ALMA MATER STUDIORUM
UNIVERSITÀ DI BOLOGNA
DEPARTMENT OF LEGAL STUDIES

VOL. 2
ISSUE 1
2017

UNIVERSITY OF BOLOGNA LAW REVIEW

ARTICLES AND ESSAYS

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E-ISSN 2531 – 6133

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UNIVERSITY OF BOLOGNA LAW REVIEW

GENERAL INFORMATION. The University of Bologna Law Review is a student-run, peer-reviewed, open access journal published by the University of Bologna, Department of Legal Studies. Financial support is officially provided by Cleary Gottlieb Steen & Hamilton LLP. The Journal is published twice a year (all year around). Publication number ISSN 2531-6133. The Journal is hosted and mantained by ASDD-AlmaDL.

ADDRESS. University of Bologna, Department of Legal Studies, Via Zamboni 27/29, 40126, Bologna, Italy.

SUBMISSIONS. The University of Bologna Law Review accepts articles, essays, book reviews, and case notes. Authors can submit their manuscripts via email to bolognalawreview@unibo.it, via ExpressO, or via website. https://bolognalawreview.unibo.it/about/submissions

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Moonlighting Sonata: Conflicts, Disclosure, and the Scholar/Consultant

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ABSTRACT: Although the impact of conflicting interests is of constant concern to those in legal education and other fields, a recent scholarly article and an extensive analysis in the New York Times suggest the problem is more pressing than ever. In the context of legal scholarship the problem arises when a professor is, in effect, employed by two entities. Disclosure of possible conflicts is the most commonly proposed response. The article argues that disclosure is merely a risk shifting devise that does not fully address the issue of bias. It draws on comparisons with products liability and legal ethics to suggest that many conflicts should simply be avoided.

KEYWORDS: *Conflicts of Interest; Disclosure; Ethics; Legal Practice; Risk Shifting*

https://doi.org/10.6092/issn.2531-6133/6918

1. INTRODUCTION

Although the impact of conflicting interests is a constant concern for those in legal education and other annexed fields, a recent scholarly article[1] and an extensive analysis in the New York Times[2] suggest the problem is more pressing than ever. In the context of legal scholarship the problem arises when a professor is, in effect, employed by two entities. One of these employers, the academy, and the broader profession in which it is positioned, academia, have legitimate expectations of true scholarly work that reflects open-mindedness and objectivity with respect to topic selection, analysis, and positions taken, if any.[3] In this context, the goal for the professor/scholar is to discover truths, inconvenient and otherwise.[4] In effect, the professor is comparable to the employee of a think tank.

The other employer, the retaining firm in which expertise is sold to those with relatively deep pockets, certainly places great importance on clear thinking but, ultimately and most often, has a desired end result in mind that may shape the efforts and expressions of the professor. The goals of the academy and the desires of retaining firms are in conflict at least some of the time. Professors facing such conflicts are advised that resolution can occur by

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[1] Robin Feldman, Mark A. Lemley, Jonathan S. Masur & Arti K. Rai, *Open Letter on Ethical Norms in Intellectual Property Scholarship*, 29 HARV. J.L. & TECH. 339 (2016).
[2] *See* Eric Lipton, Nicholas Confessore & Brooke Williams, *Think Tank Scholar or Corporate Consultant? It Depends on the Day*, N. Y. TIMES (Aug. 8, 2016), http://www.nytimes.com/2016/08/09/us/politics/think-tank-scholars-corporateconsultants.html.
[3] An example is found in the University of Florida regulations:(d) Statement on Professional Ethics. l. The professor, guided by a deep conviction of the worth and dignity of the advancement of knowledge, recognizes the special responsibilities devolving upon members of the profession. The professor's primary responsibility to his or her field is to seek and to state the truth as he or she sees it. To this end, the professor devotes himself or herself to developing and improving his or her scholarly competence. The professor accepts the obligation to exercise critical self-discipline and judgment in using, extending and transmitting knowledge. The professor must never seriously hamper or compromise anyone's freedom of inquiry.
[4] This is in accord with every dictionary definition of "scholar."

https://doi.org/10.6092/issn.2531-6133/6918

being mindful of the dangers and making full disclosure to their readers.[5] In the context of faculty scholarship, this means disclosing to readers any and all information that would assist a reader in assessing the reliability of the scholar's work.

This solution is inadequate for several reasons. First, the notion that one may be sufficiently mindful of a conflict to offset its negative effects (some of which may be very subtle) is flawed because it fails to account adequately for the impact of optimism bias. The mindfulness approach assumes that professors can "cure" such conflicts and prevent them from having an impact on their scholarship by consciously paying attention to the possibility that conflicts are, in fact, having an impact on their research and publication. The ability to perceive the danger of an impact, however, will in many cases be clouded by an unconscious bias that will lead the scholar to believe that such effects are either, not occurring or are under his/her control. Any approach to conflicts that relies excessively or exclusively upon self-policing will suffer from this problem.

Second, reliance upon disclosure as a cure seems to excuse the scholar from responsibility for the effects of the conflict simply because the reader has been forewarned. The ethical and practical implications of an easy out for the scholar are troubling. The burden of conforming to the academy's scholarly ideal should, as a normative matter, stay with the scholar because it is an

[5] *See* A.A.L.S. Statement of Good Practices by Law Professors in the Discharge of their Ethical and Professional Responsibilities: "A law professor shall disclose the material facts relating to receipt of direct or indirect payment for, or any personal economic interest in, any covered activity that the professor undertakes in a professorial capacity. A professor is deemed to possess an economic interest if the professor or an immediate family member may receive a financial benefit from participation in the covered activity. Disclosure is not required for normal academic compensation, such as salary, internal research grants, and honoraria and compensation for travel expenses from academic institutions, or for book royalties. Disclosure is not required for funding or an economic interest that is sufficiently modest or remote in time that a reasonable person would not expect it to be disclosed. Disclosure of material facts should include: (1) the conditions imposed or expected by the funding source on views expressed in any future covered activity; and (2) the identity of any funding source, except where the professor has provided legal representation to a client in a matter external to legal scholarship under circumstances that require the identity to remain privileged under applicable law. If such a privilege prohibits disclosure the professor shall generally describe the interest represented. A law professor shall also disclose the fact that views or analysis expressed in any covered activity were espoused or developed in the course of either paid or unpaid representation of or consultation with a client when a reasonable person would be likely to see that fact as having influenced the position taken by the professor. Disclosure is not required for representation or consultation that is sufficiently remote in time that a reasonable person would not expect it to be disclosed. Disclosure should include the identity of any client, where practicable and where not prohibited by the governing Code or Rules of Professional Conduct. If such Code or the Rules prohibit a professor from revealing the identity of the client, then the professor shall generally describe the client or interest represented or both." http://washburnlaw.edu/facultystaff/otherpolicies/aalsgoodpractices.html

https://doi.org/10.6092/issn.2531-6133/6918

essential component of his/her academic job and at the heart of the scholarly function. The obligation to avoid conflicts and their negative effects should also stay with the scholar because the cumulative effect of the widespread abdication of responsibility for addressing conflicts through easy out disclosures will, as a practical matter, result in available research being less reliable. As serious as these problems are, however, they are not the core problem with the disclosure approach.[6]

This essay addresses the problem which is whether shifting the risk of conflicted scholarship to those who pay the scholar's salary and to the consumers of his or her is work is appropriate. The disclosure approach essentially shifts the risk of those conflicts to readers, listeners, and to academic employers who have reasonable expectations of objective and open-minded scholarship. Notably, by shifting the risk in this manner, the professor is then able to serve two masters (and collect two paychecks).

In the next section, we will discuss the sources of conflicts and we will note that many are not avoidable, but some are. These "moonlighting" activities can prove to be intellectually and financially rewarding for scholars. In section III we will examine other instances -- products liability and legal ethics -- in which disclosure is and is not regarded as sufficient as sufficient to address "conflicted" scholarship and compare those with the standards in academia. Next, we will search for a rationale, other than self-interest, for the approach taken in academia. The final section argues that the "disclosure as risk-shifting" approach is flawed because it does not have an apparent or articulated rationale, but instead seems to reason backwards from a conclusion that dual employment and compensation should be facilitated and justified. We conclude that, in general, scholars should make a choice between scholarly integrity and accepting payment above expenses for efforts outside that sphere.

[6] A third possibility is that the availability of paid opportunities outside the academy may influence the fields pursued and teaching preferences inside the academy.

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2. SOURCES OF CONFLICT

2.1. INHERENT

Some biases are inherent. Some of those we try to neutralize and others we embrace. For example, everyone's life experience will create in them preferences about the way things should be as a normative matter. Even the most ardent scholar cannot escape some influences that may prevent him or she from being what might be called the "perfect scholar."[7] In fact, if disclosure happens in its full-blown form, every author would reveal his or her, age, gender, race, socioeconomic background, education, employment experience, and more. All of these factors impede the scholar's ability to remain objective. For example, a lower socioeconomic class person may be reluctant to report that terminable-at-will employment has an upside and a downside in terms of the welfare of those less well off.[8] Although no one can become the perfect scholar, the concept can be an aspirational ideal that requires awareness of the pervasiveness of influences that may affect scholarship and a commitment to keeping an open mind. Absent this awareness, the author's personal life experience may become a cause and scholarship less objective. In these circumstances, scholars, rather than being searchers for and reporters of the truth, may become convinced they already know the truth and write what may be more accurately viewed as persuasive briefs rather scholarship. Those known "truths" (and the scholars themselves) may thus become more akin to clients, rather than scholars.

2.2. AMBITION BASED

In the academic setting scholarship can have two purposes. One is to convey information. The other one is to convey information about the author. These two objectives may seem inseparable but for the ambitious law professor (or one merely seeking to qualify for tenure), there can be a difference. In addition,

[7] The perfect scholars would be free of biases of any kind. This is, of course, an impossible ideal and probably not uniformly desirable.

[8] One of the authors comes from a lower socioeconomic class and struggled for years about whether to write an article that assessed the impact of limiting terminable at will employment after realizing that some of the cost of the change would be borne by those the changes was generally thought to benefit. The article was writtenand was followed by letter questioning the author's motives. *See* Jeffrey L. Harrison, *Wrongful Discharge: Toward a More Efficient Remedy*, 56 IND. L. J. 207 (1981).

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authors write for a number of audiences. These include second or third year students on law reviews, professors to whom the work may be referred and, finally, the general public which includes attorneys and judges.

An untenured scholar is in a difficult position. In some areas of legal scholarship, such as, for example, antitrust,[9] and environmental law,[10] particular approaches and viewpoints dominate. This dominance produces a priori assumptions and accepted "truths." Young scholars write with the awareness that their work must be reviewed by other law professors, many of whom will likely be adherents to the dominant approach. Thus, particularly early in their careers, scholars may shape their work to appease reviewing professors whom they fear will be too quick to examine whether the young scholar has adhered to known the "truths" of a prevailing approach or dominant viewpoint. One concern is that the works of scholars who do not conform to prevailing viewpoints will be subjected to greater and more negative scrutiny than works that, in effect, "preach to the choir." In this way, the desire for tenure and a longer term career may conflict with expressions based on objective findings. This effect cuts both ways. The young scholar may choose to "preach to the choir" and overstate the support for convention or avoid confronting convention.

This conflict is hardly only experienced by young scholars. Mobility in the profession is largely dependent on scholarship. That scholarship is first assessed by second and third year law students and, on occasion, by professors in specific areas. This creates a tension between the findings of a researcher and his or her beliefs about what a second or third law student or a professor to whom the work is referred may find appealing. For example, if influential people in antitrust are unreceptive to behavioral economics,[11] as a matter of professional strategy, it may be unwise to write about how behavior economics might inform antitrust law. Moreover, in a context where impact is sometimes

[9] The so called Chicago approach stressing consumer surplus and allocative efficiency as opposed to merely deconcentrating of economic power has been the mainstay of antitrust for nearly fifty years. Lately it has come under increasing scrutiny.
[10] Scholarship in environmental law starts with the premise that nearly all environmental measures should lean toward protecting the environment.
[11] *See, e.g.*, Joshua D. Wright & Judd E. Stone, *Misbehavioral Economics: The Case Against Behavioral Economics*, 33 CARDOZO L. REV. 1517 (2012).

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equated with frequency of citation,[12] the choice of topics and positions taken may be a function of career aspirations as much as actual long term benefits of the scholarship. In short, the conflict thus created is between long term advancement in a discipline in which there are dominant beliefs and an objective, open-minded presentation of ones ideas.

2.3. AVOIDABLE

The sources of possible conflicts that are usually the subject of concern are those that are avoidable, or perhaps, more accurately, invited. For law professors, these sources of conflict range from representing clients to serving as expert witnesses,[13] being of-counsel to law firms, or simply consulting about specific legal issues.[14] In all of these cases, the danger becomes more serious if the activity takes place at a level sufficient to affect the lifestyle of the professor.

It is important to keep in mind at this point that the relevant question for purposes of this inquiry is whether the outside activity will come into conflict the professor's work as a scholar. Another way to ask the question is to access whether any of the scholar's outside activities has an impact on the topic selected, the methodology employed, the expression of the results, or the credibility of the scholar.

In the case of the scholar/expert witness, there are numerous safeguards – opposing experts, cross-examination – to protect the audience of the actual testimony. On the other hand, positions taken as a scholar definitely affect the marketability of the professor as expert. Anyone who has been contacted to act as a potential expert knows that his or her research will be examined very closely to determine whether he or she has written anything that could be

[12] *See* Gregory C. Sisk, Valerie Aggerbeck, Robert Nick Farris, Megan McNevin & Maria Pitner, *Scholarly Impact Of Law School Faculties In 2015: Updating The Leiter Score Ranking For The Top Third*, 12 U. ST. THOMAS L.J. 100 (2015).

[13] This will, of course, vary with the jurisdiction.

[14] *See*, text accompanying *infra* note 16. In some instances, "of counsel" law professors may consult only with lawyers and not have their time billed to specific clients or matters.Firms may retain professor-consultants for assistance of a general nature and may pay their consulting fees from firm funds not attributable to a particular client or matter.When a client or a case is billed for this time, however, it is likely that the law professor (if he/she is admitted to a bar), is, at a minimum for conflicts of interest purposes, a lawyer of the firm and, in many cases, in an attorney-client relationship with the firm's clients for whom he/she provides legal services.

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construed as inconsistent with the position taken as an expert. For those dependent on expert witness activity, this may mean being careful about taking strong positions or any positions at all as a scholar.[15]

Credibility as a scholar may also be affected by the outcome of testimony. Taking positions as an expert that could not pass muster within the profession may have an impact on the faith others are willing to afford the expert's scholarly efforts. These credibility issues have occasioned commentary on the hazards faced by scholars who are expert witnesses. Perhaps the most well-known example of this involves Nobel Prize winning economist Robert Lucas. He was described as having "disdain for reality" and "abdicat[ing] entirely the concept of the independent expert witness."[16] Some may argue that cynicism about the activities of expert witnesses may have reached the point that the credibility of the scholarship produced by scholar/expert witnesses is unaffected by the scholar's assumption of other potentially-conflicting roles. If this is not the case, however, then the impact is in one direction only which is to undermine respect for such scholarship.

Law professors provide services to retaining firms in a variety of ways, including being designated "of counsel" to firms. These positions may seem relatively benign. One may wonder how being an occasional advisor to a law firm could affect scholarship. It is important to keep in mind the person who is "of counsel" is selling a product and that product must be worth it to the retaining firm. Sellers in this market would be wise not to take positions in scholarship that would be at odds with positions likely to be taken by the firm's clients. This, in effect, provides opposing counsel with effective impeachment material and lessens the value of the scholar's services as an expert. Some scholars as consultants/experts/of counsel attorneys may, because of their affiliation with retaining firms, author amici briefs as if they are disinterested scholars who just happen to advance the positions those who have retained them.

[15] The authors' perspectives are informed by their own past experiences as expert witnesses and consultants. One recalls an instance in which he was coauthoring an article in the field of antitrust and was cautioned against mentioning possible anticompetitive conduct in a particular industry because participants in that industry were prospective customers for expert services.
[16] BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION, 1999 WL 33889(N.D. Illinois, 1999).

https://doi.org/10.6092/issn.2531-6133/6918

Although the "of counsel" designation is variable and encompasses several types of relationships, from an ethical perspective:

> There can be no doubt that an of counsel lawyer (or firm) is "associated in" and has an "association with" the firm (or firms) to which the lawyer is of counsel, for purposes of both the general imputation of disqualification pursuant to Rule 1.10 of the Model Rules . . . . Similarly, the of counsel lawyer is "affiliated" with the firm and its individual lawyers for purposes of the general attribution of disqualifications . . . .[17]

This means that for conflicts of interest purposes, the clients of the firm are the clients of lawyers affiliated as "of counsel." Consequently, law professors who are "of counsel" may not view themselves as having clients, but, at least for some purposes, they do. Among the duties lawyers owe to their clients are duties of loyalty, confidentiality, and, most significantly, conflicts-avoidance.

The affiliation with a firm may mean that scholarship that takes a position contrary to the retaining or "of counsel" firm's clients may potentially generate conflicts (or at the very least, some concerns about whether the firm's clients will be displeased). A more subtle form of damage to the scholarly mission occurs when the scholar unconsciously avoids taking positions in anticipation of potential negative impact upon lucrative retention arrangements.

It is possible, at least in theory, that occasional consulting will have little impact on scholarship. This is especially the case if payment does not result in an adjustment in one's life style. The principal problem arises if the professor wants to be a repeat player. Nearly always, a consultant knows what a client would like to hear. Perhaps the consultant cannot give the client that specific message but measured tones and a lack of emphasis may mean more repeat business than a truthful "that is a totally untenable position" especially if means a loss of face for one of the "customers." This, of course, does not mean the professor's scholarship is affected but the professor may increasing become known as the "go to" person with clever ideas about how to avoid a price fixing accusation or, for example, how to invoke the exclusionary rule.

[17] AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY Formal Opinion 90-357 May 10, 1990 USE OF DESIGNATION "OF COUNSEL."

https://doi.org/10.6092/issn.2531-6133/6918

Once that is the product being sold, it is a small step to lowering the quality of the product by producing scholarship that would dilute this expertise.

2.4. PERSONAL DEVELOPMENT

A version of avoidable conflicts that deserves specific mention concerns the slippage between personal development as a scholar and remuneration. Robin Feldman and others in proposing ethical standards for intellectual property professors write:

> IP scholars have become more engaged in policy advocacy, the writing of amicus briefs, and the practice of law. In general, we think this is a salutary development. Courts regularly complain about scholarship being unconnected to the real world, and law students worry that they are not being trained to succeed in practice. Greater engagement between scholars and the world of practice can help solve both problems and can also bring a thoughtful, more unbiased perspective to legislative and judicial debates traditionally dominated by interested parties.[18]

The authors note the importance of the participation of law professors in the "real world" and this seems indisputable. This does not address, however, the issue of whether the nature of those "real world" activities should be determined by the market. There is no necessary correlation between what will enhance the development of someone in the role of scholar and the money to be earned by selling expertise. This might be contrasted with a context in which professors are prohibited from ~~for~~ earning outside income other than expenses. Rather than expertise being allocated to those who can pay and, perhaps, pay the most, outside employment would be steered in the direction of the activities most likely to enhance scholarly development. The distortion introduced into the process of becoming an accomplished scholar is exacerbated by the possibility that research and teaching preferences will be influenced by the potential lucrative consulting opportunities available in some fields but not others.

[18] Feldman et. al., *supra* note 1, p. 339.

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3. DISCLOSURE IN OTHER CONTEXTS

It is instructive to compare disclosure by legal scholars with comparable practices in other contexts. For example, the purchase of a product that carries a warning label – a form of disclosure - can be viewed as form of informed (implied) consent.[19] In the context of legal representation in some cases, informed consent may permit the formation of an attorney client relationship even where there are potential conflicts. Of course, in both regimes there are times when disclosure and consent, whether express or implied, is not enough to fully protect the less informed party and the transaction is not permitted. The question is where disclosure by scholars falls? Is it sufficient to alert readers to the possible biases or should those who aspire to be scholars simply avoid conflicts?

3.1. PRODUCTS LIABILITY

In the context of manufactured products, the issue is when a manufacturer can escape liability by noting a dangerous aspect of the product. This may not seem to fit the think tank context but in fact it does. In both cases the conflict is financial. In the case of the profit maximizing producer, the product could be made safe but it is not in the producer's profit maximizing interests. In the think tank context, the consequences are also financial. Here too the scholarly output could be made safe in the sense of being unaffected but that is not in the self-interest of the scholars.

In theory, disclosure that a product may be dangerous makes the most sense when the cost of avoiding harm is lower for the consumer than it would be for the manufacturer and others who would be affected. In particular, it is important to weigh the impact on those negatively affected by barring the marketing of the product altogether.[20] For example, small toys can be harmful to children below a certain age who like to put things in their mouths. Presumably a responsible parent realizing this, will not allow children below a certain age to have access to toys with small components. Unfortunately this is

[19] It most, thought, it is consent to some probability of harm. Whether it is rational to consent in this instances can be subject to various biases. *See infra* notes 45-52.
[20] *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 69 FR 41314.

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not always the case but the solution is to remove the warning and not to market toys that might be ingested. Although it is difficult to place values on human life, if forced to do so[21] the cost of eliminating the harm completely likely exceeds the cost of parental attention that either keeps young children away from small toys or involves close supervision. Shifting the risk to some parents some of the time arguably makes sense.

This might be contrasted with automobile airbags. Automobiles could be marketed without airbags but include a disclosure/warning that collisions may result in serious bodily harm or death. Buyers could then opt to have airbags installed. This is likely to be at a much higher per unit cost that would be incurred under conditions of mass production. Or they could simple accept the risk of injury to themselves and others. The magnitude of this risk is unknown and, unlike the cautious parent, controlling one's own actions does not reduce the risk since the harm can be caused at any time by a third party. The automobile buyer is, thus, like the reader of scholarship in that he or she is ill-equipped to assess risk of bias.

3.2. LEGAL REPRESENTATION

A similar pattern emerges in the context of the handling of conflicts of interest under attorneys' rules of professional responsibility and related bodies of law. In the legal ethics context, "curing" a conflict of interest means that the measures which have been taken are sufficient under governing law to allow all or some part of the conflicted legal representation to go forward or, if no such curative measures are available, declining or terminating the conflicted representation. Many attorney-client conflicts of interest are curable through disclosure and consent, but some are not.[22] The concepts of consentable and unconsentable conflicts of interest in legal ethics are useful in thinking about whether conflicts in scholarship should be deemed curable through consent as a form of risk-shifting. This discussion first describes how legal ethics defines

[21] Although difficult and likely impossible, placing a value on life is implicit in a great number regulations and funding decisions ranging from the installation of highway guard rails and the setting of speed limits to funding of medical research.
[22] *Cf.* MODEL RULES OF PROF'L CONDUCT R. 1.7 (Discussion Draft 1983).

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informed consent and then turns to the ethical notion of the unconsentable conflict.

When the ethics rules and the common law of conflicts do allow consent by potentially affected clients to cure a conflict of interest in legal representation, their consent must be "informed."[23] Because disclosure and consent play such important roles in the management of conflicts in legal representation, the relevant rules of professional responsibility provide extensive and nuanced guidance to lawyers. It is instructive for comparison with the treatment of disclosure as a cure to conflicted scholarship to examine some of that guidance.

"Informed consent" is defined in the Model Rules as that which "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[24] The Comments to those rules provide that lawyers "must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision."[25] That same comment also observes that:

> [o]rdinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives.[26]

The rules of professional conduct also provide lawyers with explanations regarding the relevant factors to use in assessing the adequacy of the provided disclosure:

> In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or

[23] MODEL RULES OF PROF'L CONDUCT R. 1.7 (b)(4), R. 1.9 (a), R. 1.0 (e) (Discussion Draft 1983).
[24] MODEL RULES OF PROF'L CONDUCT R. 1.0 (e) (Discussion Draft 1983).
[25] MODEL RULES OF PROF'L CONDUCT R. 1.0 (e), cmt. 6 (Discussion Draft 1983).
[26] MODEL RULES OF PROF'L CONDUCT R. 1.0 (e), cmt. 6 (Discussion Draft 1983).

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> other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.[27]

The comment to Model Rule 1.7 explains that "[i]nformed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client."[28] For purposes of our comparison, this obligation to ensure that the client is not only given information, but also receives a clear explanation of what that information means for the client's interests, i.e. precisely how the client's interests may be implicated, is important. It indicates that the focus in the legal ethics regime is always on ensuring that disclosure and consent are meaningful vis-à-vis the goal of protecting the client's right to conflict-free and competent representation. Significantly, the focus is not on facilitating the attorney's desire to represent as many clients as possible.

Disclosure and consent in this context assume the role of a warning label in the example of products liability. In effect, the client is viewed as being sufficiently informed to bear any risks of associated with possible conflicts. In addition, there may be advantages to the client in not applying the unconsentable conflict rule. For example, suppose two brothers ask a lawyer to represent both of them in their effort to purchase a restaurant. One of them is a chef; the other has money for the purchase price; both will sign a guarantee on a required loan. With fully informed consent (which would include explaining how their interests might diverge and that the lawyer may not be able to keep information one of them tells him from the other), the lawyer may represent both brothers.[29] Similarly, a couple may wish to obtain an amicable dissolution of their marriage. In many instances, a lawyer may, in some circumstances, represent both parties in the negotiation of the property settlement to be submitted to the court in the proceeding.[30]

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[27] MODEL RULES OF PROF'L CONDUCT R. 1.0 (e), cmt. 6 (Discussion Draft 1983).
[28] MODEL RULES OF PROF'L CONDUCT R. 1.7 (e), cmt. 18 (Discussion Draft 1983). The information required depends on the nature of the conflict and the nature of the risks involved.
[29] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 illus. 3 (2000).
[30] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 illus. 8 (2000).This illustration is subject to exceptions and qualifications that vary significantly from jurisdiction to jurisdiction.

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When disclosure and consent are not sufficient, the conflict is thus deemed "unconsentable",[31] and representation is not permitted. In the products liability context this is comparable to either removing a product from the market or permitting its sale only if the product is modified.[32] Three types of unconsentable conflicts are relevant here. One is the direct adversity-positional variety. For example two parties vying for the same broadcast license could not be represented by the same lawyer.[33] In another type of scenario, a relationship with a prior or concurrent client may make it impossible to disclose enough information to result "informed consent."[34] Finally, under the applicable standards dual representation is not permitted, even with consent if no objectively reasonable lawyer would conclude that he or she in this instance could provide competent and diligent representation to both parties.[35] In these situations, no amount of disclosure will cure the conflict.

3.3. COMPARING A.A.L.S. "BEST PRACTICES"

It is illustrative to compare what it takes to cure a conflict with consent under products liability law and legal ethics with the treatment of consent under the Association of American Law Schools (hereinafter A.A.L.S.) "Best Practices." The comparison is startling. In products liability law and under the legal ethics

[31] Comment to MR 1.7 Comment [28]. Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

[32] A further analogy can be found the case of the Food and Drug Administration and finding that pharmaceuticals can be marketed as safe and effective but with warning labels as opposed to drugs that are not approved at all.

[33] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 21 illus. 1 (2000).

