

ISSN: 2519-9102

Revista Akademike Legal

Legal Academic Journal

Volumi: 7 / Numri: 1
Volume: 7 / Issue: 1
Viti: 2024 / Year: 2024



Revista Akademike Legal

Legal Academic Journal

“Revistë me Vlerësim Shkencor Akademik” / “Peer reviewed Journal”

Volumi: 7 / Numri: 1

Volume: 7 / Issue: 1

Viti: 2024 / Year:2024

Botuesi/Publisher: Botimet Legal në emër të Botuesit Shtëpisë Botuese Legal Albania Shpk INC. dhe Botuesit Ekzekutiv /*On Behalf of Legal Publishing Albania Shpk INC. Publisherand Executive Editor* Av./ Atty. Lütfürrahman BAŞÖZ

Drejtuksi përgjegjës/Responsible Manager: Av./Atty. Ramazan ÇAKMAKCI

Emri i shoqërisë botuese/ Name Of Publishing Company: Legal Publishing Albania SHPK

Botuesi dhe Volumi /Printing and Volume: SEM Group sh.p.k L 91415032

Vendi i botimit/Place of Publication: I Rruga Frederik Shiroka, kulla nr.3, kati 2, Tirane / Albania

Data e Botimit/Publication Date: 2024

Vendi i menaxhimit/Place of Management: Rruga Sami Frashëri, Pallati 14, Hyrja 11, Ap. 8 Tiranë – Albania

E-mail/E-mail: info@legalalbania.com

URL: www.legalalbania.com

Gjuha e botimit/Published on Language: Shqip/Anglisht Albanian/English

Lloji i botimit/Type of Publication: Kjo është një revistë ndërkombëtare e cila i nënshtrohet vlerësimit akademik dhe botohet dy herë në vit.
This is an international peer reviewed law journal published semiannually

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ISSN: 2519-9102

Për citimet që i bëhen revistës ju lutem përdorni shkurtesën “RAL”

For citations please use the abbreviation: “RAL”

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We are delighted to be with you in our new issue

In our journal you can find the following articles: “*INTERACTION OF ROBOT ECONOMY AND INDUSTRY 4.0 IN WORLD ECONOMY AND TURKIYE*” Assoc. Prof. Dr. Ali O.BALKANLI, “*CONSTITUTIONAL CONVENTIONS IN THE UNITED KINGDOM*” Dr. Lecturer Aysel DEMİRCİ, “*ENVIRONMENTAL AUDIT*” Dr. Lecturer Arzu ERDİNÇ ERTÜRK, “*EU MOVES TO IMPROVE WORKING CONDITIONS IN PLATFORM WORK: A LOOK INTO THE PROPOSED DIRECTIVE*” Atty. Begüm ERDOĞAN-Dr. Lecturer Tayfun ACARER, “*ARBITRATION IN LONDON UNDER THE MARITIME LAW*” Asst. Prof. Dr. Faysal GÜDEN-Asst. Prof. Dr. Ticen Azize ÖZRAŞIT

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ARTIKUJT MBI ÇËSHTJET LIGJORE *LEGAL ARTICLES*

* INTERACTION OF ROBOT ECONOMY AND INDUSTRY 4.0 IN WORLD ECONOMY
AND TURKIYE

*(NDËRVEPRIMI I EKONOMISË SË ROBOVEVE DHE INDUSTRIË 4.0 NË EKONOMINË
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INTO THE PROPOSED DIRECTIVE

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INTERACTION OF ROBOT ECONOMY AND INDUSTRY 4.0 IN WORLD ECONOMY AND TURKIYE

(NDËRVEPRIMI I EKONOMISË SË ROBOTEVE DHE INDUSTRIË 4.0 NË
EKONOMINË BOTËRORE DHE TURQINË)

Assoc. Prof. Dr./Dr. Profesor i Asociuar Ali O. BALKANLI*

ABSTRACT

As we enter the 2000s, major changes have come about in production processes in the world economy. During these years, instead of machines that previously operated with simple human intervention in production, robots that can make relative decisions and perform operations have begun to emerge. These developments in technology have brought about changes in production in terms of quantity and quality. In the impact of the changing economic structure in these years, Industry 4.0 structuring was emerged in 2011. In this article, in order to analyze this changing in the production structure of the world economy, the development and interaction of the robot economy and Industry 4.0 structuring investigated in the context of the world economy and the Turkish economy. It can be seen from study that the robot economy has a great determining role in the existence of the Industry 4.0 structuring, together with Internet of Things. The increasing importance of robots in the Industry 4.0 structure has transformed phenomenon of Internet of Things (IoT), to Internet of Internet of Robots (IoTR).

Keywords: Robot, Robot Economy, Productivity, Industrial Revolution, Industry 4.0

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ABSTRAKT

Ndërsa hyjmë në vitet 2000, në proceset e prodhimit në ekonominë botërore kanë ndodhur ndryshime të mëdha. Në këto vite, në vend të makinave që më parë funksiononin me ndërhyrje të thjeshtë njerëzore në prodhim, kanë filluar të shfaqen robotë që mund të marrin vendime relative dhe të kryejnë operacione. Këto zhvillime në prodhim kanë sjellë ndryshime në prodhim në aspektin e sasisë dhe cilësisë. Nën ndikimin e ndryshimit të strukturës ekonomike në këto vite, strukturimi i Industrisë 4.0 u shfaq në vitin 2011. Në këtë artikull, për të analizuar këtë ndryshim në strukturën e prodhimit të ekonomisë botërore, zhvillimi dhe ndërvëprimi i ekonomisë së robotëve dhe strukturimit të Industrisë 4.0 u hetuan në kontekstin e ekonomisë botërore dhe ekonomisë turke. Nga studimi shihet se ekonomia robotike ka një rol të madh përcaktues në ekzistencën e strukturës Industry 4.0, së bashku me Internetin e Gjërave. Rëndësia në rritje e robotëve në strukturën Industry 4.0 ka transformuar fenomenin e Internetit të Gjërave (IoT) në Internetin e Internetit të Robotëve (IoTR).

Fjalë kyçe: *Robot, Ekonomia Robotike, Produktiviteti, Revolucioni Industrial, Industry 4.0*

1. Introduction

When it look at the development process of humanity, we see that for many centuries, humanity existed as a hunter-gatherer society and moved to a new structure with small by small changes. Considered from this perspective, the discovery of wheat and the production of bread and similar foodstuffs from it meant a great change for humanity. Especially the fact that wheat seeds can be collected and stored provided the world's humanity with significant comfort and the opportunity to move when it comes to unworrying about the future. Because human societies, like other living creatures, are creatures that give their main priority to food supply.

As they were able to accumulate future food stocks over time, they were able to focus on thinking in other areas other than food supply, with the confidence that came from this.

The historical process has shown that, with the change that came step by step, hunting and gathering societies moved to the next stage, the agricultural society. When societies turned into agricultural societies, they gained more ability to accumulate and store. These acquired capabilities have been their most important supporters in moving to a more advanced social structure. When we look at the historical change processes of societies in this dimension, we see that these processes involve very long periods of time and that the development is actually step by step and cumulative.

The time period of humanity until the 1600s represented a period in which, on the one hand, they experienced the conditions of an agricultural society, and on the other hand, they sought to seize each other's assets.

The Renaissance movement, which started in Italy in the mid-1400s, meant "bringing the mind to the fore in world affairs" and, one step later, this movement supported "the phenomenon of transforming matter with mind". The most important stage of this change manifested itself (first) with the phenomenon of industrialization that emerged in England. It can say that the first starting point in perceiving the existence conditions of the robot economy, which has begun to join our lives very rapidly today, is the situation of "putting the use of reason first in world affairs", which gained strength with the Renaissance. In a sense, with the Renaissance, humanity prioritized the mind in world affairs and turned to changing matter and making new devices from it with "mind calculations". In fact, this logic is behind today's developments at the through of new technologies. It is clear that, as during the Renaissance period, people made their lives easier by adding their own intelligence and intelligence to life more effectively than before and moved to a different structure, today's humanity has also (to put it simply) uploaded/taught its own intelligence and intelligence to machines.

From this perspective, the industrialization that came after the Renaissance, the effective use of human mind and intelligence in life and in the world of materials, by transforming the substances outside the human being (such as turning metal into a cauldron, etc.) It tells how to transform it into tools. Thus, together with industrialization, humanity around the world began to mold materials and make items for production and consumption from them. Of course, the world's humanity was capable of doing somethings similar prior to the industrial revolution. How-

ever, in the industrial revolution that came with the Renaissance, this phenomenon meant being different from the past cycle, as it meant "being dominant/getting ahead and standardizing" for the social and economic structure, and it described a transformation in the social-economic structure (and outlook on life).

2. Conceptual Framework-Research Material and Method

Mainly the question sought to be answered in this study is what kind of an implementation process Industry 4.0 is at the point of industrialization and what is the place of the robot economy in this process. Here, another question is how and what degree developing Industry 4.0 and Robot economy in world economy and in Türkiye. In this context, studying area divided 3 sections. In the first section of article, investigated developments in world economy conditions and development process of electro-mechanic before 2000s to understand point to emerging of Industry 4.0 and robotics. In the second chapter of article, it focused on Industry 4.0 and robot technologies. Here, firstly, it analyzed systematic of Industry 4.0 and later researched development of robot technologies. In the third section of article it focused on Industry 4.0 and robot economy developments in world economy and Turkish economy.

In study, the statistical data took mainly from International Federation of Robotics (www.ifr.org) and Turkish Statistical Institute (Turkstat), Dünya Bankası (worldbank.org) and also www.cognitivemarketresearch.com, www.marketresearchfuture.com and www.robotpark.com.tr databases. Method of research is time-data comparison-crosschecking analysis according to years, products and countries.

3. The Phases and Evolution of Industrialization in the World Economy

Industrialization, firstly which manifested itself in England in the 1600s, exhibited a process of spread and change, gradually spreading to a significant part of the world (first England, then Germany, etc.) until the mid-1900s. It can be said here that the great transformation for the world's humanity is industrialization. Because the industrialization is way, instead of the "cycle of war supported by the quest to seize other countries and the wealth of other countries". (War and invading cycle doesn't finished but it's priority has been decreased). Because during this time period, the world's humanity has experienced significant develop-

ments in their quest to increase production with these tools and equipment, after a step in the industrialization process, which is called the cycle of transforming materials and making tools and equipment from them. There were big transformations in industrialization from 1600 to 1900s. The quest to increase this production has also brought about production structuring trends such as Taylorism and Fordism, as production system inside of time-process¹.

With the industrial revolution that emerged in England towards the end of the 17th century, the first machine that could operate using steam power was invented, and the mechanization process that started afterwards brought about the invention of electricity and mass production capacities, and new searches continued in this process, and the dreams of automatic working machines that emerged afterwards, one step later, led to the invention of computers and advances in information-electronic technologies².

It can be said that while the 1th industrial revolution (Industry 1.0) described mechanical production systems using water-based power and steam-based power, the 2th industrial revolution (Industry 2.0) described mass production with the support of electrical power. The 3rd industrial revolution (Industry 3.0) describes the process of automating production with the digital revolution, the use of electronics and the development of IT (Information Technologies). The fourth industrial revolution (Industry 4.0) is a collective and interactive system that includes many contemporary automation systems, data transfers and production systems. Industry 4.0 means the presence of the internet of things in process of

¹ M. Aiman, K. Bahrin, N.H.N. Azli and M.F. Talib, 'Industry 4.0: A Review on Industrial Automation and Robotic' (2016) *Jurnal Teknologi* 78 <<https://journals.utm.my/jurnalteknologi/article/view/9285/5537>> 138 Access: 15 April 2024

² E. Özetmel, 'Yapay Zekâ ve İnsanlığın Geleceği' (TUBA, 2020, Bilişim Teknolojileri ve İletişim: Birey ve Toplum Güvenliği) <https://tuba.gov.tr/files/yayinlar/bilim-ve-dusun/TUBA-978-605-2249-48-2_Ch9.pdf> 101 Erişim Tarihi: 23.07.2024; C. Dirican, 'Teknolojik Gelişmelerin Ve Yapay Zeka Çalışmalarının Pazarlama Bilimine Etkileri' (2015) 2 (3) *Journal of Management, Marketing and Logistics* 565; H.Y. Taş, 'Dördüncü Sanayi Devrimi'nin (Endüstri 4.0) Çalışma Hayatına ve İstihdama Muhtemel Etkileri', (2018) *OPUS*, <*International Journal of Society Researches*, Yıl:8, Vol:9/16> 1830

production. Industry 4.0 plays a major role in the creation of a smart factory system where robots are used in production³.

The smart factory system and cyber physical systems that came with the Industry 4 structuring have actually become functional with the internet/intranet of things. It must say that these systems and objects interact and communicate with sensors and the information they receive from sensors⁴. In result, it must say that at the backside of the robot technology, there are firstly industrial revolution (mechanical power), secondly digital revolution (computer power)⁵.

Immediately after the World War II, humanity began to seek to manage these tools and equipment, which it discovered with the industrialization revolution, with elements that can also be called simple mental calculations, instead of motivating them entirely with human power. The first step in this search is transistors. In 1947, the solid-state transistor was invented in the USA. In 1948, W. Shockley developed the BJT (bipolar junction) transistor. Here, it must say that theoretical development of quantum mechanics in the 1920s, has critical role in the development of solid-state-electronics in England. There is a direct connection between quantum mechanics and solids⁶. Transistors began to be introduced to the market in the 1950s. Later, using these transistors, new "human-activated semi-intelligent devices, being pre-robot" was began to be produced. The operating logic of transistors is a 0-1 on-off logic, by creating a series of transistors, different commands were derived from these, and devices, the first interaction of which was initiated by humans, began to be produced.

This development in industrialization has opened the door to a new beginning in the world society and economy. In order to understand to-

³ U.İ.B.,Yapay Zeka Ve Yeni Teknolojiler (2017) <<https://uib.org.tr/tr/kbfile/yapay-zeka-ve-yeni-teknolojiler>> 2

⁴ T.Özçelik and F.S. Onursal, 'Endüstri 4.0'ın İş Hayatı ve Sendikalaşma Üzerine Etkisi' (2020) BMIJ 8(1) < <http://dx.doi.org/10.15295/bmij.v8i1.1399>> 991 Access:10 June 2024

⁵ S.Makridakis,'The forthcoming Artificial Intelligence (AI) revolution: Its impact on society and firms Futures'(2017) V 90 <<https://www.sciencedirect.com/science/article/pii/S0016328717300046>> Access:10 June 2024 Access: 06 April 2024

⁶ W.F.Brinkman, D.E. Haggan, and W.W.Troutman, 'A History of the Invention of the Transistor and Where It Will Lead Us' (1998) Journal Of Solid-State Circuits < <https://www.researchgate.net/publication/2977642>> Access: 28 April 2024

day's robot technology and economy phenomenon and the foundations of other developments and to analyze the development differences of economies in the world economy on the basis of knowledge and technology, it is need to consider everytime the invention of the transistor. Because the essence of this economic change occurring in developed economies who create to robot economy and Industry 4.0 system, there is concentration and transition to micro-electronics in electronics.

This transfer/impact from electronics and electro-mechanics to economy is not incomprehensible. Because in today's world economy, this change in electronics and electro-mechanic has effects on every product subject to production and consumption. That's why it can be said that this new structure formed in the electronics world after 1947 forms the beginning of the change of today's world economy and is the starting point of current trends, including robot technology and industry. It can be said that the year 1948 and its aftermath was the first transformation period in the world economy in which electronics found a place in economic life and came to the fore⁷. This period describes a period in which information beyond mechanical production knowledge and devices that process information were invented and began to take the lead in production. These developments determined the direction of economic development and international trade in the world economy until the 1980s⁸. After invention of transistor, “chip” invented at the second phase.

The new product, called chip/IC, has been essentially a “transistor network” consisting of multiple transistors. After the invention of the integrated circuit, the computer processor was invented. Integrated Circuit (IC) is network of transistors. Processors are a transistor network combination that contains many more transistors than the integrated circuit. This first processor was produced by Intel in the USA in 1965. After the first processor it produced in 1965, the company doubled the transistors in the chip/integrated/processor 1.5 years later⁹. The development has occurred very rapidly. So much so that, while in 2007, Intel produced processors working with 820 million transistors, by 2012 this

⁷ A.O.Balkanlı, 'Ekonomik Gelişme ve Uluslararası Ticarete Naoelektronik, Eğitim ve İnsan Sermayesinin Etkenliğinin Değişimi ve Endüstri 4.0 Devrimi' (2019) 9 (1) Journal of Current Researches on Business and Economics 109

⁸ Balkanlı, (n 7) 109-111

⁹ ibid

number increased to 1.7 billion transistors (in the 4-core i7 processor). Today's (2024 year's) processor, the Intel Core i7-10700K processor (and i-9 Processors), has approximately 10 billion transistors. However, if we compare the transistors in processors to neurons in the human brain, it should be noted that processors in their current state are still very weak compared to the human brain and it is necessary to consider how much they can develop.

Considering that there are more than 100 billion neurons (nerve cells) in the human brain¹⁰, it should be said that it will not be easy for the number of transistors in current computer processors to reach the number of neurons in the human brain. (For processors to come close to the human brain, an increase of approximately 10 times in processor capability is required). However, this is also a fact: Even in its current state (when we think of past periods), the developments in computer processors in the 2000s largely explain the electronic dimension of today's robot technology phenomenon and the corresponding development of the world economy in the 2000s. Because this increase in transistors in processors has become an important electronic factor that has brought about a change in the world economy.

In the change of the world economy in the 2000s, this change in electronics is almost the main determinant. The developments in electronics are not limited to the processor electronics industry alone (and its impact on production). The revolutionary changes that started after 1950s greatly changed not only production but also the content and dimensions of international trade. So, in order to understand the change in the world economy and international trade in the 2000s and the reasons for this, it is necessary to take into account the changes in the 1950s and 1970s.

4. Industry 4.0-Robot Economy Relationship

4.1. Development of Industry-4.0 Structure

The Industry-4.0 concept was discussed for the firstly at the Hannover Trade Fair in Germany on April 1, 2011. Industry 4.0 meant the 4th industrial revolution. The 1st industrial revolution referred to the

¹⁰ N.E.Süslü 'Büyük Mucize Beyin Ve Öğrenme' (2015) Hacettepe University, Helath Sciencess Journal <<https://dergipark.org.tr/tr/download/article-file/88896>> 630 Access: 06 July 2024

period between 1760 and 1830. The industrialization period of Britain expressed this period of industrial development. II. industrial revolution emerged in the early 20th century. While production was reshaped after the 1929 World Depression, industrialization moved to a different dimension than previous processes. In production lines, Taylorism was replaced by the Fordist mode of production and later by the Post-Fordist mode of production. With the 1970s, III. The industrial revolution began and lasted until the early 2000s. In 2011, the definition of "Industry 4" was introduced in Germany and it considered the beginning of the 4th industrial revolution.

The simplest answer to the question of why Industry 4 emerged in Germany is the quest to eliminate and bring forward Germany's lagging behind in world industrial product production. At this point, the main point of action for Germany in this initiative has been to regain the industrial production power it lost against countries such as China, where labor wages are very low, and to surpass its rivals, China and the USA, in the production of new technology products. Following the announcement of the Industry 4 program in 2011, Germany established the Industry 4.0 Platform in 2013. This platform consisted of companies, ministries and unions. On the website established within the context of this platform, the aims of the platform were listed as follows: To make Germany the world's largest producer of production tools and to transform the country into the production center of almost every sector in a situation¹¹.

Essentially, after the 1990s, when the world economy transformed into a global economy, Germany, which shouldered the European Union, could not achieve much success in the global economy as of these years. Because the German economy was in trouble during these years. At the behind the economic acceleration experienced by China there were with the support of US capital and enterprise (starting from the 1980s) and the support of China's cheap labor force and raw material advantages. At this point, the concept of "Industry 4" put forward in Germany also expressed the desire for Germany to participate in world competition and industrialization processes as an actor as before.

¹¹ L. Özyıldırım and Ö. Özbay, 'Sanayi 4.0: Bildiğimiz Kapitalizmin Sonu mu?' (2019) <<https://www.enternas.yonalsosyalizm.org/sanayi-4-0-bildigimiz-kapitalizmin-sonumu.html>> Access: 30 July 2024

The objectives of Industry 4.0 may be classified as follows:¹² (i) Flexibility, (ii) Personalized Solutions, (iii) Fast, high-quality, cheap production, (iv) Energy saving, (v) Reducing waste, (vi) Using production areas more efficiently (vii) Increasing working speed and reliability, (viii) Providing sustainable competitive advantage. With the Industry 4.0 structuring, it is envisaged that all monads in the production is able to communicate and interact with each other, access big data, and thus obtain products-outputs that is best meet expectations In the background of the Industry 4.0 structuring, the most basic elements among the dynamics that reveal this structure are the huge developments in the digital world and the cyber-physical systems, called the internet of things that can communicate with each other. And to these factors, it must add that big data processing capability¹³.

According to the observations made in the production facilities during the Industry 4 implementation process, there are the four factors that separate Industry 4.0 from other 3 industrial revolutions and these are (i) sensors (which are the sensors required for machines to collect data), (ii) richness of data (to store what is received from the sensors and make them ready for processing), (iii) knowledge (As artificial intelligence's activity, to make them ready for processing), (iv) process efficiency (which means getting the machine to do that type of work after the decision has been made). By combining these four elements, automation in production comes to the fore and unskilled workforce's employment decrease in production process. Instead of unskilled labor, processes that have a very low error rate and provide stability are obtained¹⁴.

¹² Ö.Y.Saatçioğlu, G.T. Kök and N.Özispıa, 'Endüstri 4.0 Ve Lojistik Sektörüne Yansımalarının Örnek Olay Kapsamında Değerlendirilmesi', (2018) Vol.23 Suleyman Demirel University The Journal of Faculty of Economics and Administrative Sciences Special Issue on Industry 4.0 and Organizational Change 1679

¹³ A.Soylu, 'Endüstri 4.0 ve Girişimcilikte Yeni Yaklaşımlar' (2018) Sayı 32 Pamukkale University Journal of Social Sciences Institute, Pamukkale Üniversitesi Sosyal Bilimler Enstitüsü Dergisi <<https://dergipark.org.tr/tr/download/article-file/474447>> 44 Access:13 July 2024 ; Taş, (n 2) 1823-1824; TUSİAD, 'Türkiye'nin Küresel Rekabetçiliği İçin Bir Gereklilik Olarak Sanayi 4.0 Gelişmekte Olan Ekonomi Perspektifi' (2016) Yayın no; TÜSİAD-T/2016-03/576 27

¹⁴ S.Şener and B.Elevli, 'Endüstri 4.0'da Yeni İş Kolları ve Yüksek Öğrenim' (2017) Vol.1 (2) Journal Of Engineer Brains <<https://dergipark.org.tr/tr/download/article-file/310191>> 26-27 Access:13 July 2024

The Industry 4.0 revolution is a structure that prioritizes digitalization, information, computer technologies and robot production technology in industrialization. In a sense, with the Industry 4.0 application, it was desired and achieved to realize production on a large scale with robot technology and computer technology in production facilities. However, it is clear that at the advanced level the world economy reached in the 2000s, the production structure called "Industry 4.0" has become a current structure in the world's leading developed economies as no-name.

With other words, "dark factory" meant to Industry 4.0, describes a production structure in which humans are less labor force and robot machines are more effective in producing more, which brings competition. And this structure is a situation where implementation is sought in many developed countries at the level that computer systems and artificial intelligence effectiveness have reached (as of that period) after the 1990s. When we look at the Industry 4 structure, it can be said that it is a structure where automation supported by computer and artificial intelligence applications is at the forefront in production and its infrastructure is fed by the Post-Fordist mode of production. While Industry 4 structuring brings automation to the production cycle to a great extent, it meant the smart factory structuring that minimizes human activity in production and provides the opportunity to be competitive, with the support of efficient business models created. Because the robots and automation systems that came with Industry 4.0 did of great value in the competitiveness of industries in the world economy. Inside of this structure, more intensive use of robots, assembly, robot systems and industrial image processing systems reduced production costs and achieved high quality standards¹⁵.

Behind the Industry 4.0 production structuring, defined as the dark factory or smart factory there are (i) Internet of things (with the support of sensors), (ii) Autonomous Robotics technology, (iii) Horizontal and Vertical integration in Production, (iv) Remote management and Control access and Cyber Security phenomenon (Cloud administration, supervising and computing via by support of cloud), (v) Big data collection and analysis, (vi) Augmented reality and additive production phenome-

¹⁵ UIB, (n 3)3

non, (vii) 3D printers¹⁶. Internet of things came to the fore in 1991 and describes the ability of electronic devices to interact with each other and transfer data to each other. In this way, management and interaction between devices in production depending on the data command set has become possible¹⁷. 3D printers are machines that transform data into real things that can be, and many mechanical parts can be printed/produced with these printers¹⁸.

In general, there is a negative corelation thinking in societies between Industry 4.0 and employment. But it cannot be said that employment will be completely negatively affected by the Industry 4 structuring. And on the contrary, with the spread of Industry 4, new job areas were expected to be created in 7 areas in the economies. And also significant portion of these business areas are active now and take employment. These are¹⁹: 1. Software Programmers, 2. Information Technologies and Internet of Things Solution Producer (IT/IoT Lösungsarchitekt), 3. Industrial Data Analyst (Industrieller Datenanalyst), 4. Robot Coordinator, Programmer, Repairer (Roboterkoordinator, Roboterprogrammierer), 5. Production Technologies Expert (Produktionstechnologe), 6. Smart Cities Planners. Smart City Planners (Smart City Planner), 7. Product Designer and Manufacturers. It should be noted here that the Internet of Things/Robots (IoT/R) combined with smart robot applications has come into being with Industry 4.0, which also means smart production system²⁰.

