məlumatlandırılması öhdəliyi qoyulmuşdur.[89]

Patentin hüquqi keyfiyyət meyarını "Seleksiya nailiyyətləri haqqında" AR Qanununa nəzərən tətbiq etdikdə patentin keyfiyyətinin qənaətbəxş olmadığı nəticəsinə gəlmək olar. Belə ki, cari Qanunda nə iddia edilən seleksiya nailiyyətləri barədə ərizələr, nə də bitkilərin patent qabiliyyəti şərtlərinə uyğun olub-olmaması ilə bağlı məlumatlar dərc edilir. Cari qanunvericilikdə və dərc edilən rəsmi reyestrdə patentin sahibi, seleksiya nailiyyətinin adı,

[83] Yuxarıda istinad 81, 14.
[84] Naina Khanna, Patent Quality: does one-size-fit all?, 5. Burada bax: https://www.eipin-innovationsociety.org/wp-content/uploads/2019/06/Working-paper-Naina-Khanna.pdf (son baxış 18 iyun 2022).
[85] Yuxarıda istinad 80, 24-26.
[86] Yuxarıda istinad 81, 4.
[87] Yenə orada, 13.
[88] Yuxarıda istinad 11, mad. 6, mad. 13.
[89] Yuxarıda istinad 7, mad. 30 (iii).

onun sinfi barədə məlumatlar açıqlanır.[90] Bu isə ictimaiyyətə lazımi səviyyədə məlumatların açıqlanması tələbinə cavab vermir (sufficient disclosure to the public), çünki AR-də dərc edilmiş məlumatlar patent verildikdən sonrakı mərhələni ehtiva edir. 2022-ci ilin Dövlət Reyestrində olan məlumatlar isə sadəcə bitki qrupları (dənli, yem, texniki, tərəvəz), cinsin və ya növün azərbaycanca, latınca və ingiliscə adlarını əks etdirir.[91]

Dövlət orqanına məlumatların açıqlanması zamanı iddia sənədində sortun mənşəyi və tarixi barədə məlumatları da nəzərdə tuta bilər. Belə bir tələb AR qanunvericiliyi və UPOV Konvensiyasında təsbit edilməsə də, bu, şəffaflığı təmin edən hüquqi vasitə ola bilər. Yeni bitki sortunu qeydiyyata aldırmaq üçün müraciət edən şəxs onun mənşəyini, sortu götürdüyü ərazi barədə məlumatları açıqlaya bilər. Bu cür məlumatların təqdim edilməsi texniki cəhətdən həmişə mümkün olmaya, ixtiraçılar üçün əlavə xərclərə və çətinliklərə yol aça bilər. Bununla belə, bu mexanizm potensial biopiratçılığın qarşısını ala,[92] üçüncü şəxslərin bitki müxtəlifliyinə qarşı etirazlar irəli sürməsinə şərait yarada bilər.[93]

İddia edilən ixtira obyekti barədə məlumatlar müvafiq dövlət orqanına açıqlandıqdan sonra dövlət orqanı konfidensial olanlar istisna olmaqla, bunları ictimaiyyətin məlumatlandırılması üçün dərc edir. Dərc edilmiş məlumatlarla tanış olduqdan sonra ixtiraya dair üçüncü şəxslərin etiraz etmək hüququ yaranır. Etiraz etmək hüququ ona görə önəm daşıyır ki, iddia edilən obyekt üçüncü şəxslərin hüquqlarını poza bilər. Bu kontekstdə "Seleksiya nailiyyətləri haqqında" Qanunda seleksiya nailiyyətinin yeniliyə görə ekspertizası həyata keçirilərkən marağı olan şəxslərin ərizə ilə etiraz bildirmək hüququ təsbit edilsə də,[94] seleksiya nailiyyətinin fərqliliyə, oxşarlığa və sabitliyə görə sınağın həyata keçirilməsi zamanı belə etiraz etmək hüququ nəzərdə tutulmamışdır. Həmçinin Qanunda seleksiya nailiyyətinin fərqliliyə, oxşarlığa və sabitliyə görə ekspertiza nəticələrinin rəsmi qaydada dərc edilməsinə dair göstəriş də yoxdur. Lakin patentin etibarsız

[90] "Azərbaycan Respublikasında seleksiya nailiyyətlərinə patent və müəlliflik şəhadətnamələrinin verilməsi qaydaları haqqında" Əsasnamənin 13-cü maddəsinə əsasən, Agentliyin rəsmi bülletenində seleksiya nailiyyətlərinin qeydiyyatı, istifadəsi və mühafizəsinə dair patent almaq üçün dövlət reyestrinə qəbul edilmiş sifarişlərin siyahısı, dövlət reyestrinə yeni qəbul olunmuş seleksiya nailiyyətlərinin siyahısı və təsviri, dövlət reyestrindən çıxarılmış seleksiya nailiyyətlərinin siyahısı, dövlət sort sınağında sınağı başa çatdırılmış seleksiya nailiyyətlərinin siyahısı, dövlət sort sınağı metodikasına dəyişikliklər və əlavələr, seleksiya nailiyyətlərinin adlarının dəyişdirilməsi haqqında, patentin etibarsız sayılması və onların ləğv edilməsi haqqında, açıq və məcburi lisenziyaların verilməsi haqqında məlumatlar dərc edilir. Bununla belə, rəsmi dərc edilmiş reyestrdə sortun kodu, sortun adı, sortun yetişkənliyi, hüquq (patent) sahibinin adı, sortun dövlət reyestrinə daxil edildiyi il və becərilməsi tövsiyə olunan bölgələri bildirən nömrələr göstərilmişdir. Yuxarıda istinad 10, 4.

[91] Azərbaycan Respublikasının Kənd Təsərrüfatı Nazirliyi yanında Aqrar Xidmətlər Agentliyi, Azərbaycan Respublikası ərazisində kənd təsərrüfatı məhsulları istehsalı üçün istifadəsinə icazə verilmiş və mühafizə olunan seleksiya nailiyyətlərinin Dövlət Reyestri (rəsmi buraxılış), 4 (2022). Burada bax: http://axa.gov.az/uploads/files/services/bitki--1663327877.pdf (son baxış 16 iyul 2022).

[92] Yuxarıda istinad 54, 21-22.

[93] Yuxarıda istinad 40, 13.

[94] Yuxarıda istinad 11, mad. 10.

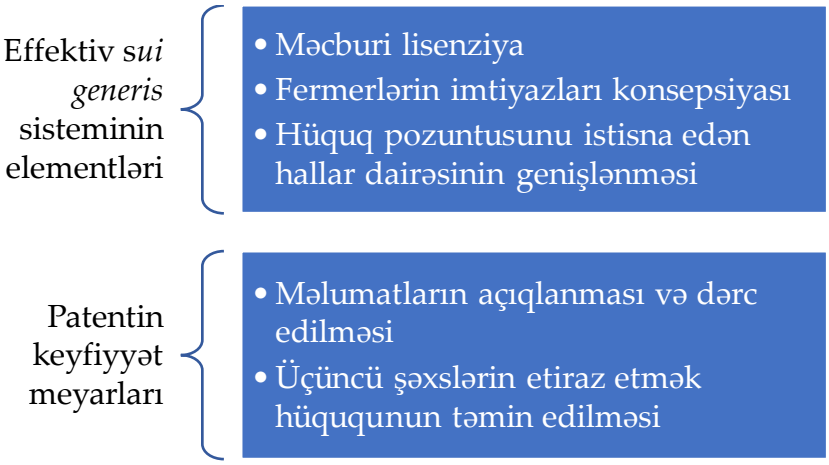
sayılması əsasları sırasında seleksiya nailiyyətinin qeyd edilən şərtlərə uyğun gəlməməsi təsbit edilmişdir. Marağı olan şəxslər bu barədə səlahiyyətli orqana ərizə ilə müraciət etdikdə qeyd edilən əsaslara görə seleksiya nailiyyətinə verilən patent etibarsız sayıla bilər.[95] Bu norma etiraz əsası ola biləcək digər halları, məsələn seleksiya nailiyyətinin adına görə də etiraz etmək hüququnu ehtiva etməlidir. Məsələn, Türkiyə Respublikasının "Yeni bitki sortlarına aid seleksiyaçı hüquqlarının müdafiəsi haqqında" Əsasnaməsində fərqlilik, sabitlik və oxşarlıq (bundan sonra DUS), yenilik tələbi, bitki sortuna iddia edilən ad, iddiaçının bitki sortuna hüququnun olmamasına dair əsaslar da etirazın predmetini təşkil edir.[96]

Qanunvericilik seleksiya nailiyyətinə dair məlumatların dərcini nəzərdə tutsa da, nəzərə alınmalıdır ki, bitki müxtəlifliyinin hüquqi mühafizəsinin təminatına dair sertifikatda və ya patent haqqında şəhadətnamədə konfidensial məlumatlar ola bilər. Ayrı-ayrı dövlətlərin qanunvericiliyində bitki sortu ilə bağlı konfidensial məlumatların açıqlanmasına dair konkret tənzimləmə nəzərdə tutulmuşdur. Avstriya qanunvericiliyinə əsasən, bitki müxtəlifliyi və toxum jurnalında, eləcə də reyestrdə bitki müxtəlifiyi barədə müxtəlif məlumatlar dərc edilməklə ictimaiyyətə açıqlanır. Səlahiyyətli orqan hər kəsə bitki sort hüququnun verilməsi üçün müraciətlərə (iddia sənədlərinə) və sınaq nəticələrinə aid sənədlərlə tanış olmaq imkanı verir. Bununla belə, irsi komponentlər haqqında məlumatlar, habelə kommersiya sirri təşkil edən məlumatların mühafizəsi təmin edilir.[97] Oxşar qayda Estoniya qanunvericiliyində də təsbit edilib: məxfi məlumatların predmeti olmayan hər bir məlumat dərc edilməklə ictimaiyyətə açıq elan edilir. Əlavə olaraq, ətraf mühitin, insan və bitki sağlamlığının mühafizəsini təmin etmək üçün tələb olunan məlumatlar konfidensial hesab edilmir.[98]

Cari qanuna seleksiya nailiyyətləri barədə kifayət qədər açıqlamanın təmin edilməsi məqsədilə səlahiyyətli dövlət orqanına daxil olan iddia sənədləri, sortun DUS testinin nəticələri barədə məlumatların da dərc edilməsinə (iddia edilən seleksiya nailiyyətləri barədə konfidensial məlumatlar istisna olmaqla) dair əlavə müddəalar daxil edilməlidir. Bundan əlavə, Qanuna üçüncü şəxslərin seleksiya nailiyyətlərinin DUS testinin nəticələri və seleksiya nailiyyətinin adına dair etiraz etmək hüququnun da əlavə edilməsi patentin keyfiyyətinə təsir edən meyar ola bilər.

[95] Yenə orada, mad. 19.
[96] Yuxarıda istinad 62, mad. 37.
[97] Austria Federal Law on the Protection of Plant Varieties, bölmə 22 (2004). Burada bax: https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/at/at093en.pdf (son baxış 1 oktyabr 2022).
[98] Estonia Plant Propagation and Plant Variety Rights Act, § 61 (1), (3) (2005). Burada bax: https://www.riigiteataja.ee/en/eli/530122021003/consolide (son baxış 1 oktyabr 2022).

Əlavə 2 – Kumulyativ mühafizə modeli və onun tərkib elementləri



IV. Qanunda Konvensiyadan fərqli qaydaların təsbiti

AR UPOV Konvensiyasına 2004-cü ildə qoşulmuşdur. Bununla belə, AR-in "Yeni bitki sortlarının mühafizəsi haqqında" Beynəlxalq Konvensiyaya qoşulmaq barəsində Qanununda Konvensiyanın neçənci ildə baxılmış versiyasına qoşulma barədə müddəa olmasa da, UPOV məlumat bazasına əsasən, AR UPOV-un 1991-ci il tarixli versiyasını qəbul etmişdir.[99] Bu baxımdan Qanunla adıçəkilən Konvensiya arasında ziddiyyət və ya fərqli qayda Konvensiyanın 1991-ci ildə yenidən baxılmış versiyası kontekstində aradan qaldırılmalıdır. Nəzərə alınmalıdır ki, UPOV-un 3 müxtəlif dövrdə qəbul edilmiş mətnləri arasında bitki müxtəlifliyinin hüquqi mühafizəsi üçün fərqli hüquqi rejimlər təsbit edilmişdir: buraya minimum mühafizə predmeti, qorunma şərtləri, müstəsna hüquqların dairəsi, mühafizə müddəti, hüquq pozuntusunu istisna edən hallar daxildir.[100]

Qanunda beynəlxalq müqavilələrdən fərqli qaydanın nəzərdə tutulduğu hallarda, hansı normanın tətbiq edilməli olduğu məsələsinə də yer

[99] Members of the International Union for the Protection of New Varieties of Plants, 1 (2021). Burada bax: https://www.upov.int/edocs/pubdocs/en/upov_pub_423.pdf (son baxış 1 oktyabr 2022). "Yeni bitki sortlarının mühafizəsi haqqında" Beynəlxalq Konvensiyaya qoşulmaq barəsində Azərbaycan Respublikasının Qanunu, mad. I (2003). Müvafiq Qanun AR-in 1961-ci il dekabrın 2-də qəbul edilmiş və 1972-ci il noyabrın 10-da, 1978-ci il oktyabrın 23-də və 1991-ci il martın 19-da Cenevrə şəhərində yenidən baxılmış "Yeni bitki sortlarının mühafizəsi haqqında" Beynəlxalq Konvensiyaya qoşulmağını nəzərdə tutmuş, qoşulmanın Konvensiyanın neçənci ildə baxılmış versiyasına aid edilməsini sual altında qoymuşdur.

[100] Yuxarıda istinad 72, 15.

verilmişdir. Belə ki, AR-in tərəfdar çıxdığı beynəlxalq müqavilələrdə **seleksiya nailiyyətlərinin sınağı, mühafizəsi və istifadəsi üzrə müəyyən edilmiş qaydalar** Qanunda nəzərdə tutulmuş qaydalardan fərqləndiyi halda, beynəlxalq müqavilələrin qaydalarının tətbiq olunacağını müəyyən edir.[101] Buna baxmayaraq, AR Konstitusiyası qanunvericilik sisteminə daxil olan normativ hüquqi aktlar ilə (AR Konstitusiyası və referendumla qəbul edilən aktlar istisna olmaqla) AR-in tərəfdar çıxdığı dövlətlərarası müqavilələr arasında ziddiyyət yarandığı zaman həmin beynəlxalq müqavilələrin tətbiqini nəzərdə tutur.[102] Qanunda müəyyən edilmiş fərqli qayda hüquq normalarının kolliziyasının bir forması olduğunu nəzərə alsaq,[103] hesab edirik ki, Konstitusiyanın istinad edilən norması yarana biləcək bütün ziddiyyətlərin dövlətlərarası müqavilələrin norması ilə həllini nəzərdə tutur. Yəni Qanunda seleksiya nailiyyətlərinin sınağı, mühafizəsi və istifadəsinə fərqli qayda şamil edilsə də, bu qaydaların digər əsaslarına da şamil edilə bilər.

Məqalənin əvvəlki bölmələrində Konvensiya və Qanun arasındakı fərqli müddəalar, eləcə də Qanunun bəzi müddəalarının Konvensiyaya uyğunlaşdırılmasına nəzər salınmışdır. Fərqli müəyyən edilmiş digər qaydalara misal kimi seleksiya nailiyyətini yaradan şəxslə bağlı normanı da göstərmək olar. Qanunda ***müəllifə*** "seleksiya nailiyyətini yaradan fiziki şəxs və ya şəxslər qrupu" olaraq anlayış verildiyi halda, Konvensiyada ***"bitki müxtəlifliyini kəşf edən, inkişaf etdirən və becərən şəxs"*** müəllif hesab edilir.[104] AR qanunvericiliyində kəşf əqli mülkiyyət hüquqları sırasına daxil olmasa da, UPOV Konvensiyasında bitkini kəşf edən şəxs də hüquq sahibi hesab edilir. Bununla belə, həmin Konvensiyada əsas diqqət bitkini kəşf edən şəxsin həmin sortu inkişaf etdirməsinə yönəlir,[105] çünki müstəsna hüquqlar yeni bitki növlərinin sahiblərinə tanınmalıdır, mədəni və yabanı halda kəşf edilən bitki sahibləri bu cür hüquqlardan yararlana bilməzlər.[106]

Nəticə etibarilə, "Seleksiya nailiyyətləri" haqqında Qanunda dövlətlərarası müqavilələrdən fərqli qaydaların müəyyən edilmə əsasları bir neçə maddə ilə məhdudlaşa bilməz. Fərqli qayda Qanun və Konvensiya arasında yarana biləcək bütün münasibətlərə şamil edilməlidir.

Nəticə

Məqalədə bitki müxtəlifliyinin əqli mülkiyyət hüquqları ilə mühafizəsinin xüsusiyyətlərinə AR qanunvericiliyi və UPOV Konvensiyası çərçivəsində nəzər salınmışdır. Məqalənin ayrı-ayrı bölmələrində araşdırılan məsələlərə

[101] Yuxarıda istinad 11, mad. 32.
[102] Azərbaycan Respublikasının Konstitusiyası, mad. 151 (1995).
[103] Christian Kreuder Sonnen, Michael Zürn, *After fragmentation: Norm collisions, interface conflicts, and conflict management*, Cambridge University Press 241, 252-254 (2020).
[104] Yuxarıda istinad 7, mad. 1.
[105] Yuxarıda istinad 25, 6.
[106] Yuxarıda istinad 40, 14.

dair belə nəticəyə gəlmək olar ki, bitkilər patentin obyekti hesab edilməsə də, seleksiya nailiyyətləri patentin obyekti hesab edilir, lakin GMO bitkilər haqqında birmənalı fikir söyləmək çətindir. Bu səbəblə də mühafizə edilən "transgen bitkilər" ilə GMO bitkilər arasındakı fərqləri nəzərdə tutan meyarlar, eləcə də GMO bitkilərin hüquqi mühafizəsinin hansı formada tənzimlənməsi müəyyən edilməlidir.

AR qanunvericiliyində seleksiya nailiyyətlərinin hüquqi mühafizə modeli *sui generis* və patent sistemlərinin kombinasiyasına əsaslanır. S*ui generis* sistemin effektivliyi yalnız hüquq sahibi ilə deyil, patentdən istifadə etmək niyyətində olan üçüncü şəxslərin hüquqlarının da balansda saxlanıla bilməsi ilə ölçülür. Bu balansın qorunub saxlanılması hüquq pozuntusunu istisna edən, həmçinin məcburi lisenziyanın verilməsi əsaslarının genişləndirilməsi hesabına mümkün ola bilər. Bu məqsədlə "Seleksiya nailiyyətləri" haqqında Qanuna fermerlərin imtiyazları və qorunan sortdan yeni bitki sortunun alınması zamanı istifadə edilmə imkanının da əlavə edilməsini təklif edirik. Digər əlavə müddəalar isə məcburi lisenziyanın verilmə əsaslarının genişləndirilməsi ilə bağlı ola bilər. Bu əsaslara patent sahibinin seleksiya nailiyyətindən istifadə etməməsi və ictimai maraqlar tələb etdiyi halda məcburi lisenziyanın verilməsi daxil edilə bilər.