[34] MODEL RULES OF PROF'L CONDUCT R. 1.7 (e), cmt. 19 (Discussion Draft 1983).] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

[35] Model Rule 1.7 provides: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.

https://doi.org/10.6092/issn.2531-6133/6918

rules when disclosure is not sufficient to protect the purchaser or the client, the outcome is that the transaction or the representation is not allowed to go forward. As explained below, in the case of legal scholarship, however, when disclosure presents a similar inconvenience, the result is to allow the dual role and, astonishingly, to require less disclosure.

More specifically, conflicted scholars are told to disclose essentially two types of information. First, the material facts relating to receipt of direct or indirect payment for, or any personal economic interest in, any covered activity that the professor undertakes in a professorial capacity.[36] Disclosure of material facts should include:

> (1) the conditions imposed or expected by the funding source on views expressed in any future covered activity; and (2) the identity of any funding source, except where the professor has provided legal representation to a client in a matter external to legal scholarship under circumstances that require the identity to remain privileged under applicable law.[37]

Note the advice given when the exception arises: "[i]f such a privilege prohibits disclosure the professor shall generally describe the interest represented."[38] In many respects, this rule makes sense since it puts the interests of a client ahead of those who consume scholarship. The foregone possibility comparable to that found in the context of products and legal ethics is not to engage in outside employment that creates the conflict.

Law professors must also disclose:

> the fact that views or analysis expressed in any covered activity were espoused or developed in the course of either paid or unpaid representation of or consultation with a client when a reasonable person would be likely to see that fact as having influenced the position taken by the professor.[39]

Again, notice that the treatment of the issue when fully informed "consent" cannot be obtained:

[36] *See supra* note 5.
[37] *See supra* note 5.
[38] *See supra* note 5.
[39] *See supra* note 5.

https://doi.org/10.6092/issn.2531-6133/6918

> Disclosure should include the identity of any client, where practicable and where not prohibited by the governing Code or Rules of Professional Conduct. If such Code or the Rules prohibit a professor from revealing the identity of the client, then the professor shall generally describe the client or interest represented or both.[40]

As has been explained above, the ethics rules reach a different result: they do not allow the lawyer to go forward with conflicted representation, if obligations to others prevent the disclosures necessary for fully informed consent. Instead, they compel the lawyer to decline or withdraw from the representation. Again, the rules seem to have the priorities correct but neglect the possibility of simply not engaging in an activity that creates the conflict. Both disclosure requirements seemed more attuned with allowing scholars to maximize their income, rather than encouraging the best possible efforts to avoid conflicts in the first place.

4. THE PROBLEM WITH DISCLOSURE

4.1. RISK SHIFTING

As noted, the issue of whether disclosure is adequate can be distilled to how the risk of a lack of objectivity should be allocated. "Should," of course, carries a normative connotation and could be equated with notions of justice or fairness. There are a variety of ways to approach the issue. For example, the Categorical Imperative would mean asking whether shifting the risk by virtue of disclosure is using readers as means to ends. A quasi-Rawlsian approach would ask what would be chosen behind a veil that meant individuals did not know if they were likely to be among the conflicted or among those who are consumers of possibly conflicted work posing as scholarship. An economic approach, similar to that described above with respect to products, would be to ask which party could protect against the risk at the lower cost.

[40] *See, e.g.*, *supra* note 5.

https://doi.org/10.6092/issn.2531-6133/6918

The answer to the risk shifting question may vary with the approach taken and the projected audience[41] but there are strong arguments for not allowing the risk to be shifted by way of disclosure. For example, from the economic perspective the question is whether legal scholarship is more like toys with small parts or automobiles without airbags. The airbag analogy is more apt because the reader has no way to gauge the actual level of the risk.

Almost certainly the cost of recognizing existence of the bias, determining its impact, and discounting the worth of the scholarship based on that analysis is a huge one for the reader. In fact, to be perfectly safe the reader would be required to discount the validity of anything carrying a disclosure.[42] Interestingly, the cost to the scholar as a scholar is also high in that scholarship with a warning label is likely to be less valued.[43] Moreover, a simple rule against accepting remuneration above expenses would mean consulting is allocated in a manner most consistent with scholarly development.

From the point of view of the Kantian Categorical Imperative the answer also seems fairly straight forward. Those who moonlight and disclose are asking readers to take on the risks of conflicts of interest that they have created. In return for consulting and disclosing the scholars receives intellectual stimulation and money. The readers become the means to achieving these ends. The problem is that these ends are very different. It is illogical to think the scholar truly interested in intellectual stimulation would only take advantage of those opportunities if compensated. Thus, even with no payment, development as a scholar would occur. The leads to the stark conclusion that scholar/consultants are asking their readers to bear the risk of avoidable bias primarily in order to allow them to earn extra income.

The Rawlsian approach is more difficult. It requires one to envision a situation in which people not knowing if they are to be consumers or producers are asked if a disclosure rule would be accepted. On a broader perspective the

[41] Given the number of ways conflict can arise and the nature of legal scholarship, it is possible it is already taken with a grain of salt. Like all law professors we would like to work from the premise that this is not the case.

[42] Eliminating all disclosure requirements would exacerbate the problem in that the reader might well assume that all works are subject to conflicts.

[43] This economic analysis can be expanded upon by asking if those made better off by a rule allowing moonlighting and disclosure could compensate those who are worse off by virtue protecting against bias. This would be an application of the Kaldor-Hick or wealth maximizing standard of efficiency but the issue still comes down to which party is, at the lower cost, able to guard against the risk.

https://doi.org/10.6092/issn.2531-6133/6918

issue is akin to whether people would prefer a society in which statements by others were dependable or, perhaps, one like our own in which nearly all statements are discounted for the possibility of exaggeration, imprecision, or fabrication. Two added pieces of information would also be available behind the veil. The first this that only a small number of those with elite educations would become the producers. Further, this small group would be able to earn modest to significant sums of money by taking on the moonlighting activities that then, sometimes, intentionally affect their veracity. The twist here is that even those profiting from the ability to shift the risk of their own biases will be vulnerable to the same lack of dependency when it comes to the work of others. In short, everyone is negatively affected and very few are able to benefit. If one follows the Rawlsian assumption of risk aversion, adoption of a "disclosure is enough" rule seems unlikely.

Although there is room for debate, it is likely that the risk shifting implicit in disclosure is not justified by any number of approaches to fairness or efficiency. On final notion that should be dispensed with is the possible argument that by reading an article that includes a disclosure, the reader has thereby consented to whatever bias the article contains. This would be like saying that the parent of the child who swallows a small toy has consented to the harm caused because there is warning label. This notion of consent is similar to one advanced by Richard Posner in the 1980s and confuses risk with the actual harm that could result from that risk.[44] If this is the proper notion of consent then every driver involved in a car crash could be said to have consented to that crash even though the fault was that of another driver.

4.2. DISCLOSURE AS PERMISSION

Although there appears to be little written on the topic, it makes sense to pose the question of whether a general disclosure requirement would increase or decrease the instances of bias. In effect, could disclosure have a liberating effect because once the risk of bias has been shifted, those who might be biased may be inclined to lower their efforts to remain objective? Conversely, does the

[44] *See* RICHARD ALLEN POSNER, THE ECONOMICS OF JUSTICE 94 (1981).

https://doi.org/10.6092/issn.2531-6133/6918

requirement of disclosure cause think tank employees to be more careful? In effect, they do not want the implications of the disclosure to be proven true.

There appears to be no answer to this question. The cynical view has an economic flavor to it and is understood by thinking in terms of the small toy example. If there is no liability for harm caused by swallowing small toys it lowers the manufacturing costs which generally means increase production. Similarly, a professor may reason, perhaps subconsciously, that he or she cannot be embarrassed by biased work since the possibility of bias has already been communicated. It is far-fetched to think that scholars would consciously use the risk shifting character of disclosure as a justification for known bias. On the other hand, it is not unreasonable to think in terms of a writer lowering his or her guard while under the impression that disclosure fulfills any obligations to readers. A less cynical view is that having been required to disclose the writer will be inclined to prove the implications of disclosure wrong and be especially fastidious about keeping outside interests at bay.

4.3. OPTIMISM AND SELF-EVALUATION BIASES

Regardless of whether one chooses the cynical or optimistic view of the possibly conflicted writer, there is a significant likelihood that both authors and readers will be affected by the optimism bias[45] or self-evaluation bias[46] or both. The optimism bias usually comes into play when people are asked to estimate or consider the likelihood of being negatively affected by a bad event.

A substantial literature illustrates that they underestimate the probability of the event affecting them.[47] These range from the likelihood of illnesses[48] to auto accidents.[49] The optimism bias can be applied to the issue of

[45] *See generally* Neil D. Weinstein & William M. Klein, *Unrealistic Optimism: Present and Future*, 15 J. SOC. & CLINICAL PSYCHOL. 1 (1996). *See also* Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEG. STUD. 199 (2006); Paul Slovic, *Do Adolescent Smokers Know the Risks?*, 47 Duke. L. J. 1133 (1998).
[46] *See generally* Robet H. Gramzoq, Andrew J. Elliot, Evan Asher & Holly A. McGregor, *Self-Evaluation Bias and Academic Performance: Some Ways and Some Reasons Why*,37 J. RES. IN PERSONALITY 41 (2003)
[47] *See generally* Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653, 1658-1663 (1998).
[48] *See* Neil D. Weinstein, *Unrealistic Assumptions about Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806 (1980).
[49] *See* David M. Dejoy, *The Optimistic Bias and Traffic Accident Risk Perception,* 21 ACCIDENT ANALYSIS & PREVENTION 333 (1989).

https://doi.org/10.6092/issn.2531-6133/6918

conflicts of interest by viewing the professor as asking him or herself whether he or she is as likely as the average person to allow outside interests to interfere with topic selection, analysis, objectivity, or presentation. If the optimism bias holds, most individuals will believe their efforts to be more objective than average. Of course, it is not possible for everyone to be above average. In effect, by referring to oneself, a bias is introduced. The optimism bias is usually found when people are asked to consider negative events. Robert Cooter, however, expands to a more general description: "[T]he psychological origin of the bias toward optimism is believing that one's own actions are free from fault, or, in a word, self-righteousness causes optimism."[50]

Cooter's broad description probably is more in line with what is called the self-evaluation bias. That bias can be negative or positive; people may over or underestimate their abilities. Most people, though, overestimate their ability[51] and it is not hard to imagine that those involved in outside employment overestimate their ability to keep their two "masters" separate. The self-evaluation or self enhancement effect has been found to be correlated with narcissism and ego involvement but not with higher levels of performance.[52] What these areas suggest is that even if one takes the benign view and believes those who are potentially subject to conflicts are mindful of possible effects and try hard to avoid the impact of outside interests on their scholarship, they are likely to over-estimate their ability to succeed.

5. CONCLUSION

The prevailing A.A.L.S. approach to conflicts in scholarship seems to be a solution arrived at by reasoning backwards from a conviction that scholars should be allowed to assume these dual roles. This is in stark contrast with other more consumer oriented, client protective approaches. It may be premised in part on an a priori on the assumption that disclosure produces

[50] *See* Robert D. Cooter, *The Objective of Private and Public Judges,* 41 PUBLIC CHOICE 107 (1983).
[51] *See* Mark D. Alicke, *Global Self Evaluation as Determined by Desirability and Controllability of Trait Adjectives,* 49 J. PERSONALITY & SOC. PSYCHOL. 1621 (1985). Constantine Sedikides & Aiden P. Gregg, *Self-Enhancement: Food for Thought*, 3 PERSP. ON PSYCHOL. SCI. 102 (2008).
[52] *See* Richard W. Robins & Jennifer S. Beer, *Positive Illusions About the Self: Short-Term Benefits and Long-Term Costs*, 80 J. PERSONALITY & SOC. PSYCHOL. 340 (2001).

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greater objectivity in scholarship. Not only is this assumption open to question, but the availability of the disclosure option may, in fact, be producing less objective scholarship because it gives scholars license not to worry about the potential impact of conflicts. The perverse effect of the disclosure requirement would thus be to produce less objective scholarship.

Some may argue in favor of the A.A.L.S. disclosure approach because without the incentive of outside income, scholars would be less engaged in real life legal processes and that such engagement is particularly valuable for legal scholars. This assumption also seems open to question. Many legal scholars would, as long as their expenses were paid, engage in outside activities for educational purposes, to enrich their research, for a change of pace, and to fulfill the service components of their jobs. Moreover, the choice of where to lend expertise would likely be more in line with actual scholarly development because financial incentives would be muted. In fact, the outcome may very well be an allocation of expertise that benefits the have-nots as well has the haves. This is not, however, to say all bias would be removed but at least avoidable bias would be limited.

The principal drawback with the disclosure solution is that it simply is not designed to address the core issue: treating less than fully informative disclosure as an accepted and sufficient cure to conflicted scholarship blurs the lines between academies and firms, between scholars and consultants, and between scholarship and advocacy. This outcome is undesirable for a number of reasons. Society depends upon its universities and its scholars to provide non-partisan, objective, expertise-driven knowledge, which is difficult to obtain elsewhere. The knowledge shaped by special interest or position-based advocacy is unlikely to be politically, socially, or theoretically neutral in its cumulative effects, nor is such knowledge equitably accessible to all of those wishing to advance a partisan view or position. Finally, if scholars are not careful to avoid the impact of the conflicts this article identifies and the lines are further blurred, consumers may either mistake advocacy for scholarship or significantly discount all scholarship because they assume it is advocacy.

 https://doi.org/10.6092/issn.2531-6133/6960

Rule of Law and Judicial Independence in Albania

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TABLE OF CONTENTS: 1. What Is the Rule of Law?; 2. Judicial Independence and the Rule of Law; 3. Judicial Independence in Albania; 4. Conclusion.

ABSTRACT: We know the importance that the rule of law has for our society, our democracy, and the kind of civilization we want, but we rarely take the time to think about what the components of the rule of law are and how we ensure that the rule of law is maintained. In its most basic form, the rule of law is the principle that no one is above the law. Legal documents, such as constitutions, national legislation, a court system, and international agreements, govern a state's actions towards its citizens. Governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedural steps that are referred to as due process. The rule of law is a very broad concept. It involves several aspects rooted in democracy. This paper will focus on the independence of the judiciary as part of the rule of law. Judicial independence means that judges are independent from political pressures and influences when they make their decisions, that they should not be pressured by a political party, a private interest, or popular opinion when they are called upon to determine what the law requires. Keeping the judiciary independent of these influences ensures that everyone has a fair chance to make their case in court and that judges will be impartial in making their decisions. Presidents, ministers, and legislators, at times, rush to find convenient solutions to the exigencies of the day. An independent judiciary is uniquely positioned to reflect on the impact of such acts on rights and liberty, and must ensure that those values are not subverted. The need for an independent judiciary in Albania is of paramount importance for Albania's integration in the European Union.

KEYWORDS: *Albania; Judicial; Independence; Law; Rule*

https://doi.org/10.6092/issn.2531-6133/6960

1. WHAT IS THE RULE OF LAW?

The rule of law is a term that is often used but difficult to define. A frequently heard saying is that the rule of law means the government of law, not men. But what does this imply? Aren't laws made by men and women in their roles as legislators? Don't men and women enforce the law as police officers or interpret the law as judges? And don't all of us choose to follow, or not to follow, the law through our everyday acts or ommissions? How does the rule of law exist independently from the people who make it, interpret it, and live it?[1]

The easiest answer to these questions is that the rule of law can never be entirely separate from the people who make up our government and our society. The rule of law is more of an ideal that we strive to achieve, but sometimes fail to live up to. The idea has been around for a long time. Many societies, including our own, have developed institutions and procedures to try to make the rule of law a reality. These institutions and procedures have contributed to the definition of what constitutes the rule of law and what is necessary to achieve it.[2]

The rule of law, in its most basic form, is the principle that no one is above the law. The rule follows logically from the idea that truth, and therefore law, is based upon fundamental principles which can be discovered, but which cannot be created through an act of will. The most important application of the rule of law is the principle that governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedural steps. The principle is intended to be a safeguard against arbitrary governance, whether by a totalitarian leader or by mob rule. Thus, the rule of law is hostile both to dictatorship and to anarchy.[3]

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[1] See Aba Division for Public Education, *What is the Rule of Law*, Americanbar.Org, http://www.americanbar.org/content/dam/aba/migrated/publiced/features/Part1DialogueROL.authcheckdam.pdf.

[2] *Ibid*.

[3] *See* Christian Fleck, *The Rule of Law*, LexisNexis.Co.Uk, http://www.lexisnexis.co.uk/en-uk/lexisnexis-for-barristers/rule-of-law.page (last visited Jun. 17, 2016).

https://doi.org/10.6092/issn.2531-6133/6960

The concept of the rule of law means that legal documents, such as constitutions, national legislation, and international agreements, govern a state's actions towards its citizens. It involves a democratic means of establishing ruling factors such as popular sovereignty, majority rule and minority rights, limited government, check and balance of powers, due process of law, protection of individual's fundamental rights and freedoms, etc. The central notion of a rule of law is that society is governed according to widely known and accepted rules followed not only by the governed but also by those in authority.

The various formal requirements of an essentially procedural version of the rule of law derive their point and fundamental value from the broader ideal of constitutionalism to which, ideally, they belong. Lon Fuller's "inner morality" of law - the model of law as a body of general, clear, stable, and prospective rules, capable of obedience, and faithfully applied by judges and other public officials - formed the core of a more elaborate conception of law as a bulwark or barrier against the exercise of arbitrary state power. Fuller's initial attempt to establish a necessary connection between law and justice, on the ground that the precepts of formal legality were necessary conditions for the existence of law, met fierce objection.[4] As H. L. A. Hart observed, the general purpose of "subjecting human conduct to the governance of rules" - the purpose Fuller ascribed to law - would allow us to treat the principles of effective law-making as a moral obligation, whatever the content of the laws, only if that general purpose were itself an ultimate human value.[5]

Fuller's insistence on the moral value of procedural legality makes perfect sense, however, when his discussion is interpreted as an exposition of the liberal or constitutional ideal of the rule of law.[6] Governmental adherence to the precepts of formal legality is a necessary feature of a constitutional regime, in which the values of personal liberty and autonomy are recognized and protected. The value of legal certainty, that procedural regularity and formal equality chiefly serve, as chiefly served by procedural regularity and

[4] T.R.S. Allan, Constitutional Justice: A Liberal Theory Of The Rule Of Law (Oxford Scholarship Online, 2010), at 61
[5] Herbert Lionel Adolphus Hart, Essays in Jurisprudence and Philosophy 349-351 (Clarendon Press, 1983).
[6] Lon L. Fuller, The Morality Of Law (Yale University Press, 1969), at 62.

https://doi.org/10.6092/issn.2531-6133/6960

formal equality is one of great importance to human dignity. When a legal system satisfies the various principles that Fuller identified as far as is reasonably practicable, people will not be punished for non-compliance with requirements whose existence was not generally known or which were otherwise impossible to obey. Even when the rules enforced fail to secure many of the various rights and freedoms characteristic of a modern liberal democracy, their consistent and accurate application will generally have great moral value: they will at least give fair warning of the exercise of state power. The principle that laws will be faithfully applied, according to the tenor in which they would reasonably be understood by those affected, is the most basic tenet of the rule of law: it constitutes that minimal sense of "reciprocity" between citizen and state that inheres in any form of decent government, where law is a genuine barrier to arbitrary power.[7]

If men were angels, no government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: one must first enable the government to control the governed; , and in the next place oblige it to control itself.[8] If considered not solely an instrument of the government but as a rule to which the entire society, including the government, is bound, the rule of law is fundamental in advancing democracy. Strengthening the rule of law has to be approached not only by focusing on the application of norms and procedures. One must also emphasize its fundamental role in protecting rights and advancing inclusiveness, and in this way, framing the protection of rights within the broader discourse on human development.[9]

The rule of law also has extremely important procedural dimensions, in addition to the foregoing substantive dimensions. It requires a set of rules that are known in advance, rules that are actually and fairly enforced, mechanisms to ensure proper application of the rules (but permit controlled departure from the rules where necessary), an independent judicial system to make binding

[7] Allan, *supra* note 4.
[8] The Federalist No. 51 (James Madison).
[9] Massimo Tommasoli, *Rule of law and democracy: addressing the gap between policies and practices*, UN Chron., Dec. 2012, at 29.

https://doi.org/10.6092/issn.2531-6133/6960

decisions when conflicts in the application of the rules arise, and procedures for amending and revising the rules.[10]

Rule of law cannot exist without a transparent legal system, the main components of which are a clear set of laws that are freely and easily accessible to all, strong enforcement structures, and an independent judiciary to protect citizens against the arbitrary use of power by the state, individuals or any other organization. There can be no free society without an independent judiciary administering the law. If one man can be allowed to determine for himself what is law, every man can. That means chaos first, and tyranny next.[11]

2. JUDICIAL INDEPENDENCE AND THE RULE OF LAW

There is increasing acknowledgement that an independent judiciary is the key to upholding the rule of law in a free society. An essential feature of modern courts is their independent function, which is based on the separation of powers doctrine. Separation of powers refers to a model of governance whereby the three branches of government (executive, legislative, and judiciary) function separately and equally, while acting as checks on each other. Under the rule of law, judicial independence is generally defined as "freedom from direction, control, or interference in the operation or exercise of judicial powers by either the legislative or executive arms of government."[12] The first one to introduce the idea of the separation of powers was Montesquieu in 1748, in his famous work "The spirit of the laws".

In the framework of the separation of powers doctrine, independent judiciaries play a very important role. The judiciary's check upon the executive and legislative is essential in upholding the rule of law, and plays a crucial role on the transparency and accountability of the government for any illegal political acts committed by political leaders or members.

[10]Samuel L. Bufford, *Defining the Rule of Law*, Judges' J., Fall 2007, at 16, 19.
[11] United States v. United Mine Workers, 330 U.S. 258, 312 (1947) (Frankfurter, J., concurring).
[12] *See* American Bar Association, *Judicial Independence Selected Definitions and Writings*, http://www.abanet.org/judind/downloads/jidef4-9-02.pdf.

https://doi.org/10.6092/issn.2531-6133/6960

Independent courts exercise their authority by interpreting matters before them in deference to the values in a nation's constitution. In this sense, the courts are seen to be the guardians of the constitution, and thereby serve to protect civil liberties of citizens. From a political perspective, an independent judiciary could give a voice to citizens who are traditionally ignored or left out of the political process. For minority groups, this is particularly relevant when the ruling government representing the majority ignores their rights or fails to apply constitutional protections for them.

Judicial independence means that judges are independent from political pressures and influences when they make their decisions. They should not be pressured by a political party, a private interest, or popular opinion when they are called upon to determine what the law requires. Keeping the judiciary independent of these influences ensures that everyone has a fair chance to make their case in court and that judges will be impartial in making their decisions.

Independent judiciaries are characterized by the following: (1) judges are free to make impartial decisions without outside political interference; (2) a judiciary acts as a check upon the executive and the legislature and, (3) judges are not arbitrarily removed or threatened.[13] The integrity of a court therefore depends upon the degree of insulation from external political actors, and their decisions would be honored even if they involve the executive or legislative bodies. Judicial independence allows judges to make decisions that may be contrary to the interests of other branches of government. Presidents, ministers, and legislators, at times, rush to find convenient solutions to the exigencies of the day. An independent judiciary is uniquely positioned to reflect on the impact of those solutions on rights and liberty, and must act to ensure that those values are not subverted.[14]

Another fundamental feature of the independent judiciary is judicial review. In the context of separation of powers, judicial review allows a court to closely review acts of the executive and legislative branches (such as legislation or regulations) without being subjected to unnecessary threats or interference.

[13] *Id.*
[14] Jeffrey Toobin, The nine: Inside the secret world of the Supreme Court 291 (2008).

https://doi.org/10.6092/issn.2531-6133/6960

Without judicial review, a court cannot adjudicate matters in an objective manner, and carefully tailor their judgments in line with constitutional principles. Indeed, judicial review is essential feature in a democratic nation's constitution, and, as some commentators have noted, it represents the ultimate expression of an independent judiciary.[15]

The Basic Principles on the Independence of the Judiciary, adopted by the United Nations in 1985, outlined the importance to: (1) establish a separate and impartial judiciary that could decide matters without political interference; (2) have a nation provide adequate resources to allow the judiciary to perform its vital functions; and (3) have such power to be enshrined in a nation's constitution.[16] The role played by judges in upholding democracy and the rule of law is also recognized by the Recommendation of the Committee of Ministers n. 12 of 1994, the European Charter on the Statute for Judges, a report of the Venice Commission on the independence of the judicial system adopted by the Venice Commission,[17] and the 2010 "Recommendation to Member States on the subject of judges; their independence, efficiency and responsibilities" of the Committee of Ministers of Council of Europe.[18]

Judicial independence is an essential cornerstone of the rule of law and for the proper functioning of a democratic society. A judicial system must promptly resolve disputes on their merits by an impartial judiciary, as unreasonable delays of the work of the judiciary seriously undermine the rule of law. The rule of law also requires at least some level of appellate review of judicial decisions to ensure proper interpretation and application of the laws.[19] Judicial independence requires that judicial participation in politics be substantially circumscribed. While the law may permit a judge to be a member

[15] Scott D. Gerber, *The Political Theory of an Independent Judiciary*, 116 Yale L.J. Pocket Part 223, 225 (2007).
[16] Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Basic Principles on the Independence of the Judiciary, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985) http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx, (last visited Nov. 15, 2016).
[17] *See* http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)004-e , (last visited Nov. 15, 2016).
[18] Recommendation CM/Rec (2010) 12 of the Committee of Ministers to Member States on Judges; Independence, Efficiency and Responsibilities, adopted by the Committee of Ministers on 17 November 2010, at the 1098th meeting of the Ministers' Deputies.
[19] Convention for the Protection of Human Rights and Fundamental Freedoms, Preamble, Nov. 4, 1950, E.T.S. 005, 213.

https://doi.org/10.6092/issn.2531-6133/6960

of a political party, the law should prohibit a judge from running for political office. Similarly, judges should not engage in political fundraising or other clearly partisan activities.

Further, judicial independence requires that both an individual judge and the system of justice be shielded from legislative reprisal for a judicial decision. In addition, legislatures must be prohibited from reducing a judge's salary or benefits, or even reducing the funding of the judiciary generally, because of displeasure with particular judicial decisions. Reasonable access to courts requires that judicial business be conducted in public. This requirement has two dimensions. First, both written judicial decisions and papers filed with courts must be available to the public when a reasonable request is made.[20] Second, courts must be open to the public so that citizens can see justice in action and be satisfied that court procedures are fair and equitable.

The rule of law also requires that judges be competent.[21] This means that judges must meet minimum requirements in education, experience, moral standards, and judicial temperament. It also requires judges to continually keep abreast of new developments in the law, legal systems, and judicial procedures. Because laws and legal procedures change frequently, ongoing judicial education is therefore critical to ensuring that judges will be able to perform their judicial duties effectively.

Although public officials enjoy a measure of immunity while working in their official capacities, the rule of law requires that they nonetheless be subject to the same laws as every other individual outside the sphere of their official duties.