4.2. Robot Technology and Automation in Economy Logic

The term of robot was first used by the Czech philosopher Karel Capek in his fiction "Rossum's Universal Robot (R.U.R.)" in 1922. In

¹⁶ Soylu, (n 13) 47/52;TUSİAD, (n 13) 27

¹⁷ Soylu ibid 45-47/52;TUSİAD, ibid

¹⁸ S.A. Göv and D. Erdoğan, 'Dördüncü Endüstri Devriminin (Endüstri 4.0) Neresindeyiz?' (2020) 7(2) İstanbul Gelişim Üniversitesi Sosyal Bilimler Dergisi 302-303

¹⁹ Şener and Alevli, (n 14) 29-32

²⁰ Aiman and Bahrin,(n 1) 137-138; B.Akyılmaz,'Robot Üretim Sistemleri Ve Nesnelere İnterneti',(2021) <https://www.researchgate.net/profile/burhan-akyilmaz-2/publication/351748032_ikinci_bolum_robot_uretim_sistemleri_ve_nesnelerin_interneti/links/60a78768299bf1031fba33bc/ikinci-boeluem-robot-ueretim-sistemleri-ve-nesnelerin-interneti.pdf> 22 Access: 25 June 2024

Czech, robot means "worker" or "slave". After Karel Capek, Isaac Asimov wrote science fiction novels about robots in 1939. Conceptually, the robot as a machine is similar to a human operating at a very high capacity, but this machine is intended to be completely free of human-specific shortcomings²¹. The use of robots in economic functioning has meant that they enable production at lower costs, primarily for entrepreneurs in businesses, instead of humans as labor in production processes. Therefore, robotic technologies, which positively affect profitability, have led entrepreneurs to employ robotic machines in production. In the Industry 4 structuring, where technology is the determining factor, it should be considered that the increased use of robots in production will, on the one hand, positively affect business profitability, while on the other hand, it will increase human labor unemployment²².

However, the use of robots in factories and other areas of the economy is not only for the profitability of entrepreneurs. Robots also protect people from work accidents and problems they may encounter through the activities they carry out in areas where there are human occupational risks in economic processes (risk of work accidents, risk of disease, etc.)²³. Therefore, when talking about the participation of robots in economic life, we should not think only in terms of profitability. It should also be noted here that robot technology supports the perfection of the product within the targeted/planned framework by decreasing the error rate in production and the product produced, and this positively affects consumer satisfaction.

It can say that main factors related to Industry 4.0 are Robots, Horizontal and Vertical System Integration, The Internet of Things, Cybersecurity, The Cloud, Big Data Analytics, Simulation, Additive Manufacturing (3 D Printing), Augmented reality²⁴. Robotic technologies are nourished by many branches of science and are thus an interdisciplinary field. Mechanical, electronics and computer engineering contribute the most to the development of robotic technologies²⁵. While the combined use of Robotics, Artificial Intelligence and Automation (R(obotics)+AI

²¹ A.Varol, 'Robotik' < https://www.asafvarol.com/dnotlar/robotik/robotik_kitabi.pdf, M.E.B. Yayınları> 56-57 Access: 14 July 2024

²² Özçelik and Onursal, (n 4) 982

²³ ibid

²⁴ Aiman; et al., Jurnal Teknologi 78,(2016) 3

²⁵ UIB, (n 3) 3

(Artificial Intelligence)+AI(utomation)=RAIA) in production processes increases, a new economic structure that can be called the robot economy has emerged. RAI A creates major changes in production and therefore consumption and provide great advantages to producers and consumers. For this reason, thanks to these advantages, robots used for both special purposes and industrial production are increasing²⁶. It should be noted here that different sciences such as Autonomous Mobile Robots (AMR), Internet of Things (IoT), Big Data, Augmented Reality, are of great importance in the realization of Industry 4.0. Here, "Autonomous Robots" may be called as robots that have certain intelligence and can make and implement decisions based on the data they collect, rather than robots with automatic work ability²⁷.

It should be noted here that the phenomenon of human-machine collaboration is at the foreground of Industry 4.0 system and in the Industry 4.0 system, smart robotic systems have an important place in realizing human-machine cooperation²⁸. Industry 4.0 allows to use more Autonomus Mobil Robots (AMRs) not only on production lines but also on assembly lines. AMRs have a different structure than standard autonomous guided robots. AMRs, unlike standard vehicles, they do not necessary an external system to localize. They are equipped with cameras and sensors to directe their environment and carry out their work themselves²⁹.

Robots are divided into 5 types according to their application areas: industrial robots, service robots, medical robots, military robots and amusement robots³⁰. Robots may undertake different tasks thanks to their features. In this surround, robots play an important role in production process. Because they will success their tasks perfectly, intelligent-

²⁶ D.Kurt and Ü. Bozoklu, 'Robot Ekonomisinin Yükselişi, Sosyal Bilimler Metinleri' (2019) Sayı 01 < <https://dergipark.org.tr/tr/download/article-file/712252>> 25-26 Access: 03 May 2024

²⁷ A.Yazıcı, 'Endüstri 4.0 Ve Otonom Robotlar' (2019) Elektrik Mühendisliği Dergisi < https://www.emo.org.tr/ekler/91f2bb2a057879e_ek.pdf?dergi=1069> 39 Access:14 July 2024

²⁸ M.Soori, R.Dastres and B.Arezoo,B.Jough, 'Intelligent robotic systems in Industry 4.0: A review' (2024) 4(3) Journal of Advanced Manufacturing Science and Technology <<https://hal.science/hal-04439263v1/file/Intelligent%20robotic%20systems.pdf>> 3 Access: 24 March 2024

²⁹ M.Javaid, A.Haleem, R.P.Singh and R.Suman, 'Substantial capabilities of robotics in enhancing industry 4.0 implementation', (2021) Volume 1, Cognitive Robotics 59 Access: 13 May 2024

³⁰ <<https://www.robotpark.com.tr>>(2024) Access: 20 July 2024

ly, safety, flexibility and collaboratively³¹. Collaborative robots are cobots that can interact with humans. These devices aim to increase human capacity in a healthy way. Robots that do not involve human-robot cooperation generally operate independently³². In the 4th Industrial revolution, by the use of digital technology, automation, and data sharing in production processes to improve productivity, adaptability, and flexibility in industrial environments, intelligent robotic systems are developed. Therefore, the integration of intelligent robotic systems within the context of Industry 4.0, while it transforming traditional production processes, it has started new peirod of smart manufacturing³³.

Robots can automatically and continuously perceive their environment (sense), transform what they perceive into processes through data analysis (think), and perform physical functions such as movement or non-physical functions such as warnings and suggestions (act)³⁴. With the increasing use of robots in industry, there has been a dramatically reducing in the number of non-qualitive workers employed. Because robots are more advantageous than human labor because they can carry out the tasks assigned to them without interruption. And robots do not exhibit major malfunctions, except for rare malfunctions, and can work with the same efficiency 24 hours inside of a day³⁵.

The increase in robots in production has brought the concept of robot economy. There are continiously developments in robot technology. And these advances in robotic technology made robotic activities's diversifications and more reliable. At result of this diversification in robots, today, according to another definition, robots may be subdivided into autonomous robots, cobots, interactive autonomous smart robots, humanoids, mobile robots, cloud robots, pick and place robots and robot swarms³⁶.

³¹ R.Goel and P.Gupta, 'Robotics and Industry 4.0', (In) (Ed.Nayyar,A. And Kumar,A.) A Roadmap to Industry 4.0. Erei-Springer (2020) < <https://doi.org/10.1007/978-3-030-14544-6>> 158 Access:13 July 2024 ; Aiman and Bahrin (n 1)139

³² Javaid, Haleem, Singh and Suman, (n 29) 64

³³ Soori,Dastres,Arezoo and Jough,(n 28) 2

³⁴ I.Wildhaber, 'Die Roboter kommen-Konsequenzen für Arbeit und Arbeitsrecht. Zeitschrift für Schweizerisches Recht', (2016) Band 135, I, Heft 4 <<https://www.alexandria.unisg.ch/server/api/core/bitstreams/0151e75f-7bfb-427d-89aa-174c76c8d608/content>> 316 Access:13 July 2024

³⁵ Varol, (n 21) 77

³⁶ Javaid,Haleem,Singh and Suman (n 29) 68

The Third industrial revolution referred to the transition from analog and mechanical devices to digital devices³⁷. In this period, transistors, microchips, computers and the internet emerged/invented. Industry 4.0 constructed on these devices/developments. In this point, Industry 4.0 refers to the era of "smart factory" and "smart objects" in which physical, digital and biological systems in the production area interact and are aware of each other and can work in harmony with each other. In this Industry 4.0 period, emerged, robotics technology, the internet of things which describes the interaction of the internet and network connections, the participation of co-bots in business life, which allow humans and machines to work together, the participation of nanotechnology in the production processes. And in this period, such as 3D printers emerged and also additive manufacturing. While digitalization grow in this process and big data has emerged. These big data started to analysed with the support of computers and information processing devices and cloud computing³⁸.

Table 1: Industrial Robots' Installations (Annual, 1.000 ')

Regions/ Years	20 12	20 13	20 14	20 15	20 16	20 17	20 18	20 19	20 20	20 21	20 22
Asia/Australia	85	99	13 4	16 1	20 0	28 0	28 4	25 5	27 4	38 5	40 5
Europe	41	43	46	50	56	67	76	74	66	82	84
The Americas	28	30	33	38	41	46	55	47	39	52	56

Source: IFR, <https://ifr.org/img/worldrobotics/2023_WR_extended_version.pdf> (2023) 10

³⁷ Z.Tekin and F.Uslu, 'İşletmelerde Zaman Yönetimi:Endüstri 4 ile Ölü Zamanı Sıfırlamak' (2018) Uluslararası 4. Çin'den Adriyatik'e Sosyal Bilimler Kongresi 138

³⁸ Özyıldırım and Özbay, (n 11);TUSİAD,(n 13) 25

Table 2: According to Customer industries, Robot Installations, World, (Annual, 1.000')

Sec-tors /Years	Elec-trical& Electro-nics	Auto-motive	Metal& Ma-chinery	Plas-tic& Chem-ical	Food	All Othe-rs	Unspe-cified
2020	112	83	41	19	12	37	85
2021	143	117	68	25	15	55	102
2022	157	136	66	24	15	61	94

Source: IFR, <https://ifr.org/img/worldrobotics/2023_WR_extended_version.pdf> (2023) 12

Industry 4.0 is system which interact with each other through a connected network of computers and equipment. In this system, the robots' activities were connected to programmable logic controller. So, works were organized and automated more easily and more³⁹. In this process, inside of time, impact of developed technology, robots, sensitive and able to think and act (sense, think, act), have become more important factor in production⁴⁰. While the first and limited robots produced in 1959 were aimed at lifting/motivating certain objects in industry now, there are currently an estimated 650 thousand industrial robots working in the world⁴¹.

In the development of robot technology, the traveling robot named "Shakey", which was developed in 1966 and perceives its surroundings. In 1980, the 3rd generation robots were developed, and these robots, as the pioneers of autonomous robots, were robots that perceive their environment, produce a plan/decision with their perceptions, and act accordingly. Until the 1990s, industrial robots had a dominant share in robot production sector⁴².

There are also significant developments in the material basis of the development of robot technology since 20-30 years. The increasing de-

³⁹ Javaid,Haleem,Singh and Suman,(n 29) 62

⁴⁰ Wildhaber, (n 34) 317

⁴¹ Varol,(n 21) 75-76

⁴² Yazıcı, (n 27) 39

mand for industrial robots has been particularly determinative here. Especially since 2017, the stock of industrial robots has increased annually average of 13%. China played a major role in this increase in demand. So much so that China's operational industrial robot stock has grown by an average of 25% every year since 2017. While the number of robots in China was one million in 2021, it exceeded 1.5 million in 2022. This amount represented 38% of the global stock. It should be noted here that the largest industrial robot market in the world is in Asia, at the effect of China. Because Asia's largest market is China as it seen from data. (If it say for compare, In the US, installations are 56,053 units in 2022 (55,212 robots in 2018)). From 2017 to 2022, annual robot installations in China was grew annually average of 8%. When it look in world economy, 79% of global robot installations occurred in five countries. They are China, Japan, USA, Republic of Korea and Germany. As of 2022, 156,936 robots have been installed in the sectors of home apparatuses, electrical machines, semiconductors, solar panels, computers, telecommunication apparatuses and video and other electronic amusement products⁴³.

It is clear that which factors are effective that make it attractive for businesses to replace human labor instead of robots. The main advantages of replacing the workforce with robots are decreasing costs, increasing production, developing of product quality, increasing of precision in the process, reducing production costs, reducing error margins and risks to people. However, it should be noted that robots have disadvantages. For example, the disadvantages of replacing the workforce with robots include increased unemployment rate, decreased tax collection, lack of empathy and the danger of hacking, here⁴⁴.

Today, robots are used in industry, medical sector, war equipment/defense sector, film industry, space industry, housework, agriculture and animal husbandry, and sports⁴⁵. In 2012, 60,141 robots were

⁴³ IFR, <<http://www.ifr.org>> (2023) 12-13 Access:15 June 2024; www.marketresearchfuture.com, (2024) Access:09 June 2024

⁴⁴ E.Carrera, F.M.Lorena, L. Zambrano, H.Yandry, V. Rade and L.Yasmina, L, 'Replacement of human personnel by artificial intelligence: advantages and disadvantages' (2022) 25 15, n. Investigación y Negocios,ol. <http://www.scielo.org.bo/pdf/riyn/v15n25/v15n25_a04.pdf> 35 Access:11 March 2024

⁴⁵ Varol, (n 21) 78-83

installed in general industries (38% of the total robots), while in the same year, 66,508 robots (42%) were installed in the automotive industry and 32,697 robots (20%) were installed in the electrical and electronics sector. By 2022, robot installation in general industries increased to 259,986 (47% of the total robot installation), 156,936 in the Electrical-Electronics sector (28% of the total robot installation), and 136,130 in the Automotive sector (25% of the total robot installation). While 14% of industrial robots were installed in China in 2012, this rate increased to 52% (290,258 units) in 2022. While the robot installation of countries other than China in 2012 was 86% with 136,359 units, in 2022 this share decreased to 48%, with 262,794 units⁴⁶. It is very clearly that in the process, the share of robot usage in Chinese economy greatly increased.

Industrial robotics market size reached to 18.6 billion USD in 2023. The Industrial robotics market's value is presciented to grow from USD 20.68 billion in 2024 to USD 43.6 billion by 2032 (compound annual growth rate (CAGR) of 9.77% (2024 – 2032)). Here, automotive industry are the main market factor increasing the market growth⁴⁷.

In world economy, service robots for professional use in Transportation and logistic sector increased from 60.000 to 86.000 from 2021 to 2022. In hospitality sector service robots for professional use increased from 11.000 to 25.000 from 2021 to 2022. In Medical robotics area service robots for professional use was 9.000 in 2021. (in 2022, it was 9.000.) In Agriculture sector service robots for professional use increased from 7.000 to 8.000 from 2021 to 2022. In professional cleaning sector, service robots for professional use is increased from 6.000 to 7.000 from 2021 to 2022. In 2022, while USA ranked first place in among the service robot manufacturers with 204.000 devices, China ranked second with the production of 99,000 devices, Germany ranked third with 74,000 devices, Japan ranked fourth with 67,000 devices, France ranked fifth with 48,000 devices, and South Korea ranked sixth with 50,000 devices⁴⁸.

Essentially, robots consist from drivers, robotic manipulators, sensors, end effectors and controllers. Most of these devices are using in automomotive industry. So, it can say that the industrial robotics indus-

⁴⁶ IFR, (n 43)

⁴⁷ <www.marketresearchfuture.com> (n 43)

⁴⁸ IFR, op.cit

try is feeded by the growth of automotive industries. While industrial robot sector grows, this development increased the integration of AI robots, IoT, and other digital technologies. In the impact of development of robot industry, robots are started to use, not only in the automotive industry, but also in food and beverage, healthcare and pharmaceuticals, aerospace and defense, metals and mining and other industries, more than ever before⁴⁹

When robot sector's sells analized, it seen that the electrical/electronics sector is seeing the main demander of industrial robots in 2020-2021-2022. In 2022 alone, 156,936 robots were installed in the production sector of electrical machines, semiconductors, solar panels, computers, telecommunications devices, household appliances, and video and electronic entertainment products. Robot demand in the electrical and electronics industry increased by an average of 5% annually since 2017. The average robot density in the manufacturing sector in 2022 was 151 robots per 10,000 employees. When this number looked at especially for Asia, it is seen that the number of robots per capita is higher. For example, Asia's average robot density in 2022 was 168 units per 10,000 employees. In the same period, Europe's robot density was 136 units per 10,000 employees. In America, this rate was 120 robots per 10,000 employees⁵⁰. (In Turkiye, 32 robots were used per 10.000 employess in 2020⁵¹.

Under the influence of the widespread of Industry 4.0, the tendency towards robotics and smart production in the industrial field is increasing. The growing industry directs companies to advanced technologies. For example, in the automotive industry, the increasing interest in electric cars brings lively demand in the robot market, considering the cost-benefits⁵². According to end use, the industrial robot market is basically divided into two. The primary market is include to Automotive, Electrical and Electronics, Chemical Rubber and Plastics, Manufacturing, Food and Beverage industries. The second market is others. "Other industries". The essence of this distinction is that the main demanding

⁴⁹ <www.marketresearchfuture.com> ibid

⁵⁰ IFR, (n 43) 15

⁵¹ <<https://www.stendustri.com.tr/turkiyede-robot-kurulumlari-yuzde-11-artti>> (2022)
Access:05 July 2024

⁵² <www.marketresearchfuture.com> ibid

industries in the robot market are the primary market industries. When it look to detail, in 2022, more than 25% of the industrial robot market consisted of the electrical/electronic end-use segment⁵³.

In nowadays, there is a rapid increase in the production and sales of industrial robots in the world economy. So, while the robot installation of the Asia/Australia region (especially in China) was 85,000 in 2012, this number is 405,000 in 2022. Robot installation increased dramatically in this region in 10 years. This value is extraordinarily high compared to other regions. At the robot installation data of other regions are quite low. For example, robot installation in Europe increased from 41,000 units in 2012 to 84,000 units in 2022. Robot installation in the Americas increased from 28,000 in 2012 to 56,000 robots in 2022.

For todays, modern trends and contents in the development process of robot technology are as follows: Cloud system and 5G telecom networks, digitalized production process, machine control and vision, programming, detection of shapes and smarter, faster, more efficient and more accessible automation, and nearshoring of production, democratizing of robot using⁵⁴.

When it analyzed developments, it can be said that robots can offer better product quality than human labor. Because robots programmed in automatized works are reliable, safety and they supplies high-quality product quality. Robots give to firms, 24/7 operation efficiency⁵⁵. As of 2024, in Robot market The US, Canada, German, France, UK, Italy, Spain, China, Japan, India, Australia, South Korea, and Brazil are active. And key companies in the Industrial Robotics market are Abb, Fanuc Corporation, Yaskawa Electric Corporation, Mrk-Systeme GmbH, Epson, Mitsubishi Electric Corporation, Comau SpA, Daihen, Denso Corporation, Finsar, Aurotek, Apex Automotion and Robotic, Adept Technology, Kawasaki Heavy Industries, Ltd., Omron Corporation, Kuka AG, Hirata Corporation, Toshiba Machine Co.Ltd.⁵⁶.

⁵³ <www.cognitivemarketresearch.com> (2024) Access: 16 May 2024

⁵⁴ IFR, (n 43) 34-35

⁵⁵ <<https://go4robotics.com>> (2024) Access: 08 April 2024

⁵⁶ <www.marketresearchfuture.com> (n 43):<https://www.cognitivemarketresearch.com> (2024) Access: 23 July 2024

5. Robotics and Industry 4.0 Developments in Türkiye

The first study on robotic technologies in Türkiye was carried out in 1987 with the support of TUBITAK Engineering Research Group and ITU. This work started with the establishment of the "Robot Technology Research Unit (ROBOTEK)" and Türkiye's participation in the European Regional Project on "Industrial Robotic Applications" organized by the United Nations UNDP/UNIDO organization in 1988. The "National Focal Point (NFP) ROBOTECH unit" of the study organized by UNIDO was determined as ITU⁵⁷.

It can be said that enterprises with capital adequacy in Türkiye have increasingly participated in industry 4 structuring and the use of robots over the years. So much so that, as of 2022, the robot installation level in Türkiye ranked 13th among the world countries with 3,700 units. In list of World Robotics Organisation, after Türkiye, in ranking, Thailand installed 3.300 robots and then Canada installed 3.200 robots. Before Türkiye (in ranking), the country that installed the most robots was China (290.300 robots), followed it by Japan (50.400 robots), the USA (39.600 robots), South Korea (31.700 robots), Germany (25.600 robots), Italy (11.500 robots), Taiwan (7.800 robots), France (7.400 robots), Mexico (6.000 robots), Singapore (5.900 robots) and Spain (3.800 robots)⁵⁸. After Türkiye, Thailand ranked 14th and Canada ranked 15th in robot installation. In Türkiye, from 2015 to 2020, annual robot installations grew by an average of 3 percent. The operational stock is 16,464 units (+%10). From 2015 to 2020, the robot stock increased by 16 percent CAGR (compound annual growth rate)⁵⁹.

In the coming years, the industrial robotics market in Türkiye is expected to experience rapid growth, with an estimated compound annual growth rate of approximately 5.5 percent. With this rate of increase, the market volume of the industrial robot market in Türkiye may increase to 43.3 billion US dollars in 2027⁶⁰. There are many reasons for this progress. Among these, increased productivity and cost savings have big importance. For these reasons, it seems that the use of robots will

⁵⁷ Varol, (n 21) 78

⁵⁸ IFR, (2023) 17

⁵⁹ <www.stendustri.com.tr> (n 51)

⁶⁰ Reportlinker.com, 'Turkey, robotics, Market Overview 2024-2028' (2024) <<https://www.reportlinker.com/market-report/Robotics/492848>> 5 Access:17 June 2024

increase due to the increase in automation in many sectors, especially the automotive, electronics and metal industries⁶¹.

But it should say that the manufacturing industry in Türkiye, which is among the high-middle income economies, is concentrated in the low and medium-low technology group⁶². For this reason, it can forecast that the use of Industry 4.0 and robot technology is not high in Türkiye, except for companies with high capital. This situation can understand from the low level of high-tech products in exports and the high level of high-tech products in imports⁶³. In Türkiye, some large companies operating in the automotive sector and white goods manufacturers are closer to Industry 4.0 and robot technology⁶⁴. (for example, Ford Otosan, Toyota Türkiye). In addition, large white goods manufacturers and electronics companies (Karel⁶⁵, Mitsubishi-Türkiye⁶⁶ and etc are work in the Industry 4.0 system⁶⁷. Apart from these, it can be said that companies in the pharmaceutical and chemical sectors are work in the Industry 4.0 system.

It can give another company's examples to transfer to Industry 4.0 in Türkiye. Example, Koç Holding companies and Sabancı Holding companies and another big holding companies transferred to Industry 4.0 system. Example, as an Electronic company Vestel (Zorlu Holding's Company) also transformed to Industry 4.0 system. Not only Vestel Company, but also Zorlu Energy, Zorlu Textile, and Zorlu Real Estate Companies, which are other companies within Zorlu Holding, have real-

⁶¹ Reportlinker, (n 60) 5

⁶² EBSO, 'Sanayi 4.0' (2015) EBSO Yayınları 45

⁶³ <www.tuik.gov.tr (2024)> Access:30 July 2024

⁶⁴ A.Sarıkan, 'Endüstri 4.0 Nedir? Türkiye'de Endüstri 4.0 Uygulamaları Nelerdir?'(2024) <<https://www.karel.com.tr/bilgi/endustri-40-nedir-turkiyede-endustri-40-uygulamaları-nelerdir-alper-sarikan-roportaji>> ; E. Kasnak and B.Özkara, 'Türkiye'deki İmalat Şirketlerinin Endüstri 4.0 Olgunluk Düzeyinin Belirlenmesi' (2022) July 3 Journal of Productivity 377 Access:17 July 2024

⁶⁵ <www.cybermagonline.com> (2024) Access: 26 July 2024

⁶⁶ <<https://tr.mitsubishielectric.com>> (2024) Access:26 July 2024

⁶⁷ EBSO, (n 62)31-36; H.Kahraman, 'Dördüncü Sanayi Devrimine Öncülük Eden 5 Şirket' (2024) <<https://www.endustri40.com/dorduncu-sanayi-devrimine-onculuk-eden-5-sirket>> Access:18 July 2024 ; <www.businesssturkiye.com> (2024) Access:18 July 2024

ized their structuring within the scope of Industry 4.0⁶⁸. Examples can be increased. Another example is Hema Industry Inc., serving in many areas from the defense industry to the automotive industry, from construction equipment to the aviation sector. As another example, Koç System (Koc Holding company) system founded in the logic of Internet of Thing (IoT), base stations, electricity meters, and production equipment as "platform 360", and this platform covered not only the production process but also the logistics and marketing processes⁶⁹.

On the subject of digital change, which is at the basis of Industry 4.0 in Türkiye, a research was conducted under the name "CEO Perspective on Digital Change" in cooperation with TUSIAD, Samsung, Deloitte and GFK organizations. Within the scope of this research, between 29 September 2015 and 15 January 2016, face-to-face interviews were held with the senior managers of 58 companies, including 11 were from the banking sector, 11 from the holding sector, 6 from the retail sector. According to this research, it has been observed that there is a significant correlation between digital maturity and digital strategy in institutions. So much so that the participants of the research saw "the clarity of the strategy" as the most fundamental factor in the success of corporate digital change and stated that the most important obstacle to digital maturity was "lack of strategy". However, as stated by the participants of the research, digital change is not yet perceived holistically in Türkiye. According to senior managers participating in the research, companies are making operational investments in individual technologies, not comprehensively⁷⁰. In this research, first activity point was customer behaviours and after digitalization and analyze process. According to research's logic, these behaviours and digitalization process are effect to markets and also these market developments impact to technological growing in production sectors⁷¹.

