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Front Pages

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The current issue is the second of the tenth volume of the *Athens Journal of Law (AJL)*, published by the *Business and Law Division of ATINER*.

Gregory T. Papanikos
President
ATINER

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- Submission of Paper: **17 June 2024**

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New Welfare Models and Community Enterprises: Commons and Sustainable Economy

By Roberta Caragnano[*]

The authoress outlines new welfare models and community enterprises, in the context of the Third Economy, with the aim of defining guidelines and interventions for the promotion of social enterprise and the strengthening of the social and solidarity economy. The Third Economy understands enterprise as an integral part of society and aims to create a new economic model that combines profit and sustainable development in line with the goals set by Agenda 2030. The goal is to define new development paradigms that put people at the centre, heeding the next generation. Sustainability is the file rouge of this study offering a rich review of the literature on the concept of the commons, while illustrating practices that have already been initiated. The essay also discusses the draft law on Community Social Enterprises as a welfare model, and concludes with de iure condendo perspectives.

Keywords: *Welfare; Commons; Third economy; Worker partcipation; Social responsibility.*

Introduction

Today's economic scenario is characterised by a paradigm that, on the one hand, consumes energy and resources and, on the other hand, produces both positive and predominantly negative impacts on people and on the planet and ecosystems. As such, questions need to be asked about the direction of the economic model towards which our economy is heading.

The COVID-19 global pandemic, in this regard, has made clear the interdependence between the global economic fabric and the fragility of every human being in the face of environmental, social and economic phenomena generated by unforeseen emergency situations.[1]

This is the context for the Third Economy: a scenario in which the needs of citizens and communities weigh as much as the demands of shareholders and in which the entrepreneur directs the mission (free of mere philanthropic intent) not only towards the achievement of profit goals, but to community welfare.

It follows that the strategic and fundamental creation of a new culture, a new economic model is called for: the "Third Economy" crafted by intelligent entrepreneurs that combines profit and sustainable development in line with the goals set by the 2030 Agenda for Sustainable Development. [...] We need a new

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[1]Gregori (2020).

civil economy and a new humanism guided by the concrete goal of defining new development paradigms that put people at the centre. Companies that have already been carrying out a new model of sustainable development for several years that, among other things, has been clamoured for in Europe, and that hopefully can be translated into a new approach towards the reconstruction of Sistema Italia.[2]

The essay aims, therefore, to initiate a shared process among the various stakeholders and, under the coordination of the Ministry of Labour and Social Policy, lead to a new civil economy and a new humanism to define new paradigms of development that put people at the centre and look towards the new generations.

In the documentary "The Third Industrial Revolution: A Radical New Sharing Economy," Jeremy Rifkin analyses precisely the aspects related to sustainability and the role of the new generations, which are central to the future of national systems. A new economic model, starting with addressing issues related to poverty and fair work, continuing on with climate change, aims to create a new pillar called the Third Economy Pact, in a general scenario in which technology dominates.

Given these premises, it seems fundamental to push questions about what can and should be the contribution that the management of the commons can provide in the search for the common good tout court in a political society.[3] This is precisely the propaedeutic approach needed for the launching of the Third Economy, a reflection that moves the foundations from the concept of the commons that distinguish it from the "common good."

Sustainability, the common thread of the path taken, is an aspect of sustainable economy, which Italy presented between 2019 and 1920 in concrete technical proposals (with the Ministry of Labour and Social Policy). Italy also presented the need for a resolution at the level of the United Nations General Assembly in the Entrepreneurship for Sustainable Development that points to specific issues of sustainability, particularly to the role of social and solidarity enterprises for the purposes of sustainable development, especially in the response to COVID19 and in the phase of post-pandemic recovery. At the international level, in fact, the Resolution on "Entrepreneurship and Sustainable Development" with Italian comments was presented to the UN General Assembly and was accepted.

The complexity of the markets and the new scenarios of the globalised economy, in fact, impose paradigm shifts yet to be addressed, in order to make more and more system in the elaboration of shared planning that see among the assets constructive confrontation and dialogue, synergy and networks for development, territory, and sharing. The vision of the Pact aims at an integrated and shared approach, with all the players involved, to evoke virtuous circuit that will guide and strengthen investment and, at the same time, create new and more qualified employment to achieve ever higher levels of development and quality of life.

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[2]"Undersecretary of State Stanislao Di Piazza on September 28, 2020 visiting the international pharmaceutical group Chiesi Pharmaceuticals, at its main production plant and research center in Parma". See Adnkronos (2020).

[3]Mattei (2011); Veca (2015); Viola (2016). On the relationship between common goods and the realisation of social justice see Zamagni (2015) at 51-80.

To this end, the essay shifts the foundations from a rich review of literature on the concept of the commons, from Garret Hardin's studies to the present day with the legislative proposals that have taken shape over the years while also citing good practices. The aim is to provide initial scientific foundations on which to start a path of study and research that, starting from the interdisciplinary nature of the subject, refocuses into a field of inquiry that has as its beacon the "Third Economy" understood as a model of development that generates profits for the well-being of people.

Findings/Results

The Economic Debate on "the commons" from Hardin to Ostrom

The study of the commons found fertile ground in the Anglo-Saxon world in 1968 when Garret Hardin in his essay "The Tragedy of the Commons."[4] published in *Science*, laid the foundations of his vision and initiated the debate that would investigate economic sociology regarding the exploitation of the commons.

The reference is to the Commons, i.e., the Anglo-Saxon designation of common lands. The author himself highlights the essentially economic nature expressessing ‘The very fact that the commons are free access and that there is no possibility of limiting the number of users leads to a situation where the rational behavior of each of them can only cause the degradation, the destruction of the resource itself, since they find themselves trapped in a tragedy of freedom based on an irresolvable conflict between individual and collective interests, with the inevitable prevalence of the former over the latter.’[5] The starting point of Hardin's theory, therefore, is the dilemma between individual interest and collective utility, what he called the "tragedy of liberty in a common property"; a dilemma in which men "users" of the common good are trapped and only the state, an external authority, can put an end to the destruction and/or unwise use. Hardin, therefore, argued that the only way to avoid the tragedy was privatisation of the resource or its public ownership.

This statist vision in the 1980’s was contrasted with a neoliberal vision viewed based on Milton Friedman’s concept as the centrepiece of the doctrine which was based on deregulation, privatisation, and reduction of social expenditures. Further, at the political level, Margaret Thatcher and Ronald Reagan (whose famous phrase was "Government is not the solution of our problem; government is the problem”), were its major exponents.

The assumption was a market devoid of regulation and governed by market forces (supply and demand) alone, without any intervention by a state public authority in a broader concept, whereby common goods are market goods and the principle applies to them that a good belongs only to those who can pay for it.

To Hardin's thesis in 1990, in her study entitled "Governing the Collective Goods," Nobel laureate in Economics Elinor Ostrom contrasted a different view

[4]Hardin (1968).
[5]Hardin (1968).

by showing that both centralised authoritarian management of goods and their privatisation are neither the solution nor without relevant problems. This theory was based on empirical cases which demonstrated the questioning of universally applicable models and pointed out that the set of individuals who are "users" of collective resources, under certain conditions, have the ability to manage natural resources in a way that is satisfactory to themselves with long-lasting resources.

It followed, according to his view, that community self-government could lead to proper management of the commons, thus refuting the dominant dichotomy between State and Market. This also demonstrated the existence of efficient and sustainable alternatives that could prevent the over-exploitation of collective resources and, consequently, also their destruction.

While privatisation of collective natural resources is not always possible (and therefore does not solve the problem of over-exploitation of resources), neither is socialisation the solution. As the economist Ostrom herself states "The choice of the bureaucratic Leviathan is not the only way to solve the dilemma of collective goods."[6]

On this basis, Ostrom defined eight "design principles" that can be considered "the coordinates of cooperative self-management of collective natural resources. The first principle the clear physical definition of the boundaries of the collective resource; the second, the congruence between the rules of appropriation and provision and local conditions; the third, the methods of collective decision-making; the fourth, the control of overseers over both the conditions of use of the collective resource and the behaviour of appropriators; the fifth, progressive sanctions; the sixth, the conflict resolution mechanisms; the seventh, the recognition of the right to organise by appropriators, and that is, the non-interference of external governmental authorities; the eighth, the multilevel organisation of the use of collective resources that are part of larger systems, so as to reduce their complexity and allow relatively small groups of people to self-manage the problem: easier indeed to solve a problem when people know each other personally and trust each other."[7]

Discussion

The "Commons" between Economics and Law

The central point of the debate, however, intends to speak of the commons, either from the economic point of view as common goods or from a legal perspective that those goods tend to rise to universal rights. This has relevant effects, especially in terms of the policies that are put in place by states.

However, before going into the merits, albeit briefly, of legal issues, it should be pointed out that the economic notion of the commons is independent of legal and moral notions. The commons are tangible or intangible resources shared and enjoyed by more or less large communities; these are goods that in themselves,

[6]Ostrom (2002).
[7]Ricoveri (2013) at 134-135.

and because of their intrinsic characteristics, are considered in an objective "neutral" sense, with respect to other goods also being far from the concept of primary good and on which there is ample economic literature. Just to give an example in the literature, we refer to grazing as a common good, precisely neutral without moral meaning "good" or "bad" and that is, however, not primary good.

Underlying Ostrom's vision is not only the definition of "common good" tout court, but the management of the good when community (management) itself, as demonstrated by her empirical cases, is more effective than private or state management. According to Grazzini, "Ostrom's discovery that communities can consolidate relationships of mutual trust and self-regulate through common interests, common practices, constant communication, trial-and-error experimentation, and can develop high skills. The advantage over private individuals and the state that communities have a greater interest in conserving and developing the commons because for them the commons can be essential resources, and because they have direct experience with it, and thus in general (though not always) communities have the best expertise to manage "their" commons in a sustainable way."[8]

In detail, the Nobel Prize-winning economist herself, who, to remove all doubt, clarifies the distinction between goods that are under common property, over which a group of people who share the good can dispose of the use of the resource (and also have exclusive rights over its use), from goods that otherwise are of open access and thus freely available and usable by all, such as the sea, water, and the atmosphere.

With respect to the legal question, it should be pointed out, however, that there is no recognised unambiguous definition of "common goods" but rather a majority consensus to consider them as neither public nor private goods, neither tangible nor intangible.[9]

A general, dominant view considers those goods to be managed, precisely, in a communal manner and for general protection that anticipates preserving them for future generations. It follows that, from an abstract legal point of view, not only a good tout court circumscribed in its physical and spatial dimension, but also other entities such as communities as well as «trusts managed in the interest of future generations, village economies, water-sharing devices, and many other organisational structures both ancient and contemporary» that can rise to the status of common good.[10]

However, the issue inherent in the nature and legal status of the commons remains a fact. Stefano Rodotà, who was among the first to raise the issue in Italian law, stated, ‘if the category of common goods remains nebulous, and everything and the opposite of everything is included in it, then it may well be that we lose the ability to identify precisely the situations in which the 'common' quality of a good can unleash its full force’[11]. The eponymous Rodotà Commission-

[8]Grazzini (2012).
[9]On the forms of governance of common goods as a parameter for their legal qualification, see Micciarelli (2014).
[10]Mattei (2017).
[11]Rodotà (2012).

formed in 2007 drafting an outline of a delegated law to amend the Civil Code rules on public goods has defined as common goods "those things that express functional utility for the exercise of fundamental rights as well as the free development of the person."[12]

In this sense, the concept of the common good, as anticipated, became linked to goods that rise to universally recognised rights. More specifically, Rodotà continues, the common goods "are those functional to the exercise of fundamental rights and the free development of the personality, which must be safeguarded by subtracting them from the destructive logic of the short term, projecting their protection into the more distant world inhabited by future generations. The attachment to fundamental rights essential". Morevover, with respect to the commons he believes that: "The emphasis is no longer on the subject of ownership, but on the function that an asset must play in society. [...] Commons are diffuse ownership, they belong to everyone and to no one, in the sense that everyone must have access to them, and no one can claim exclusivity. They must be administered according to the principle of solidarity. Unavailable to the market, the commons thus present themselves as an essential tool so that the rights of citizenship, those that belong to all as persons, can be effectively exercised."[13]

Ergo, they are not res nullius but neither are they open-access goods, and their management must be marked in such a way as to reconcile individual and collective interests in a vision that aims at efficiency and sustainability.

Hence, there also follows in point of law a still open question about the legal regime applicable to commons, in that subtle difference between subjective and objective planes. In the age of digital communication networks, the example of the Internet is fitting. The Internet is in itself a common good managed by the community of users where other networks patented by private entities, and among them those managing big data, have limitations to access, including with respect to the discipline on patents and intellectual property. Wikipedia is another similar example; a worldwide encyclopedia managed by the community of user-users.

Common goods in this sense, understood as collective enjoyment, thus include water, the environment, education, communications as well as, for some, health, housing rights, parks, and social security.

Collaborative Economy and the Commons: What Relationship (brief insights)

Building on Ostrom's vision but with a modern twist is both the strand of study of the collaborative[14] or sharing economy associated with the commons and the entrepreneurial vision of those who advocate a sustainable human economy.[15]

[12]Rodotà (2011); Mattei (2011); Rodotà (2013); Marella (2012); Quarta & Spanò (2016); Nivarra (2016); Quarta (2017).

[13]Rodotà (2012).

[14]On the relationship between the economy of collaboration and the civil economy, see Bruni & Zamagni (2015); Zamagni (2007); Becchetti (2014); Becchetti (2016); Montesi (2016). On the evolution of the concept of civil economy in light of the demands determined by the pandemic and in the new vision, read The Florence Charter for the civil economy. The future after the Coronavirus, delivered to the President of the Republic, Sergio Mattarella, on 25 September 2020 at the opening of the second edition of the Civil Economy Festival.

The collaborative or sharing economy[16] is defined, according to the Initiative Opinion of the European Economic and Social Committee (2014), as those production and exchange activities that can be traced back to the 'traditional way of sharing, exchanging, lending, renting and giving redefined through modern technology and communities.'[17] There are four forms of such an economy: collaborative consumption; collaborative production; collaborative learning; and collaborative finance, the latter of which includes crowdfunding.

To quote some of the literature, it is "a new model of production, one party shares an asset that belongs to them with another who has only an interest in using it temporarily and not in acquiring ownership. Functioning according to this description are time banks, leases that individuals can make on the Airbnb platform, and transportation contracts that arise between travelers who meet on the BlaBlaCar site."[18]

Among the earliest forms of collaborative economy that have emerged in our country, there is the (controversial) case of Uber for management in the transportation of people;[19] but also Airbnb for the rental of vacation apartments.

The link between collaborative economy and commons, therefore, albeit in their respective divisions, is metaphorically well described by Quarta as a "circular image: a community can identify a good that enables the satisfaction of its needs and decide to take care of it; on the other hand, the collective work on and for the common good - and therefore: social cooperation itself - to create the community, cementing social ties."[20]

The aspect that emerges and paves the way for an innovative and interesting line of study, and which we will also analyse below in light of the new vision of "sustainable" economy, lies in the way the common good(s) is managed for the protection and satisfaction of community interests.

On this point, authoritative civil law doctrine states that the law of goods 'represents the set of tech-nics by means of which the utilities of things are distributed among people, a set that encompasses, but does not coincide with, traditional real rights, because it also includes the techniques of organising the groups to which a situation of ownership over the goods is ascribed, techniques which, precisely, serve to plan the distribution of the utilities of the goods among the subjects participating in the organised structure whether it is a profit-making or mutual society, a nonprofit association or other'[21], hence the intersection with commons, which finds the tipping point between property and forms of group organisation.

It is the opinion of the writer that within such new models of the sharing economy - also referred to as collaborative consumption - there are a complex number of activities and organisational structures based on a community of

[15]Spedicato (2010) refers, for example, to the peer economy, the collaborative economy, collaborative consumption.
[16]Smorto (2015); Benkler (2004); Moeller & Wittkowski (2010); Capeci (2015).
[17]Own-initiative opinion. Brussels, 21 January 2014. Speaker: Hernndez Bataller.
[18]Quarta (2016); Quarta (2017).
[19]Caragnano (2016).
[20]Quarta (2017).
[21]Gambaro (2012). On the concept of goods, see also Grossi (2012).

subjects as opposed to traditional-style systems and oriented in the direction of resource sharing, as well as the use of new technologies, the use of the Internet, geolocation systems, smartphones. While this makes the use of goods more usable and reduces the steps in the distribution chain, linking them directly to production and affecting the costs of services (which tend to be progressively reduced), it also generates problems on the side of both competition law and labour law, leading to a tertium genus.

New Models toward the Third Economy

This section analyses the current perspective in which the Third Economy is placed on a path that aims at the "humanisation" of the economy and the model of different and sustainable development (§ 5.1) - also widely taken up by the Catholic social doctrine both in the Apostolic Exhortation "Evangelii Gaudium" of 2013 and and in the encyclical "Laudato sì on the care of the common home" of 2015 - that do not neglect the relationship between ethics and social responsibility of the entrepreneur (§ 5.2) and place the person at the center. The section closes with the already established experiences of Acqua Bene Comune and Teatro Valle Bene Comune (§ 5.3) and the de iure condendo framework of community social enterprises and new welfare scenarios (§ 5.4).

On the one hand, there are reported experiences that have placed the "common good" at the center, representing models, innovative and laboratory, of experimentation for the elaboration of a legal framework that gives normative status to "common goods"; on the other hand, the theme of welfare is viewed as declined both in social enterprises, with the proposal of further amendments to the Code of the Third Sector to broaden its scope, and in the perspectives of territorial welfare.

Sustainable Human Economy and Worker Participation

On the economic side of social entrepreneurship, California entrepreneur Peter Barners, building on Ostrom's theory but revisited in a modern key, reiterates the idea of a human economy based on the rules of the commons economy that is sustainable. As such, he argues that the defense of the commons can be entrusted to nonprofit foundations with the goal of preserving the good for future generations.

Barnes himself, while recognising the value of profit, admits that the current capitalist system, strictly speaking, unloads environmental and social costs on society and proposes a third way of development that is based on the "humanisation" of the economy.

The model to which Barners refers is that of the Alaska Permanent Fund Foundation, which annually remunerates citizens with dividends derived from the state's oil revenues; all in a logic of regeneration of the commons also in line with a vision of eco-rights of communities in a kind of legal consciousness that points to the enhancement and protection of the commons. In this setting, for example, would be the conversion of intensive industrial agriculture to organic agriculture that reduces pollution while preserving, on the one hand, the environment

(reducing CO2 emissions but also the use of fossil fuels for industrial production) and, on the other hand, the health of individuals.