3. JUDICIAL INDEPENDENCE IN ALBANIA

Today Albania is a parliamentary republic. This regime followed the collapse of the communist dictatorship in 1991. During more than four decades of

[20] Bufford, *supra* note 10.
[21] Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 18, art. 21 (1); Rome Statute of the International Criminal Court, art. 36 (3) (a), July 17, 1998, U.N. Doc. A/CONF.183/9; Statute of the International Court of Justice, art. 2, Oct. 24, 1946.

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communism Albania was ruled by an extreme authoritarian and dictatorial regime. Its judiciary was subject to the will of the Communist Party's Chairman and the Central Committee, as well as other executive authorities.

The beginning of the nineties marked historical and democratic changes for Albania, marking a turning point in the history of the State and its institutions. In 1998, following a popular referendum, Albania approved its new, democratic Constitution[22] which was followed by a series of important laws on the judiciary. Some of these laws replaced existing laws, while others were totally new for Albania.[23]

At the moment Albania, is going through a very important justice reform, which has included major reforms on the organization and functioning of the judiciary, the prosecution, the Constitutional Court, etc. Today's Constitution of Albania,[24] with its annexes, provides for new institutions such as the High Judicial Council, The High Prosecutorial Council, Commission and College of Appeal, International Monitoring Operation, etc. which aim at bringing the organization and functioning of state institutions closer to the organization and functioning of their counterparts, aiming to give an end at corruption and disorder in Albania and the strengthening of the rule of law.

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[22] Kushtetuta e Shqipërisë [KS] [Constitution of Albania], approved by the referendum of 22.11.1998, adjudicated by the decree of the President Rexhep Meidani no. 2260, dated 28.11.1998. Law no. 8417, dated 21.10.1998 "The Constitution of the Republic of Albania" was amended by laws no. 9675, dated 13.01.2007 "On several changes on law no. 8417, dated 21.10.1998 "The Constitution of the Republic of Albania""; law no. 9904, dated 21.04.2008 "On several changes on law no. 8417, dated 21.10.1998 "The Constitution of the Republic of Albania""; law 137/2015 and law 76/2016 "On several changes to law no. 8417, dated 21.10.1998 "The Constitution of the Republic of Albania.

[23] Ligj për Organizimin e Pushtetit Gjyqësor në Republikën e Shqipërisë, [Law on the Organization and Functioning of the Judicial Power in the Republic of Albania], *Fletorja zyrtare Republikës të Shqipërisë,* Law No. 8436, Dec. 28, 1998 (repealed 2008). *See also* Ligj për Organizimin dhe Funksionimin e Gjykatës Kushtetuese të Republikës së Shqipërisë [Law on the Organization and Functioning of the Constitutional Court of the Republic of Albania], *Fletorja zyrtare Republikës të Shqipërisë,* Law No. 8577, Feb. 10, 2000; Ligj për Organizimin dhe Funksionimin e Gjykatës së Lartë të Republikës së Shqipërisë [Law on the Organization and Functioning of the High Court of the Republic of Albania], *Fletorja zyrtare Republikës të Shqipërisë,* Law No. 8588, Mar. 15, 2000; Ligj për Organizimin dhe Funksionimin e Këshillit të Lartë të Drejtësisë Shqipërisë [Law on the Organization and Functioning of the High Council of Justice of the Republic of Albania], *Fletorja zyrtare Republikës të Shqipërisë,* Law No. 8811, May 17, 2001; Ligj për Organizimin dhe Funksionimin e Konferencës Gjyqësore Kombëtare [Law on the Organization and Functioning of the National Judicial Conference], *Fletorja zyrtare Republikës të Shqipërisë,* Law No. 9399, May 12, 2005; Ligj për Organizimin dhe Funksionimin e Gjykatave për Krime të Rënda [Law on the Organization and Functioning of the Serious Crimes Courts of the Republic of Albania], *Fletorja zyrtare Republikës të Shqipërisë,* Law No. 9110, Jun. 24, 2003.

[24] Ligj për Disa Shtesa dhe Ndryshime në Ligjin nr. 8417, datë 21.10.1998, "Kushtetuta e Republikës së Shqipërisë" [Law on several changes to Law No. 8417, dated Oct. 21, 1998 "The Constitution of Albania"], *Fletorja zyrtare Republikës të Shqipërisë,* Law No. 76, Jul. 22, 2016.

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Nevertheless, the new Constitution, just as the old one, provides that the law constitutes the basis and the boundaries of the activity of the state,[25] that the Constitution is the highest law in the Republic of Albania,[26] and that the governmental system is based on the separation and balancing of legislative, executive and judicial powers.[27] It also provides a set of fundamental rights and freedoms for the Albanian citizens, the main rules for the organization and functioning of different state powers and main Albanian institutions.

Part IX of the new Constitution provides the main dispositions for the judiciary. Judicial power in Albania is exercised by the High Court, courts of appeal and courts of first instances.[28] The major Albanian judicial reform, which started last year, engaged national and international experts, governmental and non governmental institutions and the Albanian society as a whole. Drafting of the judicial reform's laws was done by the Special Parliamentary Commission for the Judicial Reform with the help of the Permanent Parliamentary Commission on Legal Matters, Public Administration and Human Rights. Laws no. 98/2016, dated 06.10.2016 "On the organization of the judicial power in the Republic of Albania" and no. 96/2016, dated 06.10.2016 "On the status of judges and prosecutors of the Republic of Albania"[29] which form part of the judicial reform, have already set important criterias on the independence of the judiciary in Albania. The following laws that will be enacted, such as those providing changes to laws no. 8588, dated 15.03.2000 "On the organization and functioning of the High Court"; no.9399, dated 12.05.2005 "On the organization and functioning of the National Judicial Conference", law nr.49/2012, dated 03.05.2012 "On the organization and functioning of administrative courts and judicial review of administrative conflicts",[30] will also constitute important instruments for the protection of such independence.

According to the new Constitution, High Court judges are appointed by the President of the Republic upon proposal of the High Judicial Council for a

[25] KS, *supra* note 22, art. 4/1.
[26] KS, *supra* note 22, art. 4/2.
[27] KS, *supra* note 22, art. 7.
[28] KS, *supra* note 22, art. 135.
[29] All new laws enacted recently within the framework of the justice reform.
[30] In force at the moment.

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term of nine years, without the right to re-appointment. The President of the Republic within ten days following the decision of the High Judicial Council appoints the High Court judge, with the exception when there are grounds of his or her insufficient qualifications or ineligibility in accordance with the law.[31] The decree of the President of the Republic to reject the candidate has no effect if the majority of the members of High Judicial Council vote against the decree. In such case, as well as if there is no pronunciation of the President of the Republic on the matter the candidate is considered appointed and starts the office term within fifteen days following the date of the High Judicial Council's decision.[32]

High Court judges are selected from the ranks of judges with at least thirteen years of experience. One-fifth of the judges are selected among recognized lawyers with not less than fifteen years of experience having worked as lawyers, law professors or lecturers, senior employees in the public administration or other practices of law. Candidates who are not judges must have an academic degree in law and should not have held a political position in the public administration or a leadership position in a political party in the past ten years before becoming candidate. Further criteria and the procedure for the appointment and election of judges are provided by law. A High Court judge continues to stay in office until the appointment of the successor, except in cases under Article 139, paragraph 1, subparagraph c), ç), d) and dh), which provide the end of term of the High Court's judge.[33]

Part VIII of the new Constitution provides the main dispositions for the Constitutional Court of Albania (hereinafter C.C.A.). Until 28th of November 2016 C.C.A.'s activity was regulated by its organic law no. 8577, dated 10.02.2000 which provided the rules for its organization and functioning. Law no. 99, dated 06.10.2016[34]. which entered in force on 28.11.2016, provides new

[31] Law no.84/2016 "On the transitional re-evaluationof judges and prosecutors"
[32] KS, *supra* note 22, art. 136.
[33] KS, *supra* note 22, art. 136. Article 139 of KS "The mandate of a High Court judge shall end, upon: a) reaching the retirement age; b) the expiry of the nine year term mandate; c) his or her resignation; ç) dismissed as provided in article 140 of KS (commits serious professional or ethical misconduct or is convicted with a final court decision for commission of a crime); d) establishing the conditions of inelectibility and incompability; dh) establishing incapacity to exercise the duties.
[34] "On several additions and changes to organic law no. 8577, dated 10.02.2000 "On the organization and functioning of the Constitutional court of Albania"

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criteria on the election of the judges of C.C.A, on the selection of the President of the Court, the parties that can present a constitutional claim and what cases C.C.A. can decide upon, on the disciplinary measures against constitutional judges, etc.

C.C.A. is different and separate from the ordinary court system and is the authority that guarantees the respect for the Constitution and makes the final interpretation of it.[35] It has the power to examine the constitutionality of norms passed by the Parliament and other normative acts. The Constitution itself does not place this court in the section dedicated to the judiciary,[36] but dedicates to it a special Part,[37] emphasizing the importance of this court. According to the new Constitution, the Constitutional Court consists of nine judges. Three judges are appointed by the President of the Republic, three by the Parliament and three by the High Court. The members will be selected among the three first ranked candidates by the Justice Appointments' Council,[38] in accordance with the law. The Parliament appoints the Constitutional Court judges by three-fifth majority of its members. If the Parliament fails to appoint the judges within thirty days of the submission of the list of candidates by the Justice Appointments' Council, the first ranked candidate will be deemed appointed. The judges of the Constitutional Court are appointed for a nine-year mandate without the right to re-appointment. As to the requirements to be selected as a constitutional judge, the Constitution provides that a constitutional judge must have a law degree, a minimum of fifteen years of experience as judge, prosecutor, lawyer, law professor or lector, senior employee in of public administration with distinguished merits in constitutional, human rights or other areas of law. The judge should not have held a political post in the public administration or a leadership position in a political party in the last past ten years before his/her candidature. One-third of the composition of the Constitutional Court is renewed every three years.

The Constitutional Court judge continues his office term until the appointment of the successor, except in cases provided by Article 127,

[35] KS, *supra* note 22, art. 124/1.
[36] KS, *supra* note 22, pt. IX.
[37] KS, *supra* note 22, pt. VIII.
[38] New institution provided in the new Constitution.

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paragraph 1, subparagraph c, ç), d), and dh) of the Constitution, related to the end of constitutional judge's term.[39]

The constitutional judge enjoys immunity regarding the opinions expressed and the decisions made in the exercise of their functions and duties as such, except if the judge acts based upon personal interests or malice.[40] When there is sufficient ground to believe that a constitutional judge has committed one of the criminal offences provided by Article 128 of the Constitution,[41] by request of the President or any member judge of the Court, the President, or the oldest judge in office term, when subject of the disciplinary measure is the President, can request initiation of disciplinary measures.[42] A Judge's term is suspended when such proceedings start, but also if he is charged with a criminal offence, or a security measure such as "imprisonment" or "house detention" has been taken upon the judge.[43]

The compatibility of a law or other normative acts with the Constitution or international agreements is examined by the Constitutional Court. In such cases C.C.A. can be set in motion by request of the President, the Prime Minister,[44] not less than one fifth of the members of the Parliament,[45] and the Ombudsman.[46] C.C.A. can also be set in motion for the verification of the compatibility of international agreements with the Constitution, prior to their ratification, or for revision of the Constitution. Recourse to the Constitutional Court in such cases can only be upon request of the President or not less than

[39] KS, *supra* note 22, art. 125.
[40] KS, *supra* note 22, art. 126.
[41] The Constitutional Court can decide on the dismissal of the constitutional judge if: a) it finds that the constitutional judge has acted in serious professional or ethical misconduct; b) has been declared guilty by final decision of a court.
[42] Ligj për Organizimin dhe Funksionimin e Gjykatës Kushtetuese të Republikës së Shqipërisë [Law on the Organization and Functioning of the Constitutional Court of the Republic of Albania], *Fletorja zyrtare Republikës të Shqipërisë,* Law No. 8577, Feb. 10, 2000 (as amended by Law No. 99 of 2016).
[43] *Id.* art. 10/ç.
[44] *The Prime Minister of the Republic of Albania v The President of the Republic of Albania* [2002] CCA 186, [2002] 192.
[45] *A Group of Members of Parliament v The Parliament of the Republic of Albania* [2007] CCA 36, [2007] 312; *One Fifth of the Members of the Parliament v The Parliament of the Republic of Albania* [2008] CCA 18, [2008] 226; *A Group of 31 Members of Parliament v The Parliament of the Republic of Albania* [2009] CCA 3, [2009] 24; *A Group of Members of Parliament v The Parliament of the Republic of Albania* [2010] CCA 9, [2010] 138; *One Fifth of the Members of the Parliament v The Parliament of the Republic of Albania* [2011] CCA 24, [2011] 380.
[46] KS, *supra* note 22, art. 134/1; Organic law, art. 49/1.

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one fifth of members of Parliament.[47] The Head of High State Audit,[48] any court, as provided by article 145/2 of the Constitution, any commissioner established by law for the protection of the fundamental rights and freedoms guaranteed by the Constitution, High Judicial Council and High Prosecutorial Council, organs of local government, organs of religious communities, political parties and other organizations, as well as individuals can present a request to C.C.A. only if they argue that there is a direct connection between the application of the norm and their interests.[49]

Article 145/2 of the Constitution provides that judges, in the exercise of their powers while deciding a case, may choose not to apply a law, application of which is necessary for the solution of the case, if they consider it to be unconstitutional. They suspend the proceedings and send the question to the Constitutional Court.[50] This recognizes the right of judges, at any stage of the trial, not to implement the law applicable to the case, when they believe it conflicts with the Constitution. Such constitutional control of laws is initiated by courts of the ordinary judicial system.

The acts issued by the Parliament are in this way controlled by the judiciary which serves to balance the legislative branch. This said, judicial independence in Albania has always been a strong argument in and out of the country.[51] The legislative measures of 2008 regarding the election of district courts' judges by the School of Magistrates were seen as positive. The establishment of clear judicial advancement criteria was seen as an objective framework for judicial promotion and hiring. Continuing of legal education, offered by the School of Magistrates, is considered as a positive step and has been mandatory since 2005.[52] Nevertheless, the overlapping competences of inspectorates of the Ministry of Justice and High Council of Justice regarding disciplinary measures against the judges, the election of court chancellors and other judicial staff by the Minister of Justice, and the low salaries of the judges and court personnel have been among the major concerns regarding the

[47] Organic law, art. 49/2.
[48] *The Chairman of the High State Audit v The Parliament of the Republic of Albania* [2007] CCA 19, [2007] 141.
[49] KS, *supra* note 22, art. 134/2; Organic law, art. 49/3.
[50] KS, *supra* note 22, art 145/2; Organic Law, art. 68.
[51] *See* the Progress Reports of the Venice Commission for Albania during years.
[52] ABA Rule of Law Initiative, Judicial Reform Index for Albania, vol. IV, 2008, 9.

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independence of the judiciary in Albania,[53] which led to the new changes on the Constitution of Albania. The new laws, such as The Vetting Law,[54] provide new criteria on the evaluation of judges and law clerks, such as their knowledge, their assets, and their image.[55]

The case law of C.C.A., in recent years, shows that judicial independence has been brought to its (C.C.A.'s) attention many times, the most important cases being the ones of 2011-2012 regarding the election of new constitutional judges. According to Article 9/2 of C.C.A.'s organic law, the termination of the constitutional judge's term is declared by a decision of the C.C.A. In 2010, C.C.A. declared the end of term for three constitutional judges. At the time when C.C.A. was supposed to be renewed by one-third, the President of the Republic, on the 6th of September 2010 sent to the Parliament four decrees for the nomination of the new members of the Constitutional Court. While examining the applications and the career of the individuals presented by the President to be future constitutional judges, a number of members of Parliament, as provided by article 134/c of the Constitution, filed a case with the C.C.A. regarding the interpretation of the articles of the Constitution that provide the renewal of C.C.A. In its decision, dated 09.06.2011 regarding this case,[56] C.C.A. held that:

> The President and The Parliament, in the exercise of their constitutional powers, are the first to interpret the constitutional norms. If C.C.A. would have to decide on the criteria to be met by a candidate, this would lead this Court to take on constitutional competences of each of these bodies. In this regard, the President and the Parliament, based on the principle of constitutional loyalty, must work together to determine the legal criteria, in accordance with the constitutional requirement for high qualification of the

[53] *Id.*
[54] Ligj për Rivlerësimin Kalimtar të Gjyqtarëve dhe Prokurorëve në Republikën e Shqipërisë [Law on the Transitory Reevaluation of Judges and Prosecutors in the Republic of Albania], *Fletorja zyrtare Republikës të Shqipërisë,* Law No. 84, Aug. 30, 2016. The constitutionality of the Vetting Law is currently being revised by the Constitutional Court of Albania. C.C.A. asked the Venice Commission an amicus curiae on the law.
[55] Whether or not, in any way, they have connections with criminal organizations, or groups, etc.
[56] *A group of Members of the Parliament v The President of the Republic, The Parliament* [2011] CCA 24, [2011] 380.

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> candidates. This is necessary to provide a qualitative composition of the Constitutional Court". After such decision of C.C.A., the Parliament decided not to further review the decrees of the President of the Republic for the appointment of the members of C.C.A. until April 2013 as, according to the Parliament's Commission on Legal Affairs, Public Administration and Human Rights, this Court had no vacancies to be filled.

Even though the President required the Parliament to carry on with the election of the constitutional judges, the Parliament still did not act. According to a letter of August 2011 from the Parliament of the Republic of Albania to the President of the Republic, the reelection of the new constitutional judges was a closed matter until April 2013, time at which the vacancies on the Constitutional Court for the election of three judges would reopen. In October 2011 the President filed an application to the C.C.A. for abrogation of such decision of the Parliament. On 21 April 2012, one of the constitutional judges, whose term was declared terminated by decision of the C.C.A., resigned. C.C.A.'s composition was left with eight judges instead of nine.

In its decision, dated 19.07.2012 regarding the second case,[57] C.C.A. held that:

> The solution on the situation between the President and the Parliament, namely the resolution of disputes of competences between the two bodies, cannot be found by means of constitutional control . . . . C.C.A. cannot suggest or refuse the way or the means used by the legislator to fix the issue . . . . This is out of the role of constitutional control and as such cannot be included in the scope of its discretion. The Court has already emphasized the role and responsibility of the two constitutional bodies, the President and Parliament, in view of the constitutional loyalty during the process of appointment of new members.

[57] *The President of the Republic v The Parliament*, [2012] CCA 41, [2012] 571.

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Three constitutional judges presented their views on the case on their dissenting opinions. The constitutional judge, who later resigned from office, in his dissenting opinion on the case held:

> Under Article 12/5 of the Constitution the constitutional judge whose term has ended remains in office until the arrival of his successor, but this can only last for a reasonable period of time, needed for the appointment procedures of the new judge. The extension of term of the constitutional judge, after the end of his mandate, cannot be as long as to constitute consumption of a substantial part of a second 9-year term.[58] In accordance with the spirit of the Constitution, the continuation of the office term of the constitutional judge, until the appointment of his successor, means respecting three preconditions: 1. the President and the Parliament must exercise their will through respective acts, within the powers given by the Constitution; 2. these bodies must act within a reasonable time and under transparent procedures which clearly define the timeframes necessary for the normal closing of the appointment procedures for the new judge; and, 3. the continuation of the office term of the constitutional judge is to be understood and implemented as a continuation within a reasonable time. A long extension of the office term, after the end of the mandate . . . . although it is not functionally equivalent to a reappointment, legally threatens to resemble a reappointment, in violation of Article 125/2 of the Constitution.[59]

Another much discussed issue on the independence of judges was the one regarding the law on judicial administration.[60] According to such law, the Minister of Justice was in charge of drafting the organic structure of the

[58] *See* Brunilda Bara & Jonad Bara, *Constitutional Court and Constitutional Review in Albania,* 7 ICL Journal, no. 2, 2013, at 216, 217.
[59] *Id.*, (Justice Berberi dissenting).
[60] Ligj për Administratën Gjyqësore në Republikën e Shqipërisë [Law on Judicial Administration on the Republic of Albania], *Fletorja zyrtare Republikës të Shqipërisë,* Law No. 109, Apr. 1, 2013.

https://doi.org/10.6092/issn.2531-6133/6960

administration of the courts.[61] He was entitled to draft and supervise the politics on the organization and functioning of the judicial administration, the general criteria for their performance and work methodology, the internal rules on the functioning of the administration, and the disciplinary measures, judicial databases, etc.

The case of the constitutionality of such law was presented to C.C.A. by the Union of Judges of Albania (hereinafter U.J.A.). According to U.J.A.'s arguments, the independence of the judiciary must be understood as a substantive, organizational, functional and financial independence.[62] Substantive independence refers to the independence of the judges to to arrive at their decisions without submitting to any inside or outside pressure. Organizational independence consists on the right to draft and select, in accordance with established criteria, the internal administrative structure of the courts, such as recruitment of personnel at various levels, appointment of law clerks, etc.[63] Functional independence is strictly connected to the activity of the institution, activity which is self regulated by these organs and based on constitutional provisions. Each organ has the right to decide freely and independently. No organ can intervene on matters that, according to the case, constitute part of the activity of other constitutional organs or institutions. Financial independence implies the right to propose to the Parliament the annual budget, and, more specifically, the right to independently manage such budget, in accordance with the law. As the activity of the administration of the judiciary is strictly related to the everyday work of the judges, the right of the Minister of Justice to decide on all the above mentioned issues was considered by U.J.A. as an intervention on the function of the judiciary. Nevertheless, this law was abrogated by C.C.A.[64]

Another similar case was the one presented to C.C.A. in 2009 by the National Association of Judges (hereinafter N.A.J.). Law no. 9877, dated 18.02.2008 approved by the Parliament, provided for, among other things, the appointment of the chancellor of the court by the Minister of Justice and his

[61] *Id.* artt. 7, 13.
[62] *Chairman of the High State Audit, The Ombudsman v. The Parliament, etc.* [2007] CCA 19, [2007] 141;, *The Union of Judges of Albania v. The Parliament, etc.* [2012] CCA 5, [2012] 51.
[63] *Id.*
[64] *The Union of Judges of Albania v. The Parliament, etc.* [2014], CCA 10, [2014], 160.

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right (of the chancellor) to appoint or discharge the judicial secretarial personnel and administrative and technical services of the court. N.A.J. argued that the prerogative of the judiciary is to administer justice and the competences given to the chancellor constitute an interference of the executive on the judiciary. According to N.A.J., one of the most important tools for the protection of the independence of judicial institutions or organs is the proper designation of mechanisms or procedures regarding the election, appointment and discharge not only of judges, but also of other administrative staff such as the chancellor or administrative and technical personnel. This is important to guarantee the three components of judicial independence: organizational, functional and financial. The fulfillment of the legal and constitutional functions of such institutions can only be achieved by respecting each component of the independence.[65]

In its decision,[66] C.C.A. held that during the exercise of their activity judges are subject only to the Constitution and the laws. They must ensure the fulfillment of the rules provided in the Constitution, laws and other legal acts and guarantee the rule of law and the protection of individuals' rights and freedoms. Independence means autonomy. The autonomy of the judiciary includes the way the courts arrange their work and activities and even a special budget, which is self administered. The Constitution prohibits any kind of interference on the activity of the court or judges.[67] The term "activity" is strictly related to the function of the courts, which is that of bringing about justice. The independence of the judiciary is also provided for in a large number of international documents, such as: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights (E.C.H.R.), Basic Principles on the Independence of the Judiciary adopted by the U.N. Assembly, Recommendation for the Independence, Efficiency and the Role of Judges adopted by the Committee of Ministers of the Council of Europe, Universal Charter of the Judge, etc.

[65] *National Association of Judges v The Parliament, etc.*, [2009] CCA 20, [2009] 224.
[66] *Id.*
[67] KS, *supra* note 21, art. 145/3.

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At the end of the constitutional proceedings, C.C.A. abrogated the provision of the law referring to the discharge, by the chancellor, of the judicial secretarial personnel and administrative and technical services of the court.

Another important case on the independence of the judiciary, filled with the C.C.A. by U.J.A, concerned the transport service for public officials such as judges of the Constitutional Court, judges of the Supreme Court, the Chairman of the Court of First Instance and the Chairman of the Court of Appeal. In its decision, C.C.A. held that the independence of the judiciary, as part of the rule of law, includes a wide range of aspects, which, taken together, create the necessary conditions for the fulfillment of the role and duties of courts, especially regarding the protection of human rights. Some of these aspects are financial, but C.C.A. considered that even other aspects, such as:

> Determining the number of vehicles and drivers, ... protocol status, diplomatic passports and other elements, ... constituted constitutional standards of institutional independence. Consequently, the interference of legislators and the executive . . . . was considered in violation of Article 7 and 144 of the Constitution.[68]

In 2009, U.J.A. considered as interference on the judiciary and its rights the provisions of law no. 9877, dated 18.02.2008 "On the organization and functioning of the judicial power in the Republic of Albania" concerning judges' 30 calendar days of annual paid leave. According to U.J.A., the Constitution provides that: "Judges' term cannot be limited, their salary and other benefits cannot be reduced".[69] The new law of 2008, which changed the law of 1998, provided thirty calendar days of annual paid leave, which did include Saturdays and Sundays. The words "30 calendar days", which replaced the words "30 days" of the previous law on the judiciary, had interfered with the benefits that the judges received.[70]

[68] *The Union of Judges of Albania v The Parliament, etc.*, [2010] CCA 11, [2010] 211.
[69] KS, *supra* note 21, art. 138.
[70] The term "30 days" was interpreted by the judges as it did not include Saturdays and Sundays.

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In its decision,[71] C.C.A. concluded that the words "30 calendar days", in their literal meaning, and also in the meaning prescribed for such terms by the Vocabulary of Today's Albanian Language[72] did not make any changes to the days of holidays to which the judges were entitled to. The first law of 1998, as well as the 2008 law on the judiciary, provided for thirty calendar days and they did include Saturdays and Sundays.

After the entry in force of the new Constitution of Albania and the justice reform, the Parliament enacted law no. 84/2016 "On the transitional re-evaluation of judges and prosecutors in the Republic of Albania", also known as The Vetting Law, which became one of the most discussed laws in Albania following the justice reform. The case of the constitutionality of this law was presented to C.C.A. by one-fifth of the members of the Parliament, who considered the law to be in violation of constitutional principles such as the check and balance, legal certainty, independence of the judiciary and the prosecution, due process of law, individual's right to an effective remedy, right to a private life, etc. The members of the Parliament were joined, in their request for the unconstitutionality of the Vetting Law by the Union of Judges of Albania.[73]

In October 2016 the Constitutional Court of Albania addressed the Venice Commission with an amicus curia on the case, asking the Commission whether the participation of the constitutional judges, also subject to the Vetting Law, in the examination of the case would be considered as a conflict of interest; whether the law respected the fundamental principles of the rule of law and the separation and balancing of powers and whether the independence of the judiciary was endangered by the involvement in the process of re-evaluation of judges and prosecutors of the organs under the control of the executive power; and whether denial of the right of judges and prosecutors

[71] *The Union of Judges of Albania v The Parliament, etc.*, [2009] CCA 31, [2009] 390.
[72] Albanian Academy of Science, Language and Literature Institute, *Fjalor i Gjuhës së Sotme Shqipe (Vocabulary of Today's Albanian Language)*, Toena Publishing (2002).
[73] On 26.05.2017 the Union of Judges of Albania and the National Association of Judges of Albania filed a complaint with C.C.A. on the constitutionality of the Albanian Vetting Law and 2 other important laws of the justice reform. C.C.A. decided to hold a hearing on the case but a date has not been set yet. The parties were asked, until 22.06.2017, to file their written submissions on the case.