⁶⁸ N.A.Davutoğlu, 'Sanayi 4.0 uygulamalarının dünyadaki ve Türkiye'deki sektörler açısından detaylı analizi' (2021) 8/67 Journal of Social and Humanities Sciences Research < <http://dx.doi.org/10.26450/jshsr.2368>> 805 Access: 20 July 2024

⁶⁹ Davutoğlu,(n 68) 805; <www.kocsistem.com.tr> (2024) Access: 26 July 2024

⁷⁰ TUSIAD, Samsung, Deloitte, GFK, 'Türkiye'de Dijital Değişime CEO Bakışı' (2016) <<https://www2.deloitte.com/content/dam/Deloitte/tr/Documents/technology-media-telecommunications/turkiyedeki-dijital-degisime-CEO-bakisi.pdf>> 4 Access: 21 July 2024

⁷¹ TUSIAD, Samsung, Deloitte, GFK, *ibid*

There are also efforts to direct the industry towards Industry 4.0 structuring in Turkiye. For example, in a report published by TUBİTAK in the 9th month of 2023 (as an evaluation of the years 2019-2020), prioritization was made in the fields of robotics and automation. Within the scope of this study, according to Tübitak's Private Sector Machinery Manufacturing plan for 2020, robotics and mechatronic system technologies (Intelligent Robotic Systems, Advanced Control Technologies, Servo Actuators, Soft Robots, Robotics and Automation system components, Collaborative Systems) and Factory Automation systems (Collaborative Robots and Autonomous robots) have described to priority⁷². In Turkiye, large companies are turning to Industry 4.0 applications.

According to Tusiad, for Industry 4.0 structuring 6 sectors (Total of these sectors have share %60 in Gross Production) are more forefront in ranking in Turkiye. These sectors are Automative and automotive Sub-industry (Share in Gross Production share %6), Machine Industry (Share in Gross Production share %4), White Goods Industry (Share in Gross Production share %5), Food and Beverage Industry (Share in Gross Production share %18), Textile (Share in Gross Production share %15) and Chemical Industries (Share in Gross Production share %12)⁷³.

In Turkiye, it is seen that Telecom companies provide application support to companies in terms of the Internet of Things in the Industry 4.0 application⁷⁴. Moreover, at the point of supporting to Industry 4.0 system, there are activities in Turkiye. Among these supports (apart from the works of TUBİTAK and other state organizations) there is also the studies of TUSIAD Turkish Industrian and Businessman Association)⁷⁵.

In Turkiye, there are companies that import robots as well as companies that produce locally. It is observed that there is a specialization in the production of AMR, FMR, LMR, CMR, CTU type robots, especially in the production of robots for the automotive, chemical, shipping, food, iron and steel, cable, and pharmaceutical industries. As of 2024, the main demander sectors in the robot production/trade area are Durable Consumer Goods, Electronics and IoT, Energy, Aviation and Space,

⁷² <<https://tubitak.gov.tr>> (2023) Access: 18 July 2024

⁷³ TUSIAD, (n 70) 42/44

⁷⁴ <www.turkcell.com.tr> (2024) Access:26 July 2024, <www.vodafone.com.tr> (2024) Access: 26 July 2024, <www.turktelekom.com.tr> (2024) Access: 26 July 2024

⁷⁵ <www.tusiad.org> (2024) Access: 20 July 2024

Machinery Manufacturing, Medical and Dental, Engineering, Automotive, Robotics and Automation, Defense sectors⁷⁶.

Table 3: Gross R&D Expenditure/GDP in Turkiye

Years	R&D % Value	Years	R&D % Value
2001	0.52	2012	0.83
2002	0.51	2013	0.81
2003	0.47	2014	0.86
2004	0.50	2015	0.97
2005	0.56	2016	1.12
2006	0.55	2017	1.18
2007	0.69	2018	1.27
2008	0.69	2019	1.32
2009	0.80	2020	1.37
2010	0.79	2021	1.40
2011	0.79	2022	1.32

Source:www.tuik.gov.tr Access: 30 June 2024

A significant portion of the companies operating in the robot industry sector in Turkiye in terms of production and/or trade (according to information disclosed to the public in open access) may rank as follows as of July 30, 2024: Altınay Robot, Akın Robotics (humanoid robot), Defense Industry Presidency, Oskon, Xometry, Robo Automation, Universal Robots, Ecomaks Automation, Gürmas Gürel Makina San. A.Ş.,Balkan Robotic, Ingtecro, rts robotics,ceylan robot, Arge robotic,Abb,Mcfly Robotics, Kuka Turkiye, Schunk Turkiye, Siff Electromechanical, Günmak A.Ş., Closs Turkiye, Manu Robotics, Reel Mechatronics, Rotsis Robot Automation, Phoenix Contact, Sintek Engineering, Murr Electronics, Dedem Automation, SYS Robotics, Askaynak, Stäubli Robotics, Behaotomasyon, Moritek, He-Pro Mechatronics,Roboder, Wetec, Aselsan, Bozkurt Machinery, Ceysan, Demir İş Machinery, FenRobotics, Gurmak, Inno Robot, Makro Robot, Mechatronics, Robotics Inc., Robaxis,Asmetal, Omron, 3drobotik. It should be said that there are other

⁷⁶ <<https://xometry.com.tr>> (2024) Access: 20 July 2024

companies in the sector than the companies above. Other companies may investigate from Roboder (In the robot industry sector, there is an association under the name of Roboder) database⁷⁷. These companies operating in Türkiye can produce/provide the robot requirements of the production and service sectors in many fields, including industrial robots, service robots, agricultural production robots, medical sector robots, etc. As of May 11, 2023, more than 17,000 robots involved in production in Türkiye⁷⁸.

Although there are efforts to develop and advancements Industry 4.0 and Robot technologies in Türkiye, it is difficult to say that these are sufficient. The development of the ratio of R&D Expenditures to GDP in Türkiye is an important indicator in determining this. At this point, when we look at the ratio of R&D expenditures to GDP in Türkiye from 2011, when the Industry 4.0 structuring was announced, to 2022, it is seen that the rate, which was 0.79% in 2011, increased significantly to 1.32% in 2022. However, when this rate is compared with world examples, it should also be said that it is not a very high rate. For example, while the world average ratio of R&D expenditures to GDP was 1.99% in 2011, it was 2.62% in 2021⁷⁹. Compared to the world average, the share allocated to R&D by Türkiye is low. At this point, as Sözen and Mescioğlu also stated, it would be more accurate to position Türkiye's industrial condition not in 4.industrial revolution but somewhere between the 2nd Industrial Revolution and the 3rd Industrial Revolution. The reason for this is the inadequacy of companies' R&D budgets and investment in technology⁸⁰.

6. Conclusion

The robot economy and the Industry 4.0 are two intertwined elements. 3rd Industrial Revolution meant a structural change from mechanical systems, semi-electro-mechanical systems to digital systems. Of course, while production structures are changing, consumption cycles

⁷⁷ <<https://uyeler.roboder.org.tr>> (2024) Access: 18 July 2024

⁷⁸ M.Varış, <<https://www.bloomberght.com/turk-sanayiinde-17-bini-askin-robot-uretim-yapiyor-2331255>> (2023) Access:13 July 2024

⁷⁹ <www.worldbank.org> (2024) Access: 16 May 2024

⁸⁰ M.Sözen and T.Mescioğlu, 'Endüstri 4.0'ın İtici Güçlerinin Türkiye Ve Çin Üzerindeki Etkileri' (2019) VFol.12/1 International Journal of Social Inquiry 310 Access: 26 July 2024

and preferences also kept up with this change with new products. From changing production and consumption processes have also affected social structures in some way. This is not surprising. Because, in world societies, social cycles and economic cycles are intertwined at many points. For example, as industrialization increases in countries, information has come to the fore not only in production processes but also in consumption processes.

This differentiation became more evident especially in the 4th Industrial Revolution. In today's world, it seems that societies are more involved in "information and learning". As societies engage with knowledge and learning, production processes have also become more knowledge-based. Structure of changing society supported to development of production cycles. In this surround, it can say that robot economy and Industry 4.0 application describes the reshaping of production with knowledge. This is so, because behind robot technology and the 4th Industrial Revolution there are digitization of information and its application to production.

Behind the Industry 4.0 production system, defined as the smart factory, there are autonomous Robot technology, Internet of Things, Horizontal and Vertical integration in Production, Remote management and Control access and Cyber Security, 3 D printing technology, Big data collection and analysis, Augmented reality and additive manufacturing. All of these are related to development of knowledge efficiency and digitalization of knowledge.

While developed capitalist economies of world economy together with 1980s take to front knowledge in their economic and social life, when they came 2000s, they moved to 4th industry revolution and this transformation is continuing nowadays. Here, when it look transformation of Turkiye's industrialization, it can see and say that Turkiye has positive developments in Industry 4.0 structuring. In Turkiye, although it not widespread, there is development in the field of Industry 4.0 and robotics, especially in large-capital companies and in the automotive, durable consumer goods and other electronics sectors.

In the 21st century, with the industrial 4.0 revolution in the world economy, production lines in factories of some developed countries have at the big rate transformed on a different structure than in the past. So that, production is became more sophisticated with the support of digitalization. While production lines have changed under the influence of

smart production techniques in today's industrialization process, both significant increases in production have been encountered and it has become easier to design and develop new products.

Although Turkey's industrialization emerged in the 1700s as a longing in the eyes of some managers (in Ottoman period), the dates when serious industrialization steps were taken were in period of Turkish Republic. The industrialization efforts that continued from 1923 until the 1980s can be defined as the 2nd industrial revolution in the distinction of the industrialization revolution. In 1980s, while world economy change, Turkish economy is also changed. An industrialization process emerged after the 1990s, which may name a 3rd industrial revolution, with increased use of computers in production.

However, in these years, at the impact of the hegemonic power of the liberal doctrine of world economy and at the impact of the conditions of country's economy and it is not possible to talk about the intense support of the state as in the 1960s and 1970s at industrialization. A similar situation is also the case in the 2000s. In these years, Türkiye is in global economy conditions.

In these years, the striking situation in large-scale and big capitalized companies of Türkiye is the emergence of a tendency towards the Industry 4.0 revolution in varying degrees. And again in these years, the use of robots in production and distribution lines in medium and large-scale enterprises began to increase. So that, when examined as of 2022, it is seen that the use of robots in production has increased considerably. According to the calculations of the International Robotics Organization, Turkey ranked 13th in robot installation on a world scale. As of this year, this ranking represented a degree front of Thailand and Canada.

According to data above, in today's world economy, the application of Industry 4.0 and the effectiveness of the robot economy are fastly increasing. However, in Türkiye, firstly, after 2010 (2011), It cannot be said that the Industry 4.0 application tendency, which emerged in areas such as automotive and electronics, has spread to the whole economy. There is a tendency, but this tendency is weak. In this area, the state's supportive policies are needed in the main route of developing Turkey's industrial production (industrialization) and foreign trade. At this point, technology policies including tax reductions and production supports can be created to encourage companies to turn to Industry 4.0 and the robot economy by public authorities.

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CONSTITUTIONAL CONVENTIONS IN THE UNITED KINGDOM

(KONVENCAT KUSHTETUESE NË MBRETËRINË E BASHKUAR)

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ABSTRACT

An unwritten constitution refers to a constitutional order in which the rules regarding the main organizational order of a State are not collected within a single text. The UK is considered to be one of the few examples of a State with an unwritten constitution. Although there are many constitutional documents adopted in England since the Magna Carta of 1215, there is not a single codified written constitution. We know that there is a constitutional functioning based on customary constitutional practices in England. In this article, we shall discuss what these constitutional conventions are - which have a very important place in the functioning of an uncodified constitutional system.

Keywords: Constitutional Conventions, British Constitution, Unwritten Constitution, Ministerial Responsibility, Royal Prerogative

ABSTRAKT

Një kushtetutë e pakoduar i referohet një sistemi kushtetues në të cilin rregullat që qeverisin strukturën kryesore të shtetit nuk janë përmbledhur në një tekst të vetëm. Mbretëria e Bashkuar konsiderohet si një nga pak vendet me një kushtetutë të pakoduar. Edhe pse që nga Magna Carta e vitit 1215 janë miratuar shumë dokumente kushtetuese në Mbretërinë e Bashkuar, nuk ekziston asnjë kushtetutë e vetme e koduar me shkrim. Ne e dimë që Mbretëria e Bashkuar ka një sistem kushtetues të bazuar në konventat kushtetuese. Ky artikull do të shqyrtojë në detaje se çfarë janë këto konventa, të cilat luajnë një rol shumë të rëndësishëm në funksionimin e sistemit kushtetues të pa kodifikuar të bazuar në këto konventa.

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This article has been published in the 268th issue of Legal Journal of Law

Fjalë kyçe: Konventat Kushtetuese, Sistemi Kushtetues Britanik, Kushtetuta e Pakodifikuar, Përgjegjësia Ministrore, Prerogativa Mbretërore

Introduction

United Kingdom do not have a codified or formal constitution. In this sense, the British Constitution is made up of multiple unwritten and written sources, which collectively ensure the functioning of the British constitutional order. To understand the United Kingdom's constitution, which is largely but not wholly unwritten, it is necessary to examine the various legal and non-legal sources. The legal sources include Acts of Parliament and judicial decisions regulating the relationship between institutions of the state and individual citizen. Some parts are based on Acts of Parliament, such as the Scotland Act 1998, which established devolved institutions. Other laws regulate the relationship between the two chambers of Parliament and the time limit on general elections, as seen in the Parliament Acts of 1911 and 1949. The Human Rights Act 1998 also plays a significant role by guaranteeing individual freedoms. Additionally, court decisions contribute to shaping the constitution.

The principle non-legal sources of the constitution are constitutional conventions which are binding on those who operate the constitution and give rise to the accusation of unconstitutional (but not unlawful) conduct if not observed. Constitutional conventions have long been recognized as important part of the British Constitution. Ahmed et al. note that 'it is impossible to understand a constitution in the Commonwealth tradition without an appreciation of its conventions.'¹ Similarly, Peter Oliver underlines 'any judge who wishes to understand a constitution in the British tradition must understand constitutional conventions.'²

Constitutional conventions are the source of many of the significant rules in British constitutional system. Conventions regulate the institutions and functions of most aspects of parliament and responsible government: for example, the role of the Queen, the offices of Prime

¹ Farrah Ahmed, Richard Albert, and Adam Perry, 'Enforcing Constitutional Conventions' (2019) 17 International Journal of Constitutional Law 1151.

² Peter C. Oliver, 'Constitutional Conventions in The Canadian Courts' (UK Constitutional Law Association, 2020) <<https://ukconstitutionallaw.org/2011/11/04/peter-c-oliver-constitutional-conventions-in-the-canadian-courts/>> accessed 15 March 2020.

Minister and Cabinet, the rules for developing government, the dissolution of parliament, the appointment and removal of ministers, ministerial responsibilities, caretaker government, and the chain of accountability involving public services.

In the British constitutional system, these conventions are understood as being unwritten or implied; traditionally, no authoritative texts explicitly define their meaning and scope. Over time, repeated political practices can be formalized into rules of conduct and eventually become conventions. Conventional rules are often considered tacit agreements or practices that go unspoken.

To understand the nature of conventions, it is essential to consider how they come about. Constitutional conventions are not typically created intentionally. Instead, they develop through political behaviour, rather than through formal declarations. These conventions evolve from consistent political practices, which gradually become well-established rules that are generally accepted as constitutional rules.

In the early stages, actors may repeatedly follow the same practice under the same circumstances without feeling compelled to do so. For example, since 1924, international treaties have been laid before Parliament at least 21 days before ratification, not out of a desire to create a rule but as a matter of practice. Similarly, the monarch consistently accepts and acts on the advice of ministers, who are accountable to Parliament for their advice, or appoints the leader of the majority party in the House of Commons as Prime Minister, without the intent to formalize a rule. Eventually, political actors come to believe that the practice ought to be followed because it makes government institutions function more effectively.

This gradual transformation of practice into conventional rule is described by Jennings, who explains that government actors adopt behaviours that others then follow. As he puts it, "the capacity for invention is limited," meaning that when one institutional practice works well, changes in other areas are deemed unnecessary. Jennings further notes, "People begin to think that the practices ought to be followed. It was always done so in the past; they say, why should it not be done so now?" In conclusion, a practice becomes a conventional rule when it meets two main criteria: recognition of the convention among key political actors and their acceptance of it as binding.

Before turning attention to task of further analysis of some examples of constitutional conventions, the article shortly mentions about features of these conventions. *In the traditional understanding, conventions are unwritten, flexible, open to interpretation, politically enforced.*

Firstly, conventional rules are distinguishable from laws in a number of important respects. The source of a legal rule is, for the most part, identifiable and certain. Sources or origin of legal rules will normally be found within a judicial decision or within an Act of Parliament. Conventions are less certain in their origins, and it may at times be difficult to see whether a particular form of conduct is. Also, the core content of a legal rule will generally have a settled meaning convention, however, are again less certain and the obligations imposed by a convention may be varies.

Secondly, constitutional conventions are well-known as being unwritten or explicit; there were traditionally no bindingly authoritative texts stating their meaning and scope. Over time, repeated political practice can be formalised as a rule of conduct and developed to become a convention, in a sense. Conventional rules are considered tacit agreements, or beyond expression; however, these rules are increasingly being put into quasi-codified words. The meaning of rules is specified by officials who provide an authoritative statement and, therefore, they became systematised. In other words, these conventions shift from an informal form to a formal form. One successful example is that of the ministerial code, which is an example of a set of codified conventions published by the government that apply to ministerial responsibility. While long-standing conventions, individual and collective ministerial responsibilities exist, they are flexible and open to interpretation.³ The ministerial code set out the standards of behaviour expected from all those who serve in government.

Thirdly, it is commonly acknowledged that the consequences for violations of conventional rules are not generally legal but political. Breach of the conventions carries no legal penalties. The sanctions are

³ Brian Galligan, Scott Brenton, 'Constitutional conventions', *Constitutional Conventions in Westminster Systems Controversies, Changes and Challenges* (1st ed., Cambridge University Press 2015) 73.

purely political.”⁴ Likewise, it is maintained by Taylor that the British constitution heavily depends on conventions so that “government and Parliament may be regulated politically without judicial interference in the political decision-making process”, and thus political rather than legal control over the breach of a convention is vital for upholding British political constitutionalism.⁵

In the UK, the lack of a fully codified constitution makes the rules exceptionally attractive as a means of limiting government.⁶ Conventional rules determine the behaviour of political actors without judicial interference in the political process. For example, caretaker conventions provide restraint the power of the political executive until a new government is formed.⁷ As Jaconelli notes when conventions are accurately comprehended, they could bring predictability to political actors’ behaviour which can structure and put a limit to the discretionary power.⁸

However, despite their significance, these rules are surrounded by uncertainty in terms of their content and enforceability. Traditionally understanding conventions lack precise content and there is no certain mechanism to control the operation of conventions. This vagueness renders them as vague subject in constitutional law. This lack of attention to convention deficits should be viewed as a serious omission in understanding not only for conventions, but also for British democracy and constitutional development. The article presents the features and functions of some British Constitutional conventions in order to understand function of British constitutional system.

The United Kingdom (UK) has a constitutional system, with its institutions, as well as the operation of Parliament and government, controlled by various conventions. Each convention has individual features

⁴ Eugene A. Forsey, “The Courts and the Conventions of the Constitution”, *supra*, note 6, at 12.

⁵ Robert Brett Taylor, ‘Foundational and Regulatory Conventions: Exploring the Constitutional Significance of Britain’s Dependency upon Conventions’, *Public Law*, vol. 2015, pp. 614-632.

⁶ Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 50.

⁷ Jennifer Menzies and Anne Tiernan, ‘Caretaker Conventions’ in Brian Galligan and Scott Brenton (eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press 2015) 91.

⁸ Joseph Jaconelli, *The Proper Roles for Constitutional Conventions*, 38 *Dublin U. L.J.* 363 (2015).

and methods of implementation and therefore this study commences by outlining the features and functions of some UK constitutional conventions in practice. It is important to identify the details of these conventions as (while simple to describe) they are not always straightforward to implement and so can become the subject of controversy. This study therefore discusses following conventional rules; Conventions regulating the exercise of the royal prerogative such as royal consent for legislation or appointment of the prime minister, ministerial responsibility conventions, caretaker conventions, conventions requiring parliamentary approval before engaging military actions Sewel convention, Salisbury convention.

Convention regulating the exercise of the royal prerogative

In the UK the Crown is vested with executive power. Dicey described this prerogative as follows:

The residue of discretionary or arbitrary authority, which at any time is legally left in the hands of the Crown. Every act which the executive government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative.⁹

On the other hand, Blackstone defined prerogative power excludes the powers of the Crown that have no statutory authority, but are held in common with the Crown's subjects:

By the word prerogative we usually understand that special pre-eminence which the King hath, over and above all other persons, and out of the ordinary course of common law, in right of his regal dignity ... it can only be applied to those rights and capacities which the King enjoys alone, in contradiction to others, and not to those which he enjoys in common with any of his subjects.¹⁰

Prerogative powers are inherent to the Crown. Dicey's view that the Crown is able to use these powers without any need for an act of Parliament. Any action of the monarch that are not support by statute accepted under prerogative powers but, according to Blackstone, the pre-

⁹ Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, (Eight Edition 1982) 281.

¹⁰ Sir William Blackstone, *Commentaries on the Laws of England in Four Books*, vol. 1 [1753].

rogative was limited. The prerogative only includes those actions that no other person or institution in the United Kingdom can engage in law.

In the 2017 case of *R (Miller) v Secretary of State for Exiting the European Union*, Supreme Court judges give description the prerogative as including the ‘residue of powers which remain vested in the Crown, and they are exercisable by ministers, provided that the exercise is consistent with Parliamentary legislation’¹¹.

The royal prerogative is a concept of some complexity. In 2009, the Ministry of Justice underlined the issue that:

The scope of the Royal prerogative power is notoriously difficult to determine. It is clear that the existence and extent of the power is a matter of common law, making the courts the final arbiter of whether or not a particular type of prerogative power exists. The difficulty is that there are many prerogative powers for which there is no recent judicial authority and sometimes no judicial authority at all.¹²

Thus, central government is undertaken in the name of the Crown. Under the terms of the British constitutional monarchy, the Queen forms part of the legislature, i.e., Parliament, which is comprised of the Crown, the Lords, and the Commons. The Queen is considered the fount of justice, with the administration of justice being conducted in the name of the Crown. In addition, the Queen is Head of State when it comes to foreign affairs, as well as being the head of executive, while the Crown is also responsible for conferring all honours in the UK.¹³

However, apart from a small number of personal prerogatives related to the Crown, the power of the Queen is currently exercised according to direction from her ministers, in particular the Prime Minister.¹⁴ Brazier termed this general rule the “Cardinal Convention”, i.e., mandating that the monarch acts on the advice of ministers.¹⁵ Therefore, as a constitutional monarch, the Queen accepts ministerial advice concerning the use of these powers, whether or not she agrees with that ad-

¹¹ Miller Supra Note, Para 47.

¹² Ministry of Justice, Review of the Executive Royal Prerogative Powers: Final Report, 2009, paras 26 & 27.

¹³ Hilaire Barnett, *Constitutional & Administrative Law* (11th edn, Routledge 2016) 98-108.

¹⁴ Hilaire Barnett, *Constitutional & Administrative Law* (11th edn, Routledge 2016) 97.

¹⁵ Rodney Brazier, *Constitutional Practice - The Foundations of British Government* (3rd edn, Oxford University Press 1999) 189.

vice. This constitutional position ensures that ministers take responsibility for the use of these powers, ensuring that ‘the monarch does not enjoy a free hand in their exercise’.¹⁶ Rather, ‘she must exercise them on, and compatibly with, the advice tendered to her by her government.’¹⁷ The indirect democratic imprimatur of ministers is considered sufficient to render the exercise of legal powers vested in a wholly unelected monarch democratically acceptable, provided that they are exercised in line with ministerial advice.

The second general rule of prerogative powers concerns the “Tripartite Convention”, described by Bagehot in *The English Constitution* as being the Sovereign’s right to ‘be consulted, the right to encourage, [and] the right to warn’.¹⁸

These personal discretionary powers remain in the hand of the Sovereign’,¹⁹ including: (1) the right to advise, encourage and warn ministers in private; (2) to appoint the Prime Minister and other ministers; (3) to assent to legislation; and (4) in the event of a grave constitutional crisis, to act contrary to (or without) ministerial advice.²⁰

Like most conventions, these rules have been formed in general terms and are subject to controversial restraints and exceptions.²¹ Legal and constitutional opinion on precisely what constitutes the Royal Prerogative is therefore far from clear-cut. The courts play an important role in determining the existence, and lawful use of prerogative powers. But

¹⁶ Mark Elliott, ‘Can the Government Veto Legislation by Advising the Queen to Withhold Royal Assent?’ (Public Law for Everyone, 2020) <<https://publiclawforeveryone.com/2019/01/21/can-the-government-veto-legislation-by-advising-the-queen-to-withhold-royal-assent/>> accessed 15 January 2020.

¹⁷ Mark Elliott, ‘Can the Government Veto Legislation by Advising the Queen to Withhold Royal Assent?’ (Public Law for Everyone, 2020) <<https://publiclawforeveryone.com/2019/01/21/can-the-government-veto-legislation-by-advising-the-queen-to-withhold-royal-assent/>> accessed 15 January 2020.

¹⁸ Rodney Brazier, *Constitutional Practice - The Foundations of British Government* (3rd edn, Oxford University Press 1999) 185.

¹⁹ A W Bradley, K D Ewing and C J S Knight, *Constitutional and Administrative Law* (16th edn, Pearson 2015) 242.

²⁰ A W Bradley, K D Ewing and C J S Knight, *Constitutional and Administrative Law* (16th edn, Pearson 2015) 240.

²¹ Rodney Brazier, *Royal Assent to Legislation*, 129 *Law Quarterly Review* 2013, 184 – 204.

until the 1984 House of Lords case of Council of Civil Service Unions v Minister for the Civil Service (the GCHQ case), it was thought that the courts would not review how the prerogative powers were exercised, only whether they existed. The existence and extent of these powers are a matter of common law which can make the courts the final arbiter of whether a particular type of prerogative power can be considered to exist.²² The courts' silence on questions pertaining to the prerogative persisted until the mid-1980s when, in the seminal *GCHQ* case, the House of Lords held that an instruction made under an order in council could be subject, in principle, to judicial review.²³ Difficulties tend to arise due to the existence of a large number of prerogative powers for which there is a lack of any recent judicial authority or no judicial authority at all. Poole argues that 'The prerogative might now, in principle, be classified as a normal sub statutory source of law for the purposes of judicial review; however, in practice, the courts tend still to approach the prerogative with a caution bordering on outright deference.'²⁴

In March 2004, the Public Administration Select Committee (PASC) published a report on the Royal prerogative, emphasizing the need to review the current arrangements, including that all executive powers enjoyed by ministers under the royal prerogative should be enacted.²⁵ The committee stressed that the prerogative has permitted powers to move from the monarch to ministers without Parliament having any say in how they are exercised²⁶ and that this is longer acceptable to Parliament or the people.²⁷ The committee concluded that it has been

²² Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 115 - 118.