This would produce not only direct effects on the world population but also on the labour front noting that many diseases, including chronic ones, are a consequence of both the environment and nutrition. Moreover, from a strictly technical point of view, illnesses result in greater absence from the workplace and impact both the state system of support and protections, and the pension system as well as the health care system.[22] The focus, then, is the tout court protection of goods such as water,[23] environment, health, technology, education, culture, to name a few.

In the same objective the theme of the "humanisation" of the economy, which sees many companies engaged in the forefront and where a part of the revenues is invested and reinvested not only in corporate organisations, is linked with a common thread to the legal-economic theme of worker participation and the construction and implementation of participatory models in companies.[24] The connection between the two strands of study in the new and modern vision of the realisation of the aforementioned goals from the perspective of protecting the common good also has spillover effects on the territories for the enhancement of places and tourism.

At a conference organised in 2013 by the Sat Italia School[25], which aimed to share good practices in this regard, case histories of a number of realities were brought to light, and these included, to name a few, Loaker and Hotel La Perla in the Dolomites. The former (Loaker) had initiated a business model of so-called circular organisation, where choices are made following a vision that aims at democratic participation. The second (Hotel La Perla), in the vein of family management that aims to consider customers not per se but rather as guests to be pampered and to whom to introduce the scenic beauty of the area, has started a path shared also by other hoteliers that tends to enhance the territory but concurrently to also investment in social welfare. A part of the hotel's revenue, in fact, donated to the Costa Family Foundation Onlus that finances the construction of facilities for children in Tibet and Uganda[26] all with the logic of sharing and participation between ownership and employees.

Third Economy between Ethics and Social Responsibility of the Entrepreneur

[22]World Health Organization (2011); Schmitz (2011); OECD (2012); European Network for Workplace Health Promotion (2013); United Nations (2013); Bell, Lutz, Webb & Small (2013); Varva (2014); Kubo, Goldstein, Cantley, Tessier-Sherman, Galusha, Slade, Chu & Cullen (2014); Pollak (2014); Tiraboschi (2015).

[23]In Italy in 2011 there was a referendum on water as a common good; for further information, please refer to § ***Water Common Good and Valley Theater Common Good.***

[24]Treu (1988); Pedrazzoli (1989); D'Antona (1992); Cella (2000); Caragnano (2011). On the classification of the various forms of participation made by Baglioni which distinguishes it into antagonistic, collaborative and integrative see Krieger & O'kelly (1994); Baglioni (1995); Molesti (2006).

[25]La SAT ITALIA is a non-profit organisation founded in 2012.

[26]Bartolini (2013).

Returning to the concept of the common good in relation to sustainability there is, therefore, the need to intervene, including from a legislative standpoint, on a definition of the concept that underlies the vision of the new development model of the Third Economy on which the government is working. We are, in fact, on the path toward a Third Economy that, generated by the need to guarantee the rights of each person, is now embarking on challenges called upon by the entire world.

The next decade will be opening in a complex scenario, as marked by a pandemic and suffering in which ethics seems to succumb to the ruthless logic of profit at any cost. The munitions market, pollution, and the struggle for water are among the most obvious manifestations.

Italy, especially in the last two decades, is credited with introducing new approaches and visions into the political and economic debate. It speaks of the common good and the centrality of the person as essential and unavoidable elements. A natural continuation of the thought by Olivetti its best exponent. He is the man who appears today to be of absolute modernity and is recalled every time the debate puts corporate welfare and corporate social responsibility at its foundation.

The starting point is the centrality of the person and their wellbeing in this case young people, who will have to live and manage the evolution of society oriented toward a model of sustainability of the economic system, in light of the themes of Agenda 2030. 'The central role of the person as an engine of innovation and development, both in the enhancement of human resources in productive spheres with attention to the needs of citizens, whether workers, consumers, service users, savers or taxpayers, is a central theme of the current debate as well as of the warning from the encyclical of Pope Benedict XVI'.[27] The key phrase is "human capital."

More than models boxed in the norms of law, they will have to be legislated by giving breathing space to initiate processes. Article 41 of the Constitutional Charter defines economic initiative as a necessary tool for the realisation of the common good, without harming what the fundamental values of the person are.[28]

This line of reasoning leads back to the real innovative content of the debate of recent years, that of the social responsibility of the entrepreneur, who, like a politician, assumes through his/her actions an obligation to citizens. It is by this route that one will secure the economy from unwise choices that feed the dark side of progress (speculative finance, munitions market, environmental destruction, water speculation). It is important, therefore, to start talking about community enterprises that operate for an innovative idea of profit: one that will contribute to the needs of entire communities (on this point see infra § 6). 'The economy will grow and develop for the common good and relational goods, thanks to concrete good practices. Not just a desirable and possible future, but a concrete ideal that will lead us to sustainability for Italy and the entire planet.'[29]

[27]Caragnano (2011).
[28]Di Piazza (2020).
[29]Di Piazza (2020).

In line with the innovative vision illustrated so far, a virtuous pair has taken shape over the years: that of Economy and Ethics, expressed in the all-Italian vocation to the Third Sector. The introduction of a new Code, [30] aimed at intervening in an area in which regulations were previously derived from other rights, is set to instil a new soul for the Economy; a State no longer a concessionary of models that left little margin for the needs of people, territories and communities. No longer resources to produce goods and services and then induce their consumption. 'In harmony with the goals of Agenda 2030 and the cry of alarm from civil society, a Third Pillar Economy between State and Market. A development process that has an ambitious goal, starting from the Welfare State and arriving at the Welfare Society. Work, no longer hostage to the market economy, but declined around the centrality of the person. A paradigm shifts and new visions in which passive and active labour policies are being redesigned.'[31]

Water Common Good and Valley Theater Common Good

More recent examples of economic democracy linked to the common good include Acqua Bene Comune, a public entity of the city of Naples, and the Fondazione Teatro Valle Bene Comune. Basically it is an entity established ad hoc and open to citizen participation that, based on the model of the French company Eau de Paris, is responsible for the management of water in the Neapolitan city in the interest of both the community and future generations.

Naples was the first Italian city to implement public management of water, following the Referendum of June 12 and 13, 2011. in fact, on October 26, 2011, there was the acknowledgement by the City of Naples (sole shareholder), of the transformation of ARIN Spa (Azienda Risorse Idriche) into ABC (Acqua Bene Comune). The Preamble of the Statute states that the special company 'takes its cue from the awareness that the profound transformations of law and economy on a global scale call for a rethinking of the category of public goods.'

Evidence of such a requirement is provided by, among others, the Supreme Court of Cassation United Civil Sections Decisions No. 3665 of Feb. 14, 2011 and No. 3831 of Feb. 16, 2011. Pivotal to the perspective if one has reason to adopt it, is the subversion of the principle that defines the characteristics of public goods according to the legal regime imposed on them by the state, given the latter's inadequacy, as a conceptual category no less than as a political entity to become the sole promoter of the interests of the populations, containing and directing the forces that carry out economy and law. By identifying goods according to their specificity and the nature of the benefit derived for the users, the category of common goods is delineated.

[30]The reference to the Third Sector Code (Legislative Decree 3 July 2017 n.117 and subsequent amendments) which has reorganised and revised the current regulations on the subject overall, defining, for the first time, both the perimeter of the so-called Third Sector and the entities that are part of it, with homogeneous and organic definitions.

[31]Thus in the Report by S. Di Piazza to the European Network on the Monitoring of Regional Labour Markets – ENRLMM. Annual Meeting – 15th Anniversary. Video conference – Rome, Thursday 17 September 2020.

In the Statute of ABC we read: 'Common goods are said to be those goods which, although in the diversity of the relations that for each type are established with their respective users, express utilities directly functional to the free development of the human person and the enjoyment of fundamental rights. Common goods are informed by the principle of intergenerational preservation of utilities». The quaestio always there in the concept and legal framing of common goods, such as water.'

Another experience is that of Teatro Valle Bene Comune, recognised precisely as a common good in 2011 and awarded the prestigious Princesse Margriet Prize in Brussels in 2013. The history of the Theatre has its roots in a long diatribe of some artists and workers in the performing arts who demonstrated opposition to the privatisation of the same (Theatre) and who gave birth to a project that later, as mentioned, led to declaring the property a common good, in which national and international artists performed free of charge for three years, managing the Theatre in a participatory manner, despite the fact that from many quarters there were doubts about the legal status of the initiative, including formal aspects (on this point it should be noted that the Court ruled in favour of recognising the operation).

Over the years, the Theatre has given birth to the Teatro Valle Bene Comune Foundation (made up of more than 6 thousand members), a non-profit entity established in the interest of culture and future generations and that has become a model and a laboratory of experimentation of innovative models, alternatives to the public and private ones, towards the creation of a legal system that recognises, protects and gives legal status to the common goods as understood. Aspect which is still being debated in legal doctrine today.

The Third Economy: Community Social Enterprises and Welfare Scenarios

The topic so far, albeit briefly analysed, of for-profit and nonprofit management in the current scenario, including regulatory, finds elements of contact with an evolving legislative framework.

Bill No. 1650[32] has been filed in the Senate with the aim of recognising and supporting community-based social enterprises, making amendments to Legislative Decree No. 112 of July 3, 2017 on social enterprise in order to broaden the scope of the current law and allow social enterprises to carry out a range of activities precisely typical of community enterprises, again within the Third Sector.

As stated in the explanatory report, 'community social enterprise [is] a new way of organising the production in an ongoing and professional form of goods and services of interest to a specific community, based on the direct participation of the inhabitants of a specific place, who recognise themselves in common objectives of development and regeneration of assets referable to a specific territory. Community enterprises, therefore, are distinguished essentially by two

[32]Bill no. 1650 on the initiative of senators Fenu, D'Alfonso, Comincini, De Petris, Provisions regarding community social enterprises. The bill communicated to the Presidency on 13 December 2019 can be consulted online on the website of the Senate of the Republic.

characteristics: the benefit for the community of reference, created through a business activity aimed at combating phenomena of depopulation, economic decline, social or urban decay, and the participation of its members, the ultimate recipients of the benefit. In this sense, the open and development-oriented community enterprise, guaranteeing all its members non-discriminatory access to the goods and services it produces, with a view to the common good.

In the aforementioned proposal - in line with the perspective of progressive development of Community Social Enterprises - the full implementation of the principle of subsidiarity is realised in the opinion of the writer. This principle is realised both in its horizontal dimension (through the action of private entities that provide for the care of collective needs and activities of general interest both individually and in an associated manner with a subsidiary role played by the public authorities that intervene in function, of what is planned by private entities) and in the vertical dimension where subsidiarity is articulated in the distribution of competencies among the different levels of territorial government with the enhancement of the role of territorial entities in an increasingly strategic perspective of planning, coordination and, in some cases, even management of welfare policies. Ascoli, in this regard, argues that the future of welfare models should tend toward the search for paths and tools capable of dealing with the new issues related to overcoming state/market dualism since, in a welfare mix or welfare society perspective, ‘it is necessary to move toward forms of "co-planning" and "co-assessment" of social interventions on the territory in which the different actors (public and third sector) manage to build networks of social protection and welfare promotion that would otherwise be unthinkable.’[33]

A path of territorialisation of welfare ensues. The network of public and private actors that emerges is called the "diamond of welfare" which represents a virtuous model of collabo ration and coordinated action between State, Market, Third Sector, Families/Individuals. As such, in the division of competences of multilevel government, the national level guarantees the basic services, which concern the essential services recognised by law, while the local level becomes the most balanced environment in which the subjects of the diamond, as per the needs of the territory, articulate appropriate tools and models of second welfare sewing on the territory of reference the most suitable dress to the existing social needs.

A path that, in the new configuration of the empirical research also determined by the crisis and the continuous transformations of the economy, sees ‘a progressive rapprochement of the four points, which tend increasingly to collaborate overlapping like the petals of a flower. Thus emerged a new configuration in which - in some territories and policy areas - State, Market and private social work together to provide solutions and answers for the well-being of individuals and families, considered not only passive beneficiaries, but increasingly subjects called upon to contribute responsibly and as far as within their means. In this new configuration, there coexist areas in which stakeholders from the four arenas act "mostly alone," and areas in which bilateral synergies are developed, up to cases-significantly increased in recent years-in which stakeholders belonging to the four spheres "network" and together design, manage, and produce programs and

[33]Ascoli & Pasquinelli (1993).

initiatives, marked precisely by a higher degree of sharing of financial and project resources'[34].

On this basis and in order to respond to the changing needs of the labour market [1] business networks together with cooperatives and consortiums [2] have become increasingly widespread, especially among small and medium-sized companies. This has also resulted in the economic crisis that imposes a paradigm shift in the vision of the role of the public entity and a necessary rethinking of development models. Lest we forget the role of bilateral bodies, which, however, assume a greater role in guaranteeing forms of assistance of a health and social security nature.

In this vein, Community Enterprises can represent an integral part in the new vision of welfare policies to consolidate and create added value, as well as greater competitiveness, and thus aim to create pacts of collaboration with the reference territory, in particular with local public institutions, concretely realising a system of second welfare responding to the economic and social needs of each reality.

Conclusion

The de iure condendo perspective of this and in the whole path initiated at the ministerial level, put legislative measures in place thatare based on a definition (including legal) of "common good." On the one hand this perspective rewards for-profit businesses supporting the common good and the community; As indicated to us by Article 41 of Italy's Constitution: 'Free private economic initiative […] cannot be carried out contrary to social utility [...]' (meaning the Common Good). On the other hand, such a perspective must make it possible to build a "Third Economy" that is not an alternative to the first (the market economy) or the second (the state), but that serves to support them realise the principles of the Constitutional Charter.

This is the path of building a "Pact for a Third Economy" that is supportive of the state and the market economy. It is a path shared with social partners and businesses to initiate growth processes that also carry out co-designing in the management of the common good, extended to all businesses that meet positive requirements for the community. A path now to be started in nuce that can in the long term ensure that tomorrow will bring "enlightened" enterprises that manage common goods such as health, education, environment, water, highways.

Therefore, the concept of a sustainable economy is to be considered from a systemic perspective and in relation to employment policies in the vision of a development that is capable of producing employment growth, especially among young people, with policies and measures aimed at supporting growth and competitiveness. This is also reaffirmed by the European Commission, which in its annual survey on Employment and Social Developments in Europe (ESDE), published in the summer of 2017, highlighted the importance of investing in people and enabling them to take advantage of quality employment opportunities. These elements are the notable aspect of the New Skills Agenda for Europe, in

[34]Maino & Razetti (2019) at 34.

order to support the development of citizens' skills to prepare them for a changing work world.

The Covenant today has been signed by eighteen of the most representative business associations in the world of corporate social responsibility: benefit corporations, B. corporations, community economy, circular economy, responsible consumption, social enterprises, and the world of cooperation, to name a few.

The goal is to initiate a policy dialogue to convey entrepreneurs' proposals through direct dialogue with policy makers by starting with the involvement of new businesses and, thus, experimenting with business models that also consider social impact.

Similarly, the aim is to involve new businesses, including those that also consider social impact. Additionally, the Project also aims to follow the cultural transformation by supporting all the events that have already been initiated that promote a new way of doing business: from the Florence Festival, to Regeneration in Parma, to the Economie di Francesco, to the Bertinoro Days to the Festival of Social Doctrine, from Festambiente to the Festival of Soft Economy, to name a few.

In conclusion, the path is also aimed at the establishment of an institutional container, such as a Study Centre, that can act as a Design Laboratory of the strategic vision and be a real lever, in terms of research and development, for the implementation of Covenant policies and actions. The model, that of Adriano Olivetti, who pioneered the idea of the factory as an idea of Community, is based on democratic participation in the life of the enterprise. Olivetti himself had shown how profit can create open communities that create employment and well-being, care for people and do business. The die is cast and the path set in motion.

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Water - Public Good Vital for Humanity

By Elena Emilia Ştefan[*]

In the background of the climate change, we estimate that one of the problems that humanity is to face in the near future concerns natural resources. In our view, water is one of the resources that will become increasingly important in the coming years by being on the way to diminishing. Force majeure events such as the vegetation fires or floods in the summer of 2023 show us that people and nature must be friends. Given that drinking water is vital for human existence, we believe that the proposed topic is of general interest and should be of concern not only to public authorities, but to the entire scientific community and to individuals, which makes it topical and important. The scope of the study is to analyse the issue of water, which means that, on the one hand, we will investigate the national regulatory framework but also comparative law to know how the legislator relates to water and, on the other hand, we will capture the current international trends in this field. By using research methods specific to law, we will underline the conclusion of our paperwork, that the protection of water resources is the responsibility of all of us: individuals, authorities, states, taking into consideration present and future generations.

Keywords: *public authorities; water; public good; Administrative Code; case-law.*

Introduction

From the birth of man to his passing away, water is essential to life. If man can survive without food for a short period of time, without drinking water his chances of living are considerably reduced. Nowadays, in the context of climate change and natural resource depletion, public authorities are permanently forced to identify solutions, from a legal but also an ethical or moral point of view, regarding access to drinking water for the population. Therefore, "*human coexistence increasingly feels the need for security, clarity and order within its inner relationships*[1]".

This issue raised our interest by starting from the fact that the right to drinking water is regulated in the Constitution of Slovenia: "*Everyone has the right to drinking water*"[2] (Article 70a). Besides, "*perhaps more than ever, humanity is faced with this reality: The imperative to identify legislative solutions for the present and for the future generations, at the boundary between law, ethics and*

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[1]See Popa (2008) at 63.

[2]See in this respect the public source at https://www.constituteproject.org/constitution/Slovenia_2016

morality[3]. The *World Water Day*[4] is celebrated internationally on the 22nd of March since 1993, and water conferences are regularly held[5].

In recent years, more and more force majeure events have taken place on almost all continents and have raised the question of the survival of humans as a species: floods, wildfires or even war. No matter what natural catastrophe we speak of, water and food, medicine and housing are basic human needs. Public authorities believe that "*due to a number of factors, including population growth, industrialization and climate change, water resources around the world are under high pressure, not only in terms of quality but also in terms of quantity*[6]*"*.