Patentin keyfiyyətini təmin etmək məqsədilə Qanunda iddia sənədlərinin, həmçinin sortun DUS testi nəticələri barədə məlumatların (iddia edilən seleksiya nailiyyətləri barədə konfidensial məlumatlar istisna olmaqla) da dərc edilməsinə dair müvafiq icra hakimiyyəti orqanının öhdəliyi müəyyən edilə bilər. Üçüncü şəxslərin seleksiya nailiyyətini etiraz etmək hüququnu təmin etmək məqsədilə DUS testinin nəticələrinə, seleksiya nailiyyətinin adına dair etiraz etmək hüququnun əlavə edilməsi patentin keyfiyyətinə təsir edən meyar ola bilər.

"Seleksiya nailiyyətləri" haqqında Qanunda bitki müxtəlifliyinin mühafizəsində UPOV Konvensiyasından fərqli tənzimləmə nəzərdə tutulmuşdur. Hesab edirik ki, Qanunda konkret hansı hallarda beynəlxalq müqavilələrin tətbiq ediləcəyi qeyd edilsə də, bu istisna xarakter daşımır. Konstitusiya normasına uyğun olaraq fərqli qaydanın digər bütün məsələlərə də eyni qaydada şamil olunacağı qənaətindəyik.

Inji Mammadli[*]

INTERNATIONAL ORGANISATIONS AND ACCOUNTABILITY FOR HUMAN RIGHTS ABUSES: OBSTACLES CAUSED BY JURISDICTIONAL IMMUNITY

Abstract

The proliferation of international organisations has increased their power to affect the lives of many people and their human rights. Whether they authorise and deploy missions to conflict-ridden areas to create conditions for stability and peace or fund projects to improve people's lives, international organisations are believed to be critical in addressing global issues. Coincidentally, there is now considerable evidence of international law violations and human rights abuses arising out of these organisations' decisions and conduct. However, the jurisdictional immunity granted to these organisations has made it difficult, if not impossible, to address the issue of holding those organisations accountable for human rights violations. Therefore, this article aims to assess the content of jurisdictional immunities to illustrate the necessity for reducing the immunities of international organisations.

Annotasiya

Beynəlxalq təşkilatların sayının artması onların daha çox insanın həyatına və hüquqlarına olan təsir gücünü artırmışdır. İstər münaqişə zonasında sülh və sabitliyi təmin etmək məqsədilə əməliyyatları qanuniləşdirmək və həyata keçirməklə, istərsə də insanların həyat şəraitini yaxşılaşdırmaq üçün layihələri maliyyələşdirməklə beynəlxalq təşkilatlar qlobal problemlərin həllində mühüm rol oynayır. Bununla birlikdə, hazırda həmin təşkilatların qəbul etdikləri qərarlar və həyata keçirdikləri fəaliyyət nəticəsində ortaya çıxan beynəlxalq hüquq və insan hüquqlarının pozulmasına dair kifayət qədər sübutlar mövcuddur. Buna baxmayaraq, həmin təşkilatlara verilən yurisdiksiya immuniteti onların insan hüquqlarının pozulmasına görə məsuliyyətə cəlb edilməsi məsələsinin həllini çətinləşdirmiş, hətta mümkünsüz etmişdir. Bu səbəblə də məqalə beynəlxalq təşkilatların immunitetlərinin azaldılması zərurətini göstərmək üçün yurisdiksiya immunitetinin məzmununu araşdırmaq məqsədi daşıyır.

CONTENTS

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Introduction

The importance of international organisations in the contemporary international community cannot be overstated. They have evolved into critical components of the international legal order as institutionalised collaboration has expanded to almost every sector. However, it cannot be disputed that despite these institutions' significant accomplishments, their track record is far from faultless.[1] History is replete with convincing evidence that, in many instances, international organisations have harmed the people they were deployed to protect.

The activities of international organisations may harm third parties and violate human rights in various situations. There is an increased likelihood of such harm occurring when international organisations exert direct operational command or wield power.[2] This is the case, for instance, in peacekeeping operations, humanitarian interventions, or provisional territorial administration in post-conflict settings. It is well acknowledged that post-conflict operations by the United Nations (hereinafter the UN), for instance, have occasioned grave human rights violations.[3] Notable examples include the UN peace mission to Mozambique, where the soldiers working for the mission lured underage girls into prostitution.[4] In the Central African Republic, where the UN peacekeepers were deployed to dispel conflict, they reportedly sexually abused local women and children.[5] Similarly, the

[1] Frédéric Mégret, Florian Hoffmann, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 Human Rights Quarterly 314, 336 (2003).
[2] Jan Wouters, et al., Accountability for Human Rights Violations by International Organisations, 16 (2010).
[3] Ved P. Nanda, *Accountability of International Organizations: Some Observations*, 33 Denver Journal of International Law and Policy 379, 382 (2005).
[4] United Nations, Promotion and Protection of the Rights of Children: Impact of armed conflict on children: note / by the Secretary-General, A/51/306 (1996), https://sites.unicef.org/graca/a51-306_en.pdf (last visited Nov. 14, 2022).
[5] UN Human Rights Council, Report of the Independent Expert on the Situation of Human Rights in the Central African Republic: note / by the Secretariat, A/HRC/33/63 (2016),

peacekeeping mission run by the African Union with the approval of the UN Security Council in Somalia has been accused of sexual violence against the local population.[6] Furthermore, a number of reported cases of the UN police abuse (some of which have resulted in the deaths of "suspects"),[7] accusations of excessive force employed by NATO forces[8] and many other cases involving gross negligence, national and international crimes[9] suffice to show that international organisations are not immune to human rights violations. The irony of the fact is that the harm in many of these instances was caused through actions intended to spread, foster, and protect the rule of law.[10]

Nevertheless, the means available to hold these organisations accountable for violating human rights are still in their infancy. Claims brought against international organisations have been rejected in various forms, principally by virtue of a broad interpretation of the doctrine of functional necessity, which will be explored below.[11]

It is noteworthy that the current accumulated legislation on the immunities of international organisations emerged in the 1920s and 1930s and was codified in the 1940s for the United Nations.[12] It did not undergo substantive changes thereafter and was largely replicated for successive organisations. The emergence and application of the concept of immunity were attributed to the importance of preserving a space for international organisations to exercise their powers and control in different domains through isolating them from their members' interference. This necessarily entailed an exemption from the jurisdiction of the national courts: the idea was that if states could subject international organisations to their courts' jurisdiction, it would allow them to overly interfere with the affairs of these organisations.

At present, national law establishes the rules on the treatment of international organisations at the domestic level, including the rules

https://digitallibrary.un.org/record/848572?ln=en (last visited Nov. 14, 2022); *See also* Sophia Genovese, *Prosecuting U.N. Peacekeepers for Sexual and Gender-Based Violence in the Central African Republic*, 43 Brooklyn Journal of International Law 609, 617-619 (2018).

[6] "The Power These Men Have Over Us" Sexual Exploitation and Abuse by African Union Forces in Somalia, Human Rights Watch (2014), https://www.hrw.org/report/2014/09/08/power-these-men-have-over-us/sexual-exploitation-and-abuse-african-union-forces (last visited Nov. 14, 2022).

[7] Amnesty International, Federal Republic of Yugoslavia (Kosovo), Setting the Standard? UNMIK and KFOR's Response to the Violence in Mitrovica, AI Index EUR 70/13/2000, 9 (2000), https://www.amnesty.org/fr/documents/eur70/013/2000/en/ (last visited Dec. 1, 2022).

[8] Country Reports on Human Rights Practices: Report Submitted to the Committee on Foreign Affairs, U.S. House of Representatives and Committee on Foreign Relations, U.S. Senate by the Department of State in Accordance with Sections 116 (d) and 502B (b) of the Foreign Assistance Act of 1961, as Amended, Volume 1, 1575 (2005).

[9] José Alvarez, *International Organisations and the Rule of Law*, 14 New Zealand Journal of Public and International Law 3, 6 (2016).

[10] *Ibid.*

[11] Niels Blokker, *International Organisations: The Untouchables?* 10 International Organizations Law Review 259, 259 (2013).

[12] *Id*., 14; *See also* Tiina Pajuste, *The Evolution of the Concept of Immunity of International Organisations*, Tallinn University: Open Journal Systems, 11-18 (2018).

governing their immunity.[13] Prominent examples include the International Organizations Immunities Act of the United States of America[14] or the International Organisations Act 1968 of the United Kingdom. Internationally, applicable provisions[15]on immunity are mentioned in multilateral treaties,[16] or the constituent instruments of international organisations,[17] or derived from customary international law.

Thus, from the time of their development till now, the immunities granted to international organisations under international law are conventionally seen as vital to safeguard these institutions' independent functioning.[18] However, it is worth bearing in mind that member states of an international organisation are under a duty to respect the rights of individuals (who are subject to their jurisdiction) access to a court and their right to a remedy. In case these individuals' rights are violated by international organisations, the application of the jurisdictional immunities by national courts may contradict the duty in question.[19] As Young has phrased: *"Inherent in any grant of immunity is the risk of potential abuse."*[20]

Several scholars, therefore, see the lack of accountability of international organisations as evidence strongly calling for reducing their immunities.[21] This article likewise contends that, despite universal consensus on their merits, jurisdictional immunities of international organisations generate a paradoxical situation where the very institutions involved in promoting the rule of law cannot be called to account under the rule of law.

The evaluation begins with a discussion of factors that necessitate jurisdictional immunities for international organisations, as well as obstacles to justice they cause when applied in practice. Several examples of human rights violations committed by international organisations are provided therein, to demonstrate the challenges they create in justifying those immunities.

The next section picks up in 1996, when the International Law Association (hereinafter ILA) started exploring ways to hold international organisations accountable for their wrongful acts and introducing recommendations in this regard in their reports. Attention is then drawn to another pivotal moment in the history of international law, when the International Law Commission

[13] Tom Obokata, Transnational Organised Crime in International Law, 108 (2010).
[14] International Organizations Immunities Act (1945).
[15] International Organisations Act (1968).
[16] *See* Convention on the Privileges and Immunities of the United Nations (1946).
[17] *See* Charter of the Organisation of American States, art. 133-35 (1948).
[18] Jan Klabbers, An Introduction to International Organizations Law, 130-139 (3rd ed. 2015).
[19] Luca Pasquet, *Litigating the Immunities of International Organizations in Europe: The "Alternative- Remedy" Approach and its "Humanizing" Function*, 36 Utrecht Journal of International and European Law 192, 192 (2021).
[20] Carson Young, *The Limits of International Organization Immunity: An Argument for a Restrictive Theory of Immunity Under the IOIA*, 95 Texas Law Review 889, 906 (2017).
[21] Blokker, *supra* note 11, 260.

(hereinafter ILC), created by the UN General Assembly, drafted a set of articles on the accountability of international organisations. The section also includes a summary of the practical application of ILC's draft articles and the challenges arising thereof.

Lastly, the final section examines the existing frameworks, as well as their virtues and deficiencies. It is concluded by proposing three options for limiting the extent of the immunities of international organisations.

I. Jurisdictional immunities: necessity or obstacle?

As already noted, jurisdictional immunity has long been viewed as a mechanism required to ensure the independence of international organisations from their member states and to protect them against judicial interference in their affairs. It helps shield international organisations against undue external influence and pressure they are particularly vulnerable to. Indubitable is the fact that attempts to utilise international organisations as appendages to member states' foreign policies undermine these organisations' independent action and negatively impact their growth.[22] Immunity as a guarantee of independence ensures that the international organisation does not become a tool of individual member states' foreign policy, aimed against other member states' policies and national interests.

External pressure can also be exercised by placing international organisations under indirect control through subjecting them to the member states' judiciary.[23] Immunity is necessary in this case, as it prevents national courts from acquiring the power to determine the legal effects of the international organisation's acts. Put simply, if the domestic court declares an organisation's act illegal and therefore non-applicable within the member state's domestic legal order, it may substantially impair the functioning of an international organisation.

The law of immunities is thus based on a logical process, following the ultimate goal to ensure the independence of these subjects and secure their ability to effectively carry out their functions.[24] The notion that an international organisation must have some level of immunity in order to carry out its mandate is also enshrined in Article 105 of the UN Charter: "*The Organisation shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes*".[25]

This provision is in line with the functional necessity doctrine. It is worth noting, however, that the doctrine entitles the organisation only to the immunity from the jurisdiction that is strictly required to fulfill the

[22] Clive Archer, International Organisations, 70 (2002); *See also* Sonu Trivedi, A Handbook of International Organisations, 12 (2005).
[23] August Reinisch, *Privileges and Immunities*, Jacob Katz Cogan, Ian Hurd, and Ian Johnston, The Oxford Handbook of International Organizations 1048, 1054 (2016).
[24] Pasquet, *supra* note 19, 195-196.
[25] Charter of the United Nations, art. 105 (1945).

organisation's purposes without undue interference. Defining the organisation's purposes and the actions it needs to take to fulfil those purposes is the key to delimiting the scope of the respective organisation's immunity from legal process. Therefore, the key question for deciding immunity should be whether subjecting the international organisation to the member state's jurisdiction will impair its ability to perform its institutional functions in line with its constituent. There is no need for granting immunity to an international organisation if its ability to carry out its tasks is not affected and a possible judicial review does not disrupt its working order. As voiced by Muller in 1995, there is no functional necessity to deprive "*… private parties dealing with the organisation of all forms of judicial protection*".[26]

Nonetheless, it is now clear that in practice, the immunity from suit has been interpreted as absolute immunity. It has effectively excluded human rights issues and isolated the organisations from accountability through a judicial review undertaken by national courts.[27] The uncontrolled use of immunity begets a set of circumstances in which individuals are deprived of the option to seek justice and safeguard their rights.[28] This sequentially causes a severe sense of powerlessness in the people who are unable to have their voices heard in a court of law.[29] Such an obstacle in accessing justice contradicts the definition of the right to a court advanced by the European Court of Human Rights (ECtHR) in its Golder decision: "*… Article 6 para. 1 [of the European Convention] secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal*".[30]

The principle upheld in this judgement is at odds with the concept that the court could declare its lack of jurisdiction due to the defendant's immunity. Namely, if the accusations concerning "civil rights and obligations" are aimed against an international organisation, the judge would have to choose between two scenarios: (a) rejecting immunity to safeguard the right to a court, or (b) restricting access to justice in order to fulfil the duty to grant immunity.

The moral quandary in this scenario is even more difficult if the accusations concern not just private law rights and obligations, but also human rights abuses. A rejection of justice would thus indicate a breach of human rights both substantively and procedurally. To be precise, while immunities represent procedural barriers on the jurisdiction that do not alter substantive rights, access to justice is critical for safeguarding substantive rules on human

[26] A. Sam Muller, International Organizations and Their Host States: Aspects of Their Legal Relationship, 271 (1995).
[27] Matthew Parish, *An Essay on the Accountability of International Organizations*, 7 International Organizations Law Review 277, 277 (2010).
[28] Dinah Shelton, Remedies in International Human Rights Law, 50 (2015).
[29] *Supra* note 19, 196.
[30] Golder v. UK, No. 4451/70, § 36 (1975). Available at: https://hudoc.echr.coe.int/rus?i=001-57496 (last visitied Dec. 15, 2022).

rights. Hence, immunities impede the law's effective implementation and make it virtually impossible to enjoy human rights. This double breach is especially heinous in the event of atrocities perpetrated during wars, as it means that people who have formerly been exposed to violent and distressing incidents are also denied the right to seek redress.[31]

There is abounding evidence of incidents from history to support this claim. To illustrate, the human cost of NATO's military intervention in Libya has been documented and is believed to have amounted to deaths of more than seventy civilians.[32] Yet, NATO has denied these charges, insisting that its personnel employed all feasible methods to minimise civilian casualties.[33]

In 2013, allegations ensued that a thousand person Nepalese the UN force was responsible for a cholera outbreak in Haiti, which had not experienced any such outbreaks for three centuries, resulting in the deaths of thousands of people.[34] Following the victims' attempt to sue the organisation, the UN asserted that it was immune from international lawsuits. The same scenario occurred in Kosovo in 1999 when Roma people were relocated to the temporary UN run camps due to the conflict with Serbia and were poisoned by lead in those camps.[35]

In these situations, international organisations effectively evaded accountability by invoking immunity for their actions.[36] This suffices to show that, regardless of how noble the motive behind the grant of immunity may be, the result is that no domestic court or arbitration body has jurisdiction over it until the organisation relinquishes its immunity.[37]

II. Existing accountability framework

In recent decades, the international legal community has given more consideration to the issue in question. This is clearly demonstrated by the significant projects done by the ILA and the ILC, which will be discussed below.

[31] *Supra* note 19, 194.
[32] Unacknowledged Deaths: Civilian Causalties in NATO Campaign in Libya, Human Rights Watch (2012), www.hrw.org/sites/default/files/reports/libya05l2webwcover.pdf (last visited Oct. 20, 2022).
[33] Statement by the NATO Spokesperson on Human Rights Watch Report, NATO (2012), http://www.nato.int/cps/en/natolive/news_87171.htm (last visited Oct. 20, 2022).
[34] Adam Houston, *UNstoppable: How Advocates Persevered in the Fight for Justice for Haitian Cholera Victims*,19 Health and Human Rights Journal 299, 299 (2017).
[35] Sarah Stevens, *The United Nations' Immunity to Cholera in Haiti*, 8 Harvard International Review 13, 13-14 (2017).
[36] Jennifer Murray, *Note: Who Will Police Peace-Builders? The failure to Establish Accountability for the Participation of U.N. Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina*, 34 Columbia Human Rights Law Review 473, 505 (2003); *See also supra* note 3, 386.
[37] Engela C. Schlemmer, *International Organisations, the Rule of Law and Immunity*, South African Law Review 21, 25 (2013).