²³ Thomas Poole, 'United Kingdom: The Royal Prerogative' (2010) 8 *International Journal of Constitutional Law*.146-155.

²⁴ Thomas Poole, 'United Kingdom: The Royal Prerogative' (2010) 8 *International Journal of Constitutional Law*.146-155. 146-155.

²⁵ House of Commons Public Administration Select Committee, 'Taming the Prerogative: Strengthening Ministerial Accountability to Parliament' (House of Commons London: The Stationery Office Limited 2004) 14.

²⁶ House of Commons Public Administration Select Committee, 'Taming the Prerogative: Strengthening Ministerial Accountability to Parliament' (House of Commons London: The Stationery Office Limited 2004) 7.

²⁷ House of Commons Public Administration Select Committee, 'Taming the Prerogative: Strengthening Ministerial Accountability to Parliament' (House of Commons London: The Stationery Office Limited 2004) 7.

demonstrated how these powers can be constitutionalized (and in particular certain key powers can be anchored in the consent of Parliament) and it is therefore now time for this process to be completed.²⁸

The committee specifically called for comprehensive legislation on the prerogative powers of ministers, which have been exercised on the behalf of the sovereign, with ministers taking responsibility for actions undertaken in the name of the Crown. The committee was accompanied by a draft bill focussing on three essential prerogative powers of ministers, related to: (1) armed conflict; (2) the conclusion and ratification of treaties; and (3) the issue and revocation of passports.²⁹

The government responded in July 2004, acknowledging the importance of the subject matter and the beneficial work carried out by the committee. However, the committee also demanded more rigorous parliamentary accountability and scrutiny when it came to ministers' exercise of specific prerogative powers.³⁰ The government noted that these provide much-needed flexibility, as well as being a well-established aspect of the constitution, while ministers require executive powers to react rapidly when faced with potentially complex and dangerous circumstances.³¹ Its response also pointed out that ministers are accountable to Parliament for all their actions, including those taken under prerogative powers, and that the use of these powers is subject to scrutiny by Departmental Select Committee. Therefore, the government remained in favour of continuing to consider changes on a case-by-case basis, without the need for legislation.³²

The Governance of Britain (2007), and the subsequent Constitutional Reform and Governance Act (2010), provide for parliamentary scrutiny of treaties, as well as establishing a statutory basis for the civil

²⁸ House of Commons Public Administration Select Committee, 'Taming the Prerogative: Strengthening Ministerial Accountability to Parliament' (House of Commons London: The Stationery Office Limited 2004) 12.

²⁹ House of Commons Public Administration Select Committee, 'Taming the Prerogative: Strengthening Ministerial Accountability to Parliament' (House of Commons London: The Stationery Office Limited 2004) 9.

³⁰ Ministry of Justice, 'Review of The Executive Royal Prerogative Powers' (Crown copyright 2009).

³¹ Ministry of Justice, 'Review of The Executive Royal Prerogative Powers' (Crown copyright 2009).

³² Ministry of Justice, 'Review of The Executive Royal Prerogative Powers' (Crown copyright 2009).

service. In addition, the Fixed-term Parliamentary Act 2011 brought the dissolution of Parliament under statutory authority, thus removing any control from the Crown.³³

Prerogative powers mostly were exercised without any parliamentary authority. These reforms that put prerogative powers on a statutory footing are usually considered to permanently reduce prerogative power. Therefore, these important areas of government activity which, today as in the past, are essential to the effective operation of the state are used under scrutiny of parliament.

It can therefore be concluded that, despite substantial ministerial prerogative powers having been recently enshrined into law, there remain three major prerogative powers the monarch continues to exercise: (1) the granting of the royal assent to legislation; (2) the appointment of the Prime Minister; and (3) the dismissal of the government. These are discussed in detail below.

Royal consent for legislation

It is a constitutional convention that, when a bill has passed both Houses of Parliament, “Royal Consent” is required to complete the legislation process.³⁴ Marshall argued that the affording of assent to legislation having received the approval of the Commons and the House of Lords is, in practice, automatically exercised.³⁵ Since 1708 when Queen Anne rejected the consent to a Scottish Militia Bill on the advice of ministers no such bill has failed to receive royal assent.³⁶

However, Tomkins stated that ‘we should not be deceived by the longevity of the practice that the royal assent is not withheld, into thinking that this is a power the exercise of which is now entirely beyond comprehension’.³⁷ He also argued that ‘power has not been exercised for

³³ Fixed-term Parliamentary Act 2011.

³⁴ Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 353.

³⁵ Geoffrey Marshall, *Constitutional Conventions: The Rules and the Forms of Political Accountability* (1984) Clarendon Press-Oxford.

³⁶ Rodney Brazier, *Constitutional Practice - The Foundations of British Government* (3rd edn, Oxford University Press 1999) 193.

³⁷ Adam Tomkins, *Public Law*, Clarendon Law Series, Oxford University Press (1st edn 2003) 63.

some time is not necessarily conclusive evidence that the power is no longer available'.³⁸

In addition, Elliot noted that the Queen has a constitutional duty to grant royal assent to bills,³⁹ as enshrined in the convention of royal assent. Furthermore, this convention obeys the principle of parliamentary sovereignty:

Consistently with the historical context in which it first emerged, the royal assent convention ensures that Parliament enjoys constitutional primacy in matters of law-making and that the monarch's legal power to interfere in such matters by withholding royal assent is effectively neutralized by a convention that requires the granting of such assent. In this way, the royal assent convention is an essential underpinning of the principle of parliamentary sovereignty.⁴⁰

However, this convention can simply identify a Monarch formally granting of royal assent for every legislation that successfully passes both the House of Commons and Lords. This infers that the implementation of the convention can become complex should ministers advise the Queen not to grant royal assent to a given bill. The key aspect is therefore how the conventions of ministerial advice and royal assent are simultaneously applied.

There is no consensus among constitutional scholars whether the monarch can withhold royal assent to a bill if advised to do so by her ministers. Brazier considered that royal consent should never be refused unless on ministerial advice, i.e. the monarch can refuse to grant consent to a bill if so advised by the relevant minister.⁴¹ Moreover, Twomey highlighted a number of examples, primarily originating from Australia,

³⁸ Adam Tomkins, *Public Law*, Clarendon Law Series, Oxford University Press (1st edn 2003) 64.

³⁹ Mark Elliott, 'Can the Government Veto Legislation by Advising the Queen to Withhold Royal Assent?' (*Public Law for Everyone*, 2020) <<https://publiclawforeveryone.com/2019/01/21/can-the-government-veto-legislation-by-advising-the-queen-to-withhold-royal-assent/>> accessed 15 January 2020.

⁴⁰ Mark Elliott, 'Can the Government Veto Legislation by Advising the Queen to Withhold Royal Assent?' (*Public Law for Everyone*, 2020) <<https://publiclawforeveryone.com/2019/01/21/can-the-government-veto-legislation-by-advising-the-queen-to-withhold-royal-assent/>> accessed 15 January 2020.

⁴¹ Rodney Brazier, *Constitutional Practice - The Foundations of British Government* (3rd edn, Oxford University Press 1999) 193.

suggesting that the monarch is not obliged to accept any advice of Queen's ministers to refuse assent.⁴² Twomey was of the opinion that royal assent does not form an exception to the general rule that prerogatives are exercised on advice.⁴³ Tomkins argues that if the monarch was given clear advice by the Prime Minister to withhold assent from a bill 'it seems to be the case that the monarch should follow that advice'.⁴⁴ Similarly, Munro asserts that 'the Crown cannot refuse assent except on advice.'⁴⁵ Bradley, Ewing and Knight agreed with this view, the Queen's refusal of assent to a bill 'could now only be exercised on ministerial advice and no government would wish to veto Bills for which it was responsible or for the passage of which it had afforded facilities through Parliament'.⁴⁶

The interpretation of the convention that the Queen should accept the advice of her ministers conforms to the principle of responsible government.⁴⁷ The Queen therefore has generally no discretion when it comes to the exercise of these powers and thus cannot legitimately be criticized for following the advice of a Government in the possession of the confidence of Parliament.⁴⁸ In a practical sense, the majority of the Queen's prerogative powers are now exercised on the advice of ministers

⁴² Anne Twomey, 'Royal Assent – The Business of Parliament or The Executive?' (2016) No. 16/12 Sydney Law School Legal Studies Research Paper 5.

⁴³ Anne Twomey, 'Royal Assent – The Business of Parliament or The Executive?' (2016) No. 16/12 Sydney Law School Legal Studies Research Paper 15.

⁴⁴ Adam Tomkins, *Public Law*, Clarendon Law Series, Oxford University Press (1st edn 2003) 63-4.

⁴⁵ Robert Craig, 'Could the Government Advise the Queen to Refuse Royal Assent to A Backbench Bill?' (UK Constitutional Law Association, 2019) <<https://ukconstitutionallaw.org/2019/01/22/robert-craig-could-the-government-advise-the-queen-to-refuse-royal-assent-to-a-backbench-bill/>> accessed 16 January 2020.

⁴⁶ A W Bradley, K D Ewing and C J S Knight, *Constitutional and Administrative Law* (Pearson, 16th ed, 2015) 207.

⁴⁷ Robert Craig, 'Could the Government Advise the Queen to Refuse Royal Assent to A Backbench Bill?' (UK Constitutional Law Association, 2019) <<https://ukconstitutionallaw.org/2019/01/22/robert-craig-could-the-government-advise-the-queen-to-refuse-royal-assent-to-a-backbench-bill/>> accessed 16 January 2020.

⁴⁸ Robert Craig, 'Could the Government Advise the Queen to Refuse Royal Assent to A Backbench Bill?' (UK Constitutional Law Association, 2019) <<https://ukconstitutionallaw.org/2019/01/22/robert-craig-could-the-government-advise-the-queen-to-refuse-royal-assent-to-a-backbench-bill/>> accessed 16 January 2020.

who are, in turn, accountable to Parliament. All criticism should therefore be directed at her government, which is democratically accountable to Parliament and whose constitutional role is to absorb such criticism.⁴⁹ This is significant, due to it upholding the principle of democratic government, thus identifying the electorate as justifying the use these powers.⁵⁰

Barber believed that the Queen would be acting unconstitutionally if she refused to give her assent to legislation as advised by her Prime Minister or ministers.⁵¹ He also noted that there is no longer any acceptable purpose behind the convention, specifically focusing on the reasons behind the convention concerning royal assent.⁵²

Now the convention is operating against democratic values, rather than upholding them. Rather than supporting the parliamentary government, it would undermine it. The point of the convention on royal assent is to uphold the primacy of the democratic element of the constitution in the making of law. But just as it would be undemocratic to allow one person (the Monarch) to veto legislation, so too it would be undemocratic to give this power to the Prime Minister.⁵³

Thus, should the House of Commons and the House of Lords approve a Bill failing to meet with government approval, the government

⁴⁹ Robert Craig, 'Could the Government Advise the Queen to Refuse Royal Assent to A Backbench Bill?' (UK Constitutional Law Association, 2019) <<https://ukconstitutionallaw.org/2019/01/22/robert-craig-could-the-government-advise-the-queen-to-refuse-royal-assent-to-a-backbench-bill/>> accessed 16 January 2020.

⁵⁰ Robert Craig, 'Could the Government Advise the Queen to Refuse Royal Assent to A Backbench Bill?' (UK Constitutional Law Association, 2019) <<https://ukconstitutionallaw.org/2019/01/22/robert-craig-could-the-government-advise-the-queen-to-refuse-royal-assent-to-a-backbench-bill/>> accessed 16 January 2020.

⁵¹ Nick Barber, 'Can Royal Assent Be Refused on the Advice of the Prime Minister?', (UK Constitutional Law Association September 26, 2013) <<https://ukconstitutional-law.org/2013/09/25/nick-barber-can-royal-assent-be-refused-on-the-advice-of-the-prime-minster/>> accessed July 29, 2019.

⁵² Nick Barber, 'Can Royal Assent Be Refused on the Advice of the Prime Minister?', (UK Constitutional Law Association September 26, 2013) <<https://ukconstitutionallaw.org/2013/09/25/nick-barber-can-royal-assent-be-refused-on-the-advice-of-the-prime-minster/>> accessed July 29, 2019.

⁵³ Nick Barber, 'Can Royal Assent Be Refused on the Advice of the Prime Minister?', (UK Constitutional Law Association September 26, 2013) <<https://ukconstitutional-law.org/2013/09/25/nick-barber-can-royal-assent-be-refused-on-the-advice-of-the-prime-minster/>> accessed July 29, 2019.

itself could not prevent such a Bill from becoming law by advising the Queen not to grant royal assent.

This aspect is currently particularly relevant in relation to process of the UK's departure from the European Union, known as "Brexit", including the possibility for Parliament to take control, potentially by legislating to avert a no-deal Brexit. Elliott noted that 'the Ministerial advice convention simply does not apply to the granting of royal assent to Bills⁵⁴ (otherwise) the Government had an unqualified veto over legislation'⁵⁵ and 'whenever the Government disagreed with legislation approved by both Houses, it could thwart its enactment by advising the Queen to withhold royal assent'.⁵⁶ This contradicts the principle of parliamentary sovereignty, which states that it is Parliament, rather than the *government*, that possesses the right to make (or unmake) any law, while the Queen should not withhold her royal assent whenever so directed by the Government.⁵⁷ Elliott further stated that 'governments enjoy a very high degree of control over the parliamentary business... as a result, there is very little chance indeed of a Bill succeeding in making its way through the two Houses, unless the Government is willing to support it'.⁵⁸

⁵⁴ Mark Elliott, 'Can the Government Veto Legislation by Advising the Queen to Withhold Royal Assent?' (Public Law for Everyone, 2020) <<https://publiclawforeveryone.com/2019/01/21/can-the-government-veto-legislation-by-advising-the-queen-to-withhold-royal-assent/>> accessed 15 January 2020.

⁵⁵ Mark Elliott, 'Can the Government Veto Legislation by Advising the Queen to Withhold Royal Assent?' (Public Law for Everyone, 2020) <<https://publiclawforeveryone.com/2019/01/21/can-the-government-veto-legislation-by-advising-the-queen-to-withhold-royal-assent/>> accessed 15 January 2020.

⁵⁶ Mark Elliott, 'Can the Government Veto Legislation by Advising the Queen to Withhold Royal Assent?' (Public Law for Everyone, 2020) <<https://publiclawforeveryone.com/2019/01/21/can-the-government-veto-legislation-by-advising-the-queen-to-withhold-royal-assent/>> accessed 15 January 2020.

⁵⁷ Mark Elliott, 'Can the Government Veto Legislation by Advising the Queen to Withhold Royal Assent?' (Public Law for Everyone, 2020) <<https://publiclawforeveryone.com/2019/01/21/can-the-government-veto-legislation-by-advising-the-queen-to-withhold-royal-assent/>> accessed 15 January 2020.

⁵⁸ Mark Elliott, 'Can the Government Veto Legislation by Advising the Queen to Withhold Royal Assent?' (Public Law for Everyone, 2020) <<https://publiclawforeveryone.com/2019/01/21/can-the-government-veto-legislation-by-advising-the-queen-to-withhold-royal-assent/>> accessed 15 January 2020.

It is an established constitutional convention that: ‘the Royal Assent is not withheld from Bills which have been passed by both Houses of Parliament’. The convention now confirms that ‘the Crown must agree to the legislation through the prerogative of Royal Assent’. However, it should be recognized that, although unlikely, there may, in future, be exceptional circumstances in which assent may be refused. Craig pointed out the following:

The questions connect to the contested status of royal assent and whether it is a legislative power that is triggered by successful passage of a bill through the two Houses, or an executive power effectively in the hands of the government.⁵⁹

He therefore concluded that elected politicians must strive to avoid such a scenario from transpiring, with the hope that a negotiated solution can be found in the House of Commons to ensure that a constitutional crisis is avoided.⁶⁰

Thus, it is difficult to imagine that the monarch would withhold royal assent today. The Queen has no effective discretion in deciding to grant royal assent to bills, or consent to the introduction of bills.⁶¹ Even, royal consent being viewed by some as an unnecessary procedure (and even a potential threat to democratic governance). The reason behind the reluctance to abolish this convention is the strong symbolic significance of the practice of royal assent in the UK.

Appointment of the Prime Minister

A long-established UK convention states that the Queen may appoint the office of Prime Minister the individual capable of commanding

⁵⁹ Robert Craig, ‘Could the Government Advise the Queen to Refuse Royal Assent to A Backbench Bill?’ (UK Constitutional Law Association, 2019) <<https://ukconstitutionallaw.org/2019/01/22/robert-craig-could-the-government-advise-the-queen-to-refuse-royal-assent-to-a-backbench-bill/>> accessed 16 January 2020.

⁶⁰ Robert Craig, ‘Could the Government Advise the Queen to Refuse Royal Assent to A Backbench Bill?’ (UK Constitutional Law Association, 2019) <<https://ukconstitutionallaw.org/2019/01/22/robert-craig-could-the-government-advise-the-queen-to-refuse-royal-assent-to-a-backbench-bill/>> accessed 16 January 2020.

⁶¹ Robert Hazell and Bob Morris, ‘The Queen at 90: the challenging role of the monarchy, and future challenges’ (The Constitution Unit), <<https://constitutionunit.com/2016/06/10/the-queen-at-90-the-changing-role-of-the-monarchy-and-future-challenges/>> accessed 01 January 2021.

a majority in the House of Commons.⁶² The Queen's role in appointing a prime minister is one of her remaining prerogative powers.⁶³ However, the implementation of this convention can, in some circumstances, prove complex, i.e., if no party has an overall majority or the Prime Minister resigns during his/her term of office as a result of age or illness.⁶⁴

If the government have a majority, it is for the party or parties in government directly electing a new Prime Minister, who must be the individual most likely to command the confidence of the House of Commons. But if a prime minister resigns and the party in government does not hold a majority, it becomes more difficult. According to the Cabinet Manual, "the Sovereign should not be drawn into party politics, and if there is doubt it is the responsibility of those involved in the political process, and in particular the parties represented in Parliament, to seek to determine and communicate clearly to the Sovereign who is best placed to be able to command the confidence of the House of Commons".⁶⁵

If a clear alternative is likely to be able to command confidence, then this only needs to be made clear to the Palace. The Queen believes in party leaders deciding among themselves and suggesting to the Queen.⁶⁶

If negotiations over government formation have not made clear as to who can command confidence, then it is expected that political parties will find who is best placed and ensure that the Queen is not involve any disputes. It is the responsibility of the politicians to protect the Queen by

⁶² The Cabinet Manual, A guide to laws, conventions, and rules on the operation of government, (1st edn October 2011) Para 3.1

⁶³ Catherine Haddon, 'The Appointment of Prime Ministers and The Role of The Queen' (The Institute for Government, 2019) <<https://www.instituteforgovernment.org.uk/explainers/appointment-prime-ministers>> accessed 19 January 2020.

⁶⁴ Tomkins, Public Law, 64.

⁶⁵ The Cabinet Manual, A guide to laws, conventions, and rules on the operation of government, Para 2.28.

⁶⁶ Catherine Haddon, 'The Appointment of Prime Ministers and The Role of The Queen' (The Institute for Government, 2019) <<https://www.instituteforgovernment.org.uk/explainers/appointment-prime-ministers>> accessed 19 January 2020.

⁶⁶ Tomkins, Public Law.

determining the eventual outcome.⁶⁷ There is a strong constitutional convention that the Queen should be kept out of politics.⁶⁸

This is demonstrated by the way that, following the resignation of Prime Minister Theresa May on June 7th, 2019, Boris Johnson was elected as the new Conservative leader under the existing party rules. In normal circumstances, if the new leader is able to command the confidence of the House of Commons, he or she is immediately called upon by the Queen to form a government and take office as Prime Minister. However, in the case of Boris Johnson, a number of Conservative MPs declared that they would bring a vote of no confidence in a new leader, with Dominic Grieve and Ken Clark already having indicated that they would not be able to support an administration prepared to leave the EU without a deal. After stating his willingness to take such a step, Johnson was warned that he could be prevented from entering Downing Street should it become clear he would be unable to command a majority in the House of Commons.⁶⁹

Hazell and Russell pointed out that this scenario is unusual.⁷⁰ The Conservative party had a minority government at the time and was also severely divided by issues surrounding Brexit. Hazell and Russell argued that, even if a small number of Conservative MPs refused to support Johnson's administration, this could lead to considerable difficulties, including being unable to command the confidence of the House of

⁶⁷ Robert Hazell and Meg Russell, 'Six Constitutional Questions Raised by The Election of The New Conservative Leader' (The Constitution Unit Blog, 2019) <<https://constitution-unit.com/2019/06/30/six-constitutional-questions-raised-by-the-election-of-the-new-conservative-leader/>> accessed 16 January 2020.

⁶⁸ Catherine Haddon, 'The Appointment of Prime Ministers and The Role of The Queen' (The Institute for Government, 2019) <<https://www.instituteforgovernment.org.uk/explainers/appointment-prime-ministers>> accessed 19 January 2020.

⁶⁸ Tomkins, Public Law.

⁶⁹ Michael Savage, 'Boris Johnson 'Might Never Enter No 10' If MPs Withdraw Support' (the Guardian, 2019) <<https://www.theguardian.com/politics/2019/jun/30/boris-johnson-might-never-enter-no-10-if-mps-withdraw-support>> accessed 16 January 2020.

⁷⁰ Robert Hazell and Meg Russell, 'Six Constitutional Questions Raised by The Election of The New Conservative Leader' (The Constitution Unit Blog, 2019) <<https://constitution-unit.com/2019/06/30/six-constitutional-questions-raised-by-the-election-of-the-new-conservative-leader/>> accessed 16 January 2020.

Commons, and so being prevented from becoming Prime Minister. In addition, they stressed that, should this take place:

The Queen might make a provisional appointment, conditional on the new Prime Minister demonstrating confidence. Alternatively, Theresa May could remain in place and facilitate a process in Parliament to demonstrate that the winning candidate – or indeed an alternative candidate – can win a confidence vote, before recommending that person to the Queen.⁷¹

They concluded that the Cabinet Manual (which covers changes in government) does not address the unusual parliamentary circumstances currently created by the Brexit dilemma.⁷²

Despite these constitutional concerns being alleviated when Boris Johnson was appointed as the new Prime Minister, it is important to clarify the existence of this potential uncertainty, in order to improve the process.

Collective ministerial responsibility

The concept of collective responsibility identifies that decisions made by the cabinet are binding on all members of the government. Under the convention, all ministers can express their views in the privacy of cabinet, but (even if they strongly disagree with the final decision) are required to publicly support that decision or remain silent on the issue.⁷³ The key element of collective responsibility is that ministers may argue for or against a proposal in the privacy of the Cabinet Room, but after a decision is made, they must support the cabinet decision in public even if they were not present when the decision was made. Also, some committees which have the authority to make decisions on behalf of government have the same standing as that of cabinet, and ministers are

⁷¹ Robert Hazell and Meg Russell, 'Six Constitutional Questions Raised by The Election of The New Conservative Leader' (The Constitution Unit Blog, 2019) <<https://constitution-unit.com/2019/06/30/six-constitutional-questions-raised-by-the-election-of-the-new-conservative-leader/>> accessed 16 January 2020.

⁷² Robert Hazell and Meg Russell, 'Six Constitutional Questions Raised by The Election of The New Conservative Leader' (The Constitution Unit Blog, 2019) <<https://constitution-unit.com/2019/06/30/six-constitutional-questions-raised-by-the-election-of-the-new-conservative-leader/>> accessed 16 January 2020.

⁷³ Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 246.

bound to them.⁷⁴ This longstanding convention therefore guarantees that the executive branch of government speaks with one voice in public, so preventing a divided cabinet from losing the respect of backbenchers, who look to government for firm leadership, while opposition parties are prepared to exploit any perceived disunity.⁷⁵

This results in any a minister who does not support a cabinet decision being expected to resign.⁷⁶ There have been notable examples of ministerial resignations over disagreements with collective decisions.

1. In August 2014, the then Foreign Minister, Baroness Warsi, resigned due to her conviction that the government of David Cameron was putting insufficient pressure on Israel during the conflict in Gaza.⁷⁷ In her resignation letter to the Prime Minister, she stated that:

(The government's) approach and language during the current crisis in Gaza are morally indefensible, is not in Britain's national interest and will have a long-term detrimental impact on our reputation internationally and domestically.⁷⁸

2. In March 2003, Robin Cook (a former Foreign Secretary in the government of Labour Prime Minister Tony Blair) resigned as Leader of the House of Commons as a result of disagreeing with the government's decision to join the military attack on Iraq.⁷⁹

3. In November 1990, Sir Geoffrey Howe resigned as Deputy Prime Minister over government policy on the European single currency and the general approach to the European Union.⁸⁰

4. In October 1989, Nigel Lawson resigned as the Chancellor of the Exchequer as a result disagreement between the Prime Minister over Alan Walters remains her personal economic adviser.⁸¹

⁷⁴ Patrick Weller, 'Cabinet Government', *Constitutional Conventions in Westminster Systems* (1st edn, Cambridge 2015) 75.

⁷⁵ Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 246.

⁷⁶ Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 247.

⁷⁷ BBC News, 'Warsi Quits as Minister Over Gaza' (BBC News, 2014) <<https://www.bbc.co.uk/news/uk-politics-28656874>> accessed 19 January 2020.

⁷⁸ BBC News, 'Warsi Quits as Minister Over Gaza' (BBC News, 2014) <<https://www.bbc.co.uk/news/uk-politics-28656874>> accessed 19 January 2020.

⁷⁹ Matthew Tempest, 'Cook Resigns from Cabinet Over Iraq' (the Guardian, 2003) <<https://www.theguardian.com/politics/2003/mar/17/labour.uk>> accessed 19 January 2020.