The purpose of the paper is to study the legislation, doctrine and case-law in order to know as much as possible about the legal regime of water. In this context, we aim to reflect on the importance of water as a non-renewable natural resource and to answer the following questions: "*Is there international legislation applicable to the quality of water intended for human consumption*"? or "*does the Constitution of Romania expressly provide for the right to drinking water?"*

We focus on the following specific objectives:

1. know the concepts and present the legal framework applicable to water;
2. identify the national authorities involved in managing water-related issues;
3. research the national literature and the comparative law relating to water;
4. analyse the relevant case-law of the European Court of Human Rights on water.

The present paper proposes an interdisciplinary analysis on a subject matter that has an impact on life on this planet, namely water, therefore we consider that its research topic is topical, both for scientific and for practical, applicative purposes.

Literature Review

The analysis of the literature reveals that water has been a concern for specialists from all over the world. For a long time, researchers have debated on how to refer to water: as a public good, as a public service or as a human right. The international scientific community analyses topics such as: the right to water, water pollution, causes of water scarcity, water governance crisis.

According to the doctrine, *access to water* means "*that right of fundamental value, according to which natural and legal persons use water in the necessary quantity and of an adequate quality*[7]*"*. It is stated in the same context that, "*considering that water is vital for human life and human health, and also essential for the management of ecosystems, for agriculture, energy and global*

[3]See Ștefan (2023) at 397.
[4]See in this respect the public source at https://www.worldwaterday.org/
[5]For example, the OECD Conference on 22-24 March 2023, New York. See in this respect the public source at https://www.oecd.org/water/oecdattheun2023waterconference.htm
[6]See in this respect the public source at https://insp.gov.ro/2023/03/22/22-martie-ziua-mondiala-a-apei/
[7]See Dogaru & Kajcsa (2021) at 35.

security of the planet, since 2010, access to water and sewerage has been recognized as a human right[8]".

Another author analysed the disparities in the quality of drinking water. He conducted a case study on California and examined violations of drinking water quality, identifying the categories of communities disproportionately affected by contaminated water[9]. The public interest in the environmental decision is another matter analysed by the doctrine, being expressed worldwide as "*general interest of humanity*"[10]. Other authors note: "*We witness a drop in groundwater levels due to irrigation at a rate that exceeds natural recharging (through rain and snow melting); thus, the overpumping of water in the aquifer basins in India, China, North Africa, Saudi Arabia and the US exceeds 160 million tons annually*[11]".

Among the specialists' concerns we find the corporate social responsibility in environmental issues, discovering that economic operators are also involved in taking measures to reduce pollution. A study states that "*the importance of corporate social responsibility activities has increased in recent years*[12]*"*. Other authors believe that *"there are expectations that economic operators will find solutions to key social problems and environmental challenges, such as access to water and healthcare at affordable prices*"[13]. Also, as emphasised by the doctrine "*in the context of global concerns of the States to regulate and implement measures with direct impact on climate change, there is an increasing need for regulatory certainty"*[14].

Another paper analyses the industrial pollution. It is a case study about a city in Ethiopia[15] stating that "*four types of pollution have prevailed in this city: water pollution, air pollution, land pollution and noise pollution. All these types of pollution come from the failure of government, factories and society to act according to the law[16]"*. Another author believes that "*the infrastructure deficit in water and waste management, especially in the southern regions, generates environmental and health impacts, leads to considerable costs and revenue losses for the Italian economy[17]*".

The literature also investigates bioethical issues related to the principle of utility in residential drinking water consumption. The authors highlight that "*the tariff policy has rationalized the basic water consumption in vulnerable populations, but with a regressive trend, the utility principle prioritizes financial sufficiency over efficiency and equity considerations*[18]". Another paper presents the situation in Argentina, with the authors considering that "*the current water crisis is largely*

[8]*Ibid.*
[9]See Acquah & Allaire (2023) at 69-86.
[10]See Manu (2021) at 18.
[11]See Ioniţă & Ioniţă - Burda (2022) at 9.
[12]See Lazăr (2023) at 407.
[13]See Gajadhur (2022) at 205.
[14]See Stefan (2023) at 575.
[15]See Choramo (2021) at 517-540.
[16]*Ibid*, at 538.
[17]See Caponetti (2023) at 281.
[18]See Zambrano & Rodriguez (2023) at 1079.

a governance crisis, so improving water governance will help address current and future water challenges"[19].

Methods of Research

The architecture of this paper includes several research directions that combine the national plan with the comparative law. Chronologically, first the research topic was chosen and a research plan was drawn up. Subsequently, with the help of law-specific research methods, the documentation and data collection were carried out, and then the logical analysis and interpretation[20] of the information was carried out in order to draw some conclusions.

The emphasis in the work was placed on the knowledge of the practical ways in which the analysed concepts are reflected in the social life. Therefore, from a methodological perspective, the research was not limited to the analysis of the applicable normative acts, but was extended to the doctrine as well. The purpose of the research of the doctrine was to provide a panoramic view on the subject, which is why specialised opinions were gathered, selected from different corners of the world, with the intention of supporting the scientific community to find new legislative solutions to global water-related challenges.

In order to fulfil the proposed purpose, an interdisciplinary analysis of the topic was conducted, since it is at the intersection of several disciplines: administrative law, environmental law, public international law and European Union law. At the same time, in order to highlight the topicality and importance of the subject, two case studies conducted by the European Court of Human Rights were selected.

International Legal Framework for Water Protection - A Few Milestones

The legal framework includes several international normative acts applicable to water issues, of which we will selectively present the most important ones. From the Commission Communication on the European citizens' initiative "*water and sanitation are a human right! Water is a public good, not a commodity*", it turns out that the European Union introduced minimum water quality requirements in 1970, gradually expanding its water legislation over the past four decades[21].

Historically, at the international level, the Helsinki Convention of 17 March 1992 on the Protection and use of transboundary watercourses and international lakes[22], as approved by the Council Decision of 24 July 1995 on the conclusion on behalf of the Community of the Convention [...][23]. Romania has ratified the Protocol on water and health since 1999 through its Government Ordinance no.

[19]See Velasco, Calderon, Lima, Matencon & Massone (2023) at 623.
[20]On the interpretation of the legal norm, see Bădescu (2018) at 167-187.
[21]See in this respect the public information at https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX%3A52014DC0177
[22]Published in the Official Journal of the European Union L 186/44, 5.08.1985.
[23]See in this respect the public information at https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A31995D0308

95/2000 [...][24]. Article 2(2) of the Protocol defines *drinking water* as "*water that is used or intended to be supplied for human use for drinking, cooking, preparing food, personal hygiene or similar purposes*".

Also, the United Nations General Assembly Resolution no. 64/292 of 28 July 2010 on the right to water and sanitation recognises that "*the right to safe and clean drinking water and sanitation is an essential human right for a normal life and for the exercise of all human rights*"[25] (point 1). According to public information "*Right2Water"* is the first European citizens' initiative to meet the requirements set out in the Regulation of the European Parliament and of the Council on the citizens' initiative, which was officially presented to the Commission on 20 December 2013, after receiving the support of 1.6 million citizens[26].

Broadly speaking, the European water regulatory framework includes the Directive establishing a framework for Community water policy[27], the Directive on the quality of water intended for human consumption[28] and the Directive on urban waste water treatment[29]. Considering the analysed topic, we choose to present only the EU Directive 2020/2184 of the European Parliament and of the Council of 16 December 2020 on the *quality of water intended for human consumption.*

Article 1 states as objectives of the directive: "*protect the human health from the adverse effects of contamination of water intended for human consumption by ensuring its quality as safe and healthy water, and to improve access to water intended for human consumption"*.

For the purposes of the Directive, *water intended for human consumption* means:

a. *any type of water, whether in its original state or after treatment, intended for drinking, cooking, food preparation or any other household purpose, both in public and private premises, irrespective of its origin and whether it is supplied from a distribution network or from a tanker or is bottled in bottles or containers, including spring water;*
b. *any type of water used in any food business for the production, processing, preservation or marketing of products or substances intended for human consumption.*

The European normative act provides for quality standards for water, more specifically that water intended for human consumption is "*sanogenic and clean"* if:

[24]Published in Official Journal no 433 of 3 September 2000.
[25]See in this respect the public information at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/479/35/PDF/N0947935.pdf?OpenElement
[26]See in this respect the public information at https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX%3A52014DC0177
[27]Published in Official Journal of the European Union L 327/22.07.2000.
[28]Published in Official Journal of the European Union L 435/23.12.2020.
[29]Published in Official Journal of the European Union L 135/30.05.1991.

a. *water does not contain any micro-organisms, parasites and any other substances which, by their number or concentration, constitute a potential danger to human health* (article 4).

We also recall the *European Parliament Resolution of 5 October 2022 on access to water as one of the human rights – the external dimension*[30] that "*reaffirms the right to safe drinking water and sanitation as one of human rights* [...] (point 1)".

Brief Retrospective of the Legislation on Legal Protection of Water - The National Plan

In this section, the research methodology involved investigating first the general framework applicable to water: the Constitution of Romania, the Administrative Code[31] and the Civil Code[32], then the water specific legislation was mentioned. From this perspective, the logical thread of the information that is presented reflects the expression "*from general to particular"*.

The Constitution of Romania regulates "*property"* under its Article 136: "*the riches of public interest of the subsoil, the airspace, the waters with a recoverable energy potential, of national interest, the beaches, the territorial sea, the natural resources of the economic area and of the continental shelf, as well as other goods established by the organic law shall be exclusively subject to public property*" (paragraph 3).

Public property is regulated in the Administrative Code (Part IV - *Specific rules on public and private property of the State or of administrative-territorial units)* and in the Civil Code (Book III - *On goods,* Title VI - *Public property).*

In the administrative law doctrine, the concepts of public property and public domain have often been analysed. According to one opinion, "*the notion of public domain becomes a topical notion again after 1989 [...]*"[33]. In another opinion, the notion of public domain "*cannot be limited only to goods that are subject to public property […]*"[34]. We agree with the opinion that "in the *narrow sense*, the public domain identifies itself with the sphere of public property goods, while in the *broad sense* the scope of the public domain includes, in addition to all public property goods and some private property goods, which […] is under the guard and protection of the State or of the administrative-territorial units, being subject, besides the rules of private law, to a regime of public law[35].

[30]See in this respect the public information at https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:52022IP0346&from=EN

[31]GEO No 57/2019 on the Administrative Code, published in Official Journal no. 555 of 5 July 2019, as further amended and supplemented.

[32]Law no. 287/2009 on the Civil Code, published in Official Journal no. 511 of 24 july 2009, as further amended and supplemented.

[33]See Negruț (2020) at 32.

[34]See Iorgovan (2005) at 167.

[35]See Apostol Tofan (2020) at 237.

The Civil Code provides in its Article 859: "*The riches of public interest existing in the subsoil, the airspace, the waters with an recoverable energy potential, of national interest [...] as well as other goods established by organic law are the exclusive object of public property*".

According to Article 286 (1) of the Administrative Code: "*The public domain of the State or of the administrative-territorial units consists of the goods referred to in Article 136 (3) of the Constitution, of those established in Annexes 2 to 4, and of any other goods which, according to the law or by their nature, are of public use or of public interest and are acquired by the State or by the administrative-territorial units by one of the ways provided by the law"*.

Once the general regulatory framework applicable to water has been specified, which shows that it is an exclusive object of public property, we will briefly mention the state of transposition of the European legislation on the legal regime of water. As shown above, "*the purpose of the administration is to satisfy the interests of the people*"[36]. Considering the international normative acts, we make two clarifications regarding the transposition of the European legislation in Romania:

a. Law no. 458/2002 on the quality of drinking water[37] transposed the Directive 98/83/EC on the quality of water intended for human consumption;
b. Government Ordinance no. 7/2023 on the quality of water intended for human consumption[38] transposed the EU Directive 2020/2184.

The normative act adopted in 2023 regulates the quality of water intended for human consumption and has two objectives: to protect the human health against the adverse effects of contamination of water intended for human consumption, by ensuring its quality as sanogenic and clean water, as well as improving access to drinking water. At the same time, "*the legal norm requires acceptance and observance of the prescribed conduct*[39]".

According to Article 4 (7) of the Government Ordinance no. 7/2023, the competent authority in the field of supervising, monitoring and control of drinking water quality is the *Ministry of Health, through the public health directorates* of each county and of the Municipality of Bucharest and the *National Institute of Public Health*. At the same time, the competent authority for water management is the "Romanian Waters" National Administration ("Apele Române") and its subordinated units.

[36]See Vedinaș (2023) at 26.
[37]Published in Official Journal no. 552 of July 29, 2002.
[38]Published in Official Journal no. 63 of January 25, 2023.
[39]See Hegheș (2022) at 153.

Water-related Disputes arising in Practice, as found in the Case-law of the ECHR

In this section, we will present two case studies from the case-law of the European Court of Human Rights. The first case, *Tatar v. Romania*, settled on 27 January 2009, deals with the pollution of some rivers as a result of an environmental accident as a result of an industrial procedure, while in the second case, *T.N.B. and C.D. v. Romania*, settled on 14 February 2008, the public authorities failed to get involved in solving a problem that concerned access to drinking water for the citizens.

In the first case, *Tatar v. Romania*, the two applicants, VGT and PT, father and son, brought the case before the Court on 17 July 2000 and complained about the fact that the technological process used by company *A.* was endangering their lives, as well as about the passivity of the authorities toward this situation[40]. In short, the facts were as follows: "*On 30 January 2000, an environmental accident happened, with a large amount of polluted water (estimated at almost 100,000 m^3) containing, among others, sodium cyanide, being discharged into the river Săsar, then into the rivers Lăpuș and Someș. The polluted water reaching the river Someș got discharged into the river Tisa [...], crossed the border between Romania and Hungary, [...] crossed the border between Romania and Serbia and Montenegro, and entered again the territory of Romania, being subsequently discharged into the Danube. In 14 days, the polluted water covered 800 km, and finally it was discharged into the Black Sea through the Danube Delta*" (para. 25)[41].

The Court found that: "*the persons concerned were domiciled, at the time of the facts, in the city of Baia Mare, in a housing district located about 100 m from the extraction plant and the Săsar pond, elements of the mining exploitation of company A., which was using a gold and silver extraction technology that involved extraction by dissolution with sodium cyanide"* (para. 89). As regards the consequences of the environmental accident of January 2000, the Court found that "*according to the exhibits in the file, the industrial activity in question was not stopped by the authorities, who continued to use the same technology*" (para. 120).

The Court held that: "*the first applicant unsuccessfully took numerous administrative and criminal steps to get to know the potential risks resulting from the environmental accident in January 2000, to which he and his family were exposed, and to sanction the people responsible for that incident"* (para. 123). In conclusion, the Court found that "*the respondent State failed to fulfil its obligation to guarantee the applicants' right to privacy and family life, within the meaning of Article 8 of the Convention*" (para. 125).

The second case study concerns the case *of T.N.B. and C.D. v. Romania* and concerns two applicants, mother and son (Mr. TNB, son of Ms CD), who brought the case before the Court on 15 May 2006[42].

In short, after the reading the judgment, it follows that:

[40]ECHR, *Tatar v. Romania*.
[41]*Ibid*., *apud* Ștefan (2023) at 113-114.
[42]ECHR, *T.N.B. and C.D. v. Romania*.

> "*the applicant is the owner of the apartment she occupies with her son, located on the top floor of a building […]. The supply of drinking water through the public distribution network is made on the basis of a single contract concluded by the owners' association of the building with company A, which has the quality of concessionaire of the public service.*
> *The applicants' access to drinking water was interrupted as of 20 October 2001, as the neighbours living on the lower floors of the building stopped the water by turning off the water supply pipes of the apartment occupied by the applicants. As the quarrels with the neighbours continued, the applicants asked the concessionaire company A. to conclude a water supply contract with them* (para. 4-9)".

The applicant stated that "*the concessionaire refused to conclude a contract with the applicants and, by a letter dated 21 August 2003, it communicated to them the refusal to authorize the branching for their exclusive use, besides the one serving the building as a whole"* (para. 9).

In the present case, "*on 26 January 2003, the applicants brought an action against company A. before the first instance court of district 1, with an action to oblige it to conclude a contract for the supply of drinking water. By its final decision issued on 22 November 2005, the High Court of Cassation and Justice, in appeal, allowed that the concessionaire company concluded a drinking water supply contract with the applicant C.D., as owner of the apartment, but the concessionaire company refused to conclude the contract immediately, requesting the installation of a new branching, at the applicants' expense"* (para. 13-23).

Following its analysis, the Court found that: "*despite the final decision of the High Court of Cassation and Justice of 22 November 2005, which ordered the public service concessionaire company to conclude a supply contract with the applicants and, despite the subsequent steps taken for its performance, this court decision was not enforced"* (para. 33).

The Court also stressed that: "*the obligation was imposed on a private individual, namely a private company […] but that company, as a concessionaire of the public water distribution service, had concluded with the municipality a contract of administrative law, the performance of which had to be controlled by the public authorities"* (para. 34).

In conclusion, the Court considered that "*the national authorities did not take all reasonable measures which could have been expected of them to enforce the final decision that was favourable to the applicants"* (para. 40).

Conclusions

From the entire analysis carried out, we consider the established research objective fulfilled, as the paper provides a lot of information about the legal regime of water, from an interdisciplinary perspective. The organisation of the research was based on a structure that observed a logical thread: legislation, doctrine and case-law, and the entire documentation carried out allows us to formulate some conclusions we have reached.

A first conclusion is that, unlike the Slovenian Constitution, which expressly enshrines the right to drinking water, the Constitution of Romania does not provide for this, but at national level, water is considered an exclusive object of public property, according to the law.

Another conclusion concerns the relevant authorities in the field of supervising, monitoring and control of drinking water quality. The research shows that it is the Ministry of Health, through the public health directorates of each county and of the Municipality of Bucharest and the National Institute of public Health. At the same time, following the review of the literature, it is found that the topic of water is frequently analysed by researchers. The depletion of non-renewable natural resources concerns the entire international scientific community.

Regarding the legal framework, at the international level, there is a constant concern for regulating the legal protection of water, the paper presenting the legislation from a triple perspective – international, European and national. Our country has transposed the European legislation, namely the EU Directive 2020/ 2184 on the quality of water intended for human consumption through the Government Ordinance no. 7/2023.

At the same time, the case studies selected from the ECHR case-law refer to water but also to the passivity of public authorities in relation to citizens, both of which have certain peculiarities. The case-law collected provided information showing both the importance of water for the population and the importance of compliance by the public authorities of their obligations towards the citizens.