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subject to the law on re-evaluation to be addressed to domestic courts was contrary to Article 6 of the E.C.H.R.

In its opinion no.868/2016 on the case the Venice Commission held that the Constitutional Court had to choose between two alternatives. Either it had to exclude the possibility of a judicial review of the vetting legislation, since a regulation of the conflict of interest was missing in the Vetting Law, or it had to recognize the basic importance of the guarantees ensured by a functioning judicial review of legislation and deal consequently with the case submitted to its judgment.[74] Concerning the issue of conflict of interest and the possible disqualification of constitutional judges, the Venice Commission underlined that all the constitutional judges, according to the Constitution and the Vetting Law, would be subject to the Vetting Law which provides for the re-evaluation of every judge in Albania including the judges of the Constitutional Court. Therefore, the possible conflict of interest could affect the position, not only of one or some constitutional judges, but of all the constitutional judges sitting at the Constitutional Court. Consequently, the disqualification of the constitutional judges because of the existence of a conflict of interest would result in the total exclusion of the possibility of judicial review of the Vetting Law in view of its conformity to the Constitution. This would undermine the guarantees ensured by a functioning judicial review of legislation. This situation could be considered by the Constitutional Court as an "extraordinary circumstance" which may require departure from the principle of disqualification in order to prevent denial of justice.[75]

On the question whether judicial independence was endangered by the involvement, of the organs allegedly under the control of the executive power, in the process of re-evaluation of judges and prosecutors, the Commission held that, despite the involvement of executive bodies in the investigation process and the initial research for evidence, the evaluation and assessment of any information or evidence gathered by them rested with the newly created constitutional bodies which possessed both the characteristics of judicial

[74] CDL-AD(2016)036, *Amicus Curiae Brief for the Constitutional Court of Albania on the Law On The Transitional Re-Evaluation Of Judges And Prosecutors (THE VETTING LAW)*, Adopted by the Venice Commission at its 109th Plenary Session (Venice, Dec. 9-10, 2016), p. 18 http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)036-e .
[75] *Id.*, at 61

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bodies and had the power to verify themselves the evidence gathered by the executive organs. On this basis, it held that the Vetting Law did not seem to amount to an interference with the judicial powers.

According to the Commission, it is quite normal and in line with European standards that the evidence presented to a court of law is initially obtained by executive bodies such as the police or prosecutor. Provided its evaluation, i.e. the assessment of its veracity and the weight to be attached to it is a matter for judicial determination, this does not amount to an interference with the judicial power.[76] The bodies involved in the vetting process have instrumental and subservient functions aimed at helping the new institutions to carry out their difficult mandate. Decision-making power in all cases appears to remain with the Independent Commission and Appeal Chamber, established for this purpose in accordance with the provisions of the Constitution as independent and impartial judicial bodies.[77]

As to the question of C.C.A. on the comformity of the law with Article 6 of the E.C.H.R. regarding the right to fair trial,[78] the Commission held that the provisions of the new Constitution provided sufficient elements to conclude that the newly created constitutional bodies presented judicial guarantees for the judges and prosecutors undergoing the vetting process and the rights and safeguards contained in the legislative and constitutional scheme seem extensive. In its decision dated 18.01.2017 on the case, by a majority of votes, C.C.A. held the Vetting Law was in accordance with the Constitution of Albania.[79]

In addition to the independence of the judiciary from the legislative and the executive, other much discussed issues in Albania are the independence of the judiciary from the parties to the case; additionally, when it comes to cases regarding members of the Parliament or the government, many court decisions are viewed as political.

Because the perception of the corruption of the judiciary still remains widespread not only by the public, but also by the media, and the cases of

[76] *Id.*, at 36.
[77] *Id.*, at 38.
[78] Question 3 of the *Amicus Curiae*
[79] *Not less than 1/5 of Members of Parliament, Union of Judges of Albania v The Parliament*, [2017] CCA 2.

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judges prosecuted for corruption being rare, as many Albanian constitutionalists had previously suggested,[80] our system needed radical changes. The new Constitution and the new institutions provided therein hopefully will strengthen the rule of law in Albania and public's trust in the Albanian judicial system. Nevertheless it is up to the courts and state institutions to emphasize its importance and to obey the rule of law, while at the same time guaranteeing the respect for an independent judiciary.

4. CONCLUSIONS

The challenge for emerging democracies is to build public confidence in the belief that a body politic is firmly founded upon the rule of law. Such confidence is established where citizens know that they are protected against state interference other than 'in accordance with law'; that no one, regardless of position, is above the law and that the law itself is transparent and fair. Judges uphold the rule of law by acting as fair and impartial arbiters of disputes and by conducting trials on legal grounds only and without any improper influence. Judges can only fulfill this important public service if there exists secure structures which protect their internal and external independence thereby enabling them to decide "without fear or favor, affection or ill-will".[81]

An independent judiciary is, therefore, the key to upholding the rule of law in a free and democratic society. No other organ of state carries out the crucial function of fairly and impartially resolving disputes between individuals and the State in accordance with law. The independent judge is there not just to uphold the rights of the individual but "to strike a balance between the rights and freedoms of the individual and the protection of the rights and freedoms of the community". Where that balance is not struck fairly

[80] Kristaq Traja, Speech at Sheraton Hotel Tirana on the Occasion of the 15th Anniversary of the Constitution.
[81] Ann Power, Judge of the European Court of Human Rights, Int'l Bar Ass'n Conference, *Judicial Independence and the Democratic Process: Some Case Law of the European Court of Human Rights* (Sep., 2012), 2.

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and impartially, the seeds of resentment, bitterness and discord are cultivated and peace, which can only be founded upon justice, is jeopardized.[82]

The principle of independence of judges was not invented for the personal benefit of the judges themselves, but was created to protect human beings against abuses of power. It follows that judges cannot act arbitrarily in any way by deciding cases according to their own personal preferences, but that *their duty is and remains to apply the law.* In the field of protecting the individual, this also means that judges have a responsibility to apply, whenever relevant, domestic and international human rights law.

Only an independent Judiciary is able to render justice *impartially* on the basis of law, thereby also protecting the human rights and fundamental freedoms of the individual. For this essential task to be fulfilled efficiently, the public must have full confidence in the ability of the Judiciary to carry out its functions in this independent and impartial manner. Whenever this confidence begins to be eroded, neither the Judiciary as an institution nor individual judges will be able to fully perform this important task, or at least will not easily be *seen* to do so.[83]

Judicial independence and judicial supremacy work together in an attempt to guarantee that the rule of law will not be eroded by the political pressures in existence at any particular point in time. By removing the ultimate interpretation of constitutional provisions from elected officials, the principle of judicial supremacy reduces the likelihood that basic legal protections will fall victim to the passions of the moment. Insulating judges from political influence advances the same objective.[84]

The justice reform going on in Albania aims for a total reformation of the judicial system and the functioning of the courts in Albania, including the Constitutional Court, placing important criteria on the selection not only of the judges, but also of the law clerks, emphasizing the importance of the

[82] *Id.*
[83] *See* U.N. Office of the High Commissioner For Human Rights and International Bar Association, *Human Rights in the Administration Of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers,* 115, Professional Training Series No. 9 (2003).
[84] *See* David Boies, *Judicial Independence and the Rule of Law*, 22 Wash. U.J.L.Pol'y 57, 58 (2006).

https://doi.org/10.6092/issn.2531-6133/6960

independence of the judiciary, moving forward to Albania's integration in the European Union.

 https://doi.org/10.6092/issn.2531-6133/7180

De Criminali Proportione: On Proportionality Standing Between National Criminal Laws and the E.U. Fundamental Freedoms

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TABLE OF CONTENTS: 1. Introduction; 2. The principle of proportionality and free movement of persons; 3. The principle of proportionality and free movement of goods; 4. The principle of proportionality and free movement of services; 5. The principle of proportionality and free movement of capitals; 6. Conclusion.

ABSTRACT: Over time, the European Court of Justice has had to clarify whether and under what circumstances national laws may put one of the four fundamental freedoms of the internal market aside in cases concerning clashes between national regulations and said freedoms. The answers provided by the E.C.J. have always focused on the centrality of the principle of proportionality, expressing the idea that a balance between conflicting interests and means to protect those interests must be reached. An a priori protection of the fundamental freedoms has been refused in favor of a more concrete kind of approach. This article deals with this topic, assessing the relationship between proportionality and free movement of persons, goods, and services. Also, it is checked whether, thanks to the principle of proportionality, the E.C.J. may achieve the role of a European Constitutional Court that can protect the E.U. interests without putting national interests aside.

KEYWORDS: *Principle of Proportionality; European Court of Justice; Free Movement of Persons; Free Movement of Goods; Free Movement of Services*

https://doi.org/10.6092/issn.2531-6133/7180

1. INTRODUCTION

It is a notable aspect of the European Union ("EU") legal framework that the general principle of proportionality regulates the exercise of powers by the Union. Although it has been developed by the European Court of Justice (hereinafter E.C.J.)[1] in order to limit the institutions' discretion, it has also been applied to national legislation, as far as the interference of national regulations on obligations under E.U. law has been concerned.[2]

From a general point of view and in light of what the Lisbon Treaty provides with regard to said principle, one must consider art. 5(4) of the Treaty on the European Union (hereinafter T.E.U.):

> Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The Institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principle of subsidiarity and proportionality.[3]

Protocol No. 2 requires draft legislation to be justified with regard to the principles of subsidiarity and proportionality, adding that any draft legislative

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[1] It is thank to the ECJ if that principle has progressively been constitutionalised and normativised. *See* Case 138/79, SA Roquette Frères v Council, 1980 E.C.R. 03333; Case 44/79, Liselotte Hauer v Land Rheinland-Pfalz, 1979 E.C.R. 03727; Case 11-70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1970 E.C.R. 01125; Case 19/61, Mannesmann AG v High Authority, 1962 English special edition 00357 and Case 8-55, Fédération Charbonnière de Belgique v High Authority, 1956 English special edition 1954-56 00245.

[2] *See* Harbo Tor Inge, *The Function of the Proportionality Principle in EU Law*, 16 EUROPEAN L. J. 158, 158-185 (2010); TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EU LAW (Oxford EU Law Library, 3rd ed. 2018); ENZO CANNIZZARO, IL PRINCIPIO DELLA PROPORZIONALITÀ NELL'ORDINAMENTO INTERNAZIONALE [THE PRINCIPLE IN INTERNATIONAL LAW] (2000); THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE (Evelyn Ellis ed., 1999); NICHOLAS EMILIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW, A COMPARATIVE STUDY (1996). On the principle of proportionality in the case law of the European Court of Human Rights, see SÉBASTIEN VAN DROOGHENBROECK, LA PROPORTIONNALITE DANS LE DROIT DE LA CONVENTION EUROPÉENE DES DROITS DE L'HOMME [THE PROPORTIONALITY IN THE EUROPEAN CONVENTION OF HUMAN RIGHTS] (2001).

[3] *See* Consolidated version of the Treaty on the Functioning of the European Union [hereinafter TFEU] Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, art 5, Dec. 17, 2007, 2008 O.J. (C 115) 206.

https://doi.org/10.6092/issn.2531-6133/7180

act shall contain a detailed statement making it possible to appraise compliance with said principles. Furthermore, pursuant to art. 52(1), second line of the Charter of Fundamental Rights of the European Union (hereinafter the Charter), subject to the principle of proportionality, limitations on the rights and freedoms recognized by the Charter may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of other.[4]

Over time, issues concerning proportionality of criminal offenses have been brought to the E.C.J.'s attention. As a matter of fact, the Court has been asked whether and under what circumstances national laws may put one of the four fundamental freedoms of the internal market aside in cases concerning clashes between national regulations and said freedoms. The answers provided by the E.C.J. have constantly underlined the centrality of the principle of proportionality. Additionally, it is not by chance that a specific declination of that principle regarding criminal offenses and penalties may be now found under art. 49(3) of the European Charter of Fundamental Rights, under which "the severity of penalties must not be disproportionate to the criminal offense".[5] In fact, the Court has always looked for a balance between conflicting interests and means to protect those interests.

[4] On art. 52 of the Charter see Koen Lenaerts, *Exploring the Limits of the EU Charter of Fundamental Rights*, 8 EUR. CONST. L. REV. 375 (2012). On the EU Charter of Fundamental Rights in general, see THE EU CHARTER OF FUNDAMENTAL RIGHTS AS A BINDING INSTRUMENT: FIVE YEARS OLD AND GROWING (Sybe de Vries, Ulf Bernitz & Stephen Weatherill eds., 2015); MAKING THE CHARTER OF FUNDAMENTAL RIGHTS A LIVING INSTRUMENTS (Giuseppe Palmisano ed., 2014); THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY (Steve Peers, Tamara Hervey, Jeff Kenner & Angela Wards eds., 2014).

[5] *See* For what concerns administrative sanctions, Council Regulation (EC, Euratom) 2988/95, of 18 December 1995 on the protection of the European Communities financial interests, 1995, O.J. (L-312) 1. Pursuant to art. 2(1) and (3), administrative sanctions shall be «proportionate» and «Community law shall determine the nature and scope of the administrative measures and penalties necessary for the correct application of the rules in question, having regard to the nature and seriousness of the irregularity, the advantage granted or received and the degree of responsibility».

https://doi.org/10.6092/issn.2531-6133/7180

So, this search for a balance is the topic this article tackles[6] in order to assess the relationship between proportionality and free movement of persons (Pt. II), goods (Pt. III), and services (Pt. IV).[7] Furthermore, it is checked whether the principle of proportionality may make it possible for the E.C.J. to achieve the role of a European Constitutional Court that can protect the E.U. interests without putting national interests aside.

2. THE PRINCIPLE OF PROPORTIONALITY AND FREE MOVEMENT OF PERSONS

In contemplating the free movement of persons, one may consider some questions referred to the Court for a preliminary ruling by the Pretura di Milano regarding regulations concerning the presence of foreigners in Italy.[8] The questions concerned the regulations' consistency with the free movement of persons and freedom of establishment.

Focusing on proportionality, Advocate General (hereinafter A.G.) Trabucchi noted that this general principle obligates both national and supranational authorities to achieve a balance. Public authorities can only subject foreigners to greater intrusion into their private lives than that national citizens are subjected to only in the presence of an objective

[6] *See also* Ermioni Xanthopoulou, *The Quest for Proportionality for the European Arrest Warrant: Fundamental Rights Protection in a Mutual Recognition Environment*, 6 NEW J. EUR. CRIM. L. 32 (2015); Tomasz Ostropolski, *The Principle of Proportionality under the European Arrest Warrant – with an Excursus on Poland*, 5 NEW J. EUR. CRIM. L. 167 (2014); ESTER HERLIN-KARNELL, THE CONSTITUTIONAL DIMENSION OF EUROPEAN CRIMINAL LAW (2012); Martin Böse, *The Principle of Proportionality and the Protection of Legal Interest*, 1 EU. CRIM. L. REV. 35 (2011); and Anna Maria Maugeri, *Il principio di proporzione nelle scelte punitive del legislatore europeo: l'alternativa delle sanzioni amministrative* [*The Proportionality Principle in the Punitive Choices of the European Legislator: the Administrative Sanctions Alternative*], *in* L'EVOLUZIONE DEL DIRITTO PENALE NEI SETTORI D'INTERESSE EUROPEO ALLA LUCE DEL TRATTATO DI LISBONA [*The Evolution of Criminal Law in the Sectors of European Interest in the light of the Lisbon Treaty*] 67 (Giovanni Grasso & Rosario Sicurella eds., 2011).

[7] *See* Joined cases C-358/93 and C-416/93, Criminal proceedings against Aldo Bordessa, Vicente Marí Mellado and Concepción Barbero Maestre, 1995 E.C.R. I-00361 (I could not find precedents concerning the compatibility of national criminal measures with free movement of capitals. For what concerns administrative regulations).

[8] At that time, pursuant to R.D. n. 773/1931, art. 142 (It.), a foreign national had to report to the public security authority their entry into the national territory within three days. In case of failure, the penalty provided for was a maximum of three month's detention or a maximum fine of 80.000 Lit. Pursuant to D.Lgs. n. 50/1948, art. 2 , Italian nationals were to report the presence of foreign nationals to whom they provided board and lodging within 24 hours. In case of failure, the penalty was detention for up to six months (to which a fine up to 240.000 Lit. could be added). Afterwards, those provisions were repealed.

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justification. They must also take into account the relationship between the obligations imposed to them and the pursued legal purpose.[9]

According to the E.C.J., free movement of persons does not exclude the right of Member States to adopt measures whose purpose is to get information about the presence of foreigners. The Treaty prevents deportation in the event that this information is not provided. However, other penalties – such as fines and detention – may be legitimate, provided that they are not so disproportionate to the gravity of the infringement that they become an obstacle to the free movement of persons.[10]

In Calfa, an Italian national had been caught in possession of drugs while in Greece, sentenced to three months' imprisonment, and her permanent exclusion from Greek territory was ordered. Two questions were referred to the E.C.J.: One concerned the consistency of permanent exclusion with Community law, since this measure could not apply to Greek citizens;[11] the other question dealt with the consistency of said measure with the principle of proportionality.

A.G. La Pergola highlighted that the question related to the dame issue since proportionality is one of the criteria that must be taken into account when assessing the consistency of national provisions with supranational rules. From his point of view, as far as the protection of fundamental interests of the society against a genuine and sufficiently serious threat is concerned, national authorities should adopt measures that are effectively designed to combat those conducts, despite the fact that national legislation does not always provide for the same measures. However, regarding the actual case, he came to the conclusion that Greek legislation had introduced a form of discrimination because, when convicted of the same offense, nationals had the

[9] Opinion of AG Trabucchi in *Watson and Belmann*.

[10] Case 118-75,Lynne Watson and Alessandro Belmann, 1976 E.C.R. 01185. A similar reasoning, concerning German regulations sanctioning foreigners living in Germany without passport or residence permit, may be found in Sagulo and others, Case 8/77, Concetta Sagulo, Gennaro Brenca and Addelmadjid Bakhouche, 1977 E.C.R 01495.

[11] Greek nationals cannot be subject to an expulsion order, but may be ordered not to reside in certain parts of the territory in some cases, especially those concerning drug dealing (the prohibition is discretionary and may not exceed five years).

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main penalty applied, while foreigners were subject to that and an additional penalty, the expulsion. So, this measure was contrary to Community law.[12]

The E.C.J. agreed and added something with regard to expulsion:

> In this respect, it must be accepted that a Member State may consider that the use of drugs constitutes a danger for society such as to justify special measures against foreign nationals who contravene its laws on drugs, in order to maintain public order. However, as the Court has repeatedly stated, the public policy exception, like all derogations from a fundamental principle of the Treaty, must be interpreted restrictively. [...] Previous criminal convictions cannot in themselves constitute grounds for the taking of such measures. It follows that the existence of a previous criminal conviction can, therefore, only be taken into account in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy [...]. It follows that an expulsion order could be made against a Community national such as Ms Calfa only if, besides her having committed an offence under drugs laws, her personal conduct created a genuine and sufficiently serious threat affecting one of the fundamental interests of society.[13]

Thus, there was a disproportionate legal reaction in Calfa that involved the use of an unjustified differentiation in the applicable sanctions depending on the citizenship of the offender, without taking into account the seriousness of their conduct.[14]

In Nazli, a Turkish citizen living in Germany was not able to obtain an extension of his residence permit because he had been implicated in a case of drug trafficking and sentenced to a suspended term of imprisonment. One of

[12] Opinion of AG La Pergola in *Calfa*.
[13] *See* Case C-348/96, Criminal proceedings against Donatella Calfa, 1999 E.C.R. I-00011, 22-25.
[14] *See also* Case C-441/02, Commission of the European Communities v Federal Republic of Germany, 2006 E.C.R. I-03449, 33, 34, 93. *See also* Case C-50/06, Commission of the European Communities v Kingdom of the Netherlands, 2007 E.C.R. I-04383.

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the issues brought before the E.C.J. concerned the expulsion of a Turkish citizen that had been ordered out of the will of dissuading other foreigners from committing those offenses, and the compatibility of this measure with Community law.[15]

According to A.G. Mischo, only general preventive reasons may justify expulsion. Since the sanction of imprisonment had been suspended, that would deny the idea that the Turkish citizen would commit that offense again, in that the Turkish citizen's criminal behavior had been deemed not so serious. So, expulsion should have been deemed inconsistent with Community law.[16] The E.C.J. ruled that it must be assessed whether the personal conduct indicates a specific risk of new and serious prejudice to the requirements of public policy.[17]

In Orfanopoulos and Oliveri, a Greek national and an Italian national, both drug addicts with a number of convictions, were denied the extension of their residences permits by the German authorities. A.G. Stix-Hackl referred to Calfa and Nazli, stating that it should be considered whether the present conduct could be regarded as a threat. Furthermore, she took into account the European Court of Human Rights (hereinafter E.Ct.H.R.) case law concerning art. 8 of the European Convention on Human Rights (hereinafter E.C.H.R.),[18] since the expulsion of Mr. Orfanopoulos and Mr. Oliveri could have negatively affected the members of their families: as a matter of fact, they might have

[15] Under art. 6(1) fourth point of the decision no. 1/80 of the Association Council of 19 September 1980 on the development of the Association between the European Economic Community and Turkey, a Turkish worker duly registered as belonging to the labour force of a Member State shall enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment. Thus, one of the questions concerned whether the Turkish worker had lost that right because of his criminal record.

[16] Opinion of AG Mischo in *Nazli*. The order would have not been consistent with art. 14(1) of the decision no. 1/80 which provides that the provisions concerning employment and free movement of workers shall apply "subject to limitations justified on grounds of public policy, public security or public health", while Mr Nazli had only been involved in a case of drug selling.

[17] *See* Case C-340/97, Ömer Nazli, Caglar Nazli and Melike Nazli v Stadt Nürnberg, 2000 E.C.R. I-00957. The Court dealt with similar cases in Case C-349/06, Murat Polat v Stadt Rüsselsheim, 2007 E.C.R. I-081670, and in Case C-145/09, Land Baden-Württemberg v Panagiotis Tsakouridis, 2010 E.C.R. I-11979.

[18] Pursuant to European Convention on Human Rights, art. 8, Nov. 4, 1950, 10 Council of Europe Secretary General 1 (Right to respect for private and family life): "(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

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had to move to another country.[19] Therefore, according to the A.G., three aspects should have been verified: the personal situation, especially for what concerns the extent of integration in the State from the social and professional point of view and in terms of family relations; the situation of family members, especially if they should move to another State; and the seriousness and number of the offences committed by the individual.[20]

The E.C.J. criticized automatic expulsions of a foreigner as a consequence of a criminal conviction and ruled:

> The necessity of observing the principle of proportionality must be emphasised. To assess whether the interference envisaged is proportionate to the legitimate aim pursued, in this instance the protection of public policy, account must be taken, particularly, of the nature and seriousness of the offences committed by the person concerned, the length of his residence in the host Member State, the period which has elapsed since the commission of the offence, the family circumstances of the person concerned and the seriousness of the difficulties which the spouse and any of their children risk facing in the country of origin of the person concerned.[21]

Thus, based on the above-mentioned case law, the Court believes that the Member States are allowed to limit free movement of persons, provided that they make a careful assessment to achieve a balance between security reasons and the interest which is put aside – which means, said freedom. In this regard, one should bear in mind that the Maastricht Treaty introduced the European citizenship as a personal status that disconnected the binds between free movement of persons and economic activities: so, free movement of persons

[19] *See* Boultif v Switzerland, App. no. 54273/00, 2001-IX Eur. Ct. H.R. For what concerns the ECJ case law, see also Case C-60/00, Mary Carpenter v Sec'y of State for the Home Department, 2002 E.C.R. I-06279.
[20] Opinion of AG Christine Stix-Hackl in *Orfanopoulos and Oliveri*.
[21] *See* Joined Case C-482/01 and C-493/01, Georgios Orfanopoulos and Others (C-482/01) and Raffaele Oliveri (C-493/01) v Land Baden-Württemberg, 2004 E.C.R. I-05257, 99. *See also* Council Directive 2004/38, art. 28, 2004 O.J. (L 158) 77, 115 (EC) and the explications *infra*.

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has become an individual right in itself.[22] Therefore, in light of the relevance of this freedom and the qualitative leap that has occurred since 1992, the Court has identified some conditions Member States should comply with if they want to legitimately affect it and said conditions that have been transposed into E.U. legislation. In fact, the need for a balance is now well-expressed by the formula under art. 27(2), second line of Directive 2004/38:[23] a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Its meaning is quite clear in that it conveys the idea of a reasonably substantial prejudice to the axiological system that defines the identity of a community.[24]

3. THE PRINCIPLE OF PROPORTIONALITY AND FREE MOVEMENT OF GOODS

When evaluating the principle of proportionality and free movement of goods, one should look at that topic in light of the concept of measures having an effect equivalent to a quantitative restriction as defined in Dassonville.[25]

In Donckerwolcke, the issue at stake involved the importation into France of bales of cloth and sacks by two Belgian companies. According to the directors of those companies, the goods originated in Europe but the French

[22] Apart for the provisions under art. 20 and 21 TFEU, see art. 45(1) of the EU Charter of Fundamental Rights that provides that every citizen of the Union has the right to move and reside freely within the territory of the Member States. *See also* Case C-378/97, Criminal proceedings against Florus Ariel Wijsenbeek, 1999 E.C.R. I-6251.

[23] Council Directive 2004/38, 2004 O.J. (L 158) 77, 113 (EC). Pursuant to art. 27 of this Directive, "1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends. (2) Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted".

[24] On the application of art. 27(2), second line of directive 2004/38 to non-criminal cases see Case C-434/10, Petar Aladzhov v Zamestnik director na Stolichna direktsia na vatreshnite raboti kam Ministerstvo na vatreshnite raboti, 2011 E.C.R. I-11659. *See also* Case C-249/11, Hristo Byankov v Glaven sekretar na Ministerstvo na vatreshnite raboti, 2012 published in the electronic Reports of Cases.

[25] *See* Case 8/74, Procureur du Roi v Benoît and Gustave Dassonville, 1974 E.C.R. 00837 where the Court identified "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade" as measures having an effect equivalent to quantitative restrictions.

https://doi.org/10.6092/issn.2531-6133/7180

customs authorities found out that they came from the Middle East, so the directors were charged with having made false declarations of origin and sentenced to imprisonment and fine and the goods were confiscated. The questions referred to the E.C.J. concerned the nature of those penalties as measures having an effect equivalent to a quantitative restriction.