⁸⁰ BBC News, 'BBC ON THIS DAY | 1 | 1990: Howe Resigns Over Europe Policy' (News.bbc.co.uk, 1990) <http://news.bbc.co.uk/onthisday/hi/dates/stories/november/1/newsid_2513000/2513953.stm> accessed 19 January 2020.

These resignations tend to suggest that the convention of collective responsibility remains a significant force in government.

Marshall identified three implications arising from the convention: (1) confidence; (2) unanimity; and (3) confidentiality.⁸²

1. **Confidence** implies that a government can remain in office unless it has lost the confidence of the House of Commons.⁸³

2. **Unanimity** is considered the most important practical aspect of the convention,⁸⁴ in particular in stating that all members of the government obey the convention when they speak and vote in unity in Parliament, apart from when the Prime Minister and the cabinet make an exception, i.e., a free vote or an “agreement to differ”.⁸⁵

3. **Confidentiality** recognizes that, as a universally applicable situation, unanimity is a constitutional fiction, but one that must be maintained. In addition, it is believed to enable frank ministerial discussion within cabinet and government.⁸⁶ Furthermore, this confidentiality of cabinet discussion is secured by forbidding any revelations by members of cabinet,⁸⁷ while the publication of a former cabinet member’s memories of his/her political life account must also defer to this cabinet secrecy.⁸⁸

⁸¹ Christopher Huhne, Alan Travis and Patrick Wintour, 'Lawson Sparks Reshuffle' (the Guardian, 2020) <<https://www.theguardian.com/politics/1989/oct/27/past.christopher-huhne>> accessed 14 March 2020.

⁸² Geoffrey Marshall, *Constitutional Conventions: The Rules and the Forms of Political Accountability* (1984) Clarendon Press-Oxford 55.

⁸³ Geoffrey Marshall, *Constitutional Conventions: The Rules and the Forms of Political Accountability* (1984) Clarendon Press-Oxford 55-61.

⁸⁴ Geoffrey Marshall, *Constitutional Conventions: The Rules and the Forms of Political Accountability* (1984) Clarendon Press-Oxford 55-61.

⁸⁵ Geoffrey Marshall, *Constitutional Conventions: The Rules and the Forms of Political Accountability* (1984) Clarendon Press-Oxford 55-61.

⁸⁶ Geoffrey Marshall, *Constitutional Conventions: The Rules and the Forms of Political Accountability* (1984) Clarendon Press-Oxford 55-61.

⁸⁷ Geoffrey Marshall, *Constitutional Conventions: The Rules and the Forms of Political Accountability* (1984) Clarendon Press-Oxford 55-61.

⁸⁸ Geoffrey Marshall, *Constitutional Conventions: The Rules and the Forms of Political Accountability* (1984) Clarendon Press-Oxford 55-61.

This aspect was exemplified by the well-known case of *Attorney-General v Jonathan Cape Ltd* (1976) QB 752⁸⁹, which considered the disclosing of details of cabinet discussions.⁹⁰ Crossman was a cabinet minister in the Labour government of Harold Wilson in the 1960s, whose diaries (which included accounts of discussions and disagreements at cabinet meetings) were subsequently published. The government sought to bring an injunction to prevent further publication of his diary, but Crossman's publishers argued that the duty of cabinet confidentiality is a convention and therefore cannot be enforced by the courts.⁹¹ This case, which took place in 1975, turned on whether cabinet secrecy was enforceable by the court. The Lord Widgery CJ then considered the nature of collective responsibility as follows:

I find overwhelming evidence that the doctrine of joint responsibility is generally understood and practiced and equally strong evidence that it is on occasion ignored.⁹²

On the question of cabinet confidentiality, the Lord Chief Justice stated that 'the cabinet is at the very centre of national affairs and must be in possession at all times of information which is secret or confidential'. The case therefore accepted the principle of the legal obligation of cabinet secrecy but concluded that its application depended on the legal value given to a constitutional convention. The Lord Chief Justice accepted that ministers owed each other a legally enforceable duty of confidentiality, but that this duty did not derive from the convention turning into law. Instead, the court relied on existing common law to fulfil the ultimate aim of the convention: 'by "stretching" common law principles about confidentiality in respect of other types of relationships, particularly marriage and commercial undertakings.'⁹³

⁸⁹ All Answers Ltd, '*Attorney-General v Jonathan Cape Ltd*' (Lawteacher.net, January 2020) <<https://www.lawteacher.net/cases/attorney-general-v-jonathan-cape.php?vref=1>> accessed 27 January 2020.

⁹⁰ All Answers Ltd, '*Attorney-General v Jonathan Cape Ltd*' (Lawteacher.net, January 2020) <<https://www.lawteacher.net/cases/attorney-general-v-jonathan-cape.php?vref=1>> accessed 27 January 2020.

⁹¹ All Answers Ltd, '*Attorney-General v Jonathan Cape Ltd*' (Lawteacher.net, January 2020) <<https://www.lawteacher.net/cases/attorney-general-v-jonathan-cape.php?vref=1>> accessed 27 January 2020.

⁹² Hilaire Barnett, *Constitutional & Administrative Law* (11th edn, Routledge 2016) 228.

⁹³ Michael Everett, 'Collective Responsibility' (House of Commons Library 2016) 9.

All members of government are therefore bound by the doctrine of collective responsibility, except 'where it is explicitly set aside'.⁹⁴ The 2016 House of Commons briefing paper on collective responsibility noted that there are two ways to suspend the normal rules of collective responsibility, i.e. (1) free votes or (2) an agreement to differ.⁹⁵ A free vote is 'one where there is no stated Government policy on the issue',⁹⁶ while an agreement to differ is 'a situation where the Government has adopted a policy but has allowed ministers to dissent publicly from that policy to some degree for a limited period'.⁹⁷

The Prime Minister can formally waive the convention if there are pronounced political disagreements within cabinet, with the Prime Minister then potentially finding it more expedient to suspend the convention, rather than find it breached by members of the cabinet.⁹⁸

1. Between 1931 and 1932, the coalition government, led by Prime Minister Ramsey MacDonald, disagreed over economic policy, and in particular over the issue of tariff duties. This resulted in MacDonald suspending the convention, and thus allowing cabinet to dissent.⁹⁹

2. In 1975, this was also a measure taken by Labour Prime Minister, Harold Wilson, when he permitted ministers to express their views publicly in relation to the referendum on the UK's continued membership of the European Economic Community.¹⁰⁰

3. In 2008, the Labour Prime Minister, Gordon Brown, allowed some leeway concerning the Embryology Bill, in order to accommodate the beliefs of Catholic ministers.¹⁰¹

4. In 2010, during the coalition government led by David Cameron, there was an inevitable relaxation of the rules on collective responsibility in relation to policy, in response to political differences between the Conservatives and the Liberal Democrats. More recently, David Cameron also allowed ministers to campaign on different sides of the

⁹⁴ Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 247.

⁹⁵ Michael Everett, 'Collective Responsibility' (House of Commons Library 2016) 8.

⁹⁶ Michael Everett, 'Collective Responsibility' (House of Commons Library 2016) 11.

⁹⁷ Michael Everett, 'Collective Responsibility' (House of Commons Library 2016) 14.

⁹⁸ Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 247.

⁹⁹ Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 247.

¹⁰⁰ Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 247.

¹⁰¹ Rosa Prince, 'Gordon Brown Allows Free Vote on Embryos' (Telegraph.co.uk, 2008) <<https://www.telegraph.co.uk/news/politics/labour/1582685/Gordon-Brown-allows-free-vote-on-embryos.html>> accessed 19 January 2020.

referendum debate relating to Britain's continued membership of the EU.¹⁰²

5. The justice Minister, Phillip Lee has resigned over the Theresa May's approach to Brexit.¹⁰³

6. David Davis, Steve Baker, Boris Johnson, Conor Burns, Chris Green, Robert Court, Scott Mann have quit their role being opposite to the Chequers Agreement.

7. Minister of State for transport, Jo Johnson resigned in opposition to Theresa May's handling Brexit negotiations.¹⁰⁴

8. Shailesh Vara, Rt Hon Dominic Raab, Rt Hon Esther McVey, Suella Braverman, Anne-Marie Trevelyan, Ranil Jayawardena, Rehman Chishti, Sam Gyimah, Will Quince resign their position being disagree to the Withdrawal Agreement and Political Declaration.¹⁰⁵

It can therefore not be considered that implementation of the conventions remains the responsibility of the Prime Minister, who has the power to force ministers to strictly follow the convention, or he/she can rule that, if circumstances demand, cabinet members need to explain any opposing views. This was exemplified by Tony Blair, as a "New Labour" Prime Minister, needing to appoint John Prescott as Deputy Prime Minister (i.e. as the face of traditional Labour), which extended to Blair omitting to take any action against Prescott when he criticized New Labour's policy of creating academy schools.¹⁰⁶ Furthermore, the UK's entrance into the Iraq War was so controversial it split the Labour Party,

¹⁰² BBC News, 'Cameron Confirms Free Vote On EU' (BBC News, 2016) <<https://www.bbc.co.uk/news/av/uk-politics-35236381/eu-referendum-david-cameron-confirms-conservative-mps-will-have-free-vote>> accessed 19 January 2020.

¹⁰³ Pippa Crerar and Peter Walker, 'Justice Minister Phillip Lee Resigns Over Brexit Policy' (the Guardian, 2020) <<https://www.theguardian.com/politics/2018/jun/12/justice-minister-phillip-lee-resign-over-brex-it-policy>> accessed 14 March 2020.

¹⁰⁴ Grant Costello, 'Just How Many Ministers Have Been Sacked or Quit Theresa May's Government?' (Scottish National Party, 2020) <<https://www.snp.org/just-how-many-ministers-have-been-sacked-or-quit-theresa-mays-government/>> accessed 14 March 2020.

¹⁰⁵ Grant Costello, 'Just How Many Ministers Have Been Sacked or Quit Theresa May's Government?' (Scottish National Party, 2020) <<https://www.snp.org/just-how-many-ministers-have-been-sacked-or-quit-theresa-mays-government/>> accessed 14 March 2020.

¹⁰⁶ A W Bradley, K D Ewing and C J S Knight, *Constitutional and Administrative Law* (16th edn, Pearson 2015) 98-101.

leading to Blair not wishing to lose his International Development Secretary, Clare Short, despite her criticism of the way in which the decision was made. On the other hand, Cameron recently reinforced the convention with his statement that ministers should not criticize the government's negotiating position concerning EU reform.¹⁰⁷

Individual ministerial responsibility

The constitutional concept of individual ministerial responsibility is a critical aspect of the "Westminster Model" of Parliamentary democracy, i.e. ministers are responsible to Parliament for both the operation of their department and their personal conduct in public life.¹⁰⁸ This convention determines a constitutional mechanism setting down the accountability of ministers to Parliament, both for their action and other agencies acting in their departments.¹⁰⁹ The convention, like most conventions, are formed in general terms. Thus, ministers are required to take responsibility for any misconduct in their ministerial departments, including facing the prospect of being asked to resign.¹¹⁰

Between 1989 and 2014, there were a number of ministerial resignations over the misconduct of their departments, including the following:

1. In 1989, Edwina Currie offered her resignation over the public alarm caused by her claim that 'most of the egg production in this country, sadly, is now affected with salmonella'.¹¹¹

2. In 1990, Mr. Nicolas Ridley resigned after accepting responsibility for making intemperate remarks about a fellow Member state of the European community.¹¹²

¹⁰⁷ A W Bradley, K D Ewing and C J S Knight, *Constitutional and Administrative Law* (16th edn, Pearson 2015) 98-101. 98-101.

¹⁰⁸ Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 246.

¹⁰⁹ Hilaire Barnett, *Constitutional & Administrative Law* (13th edn, Routledge 2019) 249-258.

¹¹⁰ Oonagh Gay and Thomas Powell, 'Individual Ministerial Responsibility- Issues and Examples' (2004) Research Paper 04/31 House of Commons Library.

¹¹¹ Alan Doig, *The Resignation of Edwina Currie: A Word Too Far*, *Parliamentary Affairs*, Volume 42, Issue 3, July 1989, Pages 317-329, <https://doi.org/10.1093/oxfordjournals.pa.a052201>.

¹¹² Mark Fineman, 'British Trade Minister Quits Post to End Furor: Europe: Ridley's Insults Against Germany and France Brought Cries of Protest. Thatcher Replaces Him with A Proponent of Economic Unity.' (Los Angeles Times, 1990)

3. Stephen Byers resigned in 2002 as Secretary of State for Transport, due to shortcomings in his office.¹¹³

4. In 2002 the Secretary of State for Education offered resignation due to criticism over examinations.¹¹⁴

5. In 2005, the Work and Pensions secretary, David Blunkett, resigned for the second time, due to breaching a rule that a former minister should consult the advisory committee on business appointments they intended to take within two years of leaving the office.¹¹⁵ He had previously been forced to resign as Home Secretary after an e-mail emerged showing a visa application for the nanny of his former lover had been fast-tracked.¹¹⁶

6. In 2011, the Defence Secretary, Liam Fox, offered his resignation over disclosures that a close friend, Adam Werritty, after an investigation and report by the Cabinet Secretary, had gained high-level access meetings by representing himself as a Dr. Fox's adviser.¹¹⁷

7. In 2014, Mark Harper, the Minister for Immigration, resigned after discovering that his self-employed cleaner did not have permission to work in the UK.¹¹⁸

<<https://www.latimes.com/archives/la-xpm-1990-07-15-mn-257-story.html>> accessed 21 January 2020.

¹¹³ BBC News, 'BBC NEWS | Politics | Stephen Byers Quits Government' (News.bbc.co.uk, 2002) <http://news.bbc.co.uk/1/hi/uk_politics/2013061.stm> accessed 21 January 2020.

¹¹⁴ BBC News, 'BBC NEWS | Education | Education Secretary Resigns' (News.bbc.co.uk, 2002) <<http://news.bbc.co.uk/1/hi/education/2359695.stm>> accessed 21 January 2020.

¹¹⁵ Sarah Left and Tom Happold, 'Blunkett Resigns' (the Guardian, 2004) <<https://www.theguardian.com/uk/2004/dec/15/davidblunkett.immigrationpolicy1>> accessed 21 January 2020.

¹¹⁶ Sarah Left and Tom Happold, 'Blunkett Resigns' (the Guardian, 2004) <<https://www.theguardian.com/uk/2004/dec/15/davidblunkett.immigrationpolicy1>> accessed 21 January 2020.

¹¹⁷ Toby Helm, 'Why Liam Fox Had to Resign' (the Guardian, 2011) <<https://www.theguardian.com/politics/2011/oct/15/liam-fox-resignation-conservatives>> accessed 21 January 2020.

¹¹⁸ Tim Ross, 'Mark Harper Resigns After Hiring Illegal Immigrant' (Telegraph.co.uk, 2014) <<https://www.telegraph.co.uk/news/politics/conservative/10626150/Mark-Harper-resigns-after-hiring-illegal-immigrant.html>> accessed 21 January 2020.

8. The Minister for Culture Media and Sport, Maria Miller, was forced to resign following public anger over allegations concerning her expenses.¹¹⁹

The above examples highlight that the acceptance of responsibility has not inevitably led to ministerial resignations in the past, but that, more recently, this seems to have become an effective a tool for controlling individual ministers, particularly when it comes to failures within their departments. In effect, there is no certain and strict rule to determine when (and whether) a minister should resign, and that resignations cannot be seen as an automatic result of any breach of the convention. Like other conventions, this remains an ambiguous and flexible doctrine, open to interpretation, with its relevance decided on a case-by-case basis.¹²⁰ Similarly, Doig remarks that individual responsibility is ‘relative rather and absolute’ and whether to accept responsibility for minister’ actions depends range of circumstances.¹²¹ For example, most recently, when Home secretary, Priti Patel, is facing allegations of breaching the ministerial code for bullying allegations across three government departments,¹²² Prime minister, Boris Johnson, refused to sack Patel despite an inquiry by his independent adviser Sir Alex Allan that concluded she had broken the ministerial code by bullying allegations across three government departments even if she wasn’t aware she was bullying staff.¹²³

¹¹⁹ Georgia Graham, ‘Maria Miller Resigns as Culture Secretary Over Expenses Claims’ (Telegraph.co.uk, 2014) <<https://www.telegraph.co.uk/news/newstoppers/mps-expenses/conservative-mps-expenses/10754010/Maria-Miller-resigns-as-Culture-Secretary-over-expenses-claims.html>> accessed 21 January 2020.

¹²⁰ Hilaire Barnett, *Constitutional & Administrative Law* (11th edn, Routledge 2016).

¹²¹ Alan Doig, *The Double Whammy: The Resignation of David Mellor, MP*, Parliamentary Affairs, Volume 46, Issue 2, April 1993, Pages 167–178, <https://doi.org/10.1093/oxfordjournals.pa.a052410>

¹²² Rajeed Syal and Heather Stewart, ‘Bullying inquiry ‘found evidence Priti Patel broke ministerial code’’ (The Guardian) <https://www.theguardian.com/politics/2020/nov/19/boris-johnson-expected-to-rule-on-priti-patel-bullying-claims-within-weeks> accessed 7 February 2021.

¹²³ Rajeed Syal and Heather Stewart, ‘Bullying inquiry ‘found evidence Priti Patel broke ministerial code’’ (The Guardian) <https://www.theguardian.com/politics/2020/nov/19/boris-johnson-expected-to-rule-on-priti-patel-bullying-claims-within-weeks> accessed 7 February 2021.

This is unusual. Although Boris Johnson faced a lot of criticism, he has decided to keep her in her role by vigorously defending the home secretary. Johnson has decided that short-term political fallout is outweighed by the benefits of keeping an ally in post.

It can, therefore, be said that ministerial responsibility depends on the political values of the day. Finer argued that 'whether a minister is forced to resign depends on three factors; on himself, his Prime Minister and his party'.¹²⁴ He noted that minister cannot refuse resignation, 'if the minister is yielding, his Prime Minister unbending, and his party is out for blood.'¹²⁵ According to Finer, a minister's fate therefore depends, first, on his or her ability to endure against bitter criticism and in the end turn down in his or her fortunes or, failing that, an opportunity to protect minister career.¹²⁶ The second factor, which determines a minister's fate, is the extent to which he or she is supported by the prime minister.¹²⁷ The collective responsibility protect ministers from individual responsibility. A minister's fate depends, lastly, on his or her ability to standing with the party.¹²⁸ If minister would retain the support of Government Backbenchers, it possible for him to continue in office.

It can be concluded that individual ministerial responsibility convention is essentially political in nature. There is no agreement on its application. Its operation depends on a range of factors. The convention has been evaluated slowly accordance with changing circumstances. Their breach brings political concerns. The functions of conventions often necessitate flexibility.

¹²⁴ S. E. Finer, 'The Individual Responsibility of Ministers' (1956) 34 Public Administration 393.

¹²⁵ S. E. Finer, 'The Individual Responsibility of Ministers' (1956) 34 Public Administration 394.

¹²⁶ S. E. Finer, 'The Individual Responsibility of Ministers' (1956) 34 Public Administration 386.

¹²⁷ S. E. Finer, 'The Individual Responsibility of Ministers' (1956) 34 Public Administration 386.

¹²⁸ S. E. Finer, 'The Individual Responsibility of Ministers' (1956) 34 Public Administration 377-396.

Caretaker convention

The caretaker convention supports the concept of the accountability of government and is important for managing elections in an effective manner during periods of political and economic uncertainty.¹²⁹ This section outlines the features and application of the caretaker conventions in the UK.

The caretaker period continues during the period following a general election, until a new government has been formed capable of commanding the support of the House of Commons. Schleiter and Belu stated that the caretaker period in the UK is relatively short, and transitions and government formulations are easily achieved, due to the plurality of the electoral system generally resulting in single-party majorities and avoids any need for complex coalition negotiations to form a government.¹³⁰ The UK rules governing caretaker situations have historically been underdeveloped, due to the existence of very short transition periods and thus only a small risk of contentious arising in relation to the caretaker conventions.¹³¹

However, Schleiter and Belu noted that caretaker periods are now becoming increasingly likely, due to: (1) changes to the rules governing the election timetable; (2) new restrictions on the executive by the Fixed-term Parliaments Acts (2010); and (3) changes in electoral behaviour. This alteration in the length of caretaker periods demonstrates the need to develop detailed caretaker conventions,¹³² as these remain in need of clarification, despite having been recently discussed in detail and now forming part of the Cabinet Manual.¹³³

¹²⁹ Jennifer Menzies and Anne Tiernan, 'Caretaker Conventions' in Brian Galligan and Scott Brenton (eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press 2015) 91.

¹³⁰ Petra Schleiter, Valerie Belu, *The Challenge of Periods of Caretaker Government in the UK*, *Parliamentary Affairs*, Volume 68, Issue 2, April 2015, Pages 229–247, <https://doi.org/10.1093/pa/gsu027>.

¹³¹ Petra Schleiter and Valerie Belu, 'Avoiding Another 'Squatter in Downing Street' Controversy: The Need to Improve the Caretaker Conventions Before The 2015 5.

¹³² Petra Schleiter, Valerie Belu, *The Challenge of Periods of Caretaker Government in the UK*, *Parliamentary Affairs*, Volume 68, Issue 2, April 2015, Pages 229–247, <https://doi.org/10.1093/pa/gsu027>.

¹³³ Petra Schleiter, Valerie Belu, *The Challenge of Periods of Caretaker Government in the UK*, *Parliamentary Affairs*, Volume 68, Issue 2, April 2015, Pages 229–247, <https://doi.org/10.1093/pa/gsu027>.

Schleiter and Belu highlighted the need to differentiate between 'caretaker' and 'purdah' periods, along with their relevant rules.¹³⁴

1. The purdah period is one in which a general election has been called and until any new government has been appointed.

2. The 'caretaker period' is that following a general election, until a new government commanding the support of the House of Commons has been formed.

A period of purdah always takes place before an election, with its rules primarily regulating electoral fairness and caretaker periods should the outcome of an election fail to deliver an overall majority.¹³⁵ The current caretaker convention has been criticized for not sufficiently clarifying the differentiation between these periods and rules.¹³⁶

The main reason for the restrictions placed on government activity during this purdah period before an election is to ensure electoral fairness. The purdah rules apply during the period in which the government may still command a majority in the outgoing House of Commons, therefore ensuring that it does not obtain an unfair electoral advantage by inappropriately drawing on the resources of public services to support its activities.¹³⁷ In addition, this convention imposes restrictions on government publicity, activity, and relationship with the civil service. For example, Hazell noted that, during local government or European elections, the incumbent government 'should not use the Government publicity machine to generate good news stories for your party.'¹³⁸ Likewise, the convention requires that government agencies avoid partisan-

¹³⁴ Petra Schleiter and Valerie Belu, 'Avoiding Another 'Squatter in Downing Street' Controversy: The Need to Improve the Caretaker Conventions Before The 2015 85.

¹³⁵ Petra Schleiter and Valerie Belu, 'Avoiding Another 'Squatter in Downing Street' Controversy: The Need to Improve the Caretaker Conventions Before The 2015 454-461.

¹³⁶ Petra Schleiter and Valerie Belu, 'Avoiding Another 'Squatter in Downing Street' Controversy: The Need to Improve the Caretaker Conventions Before The 2015 454-461.

¹³⁷ Jennifer Menzies and Anne Tiernan, 'Caretaker Conventions', *Constitutional Conventions in Westminster Systems Controversies, Changes and Challenges* (1st edn, Cambridge University Press 2015) 93.

¹³⁸ Robert Hazell, 'The Cabinet Manual and The Caretaker Convention' (The Constitution Unit Blog, 2015) <<https://constitution-unit.com/2015/03/06/the-cabinet-manual-and-the-caretaker-convention/>> accessed 27 January 2020.

ship during an election period.¹³⁹ These restrictions come into force with the announcement of an election and ends with the closing of polls.¹⁴⁰

During a caretaker period, however, the incumbent government remains in place, although no longer commanding the confidence of Parliament. The caretaker rules provide for continuity and constraint during this transition period, thus preventing the country from being left without a functioning executive.¹⁴¹ The caretaker convention holds the incumbent government as the “status quo”, until the new government is formed,¹⁴² while at the same time protecting the freedom of action of an incoming government.¹⁴³ Thus, until the new government takes office, the caretaker government is required to avoid: (1) any major policy decisions; (2) signing major contracts; (3) undertaking important appointments; and (4) employing public servants for election activities.

Schleiter and Belu argued that the current convention presents caretaker conventions as a post-election extension of the “purdah” or pre-election rules, with no differential being made between rules pertaining to electoral fairness and caretaker periods.¹⁴⁴ As a result, the manual states that, following an election and during the period before a new government is in place ‘many of the restrictions set out in para 2.27-2.29

¹³⁹ Robert Hazell, 'The Cabinet Manual and The Caretaker Convention' (The Constitution Unit Blog, 2015) <<https://constitution-unit.com/2015/03/06/the-cabinet-manual-and-the-caretaker-convention/>> accessed 27 January 2020.

¹⁴⁰ Petra Schleiter and Valerie Belu, 'Avoiding Another ‘Squatter in Downing Street’ Controversy: The Need to Improve the Caretaker Conventions Before The 2015 General Election' (2014) 85 *The Political Quarterly* 454-461.

¹⁴¹ Jennifer Menzies and Anne Tiernan, ‘Caretaker Conventions’ in Brian Galligan and Scott Brenton (eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press 2015) 93.

¹⁴² Jennifer Menzies and Anne Tiernan, ‘Caretaker Conventions’ in Brian Galligan and Scott Brenton (eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press 2015) 92.

¹⁴³ Jennifer Menzies and Anne Tiernan, ‘Caretaker Conventions’ in Brian Galligan and Scott Brenton (eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press 2015) 92.