The final conclusion of the paper is that, in our opinion, drinking water is vital for human existence, so we express our concern about the decrease in water resources, a situation that impacts both present and future generations. Therefore, we consider that water, which sustains the life of all of us (individuals, authorities, States), should be approached more responsibly. The water problem is much broader, the subject not being exhausted in this paper, which urges us to draw new directions of future research that will take into account the analysis of the case-law at international level.

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Promoting Effective Refugee Protection in India: Balancing National Interests and International Obligations

By Garima Tiwari[*]

This paper explores the situation of refugees in India, particularly Sri Lankan and Rohingya refugees who are seeking asylum in India and face the issue of statelessness due to the lack of a concrete refugee law in India. The Foreigners Act 1946 of India defines foreigners as individuals who are not Indian citizens and requires non-citizens to possess government-issued documentation. Failure to possess such documents exposes individuals to penalties outlined in section 14 of the Act, including potential imprisonment and fines. The Act also grants the government the authority to detain and deport foreign nationals residing unlawfully in India. Furthermore, the Citizenship Amendment Act, 2019 ("CAA") addresses the plight of religious minorities, excluding Sri Lankan, Rohingya and other refugees, as it only applies to refugees from Afghanistan, Bangladesh, and Pakistan. The CAA allows eligible Hindu refugees who entered India before December 31, 2014, to obtain Indian citizenship. The absence of a concrete refugee law in India, coupled with concerns over the potential impact of the CAA on India's secular constitutional fabric, has raised international apprehension. It is important to note that India is not a party to the Convention Relating to the Status of Refugees, 1951, and its 1967 protocol, limiting its refugee protection obligations. By analysing relevant legal sources, judicial decisions and international standards, this paper aims to provide a comprehensive understanding of the legal complexities surrounding refugee protection in India and the implications of the CAA within the context of India's international obligations.

Keywords: *Refugee; International Law; India; Secularism; Domestic Law.*

Introduction

The refugee crisis is not a new problem in the world. It has been in place since the evolution of civilised society and the concept of state, sovereign authority, and borders. In 1951, United Nations took the initiative to build a safe harbour for refugees and create obligations on nations for the accommodation of refugees through the United Nations Convention on Status of Refugees, 1951 ("Refugee Convention") and its Protocol, 1967. The Refugee Convention currently has 146 signatories. India along with some other South-Asian states like

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Bangladesh, Pakistan, Sri Lanka, Malaysia, and Indonesia has not signed the Refugee Convention.[1]

Despite not being a signatory to the conventions and protocols on refugees, India has a long-standing history of hosting refugees. Starting with the aftermath of the partition of India and Pakistan in 1947 to the more recent influx of Rohingya Muslims from Myanmar, India has opened its doors to people fleeing persecution, conflict, and other forms of violence in neighbouring countries. This generous approach, however, has come with its challenges. The complex refugee crisis in India has triggered social, economic, and political tensions, particularly in Indian states like Assam, Tripura, and Manipur, where clashes between local communities and refugees have led to unfortunate incidents of violence. This situation has raised pertinent questions about social integration, humanitarian obligations, and the delicate balance between protecting national interests and upholding international human rights standards. Exploring the nuances of India's refugee crisis provides valuable insights into the complexities of managing large-scale displacement within a diverse and densely populated nation.

This paper explores the situation of refugees in India, particularly Sri Lankan and Rohingya refugees who are seeking asylum in India and face the issue of statelessness due to the lack of a concrete refugee law in India. The Foreigners Act 1946 of India defines foreigners as individuals who are not Indian citizens and requires non-citizens to possess government-issued documentation. Failure to possess such documents exposes individuals to penalties outlined in section 14 of the Act, including potential imprisonment and fines. The Act also grants the government the authority to detain and deport foreign nationals residing unlawfully in India. Furthermore, the Citizenship Amendment Act, 2019 ("CAA") addresses the plight of religious minorities, excluding Sri Lankan, Rohingya and other refugees, as it only applies to refugees from Afghanistan, Bangladesh, and Pakistan. The CAA allows eligible Hindu refugees who entered India before December 31, 2014, to obtain Indian citizenship. The absence of a concrete refugee law in India, coupled with concerns over the potential impact of the CAA on India's secular constitutional fabric, has raised international apprehension. It is important to note that India is not a party to the Convention Relating to the Status of Refugees, 1951, and its 1967 protocol, limiting its refugee protection obligations. By analysing relevant legal sources, judicial decisions and international standards, this paper aims to provide a comprehensive understanding of the legal complexities surrounding refugee protection in India and the implications of the CAA within the context of India's international obligations.

Defining Refugees: A Closer Look at Those in Exile

Simply put, a refugee means any person who has fled to another country due to some reason which made it difficult for them to stay in their country of origin. Legally, the more universal definition of a refugee is provided Article 1(A)(2) of

[1]Janmyr (2021).

the Refugee Convention, as amended by its 1967 Protocol, defining a refugee as someone who:

> *"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it […[In the case of a person who has more than one nationality, the term 'the country of his nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."*

It is very important to note that the refugee definition is declaratory, i.e., a person is a refugee as soon as s/he fulfils the criteria contained in the definition even before the formal determination of her/his refugee status. There is a presumption that anyone who has stepped out of their home country and crossed the border to escape a risk of serious harm in their country of origin are refugees and should be treated as such. The cause of migration of people to take refuge in another country can be due to many reasons, but the most prevalent reasons are war, internal conflicts, lynching, human trafficking, dislocation due to environmental hazards, natural disasters, etc. India has witnessed such a crisis during the war in Bangladesh and other neighbouring countries.

Trajectory of Refugee Policy in India

Migration and particularly refugee movement is the most underlying concern globally today. It could be due to various factors including economic, social, political, etc. United Nations High Commission for Refugees has estimated displacement or statelessness of about 117.7 million people in 2023.[2] Currently, India has no specific law governing refugees. It also is not a party of the Refugee Convention of 1951 or its protocol of 1967, thus India is not obliged to play a host country for the refugees. But refugees are treated as foreigners and the governing laws for them are The Passport Act, 1967 (India), the Registration of Foreigners Act, 1946 (India), and the Foreigners Order, 1948 (India) Under the Foreigners Act, 1946. The migrants entering India without permission or staying beyond the date of permission are illegal migrants. Indian law clearly distinguishes between a refugee and an illegal migrant. However, the government holds the power to declare any set of refugees as illegal immigrants.[3]

The reason behind India not being a signatory to the Convention could be multi-fold which included its own economic, social, political, and financial interests. India is a populous country already, it became the most populous country

[2]UNHCR (2023).
[3]Subramanian (2021).

in the world by surpassing China in April 2023.[4] The total population of India in 2022 was recorded at 1,417,173,173, out of which 242,835,00 are refugees.[5] The increasing number of refugees impacts the economy adversely. It creates a more densely area of population with no job or economic support. The signing of the convention was feared to bring unnecessary intervention in the internal matters of the country with the close interlinked borders of India with its neighbors.

However, it is known that India has a rich history of providing refuge to people from various countries, even though it is not bound by any formal international agreements to do so. This tradition dates back to the partition between India and Pakistan and continues to the present day. The partition, in particular, led to a massive wave of refugees, prompting the construction of the entire city of Faridabad to accommodate them.[6] Another significant event that resulted in a substantial inflow of refugees occurred in 1959 when the Dalai Lama, along with over 100,000 of his followers, sought asylum in India after fleeing Tibet. This influx placed a significant economic burden on India. Furthermore, subsequent major events, such as the Bangladesh War, the Afghanistan crisis, Pakistan refugees, and the arrival of Sri Lankan Tamil refugees, as well as similar occurrences in neighbouring countries, have compelled India to provide refuge to millions of people, thereby straining its economy.

According to a report of India Today, "More than 1.34 lakh Sri Lankan Tamils crossed the Palk Strait to India between 1983 and 1987 during the first in flow. In three more phases, many more refugees entered India. The war-torn Sri Lankans sought refuge in Southern India with more than 60,000 refugees currently staying in 109 camps in Tamil Nadu alone."[7] A person can attain the status of refugee in India by applying for verification with all the valid documents in support of the grounds of persecution or fear of persecution due to which the person has fled from their mother country. The documents must validly show a genuine claim for determination of its refugee status.[8] United Nations High Commissioner for Refugees plays an important role in the determination of the status of refugees and further, it helps in verifying the details of the persons. Deciding who is a refugee and who is not is a peculiar task supported by the relevant documents one can provide of its "well-found fear" of persecution. Interpreting the status of refugees in 1986, the Supreme Court of the United States in the case of *INC v. Cardoza Fouseca*[9] remarked that the "well-founded fear" scale would be applicable

> "so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is not enough that persecution is a reasonable possibility[…]"

being a non-signatory to the relevant conventions, is not obligated to adhere to the principles of refoulement. Refoulement involves the return of refugees to their

[4]United Nations (2023).
[5]Macrotrends (2023).
[6]Jha (2018).
[7]Jha (2018).
[8]Pooja (2023).
[9]480 U.S. 421 at page 21.

home countries when the risk of persecution persists there. While international law prohibits refoulement, India's lack of formal agreements means it is not legally bound by these conventions. Although India is still bound by on the humanitarian ground and under the customary international law obligation. The Indian Supreme Court has at a time in different cases such as *Gramophone Co of India Ltd v. Birendra Bhadur Pandey*[10], held that Customary International law forms part of the law of the land unless it is explicitly ousted by the Municipal law. But in the recent case of *Mohammed Salimullah v. Union of India*[11] the Supreme Court ordered the deportation of Rohingya Refugees on the ground of threat to national security. This shows that India stands at the shaded region of obligation and non-obligation towards the Refugee crisis.

The refugee influx in India is mostly through the North-Eastern Corridor, thus creating most problems for the North-Eastern states. Whether it be the Myanmar Coup, or the Bangladesh War north-eastern states have suffered it all. The States of Manipur, Mizoram, Tripura, and Assam have continuously faced this problem over the years. The continuous influx of refugees' incoming has ignited insecurity among these states. The ongoing struggle between local communities and Bangladeshi refugees frequently erupts in violence, tragically resulting in loss of life. The most intense conflicts are concentrated in several northeastern states like Assam, Tripura, and Manipur. Local communities and tribal groups assert that the influx of refugees from Bangladesh and the continuous stream of undocumented immigrants have brought about a significant shift in the social composition of these areas. As a result, they feel that they have become a minority in their own homeland. This demographic change was a major factor contributing to the Kokrajhar riots in Assam in 2012, which claimed the lives of over 80 people.[12] Thus, the refugee crisis is a huge problem for India. It although smartly did not bound itself by any convention on refugees or made a refugee framework to support the refugees. But still is serving them over the years. The moral obligation of India and the geopolitical pressure force it to open its doors to a large population of refugees. An absence of law on the subject has marked even more problems and therefore, it is usually suggested that India reconsider making a specific law on the subject.

In fact, the Standing Committee on External Affairs presented its report on 'India and International Law including extradition treaties with foreign countries, asylum issues, international cyber security and issues of financial crimes' on September 10, 2021 where it pointed out that asylum is granted on case to case basis and that, "Ministry of External Affairs steadfastly advocate India's stand on the concept of shared responsibility of all Sovereign countries in refugee crises developing anywhere in the world, making a strong case for review of the 1951 UN Convention and its 1967 Protocol. After that India can reconsider and revisit the 1951 Convention and 1967 Protocol."[13] Further that, Domestic Protocol on status of refugees and asylum seekers with specific responsibilities assigned to

[10](1984) 2 SCC 534.
[11](2021) SCC Online SC 296.
[12]Bhuyan (2018).
[13]Ministry Of External Affairs (2021).

specific agencies could be created. In response the 18th report of the Committee on External Affairs of December 2022 said that, "The existing system is sufficient to handle the refugee situation at this point of time. However, as recommended by the Committee a proposal for preparing and notifying new Domestic Protocol on status of refugee and asylum seekers with specific responsibilities assigned to specific agencies could be considered in consultation with all stakeholders."[14]

Thus, India would rely on domestic protocols and not sign the international instruments till they align with the idea of shared responsibility.

UNHCR's Empowerment Programs for Displaced Communities in India

UNHCR has been operational in India since 1981 to provide limited assistance to the Indian government in plans to support refugees and asylum-seekers. It works in collaboration with the government, non-governmental organisations, and other civil societies to provide the refugees and other ousted people with health, education, legal aid services, and other required needs. The policy and plans for granting asylum and other facilities are under the domain of the Indian Government, UNHCR is just a helping body to assist is hassle-free support. However, it is crucial to recognise that any choice made by the Indian government regarding granting refugee or asylum status cannot be divorced from its global obligations, which stem from international agreements such as the Universal Declaration of Human Rights, the Convention on the Reduction of Statelessness,1961 and the Convention on the Rights of the Child, 1989. India has ratified these conventions, committing itself to certain principles and standards. When combined with the directives outlined in the Indian Constitution, these international frameworks compel India to establish a refugee policy that is inclusive and does not discriminate based on factors such as nationality, religion, gender, or place of birth.

Citizenship and Identity: The Dilemmas of Belonging and Exclusion

Article 5-11 of the Constitution of India lays down the broad norms of who shall be a citizen of India and who would not. It excludes certain people from its ambit who after partition went back to Pakistan or who have wilfully taken citizenship of any other country. The Citizenship Act, 1955 lays down a few methods by which a non-citizen can acquire citizenship in India. It includes by naturalisation (section 6), by birth (section 5), by registration (section 5), by descent (section 4), and incorporation of territory (section 7). The Citizenship (Amendment) Act of 2019, known as CAA, was approved by the Indian Parliament on December 11, 2019. This act brought about changes to the Citizenship Act of 1955, enabling individuals from specific religious minorities, namely Hindus, Sikhs, Buddhists, Jains, Parsis, and Christians, who had fled from Pakistan, Bangladesh, and Afghanistan before December 2014 due to

[14]Ministry Of External Affairs (2022).

religious persecution or the fear thereof, to attain Indian citizenship. It is important to note that Muslims were excluded from the provisions of this act. According to the 2019 CAA amendment, migrants who had entered India by December 31, 2014, and had experienced religious persecution in their home countries were eligible for expedited Indian citizenship through this new law. These eligible migrants could obtain Indian citizenship in six years, and the amendment also reduced the residency requirement for their naturalisation from eleven years to five. The arrival of refugees from Bangladesh into Assam sparked protests in the region. In response to this situation, the Assam Accord was established in 1985, which resulted in the addition of a new Section 6A in the CAA. Under this provision, the first cut-off date for granting citizenship was set at January 1, 1966, and individuals who were considered ordinary residents in Assam from that date were eligible for citizenship. Those who entered Assam between January 1, 1966, and March 25, 1971, were entitled to citizenship after a waiting period of ten years. However, the process was criticised for being too slow. The setting up of the Foreigners Tribunal was proposed but the same was struck down by the Supreme Court.[15]

In the Northeast region of India, there were concerns regarding undocumented migrants, primarily stemming from two main issues: the potential threat to the region's cultural identity and the impact on its electoral balance. These concerns were even acknowledged by the Supreme Court, which characterised the situation as a form of invasion. To address these concerns, there was an effort to expedite the process by establishing a National Register of Citizens (NRC). CAA sparked a controversy nationwide due to it allegedly being biased towards particular communities. CAA came along with the National Population Register (NPR), and the NRC which were specific to Assam. It was feared that the simultaneous enforcement of this revised Act in conjunction with the NPR and the NRC would have detrimental consequences for the underprivileged, marginalised, migrant, female, transgender, and indigenous populations. The primary concern is that they will be categorized as “suspicious voters” and consequently forfeit their right to vote. In essence, they will find themselves without a recognised nationality and a say in matters affecting them.[16] The Rohingya migrants were also to be put up in detention centres till deportation. But one must keep in mind that all these are only those migrants who entered the country after December 2014. India with its CAA did not do injustice toward the refugees who were afraid of persecution but merely acted against its increasing population which was even increased by the influx of migrants and illegal migrants. Although India is a hospitable nation, but it also has to see its self-interest before providing for others. Accepting millions of migrants every year has putting negative impact on its economy and resources. Though India is obliged on humanitarian grounds to provide them shrine, every country seeks their municipal interest before international charity. It must be highlighted that on 11th March 2024, the Indian government has notified the Citizenship (Amendment) Rules, 2024 for its implementation.

[15]Dhavan (2023).
[16]Kumar & Damle (2020).

Harmonising Humanity: Challenges, Reforms, and Paths to Effective Refugee Integration

As discussed, India has a long history of hosting refugees from various regions and for different reasons. However, the legal framework and issues surrounding refugees in India are complex, posing significant challenges. One of the central challenges in India's refugee law is the absence of a clear and comprehensive definition of the term 'refugee'. This lack of definition has resulted in ambiguity regarding the legal status of refugees in the country. As a result, refugees often face difficulties accessing basic rights and protections, including access to education, healthcare, and employment.

India has encountered a significant influx of refugees due to its geographical proximity to conflict zones and neighbouring countries. For instance, Rohingya refugees from Myanmar and Tibetan refugees escaping China have sought refuge in India. However, the Indian government has often classified these refugees as 'migrants' or 'illegal immigrants,' denying them the legal status of refugees and, consequently, the associated rights and protections. The living conditions of refugees in India is another pressing concern. Refugee camps are often overcrowded, lacking proper sanitation and access to clean water. Basic needs like food, shelter, and healthcare can be difficult to come by for many refugees. Moreover, economic opportunities for refugees are limited, leaving them vulnerable to poverty and exploitation. To address these challenges, there is a need for significant reforms in India's refugee law. Addressing these multifaceted challenges necessitates significant reforms within India's refugee law framework. A precise and inclusive definition of refugees aligned with international standards is imperative. Consideration of ratifying the 1951 Refugee Convention and its 1967 Protocol could provide a structured legal framework for refugee protection.

Additionally, enhancing living conditions in refugee camps, facilitating access to education and healthcare, and fostering economic opportunities for refugees are essential steps. Legalising refugee employment would not only alleviate their financial burdens but also contribute to the local economy. This can help prevent refugees from becoming a burden on the state. collaborative efforts with neighbouring countries and international organisations are crucial in addressing root causes of displacement, promoting safe repatriation, and developing response plans for sudden refugee influxes. Pursuing durable solutions tailored to individual preferences and prevailing conditions, including voluntary repatriation, local integration, and resettlement, is paramount. In conclusion, while India's history of hosting refugees underscores its humanitarian ethos, the complexity of its refugee law and associated challenges cannot be understated. Addressing these challenges through legal reforms and enhanced support mechanisms is imperative to ensure the well-being and protection of refugees within the country's borders.