A.G. Capotorti identified two possible violations of the principle of proportionality: first, a national provision that obligates importers to make an exact declaration on the origin of the goods without leaving any ground to stand on if they do not know is disproportionate; secondly, penalties are excessive in that they do not reflect the seriousness of the offense.[26]

The E.C.J. ruled that theoretically, the knowledge of the origin may be necessary both for the Member States to determine their commercial policy and the Commission to perform its control activities. However, the Member States may only require the importers to indicate the origin of the goods when they know it or may reasonably be expected to know it. All things considered, a violation of that rule cannot lead to the application of disproportionate sanctions, given the administrative nature of the contravention. So, in light of the principle of proportionality,

Any administrative or penal measure which goes beyond what is strictly necessary for the purposes of enabling the importing Member State to obtain reasonably complete and accurate information on the movement of goods falling within specific measures of commercial policy must be regarded as a measure having an effect equivalent to a quantitative restriction prohibited by the Treaty.[27]

This reasoning was later confirmed in a case involving the importation into France of prohibited goods by means of false declaration of origin and on

[26] Opinion of AG Capotorti in *Donckerwolcke*.
[27] *See* Case 41/76, Suzanne Criel, née Donckerwolcke and Henri Schou v Procureur de la République au tribunal de grande instance de Lille and Director General of Customs, 1976 E.C.R. 01921.

https://doi.org/10.6092/issn.2531-6133/7180

the basis of false or inaccurate documents: the defendants were sentenced to pay some fines.[28]

A.G. Warner referred to Donckerwolcke and agreed with the solution provided in that case.[29] The E.C.J. did the same and ruled that in general terms, any administrative or penal measure that goes beyond what is strictly necessary for the purpose of enabling the importing Member State to obtain reasonably complete and accurate information on the movement of goods must be considered a measure having an effect equivalent to a quantitative restriction prohibited by the Treaty.[30]

Another case concerned the limitation of free movement of goods on the ground of public morality. In 1977, two British citizens were convicted of a number of offenses relating to the importation and sale of pornographic articles. Under sec. 42 of the 1876 Customs Consolidation Act and sec. 304 of the 1952 Customs and Excise Act, those articles could be forfeited and destroyed. One of the points at issue concerned the notion of public morality under art. 36 of the Treaty establishing the European Community,[31] that provided that prohibitions or restrictions on imports, exports or goods in transit could be justified on that ground.

A.G. Warner stated that it is quite difficult to provide a uniform definition of public morality and a criterion of reasonableness should be taken into account, meaning that the effects of the prohibition should not be disproportionate in light of the pursued objective.[32]

The Court ruled that different regulations were into force in the United Kingdom, given the peculiarities of the legal system of that country; Anyway, that did not make it possible to acknowledge the existence of a legal –

[28] The case was particularly complex: after being ordered to pay a fine by the Montpellier *Tribunal de grande instance*, one of the parties - Leonce Cayrol, a French national - applied to the Italian *Tribunale di Saluzzo* for a warrant for attachment against the assets of Rivoira Giovanni e Figli s.n.c. in order to get a compensation on the grounds that the penalties imposed by the French authorities were the consequence of the company conduct. As a matter of fact, the company had deceived custom authorities as to the origin of a number of consignments of table grapes using the certificate of the Italian Trade Agency, while the grapes came from Spain. The Tribunale di Saluzzo referred the question to the CJEU when *Donckerwolcke* had already been passed.

[29] Opinion of AG Warner in *Cayrol*.

[30] *See* Case 52/77, Leonce Cayrol v Giovanni Rivoira & Figli, 1977 E.C.R. 02261.

[31] *See* TFEU art. 36.

[32] Opinion of AG Warner in *Henn and Darby*.

https://doi.org/10.6092/issn.2531-6133/7180

meaning, permitted – trade of those articles, so no arbitrary discrimination had been created.[33]

Another important ruling may be found in Wurmser, which concerned the compatibility with Community law of a French legislation requiring importers to verify the conformity of imported products with the rules in force and imposing criminal liability in the case of failure. According to the Court,

> For a national rule capable of having a restrictive effect on imports to be justified under art. 36 of the Treaty or on the basis of [...] imperative requirements [...], it must [...] be necessary for the purposes of providing effective protection of the public interest involved and it must not be possible to achieve that objective by measures less restrictive of intra-Community trade. It must therefore be considered whether a national provision such as that concerned in the main proceedings is in accordance with the principle of proportionality thus expressed. [...] In regard in particular to the verification of information supplied to consumers as to the composition of a product when it is released for sale, the importer may not, as a general rule, be required to have the product analysed for the purpose of that verification. Such an obligation would impose on the importer a burden considerably greater than that imposed on a domestic manifacturer, who himself has control of the composition of the product, and it would often be disproportionate to the objective to be achieved, having regard to the existence of other forms of verification equally reliable and less burdensome.[34]

So, as far as the free movement of goods is concerned, the Court's reasoning gets more cryptic than it is in the cases on free movement of persons. In fact,

[33] Case 34/79, Regina v Maurice Donald Henn and John Frederick Ernest Darby, 1979 E.C.R. 03795.
[34] *See* Case 34/79, Regina v Maurice Donald Henn and John Frederick Ernest Darby,1979 E.C.R. 03795.

https://doi.org/10.6092/issn.2531-6133/7180

based on the above-mentioned cases,[35] it cannot be identified a clear and stentorian formula such as the one of genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society that can be found in the case law concerning free movement of persons. Anyway, one cannot deny the E.C.J. has always tried to strike a balance between national and supranational interests. Furthermore, a fundamental achievement can be found in the equivalence between proportionality and reasonableness established by A.G. Warner.[36]

4. THE PRINCIPLE OF PROPORTIONALITY AND FREE MOVEMENT OF SERVICES

With regard to free movement of services, one may refer to a case regarding criminal proceedings brought in Germany against a Greek woman since she had not complied with the German legislation that provided for the exchange of foreign licenses for a German one within one year of taking up normal residence in Germany. In case of failure to comply, the German legislation provided for up to one year's imprisonment or a fine or, if the offense was committed as a result of carelessness, for up to six month's imprisonment or a fine. The woman was found driving with a Greek license but without a German one after the one-year period had passed. Her husband faced the same

[35] *See also* Case C-12/02, Criminal proceedings against Marco Grilli, 2003 E.C.R. I-11585; Case C-121/00, Criminal proceedings v. Walter Hahn, 2002 E.C.R. I-09193; Case C-394/97, Criminal proceedings against Sami Heinonen, 1999, E.C.R. I-03599; Case C-83/94, Criminal proceedings against Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer, 1995 E.C.R. I-03231; and Case C-17/93, Criminal proceedings against J.J.J. Van der Veldt,1994 E.C.R. I-03537.

[36] *See also* the Opinion of AG Capotorti in *Adoui* and *Cornauille* (Joined cases 115 and 116/81, Rezguia Adoui v Belgian State and City of Liège; Dominique Cornuaille v Belgian State, 1982 E.C.R. 01665, and Case C-65/05, Commission of the European Communities v Hellenic Republic, 2006 E.C.R. I-10341, at paras. 38-41) in which the ECJ ruled that "even if that case-law may not be applied in the present case, the overriding public interest reasons put forward by the Hellenic Republic may justify the barrier to the free movement of goods. However, it is also necessary for the national legislation at issue to be proportionate to the objectives being pursued. In that regard, the Hellenic Republic has not established that it implemented all the technical and organisational measures likely to have achieved the objective pursued by that Member State using measures which were less restrictive of intra-Community trade. The Greek authorities not only could have had recourse to other measures which were more appropriate and less restrictive of the free movement of goods, as the Commission suggested during the pre-litigation procedure, but also could have ensured that they were correctly and effectively applied and/or executed in order to achieve the objective pursued. It follows that the prohibition laid down by art. 2(1) of Law No. 3037/2002 on the installation in Greece of all electrical, electromechanical and electronic games, including all computer games, on all public and private premises apart from casinos, constitutes a measure which is disproportionate in view of the objectives pursued".

https://doi.org/10.6092/issn.2531-6133/7180

penalties since, as person in charge of the vehicle, he allowed his wife to drive it without a German license. The national judge decided to stay the proceedings and refer a question to the E.C.J. in order to understand whether those provisions were consistent with free movement of persons and freedom of establishment.[37]

The ruling was quite solomonic. In fact, on the one hand, the Court ruled out the prohibition for the Member States to obligate to exchange the license since at that time, the directive on mutual recognition of driving licenses had not come into force yet;[38] on the other hand, the Court acknowledged it would have been disproportionate to treat a person who was found driving with a license issued by another Member State as if they were driving without a license at all. That would be excessive, especially if one considers that the offense is not so serious. Furthermore, the Court underlined the negative consequences arising from the failure to comply with the principle of proportionality, stating that a criminal conviction may have consequences for the exercise of a trade or a profession, as far as the access to certain activities or offices is concerned.[39]

Another case involved criminal proceedings brought in Italy against more than a hundred people who had allegedly violated the Italian regulation which criminalises the collection and transmission of bets without a license.[40] The bets were transmitted to an English bookmaker, so freedom of establishment and freedom to provide services were considered.

According to the E.C.J., national legislation that prohibits on pain of criminal sanctions the collection, acceptance, registration, and transmission of offers to bet, in particular on sporting events, without a license is a restriction

[37] As a matter of fact, the driving licence represents the necessary prerequisite for the exercise of a trade or a profession, so the obligation to exchange it could be seen as a discrimination against the citizens of other Member States.

[38] *See* Council Directive 91/439/ECC of 29 July 1991 on Driving licences, 1991 O.J. (L-237) 1.

[39] *See* Case C-193/94, Criminal proceedings against Sofia Skanavi and Konstantin Chryssanthakopoulos, 1996 E.C.R. I-00929; Case C-230/97, Criminal proceedings against Ibiyinka Awoyemi, 1998 E.C.R. I-06781.

[40] Pursuant to L. n. 401/1989, art. 4, (It.) fines and imprisonment may apply in that case. *See also* Case C-6/01, Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v Estado português, 2003 E.C.R. I-08621; Case C-67/98, Questore di Verona v Diego Zenatti, 1999 E.C.R. I-07289; Case C-124/97, Markku Juhani Läärä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State), 1999 E.C.R. I-06067 and Case C-275/92, Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler, 1994 E.C.R. I-01039.

https://doi.org/10.6092/issn.2531-6133/7180

to those freedoms. The issue at stake regarded the possibility to identify a good reason to justify that restriction. First of all, it had to be justified by imperative requirements in the general interest. Second, it had to be suitable for achieving the pursued objective. Third, it had not to go beyond what is necessary in order to attain it. Therefore, according to the Court, it is up to the national judge to assess it by taking into account some hints given by the Court itself, according to whom consumer protection and the prevention of fraud and incitement to squander on gaming are imperative requirements in the general interest. However, it must be determined whether the restriction aims at achieving that purpose coherently and systematically. Regarding the actual case, the Court held that Italy pursued a policy of expanding betting and gaming. Thus, those reasons could not justify the choice. More, the Court ruled that

> It is for the national court to consider whether the manner in which the conditions for submitting invitations to tender for licences to organise bets on sporting events are laid down enables them in practice to be met more easily by Italian operators than by foreign operators. If so, those conditions do not satisfy the requirement of non-discrimination. Finally, the restrictions imposed by the Italian legislation must not go beyond what is necessary to attain the end in view. In that context the national court must consider whether the criminal penalty imposed on any person who from his home connects by internet to a bookmaker established in another Member State is not disproportionate . . . . especially where involvement in betting is encouraged in the context of games organised by licensed national bodies.[41]

In this regard, one may also consider Placanica, where the Court held that a licensing system may be seen as an efficient mechanism to prevent the exploitation of betting and gaming activities for criminal or fraudulent purposes. However, it is up for national courts to determine whether that kind

[41] *See* Case C-243/01, Criminal proceedings against Piergiorgio Gambelli and Others, 2003 E.C.R. I-13031.

https://doi.org/10.6092/issn.2531-6133/7180

of mechanism genuinely contributes to that type of objectives, as well as to ascertain whether it satisfies the condition of proportionality.[42]

Hence, it can be confirmed what has already been written with regard to free movement of goods: There is no standard formula but the Court always tries to strike a balance between conflicting interests.[43]

5. CONCLUSION

The early approach followed by the E.C.J. with regard to the principle of proportionality can be summarized through the well-known cost-benefit formula. In this regard, one should remember the most renowned[44] wording of the principle that can be found in the E.C.J. case law: "The Institutions must ensure that the burdens which commercial operators are required to bear are no greater than is required to achieve the aim which the authorities are to accomplish."[45]

Over time, the E.C.J. has tackled the issue from a different angle, mainly in light of the general provisions that can be found in the Treaties and under art. 52 of the Charter. Most of all, the Court has effectively made it a general tool to achieve a fair balance between fundamental rights and general interests by constantly stressing that the principle of proportionality "requires that acts of the E.U. institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is

[42] *See* Joined Cases C-338/04, C-359/04, C-360/04, Criminal proceedings against Massimiliano Placanica, Christian Palazzese and Angelo Sorricchio, 2007 E.C.R. I-01891; see also Case C-347/09, Criminal proceedings against Jochen Dickinger and Franz Ömer, 2011 E.C.R. I-08185.
[43] Even if the topic is only implicitly considered, see also Case 5/83, Criminal proceedings against H.G. Rienks,1983 E.C.R. 04233 and Case 271/82, Vincent Rodolphe Auer v Ministère public, 1983 E.C.R. 02727, concerning the improper exercise of the profession of veterinary surgeon.
[44] *See* TITO BALLARINO, LINEAMENTI DI DIRITTO COMUNITARIO [PRINCIPLES OF COMMUNITY LAW] 182 (3rd ed. 1990).
[45] Joined Cases 26 and 86/79, Criminal proceeding against Forges de Thy-Marcinelle and Monceau, 1980, E.C.R. *01083* at para. 6 and Case 5/73, Criminal proceeding against Balkan 1973, E.C.R. 1092 at para. 22.

https://doi.org/10.6092/issn.2531-6133/7180

appropriate and necessary in order to achieve those objectives"[46] and that "when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."[47]

Thus, the principle of proportionality surely is the parameter that makes it possible to assess the utility, suitability, and adequacy of draft legislative acts[48] but it has become an instrument of protection of fundamental rights against excessive interference from E.U. acts, first, and Member States acts, then, too.

Therefore, the progressive opening of the European Union to a political dimension – that is to say the progressive opening to the protection of fundamental rights – has brought to light a specific, non-economic declination of the principle of proportionality that concerns the criminal matter too. When it comes to the relationship between E.U. law and criminal law, the E.C.J. seems to focus on the clash between national and supranational legal interests deserving protection in order to avoid that national security policies always prevail and supranational interests are always put aside.

In this regard, one may deem meaningful the equivalence between proportionality and reasonableness drawn by A.G. Warner,[49] since it leads to the consequence that criminal sanctions must be used measurably in order to punish not the violation of a normative precept in itself, but a conduct which effectively harms a legal interest that deserves protection; that is to say, criminal sanctions must be used to punish a genuine, present, and sufficiently

[46] *See, e.g,* Joined Case C-293/12 and Case C-594-12, Digital Rights Ireland Ltd, Seitlinger and Others, 2014, published in the electronic Report of Cases, at para. 46; Case C-101/12, Schaible v Land Baden-Württemberg, 2013, published in the electronic Report of Cases, at para. 29; Case C-283/11, Sky Österreich GmbH v Österreichischer Rundfunk, 2013, published in the electronic Report of Cases, at para. 50 and Case C-558/07, S.P.C.M SA. and Others v Secretary of State for the Environment, Food and Rural Affairs, 2009, E.C.R. I-05783, at. par. 41. On the topic see Georgios Anagnostaras, *Balancing Conflicting Fundamental Rights: The Sky Österreich paradigm*, 39 EUR. L.REV. 111 (2014).

[47] *See, e.g,* Joined Case C-581/10 and C- 629/10, Nelson and Others, 2012, published in the electronic Reports of Cases, at para. 71 and Case C-343/09, Afton Chemical Limited v Secretary of State for Transport, 2010, E.C.R. I-07027, at para. 45.

[48] *See* Franco Pizzetti & Giulia Tiberi, *Le competenze dell'Unione e il principio di sussidiarietà* [*EU Authority and Subsidiarity Principle*] *in* LE NUOVE ISTITUZIONI EUROPEE. COMMENTO AL TRATTATO DI LISBONA 143-153 (Franco Bassanini & Giulia Tiberi eds., 2nd ed. 2010).

[49] However, it is interesting to notice that the Italian Constitutional Court has come to the same conclusion, too. *See also* Italian Constitutional Court, Judgment of I June 1995, no. 220, at para. 4, where the Court underlined that proportionality is a direct expression of the general canon of reasonableness.

https://doi.org/10.6092/issn.2531-6133/7180

serious threat affecting one of the fundamental interests of society while avoiding excesses which are justified by reasons of internal politics only.

This is positive in that it restates the centrality of the principle of proportionality but one may wonder if it really makes it possible to avoid a tough situation. In light of the above-mentioned case law, the E.C.J. seems to be the only judicial body entitled to assess the balance between national and supranational conflicting legal interests and it looks like the Court is keen to preserve its position as the only judicial body entitled to do so. This may raise a problem – and not a small one – if one considers the sometimes complicated relationship between the E.C.J. and national courts, especially some Constitutional Courts.[50]

The position held by the E.C.J. is quite balanced indeed, since its purpose is not the a priori protection of the fundamental freedoms when a clash between them and national provisions arises. However, one may question that approach when it comes to criminal law. It is well renowned that the E.C.J. has ruled out the existence of national safe havens not affected by the supranational law;[51] at the same time, a peculiar tie between criminal law and national sovereignty does exist and cannot be denied.[52]

Hence, as far as proportionality is concerned, one may think that the E.C.J. could avoid new conflicts with national courts only by sticking to its constant interpretation of the principle of proportionality. However, this requires the Court to carefully assess the fundamental interests of national

[50] One may want to check the *Lisbon* judgment of the German Federal Constitutional Court (BVerfG, 2 BvE 2/08 *Gauweiler Die Linke v. Act of Approval of the Lisbon Treaty (Lisbon)*, Judgment of 30.6.2009) and the academic literature it has given rise to. *See* Armin Steinbach, *The Lisbon Judgement of the German Federal Constitutional Court - New Guidance on the Limits of European Integration?*, 11 GER. L. J. 367 (2010); Jacques Ziller, *The German Constitutional Court's Friendliness Towards European Law: On the Judgement of Bundesverfassungsgericht over the Ratification of the Treaty of Lisbon*, 16 EUR. PUBLIC L. 53 (2010); Daniel Thym, *In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court*, 46 COMMON MKT. L. R. 1795 (2009). Also, one should consider the Declaration 1/2004 of the Spanish Constitutional Court (European Constitution), Judgment K 18/04 of the Polish Constitutional Court (Accession Treaty) and Decision Pl. ÚS 19/08 of the Czech Constitutional Court (Lisbon).

[51] *E.g.*, Case 82/71, SAIL v Pubblico Ministero della Repubblica Italiana, 1972, E.C.R. 00119, at para. 5, the Court ruled that art. 177 of the Treaty on the European Economic Community is worded in general terms and draws no distinction according to the nature, criminal or otherwise, of the national proceedings within the framework of which the preliminary questions have been formulated. In Case 186/87, Cowan v Trésor public, 1989, E.C.R. 00195, at para. 19, the Court ruled that although in principle criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible, Community law sets certain limits to their power.

[52] *See, e.g.*, Case C-329/11, Achughbabian v Préfet du Val-de-Marne, 2011, E.C.R. I-12695, at para. 32.

https://doi.org/10.6092/issn.2531-6133/7180

societies and that should lead to a more comparative, cross-fertilized approach to proportionality. As a matter of fact, the decisions of national courts should be taken into proper account in order to identify the real scope of national interests. Otherwise, the proportionality test would be based on a one-way interpretation of both national and supranational interests by the Court which could cast some doubts on the effective fairness of the assessment.

Truth be told, the case law mentioned in this article makes it clear that the Court does not follow that interpretative approach and does not seem so willing to follow it for several reasons,[53] most of all because that may compromise its battle over judicial supremacy in Europe.[54] Anyway, the careful consideration of national courts decisions may be an interesting way to ascend – once and for all, maybe? – to the role of European Constitutional Court without disregarding national differences.

[53] *See* Gráinne de Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, 20 MAASTRICHT J. EUR. & COMP. L. 168 (2013).
[54] The expression "battle over judicial supremacy in Europe" may be found in Asterios Pliakos & Georgios Anagnostaras, *Who is the Ultimate Arbiter? The Battle Over Judicial Supremacy in Europe*, 36 EUR. L. REV. 109 (2011).

 https://doi.org/10.6092/issn.2531-6133/7234

A Primer on the "Bell Case Synthesis Method" and a Lesson on Adult Child's Play

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TABLE OF CONTENTS: 1. Introduction; 2. The Bell Method Explained; 3. The Bell Method Illustrated; 4. Conclusion.

ABSTRACT: The ability to successfully discern and communicate the relevant aspects of a judicial opinion is a fundamental skill that legal professionals must have. Despite its importance, many in the legal arena lack the ability to effectively demonstrate this skill. Needless to say, law students suffer from this same shortcoming. After years of reading inadequate briefs submitted by lawyers and reviewing deficient submissions by law students, I developed an original case synthesis method. This method, titled the "Bell Case Synthesis Method," teaches one how to select supporting cases and how to adequately explain the relevant aspects of selected cases. This original method has been tested for years and has proven to be quite valuable for memo and brief writing, as well as for the higher level thinking that is needed for success in law school and the practice of law. This article will benefit a broad audience, including lawyers, law students, paralegals, law clerks, inmate counsel and legal educators. In addition, it is timely, given the recent emphasis on producing practice-ready law school graduates.

KEYWORDS: *Legal Writing.*

https://doi.org/10.6092/issn.2531-6133/7234

1. INTRODUCTION

There are times when charm and flattery can lead to an unearned result. Unfortunately, those times do not exist in the legal writing arena. Legal writers must be able to deliver substance if they want to achieve a result through their written submissions. And, in legal writing, what is considered substance is not fodder for debate. It is universally understood to be the content of the Discussion section of legal briefs or memorandums. Case analysis and case synthesis happen to be two of the most important skills needed for the development of a robust Discussion in a legal brief or memorandum.

Case analysis is the process of taking a case apart.[1] Once this is done, legal writers are often tasked with determining how individual cases complement each other to establish a single rule. This process of putting the pieces back together is known as case synthesis.[2] In many ways, these processes bear a kinship to that familiar practice of toddlers spending hours dismantling blocks then spending more hours putting them back together. For the toddler, this is a sign of developmental progress. For the legal writer, there are but two diametrically opposed outcomes when it comes to this subject-matter: professional impotence or professional prowess. This is said because, if a legal writer cannot successfully demonstrate mastery of these skills, legal victories will likely not be achieved. This comes at an emotional cost to the writer, but matters are even worse for the party in need of a written advocate.

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[1] *See* LAUREN CURRIE OATES & ANNE ENQUIST, THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH, AND WRITING (5th ed. 2010); "Case analysis is the use of cases to make legal arguments." DIANA ROBERTO DONAHOE, LEGAL WRITING: ANALYSIS, PROCESS AND DOCUMENTS 31 (2011); Case analysis has also been explained as "[c]omparing and contrasting decisions to assess the outcome of an issue posed by a factual scenario." ANDREA B. YELIN & HOPE VINER SAMBORN, THE LEGAL RESEARCH AND WRITING HANDBOOK: A BASIC APPROACH FOR PARALEGALS 391 (6th ed. 2012).

[2] *See* LLAUREL CURRIE OATES & ANNE ENQUIST, THE LEGAL WRITING HANDBOOK ANALYSIS, RESEARCH, AND WRITING (5th ed. 2010); "Case synthesis is the weaving together of cases to create a clearly enunciated rule." DIANA R. DONAHOE, EXPERIENTIAL LEGAL WRITING ANALYSIS, PROCESS AND DOCUMENTS 32 (2011); Case synthesis has also been explained as the "binding together [of] several opinions into a whole that stands for a rule or an expression of policy." RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING STRUCTURE, STRATEGY, AND STYLE 155 (6th ed. 2009).

https://doi.org/10.6092/issn.2531-6133/7234

The aggrieved party will never be able to realize results in the judicial arena—not necessarily because the merits don't compel such—but often because the writer lacks the ability to articulate the legal position effectively. The personal toll of this is incalculable. Conversely, the writer who can demonstrate mastery of these skills increases his odds of personal success and simultaneously fills a meaningful void in society when it comes to successful advocacy and access to justice.

Despite the importance of these skills, many official players in the legal arena lack the ability to effectively demonstrate them. After a decade as an appellate court employee who regularly read barren briefs submitted by lawyers and inmates and nearly twenty years of reviewing deficient submissions by law students and paralegal students, I developed an original case synthesis method, called the "Bell Case Synthesis Method."[3] This was prompted by the realization that the current pedagogy proceeds on a deeply flawed presumption. It falsely assumes that the sound critical thinking skills needed to compete in law school or in the legal arena confers upon one the ability to critically analyze cases and to synthesize them effectively. The Bell Method was created upon the belief that every adult legal writer innately possesses these cognitive fundamentals by virtue of having passed the toddler stage. This method transposes what is organically contemplative into a deliberate, conscious approach to reasoning and communicating. More directly, the Bell Method converts an abstract intellectual skill into a formula-driven one that is performed through the use of a template that is scholastic in nature.

In Section I, I will explain the Bell Method by introducing the three stages of the process: (1) completion of the companion chart; (2) use of the companion chart to determine the worth of a case; and, (3) conversion of the companion chart content to a written summary of the case. Thereafter, in Section II, I will demonstrate the Bell Method by illustrating each of the three above-referenced stages. My hope is to offer a tool that lawyers, law students,

[3] The "Bell Case Synthesis Method," created by the author in 2008, is hereinafter referred to as the "Bell Method." It includes an original chart and an original method of organizing and presenting the substance of a case discussion.

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law clerks, paralegals, inmate counsel and legal educators can use to ensure the composition of intellectually satisfying, judiciously drafted legal documents.

2. THE BELL METHOD EXPLAINED

"Cases are synthesized because it is hard to find a single decision that articulates the precise rule of law to support a point in a memo or brief."[4] "Synthesizing authority requires finding a common theme from two or more sources that ties together the legal rule."[5] "Often one case holding will expand another, so the two holdings can be combined, or synthesized, to reflect an accurate statement of law."[6] The Bell Method teaches one how to select, from research findings, potentially useful cases, how to discern when a case is actually a beneficial authority and how to adequately explain the relevant aspects of the selected cases to a reader.[7] The Bell Method works equally well for objective and persuasive writing. The process begins with the factual scenario that needs to be resolved and the case(s) being considered as authority. There are three steps following this.

Step 1. Completion of the Bell Chart [8]

The Bell Method first requires completion of the companion Bell Chart. The chart is designed to address one legal issue at a time. The chart is a private instrument to be seen exclusively by the writer. It was created to aid with the higher order thinking needed to do case analysis and case synthesis. To complete the chart, case analysis is done as each case is critically read and picked apart. At this stage in the process, The Bell Chart is just a chart. Later, the Bell Chart becomes an outline for the written Bell Method of case

[4] ANDREA B. YELIN & HOPE VINER SAMBORN, THE LEGAL RESEARCH AND WRITING HANDBOOK A BASIC APPROACH FOR PARALEGALS 461 (6th ed. 2012).
[5] *Id.*
[6] YELIN & SAMBORN, *supra* note 5.
[7] For other methods, *see* LINDA H. EDWARDS, LEGAL WRITING AND ANALYSIS 122-125 (3rd ed. 2011) (discussing the work of Professor Michael Smith); RICHARD K. NEUMANN, JR. & SHEILA SIMON, LEGAL WRITING 54-58 (2nd ed. 2011); JUDITH M. STINSON, THE TAO OF LEGAL WRITING 66-67 (2009); Paul Figley, *Teaching Rule Synthesis with Real Cases*, 61 J. Legal Educ. 245 (2011); Tracy McGaugh, *The Synthesis Chart: Swiss Army Knife of Legal Writing*, 9 Persp: Teaching Legal Res. & Writing 80 (2001).
[8] The "Bell Chart" was created by the author in 2008 for use with the Bell Method.