A. Reports of ILA's Committee on Accountability of International Organisations

The ILA began its scrutiny of the wrongful acts of international organisations in 1996, with the establishment of the Committee on Accountability of International Organisations (hereinafter CAIO).[38] The Committee was tasked with evaluating possible measures (legal or otherwise) which could be taken to guarantee international organisations' accountability to third parties or their members. Thus, it was designed to develop recommended rules and best practices on good governance, as well as to identify primary and secondary rules on responsibility.[39]

In its reports, CAIO did not explicitly define accountability, although it famously linked the concept to international organisations' power and authority: "*Power entails accountability, that is the duty to account for its exercise*".[40] In view of this, the Committee categorised accountability into four forms, namely legal, administrative, political, and financial, noting that the form of accountability that will ensue would depend on specific circumstances in which the acts or omissions of the international organisation took place.[41] CAIO went on to note that the likelihood of obtaining the necessary degree of accountability would be increased if the four forms of accountability combined or overlapped.[42]

The extension of the concept of accountability to include administrative, political, and financial aspects is what is noteworthy in ILA's work. Since legal accountability most often means judicial review, individuals' inability to launch legal processes against international organisations due to the latter's immunity raises the need to seek alternative forms of accountability. The problem is, however, that there is no uniform understanding of how exactly these forms would be practised. An example of financial responsibility could perhaps be the death and disability compensation program established by the UN, which allows contributing states to seek compensation on behalf of their nationals in the event of the latter's death or disability, if these incidents are attributable to service in a UN peacekeeping mission.[43] Nonetheless, the UN does not accept liability for the off-duty acts of its peacekeepers.[44] It follows that the UN can effectively evade financial (or legal) responsibility for sexual or other types of violence on behalf of its peacekeepers. In this regard, one can hardly disagree with Nigel D. White's argument that "UN does not act

[38] Committee on Accountability of International Organisations, Final Report, International Law Association, Berlin Conference, 4 (2004).
[39] Lorenzo Gasbarri, The Concept of an International Organization in International Law, 184 (2021).
[40] *Supra* note 38, 5.
[41] *Ibid.*
[42] *Ibid.*
[43] United Nations General Assembly, Resolution 49/223A, A/RES/49/233 (1995).
[44] Memorandum to the Director, Office for Field Operational and External Support Activities, United Nations Juridical Yearbook, 300 (1986).

diligently to prevent human rights violations when it has the power to do so, then it would be responsible and accountable to those suffering harms as a result of those violations."[45]

Furthermore, administrative accountability seems more ambiguous: it could refer to systems of supervision and control internal to the organisation, such as the ombudsmen, audit offices, inspectors general, and anti-fraud offices.[46] One can think of the World Bank's Inspection Panel (will be explored below) or the UN's Joint Inspection Unit.[47]

Political accountability, on the other hand, has been interpreted as the accountability of the organisation's legislative organs, as well as its secretariats, to groups affected by the organisation's decisions and conduct.[48] It may be exercised, *inter alia*, through reducing the democratic deficit. This could be exemplified by the fact that there are no identifiable decision-makers who could be held accountable for the wrongful decisions or actions of the international organisation.[49] It could be proposed, therefore, that nation states (as representatives of their citizens) could form a link between their citizens and international organisations. Thus, citizens should become the ultimate accountability form for international organisations. However, in practice, it is rather complicated to develop direct democratic links between individuals and international organisations. Two arguments would suffice to demonstrate this point:

1) International organisations have limited competences and lack a territory of their own. It seems controversial to regard nationals of the member states as 'indirect' citizens of the organisations themselves. Furthermore, without a directly elected global government, international organisations are not democratically accountable to the people.

2) Such international democracy would require internal democracy in the member states. Strictly speaking, if a member state is not democratic itself, it cannot legitimately claim to act on behalf of its citizens.

One way to address international organisations' lack of accountability to the nationals and/or inhabitants of their member states is to ascertain that organisations are subject to the rule of law and are required to uphold human rights. At present, the degree to which international organisations are bound

[45] Nigel D. White, *In Search of Due Diligence Obligations in UN Peacekeeping Operations: Identifying Standards for Accountability*, 23 Journal of International Peacekeeping 203, 206 (2020).
[46] Eugénia C. Heldt, *Lost in internal evaluation? Accountability and insulation at the World Bank*, 24 Contemporary Politics 568, 574 (2018).
[47] *See* Statute of the Joint Inspection Unit, art. 5: The Inspectors have "...the broadest powers of [independent] investigation in all matters having a bearing on the efficiency of the services and the proper use of funds" (1976).
[48] Michael Fowler, Sumihiro Kuyama, Accountability and the United Nations System, 3 (2007).
[49] Michael Zurn, *Global Governance and Legitimacy Problems*, 39 Government and Opposition 260, 260 (2014).

by human rights obligations is still unclear,[50] as the great majority are not obliged by any human rights treaties as signatories.[51] Therefore, the binding nature of international human rights law must be evaluated in relation to international organisations. This issue was discussed in CAIO's report, where the Committee called on international organisations to uphold fundamental human rights commitments as well as relevant principles and standards of international humanitarian law when taking actions concerning "… *the use of force, temporary administration of territory, imposition of coercive measures, launching of peacekeeping or peace-enforcement operations*".[52]

Another crucial enabling factor for accountability is the transparency of governance.[53] This is why, in addition to the forms of accountability, CAIO identified three levels of accountability and distilled them into a set of recommended rules and practices (RRPs).[54]

The first level of accountability concerned internal and external scrutiny and monitoring that international organisations should be subject to, regardless of possible liability and/or responsibility that would ensue.[55] International organisations, in this case, were to be called to account for the fulfillment of functions laid down in their constituent instruments. RRPs on this level included principles common to all international organisations: the one that stood out was the principle of good governance.[56] The mentioned principles encompass, *inter alia,* transparency and democratic participation in the decision-making process, access to information, and sound financial management.[57] Other principles included, *inter alia*, the bona fide principle, the principle of supervision and control, objectivity, and impartiality. CAIO, furthermore, argued in its report that international organisations must, as a separate principle, provide reasons for their decisions or specific courses of action.[58]

The second level addressed issues of tortious liability and responsibility for adverse consequences of acts or omissions of international organisations that do not *ipso facto* violate international and/or institutional law.[59] This would

[50] Maurizio Ragazzi, Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie, 111 (2013).
[51] Pierre Schmitt, Access to Justice and International Organisations: The Case of Individual Victims of Human Rights Violations, 53 (2017); *Supra* note 3, 385.
[52] *Supra* note 38, 23.
[53] Jan Klabbers, Anne Peters, Geir Ulfstein, The Constitutionalization of International Law, 266 (2009).
[54] *Supra* note 38, 5-6.
[55] *Id.*, 8.
[56] Committee on Accountability of International Organisations, International Law Association, Taipei Conference, 878 (1998).
[57] Committee on Accountability of International Organisations, International Law Association, New Delhi Conference, 2 (2002).
[58] *Supra* note 38, 13-14.
[59] *Id.*, 5.

include instances where, for example, an organisation's space activity would damage the environment but not constitute an illegal act.[60]

Finally, the third level of accountability involves acts or omissions that do violate international and/or institutional law.[61] Breaches of international law include, *inter alia*, cases of human rights abuse or gross negligence, while *ultra vires* acts of an institution's organs would constitute a breach of institutional law.[62]

At face value, such RRPs appeared to be potentially substantial. It must be borne in mind, however, that unlike the ILC, which is a body of experts operating as an organ of the UN General Assembly, ILA is simply an academic organisation, hence its works are non-binding and only offer academic insight into various domains of international law.[63]

B. ILC's Draft Articles on the Responsibility of International Organisations

The ILC, *à son tour*, began working on rules concerning the accountability of international organisations in 2002, based on the recommendations of its working group.[64] The task was concluded in 2011, with the adoption of Draft Articles on the Responsibility of International Organisations (hereinafter Draft Articles).[65]

The ILC's Draft Articles were a significant milestone, as this was the first attempt to establish a legal framework for holding international organisations accountable for committing wrongful acts. It should be noted at the outset that despite defining key points of international organisations' responsibility, the Draft Articles still lack a conclusive legal status and are non-binding.[66] Neither states nor international organisations have acknowledged them, and it remains unclear if they reflect or form part of the customary international law, owing to their insufficient practical application. Nonetheless, they have been referred to in several cases concerning the responsibility of international organisations,[67] where they are figured as authoritative documents. This is a positive sign, implying that the Draft Articles can, at the very least, function as a type of soft law and assist in clarifying international organisations' responsibility guidelines.

[60] *Ibid.*
[61] *Ibid.*
[62] *Supra* note 38, 5.
[63] Ademola Abass, Complete International Law: Text, Cases, and Materials, 187 (2014).
[64] Mirka Möldner, *Responsibility of International Organizations - Introducing the ILC's DARIO*, 16 Max Planck Yearbook of United Nations Law 281, 284 (2012).
[65] Draft Articles on the Responsibility of International Organizations, the International Law Commission, 63rd Session, U.N. Doc. A/66/10 (2011).
[66] Helmut Philipp Aust, Complicity in Violations of International Humanitarian Law, in Heike Krieger, Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region, 448 (2015).
[67] *See* Al-Jedda v. The United Kingdom, No. 27021/08, § 55-57 (2011). Available at: https://hudoc.echr.coe.int/eng?i=002-426 (last visited Dec. 15, 2022).

While a complete study of the Draft Articles' contents is beyond the scope of this Article, it is useful to list some of the merits and issues. Foremost, the primary importance of the Draft Articles lies in the fact that they reflect the fundamental principle of international responsibility, according to which "*every internationally wrongful act entails international responsibility*".[68] Recognising international organisations as subjects of international law, the Draft Articles laid down that an international organisation bears responsibility when: 1) the conduct (consisting of an act or omission) represents a breach of the organisation's international obligations and 2) the conduct is attributable to the international organisation in question.[69]

To summarise, according to the ILC, for an international organisation to be considered accountable under international law, the following conditions must be met cumulatively:

1) An obligation under international law, whether conventional or general,[70] is breached. The ILC has also specified that international obligations can be drawn from any source of international law,[71] as well as from the organisation's rules if the particular norm qualifies as an international legal obligation.[72]

2) This breach is committed by the international organisation, and attributed to it. General rules on attribution are discussed below.

3) No circumstances mentioned in the Draft Articles that would preclude the wrongfulness of the conduct in question are present.[73]

Draft Articles were also significant for establishing general rules on attribution applicable to international organisations. Addressing the question of attribution, they emphasised the principle of effective control to determine which entity is responsible for the conduct: the international organisation or the contributing state. Although the term "effective control" is not explicitly defined in the Draft Articles, ILC's previous report provided an outline: "(…) *the factual control that is exercised over the specific conduct taken by the organ or agent placed at the receiving organisation's disposal.*"[74]

[68] *Supra* note 65, art. 3.
[69] *Id.*, art. 4.
[70] *See* Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, para. 37: "International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."
[71] Sources of international law are traditionally regarded as those listed in Article 38 of the Statute of International Court of Justice, namely: international conventions, international custom, general principles of law, and if the parties are bound by the decision in a particular case: judicial decisions and the teachings of the most highly qualified publicists.
[72] Commentaries to the Draft Articles, 53 (2011). Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf (last visited 19 Nov. 2022).
[73] *Supra* note 65, art. 20-25: consent, self-defence, countermeasures, force majeure, distress, necessity.
[74] Report of the International Law Commission, UN General Assembly Official Reports, Supplement No. 10, UN Doc. A/59/10, 111, para. 3 (2004).

The provisions concerning attribution raise a few issues, however. Firstly, although the Draft Articles refer to the notion of effective control, they do not specify how to determine which entity exactly exercises it. In terms of peacekeeping, for instance, it is evident that the entity in effective command and control of the operation is liable for combat-related harm in breach of international humanitarian law.[75] In this case, it would be the entity that issued the order that led to harm to third parties. However, in the human rights context, it is insufficient to simply evaluate who issued the order: human rights violations are committed by foot soldiers, without any order from either the international organisation or the relevant state. One possible answer is that, while peacekeepers serve on behalf of their states as well as the organisation that authorised their mission, it is the relevant state that maintains disciplinary authority over the forces.[76] Nonetheless, the entity that did not issue the direct order might have a veto authority, which means it could have prevented the conduct, and, by extension, the harm caused by it. Are both entities accountable in this case?

The Draft Articles do not provide definitive and comprehensive answers to this and other questions related to effective control. This explains why the concept of effective control has been interpreted inconsistently in case law. To name a couple of instances, Dutch national courts took a different approach than the European Court of Human Rights (hereinafter ECtHR) when determining the contours of the criterion for attribution. In 2008, Hasan Nuhanovic, whose brother and father were killed by Bosnian Serb forces (because they were not permitted by the Dutch UN peacekeepers to leave Srebrenica together with them), argued that the peacekeepers' failure to save his relatives constituted a wrongful act, attributable to the Netherlands.[77] The Hague District Court concluded that the actions of the Dutch battalion should be solely imputed to the UN, since if state "A" places its organs under the direction and control of state "B" – or, by analogy, an international organisation – whichever action these organs take will be attributed to the state "B" or the international organisation.[78] This decision mirrored the

[75] Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces Headquarters: Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operation — Financing of the United Nations Peacekeeping Operations, Report of the Secretary-General, UN Doc. A/51/389, 6, para. 19 (1996).

[76] Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, 51 Harvard International Law Journal 113, 155 (2010).

[77] For facts of the case, *see* Mehida Mustafic-Mujic and Others v. the Netherlands, No. 49037/15, paras. 29-31 (2015). Available at: https://hudoc.echr.coe.int/eng?i=001-167040 (last visited Jan. 13, 2023).

[78] Rechtbank's-Gravenhage (District Court), HN v. Netherlands (Ministry of Defence and Ministry of Foreign Affairs), Judgement LJN: BF0181/265615; ILDC 1092 (2008),

ECtHR's approach in the joined cases *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*,[79] which determined that the alleged wrongful act was exclusively attributable to the UN, concluding that the Court, therefore, lacked competence *ratione personae* to rule on conduct taken on behalf of the UN by the respondent states.[80] This line of reasoning, however, was not sustained by the Dutch appeal and Supreme courts. *A contrario,* the latter backed the notion of the possibility of dual attribution, affirming the Netherlands' responsibility along with the UN's.[81]

Although the concept of dual attribution has been recognised by the ILC in its report,[82] the Draft Articles leave little room for dual attribution based on dual (or joint) control of the conduct in question. If an organ is placed at the international organisation's disposal, then its conduct is attributable to the latter (Article 7), while if the state exercises effective control over the conduct, it is to be called to account for it.[83] It appears that the latter rule for attribution excludes the former.

On a positive note, another peculiarity of the Draft Articles is how they addressed the scenarios of a member state attempting to escape (one of) its international commitments through an international organisation.[84] This clause ensures that states parties to the human rights conventions (*inter alia*) cannot simply abdicate their obligations by transferring competence to international organisations. Draft Articles also acknowledge the converse situation, where an international organisation violates its international legal commitments by authorising its member states to carry out decisions that would be illegal if carried out by the organisation itself.[85]

Equally important rules were also included in the Draft Articles' reparation provisions. Articles 34 to 40 lay down that international organisations must

https://opil.ouplaw.com/display/10.1093/law:ildc/1092nl08.case.1/law-ildc-1092nl08?prd=OPIL (last visited Jan. 13, 2023).

[79] The cases dealt with the responsibility of States (namely France, Norway and initially Germany) for the actions of their troops serving as part of NATO's Kosovo Force (KFOR), established by a resolution of the UN Security (1244). The Behrami case involved accusations against French troops of KFOR, who, despite being in charge of mine and ordnance clearing operations, allegedly failed to de-mine the region, which resulted in the killing of one boy and injuring of another (paras. 5-7). Mr. Saramati, on the other hand, claimed that he had been subjected to extrajudicial detention by KFOR troops (and later UN Interim Administration Mission) without access to court (para. 62).

[80] Behrami and Behrami v. France and Saramati v. France, Germany and Norway, No. 71412/01, §143-152 (2007). Available at: https://hudoc.echr.coe.int/fre?i=002-2745 (last visited Jan. 13, 2023).

[81] The State of the Netherlands v. Hasan Nuhanović, Case No. 12/03324, Supreme Court of the Netherlands, 22-23, para. 3.11.2 (2013).

[82] *Supra* note 56, 101.

[83] *Supra* note 65, art. 7; *See also* Stian Øby Johansen, *Dual Attribution of Conduct to both an International Organisation and a Member State*, 6 Oslo Law Review 178, 186 (2019).

[84] *Id.*, art. 61: "A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation".

[85] *Id.*, art. 17 (1) and (2).

pay full reparation for material and moral harm caused by their actions or omissions.[86] Interestingly, reparation in this case appears to be an obligation of the wrongdoer, in contrast to the right of the injured party. It follows that the obligation will arise regardless of whether the injured party makes a claim. Moreover, in its commentary, the ILC noted that the lack of adequate financial means to pay full reparation would not exempt an international organisation from this obligation.[87] The ILC asserted that the international organisation could not use its internal regulations to justify its failure to comply with its obligations.[88] While the provision is *ipso facto* ambitious and promising, the reality remains that international organisations are still guided by their own internal rules and procedures. Hence, a claim brought against the international organisation will be a part of its *lex specialis*, which, in turn, will take precedence over the obligation to make full reparation.

Another defect of these Draft Articles is the provisions concerning the invocation of responsibility. Although the victims of international human rights law violations are private persons, only states and international organisations can invoke the responsibility of international organisations.[89] In accordance with Article 43, the responsibility of an international organisation can be invoked by a state or international organisation if the breached obligation is owed directly to them or to a group they belong to, or to the international community.[90] Although Draft Articles do recognise that other actors (including private persons) may be entitled to invoke international organisation's responsibility, they only cover the implementation of the responsibility of international organisations by states or by other organisations.[91] They thus leave little possibility for individuals to directly hold international organisations accountable. This demerit is extant despite the ILC's acknowledgement that there are international obligations owed to individuals that international organisations could breach.[92] Article 33 (2) of the Draft Articles clarifies the scope of these obligations as extending to "*any right, arising from the international responsibility*[93] *of an international organisation, which may accrue directly to any person or entity other than a State or an international organisation*".[94] This provision implies the violations which may

[86] *Id.*, art. 34-40.
[87] Report of the International Law Commission, UN General Assembly Official Records, Supplement No. 10, UN Doc. A/64/10, 112, no. 3 (2009).
[88] *Id.*, 113, no. 1.
[89] *Supra* note 65, art. 43.
[90] *Ibid.*
[91] *Id.*, art. 50.
[92] *Id.*, art. 10.
[93] International responsibility is a legal institution by which a subject of international law is called to account for the breach of an obligation under international law against another subject of international law.
[94] *Supra* note 65, art. 33 (2).

occur directly in relation to individuals, yet the Draft Articles do not cover the consequences of such violations.[95]

It is also important to mention that the provisions of the Draft Articles make no mention of accountability mechanisms.[96] They do not contain any attempt to tackle the impediments preventing individuals from holding international organisations accountable.[97] Without adequately addressing the issues concerning the absence of available judicial forums for individuals to bring claims against international organisations or immunity-related procedural barriers, it would be safe to state that the ILC's normative exercise is lacking a logical conclusion.[98]

C. *Mutatis mutandis* applicability

Owing to the lack of authoritative documents or consistent and comprehensive case law on the matter, analogous application of the principles of international responsibility of states to international organisations has steadily gained more consideration.[99] This should not come as a surprise since the rules applicable to states under the ILC's Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter ARSIWA) are, in essence, *mutatis mutandis* applicable to international organisations. Article 58 of the Draft Articles is a prominent illustration of how ARSIWA Article 16 applies to the issue of international organisations.[100] Nonetheless, even this approach paves the way to inconsistent decisions in case law, as illustrated above. Binding, authoritative documents are needed to address the problem, provide answers to the issues of attribution of responsibility, and further clarify the notion of "effective control".

III. Established mechanisms and way forward

A. Alternative remedy approach

Thus far, two major approaches have been used to tackle the issue in question: the alternative remedy approach and the judicial approach.

[95] Armin von Bogdandy and Mateja Steinbrück Platise, *DARIO and Human Rights Protection: Leaving the Individual in the Cold*, 8 International Organizations Law Review 67, 67 (2012).
[96] Vanessa Richard, *International Organizations between Responsibility and Accountability: Is the Regime Drafted by the ILC Appropriate for International Organizations?* 46 Revue Belge de Droit International 190, 191-192 (2013).
[97] Jan Wouters, Jed Odermatt, Are All International Organizations Created Equal? Reflections on the ILC's Draft Articles of Responsibility of International Organizations, Leuven Centre for Global Governance Studies, 3-4 (2012).
[98] Kibrom Teweldebirhan, *Outsourcing Accountability: States, International Organizations and Accountability Deficit in International Law*, 20 Southwestern Journal of International Law 313, 321 (2015).
[99] Kjetil Mujezinovic Larsen, The Human Rights Treaty Obligations of Peacekeepers, 100 (2012).
[100] Article 16 of ARSIWA concerns "Aid or assistance in the commission of an internationally wrongful act", while Article 58 of the Draft Articles deals with "Aid or assistance by a State in the commission of an internationally wrongful act by an international organization".