Conclusion

In conclusion, India's approach to its refugee policy should prioritise humanitarian values while also taking into consideration the nation's economic and political interests. Regardless of religious, political, or communal factors, a well-rounded refugee policy can serve India's broader objectives by addressing the refugee crisis in a neutral and balanced manner. India's vast economic potential can be harnessed through inclusive refugee policies. By allowing refugees to legally work and contribute to the local economy, the nation can tap into a pool of skilled and unskilled labour, potentially boosting economic growth and development. This approach aligns with India's aspirations for economic prosperity.

Moreover, a humane refugee policy can enhance India's standing on the international stage. By adhering to international norms and standards, India can strengthen its diplomatic relationships and garner support for its interests, including potential global cooperation on security issues, trade agreements, and climate change initiatives. Furthermore, a well-structured refugee policy can help maintain regional stability. Collaborative efforts with neighbouring countries and international organisations can address the root causes of displacement and reduce the risk of conflicts spilling over borders. India's political interests are also safeguarded through a balanced refugee policy. Upholding the principle of non-refoulement and respecting international agreements can demonstrate India's commitment to the rule of law and human rights. This can foster trust and goodwill among nations and positively influence their strategic alliances.

A refugee policy that remains neutral and impartial, focusing on humanitarian considerations, economic benefits, and political stability, can help India navigate the complex challenges posed by refugee crises. By emphasizing inclusivity, collaboration, and adherence to international standards, India can position itself as a responsible global actor while advancing its interests and contributing to a more harmonious world. In considering whether India should ratify the Refugee Convention, it is crucial to weigh the potential benefits and drawbacks in the context of its economic, political, geopolitical, and social interests. From an economic perspective, ratifying the Refugee Convention could offer India certain advantages. It would provide a structured framework for dealing with refugees, including access to international assistance and cooperation. This can help alleviate the financial burden of hosting refugees and even potentially contribute to economic growth by allowing refugees to legally participate in the labour market, thereby tapping into a skilled workforce.

In the political arena, ratifying the Refugee Convention would demonstrate India's commitment to international human rights standards and the rule of law. This can enhance its diplomatic standing, strengthen regional relationships, and potentially facilitate cooperation on various issues, such as security, trade, and climate change, ultimately serving its political interests. Geopolitically,

India's ratification could enhance its influence on the global stage by showcasing its dedication to addressing humanitarian concerns and contributing to global stability. It could bolster India's image as a responsible and compassionate international actor, which can be advantageous in securing strategic alliances and partnerships. However, India's social interests are equally important. Ratification must be accompanied by a well-crafted domestic refugee policy that safeguards the rights and interests of its citizens while providing refuge to those in need. Balancing social cohesion and the protection of vulnerable populations is crucial. It is essential to recognise that ratifying the Refugee Convention also comes with potential challenges, such as managing a potentially large influx of refugees and adhering to international obligations, which may strain resources and infrastructure. Careful planning and collaboration with international organisations and neighbouring countries would be necessary to mitigate these challenges effectively. In conclusion, India's decision to ratify the Refugee Convention should be considered holistically, weighing its economic, political, geopolitical, and social interests. While ratification could bring benefits in terms of economic growth, diplomatic relations, and geopolitical influence, it should be accompanied by a well-thought-out refugee policy that addresses domestic concerns and ensures that the interests of both refugees and citizens are safeguarded. Ultimately, the decision should align with India's broader goals of contributing to global stability, ideology of shared responsibility while also protecting its national interests and societal harmony.

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Complexity of Legal Harmonisation in Southeast Asia: A Diversity of Legal Systems & Languages

By Robert Brian Smith[*1]

The eleven countries of the Southeast are quite diverse in terms of culture, religion, language and legal system. All members except Thailand were colonies of European powers who introduced their legal systems. Even Thailand, which was never colonised, was influenced by the laws of the European powers. This European influence has resulted in a range of political and legal systems. Although English is the working language of ASEAN, it is the national language of none. Cambodia, Lao PDR, Myanmar, and Thailand use a non-Latin script, and Vietnam uses Latin-based orthography to complicate matters further. The diversity of national and official languages is a crucial element impacting the ability of ASEAN member states to harmonise their laws, so there is a common approach to prosecuting international criminal activity. Such an approach is critical as the ASEAN Economic Community moves to greater integration. The article briefly describes the importance of language in understanding legal concepts. Then, it describes the variety of legal systems in place across Southeast Asia, which, other than the case of Thailand, are vestiges of their colonial past. The article discusses three possible models for harmonisation/ cooperation: a set of model laws, accession to an international treaty, or an agreement to cooperate. In the case of Brunei Darussalam, Malaysia, the Philippines and Singapore, where legal systems use English, all three models could be used. For the other seven countries, because of their language diversity, it is argued that the set of model laws is inappropriate. The preferred option is a treaty or convention that sets out the scope and minimum requirements to be included in the local law and the obligations to cooperate. The Convention on Cybercrime (Budapest Convention) is a possible model.

Keywords: *Southeast Asia, Cybercrime Convention, Law harmonisation, Legal translation, Model laws*

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Introduction

The Association of Southeast Asian Nations (ASEAN) is a regional organisation whose working language is English.[2] It is not the national language of any of its ten members and one prospective member. It is an official language of three members: Malaysia, the Philippines and Singapore.

This article focuses on the impact of language on the ability of ASEAN member states to harmonise their laws, develop a common approach to prosecution of international criminal activity, and develop a framework for closer cooperation. The issue is broader than translation, per se; it is also an issue of the process undertaken in the initial drafting of the law and placing the translation in context.

Suwannasri and Nomnian investigated the use of English as a lingua franca[3] for the populations of the ASEAN member countries.[4] Member countries were divided into two categories: the Outer Circle, which consists of countries colonised by English-speaking powers and the Expanding Circle, where English has no role in domestic institutions. These countries are Cambodia, Indonesia, Lao PDR, Thailand, and Vietnam. Timor-Leste would also be placed in the Expanding Circle. The Outer Circle countries are Brunei Darussalam, Malaysia, Philippines, Singapore, and Myanmar before 1962.

Assy argues that Anglo-American law uses "common" expressions and gives them meanings in law different from their ordinary ones, for instance, action meaning lawsuit.[5] Also, legal language utilises expressions taken from "formal and archaic English, Latin, and Old French terms" that have a specific meaning in law, such as alibi, amicus curiae, affidavit and estoppel.[6] It also utilises expressions with no additional legal implications, such as prima facie, versus, and aforesaid. Legal language is "underpinned by a body of theories, doctrines, principles, and rules," all required to understand the meaning and scope of legal concepts.[7] After studying the impact of language on the legal system of Timor Leste, Simões argued that law is a kind of language of its own, and legal systems cannot be separated from the underlying technical language.[8] A quantitative regression study of cross-citations between Supreme Courts in Europe found that knowledge of the language cited in court appeared more important than legal traditions, culture or politics.[9]

The complexity of the task can be gauged from the fact that the University of Kent provides its undergraduate law students with a ten-page list of Latin terms.[10] This is, in fact, minuscule compared to the 11th edition of the authoritative Black's Legal Dictionary, which has 2,110 pages of legal entries.[11]

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[2]*Charter of the Association of Southeast Asian Nations. (2007).*
[3]Defined as a common or bridging language.
[4]Suwannasri & Nomnian (2017).
[5]Assy (2011).
[6]Ibid at 399.
[7]Ibid.
[8]Simões (2015).
[9]Gelter & Siems (2014) at 267.
[10]Lawlinks. (n.d.).
[11]Garner (2019).

What is harmonisation? Clough[12] has provided a cogent discussion in his critique of the Convention on Cybercrime.[13] This author has broadened the focus of the original discussion to cover transnational crime in general. Clough emphasises that "harmonised does not mean identical".[14] What is needed is the ability to enable enforcement mechanisms to work effectively, considering national and regional differences influenced by each party's legal traditions, history, and culture. Key issues include substantive and procedural law and possible legal restrictions or prohibitions on activities such as mutual assistance and extradition. To respond effectively to transnational crime, legislative harmonisation must seek to accommodate and reconcile differences between the parties. One solution could be to allow parties to exercise their right to declare reservations so that implementation can be adapted to the local conditions, thus addressing the difficulties in achieving consensus between all parties. Despite these difficulties, Clough considered that harmonisation is critical in the case of transnational crime, such as cybercrime, as there is a need to ensure that no safe haven is provided to the offenders. There must also be effective cooperation between the various law enforcement agencies.

Table 1. *Southeast Asian Economies - Democracy Index 2023*

Country	**Regime Type**	**Overall Score**	**Rank**	**Electoral Process and Pluralism**	**Functioning of Government**	**Political Participation**	**Political Culture**	**Civil Liberties**
Brunei Darussalam	4	No data						
Cambodia	4	3.05	121	0.00	3.21	5.00	5.00	2.06
Indonesia	2	6.53	56	7.92	7.86	7.22	4.38	5.29
Lao PDR	4	1.71	159	0.00	2.86	1.67	3.75	2.35
Malaysia	2	7.29	40	9.58	7.50	7.22	6.25	5.88
Myanmar	4	0.85	166	0.00	0.00	1.11	3.13	0.00
Philippines	2	6.66	53	9.17	4.64	7.78	4.38	7.35
Singapore	2	6.18	69	5.33	7.14	4.44	7.50	6.47
Thailand	2	6.35	63	7.00	6.07	5.00	6.25	7.06
Timor-Leste	2	7.06	45	9.58	5.93	5.56	6.88	7.35
Vietnam	4	2.62	136	0.00	3.93	2.78	3.75	2.65

Note: 1 = Full Democracy; 2 = Flawed Democracy; 3 = Hybrid Regime; 4 = Authoritarian
Source: Democracy Index 2023[15]

[12]Clough (2014).
[13]*Convention on Cybercrime* (2001).
[14]Clough (2014) at 701.
[15]Economist Intelligence Unit (2024) at Table 2.

Decision-making in ASEAN is based on the principle of conciliation and consensus[16], so any approach must receive unanimous approval. As can be seen in Table 1, a complicating factor is that, based on the Democracy Index developed by the Economist Intelligence Unit, the economies range from flawed democracies to authoritarian regimes.

This article examines the legal systems and languages of ASEAN and provides selected examples from the literature that show the issues associated with legal translation. Considering language issues, it assesses three potential models for cooperation: a set of model laws, accession to an international treaty, or an agreement to cooperate. To which of these three models should countries aspire? Does it depend on their legal system, national language, and its nuances and understandings?

Methodology

This research is based on the documentary research concept. It analyses Southeast Asia's current governance structures, legal systems and national languages. It then discusses the difficulties of translation in a legal setting. Finally, it investigates the types of models currently in practice to ascertain which model may be the best fit for legal harmonisation in Southeast Asia.

Legal Analysis

Legal Systems and Languages of ASEAN Members

Common Law Countries

The three ASEAN countries with a common law system were former British colonies (Malaysia and Singapore) and a British dependency (Brunei Darussalam).

Brunei Darussalam

Brunei Darussalam is an absolute monarchy with the supreme executive authority of the country vested in the Sultan[17] , who is also the Prime Minister.[18] As a result, although not evaluated by the Economist Economic Unit, it is clearly an authoritarian regime.

In Brunei Darussalam, the Supreme Court is guided by the Constitution, but where no written laws exist, they rely on judicial precedent.[19] The common law of England, the doctrines of equity, and statutes of general application apply subject to local circumstances and customs.[20] Brunei introduced Sharia law in 2014[21] with

[16]*Charter of the Association of Southeast Asian Nations*. (2007) art. 20(1).
[17]*Constitution of Brunei Darussalam (revised edition 2011)* art 4(1).
[18]Ibid at art 4(2).
[19]*Legal System in Brunei Darussalam*.
[20]*Application of Laws Act (rev ed 2009) (Brunei Darussalam).*

the Syariah Penal Code Order[22] in 2013, followed by the Syariah Courts Criminal Procedure Code Order in 2018.[23]

The official language is Malay, although the Constitution states that an official version in the English language must be provided, and both versions must be accepted as "authentic text".[24]

Malaysia

Malaysia has a federal structure[25] with a democratically elected national parliament[26] and a monarch as head of state.[27] As shown in Table 1, the Economics Intelligence Unit considers it a flawed democracy due to its relatively low scores on *Political Culture* and *Civil Liberties*. The Yang di-Pertuan Agong, the head of state, is elected by the Conference of Rulers for a term of five years.[28]

The Malaysian legal system is based on legislation and the common law system.[29] The common law of England and the rules of equity as administered in England up to 7 April 1956 apply in as far as they are applicable to Malaysia.[30]

The national language of Malaysia is Malay, and no person is prevented from using other languages "otherwise than for official purposes." However, authoritative texts such as bills and acts will be in English until Parliament provides otherwise.[31] The use of English still applied on 29 February 2024.

Singapore

Singapore is a sovereign republic.[32] It is a parliamentary democracy[33] with an elected President as head of state.[34] As shown in Table 1, the Economics Intelligence Unit considers it a flawed democracy due to its low scores on

Electoral Process and Pluralism and *Political Participation*.

Local jurisprudence is now a significant part of the common law in Singapore.[35] The common law of England, as far as it was part of Singapore law immediately before 12 November 1993, continues to be part of the law of Singapore.[36]

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[21]Hunt (2014).
[22]*Syariah Penal Code Order, 2013.*
[23]*Syariah Courts Criminal Procedure Code Order, 2018.*
[24]*Constitution of Brunei Darussalam (revised edition 2011)* art 82.
[25]*Federal Constitution (1 November 2010 reprint) (Malaysia)* art 1.
[26]Ibid at pt IV ch 4.
[27] Ibid at art. 32.
[28] Ibid at art. 32(3).
[29] Ahmad (2014).
[30]*Civil Law Act 1956 (incorporating all amendments up to 1 January 2006*).
[31]*Federal Constitution (1 November 2010 reprint) (Malaysia)* art 152(2).
[32]*Constitution of the Republic of Singapore (1963) (version as at 14 March 2019)* art. 3.
[33]Ibid at pt VI.
[34]Ibid at ch 1.
[35]Tan & Chan (2019) s 1.3.3 to 1.3.6.
[36]*Application of English Law Act (1994, rev ed) (Singapore).*

The official languages are Malay, Mandarin, Tamil and English whilst the national language is Malay in the Roman script.[37] Laws are mandated to be published in plain English.[38]

Civil Law Countries

Indonesia

Indonesia is "a unitary state with the form of a Republic",[39] with the power of government held by the President.[40] Ministers are appointed and dismissed by the President.[41] As shown in Table 1, the Economics Intelligence Unit considers it a flawed democracy due to its low scores on *Political Culture* and *Civil Liberties*.

Laiman et al. have described the complexity of Indonesia's legal system, although it is a country based on civil law on the Dutch model.[42] The Netherlands East Indies, as Indonesia was called, was a Dutch colony. The Codes are "heavily, if not translated, influenced, or derived from the French codified laws" due to France occupying the Netherlands during the Napoleonic Wars.[43] There are also elements of customary and Adat Law.[44] Adat Law is a set of local and traditional laws and dispute resolution systems operating in many parts of Indonesia, and it tends to be based on region and ethnicity.[45] Adat law is important in areas such as family law, inheritance, and agrarian law.[46] Syariah Law principles are not part of Indonesian law, although the Court of Religion originally applied Syariah law to matters of marriage and inheritance for Muslims.[47] With regional autonomy, Aceh introduced Syariah courts, which cover matters such as family law, civil law, criminal law, courts, and education.

The language of the state is Bahasa Indonesia[48], which uses the Latin script.

Lao Peoples Democratic Republic (Lao PDR)

Lao PDR is a people's democratic state. "All powers belong to the people, [and are exercised] by the people and for the interests of the multi-ethnic people of all social strata with the workers, farmers and intelligentsia as key components".[49]

[37]Constitution of the Republic of Singapore (1963) (current version as at 14 March 2019) art 153A.
[38]Ying (2000).
[39]The Constitution of the Republic of Indonesia (1945, consolidated) (tr Ministry of Foreign Affairs of the Republic of Indonesia 1 July 2003) art 1(1).
[40]Ibid at art 4(1).
[41]Ibid at art 17.
[42]Laiman, Reni, Lengkong, Ardianto, Reni & Renaldi (2019).
[43]Ibid s 1.1.
[44]Ibid s 6.2
[45]Ibid.
[46]Ibid.
[47]Ibid.
[48]*The Constitution of the Republic of Indonesia (1945, consolidated) (tr Ministry of Foreign Affairs of the Republic of Indonesia 1 July 2003)* art 36.
[49]*Constitution of the Lao PDR (amended) (tr Khamphaeng Phochanthilath)* art 2.

> The Lao Front for National Construction, the Lao Veterans Federation, the Lao Federation of Trade Unions, the Lao People's Revolutionary Youth Union, the Lao Women's Union and other social organisations are the organisations to unite and mobilise all strata of the multi-ethnic people to take part in the tasks of protection and construction of the country, to develop the right of self-determination of the people, and to protect the legitimate rights and interests of members of their respective organisations. *They have the right and duty to monitor the activities of the National Assembly, Local People's Assemblies and other members of such assemblies.*[50] (emphasis added)

As shown in Table 1, the Economics Intelligence Unit considers it an authoritarian regime due to its low scores on all variables, which is unsurprising for a communist state.

The President of the State is elected by a vote of the National Assembly.[51] "The government consists of the Prime Minister, Deputy Prime Minister[s], ministers and chairmen of the ministry-equivalent organisations".[52]

Legislation is the primary source of law, and there are two types of legislation: legislation of general application and legislation of specific application, such as presidential decrees or decisions and notifications.[53] Jurisprudence is not part of the legal system.[54] There are no codes in print, and there are no legal journals, but various laws are included on government websites.[55]

The Lao language and its script are the official language and script.[56]

Thailand

Thailand is a parliamentary democracy with a king as head of state.[57] As shown in Table 1, the Economics Intelligence Unit considers it a flawed democracy as it has relatively low scores on *Functioning of Government*, *Political Participation* and *Political Culture*.