¹⁴⁴ Petra Schleiter and Valerie Belu, 'Why the UK Needs Improved Caretaker Conventions Before the May 2015 General Election | British Politics and Policy At LSE' (Blogs.lse.ac.uk, 2015) <<https://blogs.lse.ac.uk/politicsandpolicy/why-the-uk-needs-improved-caretaker-conventions-before-the-may-2015-general-election/>> accessed 27 January 2020.

would continue to apply'.¹⁴⁵ This thus leaves a lack of clarity when it comes to the rules that remain in force during a caretaker period.¹⁴⁶

Schleiter and Belu highlighted that the *purdah* and caretaker periods are clearly distinguishable.¹⁴⁷ They also specified the reasons for government power being restricted during caretaker periods in the Cabinet Manual, i.e., as to ensure greater clarity to ministers, Members of Parliament, civil servants and the public about what should and what should not happen during these periods. Similarly, Hazell stressed that:

It would help to keep them conceptually and practically distinct if the Cabinet Office could adopt the term 'caretaker convention' to describe the restrictions on government decision making. The '*purdah*' rules describe the restrictions on government publicity, which apply during any election, even when the government has a majority.¹⁴⁸

Caretaker conventions contain two important aspects: firstly, to guarantee the country is never without an acting government and secondly, to protect the freedom of action of the incoming government.

To guarantee the country is never without an acting government, the incumbent government should continue with the management of the

¹⁴⁵ Petra Schleiter and Valerie Belu, 'Why the UK Needs Improved Caretaker Conventions Before the May 2015 General Election | British Politics and Policy At LSE' (Blogs.lse.ac.uk, 2015) <<https://blogs.lse.ac.uk/politicsandpolicy/why-the-uk-needs-improved-caretaker-conventions-before-the-may-2015-general-election/>> accessed 27 January 2020.

¹⁴⁶ Petra Schleiter and Valerie Belu, 'Why the UK Needs Improved Caretaker Conventions Before the May 2015 General Election | British Politics and Policy At LSE' (Blogs.lse.ac.uk, 2015) <<https://blogs.lse.ac.uk/politicsandpolicy/why-the-uk-needs-improved-caretaker-conventions-before-the-may-2015-general-election/>> accessed 27 January 2020.

¹⁴⁷ Petra Schleiter and Valerie Belu, 'Why the UK Needs Improved Caretaker Conventions Before the May 2015 General Election | British Politics and Policy At LSE' (Blogs.lse.ac.uk, 2015) <<https://blogs.lse.ac.uk/politicsandpolicy/why-the-uk-needs-improved-caretaker-conventions-before-the-may-2015-general-election/>> accessed 27 January 2020.

¹⁴⁸ Robert Hazell, 'The Cabinet Manual and The Caretaker Convention' (The Constitution Unit Blog, 2015) <<https://constitution-unit.com/2015/03/06/the-cabinet-manual-and-the-caretaker-convention/>> accessed 27 January 2020.

country during the transition period, carrying out administrative tasks and dealing with any urgent matters.¹⁴⁹

This was demonstrated by the Labour Prime Minister, Gordon Brown remaining in office pending the completion of coalition talks after his government lost its majority following the general election of May 2010. However, his failure to immediately resign led to some controversy, with Brown being criticized in the media as a “squatter” in Downing Street.¹⁵⁰ The Prime Minister then resigned four days after the election, with a House of Commons committee later confirming that this had been the constitutionally appropriate time.¹⁵¹

This event prompts consideration of whether there is a duty placed on an incumbent Prime Minister to remain in office until it becomes clear who will be able to form the next government.¹⁵²

The Cabinet Manual noted:

Recent examples suggest that previous Prime Ministers have not offered their resignations until there was a situation in which clear advice could be given to the Sovereign on who should be asked to form a government. This precedent needs to be tested by enough practice to be regarded in future as having established a constitutional convention.¹⁵³

This demonstrates a lack of clarity in UK caretaker conventions which prevents a caretaker government from resigning.

Schleiter and Belu stated that ‘to ensure effective governance in the transition period, it is essential that the Prime Minister and government do not resign until the next regular government has been

¹⁴⁹ Jennifer Menzies and Anne Tiernan, ‘Caretaker Conventions’ in Brian Galligan and Scott Brenton (eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press 2015) 92.

¹⁵⁰ Nicola Boden, ‘From Green-Eyed Chancellor to the ‘Squatter of No10’, Gordon Brown Finally Admits He Can’t Hang On To Job He Coveted For So Long’ (Mail Online, 2010) <<https://www.dailymail.co.uk/news/election/article-1272278/From-green-eyed-Chancellor-squatter-No10-Gordon-Brown-finally-admits-hang-job-coveted-long.html>> accessed 28 January 2020.

¹⁵¹ House of Commons Political and Constitutional Reform Committee 2011; 11.

¹⁵² Parliament UK, ‘Operation of the ‘Caretaker Convention’ (2015).

¹⁵³ The Cabinet manual - draft a guide to laws, conventions, and rules on the operation of government 2011. <https://www.gov.uk/government/publications/cabinet-manual>.

formed'.¹⁵⁴ Likewise, Hazell noted that caretaker conventions guarantee that the country is never left without an acting government. However, the current caretaker convention in the UK lacks any written rules to prevent a caretaker government from resigning.¹⁵⁵ The Cabinet Manual sets out that:

These provisions do not explicitly require the incumbent government to remain in office during the caretaker period until the next cabinet is formed, and also the House of Lords' Constitution Committee concluded that an incumbent Prime Minister has no duty to remain in office until it is clear what form an alternative government might take".¹⁵⁶

A parliamentary report on the need to update the Cabinet Manual concluded that it should clarify the principle that there must always be a government in place,¹⁵⁷ while at the same time recommending that:

For the benefit of the media and the general public, the Cabinet Secretary should set out clearly, and well in advance of the forthcoming general election, the Government's view of the constitutional principles which underpin the continuance in office or otherwise of administrations following a general election.¹⁵⁸

This criticism thus requires further consideration, due to the need for political and economic uncertainty to be effectively managed during

¹⁵⁴ Petra Schleiter and Valerie Belu, 'Why the UK Needs Improved Caretaker Conventions Before the May 2015 General Election | British Politics and Policy At LSE' (Blogs.lse.ac.uk, 2015) <<https://blogs.lse.ac.uk/politicsandpolicy/why-the-uk-needs-improved-caretaker-conventions-before-the-may-2015-general-election/>> accessed 27 January 2020.

¹⁵⁵ Robert Hazell, 'The Cabinet Manual and The Caretaker Convention' (The Constitution Unit Blog, 2015) <<https://constitution-unit.com/2015/03/06/the-cabinet-manual-and-the-caretaker-convention/>> accessed 27 January 2020.

¹⁵⁶ The Cabinet manual - draft a guide to laws, conventions, and rules on the operation of government 2011 (n 154).

¹⁵⁷ 'House of Commons - Government Formation Post-Election - Political and Constitutional Reform' (Publications.parliament.uk, 2015) <<https://publications.parliament.uk/pa/cm201415/cmselect/cmpolcon/1023/102306.htm>> accessed 16 January 2020.

¹⁵⁸ 'House of Commons - Government Formation Post-Election - Political and Constitutional Reform' (Publications.parliament.uk, 2015) <<https://publications.parliament.uk/pa/cm201415/cmselect/cmpolcon/1023/102306.htm>> accessed 16 January 2020.

caretaker periods, as the country cannot be left without a functioning executive.

To protect the freedom of action of an incoming government, a caretaker government should avoid major policy decisions, the signing of major contracts, undertaking important appointments or including public servants in election activities until the new government formed. These conventions act to prevent an outgoing government from forcing an incoming government to follow major new policies, by ensuring a caretaker government is unable to make any decision capable of binding or limiting the incoming government. The Cabinet Manual clarifies that this restraint should not be detrimental to the national interest, or wasteful of public money, and if urgent decisions need to be made, they can be handled by temporary arrangements or following relevant consultation with the opposition parties.¹⁵⁹ Thus, the guidelines state that a caretaker government should refrain from undertaking significant decisions, and any necessary interim measures must only contain a short-term commitment.

Schleiter and Belt argued that the current form of the convention does not effectively clarify the exact identity of a “major policy decision” and thus fails to offer adequate information relating to the caretaker period.¹⁶⁰ They also noted that some Westminster systems have chosen ‘definitions revolving around the monetary value of the contract’ and ‘many have codified the level of appointment [permitted without consultation during the caretaker period] with precision’¹⁶¹. Similarly, critical aspects consist of the need to put in place appropriate protocols for the consultation process between the government and the opposition, should these become necessary. Central questions in need of clarification concern firstly, the degree of agreement required between parties before any

¹⁵⁹ The Cabinet manual - draft a guide to laws, conventions, and rules on the operation of government 2011. <https://www.gov.uk/government/publications/cabinet-manual>.

¹⁶⁰ Jennifer Menzies and Anne Tiernan, ‘Caretaker Conventions’ in Brian Galligan and Scott Brenton (eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press 2015) 93.

¹⁶¹ Petra Schleiter and Valerie Belu, ‘Why the UK Needs Improved Caretaker Conventions Before the May 2015 General Election | British Politics and Policy At LSE’ (Blogs.lse.ac.uk, 2015) <<https://blogs.lse.ac.uk/politicsandpolicy/why-the-uk-needs-improved-caretaker-conventions-before-the-may-2015-general-election/>> accessed 27 January 2020.

decision can be taken and secondly, the identity of those participating in any such consultation.

The guidelines devolve responsibility to the caretaker government when it comes to determining which matters are urgent or in need of consultation, although only urgent, routine, non-controversial and reversible decisions are considered appropriate. The caretaker convention, like other conventions, thus follows common sense political practice.

Finally, the current conventions lack clarity concerning the end of caretaker periods.¹⁶² The Cabinet Manual is indeterminate in its statement that:

The point at which the restrictions on financial and other commitments should come to an end depends on circumstances but may often be either when a new Prime Minister is appointed by the Sovereign or where a government's ability to command the confidence of the Commons has been tested in the House of Commons.¹⁶³

In practice, the caretaker government *generally* ends when the Queen invites the individual most likely to form a government and command the confidence of the House of Commons. Where the election delivers a clear majority to a single party, this process is straightforward, with the caretaker period coming to an end when the leader of the majority party is invited to form the new government, which generally takes place within a matter of hours. However, this process becomes more complex when an election fails to deliver a decisive result. The Cabinet Manual states that, under these circumstances, an incumbent government should remain in office until the Prime Minister tenders his or her resignation (and that of the government) to the Queen, i.e. when it becomes apparent that another individual is better placed to form an administration commanding the confidence of the House.

This raises the issue of the circumstances under which it becomes apparent that an incumbent government is unlikely to command the confidence of the House, but the composition of the new government has not yet been established. This highlights the need to ensure greater clari-

¹⁶² 'House of Commons - Government Formation Post-Election - Political and Constitutional Reform' (Publications.parliament.uk, 2015) <<https://publications.parliament.uk/pa/cm201415/cmselect/cmpolcon/1023/102306.htm>> accessed 16 January 2020.

¹⁶³ The Cabinet manual - draft a guide to laws, conventions, and rules on the operation of government 2011. <https://www.gov.uk/government/publications/cabinet-manual>.

ty by carefully defining the period in which the caretaker conventions apply, with the specific duration explicitly announced. Hazell stated that: 'it should always be clear to politicians, Whitehall, the media and the public whether a government is a caretaker or not.'¹⁶⁴

The above discussion therefore leads to the conclusion that it is essential to further improve the clarification of these aspects of the convention in order to enhance its effectiveness.

Convention requiring parliamentary approval before engagement in military action

The decision to engage in armed conflict is a prerogative power. According to constitutional convention, the Prime Minister has the power, on behalf of the Crown, to decide to make a declaration of war, with Parliament having little influence over the use of this power, i.e., "at times the role of the Parliament is little beyond a rubber stamp."¹⁶⁵ The UK government's decision to seek parliamentary approval before engaging in the Iraq war in 2003 sparked a debate as to whether the government should always undertake this action in future.

It has now been accepted that a new convention has emerged implying that the government is unable to engage military action overseas without a debate in the House of Commons and a subsequent vote on the deployment of armed forces. However, there remains considerable uncertainty concerning the credibility and proper operation mechanism of the British Parliament in the decision to deploy ordinary military troops.

Making and ratifying treaties

The making and ratification of treaties is also a prerogative power.¹⁶⁶ Treaties are ratified by the government, acting under the Royal

¹⁶⁴ Robert Hazell, 'The Cabinet Manual and The Caretaker Convention' (The Constitution Unit Blog, 2015) <<https://constitution-unit.com/2015/03/06/the-cabinet-manual-and-the-caretaker-convention/>> accessed 27 January 2020.

¹⁶⁵ James Strong, 'The War Powers of The British Parliament: What Has Been Established And What Remains Unclear?' (2018) 20 *The British Journal of Politics and International Relations* 19-34.

¹⁶⁶ Hilaire Barnett, *Constitutional & Administrative Law* (11th edn, Routledge 2016) 107.

Prerogative, which provides ministers with a free hand to conclude international agreements.¹⁶⁷

This aspect has led to a number of issues arising from the lack of any formal role played by Parliament in the drawing up of treaties, or in the approval of the text of treaties, except when a treaty would require a change in English law or the grant of public money. The Ponsonby rule states that the government is required to place any treaty before Parliament at least twenty-one days before ratification. However, this is non-statutory, and can be waived if speedy ratification is required. This led to PASC demanding a legal safeguard concerning the Ponsonby rule in March 2004,¹⁶⁸ with the Ponsonby rule on the ratification of international treaties being codified in the Constitutional Reform and Governance Act 2010¹⁶⁹ and Parliament being awarded a new statutory role in the ratification of treaties. Parliament now has the legal power to accept or to reject international agreements.

The Salisbury convention

The Salisbury convention regulates the relationship between the House of Commons and the House of Lords. The convention by which the House of Lords gives way to the will of the elected House was breached in 1908, when the Lords rejected the Commons' Finance Bill. The budget crisis experienced during this time had raised the issue of whether the unelected House of Lords should have the power to veto legislation passed by Commons, and, if so, whether such power should include the power to veto the budget.

Tomkins stated that 'the events of 1909 - 1910 had shown that the something more solid than informal understanding was now needed if the government was going to be able to conduct its business efficiently'.¹⁷⁰ The then Prime Minister (i.e., Asquith) asked the King to exercise his prerogative power to create between 400-500 new Liberal peers, in order to destroy the inbuilt Conservative majority in the Upper House. Following an impasse between the two Houses, not only were sufficient num-

¹⁶⁷ Public Administration Select Committee (PASC).

¹⁶⁸ Public Administration Select Committee (PASC).

¹⁶⁹ Constitutional Reform and Governance Act Chapter 25 2010.

¹⁷⁰ Tomkins, (2003). Public law. Oxford: Oxford University Press.

bers of peers assigned to secure a majority of the Bill, but the convention was legally safeguarded in the Parliament Bill 1911.¹⁷¹ This ensured that, from then on, the House of Lords would no longer enjoy equal power to approve or reject legislative proposals, or to delay any legislation limited by time.¹⁷²

The Salisbury doctrine is currently understood to refer to the unelected second chamber abstaining from obstructing a bill stated in the governing party's election manifesto.¹⁷³ It has therefore been generally agreed that the Lords still have a valuable role to play and are a revising chamber, being mandated to improve the quality of legislation.¹⁷⁴

However, the second chamber is not democratically elected and the rationale for the Salisbury convention is therefore to support the principle of democracy, i.e. it would be undemocratic (and therefore unconstitutional, albeit not unlawful), for the unelected House of Lords to table amendments potentially undermining the purpose of the government's manifesto commitments.¹⁷⁵ Elliott emphasized that 'manifesto Bills have a form of democratic legitimacy that can be traced back not just to the *elected chamber* but to the *electorate* itself.'¹⁷⁶

The ambit of the convention is not easily specified.¹⁷⁷ While it is accepted that the Lords may amend details of a bill for the purposes of improvement, there remain difficulties in differentiating between these and "wrecking amendments", i.e. those capable of altering the bill's intent.¹⁷⁸ The Lords are therefore required to take care not to frustrate the

¹⁷¹ Parliament Act 1911.

¹⁷² Hilaire Barnett, *Constitutional & Administrative Law* (11th edn, Routledge 2016) 363.

¹⁷³ Richard Kelly, 'House of Lords: Conventions' (House of Commons 2007) 5.

¹⁷⁴ Glenn Dymond and Hugo Deadman, 'The Salisbury Doctrine' (House of Lords 2006) 2-3.

¹⁷⁵ Joseph Jaconelli, *The Proper Rules for Constitutional Conventions*, 38 *Dublin U. L.J.* 363 (2015).

¹⁷⁶ Mark Elliott, 'Does the Salisbury Convention Apply During a Hung Parliament?' (Public Law for Everyone, 2017) <<https://publiclawforeveryone.com/2017/06/10/does-the-salisbury-convention-apply-during-a-hung-parliament/>> accessed 27 January 2020.

¹⁷⁷ Joseph Jaconelli, *The Proper Rules for Constitutional Conventions*, 38 *Dublin U. L.J.* 363 (2015).

¹⁷⁸ Joseph Jaconelli, *The Proper Rules for Constitutional Conventions*, 38 *Dublin U. L.J.* 363 (2015).

will of the people.¹⁷⁹ A number of further points of difficulty have arisen due to the election manifestos of political parties being imprecise in their wording and promises, being typically drawn up to allow considerable freedom of manoeuvre in the event that the party wins office.¹⁸⁰ It is therefore unclear what constitutes a manifesto bill, including which amendments are capable of destroying or altering it beyond recognition. Finally, the Salisbury convention is ill-suited to the circumstances of a coalition government, having arisen in the era of one-party rule. This raises the question of whether, in the new political landscape, the convention should only apply if the measure in question was promised in the manifestos of each of the coalition partners, or if it would be sufficient for it to have been mentioned in the manifesto of the “senior partner” to the coalition.¹⁸¹

It is generally accepted that the answers to these questions will remain highly subjective, leaving considerable uncertainty concerning how to operate the convention in the political realm. Jaconelli noted that: ‘The doctrine, even if it lacks a canonical verbal statement, has functioned tolerably well as a conventional standard of behaviour.’¹⁸² A recent example of this uncertainty was when the House of Lords returned the European Union Withdrawal Bill to the House of Commons, where MPs were required to decide whether to accept or reject the peers’ amendments. Many Brexiteers (i.e., those wishing to leave the EU) argued that the House went too far with its amendments and thus violated the Salisbury-Addison Convention. However, it remains generally agreed that, in this case, the peers did not reject the bill outright, and neither did their amendments destroy or alter it beyond all recognition, i.e., even with the peers’ amendments, Britain was still able to leave the EU, with the Lords simply asking MPs to think again, which did not form an unconstitutional act.

¹⁷⁹ Joseph Jaconelli, *The Proper Rules for Constitutional Conventions*, 38 *Dublin U. L.J.* 363 (2015).

¹⁸⁰ Joseph Jaconelli, *The Proper Rules for Constitutional Conventions*, 38 *Dublin U. L.J.* 363 (2015).

¹⁸¹ Mark Elliott, ‘Does the Salisbury Convention Apply During a Hung Parliament?’ (Public Law for Everyone, 2017) <<https://publiclawforeveryone.com/2017/06/10/does-the-salisbury-convention-apply-during-a-hung-parliament/>> accessed 27 January 2020.

¹⁸² Joseph Jaconelli, *The Proper Rules for Constitutional Conventions*, 38 *Dublin U. L.J.* 363 (2015).

It can therefore be argued that, in this case, the flexibility of the convention proves its value.¹⁸³ Similarly, Elliott stated that ‘the Salisbury convention, like all constitutional conventions, is an organic phenomenon that acquires its meaning, its status and its bite from the views that prevail within relevant sections of the political community’ and thus ‘unduly legalistic analysis of conventions must be avoided.’¹⁸⁴ He further noted that ‘whether the House of Lords will feel able to disregard the Salisbury convention during the present Parliament is a question that cannot be determined in isolation from the views of the relevant political actors.’¹⁸⁵

The Sewel convention

The UK Parliament is sovereign and can change the law in devolved areas. However, since 1999, successive UK Governments have followed the convention that Westminster does not generally seek to interfere in devolved areas without agreement from the devolved legislatures.¹⁸⁶

The origin of the Sewel convention lies in the statement by Lord Sewel in the House of Lords on 21 July 1998, during the passage of the Scotland Act 1998. Lord Sewel, the Scottish Office minister, stated that the government hoped a convention would develop to ensure that Parliament would not normally legislate on devolved matters without the consent of the devolved legislature.¹⁸⁷ The government replied to his demand by establishing a Memorandum of Understanding¹⁸⁸ between the UK government and the devolved governments in December 2001

¹⁸³ Joseph Jaconelli, *The Proper Rules for Constitutional Conventions*, 38 *Dublin U. L.J.* 363 (2015).

¹⁸⁴ Mark Elliott, ‘Does the Salisbury Convention Apply During a Hung Parliament?’ (Public Law for Everyone, 2017) <<https://publiclawforeveryone.com/2017/06/10/does-the-salisbury-convention-apply-during-a-hung-parliament/>> accessed 27 January 2020.

¹⁸⁵ Mark Elliott, ‘Does the Salisbury Convention Apply During a Hung Parliament?’ (Public Law for Everyone, 2017) <<https://publiclawforeveryone.com/2017/06/10/does-the-salisbury-convention-apply-during-a-hung-parliament/>> accessed 27 January 2020.

¹⁸⁶ Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017) 325.

¹⁸⁷ *HL Deb*, Vol 592, col 791 (21 July 1998).

¹⁸⁸ *Memorandum of Understanding and Supplementary Agreements* (2013).

(Cm 5240). Paragraph 14 of the current Memorandum of Understanding¹⁸⁹, published in October 2013, states:

The UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters, except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.¹⁹⁰

Therefore, The Sewel Convention was regulated by the Scottish Executive and the UK Government, rather than between the two Parliaments. This implied that it was a “soft” practice, i.e., that it is not enshrined in statute. Furthermore, it reduces the scope for informed scrutiny of legislation, being simply an official interpretation of Sewel convention.

Alongside the written agreement, The Devolution Guidance Note 10 (“DGN10”) has been accepted by both the UK and Scottish Governments and clarifies how the Sewel convention has operated in practice since 1999. DGN 10 forms an extended operation mechanism of the convention, stating that the consent of the Scottish Parliament was generally required both when a UK Bill makes provision for devolved matters and also when it alters the legislative competence of the Scottish Parliament or the executive competence of Scottish Ministers, i.e., despite these being reserved matters.¹⁹¹

This is now reflected in the Standing Orders of the Scottish Parliament, which have, since November 2005, described a UK Bill requiring the consent of the Scottish Parliament by the Bill previously known as a Sewel motion and now known as a Legislative Consent Motion (“LCM”), which:

Makes provision applying to Scotland for any purpose within the legislative competence of the Parliament, or which alters that legisla-

¹⁸⁹ Gov. UK, 'Devolution Guidance Notes' (GOV.UK, 2019) <<https://www.gov.uk/government/publications/devolution-guidance-notes>> accessed 20 January 2020.

¹⁹⁰ Department for Constitutional Affairs DGN 10.

¹⁹¹ Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), *The UK Constitution After Miller* (Forthcoming). Available at SSRN: <https://ssrn.com/abstract=3108502>.

tive competence or the executive competence of the Scottish Ministers.¹⁹²

The Smith Commission demanded that ‘The Sewel Convention should be put on a statutory footing’.¹⁹³ In 2016, the government answered this demand by recognizing Sewel Convention through section 2 of the Scotland Act 2016, whose subsections (7) and (8) now state:

(7) This section does not affect the power of the Parliament of the UK to make laws for Scotland.

(8) But it is recognized that the Parliament of the UK will not normally legislate with regards to devolved matters without the consent of the Scottish Parliament.

However, Lord Norton criticized the fact that the UK government had narrowed and undermined the meaning of the Sewel Convention by omitting a practice, and Section 2 refers only to the original scope rather than reflecting its extended scope, i.e. by DGN 10.¹⁹⁴ Furthermore, the UK Government was accused of having deliberately kept Section 2 only narrowly depicted in the order, in order to allow the development of a manoeuvre to escape the need to seek the consent of the Scottish Parliament for any UK Bill, thus altering the definition of devolved competence.¹⁹⁵

The UK government defended the extension of this convention by stating that DGN10 was never strictly part of the Sewel Convention, being used only as ‘a working arrangement’.¹⁹⁶ DGN10 was described as:

Not a document which was ever approved by either House of this Parliament but was developed by the Civil Service for the application

¹⁹² This is now contained in Rule 9B.1 of the Standing Orders of the Scottish Parliament 4th Edition, 9th Revision (30 October 2015).

¹⁹³ Iain Jamieson, 'Putting the Sewel Convention on A Statutory Footing > Scottish Constitutional Futures Forum' (Scottishconstitutional futures.org, 2020) <<https://www.scottishconstitutional futures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/7001/Iain-Jamieson-Putting-the-Sewel-Convention-on-a-Statutory-Footing.aspx>> accessed 15 March 2020.

¹⁹⁴ HL Deb 24 Feb 2016 col 295

¹⁹⁵ McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (n 192).

¹⁹⁶ Mark Elliott and Robert Thomas, Public Law (3rd edn, Oxford University Press 2017) 328.

and operation of what was understood by the Civil Service and everyone else to be the Sewel convention.¹⁹⁷

It was thus considered ‘not appropriate that it should be enshrined in statute’.¹⁹⁸ In particular, it has been argued that the UK Parliament has retained the power to make laws concerning devolved matters, i.e., Section 28(7) of the Scotland Act 1998 ‘makes it clear that the devolution of legislative competence to the Scottish Parliament does not affect the ability of Westminster to legislate for Scotland even in relation to devolved matters’.¹⁹⁹

Jamieson argued that the UK Government has put the Sewel convention on a statutory footing, which, in Section 2, has created many uncertainties.²⁰⁰ He notes that previously a UK Bill which altered the definition of devolved competence is normally obtained the consent of the Scottish Parliament.²⁰¹ He suggests that there would still be a convention to this effect, even although not part of the Sewel convention as described in Section 2.²⁰² Similarly, McHarg notes that the practice of the convention should be determinative of the scope of that rule.²⁰³

¹⁹⁷ Department for Constitutional Affairs DGN 10.

¹⁹⁸ Iain Jamieson, 'Putting the Sewel Convention on A Statutory Footing > Scottish Constitutional Futures Forum' (Scottishconstitutional futures.org, 2020) <<https://www.scottishconstitutional futures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/7001/Iain-Jamieson-Putting-the-Sewel-Convention-on-a-Statutory-Footing.aspx>> accessed 15 March 2020.