Alternative remedy approach was initially adopted by the ECtHR[101] and subsequently used by domestic jurisdictions in Europe.[102] It entails direct action through internal accountability systems. In other words, the grant of immunity to an international organisation could constitute a violation of individuals' right to a court, if the claimants do not have recourse to another remedy ("alternative" to national courts) to protect their rights.[103] Thus, before granting immunity, a national court must first determine if an alternative remedy is available. Several merits of this approach can be noted:

Firstly, it gives legal significance to the status of individual claimants through reinstating the normative contradiction between organisational immunity and human rights. This enables the court to lift immunity if it finds that there was no alternative remedy available to the plaintiffs.[104]

Secondly, it recognises that procedures other than those made available under the domestic legal systems may meet the conditions of the right to a court of law, thus helping courts avoid conflict. In other words, immunity may be provided while not infringing on human rights because the international organisation has established internal systems or provides the option of instituting an arbitration. This appears to be a fair balance between an international organisation's right to be immune from jurisdiction and an individual's right to seek jurisdictional protection.[105]

This approach, therefore, focuses on a local solution via setting up organisational-level remedial mechanisms, used *inter alia* to handle third-party claims.[106] It has become an increasingly appealing option.[107] Such instruments safeguard the autonomy of an international organisation but simultaneously guarantee its accountability, thus fulfilling the organisation's commitment to providing adequate methods of settlement in return for jurisdictional exemption. Prominent examples include the inspection panel model introduced by the World Bank in 1993 in response to increased accountability demands.[108] The Inspection Panel (hereinafter the Panel), which is now housed by the World Bank Accountability Mechanism, consists of three members and serves as an impartial platform for individuals and

[101] Waite and Kennedy v. Germany, No. 26083/94 (1999). Available at: https://hudoc.echr.coe.int/eng?i=001-58912 (last visited Jan. 13, 2023).
[102] *See* Federal Supreme Court of Switzerland, X. v. ICRC, Case No. 5A_106/2012, para. 7.2.1 (2012).
[103] Waite and Kennedy, No. 26083/94.
[104] *See* Charitos Stavrinou v. United Nations and Commander of the UN Force in Cyprus, Supreme Court of Cyprus, Civil Appeal № 8145, 10 (1992); *See also* Siedler v. Western European Union, Brussels Labour Court of Appeal (2003).
[105] *Supra* note 17, 196.
[106] Teweldebirhan, *supra* note 98, 322.
[107] Karel Wellens, *Accountability of International Organizations: Some Salient Features*, Proceedings of the Annual Meeting, 97 Cambridge University Press 241, 245 (2003).
[108] International Bank for Reconstruction and Development, International Development Association, Resolution No. IBRD 93-10, Resolution No. IDA 93-6, The World Bank Inspection Panel (22 Sep. 1993).

communities who have been or may be affected by the Bank's policies and the projects it finances.[109] After the Panel has reviewed the requests for investigation and determined that they are eligible, the complainants have two options: to have their complaint referred to the Dispute Resolution Service, where they can try to reach an agreement,[110] or have the Panel launch a compliance investigation.[111]

In the human rights context, a representative case would be the Panel's consideration of human rights concerns in its inspection in the Chad-Cameroon and Pipeline Project.[112] The investigation report mentioned a number of alleged violations of the Bank's social and environmental policies, including involuntary resettlement and health damage associated with the project financed by the Bank.[113]

Another potentially useful instrument for ensuring, or at least improving, responsibility for violations of individual rights under international law would be the ombudsman model. The concept of an ombudsman has been successfully applied in the European Union law, where the institution was established by the 1992 Maastricht Treaty.[114] The purpose of the Ombudsman is to receive and examine complaints from the citizens and residents of the Union, concerning maladministration by the institutions, bodies, offices and agencies of the Union. In case the claim of maladministration is confirmed, the Ombudsman refers it to the entity concerned along with a report, which is also forwarded to the European Parliament.

As illustrated, these mechanisms provide an accountability forum for communities or individuals that are or may be damaged by the organisation's decisions and actions and promote the rule of law within the institutions themselves. However, it is important to recognise the flip side of this coin. The following issues of the internal remedial mechanisms stand out:

1) The construction of such a structure is subject to the organisation's disposition in all cases.[115]

[109] *Id.*, para. 2, 12.
[110] International Bank for Reconstruction and Development, International Development Association, Resolution No. IBRD 2020-0005, Resolution No. IDA 2020-0004, The World Bank Accountability Mechanism, para. 11 (2022).
[111] International Bank for Reconstruction and Development, International Development Association, Resolution No. IBRD 2020-0004 and Resolution No. IDA 2020-0003, The World Bank Inspection Panel, para. 34 (2020).
[112] World Bank Inspection Panel, Investigation Report: Chad-Cameroon Petroleum Development and Pipeline Project (loan no. 4558-CD); *See also* Petroleum Sector Management Capacity-Building Project (credit no. 3373-CD) and Management of the Petroleum Economy Project (credit no. 3316-CD) (2002).
[113] *Id.*, para. 34-37, 210-217 (2002).
[114] Consolidated Version of the Treaty on the Functioning of the European Union, O.J. C 326/47, art. 228 (2012).
[115] *Supra* note 98, 323.

2) It constitutes a structural component of an international organisation, and the outcome of the process is the organisation's decision.[116] The fact that the international organisation itself staffs and finances this mechanism casts doubt on the latter's independence.[117] The internal administrative processes of the UN, for instance, the organisation is entirely in charge of the investigation, processing, and final adjudication of claims.[118]

3) No less debatable is the issue regarding third-party access to these processes. International organisations not seldom operate as sentries to decide if individuals can make use of the organisation's internal mechanisms.[119] Consider the Inspection Panel of the World Bank, in which a claim may only be submitted by a group of two or more persons, not by an individual.[120]

4) Uncertainty remains over the question as to what exactly constitutes a "reasonable" alternative to national courts. ECtHR considers any means provided by the organisation itself sufficient.[121] The position advanced in the *Mothers of Srebrenica* case[122] is notably perplexing – namely, that a remedy directed against a subject other than the organisation itself can be seen as a reasonable substitute for a remedy against the latter.[123] This interpretation entirely disregards international organisations' accountability and deviates from the concept that an organisation should "compensate" for its immunity by offering appropriate remedies.[124] The perils of such a position are furthermore evident in cases where states and international organisations share responsibility (e.g. peacekeeping operations), where international organisations may be granted immunity since the Contributing State may be sued instead, while the State can place all responsibility on the organisation.[125]

Moreover, although the alternative-remedy approach has achieved some traction, in practice it remains dismally infrequent.[126] Courts appear to be

[116] Matteo Tondini, *The "Italian Job": How to Make International Organisations Compliant with Human Rights and Accountable for Their Violation by Targeting Member States*, Accountability for Human Rights Violations by International Organisations 169, 174 (2010).
[117] Devika Hovell, *Due Process in the United Nations*, 110 American Journal of International Law 1, 43 (2016).
[118] Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations, UN Doc. A/51/389, para. 10, 20 (1996).
[119] *Supra* note 98, 324.
[120] Inspection Panel at the World Bank, Operating Procedures, para. 11 (a) (2021).
[121] *Supra* note 19, 197.
[122] The case concerned the failure of the Dutch battalion operating as the UN peacekeeping force to protect Bosnian civilians from the massacre committed against them by Bosnian-Serb forces in Srebrenica, a village in Bosnia and Herzegovina. The relatives of the victims of the massacre tried to call the UN to account for its peacekeepers' actions through Dutch courts. The decision confirmed UN's total immunity from prosecution.
[123] Mothers of Srebrenica and others v. the Netherlands, No. 65542/12, § 167 (2012). Available at: https://hudoc.echr.coe.int/fre?i=002-7604 (last visited Jan. 13, 2023).
[124] *Supra* note 19, 197; *See also* August Reinisch, *The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals*, 7 Chinese Journal of International Law 285, 285 (2008).
[125] *Ibid.*
[126] *Id.*, 199.

cautious about lifting immunity by reason of deficiencies of the procedural nature of international organisations' internal dispute settlement mechanisms.[127] To illustrate, the Brussels Court of Appeals upheld NATO's immunity in a case involving the repercussions of NATO bombardment in Libya in 2011, which led to civilian casualties.[128] The Court, furthermore, ventured to state that the claimants could bring the proceedings before Libyan courts, or sue the member states of the organisation, or alternatively may have sought diplomatic protection. This was a rather confusing argument on behalf of the Court: it is questionable if the Libyan courts would have been effective or accessible in spite of the civil war, or if they would have had jurisdiction over this issue in the first place.

Lastly, no such mechanism holds significance if judicial or quasi-judicial measures provide more appropriate remedies. Dissatisfaction with these systems has in numerous cases prompted new legal action in human rights courts, which could be claimed to operate as last-resort courts for matters concerning international organisations' accountability. One example would be *Gasparini v. Italy and Belgium* case, which revolved around a labour dispute between NATO and its employee.[129] After taking action before the NATO Appeals Board and having his appeal dismissed, Mr. Gasparini alleged before the ECtHR that NATO's internal labour dispute settlement mechanism breaches the fundamental provisions and the fair-hearing requirements under the ECHR.[130] ECtHR could not identify any "manifest inadequacy" in NATO's internal dispute resolution mechanism and subsequently dismissed the case.[131]

Furthermore, the alternative-remedy approach does not hold up due to revisionist decisions such as the one in the *Mothers of Srebrenica* case, in which the ECtHR ruled that the absence of an alternative remedy does not *ipso facto* constitute a violation of the right of access to a court.[132] The Waite and Kennedy doctrine[133] is effectively invalidated through interpretations like this one, which is especially troubling from the human rights standpoint. Arguing that an international organisation's immunity should be prioritised, regardless of the availability of an alternative remedy, is essentially

[127] *Ibid.*
[128] El Hamidi and Chlih v. North Atlantic Treaty Organization (NATO) and Belgium (intervening), Appeal decision, ILDC 3043, JT 6772 (BE 2017).
[129] Gasparini v. Italy and Belgium, No. 10750/03 (2009). Available at: https://hudoc.echr.coe.int/eng?i=001-92899 (last visited Jan. 13, 2023).
[130] *Ibid.*
[131] *Ibid.*
[132] Mothers of Srebrenica and others, No. 65542/12, § 164.
[133] The doctrine promotes the idea that an international organisation should, in theory, only be immune from being challenged before domestic courts if it offers an alternate method of dispute resolution to persons seeking recourse against it.

equivalent to arguing that it must be upheld regardless of the organisation's impact on individuals.[134]

B. Judicial approach

Under the other approach, (human rights) courts have been turned to as a last – resort forum in case there are no internal remedial mechanisms available. It is thus a judicial approach and involves recourse to arbitration and human rights courts.

In relation to the issue of who determines the accountability of international organisations, one may be tempted to look for an independent court with universal jurisdiction and the authority to issue binding decisions.[135] However, in the contemporary international legal order, the search for such a court is destined to fail.[136] International law is a decentralised legal system devoid of courts with mandatory jurisdiction over all subjects. There is no single regime capable of hosting international organisations and no legally mandated system of dispute settlement (e.g., the proliferation of international courts and tribunals) that they can consent to.[137]

In practice, individuals often resort to human rights courts. However, this approach likewise cannot be sustained for a number of reasons. First, the classic state-individual approach underpins the majority of human rights regimes. As already mentioned, international organisations are, in their majority, not bound by human rights conventions as signatories. Claims brought against them may accordingly be dismissed by the courts due to the lack of standing.[138]

One may argue hereby that the codification and near-universal adoption of human rights norms laid down, *inter alia,* in the Universal Declaration of Human Rights (UDHR)[139] has developed them into customary international law, recognising them as legally binding rules.[140] Customary international law is presumed to be applicable to all subjects of international law – it follows from this point that international organisations are likewise bound by

[134] *Supra* note 19, 201.
[135] José M. Beneyto, Accountability of International Institutions for Human Rights Violations, Introductory Memorandum, Council of Europe, Committee on Legal Affairs and Human Rights, para. 38 (2013).
[136] Antonios Tzanakopoulos, *Strengthening Security Council Accountability for Sanctions,* 19 Journal of Conflict and Security Law 409, 418 (2014).
[137] *Supra* note 98, 339.
[138] *See* Behrami and Behrami v. France and Saramati v. France, Germany and Norway, No. 71412/01 (2007). Available at: https://hudoc.echr.coe.int/fre?i=002-2745 (last visited Jan. 13, 2023); *See also* Caitlin A. Bell, *Reassessing Multiple Attribution: The International Law Commission and The Behrami and Saramati Decision,* 42 New York University of International Law and Politics 501, 507-508 (2010).
[139] UN General Assembly, Resolution A/217 (III), Universal Declaration of Human Rights, UN Doc. A/RES/3/217 A (1948).
[140] Hurt Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 Georgia J. International & Comparative Law 287, 322 (1995); *See also* Christian Tomuschat, Human Rights: Between Idealism and Realism Actors, 4 (2003).

customary human rights norms.[141] This point is hardly contentious, however, we run into the accountability dilemma again: even if international organisations are obliged to observe human rights norms, there is no forum for victims to bring claims and exercise remedies.[142]

Another complication would be that an individual petition procedure is required in a human rights regime, in order to make a claim admissible in a human rights court.[143] For this reason, a claim against an international organisation as a defendant can only be heard in a human rights court if individual applications are permitted under the relevant human rights framework, or if it is brought by the state.[144]

A further challenge is posed by the fact that these courts lack jurisdiction over claims regarding operations which were conducted outside their geographical confines.

In this regard, one may raise the question regarding the role of national courts. Some opine that in order to be sufficiently effective, recourse to arbitration might necessitate the involvement of national courts.[145] However, this method would be rather problematic and largely cumbersome. To commence with, national courts lack the necessary expertise in public international law to rule on such issues. Moreover, they do not appear to be the appropriate forum for conducting the legal assessment of the peculiarities of the dispute settlement systems established by international organisations.[146]

In addition, allowing the national courts to decide whether or not to lift the immunity of international organisations may have adverse consequences. Namely, this may pave the way for contradictory rulings by courts of different member states, undermining the uniform application of regulations and subsequently causing ambiguity and tensions.[147] This would jeopardise the organisation's capacity to function properly.[148]

Next, an international organisation's independence in carrying out its objectives may be endangered if the national judiciary is allowed to interfere

[141] Henry G. Schermers, Les Bases Juridiques de l'Action des Organisations Internationales, in: R. Dupuy (ed.), A Handbook on International Organisations, 402 (1998); *See also* Niels Blokker, *International Organizations and Customary International Law: Is the International Law Commission Taking International Organizations Seriously?* 14 International Organizations Law Review 1, 2 (2017).
[142] *Supra* note 41, 53.
[143] *Supra* note 98, 326-327.
[144] *Ibid.*
[145] Emmanuel Gaillard, Isabelle Pingel-Lenuzza, *International Organisations and Immunity from Jurisdiction: To Restrict or to Bypass,* 51 International and Comparative Law Quarterly 1, 12 (2002).
[146] *Supra* note 2, 12.
[147] Rosa Freedman, Nicolas Lemay-Hébert, Siobhán Wills, The Law and Practice of Peacekeeping: Foregrounding Human Rights, 49 (2021).
[148] U.S. Court of Appeals for the District of Columbia Circuit, Marvin R. Broadbent et al., Appellants, v. Organization of American States et al., 628 F.2d 27 (D.C. Cir. 1980).

in the organisation's activities.[149] Equally questionable is the issue regarding the enforcement of the national decision. Even in the event an individual obtains a decision convicting the organisation, it is uncertain how the individual would be able to enforce this decision.[150]

Thus, the above-mentioned arguments suffice to show that neither the alternative-remedy approach nor the judicial approach is efficient on its own. This illustrates the necessity to introduce a framework of restricted immunity for international organisations.

C. Proposed mechanisms

There are two feasible methods for narrowing down the scope of jurisdictional immunities.[151] The first option would be to resort to a multilateral treaty that would apply to all types of organisations. As already mentioned, there is (at the time of writing) no such document. The Draft Articles were thus far the only real attempt, but ultimately failed to gain formal acknowledgement from the international community. The reason behind the Draft Articles' failure could have been their uniform standards, which would be impractical to apply to all international organisations.[152] A more comprehensive document, which would include an all-inclusive set of standards for the diverse range of international organisations would be preferable.

Another one would be relying on a headquarters agreement, or other instruments similar to the treaty governing the UN's immunities.[153] At present, many constituent instruments or bilateral headquarters agreements provide jurisdictional immunity to international organisations. Oftentimes, however, this is stated in such an imprecise way that the immunity is interpreted to be absolute and limitless. It should go without saying that an international organisation could never have intended to claim absolute immunity from suit. This necessitates the drafting and adoption of more precise and detailed provisions on jurisdictional immunities and their restriction, which would effectively eradicate the lack of accountability of international organisations.

A more effective practical approach in the present state of international law would be to consider dual attribution and shared responsibility in courts. For instance, the air campaign conducted by NATO on the territory of former

[149] Frédéric Mégret, *The Vicarious Responsibility of the United Nations for 'Unintended Consequences of Peace Operations'*, United Nations University Press, 250-267 (2008).
[150] *Supra* note 146.
[151] *Supra* note 145, 8.
[152] Möldner, *supra* note 64, 323-324.
[153] *Supra* note 25; *See also* General Convention on the Privileges and Immunities of the United Nations, United Nations Treaty Series, vol. 1, 15 (1946).

Yugoslavia in 1999[154] is perhaps the greatest illustration of a situation in which both the member states and the international organisation may have been held jointly accountable. The conduct in this case could be attributed to NATO and to those of its member states that participated in the execution of the military action, or otherwise contributed to it.

The importance of this is especially evident when one considers the legal vacuum (in terms of human rights protection in peacekeeping missions mandated by international organisations such as the UN) generated or perpetuated by the court decisions such as the one in Behrami and Saramati.[155] Excluding the rare exceptions, till now most cases involving the accountability of troop contributing states and international organisations have attributed the conduct to the international organisation and beendismissed on the grounds of the immunity of these organisations.[156] Dual attribution would at least partially solve the accountability gap, deter contributing states from irresponsible actions and encourage international organisations to more closely monitor the actions of the individuals working under their mandate. Furthermore, particularly from the standpoint of victims, binding rules for attributing and apportioning responsibility for human rights breaches to and among several actors would serve as a guarantee that the burden of determining who is responsible and to what extent is not placed on the individual whose human rights were violated.