The fundamental laws of the legal system of Thailand are the *Constitution*[58] *Civil and Commercial Code*,[59] *Civil Procedure Code*,[60] *Criminal Code*[61] and

[50]Ibid at art 7.
[51]Ibid at art 66 & art 67.
[52]Ibid art 71.
[53]David, De Leon-David & Kitcharoen (2019) s 3.
[54]Ibid.
[55]Ibid s 4.
[56]*Constitution of the Lao PDR (amended) (tr Khamphaeng Phochanthilath), (2016)* art 110.
[57]*Constitution of the Kingdom of Thailand, B.E. 2560 (2017)* s 2.
[58]Ibid.
[59]"English translations of the original Thai law texts are prepared for reference purposes only. Only the Thai script versions, as published in the royal Thai government gazette (**ราชกิจจานุเบกษา**), shall have legal force in Thailand". The English translation can be found at: *Civil and Commercial Code, B.E. 2468 (1925)* an online version at: *Civil and Commercial Code, B.E. 2468 (1925)* (online version). s
[60]*Act Promulgating the Civil Procedure Code, B.E 2477 (1934) (with amendments up to and including Civil Code Amendment Act (No. 30), B.E. 2560 (2017)).*
[61]*The Criminal Code (Thailand) (updated to 2009).*

Criminal Procedure Code.[62] In addition, there are a large number of organic laws. Under the Constitution, there are four types of courts: the Constitutional Court of the Kingdom of Thailand, the Courts of Justice, the Administrative Courts, and the Military Courts.[63]

> Thailand is not a common law jurisdiction and judicial precedent is not binding on lower courts. The Supreme Court of Justice is not bound to follow its own decisions, and lower courts are not bound to follow precedents set by higher courts. In practice, however, the decisions of the Supreme Court of Justice do have a significant influence on the Supreme Court of Justice itself and lower courts. Supreme Court decisions are printed on a regular basis and distributed to law libraries and private subscribers.[64]

Unlike the other ASEAN jurisdictions, the Thai Constitution remains silent on Thailand's national or official language. Most language decisions are based on unwritten assumptions about the status of the Thai language.

Since Thailand became a constitutional monarchy in 1932, there have been a series of successful military coups d'état, most recently in 1976, 1991, 2006, and 2014.[65] The military-backed 2017 constitution was approved by the new King, Vijiralongkorn, King Rama X, after he made his own amendments. At the time of writing, Thailand had a democratically elected lower house. Through the amendments and administrative arrangements, it is clear that the intent of the King "was to protect and enhance his influence as monarch".[66] The supremacy of the King is enshrined in Chapter II of the Constitution[67], namely:

> Section 6. The King shall be enthroned in a position of revered worship and shall not be violated. No person shall expose the King to any sort of accusation or action.
> Section 7. The King is a Buddhist and Upholder of religions.
> Section 8. The King holds the position of Head of the Thai Armed Forces.
> Section 9. The King has the Royal Prerogative to create and remove titles and confer and revoke decorations.

The above concepts are reinforced by stringent lèse-majesté[68] and criminal defamation[69] offences included in the Criminal Code.[70]

Wise argues that the Thai legal system should be understood in terms of Thai history.[71] He argues that traditional and modern political legitimacies should be seen as "co-existing rather than competing".

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[62]*The Criminal Procedure Code (Thailand) (updated to 2009).*
[63]Leeds & Leeds (2020) s 2.3.
[64]Ibid, at s 4.5.
[65]Wise (2019) at 205-219.
[66]Ibid, at 264.
[67]*Constitution of the Kingdom of Thailand, B.E. 2560 (2017)* ch II.
[68]*The Criminal Code (Thailand) (updated to 2009)* s 112.
[69]Ibid, at s 326.
[70]See, for instance: Smith & Perry (2020).
[71]Wise (2019) at 234.

> [As the country] was not directly colonised, hierarchy and monarchy are still tightly woven into the fabric of Thailand. Many Thais, including the [current] King himself, still believe that at times the King should play a direct political role […]. They believe in a moral hierarchy based on [Buddhist concept of] karma. […]. Within this moral hierarchy, power relations are determined between patrons and clients on a personal basis, not through elections. When disputes arise, they are best mediated and arbitrated by the King, his representatives, […] or the military, not in courts of law or legislatures or through elections.[72]

Timor-Leste

Timor-Leste is a unitary democratic Republic with a President as Head of State and a parliamentary system of government. As shown in Table 1, the Economics Intelligence Unit considers it a flawed democracy due to its relatively low scores on *Functioning of Government* and *Political Participation*.

Timor-Leste was a former Portuguese colony that proclaimed its independence on 28 November 1975 and was invaded by neighbouring Indonesia on 7 December 1975.[73] Its Independence was finally recognised internationally on 20 May 2002.[74] Its territory includes the enclave of Oecussi in Indonesian West Timor.[75]

The Head of State is the President, who is also the Supreme Commander of the Defence Force.[76] The National Parliament "is vested with legislative, supervisory and political decision-making powers".[77] The Government comprises the Prime Minister, the Ministers, and the Secretaries of State.[78]

"As a civil law country, court decisions are not binding as law; however, they may be looked to for guidance".[79] Timor-Leste utilises "the Portuguese 'Fixativa Resultada' in which the highest court may pronounce a decision binding in some cases on lower courts".[80] The Supreme Court of Justice (is empowered to provide judicial review of legislation.[81]

Previous "laws and regulations in force in East Timor shall continue to be applicable to all matters except to the extent that they are inconsistent with the Constitution, or the principles contained therein".[82]

> Timor-Leste has a significant tradition of informal law administered by local leaders and family heads. Due, in part, to the fact that the formal system is still too underdeveloped to reach the widely dispersed populations of the country, these traditional systems remain active and influential. […] Traditional "trials" under the

[72]Ibid.
[73]*Constitution of the Democratic Republic of Timor-Leste*, preamble.
[74]Ibid.
[75]Ibid at s 4(1).
[76]Ibid at s 74.
[77]Ibid at s 92.
[78]Ibid, at s 104.
[79]Greising, Vital & Gil Lobit (2019) s 2.2.
[80]Ibid.
[81]Ibid, at s 4.2.
[82]*Constitution of the Democratic Republic of Timor-Leste* s 165.

> informal system are headed by the cultural, family or other local leaders in the community, . . . Often, the goal is not retribution but, rather, reconciliation and community harmony. Currently, there is no legislation which regulates the intersection of informal and formal law— and the Constitution explicitly recognises respect for cultural history and traditions— opening another level of complexity to the legal system and creating issues of double jeopardy and conflicts of law.[83]

The official languages are the local Tetum language and Portuguese.[84] "Indonesian and English shall be working languages within civil service side by side with official languages as long as deemed necessary".[85] Due to its basic nature, few laws have been translated into Tetum.[86] The only official versions of laws are those in Tetum and Portuguese. Translations are often of poor quality, and the Portuguese version is controlling if there is a conflict.[87]

Vietnam

Vietnam is "a socialist rule of law State of the people, by the people and for the people whose base is the alliance between the working class, the peasantry, and the intelligentsia".[88] As shown in Table 1, the Economics Intelligence Unit considers it an authoritarian regime due to its low scores on all variables, which is unsurprising as, like the Lao PDR, it is a communist state.

The legal system of Vietnam, like that of the former Soviet Union, is based on the civil law system modified in accordance with Marxist-Leninist ideology.[89] Since 1995, customs have been officially recognised "as a kind of law source".[90] With the reorganisation of the People's Courts in 2014, case law has become more significant, with the Judicial Council of the Supreme People's Court tasked with issuing guidance to courts in uniformly applying law.[91] The process is facilitated by the practice of the Supreme People's Court producing an annual collection of typical cases with comments and instructions.[92]

"The national language is Vietnamese. Every nationality has the right to use its own language and system of writing, to preserve its national identity, and to promote its fine customs, habits, traditions, and culture".[93]

[83]Greising, Vital & Gil Lobit (2019) s l.
[84]*Constitution of the Democratic Republic of Timor-Leste* s 13(1).
[85]Ibid at s 159.
[86]Greising, Vital & Gil Lobit (2019) s 4.2.
[87]Ibid.
[88]*Constitution of the Socialist Republic of Vietnam (tr International IDEA)* art 2,
[89]Huong (2019) s 1.1.
[90]Legal System in Vietnam pt II s 3.
[91]*Law on Organization of People's Courts (2014)*,
[92]Hanh (2022) at s 6.
[93]*Constitution of the Socialist Republic of Vietnam (tr International IDEA)* art 5(3).

Hybrid Civil and Common Law Countries

For historical reasons, Cambodia and the Philippines have hybrid systems.

Cambodia

Cambodia is a 'multi-party democracy'[94] with a king as head of state.[95] As shown in Table 1, the Economics Intelligence Unit considers it an authoritarian state with low scores on all parameters.

The current legal system of Cambodia is a hybrid system which is an amalgam of Cambodian customs, the French legal system and common law.[96] The latter is due to the influence of foreign aid assistance to legal and judicial reform in Cambodia. As well as the primary sources, there are secondary sources, including "customs, traditions, conscience, equity, judicial decisions, arbitral awards and doctrine".[97] Secondary sources are used in civil cases where the law is not explicit, or there are gaps.[98]

The official language and script are Khmer.[99]

Philippines

The Philippines is a democratic republic[100] with executive power resting in the President.[101] As shown in Table 1, the Economics Intelligence Unit considers it a flawed democracy due to its low scores on *Functioning of Government* and *Political Culture.*

The legal system is a blend of civil, common, Islamic, and indigenous law.[102] The primary sources are statutory law and case law.[103] The civil law tradition comes from the Spanish colonial period, while the common law tradition comes from the American colonial period that followed.

The national language of the Philippines is Filipino and should be the medium of official communication and instruction in the education system.[104] Until otherwise provided by law, English remains an official language for communication and instruction, together with Filipino.[105] Regional languages are the auxiliary official languages in the regions whilst Spanish and Arabic can be promoted on a voluntary and optional basis.[106]

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[94]*The Constitution of the Kingdom of Cambodia (tr Constitutional Council, October 2015)* art 51(new).
[95]Ibid at ch II.
[96]Kong (2012) at 8.
[97]Ibid.
[98]Ibid at 9.
[99]*Constitution of the Kingdom of Cambodia (tr Constitutional Council, October 2015)* art. 5.
[100]*Constitution of the Republic of the Philippines (1987)* art II s1.
[101]Ibid at art VII s 1 .
[102]Santos-Ong (2020) s 5.1.
[103]Ibid s 5.2.
[104]*Constitution of the Republic of the Philippines, (1987)* art XIV s 1.
[105]Ibid at art XIV s 7.
[106]Ibid.

Pariah States

Myanmar

Any country where the military undertakes a coup d'état as happened in Myanmar on 1 February 2021, and then institutes a civil war on its citizens is clearly a pariah state.[107]

Sources of law in Myanmar up to the coup d'état were the Constitution, legislation, customary law, and English common law developed and adopted in Myanmar case law during the British occupation.[108] Common law was used when no local legislation governs a matter before the court. In addition, judges are granted discretionary power to decide a matter in the absence of any applicable law. Even a cursory reading of the current Constitution, which was developed under military oversight and approved in 2008, shows the lengths to which the military went to ensure they had a role in continuing to influence/hinder, as they considered necessary, the operations of a parliament by reserving 25% of the seats in both houses of the legislature to defence services personnel[109] and requiring a vote of approval greater than 75% of the Pyidaungsu Hluttaw (i.e. the Lower House) to put to the people an amendment to alter key sections of the Constitution.[110]

Myanmar language is the official language.[111]

The Translation Conundrum

One of the more interesting stories surrounding the translation conundrum is related by researcher Tamara Loos who visited southern Thailand in 2003.[112] The local Islamic judges were referring to an English language version of the *Minhaj et Talibin*[113] when settling family law disputes in the local Islamic courts.[114] The original Arabic text was compiled sometime before the 16th Century and is one of the key texts of the Shafi'i school of Islamic law, one of the four schools of law of Sunni Islam, which most Southeast Asian Muslims practice. A Dutchman then translated it into French and, in 1882, published it in Batavia, the capital of the Netherlands East Indies. The translation itself was paraphrased from several Principal Islamic commentaries rather than from the original Arabic text. In 1914, it was translated from the French into English in Singapore. The reason for both translations was to enable European colonial officials and magistrates to access the legal literature of the Shafi'i school.[115]

[107]See, for instance: EAF Editors (2024) and Farrelly (2024).
[108]Su Wai Mon & Karim (2021) s 6.
[109]*Constitution of the Republic of the Union of Myanmar, (2008)* s 74 and s 109.
[110]Ibid at s 436.
[111]Ibid at s 450.
[112]Loos (2006) at 29-30.
[113]Mahiudin Abu Zakaria Yahya ibn Sharif en Nawawi (1914).
[114]Loos (2006) at 29.
[115]Ibid.

> This version found its way in 2003 into the hands of some of Thailand's Islamic judges, who also use Arabic, Malay, and Thai language texts in the course of their duties. It is profoundly ironic that *dato yutitham* in Thailand today might utilise Islamic law through the English translation of a French translation of an amalgamation of sixteenth-century Arabic commentaries on an Islamic law text compiled by a Dutchman for application in nineteenth-century Netherlands East Indies (Indonesia). […] [a] Thai language translation of Shafi'i law on marriage, inheritance, and related issues, compiled from dozens of Arabic and Malay language kitab (commentaries on the Quran and hadith) was not completed until 1941, nearly half a century after the establishment of Islamic family courts in the south.[116]

Thailand modernised its legal system under King Chulalongkorn in the late 19th Century and early 20th Century.[117] A team of international jurists was engaged to undertake the task. For political reasons, both English and French legal teams were used. The Thai Penal Code was drafted in English and French by a joint Thai/foreign team, and the English version was translated into Thai.[118] Of particular interest is the translation of the English term liberty. The Thai term "issaraphap" is translated in modern times as liberty, independence, freedom, or autonomy.[119] Historically, at the turn of the 20th Century, however, it applied to the Thai tradition where the superiors had sovereignty or authority over themselves and their subordinates.[120]

The Thai Civil Code was drafted in English by a joint French/Siamese team without bilingual Thai input because of the great demand within the bureaucracy for fluent bilingual Thai officials.[121] The King even sent members of the French team to England to improve their English.

The recent Thai Law Dictionary English-Thai is written for Thai students who have to deal with legal English.[122] It includes the translation of over 5,000 English words or expressions into Thai. An impressive task by the compiler/ translator let down by its Preface in English, which is quoted verbatim in part: "Thai Law Dictionary are published in many styles, but that only general dictionary that cannot be used and referred to the universal system of countries. […] I […] feel very impressive with this project Thai Law Dictionary that I have seen some books which appear in the world of books." Fortunately, the version on their website is in correct English; too late for the published version, however.

In his notes on his English translation of the *Cambodian Criminal Code*,[123] Cheung sought to make a text that could be understood by itself by harmonising the translation with the underlying Khmer texts.[124] The Code states that in criminal matters, the law should be strictly construed,[125] but Cheung exposes a

[116]Ibid at 29-30.
[117]Loos (1998) at 38.
[118]Ibid at 38-39.
[119]Ibid at 36.
[120]Ibid at 41.
[121]Loos (2006) at 62.
[122]*Thai Law Dictionary: English-Thai*. (2017). Sout Paisal Law.
[123]*Criminal Code, 2009 (Cambodia) (tr Buneng Cheung, May 2011).*
[124]Ibid at p. II
[125]Ibid a art 5.

difficulty.[126] He has identified a number of undefined terms such as "torture" and "acts of cruelty"[127] or offences related to "violence"[128].[129] He considers that the meaning of the terms "specific", "other", and "special' have their ordinary meaning in Khmer, but the meanings shift in the English text with national judges unable to come to a common consensus on their usage.[130] The literal meaning of the offences in Article 79 and Article 80 are "breaking in" and "climbing in", which have been translated to mean "forced entry" and "illegal entry", respectively.[131]

In the note on the translation of the Code of Criminal Procedure of the Kingdom of Cambodia,[132] the translators again point out the difficulties of translating from original statutes into English.[133] This is especially so in this case, as the original draft language was French, which was then translated into Khmer and then finally translated into English. The English version was then harmonised with the underlying Khmer and French texts with the version adopted by the National Assembly (i.e. the Khmer version) providing the ultimate guidance. They point out that French legal terminology refers to "Magistrats", a common term for judges and prosecutors.[134] In the English translation, they looked at the context to determine whether the translation of "Magistrat"' should refer to a judge or a prosecutor.[135] In Khmer law, "confrontation" is an investigative procedure where all parties are brought together before the judge so he/she can directly clarify contradictions in respective statements.[136] In the Khmer original, there is no difference between the terms "accused" and "convicted" persons.[137] They also point out other inconsistencies which they assume jurisprudence will no doubt correct.[138]

As a further example, the Cambodian Road Law (2015)[139] was suspected by this author as being a Khmer translation of an English original, with the Khmer translation subsequently being translated into English. This was subsequently confirmed in a meeting. The Khmer translation is apparently imperfect, as is the English retranslation.

Finally, without a good grounding in Islamic Law and the meaning of the offences which have been transliterated from Arabic to English, the Syariah Penal

[126]Ibid Note on the Translation at II-III..
[127]Ibid at art 210.
[128]Ibid at art 217, art 451 and art 456.
[129]Ibid Note on the Translation at III.
[130]Ibid.
[131]Ibid Note on the Translation at IV.
[132]Code of Criminal Procedure of the Kingdom of Cambodia 2007 (tr Buneng Cheung and Jürgen Assmann, 2008).
[133]Ibid Note on the Translation at vii to viii.
[134]Ibid Note on the Translation at vii.
[135]Ibid.
[136]Ibid.
[137]Ibid at viii.
[138]Ibid at vii.
[139]*Law on Roa,d 2014*.

Code Order[140] and the Syariah Courts Criminal Procedure Code Order,[141] 2018 of Brunei Darussalam are extremely difficult to understand.

How might laws be harmonised across ASEAN when confronted with such linguistic difficulties?

Discussion

Even though there are disparate legal systems, each jurisdiction has an overarching Constitution and a legislative body able to enact laws. Therefore, it can be argued that it is not the legal systems of the ASEAN members, per se, that provide the stumbling block in adopting a set of model laws within ASEAN. Rather, it is the intricacies of translating/harmonising from one language to another. In this case, from English to the language used in drafting laws in the particular jurisdiction. The following section provides some examples of the problem.

Increasingly, criminal activity does not respect borders; therefore, it is essential that cross-border cooperation is established. This is especially so whilst the international community is grappling with the threat of international terrorism. Several models are currently in operation to facilitate such cooperation. This discussion focuses on just three.