¹⁹⁹ Elliott and Thomas, Public Law (n 4) 328.

²⁰⁰ Iain Jamieson, 'Putting the Sewel Convention on A Statutory Footing > Scottish Constitutional Futures Forum' (Scottishconstitutional futures.org, 2020) <<https://www.scottishconstitutional futures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/7001/Iain-Jamieson-Putting-the-Sewel-Convention-on-a-Statutory-Footing.aspx>> accessed 15 March 2020.

²⁰¹ Iain Jamieson, 'Putting the Sewel Convention on A Statutory Footing > Scottish Constitutional Futures Forum' (Scottishconstitutional futures.org, 2020) <<https://www.scottishconstitutional futures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/7001/Iain-Jamieson-Putting-the-Sewel-Convention-on-a-Statutory-Footing.aspx>> accessed 15 March 2020.

²⁰² Iain Jamieson, 'Putting the Sewel Convention on A Statutory Footing > Scottish Constitutional Futures Forum' (Scottishconstitutional futures.org, 2020) <<https://www.scottishconstitutional futures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/7001/Iain-Jamieson-Putting-the-Sewel-Convention-on-a-Statutory-Footing.aspx>> accessed 15 March 2020.

²⁰³ McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (n 192).

During the recent Brexit process, one of the most contentious issues has been establishing the circumstances in which the Sewel convention can be applied. Under the convention, the Scottish government demanded that the UK government should seek its consent before triggering Article 50²⁰⁴, but the UK government insisted that the decision to notify the UK's intention to withdraw from the UK under Article 50 TEU as being purely a matter of foreign affairs which could validly be made under the prerogative.²⁰⁵ Also they note that even if legislation was required to trigger Article 50, relations with the EU matters was reserved to the UK level and thus the Sewel Convention would not be engaged because the reservation of relations with the EU meant that it would not be legislation 'with regard to a devolved matter'.

Westminster believes that the decision to withdraw was one for the UK as union²⁰⁶. On the other hand, Scottish defence for the adoption of a principle of parallel consent: in other words, for Leave to win the referendum, it would need to secure a majority of votes across the UK and in each of the constituent parts of the UK.²⁰⁷

Former SNP leader, Alex Salmond noted:

That's a fundamental attack on the very principle and foundation in the statute of the Scottish Parliament of 1999, which said specifically that anything that wasn't reserved to Westminster should be run in Scotland.²⁰⁸

²⁰⁴ The Supreme Court, 'Article 50 Brexit Appeal - The Supreme Court' (Supremecourt.uk, 2017) <<https://www.supremecourt.uk/news/article-50-brexite-appeal.html>> accessed 20 January 2020.

²⁰⁵ The Supreme Court, 'Article 50 Brexit Appeal - The Supreme Court' (Supremecourt.uk, 2017) <<https://www.supremecourt.uk/news/article-50-brexite-appeal.html>> accessed 20 January 2020.

²⁰⁶ Andrew Learmonth, 'Theresa May Accused of Attacking The Foundation Of The Scottish Parliament By Seizing Back Devolved Powers' (The National, 2017) http://www.thenational.scot/news/15133315.Theresa_May_accused_of_attacking_the_foundation_of_the_Scottish_Parliament_by_seizing_back_devolved_powers/?ref=rl&lp=1 accessed 4 March 2017.

²⁰⁷ Aileen McHarg, 'Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention' (n 192).

²⁰⁸ Chris Green, 'Theresa May: Giving EU Powers To Scotland Could Harm Integrity Of UK' (Inews.co.uk, 2017) <<https://inews.co.uk/news/politics/theresa-may-much-devolution-fatally-weaken-union-528477>> accessed 28 January 2020.

Elliott noted that the act of triggering Article 50 demonstrated the UK Government exercising its prerogative powers to conduct foreign policy, rather than Parliament enacting legislation, i.e. Article 50 was invoked without any legislation being enacted by the UK Parliament.²⁰⁹ Elliot stated that ‘it is logically impossible for there to be any requirement for the Scottish Parliament’s consent Brexit legislation enacted by Westminster unless, in the first place, the Westminster Parliament is in the process of enacting such legislation.’²¹⁰ But, in the Miller case the opposite happened. The Supreme Court ruled that, while the Government can use prerogative power to make and withdraw from international treaties, whenever treaty changes require a change to domestic law, the Government must always “seek the sanction of Parliament”.²¹¹ The Supreme Court therefore ruled that it would not be legal for the Government to use prerogative powers to trigger Article 50: instead, primary legislation was required.²¹²

McHarg argues that ‘The UK Government’s attempt to downplay the significance of the embedding of EU law into the devolution statutes is unconvincing.’²¹³ She remarks that while *relations with the EU* may

²⁰⁹ Mark Elliott, ‘Can Scotland Block Brexit?’ (Public Law for Everyone, 2016) <<https://publiclawforeveryone.com/2016/06/26/brexit-can-scotland-block-brexit/>> accessed 19 January 2020.

²¹⁰ Mark Elliott, ‘Can Scotland Block Brexit?’ (Public Law for Everyone, 2016) <<https://publiclawforeveryone.com/2016/06/26/brexit-can-scotland-block-brexit/>> accessed 19 January 2020.

²¹¹ R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) REFERENCE by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review REFERENCE by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review [2016] The Supreme Court, [2016] EWHC 2768 (Admin) and [2016] NIQB 85 (The Supreme Court).

²¹² R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) REFERENCE by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review REFERENCE by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review [2016] The Supreme Court, [2016] EWHC 2768 (Admin) and [2016] NIQB 85 (The Supreme Court).

²¹³ Aileen McHarg, Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention (December 28, 2017). Elliott, Williams and Young (eds), *The UK Constitution After Miller* (Forthcoming). Available at SSRN: <https://ssrn.com/abstract=3108502>.

be reserved, the implications of Brexit for the devolution settlements real consequences for the ways in which EU law has been implemented and enforced in the devolved territories²¹⁴. Therefore, she believes devolved governments necessarily should be active participants in the removal of the EU tier in devolved areas.²¹⁵

There is no formal process determining whether the Sewel convention applies to any alteration to the powers of the Scottish Parliament. While the Scottish insist that ‘legislation authorising withdrawal would require the consent of the devolved legislatures because it would be legislation regarding devolved matters within the meaning of the Sewel convention.’²¹⁶ Nonetheless, the UK government concluded that ‘legislative consent convention’ will apply for provisions which would change the powers of the devolved bodies’. On this basis, the government sought legislative consent for the bill, which includes firstly, the EU Withdrawal Bill (i.e. transposing EU legislation into UK domestic law) and secondly, the Trade Bill, which gives the UK Government powers to implement future trade deals.

Subsequently, in June 2017, the UK government conceded that the consent of the devolved legislatures would be sought for the Withdrawal Bill. Legislative Consent Motions (LCMs) on the EU Withdrawal Bill were voted on in the Scottish Parliament and Welsh Assembly on Tuesday 15 May. The Scottish Parliament refused to consent to the Withdrawal Bill, raising the issue of whether the Scottish Parliament can “block” UK legislation on Brexit. Elliot argued that the UK Parliament is sovereign and thus the absence of consent from the Scottish Parliament would not legally restrain Westminster from enacting Brexit legis-

²¹⁴ Aileen McHarg, *Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention* (December 28, 2017). Elliott, Williams and Young (eds), *The UK Constitution After Miller* (Forthcoming). Available at SSRN: <https://ssrn.com/abstract=3108502>.

²¹⁵ Aileen McHarg, *Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention* (December 28, 2017). Elliott, Williams and Young (eds), *The UK Constitution After Miller* (Forthcoming). Available at SSRN: <https://ssrn.com/abstract=3108502>.

²¹⁶ Aileen McHarg, *Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention* (December 28, 2017). Elliott, Williams and Young (eds), *The UK Constitution After Miller* (Forthcoming). Available at SSRN: <https://ssrn.com/abstract=3108502>.

lation.²¹⁷ Because he believes that the “requirement” for consent is ultimately no more than a political expectation that the UK Parliament will respect the constitutional position of the Scottish Parliament by not riding roughshod over it in certain circumstances.²¹⁸ Elliott noted that the Scotland Act 2016 is a *law* that *recognizes a convention*, but in doing so, the Act does not, through some form of alchemy, *turn* the convention *into* law.²¹⁹

McHarg argued that Brexit is currently threatening the Sewel convention “almost to destruction” and is seriously undermining the protection it offers for devolved autonomy.²²⁰ She considered that UK government breached the Sewel convention by continuing with the EU Withdrawal Bill without the consent of Holyrood.²²¹ She also stated that “to make an exception to a rule, what is required is an explanation of why its underlying rationale either does not apply or is overridden by some competing principle”.²²² The UK government can be seen as implying that, so long as it has attempted to reach an agreement with the Scottish Government, the Convention is satisfied.²²³

²¹⁷ Mark Elliott and Robert Thomas, *Public Law* (3rd edn, Oxford University Press 2017).

²¹⁸ Mark Elliott, 'Can Scotland Block Brexit?' (*Public Law for Everyone*, 2016) <<https://publiclawforeveryone.com/2016/06/26/brexit-can-scotland-block-brexit/>> accessed 19 January 2020.

²¹⁹ Mark Elliott, 'Can Scotland Block Brexit?' (*Public Law for Everyone*, 2016) <<https://publiclawforeveryone.com/2016/06/26/brexit-can-scotland-block-brexit/>> accessed 19 January 2020.

²²⁰ Scottish News, 'Brexit Threatening Sewel Convention 'Almost to Destruction', Warns Academic' (*Scottish Legal News*, 2018) <<https://scottishlegal.com/article/brexit-threatening-sewel-convention-almost-to-destruction-warns-academic>> accessed 19 January 2020.

²²¹ Scottish News, 'Brexit Threatening Sewel Convention 'Almost to Destruction', Warns Academic' (*Scottish Legal News*, 2018) <<https://scottishlegal.com/article/brexit-threatening-sewel-convention-almost-to-destruction-warns-academic>> accessed 19 January 2020.

²²² Scottish News, 'Brexit Threatening Sewel Convention 'Almost to Destruction', Warns Academic' (*Scottish Legal News*, 2018) <<https://scottishlegal.com/article/brexit-threatening-sewel-convention-almost-to-destruction-warns-academic>> accessed 19 January 2020.

²²³ Scottish News, 'Brexit Threatening Sewel Convention 'Almost to Destruction', Warns Academic' (*Scottish Legal News*, 2018) <<https://scottishlegal.com/article/brexit-threatening-sewel-convention-almost-to-destruction-warns-academic>> accessed 19 January 2020.

McHarg's argument is persuasive, particularly that, despite it being *lawful*, it can be considered *unconstitutional* to proceed with the Withdrawal Bill without the agreement of the devolved legislatures. It can therefore be viewed as a politically inexpedient means for the UK Parliament to treat the Scottish Parliament.²²⁴ However, there have, yet been few ways identified to resolve the unprecedented and contentious situation arising from the Brexit process.

Dissolution of Parliament

The dissolution of Parliament was a prerogative power, with the Crown able to dissolve Parliament at the request of the Prime Minister. Twenty-six dissolutions have taken place in the UK since 1868, not one of which has been refused by the Sovereign, thus highlighting that the Crown is not generally entitled to refuse the Prime Minister's advice to dissolve Parliament.²²⁵

Although the convention's practical purposes are no longer in place, this power has led to the criticism that this permits the sitting Prime Minister to choose the date of a general election, i.e., when it most favours the existing government. In addition, there can remain doubts as to whether the Sovereign has refused a Prime Minister's advice to dissolve Parliament. The Fixed Term Parliaments Act of 2011 placed the dissolution of Parliament onto a statutory basis and restricted discretion of PM.²²⁶ The Fixed-term Parliaments Act 2011 provides for five-year parliaments, with polling on the first Thursday in May five years after the previous general election; and automatic dissolution 17 working days before the election.²²⁷ Section 3(2) states clearly 'Parliament cannot otherwise be dissolved'. There is provision for mid-term dissolution in section 2, but again by statute not under the prerogative.²²⁸

Section 2 allows for a mid-term dissolution in only two circumstances: if two thirds of all MPs vote for an early general election; or if a

²²⁴ Mark Elliott, 'Can Scotland Block Brexit?' (Public Law for Everyone, 2016) <<https://publiclawforeveryone.com/2016/06/26/brexit-can-scotland-block-brexit/>> accessed 19 January 2020.

²²⁵ Hamid A. Ghany, 'The Evolution of The Power of Dissolution: The Ambiguity Of Codifying Westminster Conventions In The Commonwealth Caribbean' (1999) 5 The Journal of Legislative Studies, 55.

²²⁶ The Fixed-term Parliaments Act 2011.

²²⁷ The Fixed-term Parliaments Act 2011.

²²⁸ The Fixed-term Parliaments Act 2011.

government loses its support in the House of Commons', and no alternative government which can command confidence is formed within 14 days, the Prime Minister must advise the Queen to dissolve Parliament. The only discretion which remains is the timing of an election following a mid-term dissolution: section 2(7) provides that 'the polling day ... is the day appointed by Her Majesty by proclamation on the recommendation of the Prime Minister'. The election would normally be held within three to four weeks.²²⁹

The Civil Service and the machinery of government

The management of the Civil Service is carried out by ministers under prerogative powers, regulated by Orders in Council that can be amended, supplemented or withdrawn without parliamentary approval. This has led to criticisms that this is no longer an appropriate state of affairs.²³⁰ This has therefore been regarded as a special case among the prerogative powers examined by PASC.²³¹ The committee found that there was widespread agreement that early action is required to enshrine the values of the service in statutory form.

The government of Gordon Brown comprehensively reviewed the prerogative powers of government, resulting in the Constitutional Reform and Governance Act 2010²³², which codified the conventions on the neutrality of the civil service.

Conclusion

Constitutional conventions play a critically important role in the British constitutional system. Conventions regulate the institutions and functions of the most aspects of parliament and responsible government: for example, the role of the Queen, the offices of the Prime Minister and the Cabinet, the rules for developing government, the dissolution of parliament, the appointment and removal of ministers, ministerial responsibili-

²²⁹ The Fixed-term Parliaments Act 2011.

²³⁰ House of Commons Public Administration Select Committee, 'Taming the Prerogative: Strengthening Ministerial Accountability to Parliament' (House of Commons London: The Stationery Office Limited 2004) 14.

²³¹ House of Commons Public Administration Select Committee, 'Taming the Prerogative: Strengthening Ministerial Accountability to Parliament' (House of Commons London: The Stationery Office Limited 2004) 14.

²³² Constitutional Reform and Governance Act Chapter 25 2010.

ties, caretaker government, and the chain of accountability involving public services.

This study has discussed several significant UK constitutional conventions in detail. This has led to the conclusion that, although it may appear a straightforward process to define an individual convention, there remain uncertainties in relation to its implementation. The ambiguity of conventions allows room to politicians to escape responsibility by denying their existence; or they might interpret the rule in such a way as to evade the responsibility that the conventional rule implies; or they argue that circumstances mean the rule does not apply; or, they might claim that, though a rule exists and their action would be in breach of it, the breach is justified by circumstances.²³³ Even if they are correct in their claims, the ambiguous nature of these conventions makes it very difficult to understand. Conventional rules remain in the hands of politicians and the consequences of acting against a convention can be adjusted according to political circumstances.

To conclude, conventions serve a good reason which in a sense, these conventional rules give discretionary power to politicians so that they are freely able to decide on political issues without fear of judicial interference to improve an effectively working constitutional system. Hence, the reason behind conventional rules should be supported by a clear operation mechanism and enforcement so that the constitutional system is carried out fairly as well as successfully.

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ENVIRONMENTAL AUDIT

(AUDITIM I MJEDISIT)

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ABSTRACT

In today's world, environmental problems and the search for solutions to these problems are at the top of the agenda. Environmental inspection is one of the effective ways that can prevent the gradual growth of environmental problems throughout the world and provide an understanding of environmental protection. Environmental audit is a management process created to prevent environmental problems or degradation. In this study, the definition of environmental control, which is expressed as the environmental management process, its historical development in our country and in the world, its types, as well as the institutional structuring, legislation and practices of environmental control in the United States and European Union are included.

Keywords: Environment, Environmental Management, Environmental Control, Environmental Control Types, Environmental Audit Practices

PËRMBLEDHJE

Në botën e sotme, problemet mjedisore dhe kërkimi i zgjidhjeve për këto probleme janë në krye të agjendës. Inspektimi mjedisor është një nga mënyrat efektive që mund të parandalojë rritjen graduale të problemeve mjedisore në mbarë botën dhe të ofrojë një kuptim të mbro-

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This study was prepared using the Arzu ERDİNÇ ERTÜRK's doctoral thesis titled "Administrative Audit Mechanisms and the Efficiency Problem in Environmental Protection".

This article has been published in the 231th Journal of Fiscal Law

jtjes së mjedisit. Auditimi mjedisor është një proces menaxhimi i krijuar për të parandaluar problemet mjedisore ose degradimin. Ky studim mbulon përkufizimin e kontrollit mjedisor, të shprehur si proces menaxhimi mjedisor, zhvillimin e tij historik në vendin tonë dhe në mbarë botën, llojet e tij, si dhe strukturimin institucional, legjislativ dhe praktikën e kontrollit mjedisor në Shtetet e Bashkuara dhe Bashkimin Evropian.

Fjalë kyçe: *Mjedisi, Menaxhimi Mjedisor, Kontrolli Mjedisor, Llojet e Kontrollit Mjedisor, Praktikën e Auditimit Mjedisor*

INTRODUCTION

The environment is one of the concepts that has been used frequently and has been on the agenda since the 1970s, when environmental problems gained importance. The fact that the concept of environment has a wide application area makes the implementation of environmental decisions, policies, programs and strategies both obligatory and difficult to control. At this point, we come across the concept of environmental management, which includes all actions that ensure the protection, development, improvement and control of the environment¹.

The protection of the environment, the right to live in a healthier and more balanced environment and the realization of sustainable development emphasize the importance of the audit system in environmental management. In addition, optimum use of resources, minimizing environmental damage, establishing a balance between human needs and natural resources show that there is an audit phenomenon in environmental management.

This audit is realized by;

- ✓ Evaluation of whether environmental conditions are met;

¹ In the Environmental Law numbered 2872, environmental management is expressed as follows: “Environmental management: Implementation of policies and strategies determined at local, regional, national and global levels in order to ensure the sustainable use and development of natural and artificial environmental elements by using administrative, technical, legal, political, economic, social and cultural tools.” (2nd art.).

- ✓ Examining the effectiveness of the environmental management systems being implemented;
- ✓ Determining the hazards that may arise from the substances or processes that are regulated or not.²

In this direction, environmental control emerges; environmental priorities should be clearly defined and the points where they can be reached should be tried to be determined.

Within this context, the study contains the expression of environmental auditing, the historical development of environmental auditing in the world and in our country, the types of environmental auditing, and the institutional structuring, legislation and practices of environmental auditing in the United States and the European Union.

CONCEPT OF ENVIRONMENTAL AUDIT

Environmental audit, which is an important function of environmental management and whose emergence coincided with the 1970s, can be explained as “*to control and determine the compliance of activities and facilities that have to comply with environmental legislation, and to impose necessary sanctions (change of permits or cancellation of permits) in order to ensure compliance of these activities and facilities with environmental legislation.*”³ At the same time, when we look at the purpose of environmental inspection, it is seen as determining whether the environmental legislation is being acted upon and minimizing or eliminating environmental problems. In addition, it should be underlined that environmental audit aims to protect, that this targeted value is the environment, and that environmental audit has an increasing importance day by day.

According to a different definition, environmental audit can be expressed as a long-term management mechanism established in order to prevent issues that may lead to an environmental crisis.⁴ At the same time, environmental audit can be defined as an internal evaluation sys-

² Environmental Audit, (Environmental Portal, 2016) <<https://www.cevreportal.com/cevre-denetimi/>> date of access 10 September 2020

³ Süheyla Alica, ‘Responsibility of Administrative Authority on Environment Inspection’ (2011) XV(4) Journal of Gazi University Faculty of Law 87, 89

⁴ ASCE, ‘Environmental Auditing Overview’ (1986) 112(4) August Journal of Environmental Engineering 638, 638

tem⁵ that tests the compliance of industrial organizations and public institutions with their internal policies and standards as well as their legal needs, and evaluates whether all or selected levels of an organization are in compliance with administrative obligations, internal policies and standards.⁶

In the Environmental Inspection Regulation in our country, environmental audit takes place as follows; *“In order to control the compliance of the facilities or activities with the Environmental Law numbered 2872 and the legislation enacted based on this Law, the objective is to collect and evaluate the information about the facility or activities, to record the findings, to report them when necessary, and to issue administrative sanctions in case of non-compliance with the authorized office notification”* (art. 4/ğ)

At the same time, the environmental audit can also be expressed as an administrative tool that includes a systematic, documented, regular and objective evaluation of the environmental organization, management, and equipment for environmental protection in order to evaluate compliance with organizational policies that facilitate management’s control in environmental practices and comply with administrative regulations.⁷ In fact, environmental audit also appears as a type of audit in which inputs, processes, outputs, waste, and by-products are evaluated comprehensively and the independence of the inspecting mechanism is very important.⁸

In the light of these definitions, the basic elements that environmental audits should have are;⁹

- ✓ Ensuring compliance with legal obligations,

⁵ Environment Canada, ‘Measures to Promote Compliance: Promotion of Environmental Audits’ (1989) Technical Report Series No: 2 Environmental Auditing UNEP/IEO Paris 122

⁶ J. Ladd Greeno, Gilbert S. Hedstrom and M. Diberto, *Environmental Auditing: Fundamentals and Techniques* D. Little Arthur (inc.) (Cambridge 1985)

⁷ ICC, ICC Position Paper on Environmental Auditing International Chamber of Commerce (No: 210/285, Paris 1988)

⁸ Mehmet Efendi, *Environment and Court of Accounts* PhD Thesis (Ankara University Institute of Social Sciences, Ankara 2005) 70

⁹ Dixon Thompson and Melvin J. Wilson, ‘Environmental Auditing: Theory and Applications’ (1994) 18(4) *Environmental Management* 605, 606-607

- ✓ Ensuring compliance with business and industry standards,
- ✓ Evaluation of the management of natural environmental events,
- ✓ Creating action plans to correct some deficiencies.

At the same time, in line with the above-mentioned factors, environmental audits can also appear as an administrative tool that provides a very useful and difficult time for some businesses that do not show sufficient care and do not have sufficient equipment to contribute to environmental protection.

In the light of these definitions, as a result of the environmental audits, it is questioned whether the elements of the environmental management system meet the needs and whether they are sufficient, and the deficiencies and adequacy of the environmental management systems are determined, and in case of deficiencies, the necessary changes are made in the system.¹⁰ In this case, as a result of the detection of the illegal activities of the inspected organization, which can lead to financial and penal sanctions, legislative changes and even international sanctions may come to the fore. For this reason, it should not be forgotten that in order for environmental management or environmental auditing to be successful, this management must have an effective and holistic understanding and be shaped accordingly.

DEVELOPMENT OF ENVIRONMENTAL AUDIT IN THE WORLD

In our world where the importance of protecting the environment and environmental resources is gradually increasing; It is inevitable that the control of the environment has become obligatory as much as it is protected. For this purpose, on December 2, 1970, the Environmental Protection Agency (US EPA) was established at the federal level in the United States (USA) to carry out and plan environmental protection and audit from a single source, and this year became a turning point in environmental auditing in the USA.¹¹ Thus, it is possible to say that environmental audit in a holistic sense has developed in the USA.

¹⁰ Fatma Can, An Effective Environmental Management Tool: Environmental Audit (Ministry of Environment Environmental Letters, Ankara 1995) 13

¹¹ Turan Ergün, Environmental Audit in Türkiye and Restructuring in the Context of Environmental Ethics PhD Thesis (Ankara University Institute of Social Sciences, Ankara 2014) 162

The Environmental Protection Agency began conducting environmental audits in the late 1970s and early 1980s. As an example, it can be seen that in 1979 the Environmental Protection Agency published an independent report on certified third-party inspectors who visited facilities, took samples, performed analyzes, and reported the results to government authorities. Although this audit attracted great interest in the industry, it never went beyond the report as a draft.¹² In addition, environmental audits are carried out mostly in the chemical and oil industry due to pollution. This case also shows that environmental audits have started to spread rapidly in industrialized countries.

In the 1980s, companies that developed internal audit methods and produced chemical products implemented environmental audit programs that would increase their ability to comply with environmental laws. In the 1990s, environmental control practices, which started in enterprises producing hazardous chemicals and where environmental control developed, became widespread to cover all industrial establishments.¹³ In fact, it is seen that environmental auditing is widely accepted as a common management tool in industrialized countries, and it is increasingly being applied by both foreign and local industries in developing countries.¹⁴

First of all, it is possible to say that environmental audit aims to ensure compliance of enterprises with environmental regulations and to reduce the risks that may arise from non-compliance by conducting internal audits. However, it seems that the first documents on environmental auditing began to emerge in the mid-1980s^{15 16} and management consulting firms encouraged their clients to conduct environmental audits to measure their environmental responsibilities.¹⁷

¹² Introduction to Environmental Auditing and Management, <https://www.soas.ac.uk/cedep-demos/000_P508_EAEMS_K3736-Demo/module/pdfs/p508_unit_01.pdf> date of access 20 May 2018 22

¹³ Lawrence B. Cahill, *Environmental Auditing* (7th Edition, Rockville MD: Government Institutes Publishing 1996) 18-19

¹⁴ Introduction to Environmental Auditing and Management (n 13) 22

¹⁵ Greeno et al., *Environmental Auditing: Fundamentals and Techniques* (n 7)

¹⁶ J. Ladd Greeno, Gilbert S. Hedstrom and M. Diberto, *The Environmental, Health and Safety Auditor's Handbook* D. Little Arthur (inc.) (Cambridge 1988)

¹⁷ *Environmental Auditing, Integrated Environmental Management Information Series* Department of Environmental Affairs and Tourism <<https://www.environment.gov>.