It must be noted that the concept of dual attribution has been previously confirmed in ECtHR's case law concerning the responsibility of states. In particular, in the *Ilascu and Others v. Moldova and Russia* case,[157] ECtHR found both state parties (Russia and Moldova) responsible for the conduct, although for different aspects of it. Namely, Russia was found accountable for the acts of the authorities over whom it allegedly exercised effective control (or influence),[158] while Moldova was held accountable for failing to "discharge its positive obligations" to take measures to protect the applicants' rights under the European Convention on Human Rights.[159]

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[154] *See generally* Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, International Criminal Tribunal for the Former Yugoslavia (2000).
[155] *Supra* note 99, 154.
[156] *See* Bankovic and others v. Belgium and others, No. 52207/99 (2001). Available at: https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-22099&filename=BANKOVI%C4%86%20AND%20OTHERS%20v.%20BELGIUM%20AND%20OTHERS.docx&logEvent=False (last visited Jan. 13, 2023).
[157] The case concerned the arrest and subsequent sentencing of four Moldovans in the Moldovan enclave of Transdnestr, which is under effective control of Russia. Upon their release, two of the arrested Moldovans initiated a trial against Russia for the infringement of their rights while in custody, and Moldova for attempting to breach the applicants' right of individual application to the Court.
[158] Ilascu and Others v. Moldova and Russia, No. 48787/99, § 392-93 (2004). Available at: https://hudoc.echr.coe.int/eng?i=001-61886 (last visited Jan. 13, 2023).
[159] *Id.*, para. 352.

Furthermore, dual attribution has been applied in relation to both the international organisation and the member state. This is evidenced by the *Nuhanovic* case, discussed in the previous section. However, cases like these are not common occurrences. There is a substantial scarcity of case law and the concept has not gained much popularity over the years.

Regardless of which approach is to be taken, reducing immunities would remove the accountability gap in international law and improve the effectiveness of these organisations through increased accountability.[160]

Conclusion

This article reckons the lack of accountability mechanisms for international organisations as a significant legal issue in international law, which both policymakers and scholars need to weigh into and handle. The merits of immunity are indisputable: international organisations would be unable to complete their objectives if they were subject to the jurisdiction of courts for all their activities. This argument, however, only concerns disputes that may jeopardise the execution of the organisation's core prerogatives. Consequently, setting limits on the jurisdictional immunities of international organisations is appropriate if the functioning and/or independence of the organisations are not at stake.[161] There can be no reason why international organisations cannot or must not be held accountable for the harmful consequences of their actions. As Dr. Pasquet rightfully puts it: "*Denial of justice is itself an injustice; even a double injustice when it concerns the victims of human rights violations*".[162] Contending otherwise would mean prioritising the organisation's protection over human rights, in particular, the right of access to justice, which is guaranteed to all private persons.

In fact, absolute immunity is ruled out under the functional necessity theory itself.[163] The latter presents a rather narrow definition of "necessity", according to which the international organisation can only be entitled to immunity if the latter is paramount for organisational purposes.[164] The restriction of immunities, therefore, is consistent with international law principles (principles of good faith, rule of law, as well as general international humanitarian law principles of proportionality and of necessity when using force, accountability for wrongful acts, among others).[165]

This article considered three principal ways of obviating the "denial of justice": access to effective alternative remedies, recourse to arbitration and,

[160] *Supra* note 20, 913.
[161] *Supra* note 145, 5; *See also* Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 Virginia Journal of International Law 5, 53 (1995).
[162] *Supra* note 19, 201.
[163] *Supra* note 20, 902.
[164] Steven Herz, *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity*, 31 Suffolk Transnational Law Review 484, 519 (2007).
[165] *Supra* note 45, 5-15.

lastly, the option to restrict jurisdictional immunities granted to international organisations. The first two were shown to be feeble in practice, making the last option needful. Additionally, the possibility of dual attribution was evaluated.

Thus, although there has been an increase in demand to ensure the accountability of international organisations in recent decades, much work remains to be completed. The paramount goal is to see justice served, which can only be accomplished if international organisations can be held to account - which, in turn, can work only if their immunities are restricted.

Dmytro Mykolayets[*]

THE RIGHT TO WORK FOR UKRAINIAN REFUGEES AND ITS REALIZATION IN EUROPE

Abstract

The protection of the rights of refugees has been one of the important branches of human rights protection, since such persons require additional protection measures due to the difficulties they have faced and which have forced them to find asylum in another country. This issue has become especially relevant for the citizens of Ukraine, who were forced to leave their country and move to European countries to save their lives due to the armed aggression of the Russian Federation. In this article the protection of the right to work of Ukrainian refugees in European countries is analysed from a comprehensive theoretical and practical aspects and the practical implementation of this right in the EU member states are discussed. Particularly, article focuses on shortcomings in the legal acts of the EU and analyses the legislation of three EU member states, namely Poland, Germany and Latvia. Finally, some suggestions with regard to amendments to current legal norms and promoting their integration into society are made to ensure protection of the rights of Ukrainian refugees.

Annotasiya

Qaçqınların hüquqlarının qorunması insan hüquqlarının müdafiəsinin ən mühüm məsələlərindən biri olmuşdur. Belə ki, bu şəxslər üzləşdikləri çətinliklərə görə əlavə müdafiə tədbirlərinə ehtiyac duyurlar və bu da onları başqa ölkədə sığınacaq tapmağa məcbur edir. Həmin məsələ son dövrlərdə Rusiya Federasiyasının silahlı təcavüzü nəticəsində öz ölkəsini tərk edib Avropa ölkələrinə getmək məcburiyyətində qalmış Ukrayna vətəndaşları üçün əhəmiyyət daşıyır. Məqalədə ukraynalı qaçqınların Avropa ölkələrində əmək hüquqlarının müdafiəsi müzakirə olunur və Aİ-yə üzv dövlətlərdə sözügedən hüquqların həyata keçirilməsi nəzəri və təcrübi cəhətdən hərtərəfli təhlil edilir. Xüsusilə, məqalə Aİ-nin qəbul etdiyi hüquqi aktlardakı çatışmazlıqlara diqqət yetirir və İttifaqa üzv olan üç ölkənin: Polşa, Almaniya və Latviyanın müvafiq sahədəki qanunvericiliyini təhlil edir. Sonda isə ukraynalı qaçqınların hüquqlarının müdafiəsini təmin etmək üçün mövcud qanunlara əlavələrin edilməsi və qaçqınların cəmiyyətə inteqrasiyasını dəstəkləməklə əlaqədar təkliflər verilir.

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Introduction

In the process of establishing the UN, all states came to the conclusion that the individual is at the centre of all interests and that the protection of his/her rights should be a key element in all activities of states.[1] This is particularly relevant to refugees, who are considered a vulnerable category. The problem of refugees concerns both states, international organizations, and the world community which is explained by the fact that this issue is not just about human life, but about the fate of hundreds of millions of residents. For this reason, a large number of international norms protecting human rights in general and refugees rights in particular have been adopted at the international level.

Recently, the practical importance of developing a scientific basis for solving the problems of ensuring and protecting the rights and freedoms of persons recognized as refugees has increased.[2] At the same time, ensuring proper protection of the legitimate interests of persons recognized as refugees is associated with overcoming a number of legal problems and gaps. They are caused by migration flows of refugees in Europe and have become urgent due to the lack of attention of legal scholars and the imperfection of modern institutional means of protecting the legitimate interests of recognized refugees. Therefore, these problems require finding effective ways to overcome them resorting to public legal and socio-economic transformations.[3]

The issue of the protection of the rights of refugees has become actual for the citizens of Ukraine after the Russian Federation invaded the territory of Ukraine without a declaration of war on 24 February 2022 and attempted to violate its state sovereignty.[4] Due to the fact that a number of people suffered from Russia's illegal actions, which are contrary to international law, numerous Ukrainian citizens were forced to go abroad to save their lives and

[1] United Nations, Charter, Preamble (1945).
[2] A. Stashchuk, Problems of Refugee Rights and Modern Challenges, 10 (2018).
[3] R. Kaliuzhnyi, H. Tymchyk, *Administrative and Legal Status of Persons Recognized as Refugees in Ukraine*, 22 (2015).
[4] Diana Roy, How Bad Is Ukraine's Humanitarian Crisis a Year Later? Council on Foreign Relations (2023), https://www.cfr.org/in-brief/ukraine-humanitarian-crisis-refugees-aid (last visited Jan. 25, 2023).

protect basic human rights.[5] Because of this, European states, which have received large numbers of Ukrainian refugees, have developed legal acts and instructions aimed at protecting refugees and integrating them into normal life.[6]

In spite of the fact that there are several documents at the European Union (hereinafter the EU) level, (for example: Charter of Fundamental Rights of the European Union,[7] Council Directive on the Status of Third-country Nationals Who are Long-Term Residents,[8] Directive of the European Parliament and of the Council of Establishing Standards for the Reception of Applicants for International Protection,[9] Council Directive on Minimum Standards for the Provision of Temporary Protection in the Event of a Mass Influx of Displaced persons and on measures to promote the balance of efforts between Member States to receive such persons and to bear the consequences,[10] which establishes standards for the reception of persons requesting international protection) that are binding on all member states with regard to the rights of refugees, certain aspects related to procedural issues differ from one country to another. Because of this, it is worth paying attention to the peculiarities of the legal system of the country and the legal regulation of refugee protection in the European countries in order to most effectively protect Ukrainian citizens.

Moreover, special attention should be paid to the issue of refugees' enjoyment of basic rights, including the right to work. This right is essential for ensuring the normal functioning of each person and his/her personal growth. The right to work predetermines the possibility of realization of a number of other social and labour rights: the right to rest, to fair wages, to safe working conditions, etc.[11] Since refugee status has its own characteristics, it is worth considering the question of employment of Ukrainian refugees abroad, in order to determine the most loyal jurisdictions.

It is worth noting that currently, many problems affect the integration of refugees in the labour market of member states. The main problem in the context of the realization by Ukrainian citizens of their right to work is the unequal approach of the EU member states to the regulation of the specifics of the employment of refugees. In addition, states regulate the procedure for

[5] *Ibid.*
[6] UNHCR, Refugee Protection: A Guide to International Refugee Law, 6 (2001).
[7] *See* Charter of Fundamental Rights of the European Union (2000). Available at: https://www.citizensinformation.ie/en/government_in_ireland/european_government/eu_law/charter_of_fundamental_rights.html (last visited Dec. 1, 2022).
[8] *See* Council Directive Concerning the Status of Third-country Nationals who are Long-term Residents, 2003/109/EC (2003).
[9] *See* Directive of the European Parliament and of the Council Laying Down Standards for the Reception of Applicants for International Protection (recast), 2013/33/EU (2013).
[10] *See* Council Directive on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving such Persons and Bearing the Consequences thereof 2001/55/EC (2001).
[11] International Covenant on Economic, Social and Cultural Rights, art. 7 (1966).

obtaining temporary protection and the document that a person receives after its confirmation in different ways. The second problem that prevents obtaining temporary asylum is the long period of obtaining such a permit. The next problem is the advisory nature of many acts that some countries simply ignore. It also creates obstacles in the further realization of the rights of Ukrainian refugees. The fourth problem is the unavailability of integration courses and language learning for many Ukrainians.

Hence, this article analyses EU legislation on the protection of the rights of refugees, its practical aspects and propose solutions where these rights are not sufficient for adequate legal protection.

I. Protection of fundamental rights of refugees in international law

The importance of human rights is always high and occupies a leading place in national and international law-making, but special attention is still given to the rights of vulnerable categories of people, especially those who have suffered and are in need of special protection.[12] Refugees are one of such category of persons. Most refugees appear as a result of international or domestic military conflicts. The phenomenon of refugees is determined primarily by a forced and undesirable change of place of residence for a citizen.[13]

The term *refugee* should be understood to mean a foreigner (including a stateless person) who as a result of a well-founded fear of persecution or a threat to his life is forced to leave the territory of the state of which that person is a citizen (or in whose territory he/she permanently resides) and is unable or unwilling to enjoy the protection of that state as a result of these fears.[14] The definition of the refugees consists of the provisions of the Convention Relating to the Status of Refugees. This document has become a universal and basic international instrument, which enshrines the definition of a refugee in international law. The main achievement of this Convention is that for the first time it focuses not on a group of people at risk of persecution on ethnic grounds, but on a specific person - a refugee.[15]

After all, before the adoption of the Convention, international law focused on a group of persons facing the threat of persecution on the basis of ethnicity, and the adoption of the Convention initiated concentrate on a specific person - a refugee. In the rules of the Convention, the concept of "refugee" is indicated in the singular, therefore, in order to receive legal protection, a person does not need to be a part of a certain group of persons (for example,

[12] Alexander H. E. Morawa, *Vulnerability as a Concept of International Human Rights Law*, Centre of International Relations 139, 139 (2003).
[13] Stashchuk, *supra* note 2, 3.
[14] United Nations, Convention Relating to the Status of Refugees, art. 1 A (2) (1951).
[15] *Ibid*.

an ethnic group), it is enough to simply apply for protection on his own on the basis of the relevant grounds specified by the Convention.[16]

In our opinion, the above definitions of this term are not complete. Accordingly, we would like to offer our own version to this concept. Therefore, refugees are persons who have left their country of permanent residence and are outside its borders due to extraordinary circumstances (armed conflicts, violence, climate change, etc.) and are forced to flee their countries due to well-founded fears of becoming victims of persecution or fear of a threat to their own life and health or other reasons and who cannot use the protection of their country or do not want to use this protection owing to fears.

However, in 1966 the Protocol relating to the Status of Refugees was adopted, which detailed the concept of a *refugee* on a temporary basis.[17] This document was necessary due to the fact that in the Convention relating to the Status of Refugees of 1951, there were two limitations for the definition of a refugee[18] which created significant obstacles to solve the problems of refugees, to ensure their rights and freedoms at an adequate level. In other words, they could not be regarded as refugees because they occurred in the EU.

The essence of the temporal limitation is that the right to be considered a refugee did not extend to persons who became such as a result of events that occurred after January 1, 1951. The geographical limitation is that the specified events mean either events that took place in Europe before the date or events that occurred in Europe or elsewhere before the date.[19]

Other legal acts regulating general aspects of refugee protection include the Convention relating to the Status of Refugees of 1951,[20] IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War,[21] European Agreement on the Abolition of Visas for Refugees,[22] the Convention relating to the Status of Stateless Persons,[23] the UN Declaration on Territorial Asylum,[24] the Protocol relating to the Status of Refugees.[25] According to these international legal documents, legal status is commonly understood as a set of rights and obligations of natural and legal persons. Therefore, international legal status of a refugee can be defined as a system of recognized and enshrined rights and obligations in international law.[26]

[16] *Ibid*.
[17] United Nations, Protocol relating to the Status of Refugees, art. 1 (1966).
[18] *Ibid*.
[19] *Supra* note 14, art. 1 B (1).
[20] *Ibid.*
[21] *See* United Nations, IV Geneva Convention relative to the protection of civilian persons in time of war (1949).
[22] Council of Europe, European Agreement on the Abolition of Visas for Refugees (1959).
[23] UN Refugee Agency, Convention relating to the status of stateless persons (1954).
[24] United Nations, United Declaration on Territorial Asylum (1967).
[25] *Supra* note 17.
[26] *Supra* note 2.

As stated above, the fundamental rights of refugees and their protection are reflected in international law.[27] Formed under the influence of various events over decades, the norms are legal mechanisms that, taken together, not only formalized the legal protection of refugees, but also became the basis for the development of these norms in the legislation of countries. The presence of such a huge number of international and regional documents that differ from each other on many issues (for example, in the definition of the concept of a refugee) complicates the provision of effective legal assistance to refugees and rightfully puts on the agenda the question of the need to adopt and apply the same universal international agreement on the problems of refugees.[28]

Undoubtedly, the guarantees of the rights and freedoms of a person and a citizen are the main conditions, ways and means by which every person has the opportunity to realize his rights. Today one of the irreplaceable signs of a legal state is a developed democracy which is a real guarantee with regard to human rights, especially the right to work.

It is worth noting that, in addition to the necessary general issues raised in international legal documents, the issue of protection and realization of individual human rights of refugees remains unresolved. One of them is the right to work, which is the most essential human right.[29] Refugees, such as any other person, are endowed with a full range of inalienable fundamental rights and the fact that they have a certain status should in no way discriminate against them in the field of work. However, by virtue of the fact that a refugee enters another country and is under its protection, she or he is, accordingly, subject to the labour laws and requirements of that country.[30]

Thus, we can state that in one way or another, all refugees have the right to work, but the provision of this right must come from the host state. Freedom of work is an absolute right, it concerns an indefinite circle of persons, as well as the right to property, the right to life and other constitutional rights of a person and a citizen. Being an absolute right, it has priority over other rights that make up the comprehensive right to work.

Freedom of work is one of the basic human rights that are inalienable by nature, like freedom of speech, freedom of thought, freedom of movement, etc. A person deprived of freedom of labour turns into a slave, effectively losing human dignity. In other words, the essence of a person from the point of view of his material existence lies in his ability to work. From the social development aspect, the right to work is his freedom. It can be stated that international legal norms regarding the protection of human rights grant refugees the right to work and impose obligations on states to implement this

[27] *Id*., 8.
[28] *Ibid*.
[29] *Supra* note 14.
[30] *See* J. Milner, Refugees, The State and the Politics of Asylum in Africa (2009).

right. Furthermore, it determines the legislative and procedural issues of the practical implementation of these rights.[31]

II. European Union legislation on refugees and current issues of Ukrainian refugees' right to work in the EU

There are two main international legal approaches to the definition of a refugee: general and regional, since a well-founded fear of persecution on a limited list of grounds is an insufficient criterion to take into account all refugee situations.[32] An analysis of the provisions of most regional agreements demonstrates a more humane treatment of refugees than the 1951 Convention.[33] However, the EU law does not broaden the definition of *refugee*, but in order to protect those who do not fall under the conventional definition of refugee, introduces another type of protection: additional.[34]

Currently, these two concepts are regulated by two sources of law - universal and regional agreements. There are differences between these sources of interpretation of the concept of "refugee", which taking into account the growing flow of refugees are interpreted in favor of a regional approach.

As a result of the need to improve the definition of refugees, some countries, especially in Africa and Latin America have expanded it, believing that a well-founded fear of being persecuted on a limited list of grounds is insufficient to take into account all refugee situations. Thus, in clause 2 of Article 1 of the Organization of African Unity Convention on Specific Aspects of the Refugee Problem in Africa of 1969 states that the term "refugee" applies to any person who in view of external aggression, occupation, foreign domination or events that have seriously disturbed civil order in part or in the entire territory of the country of her origin or citizenship, is forced to leave her usual place of residence in order to seek refuge in another place outside the country of her origin or citizenship.[35]

An expanded definition of refugees is also contained in the Cartagena Declaration of 1984, which was adopted by the countries of Latin America and refers to refugees as "persons who have left their countries because their life, safety or freedom are threatened by general violence, foreign aggression, internal conflicts, mass violations of human rights or other circumstances that seriously violate public order".[36]

[31] L. Chimanda, S. Morris, Tanzania's National Legal Framework for Refugees, Law, Policy & Practice, Local Engagement Refugee Research Network Paper No. 5, 4-8 (2020).
[32] E. Herasymenko, *Regional Standards for Defining Refugees and Distinguishing Them from Related Categories of Migrants*, 6 (2) Law and Society, 100 (2020).
[33] *Ibid.*
[34] *Ibid*.
[35] African Union, OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, art. 1 (2) (1969).
[36] Cartagena Declaration on Refugees, The UN Refugee Agency, section III (3) (1984).