One option is to prepare a set of mutually agreed model laws that the parties could adopt. As discussed earlier, this approach has significant drawbacks, as seven potential parties legislate in a language other than English. Conceivably, Brunei Darussalam, Malaysia, the Philippines, and Singapore could adopt such an approach if they so wished. For the other nations, the lack of a common language would lead to significant issues in understanding the nuances of the language in which the model documents were prepared; in this case, it would, by necessity, be English. Translation and its adoption into the different legal traditions of its members become fraught with difficulties. Clearly, this option should not be pursued further.

Regional groupings such as ASEAN have approached the issue by regional cooperation and capacity building.[142] The Philippines has, for instance, taken a leading role in Cybercrime Prevention through its Office of Cybercrime.[143] The Cybercrime Prevention Act mandates full international cooperation, which is no doubt why it was able to take the leading role.[144]

As discussed by Clough, the regional cooperation model does not have the force of law as a treaty, and it does little to ensure that the laws are compatible between the parties.[145] The primary deficiency of the "cooperative" approach is that it necessitates the parties to enter into individual treaties with the parties with

[140]*Syariah Penal Code Order, 2013*.
[141]*Syariah Courts Criminal Procedure Code Order, 2018.*
[142]For Example: *ASEAN Declaration to Prevent and Combat Cybercrime*.
[143]Department of Justice (2017, 2018).
[144]*Cybercrime Prevention Act of 2012 (Philippines).*
[145]Clough (2014).

which it seeks to cooperate rather than the concept of the Budapest Convention, also called the Convention on Cybercrime, where the parties are automatically required to mutually cooperate.[146]

Nevertheless, cooperation is an essential first step and could be the starting point for exploring the harmonisation of laws. Unfortunately, an assessment of the documents on the Philippines Office of Cybercrime website shows that some ASEAN members are far more active than others. In developing economies, this is often a capacity issue with limited suitably trained staff.

As noted above, the Budapest Convention mandates cooperation between the parties. It has not, however, mandated harmonisation. Instead, it requires that the parties commit to ensuring that their cybercrime laws meet the minimum standards specified in the treaty.[147] Some country groupings have taken a step further and directed their members to harmonise their laws. The Economic Community of West African States has taken such action.[148]

The adoption of the regional cooperation model has the advantage for each ASEAN member to draft its own laws in accordance with its legal system, customs and legal drafting practices as long as the outcome is a law or set of laws that meet the minimum standards set out in the treaty. Clough considers that, to be effective, harmonisation must seek to accommodate and reconcile differences between the parties.[149] He suggested that parties should be allowed to exercise their right to declare reservations to parts of the treaties so that implementation can be adapted to the local conditions, thus addressing the difficulties in achieving consensus between all parties. Interestingly, as of 29 February 2024, the Philippines has acceded to the *Convention on Cybercrime* after enacting the enabling legislation. Brunei Darussalam has enacted a set of cybercrime legislation[150] that would be essentially compliant with the Convention but has taken no action to be a party to it. None of the other members of ASEAN has sought to accede to the Convention either.

An example of the need for the ability to declare reservations is shown concerning "spam", which is defined as sending unsolicited messages by email, text, or instant messaging systems without consent from the recipient.[151] Spam is a worldwide concern, and the Philippines and Singapore, amongst others, enacted legislation outlawing the sending of spam. Singapore enacted a specific act – the *Spam Control Act*[152] whilst the Philippines included the outlawing of sending spam in their existing *Cybercrime Prevention Act.*[153] Whilst both acts had the same intent, the Supreme Court of the Philippines ruled that banning spam contravened the Constitutional right to free speech.[154] If the requirement for spam

[146]*Convention on Cybercrime*. (2001) ch III.
[147]Ibid at s 2.
[148]*Directive C/DIR. 1/08/11 on Fighting Cyber Crime within ECOWAS*, (2011).
[149]Clough (2014) at 701.
[150]*Computer Misuse Act 2017, cap 194.*
[151]Australian Cybercrime Online Reporting Network (2019).
[152]*Spam Control Act (Singapore, cap 311A, rev ed 2008).*
[153]*Cybercrime Prevention Act of 2012 (Philippines).*
[154]*Jose Jesus M. Disni et al.* v *The Secretary of Justice et al*. (2014). In (Vol. GR 203335). Supreme Court, Republic of Philippines: en Banc.

legislation became a requirement under an ASEAN 'treaty' or 'convention', without the ability to declare a reservation, the Philippines would be unable to be a party.

Conclusion

The nuances of language are a crucial component of the understanding of a nation's laws. Direct translation is fraught with difficulties and can result in a poorly drafted translation. This means that drafting a set of model laws in English, say, is not a suitable approach for the multi-lingual nations of Southeast Asia. While ASEAN works on the principles of cooperation and consensus, the cooperation approach is considered to be inadequate in the fight against transnational crime in this internet-connected world. An appropriate response would be to develop a treaty modelled on that of the *Convention on Cybercrime*, which sets the minimum legal standards that must be achieved. It must also allow a party to register a reservation against specific provisions to allow for country-specific conditions. Such an approach is independent of the language used in drafting the laws of the party as long as the intent of the treaty is met.

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Legal Assessment of the Condition of Recourse to Domestic Judicial Authorities in the Judicial Procedures of the European Court of Human Rights with a view to the Case of Salahuddin Anju and others v. Turkey

By Shaho Jafari[*]

The authoress outlines new welfare models and community enterprises, in the context of the Third Economy, with the aim of defining guidelines and interventions for the promotion of social enterprise and the strengthening of the social and solidarity economy. The Third Economy understands enterprise as an integral part of society and aims to create a new economic model that combines profit and sustainable development in line with the goals set by Agenda 2030. The goal is to define new development paradigms that put people at the centre, heeding the next generation. Sustainability is the file rouge of this study offering a rich review of the literature on the concept of the commons, while illustrating practices that have already been initiated. The essay also discusses the draft law on Community Social Enterprises as a welfare model, and concludes with de iure condendo perspectives.

Keywords: *Welfare; Commons; Third economy; Worker partcipation; Social responsibility.*

Introduction

One of the goals of the United Nations, apart from its main goal, which is to maintain international peace and security, and of course this main goal has undergone changes and evolving during the life of the United Nations,[1] promoting and encouraging respect for human rights and fundamental freedoms regardless of religious, sexual, ethnic, linguistic or religious distinctions.[2] Numerous human rights treaties have been adopted to achieve the United Nations goals of promoting human rights. The most important international human rights instruments adopted by the General Assembly early in the work of the United Nations were the

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[1]Article 1(1) of United Nation charter. For more information in this regard see Thakur (2006) at 27-45.

[2]Article 1(3) of United Nations charter. See Mertus (2005*)* at 17-45.

Universal Declaration of Human Rights,[3] the International Covenant on Civil and Political Rights,[4] and the International Covenant on Economic and Social Rights.[5] In addition to these international efforts, under Chapter VIII of the Charter of the United Nations, which authorises regional arrangements to advance the goals of the United Nations, a number of human rights treaties have been ratified at the regional level, including the European Convention for the Protection of Human Rights and fundamental freedoms (1950),[6] the African Charter on Human Rights and Nations (1981)[7] and the Cairo Declaration on Human Rights in Islam.[8]

This paper addresses the examination of the condition of recourse to domestic authorities in the proceedings of the European Court of Human Rights, a tribunal established in 1959 under the European Convention on Human Rights. Whether the European Court of Human Rights in its review of referral cases is subject to a single procedural and logical interpretation of the provisions of Article 35 of the European Convention on Human Rights or whether it has also taken into account political considerations. The answer to this main question will not be possible, except by examining the cases referred to the Court and with a pragmatic view. The tribunal was established on the initiative of the Council of Europe[9] and all 47 member states of the Council of Europe are members of the tribunal. Sixteen protocols have been added to the European Convention on Human Rights so far. The purpose of the drafters of the Convention, as stated in the preamble of the Convention, is to take the first steps towards the collective implementation of the special rights enshrined in the Universal Declaration of Human Rights.[10] The European Convention on Human Rights can be considered as the first human rights document that provides for a judicial institution to oversee the proper implementation of an international treaty.[11]

The European Convention on Human Rights and mainly its article 35 set out rules for the possibility of bringing an action by individuals, which in fact came into force with the adoption of the Eleventh Additional Protocol to the Convention.

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[3]It was accepted by the General Assembly as Resolution 217 during its third session on 10 December 1948 at the Palais de Chaillot in Paris, France. Of the 58 members of the United Nations at the time, 48 voted in favour, none against, eight abstained, and two did not vote.

[4]Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49.

[5]Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27.

[6]Signed 4 November 1950, Location Rome, entry into force 3 September 1953.

[7]The African Charter on Human and Peoples' Rights came into effect on 21 October 1986– in honour of which 21 October was declared "African Human Rights Day"

[8]Adopted in Cairo, Egypt, on 5 August 1990 at Conference of Foreign Ministers, 9–14 Muharram 1411H in the Islamic calendar.

[9]The Council of Europe was established in 1949 and has 47 member states with a population of 820 million. This institution is separate from the European Union. Unlike the European Union, this council does not have the power to enact binding laws, but it does have the power to implement certain treaties concluded by the European states. A clear example is the implementation of the European Convention on Human Rights with the establishment of the European Court of Human Rights. No country has joined the European Union without having already joined the Council of Europe.

[10]See Preamble of European Convention on Human Rights.

[11]Fatemi (2000) at 130-131

The most important condition for going to appeal to the European Court of Human Rights is priory resort to domestic judicial. Individuals should first go to a domestic authority to sue, and if it is determined that the wrongdoer is not productive during the domestic judicial process and will not achieve the desired result, or that despite the possibility of achieving justice, the wrongful government is unwilling to admit that there is violation of human rights and compensation, in this condition, individuals will be able to appeal to the European Court of Human Rights.

It should be noted that the new European Court of Human Rights started its work on 1 November 1998 with the adoption of the Eleventh Protocol and the entry into force of the Protocol on 31 October 1998. The ratification of this protocol has given the European Court of Human Rights the largest territorial jurisdiction with the right of governments and individuals, both nationals and non-nationals, to appeal against the member states of the European Convention on Human Rights which 47 member states in turn have a population of over 800 million. They have placed in themselves.[12] Turkey was the thirteenth member of the Council of Europe joined the Council of Europe on 13 April 1950.[13] Therefore, Turkey was one of the early members of the European Convention on Human Rights and the European Court of Human Rights. It did not accede to the International Covenant on Civil and Political Rights until 2000,[14] according to figures in the European Court of Human Rights, Turkey ranks fourth after Russia, Romania and Ukraine.[15] The country has had many cases in the court so far, and the large number of cases reflects the human rights situation in this country.[16]

Another important point to note about Turkey is the issue of complaints from individuals, which is addressed in Protocol 9 of the European Convention on Human Rights, Turkey acceded to this protocol and on this basis a large number of cases involving complaints from individuals were raised against the Turkish government. The procedure of the European Court of Human Rights in this regard has not been consistent and uniform. The court has in some cases convicted Turkey of human rights abuses, but after the events of 11 September, ruled in favor of dismissing the complaint against Turkey, and the court used some of Turkey's arguments including the fight against terrorism as the basis for its proceedings. In total, about 27,000 cases against Turkey have been rejected by the European Court of Human Rights.[17]

[12]Rainey, Wicks & Ovey (2000) at 21.
[13]Council of Europe. https://www.coe.int/en/web/portal/turkey
[14]United Nation Human Right. https://indicators.ohchr.org
[15]The issue of human rights is one of the most fundamental and fundamental issues in relation to Turkey's membership in the European Union. It has not yet joined the European Union, and accession negotiations are still ongoing, and it has been one of the countries with the most complaints in the European Court of Human Rights. For further reading in this regard see Aghdaei (2012).
[16]Aktar (2019).
[17]Ibid.

Examining the Condition of Recourse to Internal Authorities by Individuals

The right of individuals to sue governments in regional and international courts has undergone a special process, from the classic form of non-recognition of this right for individuals to the recognition of this right as part of human rights. Article 35 of the European Convention on Human Rights states the following:

> "*The court shall consider the matter only if, in accordance with the accepted principles of international law, all domestic remedies have been exhausted and the applicant has lodged his appeal within six months from the date of the final decision.*"

This condition is a customary rule in international law. The European Court of Human Rights and its Statute, the European Convention on Human Rights, appear to have been influenced by the international law approach in this regard. Therefore, it is necessary to first examine this condition from the perspective of international law, and then to review the case law of the European Court of Human Rights, specifically in the case of the Anjou brothers against Turkey, which is also known as the Roboski case.

Condition of Recourse to Domestic Authorities from the Perspective of International Law

The condition of recourse to domestic authorities in the international legal system is influenced by international jurisprudence, specifically the International Court of Justice, the draft articles on diplomatic protection, the Economic and Social Council resolution, and the doctrine.

With regard to the jurisprudence of the International Court of Justice, this right has been dealt with in various cases and has been specifically recognised in the case of InterHandel as a customary rule of international law.[18] The condition of appealing to domestic authorities in the discussion of diplomatic protection is one of the preconditions for filing a lawsuit in international authorities. However, due to the development of human rights and the entry of these fundamental rights into most academic and legal issues, the condition of appealing to domestic authorities has undergone many changes, so much so that even the International Court of Justice in some cases has not made it necessary to refer to domestic authorities. Specifically, in the case of Avena and other Mexicans, which was filed by Mexico against the United States in January 2003. The Court did not require that Mexicans reside in the United States to resort to domestic authorities of US priorly.[19] A more detailed explanation of this ruling is needed in the context of the issue of diplomatic protection, but suffice it to say here that when the Court finds that the United States has violated the rights of Mexicans under Article 36 (b) of

[18]*Interhandel, Switzerland v. United States of America*, Preliminary objections, Judgment, I.C.J.GL No. 34 [1959] ICJ Rep. 6

[19]*Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment I.C.J. Reports 2004, at 12.

the Consular Relations Convention. It ultimately votes that there is no need for resorting to internal authorities, with the specific circumstances and the correlation between government and Mexican law on Article 36 of the Civil Authority.[20]

The draft article on diplomatic protection also mentions referring to domestic authorities as one of the preconditions for filing a lawsuit in international authorities, but in Article 15, it mentions conditions that do not necessarily consider this condition necessary and issues an exemption from observing the condition. Specifically, in the first and second paragraphs of Article 15 of the draft article, it is stipulated that if there is no reasonable domestic compensation for the case or there is an inappropriate delay in the process of compensation for an infringing act attributable to the offending government, It is not necessary to refer to internal authorities.[21]

Therefore, since the International Court of Justice in the case of them and other Mexican national's states that, given the special circumstances, it is not necessary to refer to domestic authorities in this case, it should be interpreted according to Article 15 of the draft articles of the International Law Commission.[22]

Regarding the doctrine and theory of prominent jurists, it should be said that at present, and considering the increasing role of human rights in scientific debates and events, many prominent jurists believe that in cases where human rights violations have occurred by the resident government, Considering the fundamental importance of these rights and their priority over other relations between states and the fundamental commitment of states to fundamental human rights, therefore, the condition of referring to domestic authorities in these cases, i.e. cases related to human rights violations, is not necessarily observed.

Therefore, according to the position of international law regarding the condition of referring to domestic authorities by the injured party, the criteria of *availability, effectiveness and reasonable possibility of compensation* (adequacy) in Article 15 of the draft articles on diplomatic protection has been suggested that the mentioned rule should be met in each case and in case of not fulfilling any of the mentioned cases based on the foresaid article, the condition of appealing to

[20]52 Mexican nationals were arrested and sentenced to death in nine U.S. states. Mexico, in January 2003, outlines a complaint against the United States at the International Court of Justice in which it alleges that the United States violated the Articles 5 and 36 of the 1963 consular relations with non - interference from the consular support of Articles 5 and 36 of the Convention on Consular Relations (1963). Mexico also asked the court to issue a temporary decree on the eve of the execution of some of its subjects, which on February 3, 2003, ordered an interim order to take measures to prevent the execution of Mexican nationals.

[21]According to Article 15 of Draft articles on Diplomatic Protection, Local remedies do not need to be exhausted where:

(a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;

(b) there is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(c) there was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;

(d) the injured person is manifestly precluded from pursuing local remedies; or

(e) the State alleged to be responsible has waived the requirement that local remedies be exhausted.

[22]Amparo (2000) at 268.

internal authorities is not obligatory and the injured party should not be deprived of his lawsuit. In general, from the traditional position of the need to comply with the condition to the new approach of non-compliance with the condition according to the conditions mentioned in the Court's decision and the draft articles on diplomatic support, it seems that this approach in compliance with the condition in The cases referred to the European Court of Human Rights have also been influential, and in a way, Article 35 of the European Convention on Human Rights, which deals with the condition of referring to domestic authorities, has been influenced and assigned by international custom.[23] In such a way that the rights of the victims are respected, especially in cases of human rights violations.[24] Considering the approach of the international law system, it is necessary to review the criteria for accepting lawsuits in the European Court of Human Rights in accepting the lawsuits of individuals, then the performance of the said court in practice will be reviewed and criticised.

General Conditions and Criteria for accepting Claims in the European Court of Human Rights

The European Convention on Human Rights, which is in fact the Statute of the European Court of Human Rights, in its Article 35 states the conditions for the acceptance and consideration of a claim that the claim must comply with the above conditions and if not, it will be rejected. The Fourteenth Protocol, which entered into force on 1 June 2010, adds another condition to the provisions of Article 35 of the Convention, which in fact increases the court's discretion in dismissing claims.

According to Article 35 (which also amends the Fourteenth Protocol):[25]

[23]It can be stated that the Permanent Court of International Justice during its lifetime and its successor, the International Court of Justice, until the early 21st century, were subject to the traditional approach to the issue of diplomatic protection in cases, but the Court's approach can be changed from the case of brothers. Lagrand observed in 2001. In the case of the execution of the Lagrand brothers, who were German nationals, the court issued an interim injunction not to execute the death sentence until the final verdict, which was upheld by an Arizona court. In this case, the Court, in addition to its jurisdiction, considered all of Germany's demands to be heard. For further reading in this regard, see Niavarani, Zabihi & Sanaz (2015).