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synthesis. Eventually, the chart is discarded. This is an illustration of the blank Bell Chart:[9]

Table 2

	(Unresolved Factual Scenario)	(Comparison Case #1)
1. WEIGHT OF AUTHORITY		
* 2. PROCEDURAL DEVICE		
* 3. COA/ISSUE		
* 4. APPLICABLE LAW(S)		
* 5. FACTS (Summarize operative)		(SIMILAR & OUTCOME DETERMINATIVE) (DIFFERENT & OUTCOME DETERMINATIVE)
6. DATE/APPLICABLE		
* 7. HOLDING		
* 8. ANALYSIS (Law then law applied to facts)		
* 9. VALUE (Why case is/is not useful? How it relates? / Policy considerations? Counterarguments?)		

Once a case is read, the writer must begin the process of inputting the case content onto the Bell Chart, which is comprised of three separate sections: (1) the numbered entries on the left side; (2) the middle section of the chart; and, (3) the right side of the chart. The numbered entries on the far left of the chart is the starting point. There are a total of nine sections. Each of these nine factors must be addressed on the chart (but not necessarily in the written summary that will appear in the document). These nine factors are what takes the mystery out of the case synthesis process because they guide

[9] The illustration contains one case. The chart can be expanded to include multiple cases. "While comparing one case to your case can be effective, it is often too simplistic or might not thoroughly and accurately reflect the law. Usually, multiple cases exist for each rule of law. Therefore, the judge will need to determine which prior cases are more on point and which are closer to the facts and issues presented by your client's case. By providing multiple cases for comparison, you present a broad view of the law and explain where your client's situation fits into that law." DIANA R. DONAHOE, EXPERIENTIAL LEGAL WRITING ANALYSIS, PROCESS AND DOCUMENTS 37 (2011).

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the writer through the necessary critical thinking steps. Without this guidance, the writer is left to his own devices. The next section on the chart is the middle section. The middle section of the Bell Chart is completed based on the factual scenario that needs to be resolved. The writer looks to the nine factors and asks each of those questions, based on the scenario to be resolved, an inputs answers. The far-right section of the chart is completed based on the case being considered as an authority. The writer looks to the nine factors and asks each of those questions, based on the case being considered as an authority, an inputs answers.

I will now endeavor to explain each of the nine factors on the left side of the Bell Chart:

> **Box 1-Weight of Authority:** Consider the hierarchy of courts. Which court authored this opinion? Simply state where the court appears on the hierarchy of courts, i.e. state supreme court. The intention is to have the writer consider whether the opinion is still subject to change and/or to consider the weight of a strong precedent. The writer should also be mindful of the fact that a court is generally bound only by decisions from higher courts in its jurisdiction so it should be noted if the case is controlling authority.
>
> **Box 2-Procedural Device:** The legal dispute stems from some piece of paper that was filed in court. What is the name of this document? An example is a motion for summary judgement. This is a very important consideration as cases are considered because different procedural devices call for different standards of proof and burdens of proof. The intention is to have the writer consider if there are differences in the cases, which could make the cases too different to be used for support or even make the cases distinguishable. It is not unusual that a case will involve multiple procedural devices, including some introduced at each stage that the case has travelled along the hierarchy. The writer must address only the one that comports with the scenario at issue.
>
> **Box 3-Cause of Action or Issue:** The writer must identify the legal issue that the court is addressing. While it is true that some cases involve multiple legal issues, the odds are that only one of those issues is being evaluated so that is the issue to insert here. If

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your research involves multiple issues, separate charts must be used for each issue.

Box 4-Applicable Law(s): Identify the law(s) or authority upon which the court bases its analysis. There are a range of options to insert, including statutory law, administrative agency rules, jurisprudence or custom. It is not unusual for a court to rely on multiple authorities or to use laws from multiple sources, such as a codified law in concert with law extracted from the cases. There is a direct correlation between this box and box #3 as the applicable law should be responsive to the cause of action/legal issue.

Box 5-Facts: The middle column involves the facts from the scenario that is awaiting resolution. In as few words as possible, the writer must state the legally significant facts [hereinafter LSFs] and do so in bullet format.[10] The right column involves the facts of the case being analyzed on the chart. The writer must compare those facts (in the right column) to the facts in the middle column. In this instance, only LSFs are being used. As LSFs are extracted from the case, look to the middle column and ask: is this fact (from the case) very similar to the fact in the middle column or is this fact (from the case) very different from the fact in the middle column. Using bullet format and as few words as possible, insert your answer in the right column under the "similar" space if it is similar or under the "different" space if it is different.

Box 6-Date/Applicable: The writer must consider the date of the factual scenario that awaits resolution and insert it in the middle column. If possible, a month/day/year format should be used. Next, look at the date of the case being used and insert it in the right column. If possible, a month/day/year format should be used. This box often serves as an alert that law may have changed, that the selected case may not be the best one to use due to its age or that the selected case shows longstanding, time-tested principles because of its age.

[10] LSFs or determinative facts "are essential to the court's decision because they determine the outcome. If they had been different, the decision would have been different…[they] lead to the rule of the case—the rule of law for which the case stands as precedent….[these facts] can be identified by asking the following question: *If a particular fact had not happened, or if had happened differently, would the court have made a different decision?* If so, that fact is one of the [LSFs or] determinative facts." RICHARD K. NEUMANN, JR. & KRISTEN KONRAD TISCIONE, LEGAL REASONING AND LEGAL WRITING 31 (7th ed. 2013).

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Box 7-Holding: "N/A" will appear in the middle column since there has, obviously, not been a resolution of the legal issue before you. Next, locate the holding of the case you are using and insert it on the right column. If the case has many issues, tailor this to the one issue that you are analyzing on the chart.

Box 8-Analysis: "N/A" will appear in the middle column since there has, obviously, not been a resolution of the legal issue before you. There are two things that must go in the right column: the law the court used (at the top of this box) then how the court applied the facts to that law—their reasoning (at the bottom of this box). The entire focus of this box is on what the court expressed. If they considered it, it must be inserted succinctly. Thinking of law in terms of elements will make this process easier to conquer. To do this, list the law in elements (top box) then write the analysis (bottom box) as if it is a response to how the court decided each element (as opposed to a discussion of an entire legal provision).

Box 9-Value: "N/A" will also appear in the middle column since there has, obviously, not been a resolution of the legal issue before you. Before entering a response on the right column, consider: How does this case relate to the factual scenario at hand? Is this case useful? Why is this case useful? The best way to determine this is to apply the reasoning from the bottom of box #8 to the factual scenario you are attempting to resolve. There are two final considerations. Are there relevant policy considerations? If so, explain how this applies. Are there counterarguments to be discussed? If so, explain how this applies.

Step 2. Use of The Bell Chart to Determine The Worth of a Case

Once each case has been imputed onto the chart, the writer must determine which ones to include in the Discussion. This requires a mindset much like the one employed by those seeking a life partner. These people realize there are some relationship deal breakers, such as views on religion, politics, finances and children. When these things present themselves adversely in a potential mate, several at once, it's a hint that the search for a suitable mate must continue. The process of selecting suitable cases work the same way. All boxes

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must be considered as the case comparison is being done. Some of the boxes on the Bell Chart are deal breakers when it comes to determining if a case is worth using. Once the Bell chart is completed, you must give deep thought to the following boxes: 2-procedural device; 3-cause of action/issue; 4-applicable law(s); and, 5-facts. If these boxes don't line up, you are spending time with the wrong one.

If the case survives this litmus test, every brain cell must be summoned to box #9 where the writer must articulate the value of the case or declare the case to be lacking in value. There, the writer must consider the court's reasoning (that was explained in the bottom of box #8) against the factual scenario that awaits resolution. The writer must use the lesson the court taught (in box #8), but do so with the new facts (those from the scenario that awaits resolution). Lastly, the writer must contemplate policy considerations[11] and how they factor into the overall picture. The writer must do the same with counterarguments.

When a decision to make an analogy between cases is made, the writer is showing "that two situations are so similar that the reasoning that justified the decision in one should do the same in the other."[12] Certainly, the writer should be on the lookout for similarities because it must be determined if the similarities make the cases analogous, but this can't be the end of the inquiry. Sometimes the differences in the case can be helpful so remember it's not only similarities that matter when it comes to case synthesis:

> [A]t times you will find only cases where the holdings run contrary to your preferred outcome. In these situations, you will distinguish the unfavorable case by arguing that the rule doesn't apply at all or that it should be applied differently. While distinguishing cases can make you feel as if you are on the defensive, this technique can help you

[11] Public policy might be thought of as "the collective morality of the people." *See* Roderick C. White Sr., *How the Wheels Come Off: The Inevitable Crash of Irreconcilable Jurisprudence: Laws Based on Orthodox Judeo-Christian Theology in a Pluralistic Society,* 37 S.U.L.REV. 127, 178 (2009); "'Analyzing policy' means explaining how an outcome will benefit or disadvantage society. Because both sides of an issue can generate reasons why society would be better off if their side won, think of generating policy rationales as looking for the strongest policy reasons that benefit a particular side…." TERRILL POLLMAN, JUDITH M. STINSON, ELIZABETH POLLMAN, LEGAL WRITING EXAMPLES & EXPLANATIONS 134 (2nd ed. 2014); "Lawyers make policy arguments when there is no applicable rule on the subject…, when existing rules are ambiguous, and to bolster other legal arguments." DIANA R. DONAHOE, EXPERIENTIAL LEGAL WRITING ANALYSIS, PROCESS AND DOCUMENTS 6 (2011).

[12] RICHARD K. NEUMANN, JR. & KRISTEN KONRAD TISCIONE, LEGAL REASONING AND LEGAL WRITING 117 (7th ed. 2013).

https://doi.org/10.6092/issn.2531-6133/7234

> produce very effective legal arguments. However, do not feel as if you have to distinguish a case merely because it is different. All cases are different from one another. The question is whether the differences are legally significant.[13]

"Distinguishing is the opposite of analogy: a demonstration that two situations are so fundamentally dissimilar that the same result should not occur in both."[14] If you see a relative connection between the factual scenario that awaits resolution and what you entered into box #9, the case is likely valuable and you will need to include it in your discussion. If you conclude that the case has no value, discard it and begin the process again with the next case in your research stack.

Step 3. Converting the Bell Chart to a Written Summary of the Case

Once the case comparison is concluded, the writer must, during the written summary process, include the required Bell Chart boxes that have an asterisk. Next, the writer must decide if the optional boxes, which have no asterisk, should be included. If the optional boxes contain no pertinent information, the box should be ignored.

At this stage, the writer must shift his thinking from previously viewing the Bell Chart as a mere chart made up of nine separate factors to now viewing the chart as the outline of a case that will be explained in three separate sections or paragraphs. The point to grasp here is that every case is discussed through at least three paragraphs or sections. Usually, Section I can be addressed in a single paragraph. Section II normally can be resolved in one or two paragraphs. Section III can often be resolved in one or two paragraphs. In each of these sections, the writer must construct a flowing paragraph while not calling attention to any boxes. The writer simply weaves the content of the boxes into the discussion. Here is an illustration of the three paragraph/section conceptualization of the Bell Chart that is needed during the writing process:

[13] DIANA R. DONAHOE, EXPERIENTIAL LEGAL WRITING ANALYSIS, PROCESS AND DOCUMENTS 35 (2011).
[14] RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING STRUCTURE, STRATEGY, AND STYLE 154 (6th ed. 2009).

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Case #1: Section I or Paragraph I

Box 1-Weight of Authority: This is an optional box (thus the absence of an asterisk on the chart). If the weight of the case is not impressive, don't mention it.

Box 2-Procedural Device: This content must be included (thus the asterisk on the chart).

Box 3-Cause of Action or Issue: This content must be included (thus the asterisk on the chart), but this must be done in a simple way and not formally. For example, if a motion for summary judgment were at issue, you would simply say something like: "in its discussion of this motion for summary judgment." You would not make a formal statement such as this: "Whether the plaintiff Oretha Hailey should prevail in her wrongful death action after her husband was killed by a cashier with a history of unprovoked and unpredictable episodes of violence?"

Box 4-Applicable law(s): This content must be included (thus the asterisk on the chart).

Box 5-Facts: This content must be included (thus the asterisk on the chart).

Box 6-Date/Applicable: This is an optional box (thus the absence of an asterisk on the chart).

Box 7-Holding: This content must be included (thus the asterisk on the chart).

NOTES:

The content is not negotiable, but the order is.

Section I will always be objective because it is merely an overview of the court's actions.

No other content is allowed in this paragraph/section.

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Case #1: Section II or Paragraph II

Box 8-Analysis: This content must be included (thus the asterisk on the chart).

NOTES:

The content is not negotiable.

Section II will always be objective because it is where the writer explains the law (s) the court used then shows how the court applied this law or reasoned its way to a legal conclusion. In this section, the writer must take great caution to paraphrase what the court said, did, thought and/or considered. Preface statements with "the court said/felt/thought/considered" to guard against accidentally inserting the writer's thoughts. Failure to do so gives the appearance of the writer expressing his independent thoughts, which has no authoritative value in law.

The writer should guard again using excessive quotes. The reader needs to see the writer's summary of the court's reasoning. Use of excessive quotes is tantamount to suggesting that the reader should use the excerpts provided to figure out for themselves what is valuable about the case.

No other content is allowed in this paragraph/section.

Case #1: Section III or Paragraph III

Box 9-Value: This content must be included (thus the asterisk on the chart).

NOTES:

The content is not negotiable.

Section III can be written objectively or persuasively so the writer must contemplate the ultimate objective for the written submission before this section is composed.

Ultimately, Section III should be responsive to the call of the question. This is accomplished by lifting the reasoning from box #8 and applying it to the scenario that awaits resolution and suggesting

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an outcome, based on that reasoning. Before Section III is concluded, the writer should consider policy considerations and counterarguments and address them if they add substance to the discussion of the case.

The writer should guard again using excessive quotes. The reader needs to see the writer's comparison of the cases. Use of excessive quotes is tantamount to suggesting that the reader should use the excerpts provided to figure out for themselves what is valuable about the court's reasoning.

No other content is allowed in this paragraph/section.

3. THE BELL METHOD ILLUSTRATED

In this instance, the writer is writing on behalf of Billie Holliday. This writer has located the case of *Guillory v. Interstate*. The writer will first complete the chart. Thereafter, the writer will do a synthesis of the case, using the three section Bell method.

The Billie Holliday Factual Scenario:

Erica Cane, the victim in this instance, was an employee of the Louisiana Office of Student Financial Assistance. Several days prior to her death, she notified her supervisor of an immediate need to secure a restraining order to protect her from acts of violence perpetrated by her spouse. Her request was accommodated. A few days later, while at work, Erica Cane received a death threat from her estranged husband. Shortly after alerting a co-worker and the authorities, she was shot and killed by her estranged husband at her place of employment on February 7, 1998.

Billie Holliday, individually and as tutrix of Erica Cane's four minor children, filed suit alleging negligence on the part of Erica Cane's employer, prompting the state of Louisiana to file a motion for summary judgment asserting its immunity from tort liability (pursuant to the Louisiana Workers' Compensation Act). Billie

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Holliday specifically alleged that the state of Louisiana was liable in tort because it failed to provide Erica Cane with a safe workplace and that the state of Louisiana was also vicariously liable for the failures of Erica Cane's co-workers to procure security guards in a timely manner and because the security guards had not been trained to use the multi-line phone system and, as a result, caused a delay in summoning the police.

A district court hearing was held before the Honorable Greg Mathis. At issue was the state of Louisiana's motion for summary judgment (opposing a tort action and contending that workers' compensation was the exclusive remedy). The court denied the State's motion, holding that La. R.S. 23:1031 did not bar Billie Holliday from bringing an action in tort against the state of Louisiana. The State filed an appeal asking the appellate court to determine if the trial court erred in denying its motion for summary judgment.

The Completed Bell Chart Based on the Billie Holliday Factual Scenario & One Comparison Case:

Table 2

1. WEIGHT OF AUTHORITY	(*Holiday v. State of Louisiana*) appellate court (state)	*Case #1: Guillory v. Interstate* Louisiana Supreme Court
*2.PROCEDURAL DEVICE	Civil appeal re M.S.J.	Civil appeal re employer's M.S.J.
*3. COA/ISSUE	Tort suit or workers' compensation?	Entitled to workers' compensation?
*4. APPLICABLE LAW	Louisiana Workers' Compensation Act (1914) (codified as amended at LA. REV. STAT. ANN. §§ 23:1031 to 23:1379 (2012)) (generally); LA. REV. STAT. ANN. § 23:1031 (amended 2011) (specifically).	Louisiana Workers' Compensation Act (1914) (codified as amended at LA. REV. STAT. ANN. §§ 23:1031 to 23:1379 (2012)) (generally); LA. REV. STAT. ANN. § 23:1031 (amended 2011) (specifically).
*5 FACTS (Summarize operative)	1. Erica Cane worked for the state of La. 2. Employer accommodated her request for a T.R.O.	(SIMIILAR & OUTCOME DETERMINATIVE) 1. Teresa Guillory worked at gas station 2. As she was stacking cigarettes near a window, her husband, who never entered the building, shot

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	3. While at work doing her job, Erica received a death threat from her estranged husband. 4. Shortly thereafter, he entered & shot her at her workplace. 5. Erica died.	through the glass and struck her. --- *(DIFFERENT & OUTCOME DETERMINATIVE)* 1. Husband shot from outside to inside (Doesn't change outcome under W.C. law). 2. Employer refused her request to carry a weapon at work (Doesn't change outcome under W.C. law). 3. Employer didn't accommodate request for R.O. (Doesn't change outcome under W.C. law). 4. Teresa survived (Doesn't change outcome under W.C. law).
6. DATE/ APPLICABLE	02/07/1998	03/30/1995
***7. HOLDING**	N/A	Shooting is not work-related so no W.C. Tort suit is remedy.
***8. ANALYSIS** (Law then law applied to facts)	N/A	Law: WC due when injury/accident: (1) arises out of; and, (2) in course & scope of employment. #1= look to character/origin of risk or risk— see if accident came about because of employment risks or purely personal risks. #2= Look to time/place of incident. Application: #2/In course & scope? Yes— #2= easy says the court. Stacking cigarettes as employed to do. #1/Arising out of employment? Court says #1 = harder question. Court feels accident is purely personal, i.e. marriage. Injury has nothing to do with risks of the job. Court feels #2 exists, but not #1.
***9. VALUE** (Why case is/is not useful? How it relates? Policy considerations? Counterarguments?)	N/A	Useful. Factually and procedurally analogous. Can apply analysis of #1/ "arising out of" to show shooting was personal & not connected to employment. P.C.? Yes. Counterarguments? No.

https://doi.org/10.6092/issn.2531-6133/7234

Written Summary of the Case To Be Used As Authority in the Billie Holliday Discussion (Presented in Three Paragraph/Section Format):

In *Guillory v. Interstate Gas Station*,[15] the Louisiana Supreme Court addressed when an accident is considered to have "arisen out of" one's employment. *Guillory* involves a convenience store clerk who was shot by her spouse while the victim was at work stacking cigarettes as required by her employer. Mrs. Guillory survived and sought workers' compensation benefits. In response, the workers' compensation insurer filed a motion for summary judgment asserting the belief that Mrs. Guillory was precluded from recovery under the workers' compensation act because, according to the insurer, her injuries resulted from matters unrelated to her employment. The court agreed and held that workers' compensation benefits would not awarded.

Note how paragraph / section 1 contains content from boxes #1-#7 only and notice how the paragraph strings these boxes together so they flow without mentioning any boxes in particular.

The *Guillory* court approached its analysis of Mrs. Guillory's entitlement to workers' compensation by separately considering the terms "arising out of" and "in the course and scope of employment." In so doing, the court interpreted the meaning of a "dispute" over matters "unrelated to…employment" as referenced in La. R.S. 23:1031(D). The *Guillory* court explained that a determination as to "course and scope" can only be reached by looking to the time and place of the incident in question. When applied to Mrs. Guillory's case, the court reasoned that Mrs. Guillory, a service station clerk, was shot while stacking cigarettes inside the service station. Thus, the court rather effortlessly decided that Mrs. Guillory was acting within the "course and scope" of her

Note how paragraph / section 2 only includes content from box #8. Also, note how law is presented at the beginning of this paragraph and application appears at the end of this paragraph.

[15] *Guillory v. Interstate Gas Station*, 94-1767 (La. 03/30/95); 653 So. 2d 1152.

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employment at the time and in the place she was shot. As to the latter part of the inquiry ("arising out of"), the court advised that one must look to the risks of the job. The court then reasoned that Mrs. Guillory was not shot because of employment-related risks because there was nothing about her workplace or official duties that caused her injury on the night in question. Instead, the court noted that the shooting happened in the context of an ongoing marital dispute, which just happened to have visited Mrs. Guillory's workplace. In furtherance of this thinking, the court expressed that Mrs. Guillory was shot for reasons unrelated to her employment. In reasoning that the shooting was purely the result of marital difficulties and, in no way, related to her employment duties, the court concluded that the employer was not responsible for her injuries.

Note how paragraph / section 3 only contains content from box #9. Also, note how this paragraph is responsive to the call of the question or the legal issue that the writer is addressing.

Guillory is quite insightful. The *Guillory* court's guidance on the meaning of "arising out of" employment helps to evaluate Ms. Holliday's case. The *Guillory* court suggests focusing attention on whether the accident came about because of employment risks or because of purely personal risks. Ms. Cane was estranged from a man she had a history of domestic violence with. Shortly before she was murdered at work, he called her at work and threatened her. When the *Guillory* court's reasoning is applied, a single view emerges and that is that Ms. Cane's shooting, though it happened at work, was the result of a purely personal marital dispute and was in no way related to her duties as an employee of the Office of Student Financial Assistance. Thus, it is my informed view that Ms. Cane's shooting was totally unrelated to her employment, making Ms. Holliday's remedy a tort action and not a workers' compensation action. As an

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additional consideration, there is at least one policy consideration at issue. A ruling suggesting that a tort remedy is permissible would be unjust to employers whose liability would expand exponentially. This can cause harm to Louisiana's businesses who would have to bear these additional costs and, in turn, harm the public who could then have fewer employment options. For this added reason, a remedy in tort is advocated.

4. CONCLUSION

"Synthesis is the bringing together of various legal authorities into a unified cohesive statement of the law."[16] "By focusing on the reasoning and generic facts that the cases have in common, synthesis finds and explains collective meaning that is not apparent from the individual cases themselves."[17] "Synthesis adds analytical insight to…legal documents and makes reading them easier."[18] This is arguably one of the most challenging of legal writing tasks. It is also the one that plays the greatest role in professional and legal success and, astonishingly, it calls upon intellective processes routinely performed by toddlers and certainly demonstrable by adults.

The Bell Method is a proven way of achieving case synthesis. The results have been astonishing. Prior to the development of the Bell Method, students would omit needed content from case discussions, spend too much time discussing irrelevant content from cases, lift an endless string of quotes and paste them into documents without any personal explanation of why the material was extracted or students would miss the entire point of the case. After introduction of the Bell Method, most of these concerns dissipated. When one gives thought to how high the stakes are at the point in time that Discussions are drafted in the legal profession, I suspect there is little need for

[16] YELIN & SAMBORN, *supra* note 5.
[17] NEUMANN, *supra* note 15, at 155.
[18] YELIN & SAMBORN, *supra* note 5.

https://doi.org/10.6092/issn.2531-6133/7234

convincing that taking it apart only to put it back together is more than mere child's play.

 DOI 10.6092/issn.2531-6133/7258

Etching the Borders of Arbitration Agreement: the Group of Companies Doctrine in International Commercial Arbitration under the U.S. and Turkish Law

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ABSTRACT: In the 21st Century, the commerce is not confined to the boundaries of any single-nation state. Hence, we have been witness to the transactions and disputes involving multiple parties and legal systems. Assuming that you are an in-house counsel in an MNE. Do you ever wonder whether the parent or sister companies' counsel or the opposing counsel may make contact with you about the arbitral proceedings that your client has never agreed on in the first place? Is it possible whether the non-signatory parties are bound by or benefit from the arbitration agreement, and what could be the possible legal grounds given the doctrine of privity of contract? This article discusses one of these grounds, the group of companies doctrine, in the context of Turkish and US legal systems comparatively and explores its applicability in light of precedents.

KEYWORDS: *Arbitration Agreements; Doctrine of Privity: Non-Signatory Parties; Group of Companies Doctrine.*

DOI 10.6092/issn.2531-6133/7258

1. INTRODUCTION

Globalization is sitting in the catbird seat in our era. Recent decades, therefore, have witnessed that international commercial transactions are booming in terms of their size and sophistication. M.N.Es (multinational enterprises) usually include arbitration clauses in their transactions to navigate the risks that come with foreign jurisdiction and to protect their investment at stake. Such international business transactions often involve a myriad of contracts and parties. Hence, these transactions engender a variety of disputes. It is inevitable that when such a dispute arises, it will have a bearing on almost all of the parties' interest in the transaction. It would be ill-defined and vague to state that only parties who agree to arbitrate can be included in the proceedings since non-signatory parties can become a part of proceedings through a few special theories of law. Arbitrators, most often in the interest of fairness, feel compelled by circumstances to reach beyond the specific parties to an arbitration agreement.

This article discusses one of these theories, the group of companies doctrine, in general. It first summarizes the rule of agreement to arbitrate and its exceptions. The article continues with the application of the group of companies doctrine in international arbitration, specifically comparing the United States, where a pro-arbitration regime has been adopted, and Turkey, which is one of the less arbitration-friendly countries. The aim of this chapter is to present selected cases where the facts supported the application of the group of companies and then to discuss which theories acted as a substitute for the doctrine. The last part concludes by suggesting methods of drafting an arbitration clause to prevent taking chances with or to facilitate becoming a non-signatory party in international arbitration.

2. TAXONOMY OF NOTIONS RELATED TO THE 'GROUP OF COMPANIES' DOCTRINE: NON-SIGNATORY PARTIES IN ARBITRATION

We are conversant with a hornbook principle of contract law that an arbitration agreement does not bind a non-signatory party, and such an agreement cannot

DOI 10.6092/issn.2531-6133/7258

be enforced against them,[1] yet certain exceptional theories allow arbitration clauses to be imposed by or against non-signatory parties.