A peculiar regional approach to determining the status of refugees and the typology and systematization of forced migrants has developed in the EU. It has made significant efforts to ensure cooperation in law enforcement, taxation and justice, as well as the development and implementation of coordinated policies on asylum, migration and protection of external borders. The main document in this area was the "Hague Program: strengthening freedom, security and justice in the European Union".[37]

The EU has adopted a number of legal acts that regulate the specifics of the status and rights of refugees. It can be noted that the EU regional migration policy is differentiated by the countries of the migration pair and consists in the implementation of a number of directives, as well as bilateral and multilateral regulations to ensure free or preferential movement of individuals across state borders and their employment and the EU territory, as well as the settlement of refugee issues. According to the results of the study, they are structured into three groups:

1. Conceptual documents defining the rights and freedoms of the EU citizens for the institutional basis of integration processes in the EU;[38]
2. Regulatory documents that determine the status of refugees and asylum seekers, their rights and guarantees;[39]
3. Regulatory documents defining the institutional mechanisms for granting refugee or asylum-seeker status, exercising their rights and guarantees.[40]

In general, it can be argued that the European legal regulation is similar to the universal one, in addition to the general human rights that belong to all persons, it regulates the rights of refugees, which they possess by virtue of their legal status, as well as specific procedures and mechanisms regulating the obtaining of such status. In the context of the study, it is worth paying attention to a number of legal acts, which belong to the third category and regulate the mechanisms and procedures for obtaining protection for refugees.

The first is Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.[41] The norms provided for in this Directive describe the standards that are laid down at a minimum level and must be applied to refugees from third countries in cases where they cannot return to their country of origin. Morever, the Directive prescribes standards for maintaining the balance of measures taken by Member States to

[37] The Hague Programme: strengthening freedom, security and justice in the European Union (2004).
[38] *See generally* European Parliament, Charter of Fundamental Rights of the European Union (2000).
[39] *Supra* note 9.
[40] *Supra* note 10, art. 2-3.
[41] *Ibid.*

receive refugees and deal with the consequences. Such standards are, for example: a description of specific groups of persons who will be granted temporary protection; the date of commencement of the provision of temporary protection; an assessment of the scale of movement of displaced persons, etc.

Another important document within the EU is the Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection. The provisions of the Directive chosen by the author apply to persons arriving from third countries if such nationals make the appropriate application in which they apply for international protection.[42]

The military aggression on the territory of the sovereign state of Ukraine provoked the arrival of a large number of citizens of that country in the EU, who began to seek asylum there. Therefore, the integration of refugees into the labour market is significantly different from a similar integration of migrant workers due to the circumstances that caused them to arrive, which means that they have to receive more support from the Union in order to fully realize their rights.[43] Thus, the integration of refugees into social and economic society in order to realize fundamental rights, among them the right to work is a crucial issue that should receive sufficient attention in the legislation of member states.

III. Practical implementation of the protection of the right to work of refugees in EU member states

Despite common European principles and values, the legal framework of the EU member states has significant differences in the protection of refugee rights, as well as in the exercise of specific rights, including the right to work. The EU sectoral approach to labour migration institutionalizes differential treatment of categories of migrants, as well as third-country nationals and citizens of other countries.[44] First and foremost, this distinction is related to the state's need to protect the rights and jobs of its citizens in order to avoid a crisis within the country. Nevertheless, the EU member states provide ample opportunities for the employment of Ukrainian refugees, especially those countries that have previously actively attracted migrant workers from Ukraine.[45] To date, due to the events in Ukraine, many of the EU states have not only opened new opportunities for refugees, but have even made significant changes in their legislation. For this reason, it is proposed to

[42] *Supra* note 9.
[43] C. Brell et al., *The LaborMarket Integration of Refugee Migrants in High-Income Countries*, 34 Journal of Economic Perspective 94, 97 (2020).
[44] *Supra* note 4, 97.
[45] *Id*., 92.

consider some specific examples of legal regulations and procedures for securing the labour rights of refugees from Ukraine in certain member states.

A. Employment of Ukrainians in Poland

Poland became one of the countries that accepted the largest number of refugees from Ukraine and provided a huge amount of aid to people affected by the war. This is caused by several factors. Firstly, Poland borders Ukraine, so it was easier to get to it rather than to other EU states. Secondly, Ukraine and Poland are closely related historically and culturally. So, the example of Poland is worth analysing. It should be noted that, in general, Polish legislation on refugees consists of a set of national legal acts. First of all, it is worth noting the Constitution of the Republic of Poland from 1997, where the provisions of Article 56 state: "Foreigners in the Republic of Poland may enjoy the right of asylum in accordance with the principles defined by law. A foreigner who seeks protection from persecution in the Republic of Poland may be granted refugee status in accordance with international treaties binding the Republic of Poland".[46]

The Act on granting protection to aliens within the territory contains provisions which list the procedure for granting protection to a refugee from third countries, as well as the conditions and principles under which protection is guaranteed in the territory of Poland.[47] According to Article 3 of the Act, Poland may grant such a person protection in one of four forms: a) refugee status; b) asylum; c) tolerated stay permits; d) temporary protection.[48]

In addition, as the Polish researchers M. Pachocka and K. S. Szelc refer to the Office for Foreigners, Poland is legally bound by the multiple international legal acts related to migration and asylum.[49]

It should be noted that with the beginning of military aggression on the territory of Ukraine and the large number of Ukrainian refugees who began to arrive on the territory of Poland, the legislators of this country have made appropriate changes in their legislation to ensure full-scale assistance to Ukraine. Thus, on 12 March, 2022, the Law of Poland "Assistance to citizens of Ukraine in connection with the armed conflict on the territory of that state"

[46] The Constitution of Poland, art. 56 (1997).
[47] Act on Granting Protection to Aliens within the territory of the Republic of Poland, art. 1 (2003).
[48] *Id.*, art. 3.
[49] M. Pachocka, K. Szelc, Refugee Protection Poland Country Report, Global Migration: Consequences and Responses, 25 (2020). Abovementioned international legal acts are as follows: Convention for the Protection of Human Rights and Fundamental Freedoms (1950); Convention Relating to the Status of Refugees (1951); European Agreement on the Abolition of Visas for Refugees (1959); Protocol Relating to the Status of Refugees (1967); European Agreement on the Transfer of Responsibility for Refugees (1980); Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (1984); Convention on the Rights of the Child (1989); Agreement between the Swiss Confederation and the Republic of Austria on the establishment and operation of the International Center for Migration Policy Development (1993).

was adopted.[50] Foreigners who are not covered by this law and who belong to the category of migrants specified in the decision of the EU Executive Council approving the existence of a mass influx of migrants from Ukraine may benefit from temporary protection in accordance with the previously mentioned Act of on granting protection to aliens within the territory of the Republic of Poland.[51]

The respective Act defines, in particular, detailed grounds for legalizing the stay of Ukrainian citizens as well as their husbands/wives without Ukrainian citizenship who arrived in Poland in connection with military actions on the territory of that state. It also refers to persons holding the Pole Card, who together with their immediate family members, arrived in Poland because of those actions. The provisions of this law do not apply to Ukrainian citizens who have previously received: a permanent residence permit; a long-term resident's the EU residence permit; a temporary residence permit; refugee status; subsidiary protection; consent for tolerated stay, as well as those who have applied for international protection in Poland (or those on whose behalf such applications have been submitted) or have indicated their intention to apply for international protection.[52]

It should be pointed out that the Act on assistance to citizens of Ukraine in connection with the armed conflict on the territory of that state guarantees access to the labour market for citizens of Ukraine provides for a clear procedure for the employment of Ukrainian citizens.[53] Thus, an employer intending to hire a Ukrainian must, within 14 days, enter the official state portal, find the appropriate Employment Center there, and inform him that he has hired a foreigner. Citizens of Ukraine will have the opportunity to use the services provided on the Polish labour market. In particular, they can apply to Employment Centers, professional counseling centers, and also take advantage of courses - on equal terms with Polish citizens. In addition, citizens of Ukraine can start and engage in business activities on the same principles as citizens of Poland - the condition is to obtain a personal PESEL number.[54]

In our opinion, this will positively impact the economy of Poland, because many Ukrainian businesses and startups are starting their activities there, increasing tax revenues to the treasury and increasing jobs.

Furthermore, on June 30, 2022, President A. Duda signed amendments to the above-mentioned law, which regulate the conditions of temporary

[50] Act on Assistance to Ukrainian Citizens in Connection with the ArmedCconflict on the Territory of this State (2022). Available at: https://www.gov.pl/web/mswia-en/the-act-on-assistance-to-citizens-of-ukraine-in-connection-with-armed-conflict-on-the-territory-of-that-country-signed-by-the-president (last visited Dec. 1, 2022).
[51] *Supra* note 47.
[52] *Id.*, art. 103.
[53] *Supra* note 50.
[54] PESEL is a numerical mark of eleven digits that identifies an individual.

protection on the territory of the country, entry, stay, employment and residence of Ukrainians.[55] We reckon that the changes were made with the aim of creating more flexible and convenient protection conditions for Ukrainians, increasing opportunities for their stay in another country.

In particular, the provision on the need to enter Poland directly from the territory of Ukraine in order to obtain the right to temporary protection in the country has been changed. From July 1, 2022, Ukrainians in need of temporary protection may also enter Poland through the internal borders of the EU.[56] In this way, Ukrainians who will enter Poland from the territory of the EU countries will also be able to claim the rights of war refugees.

Additionally, new provisions on the PESEL UKR register have been added. Previously, this status was automatically lost after a person left Poland for more than 30 days. According to the new rules, if this status is automatically lost after a military migrant has left the country for more than 30 days, but within the Schengen area, it can be restored. UKR status can also be restored if a person returns to Poland after leaving Ukraine for more than 30 days. The reason for the return must be justified - it is active hostilities at the place of residence.[57]

Thus, it can be stated that Poland has taken many steps to meet the needs of Ukrainian refugees and protect their rights, in particular the right to work, which is one of the fundamental human rights.

B. German legislation on the right to work of Ukrainian refugees

Germany, as well as other European countries, has been confronted with the issue of refugee protection for quite some time, as it has always been an attractive jurisdiction for them. It should be noted that the general regulation of refugee protection is contained in the German Constitution. According to Article 16 (a), "politically persecuted people enjoy the right to asylum".[58] However, this article refers to only one category of persons who may be granted refugee status. Those entitled to asylum are granted a residence permit for three years. If the situation does not change in the country of origin, at the end of this period the residence permit is extended for another three years. At the earliest after three years, under certain conditions, a person can also be granted a permanent residence permit.

[55] *See* Amendment to the Act on assistance to Ukrainian citizens signed by the President (2022), https://www.gov.pl/web/mswia-en/amendment-to-the-act-on-assistance-to-ukrainian-citizens-signed-by-the-president (last visited Dec. 1, 2022).

[56] Act of June 8, 2022 amending the Act on assistance to Ukrainian citizens in connection with the armed conflict on the territory of this state and certain other acts (2022). Available at: https://dziennikustaw.gov.pl/D2022000138301.pdf?fbclid=IwAR0Hk-psEDYZJXpy6FXXZgIbSy2cHDaeOIDfNnZr6ArK45zPdZyWFUIxbPE (last visited Dec. 1, 2022).

[57] *Ibid.*

[58] The Constitution of Federal Republic of Germany, art. 16 (1949). Available at: https://www.bundestag.de/gg (last visited Dec. 1, 2022).

The specifics of the status and protection of refugees are regulated by the Asylum Act.[59] According to its provisions, a person who has been granted refugee status in Germany is subject to all the rights provided for in the Convention relating to the Status of Refugees.[60] Article 3 of this law explains who may qualify for refugee status.[61] These are quite similar to the definition given in the abovementioned Convention. The law also provides a work permit for refugees.

In addition, refugees are immediately entitled to work in Germany. They are required to obtain registration with the local foreigners' office and a document that confirms their permission to stay in Germany with a note for permission to work. A provisional residence permit is sufficient. It is only possible to find immediate employment in professions that do not require a government permit: salesperson, automobile mechanic, office manager, accountant, programmer, hairdresser, economist, mathematician, biologist and many others. Refugees applying for such jobs do not require formal recognition of educational documents. Germany supports Ukrainian refugees in the issue of employment, creates special centers to help them in finding a job, language learning and social integration. There is no specific pro-Ukrainian legislation on Ukrainian refugees in Germany, but there are certain procedural aspects that help with labour integration.[62]

C. Labour rights of Ukrainian refugees in Latvia

Latvia, like other Baltic states, has also received a large number of Ukrainian refugees. First of all, the issue of granting asylum in Latvia is regulated by a number of normative legal acts. The basis of the legislation on refugees is Immigration Law.[63] It determines the procedure for the entry, stay, transit, departure and detention of foreigners. According to Regulations on the state fee for issuing identity documents, a refugee is issued a permanent residence permit. Apart from that, a refugee should renovate his/her residence permit every five years. In order to do this, a person must annually apply to the Office of Citizenship and Migration Affairs one month before the expiry of the residence permit with an application for extension of the stay. Refugees and persons who have been granted alternative status are exempt from payment of state duty if the travel document or the residence permit is issued for the first time.[64]

[59] *See* Asylum Act, Federal Law Gazette (2008). Available at: https://www.gesetze-im-internet.de/englisch_asylvfg/englisch_asylvfg.pdf (last visited Dec. 1, 2022).
[60] *Supra* note 14.
[61] *Id*., art. 3.
[62] A.V. Rusnak et al., *Innovative Priorities of Ukraine in the Context of Global Economic Trends*, 11 Journal of Advanced Research in Law and Economics 1376, 1380 (2020).
[63] Immigration Law of the Republic of Latvia (2002). Available at: https://likumi.lv/ta/en/en/id/68522-immigration-law (last visited Dec. 1, 2022).
[64] Regulations on the State Fee for Issuing Identity Documents, § 16.5 (2012).

Another important law on ensuring the rights of refugees is Asylum Law.[65] This Act guarantees the granting of refugee status or temporary protection to persons in need, in accordance with the rules of international law. For example, Article 37[66] stipulates the conditions under which a person may apply for this status which are similar to the Convention on the Status of Refugees.[67] It is important to note that in support of Ukrainian citizens, who were forced to leave their state as a result of Russian armed aggression and come to Latvia, the government of this state adopted a special Law on Assistance to Ukrainian Civilians by the Parliament of the Republic of Latvia on 3 March, 2022.[68]

The mentioned law provides the following support for Ukrainian refugees: civilian residents of Ukraine may be granted long-term visas with the right to employment without restriction for up to one year. These visas are issued by the Office of Citizenship and Migration Affairs, the State Border Guard or diplomatic and consular missions of the Republic of Latvia abroad. Later amendments were made to the Law on 26 May, 2022 according to which Ukrainian refugees have the right to enter into labour relations without obtaining a long term visa with the right to work. In this case, an employment contract is concluded for not more than 30 days. Not later than 10 days from the date of commencement of labour relations the person must apply to the Office of Citizenship and Migration Affairs to obtain a long-term visa with the right to employment.[69]

That is, such changes greatly simplified the access of Ukrainians to the Latvian labour market, which once again confirms that the government of this country understands the importance of the implementation of labour rights of a person, as well as the harsh realities faced by refugees from Ukraine.

IV. Problems of the realization of the right to work for refugees

EU norms governing refugee policy and other topics are mandatory for all member states. But how countries interpret and integrate these norms into national legislation depends on them. Therefore, there are considerable differences between the EU members on some points. For example, refugees who want to apply for asylum in Europe cannot do so in any country they like. Since 2003, they must comply with the Dublin Agreement and according to it, a refugee must ask for asylum in the EU country whose border he crossed first.[70]

[65] Asylum Act of the Republic of Latvia (2017).
[66] *Id*., art. 37.
[67] *Supra* note 14.
[68] *See* Law on Assistance to Ukrainian Civilians (2022).
[69] *Id*., Right of Ukrainian Civilians to Employment, section 13 (1).
[70] Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention, art. 2 (6) (2003).

However, the EU member states do not always strictly adhere to these norms. According to the so-called intermediary right ("Selbsteintritt"), they can decide whether to take on the asylum application of a particular refugee, even if he first entered another EU country. For example, Germany has repeatedly refrained from sending refugees to the countries through which they arrived in Germany. One of the latest examples is the summer of 2017, when refugees were not sent to Hungary. The reason is because of legal security. The European Commission accused Hungary of making it difficult for refugees to apply for asylum, which they are entitled to under the EU law.

Among other reasons for violating the Dublin Agreement, there may be doubts about social standards in another EU country. For instance, Germany did not return refugees to Italy for a certain period of time, because they were not provided with adequate living conditions. Despite the exceptions, the Dublin Agreement means that member states whose borders are the EU's external borders have to deal with large numbers of refugees. For a long time, the EU has been trying to agree on refugee quotas among its member states in order to relieve countries such as Italy and Greece. Depending on the number of inhabitants of the country, each the EU member must accept a certain number of refugees in the event of a crisis.

This norm has so far failed due to the opposition of some countries. Poland, Hungary, Slovakia and the Czech Republic are resisting being forced to accept the refugees they will be allocated. In 2017, the EU tried to use the relocation program, according to which it was planned to relocate 160 thousand refugees from Greece and Italy to other countries. However, other the EU countries accepted only 26,000 refugees.[71]

Despite a large number of scientific works and various studies on the issue of granting refugee status, as well as the protection of labour rights of refugees, the question of equal treatment of Ukrainian refugees remains open. This is due to the high relevance of this issue after the Russian aggression on the territory of Ukraine, which led to the fact that a large number of people were forced to leave their homes and leave for Europe. For this reason, the study of the peculiarities of the employment of Ukrainian refugees in different countries is relevant and requires its own detailed analysis and study.

The main problem in the context of the realization of the right to work by Ukrainian citizens is the unequal approach of the EU member states to the regulation of the specifics of the employment of refugees. We believe that in order to facilitate the access of Ukrainian citizens to the EU labour market, it is advisable to take a number of steps at the EU level.

First of all, it is necessary to harmonize and streamline the process of providing Ukrainians with documents confirming the provision of temporary

[71] European Union Agency for Fundamental Rights, Handbook on European legislation on asylum, borders and immigration, 80 (2014).

protection. This is important for several reasons. First, without a properly issued residence permit, Ukrainians cannot move freely within the Union. In addition, they have problems returning to the EU if they temporarily leave the territory of Ukraine. In most of them, the 90-day period of stay in the EU under the visa-free regime has expired. However, when crossing the border, Ukrainians often do not have properly formalized temporary protection. Moreover, many of them have not yet received such a certificate. This raises questions when crossing the border, and often when moving within the Union.

In addition, the state regulates differently the procedure for obtaining temporary protection and the document confirming the receipt of temporary protection, which a person receives after its confirmation. Here is a common example: according to the law "On assistance to citizens of Ukraine in connection with the armed conflict on the territory of that state",[72] Ukrainians in Poland receive a PESEL, which is an analogue of a Ukrainian identification number. At the same time, they are not provided with any certificates confirming the status of temporary protection. However, in Germany, the document is issued properly, but the terms of obtaining it often exceed the permitted period of stay for citizens of Ukraine. There seem to be a lot of such problems.

Taking this into account, we believe that in order to fully ensure the possibility of Ukrainian refugees to exercise their rights, it is advisable to adopt a single standard for a temporary residence permit at the EU level. For example, in 2019, the EU adopted the European ID card. It aims to replace and standardize the different styles of identity cards currently used in the EU and European Economic Area countries. It was introduced on the basis of Regulation (EU) of the European Parliament and of the Council on strengthening the security of EU citizens' identity cards and residence documents issued to citizens and their family members exercising their right to free movement.[73] In a similar way, the issue of temporary protection can be settled. It is clear that the procedure for providing such protection in the EU is unprecedented and has not been applied before. Accordingly, there are currently inconsistencies in its regulation. That is why the adoption of a single unified document, which will regulate the relevant process, will be an important step towards improving the situation of Ukrainian refugees and ensuring their access to the labour market.