[24]Niavarani, Zabihi & Sanaz (2015) at 12

[25]Article 35 Admissibility criteria 1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken. 2. The Court shall not deal with any application submitted under Article 34 that (a) is anonymous; or (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information. 3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not

> *1. The court shall consider the matter only if, in accordance with the accepted principles of international law, all domestic legal avenues have been exhausted and the applicant has lodged his appeal within six months from the date of the final decision.*
> *2. The court shall not hear any of the claims brought under Article 34 if:*
> *(A) (applicant) is unknown*
> *(B) the subject matter of the case has not previously been heard by a court, or referred to an international investigative or investigative body, unless the petition contains new information and facts.*
> *The court shall reject any petition filed by natural persons pursuant to Article 34 if it finds:*
> *(A) declare a personal application under Article 3 inconsistent with the provisions of the Convention or the protocols relating to it, or find it unfounded or misuse of the right to submit an application. Or*
> *(B) the claimant has not suffered substantial damage, unless in order to respect (respect for) human rights as required by the Convention and its protocols, the petition is considered in its nature and provided that no case should be dismissed for that reason; Which the domestic court has not properly addressed.*
> *The court shall reject at any stage of the proceedings that it finds the application inadmissible under this article.*

A point that should not be overlooked in this regard, according to the amendment to the Eleventh Protocol in recognizing the right of natural persons to go to court and making mandatory the jurisdiction of the court to hear these complaints, is to determine the competent persons to go to court. This issue is addressed in Article 34 of the Convention. This article provides that the court may seek redress from all persons, non-governmental organisations, groups of individuals who claim to be victims of a violation of the rights set forth in the Convention or its protocols by the High Contracting States. The High Contracting States shall not impede the effective exercise of these rights.[26]

The positive innovation of this article is that individuals, regardless of their nationality, have the right to go to court for violation of their rights by member states. In other words, this is a kind of support for groups that are immigrants, refugees or residents of European states that are members of the Convention.[27]

Another point is that the European Court of Human Rights has not necessarily met these conditions in accepting some lawsuits. In other words, the court has not required itself to strictly comply with these conditions in cases where there have been serious human rights violations and domestic authorities have failed to act. As in the case of Turkey, in the complaints of the Kurds living in that country, despite the non-fulfilment of the mentioned conditions, the Court considered

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been duly considered by a domestic tribunal. 4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings

[26]The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

[27]Fatemi (2000) at 140-139

accepting the lawsuit and finally condemning Turkey. As in the case of the forced relocation of Kurds living in that country, the court argued that due to the insecurity and vulnerability of the plaintiffs due to forced evictions and the lack of sufficient formal investigation in this regard, the court considered the domestic court investigation into the internal security forces insignificant. Finally, it was not necessary to observe the condition of appealing to internal authorities.[28]

The rules of international law in this regard have not been ineffective in the rulings of the European Court of Human Rights. This effect is in line with the explicit wording of Article 35 of the Convention, which states that the conduct of domestic proceedings must be in accordance with the accepted principles of international law. The principles accepted in international law are also stated in the judicial opinions and specifically in Article 15 of the draft article on diplomatic protection, which was mentioned in the previous section. The European Court of Human Rights has also taken these criteria into account. In other words, according to Article 35 of the Convention, if the rules of international law are not observed in the domestic legal system of a member state, the European Court of Human Rights should not consider the rejection of a claim in the domestic legal system as an excuse to reject the claim. As explained in the case of the forced migration of Kurds living in Turkey.[29] In this case, the court stated that due to the insecurity of the victims and the vulnerability of these people due to forced deportation from their homeland and that no formal investigation has been conducted in this regard, the court did not have a positive outlook for the Turkish domestic court. Compensation has been described as inaccessible in south-eastern Turkey.[30]

In general, the European Court of Human Rights, together with the European Commission of Human Rights, has complied with more than the same rules of international law regarding the mandatory rules that must be observed in the domestic system of countries when referring to the domestic legal system. The availability and feasibility of claiming damages is the first criterion for achieving justice in the internal system of the member states of the European Court of Human Rights. The European Court of Human Rights considers that compensation is available and possible when the victim seeks it without any problems or obstacles. In addition, the above concept can mean that the applicant uses it in special circumstances. In fact, in some cases, the possibility of creating an obstacle to compensation can make it inaccessible.[31]

Another criterion is the effectiveness of compensation. The court considers compensation effective when there is a compensation solution in the domestic legal system of that country and there is a prospect of success in it. In cases where the compensation system is found to be useless, ineffective or unhelpful, in such cases it is not necessary to go through an internal process.[32] The European Court of Human Rights has in some cases rejected objections to the failure of the domestic compensation system, arguing that such a process is ultimately

[28] *Akdıvar and Others v. Turkey (GC),* Application no. 21893/93, ECTHR (16 September 1996).
[29] Ibid.
[30] Kurban (2014) at 18/
[31] D'Ascoli & Scherr (2007) at 18.
[32] Ibid

unsuccessful and ineffective.[33] The court may also consider the unjustified delay in hearing a case to be attributed to the ineffectiveness of the internal compensation system.[34]

Another criterion is the adequacy of compensation. Compensation is considered sufficient when the damage to the injured party is compensated in a particular case. In this regard, the European Commission of Human Rights, which has taken similar positions to the European Court of Human Rights in these cases, has stated in a case that compensation for illegal detention should include full compensation and not just the release of the detainee from prison.[35]

In conclusion, it should be noted that the European Court of Human Rights has not been uniform in its observance of the provisions of Article 35 of the Convention. In some of the cases mentioned, he did not accept the defect of the internal system as the reason for rejecting the lawsuit, and in some cases, he accepted the argument of the domestic courts of the countries in the lawsuit and did not accept the lawsuit in his final verdict. The case of Salahuddin Anju and others against Turkey is one of these lawsuits that will be addressed in the next section.

Turkish Military Operation on December 28, 2011 and the Condition of appealing to Domestic Authorities

The incident of the Turkish military operation on December 28, 2011 was considered by many experts as a purely military mistake and ultimately led to compensation in the form of compensation to the relatives of the incident. Investigating the technical aspects of how the attack is perceived is not merely a military error and seeks to punish the perpetrators.

On December 28, 2011, between the hours of 21:39 - 22:24, the Turkish Air Force bombed ordinary people entering Turkey from the Iraqi border. Thirty-four people, including 17 children, were killed in the incident. Following the deaths of several people in the incident, Salahuddin Onjo and 275 other relatives of the victims sought to sue, but initially did not reach the desired result by referring to the Turkish authorities. This was while the Turkish authorities had announced their readiness to pay the ransom of the victims.

Following this bloody incident, the relatives of the victims of the incident sought a lawsuit and took the path of litigation in the domestic authorities. However, in their opinion, they did not face a convincing answer and they were forced to go to the European Court of Human Rights, where they did not go

[33]See *Johnston and others* v. *Ireland*, App No. 9697/82, Case No 6/1985/92/139, A/112, (1987) 9 EHRR 203, 18th December 1986, ECHR 1986, para. 44. See also *Open Door and Dublin Well Woman* v. *Ireland*, App no 14234/88 (A/246- A), App No. 14235/88, [1992] ECHR 68, para 47 and *Keegan v. Ireland* (Application no. 16969/90) A291 (1994), 18 EHRR 342, at para 39. http://hudoc.echr.coe.int/eng?i=001-57881

[34]See *X v. UK*, case No, 7161/75, 7 DR 100(1976) and *Tomasi v. France*, case No. 12850/87, 46 DR 128(1990)

[35]*Lawless v. Ireland*, Case No, 332/57, in yearbook 2 (1958-1959) at 318.

anywhere. And that condition was not observed in the case, finally rejected the case. The historical course of the incident and the follow-up of the survivors of the incident are important in this regard. While Turkish judicial authorities believed that the military tribunal had jurisdiction to hear the case, the military prosecutor stated that there was no intentional action and therefore no further investigation was needed and that the survivors were forced to bring the case before the Constitutional Court (18). July 2014). The Turkish Constitutional Court, after a year and a half of filing a lawsuit with that authority, finally rejected the case, stating that a series of papers including copies of the votes cast and the exact details of the suspicions had not been sent on time. 276 relatives of the victims referred the case to the European Court of Human Rights, which finally used the same argument of the Turkish Constitutional Court to rule on the rejection of its case.[36]

Evaluating the Performance of the European Court of Human Rights in the Case of the Complaint of Salahuddin Onjo and others against Turkey regarding the Incident of December 11, 2011

Following the killing of 34 civilians who lived on the Turkish-Iraqi border and made a living by moving goods across the border to meet their daily needs, the case was brought before the Turkish authorities. As it was stated, the case was finally settled in the Turkish Constitutional Court due to non-compliance with the form and failure to send a series of papers, including copies of the votes cast and the exact details of the suspects, and some papers that did not seem to be a serious obstacle to the plaintiffs' claim. The announcement was made, while this vote was issued five years after the incident. Procrastination in the Turkish judiciary is obvious in the case. In stating the conditions of exception to domestic referral, many believe that unjustified delay in domestic proceedings is the reason for its ineffectiveness, and therefore the permission to file a lawsuit in international authorities, the sample of which was also stated.[37]

This time, after the failure of the Turkish domestic judiciary,[38] 276 survivors of the incident filed a lawsuit against Turkey in the European Court of Human Rights.[39] Unfortunately, in the European Court of Human Rights, contrary to the previous practice, especially in cases where the subject is a serious violation of human rights and as it concerns Turkey, the court in these cases described the

[36]TIMELINE and Roboski airstrike, available at https://en.wikipedia.org/wiki/Roboski_airstrike
[37]Ibid.
[38]The ruling of the European Court of Human Rights states the process of the case and specifically states the decision of the Turkish military prosecutor that the prosecutor finally concludes that, given that the Turkish military has acted in accordance with Article 24 of the Criminal Code, Also, according to Article 30 of the same law, if it is found that it was not possible to avoid committing an act due to a mistake, then that act is not criminal. Finally, on June 11, 2014, the Turkish military court rejected the lawsuit with two positive votes against one negative.
[39]*Selahaddin ENCU against Turkey and 275 other requests*, Application No. 49976/16.

referral to domestic authorities ineffective and Turkey's objection to the court's jurisdiction.[40]

This time, however, the court referred to the condition of recourse to domestic authorities as a precondition for the jurisdiction of the court.

The Court apriority stated that the complaint was under Article 2 and 3 of the Convention, as well as Article 1 of the First Protocol. These articles are about the right to life and the prohibition of torture. Recognizing that merely referring to the Turkish Constitutional Court does not mean that it is possible to compensate for what has happened and that this reference does not mean fulfilling the order of Article 35 of the Convention, The Court in the following, deals with the conditions of the first paragraph of Article 35 of the Convention which has already been scrutinised in detail and It states that the refusal to accept the request due to the fact that it did not comply with the criteria of domestic law is now an established and accepted rule.[41] The Court further states that the time limits laid down in domestic law fall within the scope of Article 35(1) of the Convention and that failure to comply with the time limits laid down in domestic law will result in the application being rejected by the European Court of Human Rights.

The court pointed out that in the office of the Constitutional Court of Turkey,[42] according to the law, a notice was sent to the lawyer of the plaintiffs to complete the documents and the lawyer of the plaintiffs delivered the documents with a delay of two days, which rejected the request. The lawyer for the plaintiffs did not provide any reason for the delay. In order to state the reason for the delay, the plaintiffs' lawyer provided a medical certificate stating that he had been granted a five-day rest period, which was also delayed. In this regard, the court agrees with the opinion of the Turkish Constitutional Court that the lawyer of the plaintiffs did not make any effort to carry out the prescribed procedures.[43]

The court further criticised the refusal to accept the lawyer's medical certificate in the Turkish Constitutional Court and expressed the opinion of the plaintiffs that the decision to reject the medical certificate, which is one of the justified excuses, is at the discretion of the commission representative, Not the Turkish Constitutional Court[44] and the intervention of the said court have violated their rights. According to the relevant Code of Judicial Procedure,[45] the decision to accept or reject a valid excuse is referred to the branch of the Constitutional Court only when a commission

[40] *Akdıvar and Others* v. *Turkey* (GC), No. 21893/93, ECTHR (16 September 1996).

[41] *Nold v. Germany*, no 27250/02, § 88, 29 June 2006, and *Maurizio Lucchesi and others v. Italy* (dec.), no 29753/02, 30 August 2011; *Selahaddin ENCU against Turkey and 275 other requests*, Application No. 49976/16.

[42] Article 47: "1) Individual complaints may be brought directly or through national courts or representations abroad, in accordance with the provisions of the law and the regulations. The formal and substantive conditions of other means of lodging a complaint are determined by the regulations of the Constitutional Court."

[43] *Selahaddin ENCU against Turkey and 275 other requests*, Application No. 49976/16.

[44] Article 48:

"1) To be declared admissible, the individual application must fulfil the conditions laid down in Articles 45 to 47. (...)

3) A committee decides on the admissibility of the appeal. It can only declare it inadmissible unanimously. In the absence of unanimity, the case is transferred to the sections

[45] Article 47 and 48 of Act No. 6216 establishing the Constitutional Court and its rules of procedure

consisting of two judges cannot hear the case unanimously. The court continued to accept the ambiguity in the Constitutional Court's ruling, but went on to state that the task of interpreting domestic law rests with domestic institutions, including the domestic court. The role of the European Court of Human Rights in this regard is limited to the compatibility or impact of this interpretation with the European Convention on Human Rights.[46]

Finally, the European Court of Human Rights upheld the decision of the Turkish Constitutional Court, stating that the shortcomings of the case were not remedied within the prescribed time limit, and ruled that the complaint should not be accepted due to the lack of internal proceedings in the case.

The European Court of Human Rights has not been unaffected by political issues. Because the lawsuit of 276 people in the Turkish Constitutional Court was rejected due to not sending a copy of the case file and the performance of the lawyer in this case by sending documents with two days' delay and not announcing a justified excuse in the first place and subsequently sending a medical certificate indicating the need to rest. With a delay, the lawyer's fault has been established. Subsequently, the European Court of Human Rights has ruled without regard to the violation of the articles of the European Convention on Human Rights in this regard, which is specifically Article 2 of the Convention, which is the right to life.

In other words, the right to life of 34 people, has become the victim of the lawyer's failure to comply with Turkey's domestic rules, and the European Court of Human Rights disregard for the catastrophe. Therefore, the legal statute of European court of human rights Has faced a grave challenge.

The European Court of Human Rights ruled in a dual manner on the rejection of the case of December 28, 2011. While in the case of forced Kurdish migration, which was described before, he called the domestic judicial actions of Turkey ineffective and entered the trial and sentencing of Turkey,[47] but this time without the trial of the Turkish judicial authorities only for not completing the documents in the Turkish Constitutional Court, By stating that the interpretation of Turkish domestic law is not one of the tasks of the court and the task of the Court is only to investigate violations of the rights protected by the Convention, it blocked the way for the relatives of the victims and survivors to seek justice. Another issue is that despite the fact that the European Court of Human Rights considered the delay of the trial in the domestic judiciary as ineffective,[48] this time, despite six years of litigation in the Turkish judiciary and the lack of results in this process, it did not consider itself entitled to trial. Despite its judicial independence, the tribunal presented the same arguments of the Turkish Constitutional Court in rejecting the allegations. At the very least, the Court did not consider the plaintiffs of the inadmissibility of the entry of the Constitutional Court in the discussion of the declaration of a justified excuse, which was justified according to the relevant procedure. As a result, it can be said that the European Court of Human Rights'

[46]*Waite and Kennedy* v. *Germany* [GC], No. 26083/94, § 54, ECHR 1999; *Rohlena* v. *Czech Republic* [GC], no 59552/08, § 51, ECHR 2015.
[47]*Akdıvar and Others* v. *Turkey* (GC), No. 21893/93, ECtHR (16 September 1996).
[48]*X v. UK*, case No, 7161/75, 7 DR 100 (1976).

performance in this case is a dual one, far from justice and influenced by the political issues governing Turkey-Europe relations.

Conclusion

From the above, we can see the importance of human rights and its impact on the condition of domestic recourse, both in terms of diplomatic protection and in terms of referring a case to the European Court of Human Rights, which is mentioned in Article 35 of the European Convention on Human Rights. This effect has led to the flexibility of the rule of recourse to domestic authorities in favor of respect for human rights. Even some authors, as stated, believe that the rule or condition of recourse to domestic authorities is merely the obligations of governments to each other and cannot be extended to cases of human rights violations. In other words, assuming that states have obligations to the international community as a whole, breach of those obligations would result in the wrongful state's international responsibility to each state, and this has been accepted in the Barcelona Traction case. Therefore, the rule of appealing to domestic authorities should also go beyond its traditional framework and be interpreted in order to protect the rights of human beings whose human rights have been violated. In addition, the case law of the International Court of Justice in the case of Lagrand and the of case of Avena, as well as the case law of the European Court of Human Rights in the cases referred to, reinforce the hypothesis that the rule of recourse to domestic authorities should be flexible or even It is not necessary to pay attention in case of severity of human rights violations and the specific circumstances of the case or the number of damages.

Doctrine and jurisprudence, as ancillary or secondary sources of international law, have played a decisive role in this development. This approach in the report of the Special Rapporteurs of the International Law Commission, which reports on the drafting of articles on diplomatic support, have been manifested. These reporters, of which Garcia Amador was the first rapporteur of the International Law Commission on the international responsibility of states, and Benona and John Dugard, have all argued for the need to amend or change the rule of recourse to domestic authorities. The European Court of Human Rights, which oversees compliance with the European Convention on Human Rights, should be at the forefront of this fundamental change in the flexibility of the rule of recourse to domestic authorities, and of course fairness dictates that the essential steps of the court be not forgotten. As mentioned, the court in several cases has not accepted the objections of governments to non-compliance with the rule of recourse to domestic authorities. But the dual and contradictory performance of the said court in the present case cannot be easily forgotten. The case of the December 18, 2011 military operation in Turkey is one of the few cases in which such a right to life of a large number of innocent people has been violated. The extent of the human casualties in this case ruled that the European Court of Human Rights should privilege the human rights protection on the non-substantive’s Turkish judiciary

rules. It means; failure to send copies of the documents to the plaintiffs' attorneys should not deprive survivors and relatives of access to justice.

Six years of internal proceedings in Turkey seem to be sufficient to prove that there was no hope that the Turkish government's judicial proceedings would be fruitful. Following its previous case law, the European Court of Human Rights should have considered the prolongation of the trial as the reason for the ineffectiveness of the case and strongly defended the European human rights aspirations. But the European Court of Human Rights' failure to hear the case, has put the court on trial for an awakened and altruistic conscience.

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