2.1. RULE: AGREEMENT TO ARBITRATE

International commercial arbitration is a private contractual process that yields final and binding results between the disputants.[2] Parties exploit the contractual nature of arbitration by tailoring the process to their needs, including with respect to procedural rules of arbitration, applicable substantive law, tribunal members, and the costs of arbitration.[3] It is noteworthy that arbitration "is a matter of consent, not coercion"[4] and this proposal is the heart of the discussion covered in this paper because the courts confirm that the non-signatories are bound by or benefit from arbitration agreements "only in rare circumstances".[5]

2.2.EXCEPTION: NON-SIGNATORY PARTIES

Whereas civil law scholars refer to "extending" the arbitration clause to non-signatories, Anglo-American scholars prefer "joining" non-signatories to the arbitration agreement.[6] Both terminologies refer to the same situations: in our case (1) when a non- signatory company of the arbitration agreement commences arbitration proceedings through an arbitration contract signed by one or more of the companies within the same group; or (2) when a non-

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[1] *See, e.g.*, United Steelworkers of Am. v. Am. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960); Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 779 (2d Cir. 1995).

[2] THOMAS E. CARBONNEAU & WILLIAM E. BUTLER, INTERNATIONAL LITIGATION AND ARBITRATION 571 (2nd ed. 2013); Winston Stromberg, *Development in the Law: Transnational Litigation: III. Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes*, 40 LOY. L.A. L. REV. 1337, 1341 (2007).

[3] CARBONNEAU & BUTLER, *supra* note 2, at 573. *See* also *United Steelworkers*, 363 U.S. at 581.

[4] Volt Info. Scis., Inc. v. Bd. of Trs., Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

[5] Westmoreland v. Sadoux, 299 F.3d 462, 465 (5th Cir. 2002) (citing Hill v. G.E. Power Sys., Inc., 282 F.3d 343, 347-49 (5th Cir. 2002)).; MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 35 (2012).

[6] William W. Park, *Non-signatories and International Contracts: An Arbitrator's Dilemma*, in MULT. PARTY ACTIONS INT'L. ARB. 3, 4-5 (2009).

DOI 10.6092/issn.2531-6133/7258

signatory company is obliged to participate as a defendant in arbitration proceedings which is commenced by or against another company within the same group pursuant to the clause signed.

There is a burgeoning trend for tribunals and courts to make arbitration clauses binding, even on third parties who never signed an arbitration agreement.[7] This is because of the well-entrenched principle of supporting the agreement to arbitrate, and it is in part driving the growing popularity of arbitration.

2.2.1. FRAMEWORK OF THE 'GROUP OF COMPANIES' DOCTRINE

Characteristics of the group of companies doctrine include either a non-signatory company availing itself of or being bound by an arbitration agreement in which another company in the same group is a part of the agreement.[8]

As we mentioned before, the parties are free to choose rules, which the arbitral tribunal adopts to conduct the proceedings. Considering the rules, the arbitral tribunal determines the scope and the effects of its jurisdiction. In cases where parties are silent on the situation of a non-signatory company in their arbitration agreement, an arbitral tribunal may "manipulate" its jurisdiction by joining the non-signatory company to arbitration. This practice has been mostly adopted and endorsed by the I.C.C., and after over a thirty-year period of application, it still maintains its importance.[9]

Not surprisingly, the trailblazing case on the group of companies doctrine is an I.C.C. case, Dow Chemical France v. Isover Saint Gobain (hereinafter *Dow Chemical*).[10] In this dispute, claimants were Dow Chemical France, the Dow Chemical Company- which was the parent company- Dow Chemical A.G. and Dow Chemical Europe- which both were subsidiaries- and

[7] *See ICC Arbitration Posts Strong Growth in 2015*, ICC, http://www.iccwbo.org/News/Articles/2016/ICC-Arbitration-posts-strong-growth-in-2015/(last visited Nov. 13, 2016).
[8] *See, e.g.*, John P. Gaffney, *The Group of Companies Doctrine and the Law Applicable to the Arbitration Agreement*, in NORTON ROSE FULBRIGHT'S INT'L. ARB. REP., May 2016 at 21-22 (briefing the essential cases where the group of companies doctrine applied).
[9] *See* Otto Sandrock, *Arbitration Agreements and Groups of Companies*, 27 THE INT'L LAW. 941, 941-942 (1993) (listing the awards where the group of companies doctrine applied by the ICC tribunals).
[10] Dow Chemical France v. Isover Saint Gobain, 9 Y.B. Comm. Arb. 1984 at 131, 131 (ICC Int'l Ct. Arb.).

DOI 10.6092/issn.2531-6133/7258

the respondent was Isover Saint-Gobain.[11] There were two distribution agreements signed between Dow Chemical A.G., Dow Chemical Europe and Isover Saint-Gobain, and thereby, the arbitral tribunal was supposed to have no jurisdiction over Dow Chemical France and the Dow Chemical Company.[12] However, the parties agreed that Dow Chemical France or any other subsidiary of the Dow Chemical Company could make deliveries under the distribution agreements.[13] The dispute arose from the products' quality, and therefore, Dow Chemical France, the Dow Chemical Company, Dow Chemical A.G. and Dow Chemical Europe initiated arbitration against Isover Saint-Gobain.[14] Isover Saint-Gobain argued that only Dow Chemical A.G. and Dow Chemical Europe were the parties of the distribution agreements and arbitration clauses, and as a result, the arbitral tribunal was exceeding the scope of its authority.[15]

In its awards, the arbitral tribunal took into consideration the negotiation, implementation and termination of the agreements that had been signed and found that both non-signatory parties had an active role during the agreement.[16] To justify this, the tribunal pointed out that Dow Chemical France played a crucial part in negotiations and also was the only supplier of the defendant.[17] The Dow Chemical Company, similarly, was the parent company and exercised a power of control when the subsidiaries concluded and carried out the agreements.[18] Combining all of these, the arbitral tribunal constructed a two-prong test, which required that (1) the signatory and non-signatory parties constituted a "single economic reality", in other words, a company group and (2) the non-signatory companies actively participated in the negotiation, performance and termination of the agreements.[19]

In *Dow Chemical,* arbitrators made the award in the interest of fairness because the non-signatory companies were “cherry-picking” while engaging in the negotiation, implementation and termination of the contracts like a

[11] *Id.* at 132-33.
[12] *Id.* at 132.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 134.
[16] *Id.* at 135.
[17] *Id.*
[18] *Id.* at 136-37.
[19] *Id.*

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signatory party but ignoring to arbitrate because it was not beneficial for their case.

The underlying motivation under *Dow Chemical* is that the international commercial arbitration is driven by the necessities of the evolving commerce, and therefore, the arbitrators should have the power to build resilience for these necessities, such as creating a new doctrine and apply the dispute. However, the group of companies doctrine, like any other new doctrines created by lex mercatoria, is open to criticism because lex mercatoria finds its own limits at the enforcement stage, and that can lead awards to be unenforceable before the national courts.[20]

Various subsequent I.C.C. cases have followed *Dow Chemical.*[21] Nonetheless, the doctrine has been criticized, and it has divided scholars and courts into two groups. One group which, sticking with a traditional approach, finds that this doctrine is unneeded and this issue should be solved under the law applicable to arbitration agreements,[22] and another group which, adopting a progressive approach toward arbitration, supports extending an arbitration agreement to non-signatory companies within the same group.[23]

Although in *Dow Chemical*, the contracts were governed by French law, not the lex mercatoria, the arbitrators engaged in lex mercatoria and created the group of companies doctrine. The Cour d'Appel de Paris still upheld the award.[24] The court, however, could have dismissed the award -considering the applicability of any novel doctrine- like the German Federal Supreme Court or the Supreme Court of the United Kingdom where they heard certain different cases based on the doctrine and rejected the doctrine.[25] These different stands

[20] *See* Abul F.M. Maniruzzaman, *The Lex Mercatoria and International Contracts:A Challenge for International Commercial Arbitration?*, 14 AM. U. INT'L L. REV. 657, 696-97 (1999).
[21] *See, e.g.*, EMMANUEL GAILLARD & YAS BANIFATEMI, PRECEDENT IN INTERNATIONAL ARBITRATION 522 (2008); ADAM SAMUEL, REVIEW OF JURISDICTIONAL PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY OF BELGIAN, DUTCH, ENGLISH, FRENCH, SWEDISH, SWISS, U.S. AND WEST GERMAN LAW, 102-6 (1989).
[22] *See, e.g.*, Société Kis France et autres v. Societe Generale et autres, 1992 Revue de l'Arbitrage 90, 93; Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd [2000] 2 SLR 98; BERNARD HANOTIAU, COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS 50 (2005).
[23] *See, e.g.*, Orri v. Société des Lubrifiants Elf Aquitaine [1992] Jur Fr 95 (11 January 1990).
[24] Société Isover-Saint-Gobain v. Sociétés Dow Chemical France and others, Cour d'appel [CA] Paris, October 21, 1983 REV. ARB. 98 (1984).
[25] *See, e.g.*, BGH, III ZR 371/12, 27 Nov. 2013 and Peterson Farms Inc. v. C&M Farming Ltd [2004] All E.R. (D) 50.

DOI 10.6092/issn.2531-6133/7258

of the national courts prove why the advocates of the traditional approaches' point may be worth further consideration.

2.2.2. COMPILATION OF OTHER EXCEPTIONS

Although a discussion of each of the exceptions is beyond the scope of this paper, under U.S. law, the majority of federal cases recognizes five theories: (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing/alter ego and (5) estoppel.[26] The third-party beneficiary theory has also been accepted as a sixth exemption.[27] Moreover, it is possible to name other theories, arising out of the arbitral awards, case law of other countries and secondary sources, such as assignment, novation, succession by operation of the law, and subrogation.[28]

As demonstrated, all these theories are accepted in a traditional sense, and they hinge on either contract or company law, or equity law. The rest of the paper will discuss whether there is a need to adopt the group of companies doctrine while the same result might be achieved through the abovementioned conventional doctrines.

3. THE U.S. LAW POSITION ON THE GROUP OF COMPANIES DOCTRINE

U.S. Courts are reluctant to acknowledge the group of companies doctrine, persisting with the idea that binding non-signatories is only possible under the

[26] *See, e.g.*, Reid v. Doe Run Res. Corp., 701 F.3d 840, 846 (8th Cir. 2012); Mundi v. Union Sec. Life Ins. Co., 555 F.3d 1042,1045 (9th Cir. 2009); World Rentals & Sales, LLC v. Volvo Constr. Equip. Rents, Inc., 517 F.3d 1240, 1248 (11th Cir. 2008); Zurich Am. Ins. Co. v. Watts Indus., 417 F.3d 682, 688 (7th Cir. 2005); Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 417 (4th Cir. 2000); Bel-Ray Co. v. Chemrite Ltd., 181 F.3d 435, 446 (3d Cir. 1999); *Thomson-CSF*, 64 F.3d at 776; *See also* Cosmotek Mumessillik Ve Ticaret Ltd. Sirkketti v. Cosmotek U.S.A., 942 F. Supp. 757, 760 (D. Conn. 1996) (adopting the same principles in terms of international commercial arbitration).

[27] *See, e.g.*, Wash. Mut. Fin. Group, LLC v. Bailey, 364 F.3d 260, 264 (5th Cir. 2004); Bridas S.A.P.I.C. v. Gov't of Turkm., 345 F.2d 347, 354 (5th Cir. 2003).

[28] James M. Hosking, *Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice without Destroying Consent*, 4 PEPP. DISP. RESOL. L.J., no. 3, 2004, at 469, 482-85.

DOI 10.6092/issn.2531-6133/7258

traditional theories recognized in *Thomson-CSF*.[29] It should be underlined that U.S. courts have never explicitly opposed the doctrine, but instead, they have applied different theories even though the facts supported applying the group of companies doctrine.[30]

The notable and most-relevant decision on the group of companies is *Sarhank Group v. Oracle Corp.* (hereinafter *Sarhank*) in which the Second Circuit found that the non-signatory parent was not bound by the foreign arbitral award rendered in Egypt, in spite of the fact that the arbitral tribunal had issued an award which concluded that the non-signatory parent was bound by the arbitration clause under the "group of companies" theory. Moreover, the Egyptian Supreme Court had upheld the award before the Second Circuit's ruling.[31]

In *Sarhank*, Sarhank Group, an Egyptian company, concluded an agency agreement (hereinafter the Agreement) with Oracle Systems Ltd. (hereinafter Systems), which was a wholly owned subsidiary of Oracle Group (hereinafter Oracle), a U.S. manufacturer.[32] The Agreement included an arbitration clause and Oracle was neither a party to the Agreement nor to the arbitration agreement.[33] A dispute arose between the contracting parties and Sarhank Group initiated arbitration against both Systems and Oracle, its parent.[34] Oracle objected to the tribunal's jurisdiction, arguing that it had not signed the Agreement.[35] Nonetheless, the tribunal rejected the claim and issued an award holding that Oracle and Systems were "jointly and severally liable".[36] The tribunal's reasoning was essentially based on the elements of the group of companies doctrine.[37] Sarhank Group moved to confirm and enforce the award

[29] *See, e.g.*, *Reid*, 701 F.3d at 846; *Mundi*, 555 F.3d at 1045; Denney v. BDO Seidman, L.L.P., 412 F.3d 58, 71 (2d Cir. 2005); Intergen N.V. v. Grina, 344 F.3d 134, 144 (1st Cir. 2003).
[30] Alexandre Meyniel, *That Which Must Not Be Named: Rationalizing the Denial of U.S. Courts With Respect to the Group of Companies Doctrine*, 3 ARB. BRIEF, no. 1, 2013, at 18, 32.
[31] Sarhank Group v. Oracle Corp., 404 F.3d 657, 658-59 (2d Cir. 2005).
[32] *Id.* at 658.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 662 (stating the award that "despite ... their having separate juristic personalities, subsidiary companies to one group of companies are deemed subject to the arbitration clause incorporated in any deal either is a party thereto provided that this is brought about by the contract because contractual relations cannot take place without the consent of the parent company owning the trademark by and upon which transactions proceed.").

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in the United States pursuant to the "New York Convention",[38] codified at 9 U.S.C. § 201-08.[39] The district court entered the judgment for Sarhank Group, but Oracle appealed the decision to the Second Circuit.[40]

The Second Circuit accepted Oracle's arguments on the grounds that Oracle did not enter into the Agreement, and the arbitrators lacked jurisdiction to determine arbitrability. Hence, the Second Circuit vacated the award.[41] Further, the Second Circuit remanded for a determination as to whether Oracle was bound by the arbitration agreement "on any basis recognized by American contract law or the law of agency", and the other ground was that "enforcement of the award would be contrary to American public policy." [42]

The Third Circuit has followed the Second Circuit's analysis in *Thomson-CFS*,[43] and it has held a narrow view in considering the extension of arbitration clauses to non-signatories.[44] In *E.I. Dupont*, DuPont China, Rhone Poulenc Fiber and Resin Intermediates (hereinafter Rhodia Fiber), and Liaoyang Petro-Chemical Fiber Company were a part of the arbitration clause included in the Joint Venture Agreement (hereinafter the J.V.A.).[45] The J.V.A. also contained a provision that the parents would "assist the Company in the balancing of foreign exchange…".[46] Furthermore, to ensure the success of the company, the J.V.A. set forth that the parties "and their *Affiliates* [emphasis added] will not

[38] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Dec. 29, 1970, 21 U.S.T. 2517, 1970 U.S.T. LEXIS 115.
[39] *Sarhank Group,* 404 F3.d at 659.
[40] *Sarhank Group,* 404 F3.d at 658.
[41] *Sarhank Group,* 404 F3.d at 662-63.
[42] *Sarhank Group,* 404 F3.d at 659.; *See also* Motorola Credit Corp. v. Uzan, 388 F.3d 39, 65 (2d Cir. 2004) (applying the law of the contract, Swiss law, to the issue of whether a non-signatory could benefit from an arbitration clause.) In *Motorola*, Motorola entered into a number of agreements governed by Swiss Law, containing a clause that any dispute arising under the agreement shall be submitted to arbitration. *Id.* 43. In this case, the Second Circuit found that "under Swiss law, defendants, as non signatories to the agreements, *may not* invoke the arbitration clauses contained in those agreements." *Id.* 51. This created a split in authority inside the Second Circuit regarding the consideration of the choice-of-law clauses and its application to the non-signatories because in *Sarhank*, the Second Circuit did not apply the Egyptian law to the issue of non-signatories. For the attempt of reconciliation *see* Republic of Ecuador v. ChevronTexaco Corp., 376 F. Supp. 2d 334, 355 (S.D.N.Y. 2005).
[43] E.I. Dupont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 195 (3d Cir. 2001) (incorporating one more exception, the third party beneficiary, into the exceptions counted in *Thomson-CSF*, 64 F.3d at 776).
[44] *See, e.g.*, Invista S.à.r.l. v. Rhodia, SA, 625 F.3d 75, 85 (3d Cir. 2010); *E.I. Dupont.*, 269 F.3d at 195; *Bel-Ray Co.*, 181 F.3d at 446.
[45] *E.I. Dupont.*, 269 F.3d at 190.
[46] *E.I. Dupont.*, 269 F.3d at 191.

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take action detrimental to the interest or well-being of the Company."[47] Pursuant to these provisions of the J.V.A., both parents entered into related agreements with the joint venture company.[48] After the dispute arose, DuPont, the parent of DuPont China, brought a suit against Rhodia Fiber and its parent, Rhodia.[49]

In its holding, the Third Circuit reinforced the federal policy favoring arbitration and added that "[T]he presumption in favor of arbitration carries "special force" when international commerce is involved…".[50] The Third Circuit analyzed whether DuPont, a non-signatory parent, was bound by the arbitration clause under the third party beneficiary, agency, and equitable estoppel theories.[51] After applying each of the theories, the Third Circuit decided that the non-signatory parent was not bound by the arbitration clause and affirmed the District Court's judgment that denied appellants' motion to compel arbitration.[52]

In *Bel-Ray,* the Third Circuit adopted again the same approach in *E.I. Dupont* and maintained its view.[53] In this case, Bel-Ray and Chemrite (Pty.) Ltd, a South-African company, signed a number of agreements including an arbitration clause.[54] While the agreements were in force, Chemrite sent a fax stating that it had changed its name to "Lubritene (Pty) Ltd",[55] but legally, the succession took place when Chemrite sold its business, including its rights under the agreements, to Lubritene, which was a newly established entity, and Chemrite entered liquidation.[56]

After the dispute arose between the parties, Bel-Ray filed an action to compel Lubritene and the four of its directors and officers (hereinafter the Individual Appellants) to arbitrate.[57] Bel-Ray alleged that Lubritene and the Individual Appellants "conspired to misappropriate Bel-Ray's technology and

[47] *E.I. Dupont.*, 269 F.3d at 192.
[48] *Id.*
[49] *E.I. Dupont.*, 269 F.3d at 192.
[50] *E.I. Dupont.*, 269 F.3d at 194.
[51] *Id.*
[52] *E.I. Dupont.*, 269 F.3d at 205.
[53] *Bel-Ray Co.*,181 F.3d at 446.
[54] *Bel-Ray Co.*,181 F.3d at 438.
[55] *Id.*
[56] *Id.*
[57] *Bel-Ray Co.*,181 F.3d at 437.

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other proprietary information and intentionally defrauded Bel-Ray by leading it to believe that Lubritene would abide by the Trade Agreements."[58] Bel-Ray also alleged "[L]ubritene marketed Bel-Ray products falsely under Lubritene's trade name, and conversely marketed inferior Lubritene products under Bel-Ray's trade name thereby damaging Bel-Ray's business reputation".[59] After claims and counterclaims, the District Court entered a summary judgment for Bel-ray and an order compelling Lubritene and the Individual Appellants to arbitrate.[60] Thus in appeal, the issue was whether the successor and four of its directors and officers were bound by the predecessor's arbitration agreement.[61]

Although the facts of the case supported the extension of the arbitration clause, the Third Circuit did not engage in a detailed analysis. The court recognized the exceptions adopted by *Thomson-CSF* and very briefly held that "having similarly compared our record with the *Thomson-CSF* court's explanation of each of the five enumerated theories, we have also concluded that each is inapposite here. "[62] The court just stayed with the reasoning that traditional principles of contract and agency law do not support joining the non-signatories to the arbitration clause.[63]

Unlike *E.I. Dupont*, the Third Circuit did not engage in application of the traditional principles of contract and agency law and rushed the conclusion by bypassing the comprehensive reasoning of its ruling. The alleged claims, however, could have supported the situation in which the claims were "intimately founded in and intertwined with the underlying contract obligations"[64] and therefore, justified the extension of the arbitration clause to

[58] *Bel-Ray Co.*,181 F.3d at *439.*
[59] *Id.*
[60] *Id.*
[61] *Bel-Ray Co.*,181 F.3d at 445.
[62] *Bel-Ray Co.*,181 F.3d at 446.
[63] *Id.*
[64] McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., 741 F.2d 342, 344 (11th Cir. 1984) (quoting Hughes Masonry Co. v. Greater Clark Cty. Sch. Bldg. Corp., 659 F.2d 836, 841 n. 9. (7th Cir. 1981)). In this case, the contractor brought a lawsuit against the construction manager. The dispute was arising from the duties to the building owner. Although there was no arbitration agreement between the disputants, each disputant had separately entered into the arbitration agreements with the building owner regarding the project. The Eleventh Circuit held that the claims were "intimately founded and intertwined with the underlying contract obligations", and thus, the non-signatory parties were subject to arbitration.

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the Individual Appellants under either the group of companies doctrine or traditional exceptions recognized by *Thomson-CFS*.[65]

In *Invista*, the Third Circuit deferred to the tribunal's partial award when the tribunal found that it had no jurisdiction over the non-signatory party, Rhodia S.A.[66] In this case, Rhodianly, Rhodia Operations S.A.S, and Rhodia S.A. commenced arbitration against INVISTA-affiliated entities.[67] Shortly after the initiation of the arbitration, INVISTA-affiliated entities brought a suit against both Rhodia S.A. and related parties alleging that Rhodia S.A. violated the non-disclosure agreement concerning the trade secret.[68] While the parties were litigating, the tribunal issued a partial award and found that it had lacked jurisdiction over Rhodia S.A.[69] Rhodia S.A. filed a motion to have each of the three INVISTA entities to be compelled to arbitrate the claims.[70]

In its holding, the Third Circuit quoted *Thomson-CSF* and restated the exceptions to bind a non-signatory party to an arbitration agreement.[71] The Third Circuit, however, did not assess these exceptions. Instead, the Third Circuit held that "the Tribunal's holding that it has no jurisdiction over Rhodia, S.A. means that Rhodia S.A. is a stranger to the I.C.C. Arbitration and, therefore, has no enforceable right of arbitration" and dismissed the appeal as moot without addressing whether the non-signatory parties were bound by the arbitration agreement.[72]

As opposed to the Second Circuit in *Sarhank*, the Third Circuit has deferred the tribunal's decision and not engaged in a merits review although it arouses curiosity whether the Third Circuit would have engaged in a merits review if the tribunal had decided contrariwise and found that it had a jurisdiction over the non-signatories.

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[65] Pedro J. Martinez-Fraga, *The Dilemma of Extending International Commercial Arbitration Clauses to Third Parties: Is Protecting Federal Policy While Accommodating Economic Globalization a Bridge to Nowhere?*, 46 CORNELL INT'L L.J. 291, 311 (2013).
[66] *See Invista S.à.r.l.*, 625 F.3d at 85.
[67] *Invista S.à.r.l.*, 625 F.3d at 80.
[68] *Invista S.à.r.l.*, 625 F.3d at 82.
[69] *Invista S.à.r.l.*, 625 F.3d at 81.
[70] *Invista S.à.r.l.*, 625 F.3d at 82-3.
[71] *Invista S.à.r.l.*, 625 F.3d at 85.
[72] *Invista S.à.r.l.*, 625 F.3d at 87.

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When the issue was whether the non-signatory party could compel arbitration, the First Circuit has considered the scope and the wording of the arbitration clause. In *Sourcing*, Sourcing Unlimited (d/b/a Jumpsource) and Asimco Technologies, Inc. (hereinafter A.T.L.) entered into a partnership agreement containing an agreement to arbitrate in China.[73] Asimco International, Inc. (hereinafter Asimco) was a subsidiary of A.T.L., and it was not a party to the agreement.[74] The chairman of Asimco, however, participated in negotiations, which resulted in the agreement and became involved in the transaction by agreeing to deliver the parts produced by the partnership to the venture's customers in the United States as well as to invoice the customers and retain partnership profit in the United States.[75] When the dispute arose, Jumpsource brought a suit against non-signatory Asimco and alleged that dispute arose from a separate oral contract whereas Asimco asserted that it was nothing but an oral modification of the partnership contract containing a provision for arbitration.[76] Asimco filed a motion to dismiss the action and compel arbitration.[77]

The main issue in this case was whether a signatory party could render an arbitration clause ineffective when the claim was filed against a non-signatory party asserting that there was no arbitration agreement in writing with a non-signatory party.[78] The First Circuit reversed the district court's order and granted the non-signatory party's motion to dismiss and to compel arbitration.[79] The Court compelled the signatory party to arbitrate with the non-signatory party by employing the equitable estoppel theory and indicating the expansive nature of the arbitration clause.[80] The court held that the claim was "intertwined" with the underlying contract, including the arbitration clause.[81]

Similarly in *Intergen*, the Third Circuit pondered the grammatical interpretation of the arbitration clause in the purchase contract. Only the

[73] Sourcing Unlimited, Inc. v. Asimco Int'l, Inc., 526 F.3d 38, 41 (1st Cir. 2008).
[74] *Id.*
[75] *Id.* at 42.
[76] *Id.* at 42-3.
[77] *Id.* at 42.
[78] *Id.* at 43.
[79] *Id.* at 48.
[80] *Id.*
[81] *Id.* at 47.

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"Buyer" and "Seller", which was defined in the contract, were allowed to invoke arbitration although the clause had a broad scope in terms of claims.[82] The Court also considered that because the parties were "sophisticated commercial actors", they could have drafted different contracts but they did make deliberate choices by defining who was eligible to invoke arbitration clause.[83] It is also noteworthy that the First Circuit made an emphasis on federal policy favoring arbitration, yet limiting the borders of the policy to exclude the "situations in which the identity of the parties is in dispute."[84] Thus, the Court upheld the district court's denial of the non-signatory parent's motion to compel arbitration.[85]

With reference to the cases analyzed above, we can infer that the U.S. courts are reaching the result without adopting the group of companies doctrine, yet adopting the contractual theories, which cover more scenarios than the group of companies doctrine.[86] It should be emphasized that this analyze above does not aim to show U.S. courts' position in terms of binding non-signatories, but to compare and contrast the applicable doctrines under U.S. law and the group of companies doctrine when the issue was whether the non-signatories were bound by the arbitration agreement.

4. THE TURKISH LAW POSITION ON THE GROUP OF COMPANIES DOCTRINE

Unlike U.S. law, Turkish law is a product of the civil law system. As a result, statutes have more bearing than the case law on the judicial system. From exploring the statutes related to the group of companies doctrine, this chapter will move on to an examination of selected Turkish Supreme Court decisions related to the doctrine. Similar to the previous chapter, the information aims to create a base for the comparison of the two legal systems.

[82] *See Intergen* N.V., 344 F.3d at 146.
[83] *Intergen N.V.*, 344 F.3d at 150.
[84] *Id.*
[85] *Id.*
[86] Meyniel, *supra* note 30, at 23.