The accepted document should specify the form, content and language of the document (we assume that such certificates should be issued in the language of the country of issue and in English for a better understanding of

[72] *Supra* note 50.

[73] *See* Regulation (EU) of the European Parliament and of the Council on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement, 2019/1157 (2019).

its content in all member states). We reckon that such a document should contain a photo of the person to whom it is issued, the date of obtaining the permit and personal data.

In our opinion, this will have a positive effect and simplify the procedure of temporary protection of Ukrainians in the EU. This will also save a lot of time for both Ukrainians and the authorities of European countries, because in this way, the refugee will have to issue documents only once, and not constantly when changing the country of residence.

The second problem that prevents obtaining temporary asylum is the long period of obtaining such a permit. Without this permit, people in most countries cannot be employed. Thus, it is necessary to overcome the high level of bureaucracy in the EU. In particular, this can be done by providing for deadlines in a single legal act that will be binding on all member states.

The third problem is the advisory nature of many acts (such as the Convention Relating to the Status of Refugees of 1951,[74] IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War,[75] the European Agreement on the Abolition of Visas for Refugees,[76] the Convention Relating to the Status of Stateless Persons,[77] the UN Declaration on Territorial Asylum,[78] the Protocol relating to the Status of Refugees[79]) which some countries simply ignore. It also creates obstacles to the further realization of the rights of Ukrainian refugees. Therefore, legal acts adopted in the context of regulating certain aspects of refugees and asylum seekers should be considered by the member states and, if this does not conflict with their legislation, should be implemented in order to avoid discrepancies in the implementation of measures to ensure rights of refugees.

Finally, the fourth problem is the inaccessibility of integration courses and learning languages for many Ukrainians. In most member states, knowledge of the state language is required for employment in decent, highly skilled jobs. However, Ukrainians often have limited opportunities to learn it. This is especially true for those living in small towns and villages. They often cannot get access to language courses. This creates impediments for both Ukrainians and the EU states.

States are losing really qualified personnel who could raise the level of the state's economy and fill the gaps that exist in the EU labour market due to a lack of specialists. Furthermore, Ukrainians cannot get access to a decent job, for which they often have the skills and appropriate education. In addition, the unavailability of integration courses creates obstacles for the socialization

[74] *Supra* note 14.
[75] *Supra* note 21.
[76] *Supra* note 22.
[77] *Supra* note 23.
[78] *Supra* note 24.
[79] *Supra* note 17.

of Ukrainian refugees. Many of them experienced severe stress due to the war, lost their homes and everything they had in their lives. They need an understanding of the local population and support. However, they cannot get it due to obstacles in accessing language learning and integration courses.

Moreover, employment can also become an important way for Ukrainian refugees to join the public life of the state, maintain a decent standard of living and distract from the horrors of war. Therefore, it is advisable to increase the number of places in the state language learning groups and provide opportunities for Ukrainian citizens to work with teachers and psychologists to improve integration into society and eliminate post-traumatic syndrome.

With this in mind, we believe that the proposed measures cannot only significantly help Ukrainians but also bring benefits to the EU member states themselves. They will be able to fill jobs with highly qualified personnel and will not need to pay assistance to refugees, because after integration and socialization, Ukrainian citizens will be able to provide a decent standard of living.

Conclusion

As it is seen from the discussion above, all refugees have the right to work, but its implementation and protection depend on the specific state that provides protection to such persons and undertakes obligations under international law to protect the rights of such persons and ensure normal life conditions for them. Exercise of this right supports to preserve and secure a number of other interrelated rights is the reason the right to work, among other rights, is so crucial for refugees.

Despite these facts, there are noteworthy differences in the legislation of EU Member States that hinder the development in the context of refugees rights. For the purpose of guaranteeing respect and ensuring the protection of these human rights, governments can provide both of the ways – solving the refugee problem and preventing it. In the first case, it is a need to ensure adequate protection of human rights in the country of origin of refugees before expecting refugees to wish to return to their country of citizenship or permanent residence. In the second case, it is about preventing citizens of certain states from having a well-founded fear of persecution on certain grounds.

When discussing the legislation of the EU, it can be argued that it was somehow formed under the influence of international law regarding refugees, as well as practical problems that arose during the development of the EU due to a large number of such persons. Therefore, we divided the EU legal acts into the following categories: conceptual documents defining the rights and freedoms of the EU citizens for the institutional basis of integration processes in the EU; regulatory documents defining the status of refugees and asylum seekers, their rights and guarantees; regulatory documents defining the

institutional mechanisms for granting the status of a refugee or asylum seeker, the realization of their rights and guarantees. All of them in one way or another regulate various issues of refugee rights and the provision of proper status and protection.

Meanwhile, some difficulties that affect the integration of refugees still remain unresolved in the labour market of the member states. Such issues are regulated by the legislation of individual member states. Despite the differences in legal and procedural aspects, the studied countries in this article are glaring examples of ensuring adequate life standards for Ukrainian refugees.

Thus, we propose considering additional mesaures to improve the situation with employment of Ukrainian citizens.

Firstly, as a new law, adopting a legal act – the Common Standard for Temporary Residence Permit at the EU level will regulate the same standard for issuing temporary protection permits for all. Then, the next suggestion can be harmonizing the timeframes for issuing duly residence permits for Ukrainians in all Member States. In this context, this could also be stipulated in the Common Residence Permit Standard.

Furthermore, increasing the number of integration courses for Ukrainian citizens, as well as organizing events for the unification and faster socialization of refugees will be a more effective solution to the integration issue. The fourth and last one is to make binding the nature of legal norms adopted in the framework of regulating certain aspects of refugees and asylum seekers. Thereby, it can eliminate hindrances to the continued implementation of the entitlements of refugees from Ukraine.

Nicat Rəsulzadə[*]

MÜLKİ PROSESDƏ ƏRİZƏ FORMALARININ TƏTBİQ EDİLMƏSİ: ALMAN HÜQUQUNDAN BAXIŞ

Annotasiya

Mülki mübahisələrin say çoxluğu məhkəmələrin iş yükünün azaldılmasını zəruri edir. Bu səbəbdən Azərbaycan Respublikası da daxil olmaqla, digər ölkələrdə bu prosesin sürətləndirilməsi və sadələşdirilməsi istiqamətində müxtəlif islahatlar aparılır. Həmin islahatların siyahısına tərəflərin təqdim etdiyi iddia və qarşılıqlı iddia ərizələrinin strukturlaşdırılması da aiddir. Bütün növ yeniliklərdə olduğu kimi, burada da tətbiq zamanı müəyyən risklərin yaranması ilə bağlı ehtimallar mövcuddur. Onların siyahısına ədalət mühakiməsinə çıxış prinsipi, prosesin şəffaflığının təmin edilməsi və digər əlaqəli məqamlar aiddir. Məqalə alman qanunvericiliyində müvafiq islahatların keçirilməsi zamanı ortaya çıxan problemli məqamlar və onlara münasibətdə sərgilənən yanaşmaları təhlil edir.

Abstract

The number of civil disputes makes it necessary to lessen the burden of courts. For this reason, diverse reforms are being made in various countries, including the Republic of Azerbaijan, in the direction of speeding up and easing the procedure. Structuring of claims and counterclaims submitted by the parties belong to this list. As with all types of novelties, there is a possibility of certain risks during the implementation stage. It includes ensuring the principle of access to justice and the transparency of the process among other relevant matters. The article analyses the controversial issues that emerged during the relevant reforms in German legislation and the approaches taken in relation to them.

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Giriş

Məhkəmə mübahisələrinin həll edilməsi zamanı prosesin yazılı hissəsi əhəmiyyətli rol oynayır. Həmin hissənin əsas məqamlarından biri kimi isə iddia ərizəsinin hazırlanıb təqdim edilməsi göstərilə bilər. Ərizələr, adətən, eyni formada yazılmır və hətta bəzi hallarda cari proses üçün əhəmiyyətsiz olan məlumatları da özündə ehtiva edir.[1] Belə ki, iddia ərizələrində dolayı və birbaşa aidiyyəti ola biləcək bütün iddiaların, həmçinin faktların toplanması tez-tez qarşılaşılan bir haldır.[2] Bunun səbəbi isə, bir qayda olaraq, məhkəmə baxışı başlanıldıqdan sonra yeni faktların və sübutların təqdim edilməsinin istisna edilməsidir.[3]

Bu isə, öz növbəsində, tərəflərin, məhkəmənin və hətta bəzən vəkillərin də çaşqınlığına səbəb olur, çünki müəyyən hallarda iddianın tam fərqli və ya yanlış istiqamətdə davam etdirilməsi ilə nəticələnə bilir. Göstərilən problemin həlli üçün isə bəzi Avropa İttifaqı ölkələrində iddiaların strukturlaşdırılması tələbi irəli sürülmüşdür.[4] Strukturlaşdırma vasitəsilə yazılı sənədlərin kəmiyyəti azala, xüsusən də mürəkkəb məsələlərdə proses sadələşdirilə, həmçinin prosesin səmərəliliyinin artırılmasına nail oluna bilər.

Milli qanunvericilik də eyni perspektivdən çıxış edərək Azərbaycan mülki prosessual hüququna bənzər yeniliyi təqdim etmişdir. Belə ki, 9 iyul 2021-ci il tarixli Qanunla Mülki Prosessual Məcəlləyə (bundan sonra AR MPM) əsaslı dəyişikliklər edilmişdir.[5] Bunların sırasına apellyasiya və kassasiya şikayətlərinin verilməsi zamanı formaların istifadə edilməsi məcburiyyəti aiddir. Belə ki, AR MPM-in 361.1, 406.1 və 407.1-ci maddələrində müvafiq şikayətin verilməsinin forması kimi həmin şablon formaların tətbiq edilməsi məcburi edilmişdir. Hər iki instansiyada istifadə edilən forma AR MPM-in müvafiq olaraq 2 və 3 saylı Əlavələrində göstərilmişdir. Həmçinin 363.1.1-1 və 408.1.1-ci maddələrinə əsasən, forma tələbinin pozulması hər iki instansiyada ərizənin geri qaytarılması üçün əsasdır.

AR MPM-in 10-1-ci maddəsinə uyğun olaraq, elektron məhkəmə sisteminin tətbiq edildiyi məhkəmələrdə müvafiq formalar elektron qaydada təqdim edilməlidir. Eyni yanaşma kassasiya şikayətlərinin təqdim edilməsi zamanı da müşahidə edilir. Bununla belə, Azərbaycan qanunvericiliyində

[1] Bax: Martin Zwickel, Die digitale Strukturierung und inhaltliche Erschließung zivilprozessualer Schriftsätze im Spannungsfeld zwischen Parteiherrschaft und Richtermacht (2018); Almuth Buschmann, Anne-Christin Gläß, Hans-Henning Gonska, Markus Philipp, Ralph Zimmermann, Digitalisierung der gerichtlichen Verfahren und das Prozessrecht, 180 (2018).

[2] Rolf Bender, Jürgen Schwarz, Strukturierter Parteivortrag und elektronische Akte, 372 (1994).

[3] Azərbaycan Respublikasının Mülki Prosessual Məcəlləsi, mad. 167.1.2, 167.1.10, 372.4 (1998); Alman Mülki Prosessual Məcəlləsi ("Zivilprozessordnung"), § 296 (1887). Burada bax: https://www.gesetze-im-internet.de/zpo (son baxış 26 noyabr 2022).

[4] Bu qayda fransız hüququnda Mülki Prosessual Məcəllənin ("Code de procédure civile") 753-cü maddəsində, ingilis hüququnda Mülki Prosessual Qaydaların ("Civil Procedure Rules") 16-cı bölməsində müşahidə edilir.

[5] Azərbaycan Respublikasının Mülki Prosessual Məcəlləsində dəyişiklik edilməsi haqqında Qanun (2021). Burada bax: http://e-qanun.az/framework/48016 (son baxış 18 yanvar 2023).

formaların tətbiqinin əhatə dairəsi proseslərin növləri üzrə məhdudlaşdırılmamışdır. Onlar yalnız instansiya aidiyyətinə əsasən, yəni apellyasiya və kassasiya instansiyalarında baxışda olmasından asılı olaraq tətbiq edilir. Prosesin sadələşdirilməsi məqsədilə forma tələbinin mövcud olmasına baxmayaraq, onların istifadəsi zamanı tərəflər yenə bütün məlumatları əvvəlki qaydada, strukturtsuz əlavə edirlər.

Qeyd edilən problemin həlli üçün hüquq ədəbiyyatında bənzər formaların tətbiqi ilə bağlı bir sıra məsələlər müzakirə edilir. Həmin müzakirələr məqalənin davamında öz əksini tapmışdır. Bunlardan ən önəmlisi qeyd edilən yeniliklərin tətbiqi zamanı ədalət mühakiməsinə çıxışın asanlaşdırılması, yoxsa tam əksinə olaraq çətinləşdirilməsi ilə bağlı olan müzakirələrdir. Digər məsələ isə formaların tətbiqinin əhatə dairəsi ilə bağlıdır. Burada iki cür yanaşma mümkündür: birincisi, onların tətbiqini bütün növ proseslərə şamil etmək və ikincisi, yalnız müəyyən növ mübahisələrdə tətbiq etmək.

Alman qanunvericiliyində də mülki prosessual hüquq sahəsində strukturlaşdırma və formaların tətbiqi ilə bağlı bənzər dəyişikliklər edilmiş, islahatlar zamanı qeyd edilmiş məsələlər ətraflı müzakirə olunmuşdur. Hazırkı məqalənin əsas məqsədi isə Azərbaycan oxucusunun diqqətinə islahatlar zamanı ortaya çıxan yanaşmanı göstərmək, həmçinin potensial üstünlük və problemlər barədə xəbərdar etməkdir.

I. Strukturlaşdırma

Alman müki prosesində strukturlaşdırma ilə bağlı bir neçə cəhd olmuşdur. Bunlardan ilki "Ştutqart Modeli" adı ilə tanınmışdır.[6] Bu modelin ideyası proses iştirakçılarının təqdim etdiyi materialların təsvirini bir elektron faylda birləşdirmək idi. Məqsəd isə faylların rəqəmsal idarə olunmasının təmin edilməsinə yönəlmişdi. O həmçinin ərizələrin bloklara, digər sözlərlə tərkib hissələrinə və iddianın özünün ətraflı şəkildə strukturlaşdırılmasını nəzərdə tuturdu.[7]

Struktur üçün şablon formaların hazırlanması elektron məlumatları emal edən proqram təminatının yaradılması üçün ilkin şərt idi. Bu proqram proses materiallarını istifadəçinin istəyinə uyğun şəkilləndirə və eyni zamanda xronoloji olaraq nümayiş etdirə bilirdi. Qeyd edilmiş təklif rədd edilsə də, onun müəyyən elementləri keçirilmiş islahatlarda öz əksini tapmışdır.

2020-ci il islahatları zamanı dəyişdirilən maddələrdən biri də Alman Mülki Prosessual Məcəlləsinin ("Zivilprozessordnung") (bundan sonra "ZPO") 139-cu maddəsi idi.[8] Dəyişikliyə əsasən, 139.1-ci paraqrafın 1 yanvar 2020-ci il tarixindən qüvvəyə minən yeni redaksiyasına üçüncü cümlə əlavə edilmişdir.

[6] Bender, yuxarıda istinad 2.
[7] Yenə orada, 374-376.
[8] Daha ətraflı bax: Hendrik Schultzky, *Die "kleine" ZPO-Reform 2020*, 74 Monatschrift für Deutsches Recht (2020).

Həmin əlavəyə görə məhkəməyə icraatı strukturlaşdırma və işə baxılması zamanı işin tərkib hissələrinə bölünməsi səlahiyyətləri verilmişdir. Burada qanunverici orqan iki elementi: strukturlaşdırmanı və bölünməni fərqləndirir. Belə ki, bölünmə dedikdə, baxış mərhələsində, məsələn, bir neçə iddiadan ibarət mürəkkəb mübahisənin daha sadə tərkib hissələrinə bölünməsi və baxışın həmin hissələr üzrə ardıcıl olaraq aparılması nəzərdə tutulur.[9]

Müvafiq olaraq, strukturlaşdırma, bir qayda olaraq, hərfi mənadan irəli gələrək mübahisəli məsələnin deyil, icraatın strukturlaşdırılması kimi başa düşülür. Burada nəzərdə tutulan məhkəmə işinin bir neçə prosessual addıma bölünməsidir. Bununla da, məhkəmə tərəflərdən mübahisənin hər bir mərhələsində yalnız həmin mərhələyə aid prosessual hərəkətlərlə kifayətlənmələrini tələb edə bilər. Bu norma prosedurun, yəni prosesin xarici təzahürünün formalaşdırılması (formal və ya vertikal strukturlaşdırma) deyil, onun maddi mənada, yəni mübahisəli məsələnin özünün strukturlaşdırılmasını (horizontal strukturlaştırılma) nəzərdə tutur.

A. Tərəflərin ərizələrinin tərtib edilməsi

Alman mülki prosessual hüququ iddia ərizələrinin məzmununun strukturlaşdırılması üçün bir sıra tələblər nəzərdə tutur. Burada ümumi olaraq bütün ərizələrə[10] və ya xüsusilə, iddia ərizələrinə[11] münasibətdə nəzərdə tutulan tələblər arasında fərqləndirmə aparmaq mümkündür. Birinci qrup, yəni ümumi olaraq bütün sənədlərə münasibətdə irəli sürülən tələblərə riayət edilməməsi ərizənin birbaşa etibarsızlığına səbəb olmur.[12]

Mülki qanunvericilikdə islahatlar "Mülki Prosessual Hüququn Müasirləşdirilməsi" üzrə İşçi Qrupuna həvalə edilmişdir. Həmin qrupun ortaya qoyduğu yanaşmaya uyğun olaraq, tərəflərin iddiaları "əsas sənəd" adlandırılan ümumi bir sənəddə toplanılmalıdır. Bu sənəd həm tərəflər, həm də məhkəmə üçün real vaxt rejimində əlçatandır. Tərəflərin təqdimatı isə iki hissəyə bölünür: faktiki və hüquqi faktlar.[13] Struktur iddia tələbinin qanuni əsaslarına görə deyil, işin hallarına görə, xronoloji ardıcıllıqda qeyd edilməlidir.

[9] Reinhard Gaier, *Strukturiertes Parteivorbringen im Zivilprozess*, 48 Zeitschrift für Rechtspolitik 101, 102 (2015).
[10] "Zivilprozessordnung", yuxarıda istinad 3, § 130 (1887).
[11] Yenə orada, §253.
[12] Bu qrup tələblər "Soll-Vorschrift" olaraq adlandırılır. Qeyd edilən normalar müəyyən edilən tələblərə riayət edilmədiyi təqdirdə belə (məsələn, qarşı tərəfin ad, soyadının qeyd edilməsi zamanı qrammatik səhvə yol verilməsi), proses zamanı çatışmazlıqların aradan qaldırılmasını mümkün edir. Digər qrup isə "Muss-Vorschrift" kimi adlandırılır və bu tələblər gözlənilmədikdə ərizə dərhal geri qaytarılır.
[13] Modernisierung des Zivilprozesses, Diskussionspapier, bölmə V. Burada bax: https://www.justiz.bayern.de/media/images/behoerden-und-gerichte/oberlandesgerichte/nuernberg/diskussionspapier_ag_modernisierung.pdf, (son baxış 11 sentyabr 2022).