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The term "group of companies" is used to refer to a management of more than one stock company under Turkish law, and the Turkish Commercial Code sets forth its principles.[87] In other words, it actually refers to a "corporate group" as understood in common law. As seen, whereas a literal translation of "corporate group" from Turkish to English results in the term of "group of companies", the meaning of it in Turkish is not the same as that of the term in English. The term, therefore, can be misleading for foreign lawyers, and thus, it becomes of importance for foreigners to consult local lawyers. It is necessary to make it clear that this article does not use the "group of companies doctrine" term as in "corporate group" throughout the discussion.

4.1. STATUTES RELATED TO THE GROUP OF COMPANIES DOCTRINE

International arbitration in Turkey is governed by the International Arbitration Act (hereinafter the I.A.A.), which is established based upon Chapter 12 of Switzerland's Federal Code on Private International Law and UNCITRAL.[88] Under the I.A.A., the arbitration agreement is a legally binding contract between the parties.[89] There is no provision that addresses the non-signatory parties situation, nor does the abundance of case law discuss the non-signatory parties' situation in an arbitration agreement, especially in terms of the group of companies doctrine.

This ambiguity has laid the burden on scholars and practitioners when they evaluate the issue in terms of predictability.

4.2. CASE LAW ON THE GROUP OF COMPANIES DOCTRINE

It is necessary to examine the Turkish Supreme Court database to ascertain if the group of companies doctrine itself has been addressed by the courts. A

[87] Turkish Commercial Code, Law No.: 6102 Official Gazette, Feb. 14, 2011 No.: 27846, §§ 195-209, enacted: Jan. 13, 2011. [hereinafter the TCC]
[88] *See* Grand Nat'l Assembly of Turk., *Draft Act of No. 4686 and its Preamble* (Jun. 6, 2001), http://www2.tbmm.gov.tr/d21/1/1-0874.pdf.
[89] International Arbitration Act. Law No.: 4686 Official Gazette, 21 Jun. 2001 No.: 24453, §4, enacted Jul. 5, 2001[hereinafter the IAA]; *Also see* the 3rd Civ. Cir. of the Turkish Sup. Ct., Case No.: 2014/12342 Decision No.: 2015/6885 dated 27 Apr. 2015.

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sufficient number of cases, albeit not ample, allows us draw certain conclusions on the issue:

(1) Assessment of Turkish case law as to the position of non-signatories yields a quite certain result that a non-signatory can be bound by or benefit from an arbitration agreement in the event of incorporation by reference,[90] assignment[91] and subrogation.[92]

(2) There are other decisions, on the other hand, discussing certain legal theories in which binding a non-signatory party pursuant to these doctrines is not accepted. These theories can be named as, third party beneficiary, guarantee or agency with the actual express authority.

Under Turkish law, if the principal gives actual express authority to the agent for concluding an arbitration agreement, the principal is deemed a party to the arbitration agreement, not the non-signatory (third party) agent.[93] The actual issue under the agency theory, in fact, is whether the principal or agent can be held liable in the event of apparent authority or estoppel.[94] For now, there is no known case in which the Turkish Supreme Court discusses this issue.[95]

In a recent Turkish Supreme Court case dated 6/25/2015, the issue was whether the I.C.C. award could be enforced on behalf of the third party beneficiary of the contract.[96] In this case, the non-signatory party, the plaintiff, was the state agency and it had approved the concession agreement which contained an arbitration clause between the defendant and the other plaintiff

[90] *E.g.,* Gen. Assemb. of Turkish Sup. Ct., Case No.: 1994/11-765, Decision No.: 1995/39 dated 1 Feb. 1995; 11th Civ. Cir. of Turkish Sup. Ct., Case No.: 2015/7064 Decision No.: 2015/9348 dated 16 Sep. 2015; 11th Civ. Cir. of Turkish Sup. Ct., Case No.: 2015/1687 Decision No.: 2015/6696 dated 11 May. 2015; 11th Civ. Cir. of Turkish Sup. Ct., Case No.: 2012/5132 Decision No.: 2012/7052 dated 2 May 2012; 11th Civ. Cir. of Turkish Sup. Ct, Case No.: 2005/13708 Decision No.: 2007/587 dated 22 Jan 2007; 11th Civ. Cir. of Turkish Sup. Ct., Case No.: 2002/216 Decision No.: 2002/4357 dated 6 May 2002; 11th Civ. Cir. of Turkish Sup. Ct., Case No.: 2001/10475 Decision No.: 2002/2260 dated 12 Mar. 2002.

[91] 11th Civ. Cir. of Turkish Sup. Ct., Case No.: 1993/5034 Decision No.: 1994/4082 dated 10 May 1994.

[92] *E.g.,* Gen. Assemb. decision *supra* note 90 dated 1 Feb. 1995; 11th Cir. decision *supra* note 90 dated 6 May 2002.

[93] *E.g.*, 19th Civ. Cir. of Turkish Sup. Ct., Case No.: 2002/7495 Decision No.: 2002/6932 dated 24 Oct. 2002; 19th Civ. Cir. of Turkish. Sup. Ct. numbered 8273/265 dated 23 Jan. 1997.

[94] Banu Şit Köşgeroğlu, Yabancı Hakem Kararlarının Üçüncü Kişilere Karşı Tenfizi [Enforcement of Foreign Arbitral Award Against the Third Parties], 15 GAZI UNIVERSITESI HUKUK FAKULTESI DERGISI [GUHFD], no 3,2001, at. 12.

[95] *See also Id.*

[96] 11th Civ. Cir. of Turkish Sup. Ct., Case No.: 2014/9538 Decision No.: 2015/8707 dated 25 June 2015.

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in the case.[97] Also, the non-signatory party was benefitting from the contract, put differently, it was the third-party beneficiary.[98] The majority of the Turkish Supreme Court reversed the judgment of the trial court and held that the approval of the contract by the non-signatory party did not necessarily mean that the non-signatory party also approved the arbitration clause.[99] The court stated that arbitration agreements had an exceptional character, and therefore, a non-signatory party shall give either express consent or tacit consent on the condition that it creates no doubt.[100] On the other hand, the dissent stated that under the Turkish Constitution, the parties can arbitrate for the disputes between state agencies and private parties, and thus, there was no ground for the majority to allege that the state agency was not a party of either the concession agreement or the arbitration clause.[101]

In one case, the Turkish Supreme Court did not accept the extension of the arbitration clause to the guarantor either. In the case dated 3/11/2004, the defendant non-signatory party was the bank that issued the letter of credit for the plaintiff where the plaintiff entered into a sale agreement, including an arbitration clause, with the other defendant, which was a corporation.[102] The Turkish Supreme Court relied heavily on its earlier precedents and held that the non-signatory bank was not bound by the agreement because arbitration agreements had exceptional characteristics as opposed to litigation in the court system.[103]

(3) There is no ruling discussing the group of companies doctrine, whether affirmatively or not. In one unpublished Turkish Supreme Court case dated 11/7/1989, the claimant filed a motion to enforce the arbitral award decided by the Arbitral Tribunal of the Bremen Cotton Exchange.[104] The

[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.* The reason why the dissent referred to the Turkish Constitution is that it was prohibited for the state agencies to arbitrate until 1999. To make concession contracts arbitrable, the Turkish Constitution was amended in 1999. The dissent opinion, in fact, took a stand against the anti-arbitration mindset of the majority. *See* §125 of the Turkish Const., amended version by Act No.: 4446 Official Gazette 14 Aug. 1999 No.: 23786 enacted 13 Aug. 1999.
[102] 19th Civ. Cir. of Turkish Sup. Ct., Case No.: 2003/2654 Decision No.: 2004/2603 dated 11 Mar. 2004.
[103] *Id.*
[104] 11th Civ. Cir. of Turkish Sup. Ct., Case No.: 1990/2931 Decision No.: 1991/6828 dated 07 Nov. 1989.

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claimant, Bunge GmbH, conducted negotiations with Osman Akca Corporation (hereinafter the Corporation) and believed that the Corporation was the party to the agreement whereas he actually entered into the contract of sale including an arbitration clause with Osman Akca L.L.C. (hereinafter the L.L.C.).[105] In this case, the Turkish Supreme Court upheld the trial court on the grounds that the arbitral award could not be enforced against the non-signatory party, the Corporation.[106]

The Corporation and the L.L.C. were sister companies.[107] Moreover, it is understood that the sister company was involved in the negotiations in a way that indicated that the non-signatory party was in effect the original party of the sale.[108]

In one case regarding a stock purchase agreement, the conflict arose out of the transfer of the trademark.[109] The stock purchase agreement concluded between the co-partners of the A.. Lastik San. A.Ş. (hereinafter the Individuals) and the C.. GmbH, the defendant.[110] The agreement set forth the conditions of the trademark transfer and included an arbitration clause for any disputes arising out of the contract.[111] As per the Agreement, the defendant shall transfer the trademark of "A.. Lastik Sanayii" to the Individuals.[112] Later, the defendant, C.. GmbH, switched the title from A.. Lastik San. A.Ş. to C.. Lastik San. A.Ş. However, it did not transfer the ownership of the trademark.[113]

The Individuals brought a suit against the defendant and the non-signatory C.. Lastik San. A.Ş.[114] The defendant filed a motion to compel arbitration and the trial court entered a judgment for the defendant and the plaintiffs appealed.[115]

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[105] *Id.*
[106] *Id.*
[107] *See Turkish Trade Registry Gazette*, THE UNION OF CHAMBER & COMMODITY EXCH. OF TURK., http://www.ticaretsicilgazetesi.gov.tr/sorgu_acik.php (last visited Nov. 6, 2015)
[108] *Id.*
[109] 11th Civ. Cir. of Turkish Sup. Ct., Case No.: 2005/7964 Decision No.: 2006/8410 dated 14 July 2006.
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*

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The Turkish Supreme Court held that the C.. Lastik San. A.Ş. did not sign the agreement regardless of whether it was the assignee or successor of the C.. GmbH or the Individuals.[116] The court also noted that because the result would directly affect the non-signatory party's rights, it shall not be enforced to arbitrate through the arbitration clause in which it had not agreed.[117] The court considered the language of the arbitration clause and held that the arbitration clause bound only the parties pursuant to the Agreement.[118]

To put it another way, the Turkish Supreme Court did not evaluate the theories, whether there is an assignment or succession, and emphasized that the arbitration agreement cannot be compelled against a non-signatory.

In the case dated 10/05/2015, the parties entered into a merger agreement which included an arbitration clause.[119] The dispute arose when the plaintiffs did not receive the payment for the shares.[120] When the plaintiffs brought a lawsuit, the defendants filed a motion to compel arbitration before the trial court.[121] The trial court entered judgment for the defendants and compelled the plaintiffs to arbitrate.[122] The Turkish Supreme Court, however, reversed the judgment by stating that the plaintiffs S.. B.. and M.. B.. did not sign the merger agreement, and therefore, the arbitration clause could not be enforced against these non-signatory parties.[123] Although the available facts of the case do not allow us to comment on the non-signatory parties' position in the transaction, there might have been an opportunity for the Turkish courts to discuss the applicability of the group of companies doctrine.

Likewise, a lack of legal reasoning and the confidentiality of the parties' names create a hurdle to study other cases regarding the possible application of the group of companies doctrine. As an illustration, in the case dated 6/24/2013, there was a construction agreement including an arbitration clause between the plaintiff, Ş..Hafriyat Ins. Taah. San. Tic. Sti., and the defendant, Ş.. M.. San. ve

[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] 11th Civ. Cir. of Turkish Sup. Ct., Case No.: 2015/9436 Decision No.: 2015/9845 dated 5 Oct. 2015.
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*

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Tic. Ltd. Sti.[124] Later, the defendant concluded a novation agreement with D.. Ltd. Sti.[125] The issue was originating from who had a right to compel arbitration.[126] After mentioning briefly these facts, the Court held that because D.. A.Ş. was a non-signatory party, it cannot be compelled to arbitrate.[127]

As it is seen, whereas the court mentioned the parties of the construction agreement and the party of the novation agreement, the Court mentioned D.. A.Ş. for the first time when it was holding that D.. A.Ş. was not bound by an arbitration agreement. In its ruling, the Turkish Supreme Court never engaged in explaining who the non-signatory D.. A.Ş. was and what was its position as to the privity between the parties.

(4) The last noteworthy point is that although the Turkish Supreme Court has adopted the piercing of the corporate veil theory relatively recently,[128] there has been no application of this theory in any arbitration agreements. In a similar vein, Turkish courts have employed the estoppel doctrine when the issue is that there is a valid agreement to arbitrate between the parties.[129] Nonetheless, Turkish courts have never used this doctrine to decide whether a non-signatory party can be enforced to arbitrate.

5. A COMPARATIVE ANALYSIS OF TWO APPROACHES

Compared to the United States, Turkish courts retain a touch of reluctance when there is a matter of arbitration. As a corollary of this, there is a visible difference between U.S. courts and Turkish courts as to the applicable doctrines on extension of arbitration agreements to the third parties, which can be deduced from the reiterated wording taken from the case law in each

[124] 15th Civ. Cir. of Turkish Sup. Ct., Case No.: 2012/4971 Decision No.: 2013/4112 dated 24 June 2013.
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] 19th Civ. Cir. of Turkish Sup. Ct, Case No.: 2005/8774 Decision No.: 2006/5232 dated 15 May 2006.
[129] *E.g.,* 19th Civ. Cir. of Turkish Sup. Ct., Case No.: 2015/7618 Decision No.: 2015/17519 dated 23 Dec.2015; 11th Civ. Cir. of Turkish. Sup. Ct, Case No.: 2003/6774 Decision No.: 2004/3751 dated 9 Apr.2004; 19th Civ. Cir. of Turkish Sup. Ct, Case No.: 1995/9108 Decision No.: 1995/9685 dated 15 Nov.1995; 11th Civ. Cir. of Turkish Sup. Ct, Case No.: 1979/3855 Decision No.: 19794351 dated 2 Oct.1979.

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jurisdiction. The main difference is that U.S. courts have accepted more number of doctrines than the Turkish courts. U.S. courts have also more frequently considered and discussed the applicability of these doctrines as opposed to Turkish courts.

Where the issue is whether a non-signatory party is bound by an arbitration clause, the jurisdictions have taken the different stands as follow:

5.1. STANCE TOWARDS ARBITRATION

The Turkish Supreme Court has repeated the phrase that "[I]n principle, the courts are the ones who hear a dispute. Arbitration agreement has an exceptional character, and it only binds the parties who agree to. If not, it runs afoul of the principle that independent courts shall exercise the judicial power pursuant to the Art. 9 of the Turkish Constitution and the principle of natural judge."[130] U.S. courts, on the other hand, have laid stress on the standard of federal policy preferring arbitration over litigation.[131] U.S. judiciary has demonstrated and reaffirmed the Congress's intent established by 9 U.S.C.S. § 2.[132]

[130] Natural judge refers to pre-established and ordinary courts and judges as opposed to ad hoc trial. *See* §37 of the Turkish Const. *See also* 19th Civ. Cir. of Turkish Sup. Ct., Case No.: 2002/7495 Decision No.: 2002/6932 dated 24 Oct. 2002; 19th Civ. Cir. of Turkish Sup. Ct., Case No.: 2003/2654 Decision No.: 2004/2603 dated 11 Mar. 2004.*See also* 11th Civ. Cir. of Turkish Sup. Ct, Case No.: 2015/14286 Decision No.: 2016/2435, dated 7 Mar. 2016; 15th Civ. Cir. of Turkish Sup. Ct, Case No.: 2015/2198 Decision No.: 2015/2758, dated 22 May. 2015; 11th Civ. Cir. of Turkish Sup. Ct, Case No.: 2013/7572 Decision No.: 2014/14133, dated 19 Sep. 2014; 15th Civ. Cir. of Turkish Sup. Ct, Case No.: 2014/3330 Decision No.: 2014/4607, dated 1 July 2014; 11th Civ. Cir. of Turkish Sup. Ct, Case No.: 2009/3257 Decision No.: 2011/1675, dated 15 Feb. 2011; 15th Civ. Cir. of Turkish Sup. Ct, Case No.: 2009/1438 Decision No.: 2009/2153, dated 13 Apr. 2009; 15th Civ. Cir. of Turkish Sup. Ct, Case No.: 1996/247 Decision No.: 1996/438, dated 29 Jan. 1996.

[131] Bouriez v. Carnegie Mellon Univ., 359 F.3d 292, 294 (3d Cir. 2004); E.I. Dupont De Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 194 (3d Cir. 2001). *See also* Sarhank Group v. Oracle Corp., 404 F.3d 657, 661 (2nd Cir. 2005). *Cf.* Intergen N.V. v. Grina, 344 F.3d 134, 150 (1st Cir. 2003) (limiting the federal policy favoring arbitration when the parties' identity is in question).

[132] 9 U.S.C.S. § 2 (1925); *See e.g.* CompuCredit Corp. v. Greenwood, 565 U.S. 95, 98 (2012); Moses H. Cone Mem'l Hosp. v Mercury Constr. Corp., 460 U.S. 1, 25 (1983).

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5.2. NON-SIGNATORY ARBITRATION EXTENSIONS

The great wealth of U.S. cases has applied five exceptions named by *Thomson-CFS*.[133] In Turkish case law, however, the courts have not named the applicable exceptions. It should come as no surprise because as a part of civil law, statutes prevail over case law. Considering this, when we examine the statutes and case law, the most striking exception reveals itself in the event of incorporation by reference.

Incorporation clauses are validated by the Art. 4 of the I.A.A. as a general provision and Para. 3 of Art. 1237 of the T.C.C. as a special provision in the event that a bill of lading refers to a charterparty containing an arbitration clause.[134] Moreover, the judicial application of these statutes is widespread when an arbitration clause is incorporated into an agreement by reference.

We can generalize that Turkish courts are not sympathetic to third party rights considering lack of privity. Therefore, only incorporation by reference, assignment, and subrogation theories satisfy a requirement of privity between the signatory and non-signatory party.

5.3. APPLICATION OF THE GROUP OF COMPANIES DOCTRINE

U.S. courts have accepted to extend arbitration agreements to the non-signatories, including company groups. The abovementioned five exceptions achieve similar results to application of the group of companies doctrine. However, the group of companies doctrine itself has no application pursuant to *Sarhank*, which applied U.S. domestic arbitration law when deciding the jurisdiction of the arbitral tribunal.[135] *Sarhank* found that the award was contrary to American public policy.[136] However, the Second Circuit should not have discounted a choice-of-law provision. The Second Circuit could have

[133] *See supra* p.6.
[134] *Compare* the Art. 4 of the I.A.A. *with* the Para. 3 of Art. 1237 of the T.C.C. The I.A.A. validates that the reference in a contract to a document included an arbitration clause constitutes an arbitration agreement on the condition that the reference is such as to make that clause part of the contract. Similar, but more specifically, the T.C.C. provides that the provisions of the charter party can also be enforced against the holder of the bill of lading. In other words, if the bill of lading is referring to a charterparty with the condition that the reference contains an arbitration clause, it may be enforced against the holder of the bill of lading.
[135] *See Sarhank Group,* 404 F.3d at 662-63.
[136] *See Sarhank Group,* 404 F.3d at 659.

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assessed the non-signatory parties' situation through the law chosen by the parties under Article V(1)(a) of the New York Convention which is a ground for refusal if there is no valid agreement to arbitrate.[137]

Turkish courts have also accepted to extend arbitration agreements to the non-signatories, albeit not as often as U.S. courts. The Second Circuit refused the group of companies doctrine implicitly in *Sarhank* whereas there is no ruling discussing, or even tacitly refusing, the applicability of the group of companies doctrine under Turkish law. The case dated 11/7/1989, where the non-signatory sister company was involved in the negotiations, could have been a perfect example for the application of the doctrine but the Turkish Supreme Court did not elaborate its legal reasoning.[138]

Although both judiciaries have not adopted the group of companies doctrine, the United States has made its position clear in contrast to Turkey by denying the existence of the doctrine itself when the courts refused to respond to claims involving the group of companies doctrine.[139]

5.4.APPLICATION OF THE OTHER EXCEPTIONS

Turkish courts have not accepted the third-party beneficiary doctrine whereas the non-signatories have been held to benefit from or have been subject to arbitration on a third-party beneficiary theory under U.S. Case law.[140]

Agency theory itself drastically differs between U.S. and Turkish law. Under U.S. law, it is accepted that when a principal is bound by an arbitration clause, "its agents, employees, and representatives" are also embraced under

[137] *See* Motorola Credit Corp. v. Uzan, 388 F.3d 39, 50 (2nd Cir. 2004) (applying a choice-of-law clause to determine which laws govern the validity of the arbitration clause).
[138] 11th Civ. Cir. of Turkish Sup. Ct., Case No.: 1990/2931 Decision No.: 1991/6828 dated 07 Nov. 1989.
[139] Brief for Defendant/Appellee and Cross-Appellant at 7, Marathon Oil Co. v. Ruhrgas A.G., 145 F.3d 211 (5th Cir. 1998). *See also* Meyniel, *supra* note 30, at 39-42.
[140] *Compare* E.I. Dupont De Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 194 (3d Cir. 2001)-*with* 11th Civ. Cir. of Turkish Sup. Ct., Case No.: 2014/9538 Decision No.: 2015/8707 dated 25 June 2015.

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the terms of such agreements.[141] Under Turkish law, however, only the principal himself is bound by an arbitration clause to the extent that his agent has the actual express authority to bind the principle.[142]

U.S. courts also recognized the doctrine of veil-piercing, by means of which a non-signatory party is bound by an arbitration agreement of its alter ego.[143] As for Turkish courts, they are unlikely to bind a non-signatory party by piercing the corporate veil, considering that there has been no such ruling so far, and that Turkish courts tend to litigate cases considering the notion of how important the express consent of the parties is to arbitrate.

In civil law systems, equitable estoppel is known as the "good-intent" doctrine, and it is not extraordinary for Turkish courts to employ this doctrine. In the United States, we see that a signatory party may be estopped from avoiding arbitration with a non-signatory.[144]

In Turkey, however, the good intent doctrine (or estoppel) may become a legal reasoning when analyzing whether there is a valid agreement between the parties, which has not covered the situations so far where the non-signatories exist.[145]

[141] *E.g.,* Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, 7 F.3d 1110, 1121 (3d Cir. 1993); Arnold v. Arnold Corp., 920 F.2d 1269, 1281-82 (6th Cir.1990); Letizia v. Prudential Bache Sec., 802 F.2d 1185, 1187-88 (9th Cir.1986). *Cf.* E.I. Dupont De Nemours & Co., 269 F.3d at 204 (not extending the arbitration clause to the non-signatories on the grounds that the claims did not arise from the agreement including arbitration clause)

[142] Turkish Code of Obligations, Act No.: 6098 Official Gazette, Feb. 4, 2011 No.: 27836, §40, enacted: Jan. 11, 2011.

[143] *E.g., Bridas,* 345 F.2d at 358-59; CTF Hotel Holdings, Inc. v. Marriott Int'l, Inc., 381 F.3d 131, 138 (3d Cir. 2004).

[144] *E.g.,* Sunkist Soft Drinks v. Sunkist Growers, 10 F.3d 753 (11th Cir. 1993); J.J. Ryan & Sons v. Rhone Poulenc Textile SA, 863 F.2d 315 (4th Cir. 1988).

[145] *Compare* 11th Civ. Cir. of Turkish Sup. Ct, Case No.: 2003/6774 Decision No.: 2004/3751, dated 9 Apr. 2004 *and* 19th Civ. Cir. of Turkish Sup. Ct, Case No.: 2002/2249 Decision No.: 2002/7219, dated 7 Nov. 2002 (finding that the party was estopped from denying arbitration agreement because silence of the denying party constituted acceptance of the arbitration agreement) *with* 19th Civ. Cir. of Turkish Sup. Ct, Case No.: 1995/9108 Decision No.: 1995/9685, dated 15 Nov. 1995 (holding that the party did not necessarily bound by arbitration agreement under the good intent doctrine where the underlying agreement was established by conduct of the parties).

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6. SOLUTIONS TO NOT TO BE (OR TO BE) A NON-SIGNATORY

Freedom of contract entitles parties to choose the law applicable to arbitration agreements as well as to the underlying contract. Most of the time, the parties do not choose the law applicable to the arbitration contract itself. This creates ambiguity of what the applicable law is. There are several approaches to determine what the law governing the arbitration agreement should be. The first thing that springs to mind would be either the substantive law chosen by the parties to govern underlying agreements or the law of the seat of the arbitration.[146] Although it seems remote possibility to apply, the other approach would be the application of transnational rules.[147] Even though choice of law clauses may be a solution, the courts can find a way to walk around the clause. Notwithstand the existence of a choice of law clause, the Second Circuit in *Sarhank* adopted domestic law through the extensive interpretation of public policy.[148]

The other solution may be a careful drafting of the arbitration clause itself. A carefully tailored arbitration clause, defining situation of third parties in arbitration may diminish the ambiguity. As an illustration, U.S. courts in *Sourcing* and *Intergen* and the Turkish Supreme Court in the case dated 7/14/2006 analyzed the scope of arbitration clauses in terms of the definition of parties when they decided on the non-signatories' position in arbitration. Therefore, clear and unambiguous language defining who the parties are and the situation of related third-parties are crucial to avoid any unexpected results.

7. CONCLUSION

The group of companies doctrine is one of the solutions to extend an arbitration agreement to non-signatories, and it is not a unique for the I.C.C. to create sui

[146] Renato Nazzini, *The Law Applicable to the Arbitration Agreement: Towards Transnational Principles*, 65 INT. COMP. LAW Q. 681, 681 (2016).
[147] *E.g.,* In *Dow Chemical*, the tribunal applied transnational rules, more specifically *lex mercatoria*, to the case and took into consideration of demands of international commerce. *Id.* 695.
[148] Sarhank Group v. Oracle Corp., 404 F.3d 662-63 (2nd Cir. 2005).

DOI 10.6092/issn.2531-6133/7258

generis theories. The doctrine came into existence through *lex mercatoria* and pragmatic-minded expert arbitrators. Nonetheless, it has created confusion by combining the equity principles where no agreement exists and the contract law principles where there is an arbitration agreement but the consent of it is tacit rather than express. Any pioneering doctrines –i.e. the group of companies doctrine- bear the risk of being rejected by the jurisdictions where the enforcement of the arbitration agreement or arbitral award is sought. Therefore, each jurisdiction has taken different stands for adaption of this doctrine.

This paper aims to see what could be the possible position of the pro-arbitration regimes and the less friendly-arbitration regimes to adopt the group of companies doctrine. To analyze this, the paper compared and contrasted two different jurisdictions - the United States and Turkey- and found that it is not necessary that the pro-arbitration regimes –e.g. the United States- are tend to adopt the group of companies doctrine although joining non-signatories to the arbitration agreement is more common and acceptable.

In the United States, agency, third-party beneficiary and estoppel theories substitute most of the time for the group of companies doctrine. Although there is a limited application of extension of arbitration clauses to non-signatories in Turkey, the abovementioned theories are also accepted in Turkey as a rule of law. If the Turkish judiciary evolves a point where arbitration is more welcomed and favored by the courts, then these theories allow the judiciary to extend the arbitration clause to non-signatories.

Even though the Turkish and U.S. courts have not accepted the group of companies doctrine, this paper argues that the courts in each jurisdiction should be more open-minded towards arbitration and should not engage in merits review when the parties seek to compel arbitral awards decided pursuant to the doctrine.

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