Bununla belə, ərizədə hüquqi qiymətləndirmənin olması məcburi deyildir.[14] Belə ki, mülki prosesin prinsiplərinə uyğun olaraq tərəflər yalnız faktların müəyyən edilməsinə cavabdehdir, onların qiymətləndirilməsi isə məhkəmənin səlahiyyətindədir. Səlahiyyətlərin bu formada bölgüsünün səbəbi isə alman mülki prosesinin inkvizitor xarakterini əks etdirən *iura novit curia* prinsipidir.

B. Horizontal strukturlaşdırma

Prosesin yazılı hissəsinin səmərəliliyi üçün yalnız tərəflərin ərizələrinin vertikal strukturlaşdırılması yetərli deyildir. Burada ərizələrin tərkibi (horizontal) strukturlaşdırılması da əhəmiyyətlidir. Horizontal strukturlaştırma dedikdə ərizənin tərkibinin müəyyən edilmiş hüquqi əsaslara uyğun olaraq tərtib edilməsi nəzərdə tutulur. Horizontal strukturlaşdırma tələbi ZPO-nun 139-cu paraqrafının birinci abzasının üçüncü cümləsindən irəli gələn bir tələbdir. Həmin paraqraf məhkəmə tərəfindən prosesin maddi olaraq idarə edilməsi tələbini müəyyən edir. Strukturlaşdırmanın bu çərçivədə həyata keçirilməsi üçün müəyyən tələblər yerinə yetirilməlidir. Burada isə tələb qismində zərurilik çıxış edir. Həmin tələb hakimin proses tərəflərinə mübahisənin gedişatı ilə bağlı ümumi və hərtərəfli izah vermək öhdəliyini özündə ehtiva edir.[15]

İşçi Qrupunun təklif etdiyi strukturlaşdırma metoduna uyğun olaraq tərəflərin iddiaları və qarşılıqlı iddiaları "əsas sənəd" adlanan bir sənəddə toplanır.[16] Sənəd özlüyündə hər tərəfə məxsus iki sütundan ibarət olur və real vaxt rejimində hər bir tərəf və məhkəmə üçün əlçatandır. Sənəddə tərəflər öz iddialarını baş verən mübahisə predmetinin faktlarına uyğun xronoloji olaraq qeyd edirlər. Tərəflərin mübahisə predmetini hüquqi cəhətdən qiymətləndirməsi məcburi deyildir, lakin predmətə əlavələrin olunması da istisna edilmir.[17]

C. Şablonlar və onların tətbiq dairəsi

İddia ərizəsinin strukturlaşdırılması zamanı şablonların tətbiqi mümkün alətlərdən biri kimi çıxış edir. Strukturlaşdırma müxtəlif əsaslara uyğun olaraq həyata keçirilə bilər. Bu istiqamətdə mümkün variantlardan biri kimi tərəflərin ərizələrinin xronoloji strukturlaşdırılması, əvvəlcədən müəyyən edilmiş şablonlara uyğun olaraq həyata keçirilməsi göstərilə bilər.[18]

Şablonların və ümumi olaraq strukturlaşdırmanın tətbiqi ilə bağlı yaranan digər suallardan biri də onların məcburililiyi və hansı növ proseslərdə tətbiq edilməsi ilə bağlıdır. Bir qayda olaraq, vəkillərin iştirakının məcburi olduğu

[14] Yenə orada, 38.
[15] Reinhard Gaier, *Erweiterte Prozessleitung im zivilgerichtlichen Verfahren, Strukturierung und Abschichtung nach § 139 I 3 ZPO*, 4 Neue Juristische Wochenschrift 177, 179 (2020).
[16] Modernisierung des Zivilprozesses, yuxarıda istinad 13, 35.
[17] Yenə orada, 38.
[18] Yenə orada, 37.

proseslərdə strukturlaşdırma məhkəmənin və ya tərəflərin iradəsindən asılı olmayaraq məcburi müəyyən edilir, eyni zamanda, onların digər proseslərdə də təyin edilməsi istisna edilmir.[19] Bununla yanaşı, alman qanunvericiliyinə əsasən, bir qayda olaraq, ilk instansiya məhkəmələrində tərəflərin vəkillər tərəfindən təmsil edilməsi məcburi deyildir.[20]

Əlavə olaraq, kütləvi xarakter daşıyan və ya müəyyən ortaq meyarlar üzrə qruplaşdırılması mümkün olan hallara aid mübahisələrdə, məsələn, sığorta, istehlakçı, icarə və ya əmək mübahisələrində şablonların, bir qayda olaraq, tətbiq edilməsi mümkün təkliflər siyahısındadır.[21] Bunun üçün müvafiq şablonlar təsdiq edilməlidir. Bu yanaşmanı dəstəkləyənlər ZPO-nun 130c paraqrafında Federal Ədliyyə və İstehlakçıların Hüquqlarının Müdafiəsi Nazirliyinin ("BMJV") nəzərdə tutulmuş şablonları müəyyən etmək səlahiyyətinə istinad edirlər. Məhkəmənin iş yükünün mümkün qədər azaldılması və mübahisələrin həll edilməsi tezliyinin artırılmasına baxmayaraq, qeyd edilən yanaşma hüquq ədəbiyyatında birmənalı olaraq qarşılanmır.[22] Səbəb qismində isə ilk olaraq həmin şablonların tərtib edilməsinin çətinliyi, digər tərəfdən, tərəflərin səmərəsiz istifadə imkanları göstərilmişdir.

Həmçinin məhkəmənin öz mülahizəsinə uyğun olaraq "normal" prosedura qayıtmaq barədə göstəriş vermək səlahiyyəti də nəzərdə tutulmuşdur.[23] Belə ki, hakim baxılan işin mürəkkəblik səviyyəsinin yüksək olmasına istinad edərək şablonların tətbiqindən imtina edə bilər.[24]

II. Tənqid və risklər

İşçi Qrupu tərəfindən təklif edilən strukturlaşdırma hüquq ədəbiyyatı tərəfindən birmənalı olaraq qarşılanmamışdır. Müzakirələr nəticəsində strukturlaşdırmanın tətbiq edilməsində texniki imkanlardan istifadədən şablonların əhatə dairəsinə və onların düzgün icra edilməməsi və ya ümumiyyətlə, icra edilməməsi halında nəzərdə tutulan sanksiyalaradək müxtəlif tənqidi fikirlər səsləndirilmişdir. Bu hissədə həmin yeniliklərin tətbiqi istiqamətində mümkün tənqid və risklər müzakirə ediləcəkdir. Bu istiqamətdə ilkin olaraq rəqəmsal imkanların bu prosesdə hansı yer tutması, şablonların ədalətə çıxış prinsipinə təsiri və müəyyən edilən qaydalar riayət edilməməsi halında hansı sanksiyaların nəzərdə tutulması müzakirə ediləcəkdir.

[19] Yenə orada, 35.
[20] Yuxarıda istinad 10, § 78.
[21] Mathias Weller, Ralf Köbler, Verfahrensgrundsätze und Modellregeln für die grundsätzlich elektronische Führung gerichtlicher Erkenntnisverfahren, 94 (2006).
[22] Bax: Reinhard Gaier, yuxarıda istinad 15, 180; Dəstəkləyənlər: Mathias Weller, Ralf Köbler, yuxarıda istinad 21; Burkhard Hess, § 2 Die Rechtsetzungskompetenzen der Union im Prozessrecht Europäisches Zivilprozessrecht, 1 (2020).
[23] Yuxarıda istinad 13, 36.
[24] Yenə orada, 13.

A. Texniki imkanların tətbiqi

Başlanğıcda rəqəmsal vasitələrin dəstəyi ilə strukturlaşdırma ideyası tənqidlə qarşılanmışdı. Bu tənqidlər, əsasən, texniki vasitələrdən istifadənin həcmi ilə bağlı idi. İrəli sürülmüş arqument isə strukturlaşdırmanın təklif edildiyi formada tətbiqinin səmərəsiz olması idi.[25] Bu proses məhkəmə aktlarının tərtib edilməsi zamanı göndərilən ərizələrin elektron formada dəyişiklik edilmədən köçürülməsindən ibarətdir. Nəticədə, bu, texniki imkanların tətbiqinin məhdudlaşdırılmasına səbəb olur. Bu da öz növbəsində, təklif edilən yeniliyin sadəcə kağız sənədlərin elektron illüstrasiyasına bərabər olmasına dəlalət edir.

Buna görə də rəqəmsal imkanlardan daha səmərəli istifadə edilməsi təklif edilirdi. Məsələn, mübahisə ilə bağlı aidiyyəti faktların müvafiq sistemə daxil edilməsindən sonra süni intellekt bu məlumatlar əsasında mümkün məhkəmə qərarı layihəsini tərtib edə bilər. Bu nümunə məcburi qüvvəyə malik deyildir və yalnız hakimin fəaliyyətinə dəstək xarakterlidir.[26] Qeyd edilən təkliflər Alman prosessual hüququnda irəliləyiş kimi qiymətləndirilsə də, Almaniya Federativ Respublikasının Konstitusiyasının 92-ci maddəsinin mümkün pozulması səbəbindən rədd edilmişdir.[27] Konstitusiya mübahisəni həll etmək vəzifəsini hakimə həvalə edir. Texniki təchiz olunmuş sistemlərin, məsələn, süni intellektin istifadə edilməsi bu maddənin müddəalarını poza bilər. Yəni burada elektron sistem Konstitusiyada nəzərdə tutulan "hakim" anlayışına bərabər tutulmur. Bu da öz növbəsində, texniki imkanların tətbiqini məhdudlaşdırır. Təkliflərin rədd edilməsinin hüquqi əsaslandırılması ağlabatan səslənsə də, rəqəmsal imkanların birbaşa istisna edilməməsi, onun bəzi elementlərini bu sahəyə inteqrasiya edilməsi, ən azından onların ətraflı müzakirəsi məqsədəuyğundur.

Bəzi ölkələr artıq süni intellekti məhkəmələrin işini yüngülləşdirməyə və şəffaflığın artırılmasına yönəlmiş alət kimi nəzərdən keçirir.[28] Süni intellekt qərarların qəbulunda köməkçi kimi də istifadə edilə bilər.[29] Bununla belə, bəzi yurisdiksiyalar qərar qəbuletmə mərhələsində hüquqi texnoloji vasitələrdən istifadə ideyasını, ümumiyyətlə, rədd edir. Məsələn, 2019-cu ildə Fransada qəbul edilən qanuna əsasən, məhkəmə qərarını proqnozlaşdıra bilən

[25] Reinhard Greger, *Der Zivilprozess auf dem Weg in die digitale Sackgasse*, 47 Neue Juristische Wochenschrift 3429, 3430 (2019).
[26] Daniel Effer-Uhe, *Strukturierter Parteivortrag im elektronischen Zivilprozess*, 1 Zeitschrift für das gesamte Verfahrensrecht 6, 12 (2018).
[27] Yuxarıda istinad 13, 7.
[28] Burada nümunə qismində Kanada göstərilə bilər; Bax: Directive on Automatic Decision-Making of the Government of Canada (2019). Burada bax: https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32592 (son baxış 11 sentyabr 2022).
[29] Carolin Kemper, *Kafkaesque AI? Legal Decision-Making in the Era of Machine Learning*, 24 Intellectual Property and Technology Law Journal 251, 260 (2020).

alətlərdən istifadə qadağan edilmişdir.[30] Hətta bunun üçün cinayət məsuliyyəti də nəzərdə tutulmuşdur.

B. Şablonların tətbiqinin ədalətə çatıma təsiri

Bir tərəfdən, tərəflərin iştirak etdiyi prosesdə şablonun mövcudluğu ədalət mühakiməsinə çıxışın asanlaşdırılması vasitəsi ola bilər.[31] Bir qayda olaraq, bunu vəkil ilə təmsil olunmayan proseslərdə müşahidə etmək mümkündür. Belə ki, tərəflər xüsusi hüquqi təhsilə sahib olmadıqlarından iddia ərizələrinin yazılması ilə bağlı zəruri biliklərə malik deyildirlər.[32] Şablonların tətbiq edilməsi isə onların işini əhəmiyyətli dərəcədə yüngülləşdirə bilər. Bununla belə, bu istiqamətdə şablonların bütün növ məhkəmə mübahisələrində tətbiq edilməsi qeyri-real görünür. Burada müxtəlif ümumi xüsusiyyətlərə sahib və eyni zamanda kütləvi xarakter daşıyan işlər arasında qruplaşdırma aparmaq olar. Məsələn, sığorta hadisəsinin baş verməsi və ya istehlakçı hüquqlarının pozulması nəticəsində yaranan məhkəmə mübahisələri belə işlərə nümunə ola bilər. Müvafiq olaraq, yuxarıda göstərildiyi kimi bənzər cəhətlər üzrə ümumiləşdirilən hər bir iş qrupuna aid olan zəruri faktların, başqa sözlə, şərtlərin siyahısı müəyyən edilə bilər. Bu halda iddiaçı şablondakı yalnız müvafiq sahələri doldurmalıdır. Növbəti addım olaraq isə süni intellekt bütün lazımi sahələrin doldurulub-doldurulmadığını və ya əsaslandırılma dərəcəsini yoxlayacaqdır.

Qeyd edilən bütün bu problemlərin aradan qaldırılması mümkündür. Hər bir işin xüsusiyyətlərini əhatə etmək üçün şablonlarda zəruri xanalarla yanaşı, əlavə sahələr də nəzərdə tutula bilər. Bununla da, bu sahədə tərəflər həmin işi bütün digər işlərdən fərqləndirdiyini hesab etdikləri məqamları qeyd edə bilərlər. Şablonların tətbiqi vəsatətin məhkəmə tərəfindən yoxlanılmasını istisna etmir. İddia ərizəsinin səhv doldurulduğu halda isə məhkəmə özünün maddi prosesin idarə edilməsi öhdəlikləri çərçivəsində bu barədə tərəfi məlumatlandırmaqla şablonların tətbiqini aradan qaldıra bilər.

C. Sanksiyanın nəzərdə tutulmaması

Normanın tətbiqinin təmin edilməsi onun tərtibindən və qüvvəyə minməsindən sonra gələn ən mühüm vəzifədir. İcranın təmin edilməsinin əvəzsiz elementlərindən biri qismində onun icra edilməməsi halında baş verə biləcək mümkün sanksiyaların nəzərdə tutulması çıxış edir. Strukturlaşdırma təklifi qaydalara əməl edilməməsinə görə sanksiya nəzərdə tutmadığına görə

[30] Malcolm, Langford, Mikael Rask Madsen, France Criminalises Research on Judges (2019), https://verfassungsblog.de/france-criminalises-research-on-judges/ (son baxış 11 sentyabr 2022); LOI n° 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice, mad. 33 (2019). Burada bax: https://www.legifrance.gouv.fr/jorf/article_jo/JORFARTI000038261761?r=3LmMkQwI17 (son baxış 11 sentyabr 2022).

[31] Yuxarıda istinad 21.

[32] Florian Specht, *Chancen und Risiken einer digitalen Justiz für den Zivilprozess Vor- und Nachteile von außergerichtlichen Konfliktlösungsmöglichkeiten*, 3 Multimedia und Recht 153, 157 (2019).

tənqid edilir.[33] Hətta müvafiq qərarın[34] və işçi qrupunun təklifi strukturlaşdırmanı zəruri etsə belə, onun pozulması heç bir mənfi sanksiyaya səbəb olmur. Bunun səbəbi isə strukturlaşdırmanın yalnız mövcud qaydalara əlavə stimul qismində başa düşülməsidir.[35]

Müxtəlif yurisdiksiyalar bu məsələ ilə bağlı fərqli yanaşmalara sahibdirlər. Nümunə olaraq, ingilis hüququnda hakimin strukturlaşdırma öhdəliklərinə əməl edilməməsi halında sanksiya təyin etmə səlahiyyəti vardır.[36] Ancaq bu səlahiyyətin əhatə dairəsi hələ də mübahisəlidir. Məhkəmə iddianın rədd edilməsi ilə maddi sanksiyanın təyin edilməsi (məsələn, prosessual xərclərin ödənilməsini tam olaraq bir tərəfin üzərinə qoyulması) arasında seçim edə bilər.[37]

Fransız hüququ isə strukturlaşdırmanın bütün müvafiq səviyyələrində tətbiq edilməsini təmin edəcək aydın sanksiyalar sisteminə malik olmaması səbəbindən tənqid edilir.[38] Belə ki, fransız mülki prosessual hüququna uyğun olaraq burada sanksiyalar yalnız bir halda təyin edilə bilər. Bu da iddia ərizəsində xülasənin olmaması halında müşahidə edilir.[39]

Nəticə

Yeniliklərin tətbiqindən göründüyü kimi, tərəflərin ərizələrinin strukturlaşdırılması ideyası bir çox hüquq sistemində öz əksini tapmasına baxmayaraq, bu sahədə hələ də bir sıra qeyri-müəyyənliklər mövcuddur. Bunlara strukturlaşdırmanın hansı həcmdə, yəni hansı növ işlərdə tətbiq edilməsindən başlayaraq, rəqəmsal imkanların bu prosesdəki rolunadək olan bir sıra məsələlər aiddir. Əlavə olaraq, texniki vasitələrin, xüsusilə də süni intellektin tətbiq edilməsi müxtəlif fundamental sualların ortaya çıxmasına səbəb olur. Belə ki, burada hakimin prosesin idarə edilməsində konstitusiya ilə müəyyən edilmiş rolu və mülki prosessual hüququn fundamental prinsipləri ilə ziddiyyətlərin yaranması aşkar edilmişdir. Bu səbəbdən də texniki vasitələr ilə müxtəlif yeniliklərin tətbiq edilməsi, ilk növbədə, geniş müzakirə edilməli və fərqli perspektivlərdən yanaşılaraq qiymətləndirilməlidir. Hazırkı məqalə bu məqsəd üçün alman hüququnda mövcud olan müzakirələri əks etdirməyə çalışmışdır.

Azərbaycan təcrübəsində hal-hazırda formaların tətbiq edilməsi ilə bağlı yalnız instansiya meyarına görə bölgü mövcuddur. Burada alman təcrübəsində olduğu kimi, ilk növbədə müəyyən sadə və kütləvi xarakter daşıyan mübahisələrdə tətbiq edilməsi daha məqsədəuyğun hesab edilə bilər.

[33] Gaier, yuxarıda istinad 15, 177.
[34] Verhandlungen des 70. Deutschen Juristentages, 15 saylı Qərar (2014).
[35] Yuxarıda istinad 13, 31.
[36] Martin Zwickel, *Die Strukturierung von Schriftsätzen*, 16 Monatsschrift für Deutsches Recht 988, 991 (2016).
[37] Yenə orada, 991; Daha ətraflı bax: Thomas Schuster, Writ - Claim form – Klage (2006).
[38] Zwickel, yuxarıda istinad 36, 989-990.
[39] Yenə orada.