In this direction, environmental audits, which were previously carried out for the purpose of protecting health, started to be carried out in the USA for the purpose of protecting environmental values and later became widespread in Canada. Especially in Canada, the internal audit practices of many businesses for their own businesses draw attention in terms of environmental auditing. It is possible to see that environmental audit has started to spread to other countries besides these countries after the 1990s.

DEVELOPMENT OF ENVIRONMENTAL AUDIT IN TÜRKİYE

Environmental auditing emerges as a type of audit that tries to develop over time in our country. In addition, it is possible to say that the interest in environmental audit has started to increase in our country with the international acceptance of environmental protection.

When we look at the period of the Ottoman Empire, it can be said that there are some legal texts on environmental audit, but they do not envisage environmental audit in a systematic way. It should also be noted that in the 18th century, the environment was perceived as purely zoning and urban planning, and the first legal texts on environmental audit were made in the area of zoning. Ebniye Nizamnamesi, which was issued in 1848, is the first Ottoman legal text that includes auditing provisions in the field of zoning. In this Regulation, regulations regarding building and road construction and expropriation are included but it was repealed in 1864. Although different regulations came into force instead, it was seen that they could not be fully implemented.¹⁸

When it comes to the Republican Period, it is seen that environmental audit was carried out on the basis of zoning in the first periods. In the first period of the Republic; The Municipal Law numbered 1580 (abolished) enacted in 1930, the Public Health Law numbered 1593, the Municipal Building and Roads Law numbered 2290 enacted in 1933, the Land Hunting Law enacted in 1937, and the Forestry Law enacted in the

za/sites/default/files/docs/series14_environmental_auditing.pdf> date of access 20 May 2018 4

¹⁸ Kemal Görmez, *Environmental Problems and Türkiye* (Gazi Bookstore, Ankara 2003)

same year are the legal texts that include provisions on environmental audit.¹⁹

When it comes to the 1960s, it is seen that the planned period was started in our country and development plans were prepared from time to time. In these development plans, the importance of the concept of sustainable development is emphasized and it is possible to say that the most important tool in realizing this is an effective environmental audit approach. The biggest supporter of an effective environmental audit is to be supported by the institutional and legal structure and to prioritize the idea of giving importance to development along with the protection of the environment. After this, it is seen that the first regulations made in the nature of a holistic environmental audit started as a result of industrial accidents towards the end of the 1970s. In this sense, these years appear as the years when environmental protection and audit phenomena were introduced in the world. Especially with the Environmental Protection Agency (EPA), which was established in the USA, it is an indication that environmental protection is considered holistically and this situation increases the legal interest in the environment in our country.

Since the first years of the republic, it is possible to see that some legal regulations have been enacted for the control of environmental problems such as public health, environmental health, traffic and air pollution, etc. Until the 1970s, we can say that a holistic approach to environmental policy and audit and an institutional structure for environmental protection could not be seen in our country.²⁰ In other words, the reason for the lack of a holistic environmental audit approach stems from the fact that an environmental policy has not been established for our country.

In our country, until the 1970s, environmental audit practices were in the forms of some inspections made by the Ministry of Health for the protection of the environment and public health, audits made by the Ministry of Interior for the development and urban planning practices of municipalities, some measures taken to prevent air pollution, and public and local administrations' audits based on Public Health Law.²¹ On the

¹⁹ Ergün (n 12) 169

²⁰ Zerrin Toprak, *Environmental Management and Policy* (3rd edn, Albi Publications Izmir 2012) 207

²¹ Ergün (n 12) 166

other hand, with the spread of the environmental phenomenon in the international arena, some studies have been started in the national field. The best example of this is that thanks to the Stockholm Environment Conference in 1972, environmental problems were included as a title for the first time in our country within the framework of the Third Five-Year Development Plan.

When it comes to the 1980s, it is seen that environmental auditing has begun to be evaluated within the scope of environmental management. At the same time, it is possible to see that in these years, based on the effects of industrial production on the environment, it is possible to see that analyzes are being carried out at the point of evaluating the environmental effects and making the environment cleaner. However, when we look at the legal development of environmental audit in our country, Article 56 of the 1982 Constitution draws attention. In this article, it is possible to say that the most important emphasis is on environmental right.²² In fact, while this development shows that environmental problems concern a large part of society, it also states that environmental audit has become important.

On the other hand, Environmental Law numbered 2872, which came to light in 1983, is an important step for our country in terms of environmental audit. Within the scope of this law, environmental concepts are included, and it is seen that environmental management and audit are mentioned for the first time. What is important here is that it should be noted that the Environmental Law directly includes the concepts of environmental management and environmental audit and forms a basis for other legislation on these issues.

In addition, in the 1990s, the industry and service sectors grew. With the growth of these sectors, the need to address issues such as environmental education, measurement, and monitoring of environmental values, efforts to reduce waste, and determine environmental management strategies has emerged.²³ At the same time, changes in the development of environmental management, structuring of environmental organization, and institutionalization are mentioned in terms of environmental protection and audit. These changes or divergences also show that environmental audit has moved away from the integrity of our co-

²² *ibid* 170

²³ *ibid* 167

untry. The lack of integrity in environmental protection and audit in these years (the 1990s) is still a problem today. This problem arises as a result of the fact that different institutions and organizations can act independently from each other. In addition, it is possible to see that other legislations related to environmental auditing were created in these years.

When it comes to the 2000s; other legislation related to environmental auditing is in question. Among these regulations are the Environmental Impact Assessment Regulation, which emerged in 2003, renewed in 2014, and amended in the following years, and the Environmental Inspection Regulation, published on 12.06.2021.

In fact, when environmental auditing in our country is examined in terms of legislation and institutional; in terms of legislation, it is seen that environmental audits are arranged by regulation. In addition, when we look at environmental audits from an institutional point of view, it is mentioned that many institutions and organizations such as ministries, directorates, provincial organizations, local governments, etc. have different duties. In addition, the existence of the private sector should not be forgotten. Obviously, the versatility (title) of environmental audit from an institutional point of view also reveals that environmental auditing cannot be used effectively.

TYPES OF ENVIRONMENTAL AUDIT

Environmental audit has a different classification. Within this context, it is possible to list the activities or audits of environmental auditing as follows:

1. Audit of Compliance with Legislation and Standards

Audit of compliance with legislation and standards is carried out in order to determine the compliance of the activities of private or public institutions, organizations, or businesses with legal regulations such as laws, regulations, statutes for environmental protection, or environmental standards by the competent authorities of these regulations.²⁴ In addition, the failure of an institution or organization to comply with envi-

²⁴ *ibid* 68

ronmental administrative regulations may reveal legal consequences that can lead to financial risks.²⁵

In this direction, the audit of compliance with legislation and standards can be carried out both by administrative authorities and by the enterprises themselves. Besides, while the purpose of the administrative authorities to carry out this inspection is that protecting the environment is a public duty; the purpose of making it by the enterprises itself is to protect the enterprise from activities contrary to environmental legislation and to prevent the income losses of the enterprise from the penal sanctions it is exposed to.²⁶

2. Audit of Monitoring Programs

Environmental monitoring is expressed as activities carried out to evaluate the quality of the environment and to measure changes in this quality. In addition, the monitoring program has also a definition as follows; “*commissioning of measuring equipment with a complex system in order to determine or measure the presence, effect, or level of any pollutant in terms of quantity or quality.*”²⁷

At the same time, with environmental monitoring; daily operations are controlled, integration is reviewed, impressions are tested and risks are evaluated.²⁸ In this way, necessary precautions are tried to be taken and possible risks are evaluated.

3. Audit of the Effectiveness of the Tools Used

It is the inspection of the effectiveness of the vehicles used and the testing of whether the pollution control and monitoring equipment is working in accordance with the operating conditions. Owing to this process, a comparison is made between the predetermined standards and the actual results obtained as a result of the test. It is possible to see that

²⁵ Can (n 11) 17

²⁶ Ergün (n 12) 69

²⁷ Environmental Glossary, <http://kisi.deu.edu.tr/orhan.gunduz/english/courses/Turkce-Ingilizce_teknik_terimler_sozlugu.pdf> date of access 20 May 2018

²⁸ Can (n 11) 20

such controls are widely used in the USA.²⁹ In fact, this type of audit ensures that the actual results of the applications are seen.

4. Environmental Impact Assessment (EIA) Audits

Environmental Impact Assessment (EIA) can be expressed as an approach that aims to predetermine the environmental degradation that may occur as a result of any activity and to take necessary measures before these deteriorations occur.³⁰ According to another definition, EIA is “a regulatory policy tool that enables monitoring and auditing of the projects covered by the evaluation at pre-operation, operational and post-operation phases.”³¹

In the EIA Regulation (art. 4/c); EIA is defined as “work to be carried out in determining the positive and negative effects of the projects planned to be realized, in determining and evaluating the measures to be taken in order to prevent or minimize the negative effects in a way that does not harm the environment, the selected location, and technology alternatives, and to monitor and control the implementation of the projects.” In addition, according to this regulation, the Ministry of Environment and Urbanization is under the authority to conduct the EIA audit, but the ministry may delegate some of its authority to the governorships (art. 5).

Together with the EIA, it becomes important to prepare projects and plans in order to provide a high level of environmental protection in accordance with its objectives and to reduce the negative effects of investments on nature.³² In this respect, the aim of EIA is to ensure that the consequences of a proposed project or activity that may occur to the environment are understood by the decision makers.³³

²⁹ Ralf Christopher Buckley, ‘Environmental Audit: Review and Guidelines’ (1990) (7) Environmental Planning and Law Journal 127, 128,130

³⁰ Orhan Uslu, Environmental Impact Assessment (Publications of the Turkish Environmental Problems Foundation, Ankara 1986) 26

³¹ Ruşen Keleş, Can Hamamcı and Aykut Çoban, Environmental Policy (7th edn, İmge Bookstore Ankara 2012) 399

³² Toprak (n 21) 271

³³ Can (n 11) 20

For the investments mentioned in the EIA; it is important to take into account all social, physical, economic and biological values.³⁴ It is also possible to state that EIA studies require a long process. Accordingly, the benefits of EIA can be listed as follows:³⁵

- ✓ Being prepared by taking precautionary measures against problems that may arise during the implementation phase,
- ✓ Seeing all aspects of the project for the project owner and evaluating the options,
- ✓ It is to provide a more reliable and collaborative approach to the decision-making process.

In this direction, the prominent features of the EIA audit among environmental audits should be that it is a type of audit that is suitable for preventive environmental protection policies and that the people in the region where the investment made or planned to be made will cause environmental impact should also participate in the process.³⁶ At this point, it is possible to see that environmental damages can be prevented before they occur, with the support of the public, thanks to a well-made or planned EIA audit. It should also not be forgotten that the EIA is an ongoing monitoring and evaluation process before and after the activity.

5. Audit of Physical Risks and Hazards

The activities of businesses in some sectors pose more risks to the environment than other businesses. Such organizations, which pose a risk to the environment, are subject to special permission methods all over the world.

Here, besides the state, businesses that carry out activities that pose a risk to the environment should also take care of the damage they may cause to the environment. Because the risks that may occur may cause additional costs to the businesses as well as the society. Physical

³⁴ Ruşen Keleş, Environment in 100 Questions, Environmental Issues and Environmental Policy (2nd edn, Yakın Bookstore İzmir 2015) 74

³⁵ Environmental Impact Assessment (EIA) Audits, (2009) <<http://muh.bartın.edu.tr/Files/ihqw3rwsfdz1k4gcncemtz5zj20131031193145ihqw3rwsfdz1k4gcncemtz5zj20131031193145.pdf>> date of access 20 May 2018 11

³⁶ Ergün (n 12) 91

risk audits are required in order for such damages not to occur or, if such damage occurred, to completely identify and to get over it more easily.³⁷

The quality of physical risk assessment depends on a good identification of the hazard. That is, for the success of the physical risk assessment; it is necessary to determine the situations that may cause an accident in the process and system, by making use of all kinds of documents together with the guides in the enterprise, emergency planning against external effects and a good definition of the danger. Obviously, it is not possible to make a physical risk assessment for unnoticed hazards.³⁸

In physical risk audit, measures should be taken to prevent errors, but since errors may occur, systems that will be activated as soon as the error occurs should be established in order to get rid of this error with the least damage.³⁹ In addition, it should not be forgotten that errors can be caused by human errors and these human errors are more difficult to detect than other errors. In addition, adequate physical risk audit will protect businesses and people from risks and will try to reduce the negative effects that may arise.

6. Audit of Financial Risk and Responsibilities

The audit type of financial risks and responsibilities consists of a commercial field that is trying to grow rapidly today. In other words, it is a type of audit that evaluates commercial risks and responsibilities related to environmental management. The risks involved in this type of audit are criminal practices arising from non-compliance with legal, administrative and managerial organizations, costs of operations such as cleaning, improvement and correction, compensations and obligations that have to be assumed due to mergers with businesses that have not been successful in the past, or the acquisition of these businesses.⁴⁰ It is seen that these risks and responsibilities occur after the damage to the environment occurs.

³⁷ *ibid* 73

³⁸ Can (n 11) 26

³⁹ Ergün (n 12) 74

⁴⁰ Buckley, *Environmental Audit: Review and Guidelines* (n 30)

The scope of the sanctions applied as a result of environmental accidents varies from country to country. Considering this situation in general, the sanctions;^{41 42}

✓ Regardless of whether the business or its activity is legal or not, it can be applied to all of them,

✓ Applicable to the entire enterprise or its activity, regardless of whether it is intentional or negligent,

✓ Regardless of the level of causing environmental problems, it can be partially applied to the past or present owners of the enterprise, the legal entity of the enterprise itself or its managers, or some employees.

7. Audit of Products and Markets

In today's world, it is possible to see that the products exhibited in the markets take place as environmentally friendly branded products. This shows that production that threatens the health of consumers (in production, use/consumption, etc.) is avoided. The development of increasing environmental awareness in society brings people to the position of individuals who do less harm to the environment and who are sensitive at the point of product consumption. With this awareness and sensitivity, it is felt more and more imperative to produce environmentally friendly products in terms of respect for the environment and the continuity of their activities.

With the development of environmental awareness and environmental standards, there are also practices that increase the production of environmentally friendly products in countries. For example, such audits and practices are carried out by the Environmental Protection Agency (EPA) in the United States (USA); the “Environmentally Friendly Product” program is implemented.⁴³ In the “Environmentally Friendly Product” program; informing consumers about which products are environmentally friendly, and the “DfE” label, which means environmentally friendly products, is applied to those products by the EPA. This label is provided for compliance with environmental and health standards. In

⁴¹ Ralf Christopher Buckley, *Perspectives in Environmental Management* (Springer Verlag, Berlin 1991)

⁴² Can (n 11) 29

⁴³ Ergün (n 12) 79

addition, EPA's environmentally friendly product logo permission is included in products that do not contain substances harmful to the environment and human health. It is possible to say that such products are inspected by the EPA in the market, and heavy penalties are imposed in case of a contrary situation.⁴⁴

On the other hand, in the countries that are members or in the process of becoming a member of the European Union (EU), the "CE" label indicates that that product is produced in accordance with environmental standards regulated by EU regulations. In addition, this "CE" label has to be obtained by businesses.⁴⁵ In fact, although its purpose is not to protect the environment directly; the result of this type of audit is that it can contribute to environmental protection.

8. Environmental Status Audits

The environmental status audit is formed as a result of reviewing environmental indicators in a region whose boundaries are determined. This type of audit is carried out at the local or national level, usually in water basins, regional airspace, and areas such as certain settlements.^{46 47} The purpose of environmental status audits is the evaluation of the environment at the local level in terms of environmental values such as land condition, water, and air quality, and noise pollution. In addition, with this type of audit, it is possible to determine the development status of environmental quality, environmental problems, and their causes.

On the other hand, the results of this type of audit should be shared with the public. Because sharing the environmental status audit reports with the public ensures that the people living in that region are informed about the most important environmental problems and their causes. This case brings us face to face with the Aarhus Convention in terms of accessing environmental information.⁴⁸

⁴⁴ *ibid* 13

⁴⁵ *ibid* 79

⁴⁶ Buckley, *Perspectives in Environmental Management* (n 42)

⁴⁷ Can (n 11) 30

⁴⁸ Ergün (n 12) 80

9. Audit of Environmental Management Programs

Audit of environmental management programs is called the activity of reviewing and evaluating the adequacy, reliability, efficiency and cost-effectiveness of environmental management programs and structures to ensure compliance with environmental legislation by the public-private sector or the administrative authority with the supervisory authority.⁴⁹ In addition, this type of audit covers issues such as routine and special monitoring programs, research, planning, budgeting, and daily actions.⁵⁰

This form of audit; with issues such as equipment, materials, facilities, storage areas, reliability and performance of processes, and the quality of operating procedures; is carried out to reveal the status of emissions, discharges, and wastes and whether there is any confusion in them. Also, as a feature of this audit, it can be seen that it focuses on ensuring as little waste as possible and preventing pollution at its source.⁵¹ ⁵² In this direction, this type of audit shows that the aim of preventing pollution at the source is compatible with the preventive environmental protection approach. However, although there are emphases on the importance of this issue in environmental legislation, it is a separate discussion topic how much importance countries attach to this issue.

10. Audit of Environmental Management Structures

The environmental management structure includes the funds, personnel, and processes used by any public or private institution to carry out environmental management. The audit of environmental management structures is defined as checking whether this established whole works as desired.⁵³

⁴⁹ Can (n 11) 31

⁵⁰ Buckley, *Environmental Audit: Review and Guidelines* (n 30) 131

⁵¹ M G Royston and T M Mc Carty, 'The Environmental Management Audit' (1988) 11(4) *Industry and Environment* 20-21

⁵² Can (n 11) 31

⁵³ *ibid* 31

In this direction, the audit of environmental management structures consists of many different components of the corporate organization and covers a wider area. These areas are as follows:⁵⁴

- ✓ Institution's commitments, terms and policies,
- ✓ Management structures (budget, advisory),
- ✓ Information flow (inside and outside the organization),
- ✓ Records (form, content, storage, access),
- ✓ Feedback (speed, efficiency, flexibility),
- ✓ Speed and reliability of warnings,
- ✓ Training procedures and programs.

The most important feature of this type of audit is that the management system is handled and evaluated as a whole. From here, data on environmental policy and approaches, information and training activities, success and failures in environmental organizations are obtained.^{55 56}

In short, the audit of environmental management structures and the audit of environmental management programs have different meanings. The main difference between the two is this; while the audit of environmental management programs focuses on the subject of "what is done" about environment in the organization, the audit of environmental management structures focuses on "how it is done".^{57 58}

11. Participation and Purchase Audits

Participation and procurement audits, which are not a public sanction and are a special type of audit, is a form of audit that is carried out or made by another business that wants to buy a business or merge with that business, as a result of understanding whether the business that it wants to buy or merge with has environmental obligations.⁵⁹

The purpose of this audit is to determine whether there are legal and financial obligations regarding the environmental effects of the past

⁵⁴ Buckley, *Environmental Audit: Review and Guidelines* (n. 30) 132

⁵⁵ Royston and Carty (n 52) 21

⁵⁶ Can (n 11) 31

⁵⁷ Buckley, *Perspectives in Environmental Management* (n 42)

⁵⁸ Can (n 11) 31

⁵⁹ Ergün (n 12) 84

or present state of the enterprise to be purchased or merged, and if there are, to determine which of these responsibilities can be transferred by joining, buying or selling.^{60 61}

During this audit, when the conditions, responsibilities, and costs are evaluated, these come in view;⁶²

- ✓ The nature and scale of any environmental pollution (cleaning cost),
- ✓ Non-compliance with environmental legislation (cost of compliance),
- ✓ Environmentally risky areas (development cost),
- ✓ Environmental responsibilities (full bearing of costs).

As a result of this audit, it is possible to determine the obligations and purchase and participation costs, and as a result, the fulfillment of environmental responsibilities.

12. Audit of Planning Processes

The audit of environmental planning processes comes about by auditing whether the planning is working well or not. In other words, the audit of planning processes and methods can make the planning of the environment more comprehensive and clear. In this direction, environmental planning is one of the important tools in protecting the environment.

At the same time, the realization of environmental planning in accordance with the laws and environmental policies is possible with the supervision of these plans and the planning process. A successful environmental planning audit is of great importance in terms of a country's environmental performance and helps to increase the success of environmental auditing.⁶³

⁶⁰ Buckley, Perspectives in Environmental Management (n 42)

⁶¹ Can (n 11) 33

⁶² *ibid* 33

⁶³ Ergün (n 12) 86-87

13. Audit of Environmental Legislation

Environmental legislation existing in the country consists of the constitution of that country, general law and other laws regulating the environment, statutes, regulations, circulars, national texts, and international treaties/contracts, judicial jurisprudence, and doctrines. Today, it is possible to talk about the intensity of activities that affect the environment. Therefore, it is possible to come across decisions concerning the environment in every new legal text that comes into force. In this direction, environmental legislation is shaped according to the environmental policy of a country and ensures that that country achieves its environmental performance successfully.⁶⁴

Audit of environmental legislation in a country can be stated as the environmental policy objectives to be achieved, the success of existing legislation in achieving these goals, and in this context, the development of environmental legislation by reviewing.^{65 66}

There is a difference between the audit of environmental legislation and the aforementioned audit of compliance with the legislation and standards in terms of purpose. The purpose of the audit of compliance with environmental legislation and standards is to check whether the organization or its activity has problems in complying with environmental legislation. At the same time, this audit is carried out on the basis of a certain institution or activity. In the audit of environmental legislation, the purpose is; in general, to determine whether the environmental legislation is sufficient to realize environmental policies and if it is not, to ensure that it is developed. For this reason, the audit of compliance with environmental legislation and standards is micro level, the audit of environmental legislation, on the other hand, is macro level audits that provide benefits.⁶⁷

⁶⁴ *ibid* 87

⁶⁵ Buckley, *Perspectives in Environmental Management* (n 42)

⁶⁶ Can (n 11) 34

⁶⁷ Ergün (n 12) 87-88

ENVIRONMENTAL AUDIT PRACTICES: UNITED STATES AND THE EUROPEAN UNION

The environmental audit may differ according to the legislation, practice, and institutional structure of the countries. In order to see these differences, examples of the United States of America and the European Union are mentioned and the reflections and structures of environmental auditing are examined.

1. United States of America (USA)

In the USA, which has a federal state structure, some of the laws, statutes, and regulations apply at the federal level and some at the state level. However, the most important federal laws that constitute the legal basis of environmental audit in the USA are as follows: Clean Air Act, Clean Water Act, Energy Policy Act, National Environmental Policy Act, Pollution Prevention Act, Resource Conservation and Development Act. However, there is no direct regulation on the environment in the US Federal Constitution.⁶⁸

On the other hand, the Environmental Protection Agency (US EPA), which was established in the USA on December 2, 1970, is an important institution that protects the environment and natural resources and ensures their inspections. Since its establishment, EPA has struggled to create a cleaner and healthier environment for the American public.⁶⁹ It is possible to see the establishment of the EPA as a response to the public reaction to the increasingly deteriorating situation in water, air and soil in order to attract public interest and to do something.⁷⁰ In addition, EPA works on environmental issues to shape and support environmental protection legislation. EPA, which is an institution with a status equivalent to ministries, aims to protect human health and the environment and is also an important tool in carrying out environmental audits.

At the same time, EPA is not only responsible for conducting environmental audits at the national level in the USA, but also for the creation, enforcement, and development of environmental laws; it also has the authority to establish and implement environmental policies and to

⁶⁸ *ibid* 247-248

⁶⁹ EPA History, <<https://www.epa.gov/history>> date of access 22 May 2018

⁷⁰ Phil Wisman, EPA History 1970-1985 (EPA Published, Washington DC 1985)

impose inspection and sanction. For this reason, it is possible to say that environmental management and audit are gathered under a single structure in the USA.⁷¹

Environmental audit types used by the United States Environmental Protection Agency can be listed as follows:⁷²

a) Conformity Assessment Audit: It is the type of audit carried out without taking samples, designed to determine whether the permit holder complies with the criteria specified in the permit granted to it and to check whether the wastewater limits are complied with.

b) Audit of Compliance by Taking a Sample: In this type of audit conducted by taking a representative sample from authorized or not authorized facilities to take samples for the auditors. In addition, the inspection of compliance by sampling has the same objectives as the compliance assessment audit.

c) Performance Revisal Audit: An audit by the auditor to evaluate the permit holder's self-monitoring program. In this type of audit, samples are not collected by the inspector, it is observed that the permit holder fulfills the self-monitoring process.

d) Compliance Bio-Monitoring Audit: This type of audit includes the same objectives and tasks as auditing compliance by sampling. Implemented in the wastewater inspection, this inspection reviews the permit holder's toxicity bio-assessment techniques and maintenance records to determine whether the wastewater is toxic.

e) Audit of Toxic Substances by Sampling: This audit, which has the same purpose as the audit of compliance by sampling, gives more importance to the toxic substances considered in its trial. It is an audit that covers priority pollutants such as heavy metals, phenols, and cyanides.

f) Diagnostic Audit: First, the diagnostic audit is an audit that concentrates on public treatment plants for which the permit process has not yet been completed. The purpose of the diagnostic audit is to ensure that the public treatment plants comply with the standards and to determine the measures for this.

g) Discovery Audit: It is used to provide an initial review of the permit holder's eligibility program. This type of audit is implemented by

⁷¹ Ergün (n 12) 250

⁷² Environmental Auditors' Handbook, (Ministry of Environment and Forestry, Ankara 2007) 15-17

the inspector's brief visual inspection of the permit holder's treatment plant, waste, and receiving waters. At the same time, the purpose of discovery audit is to expand the scope of the audit without increasing the cost of audit resources.

h) Pre-Treatment Compliance Audit: It is a type of audit that evaluates the implementation of the approved pre-treatment program of public treatment plants. Here, it aims to review the records of the public treatment plants regarding the monitoring, inspection, and sanction activities for industrial users, and this process can be completed with the audits of industrial users.

i) Follow-up Audit: Follow-up auditing is performed when a resource-intensive audit and a complaint or routine audit result in a problem that requires enforcement.

j) Sewage Treatment Sludge Audit: The purpose of this type of audit is to determine whether any facility dealing with sludge or disposal application complies with sludge regulations.

k) Rainwater Audit: It is an audit designed to ensure that facilities covered by the law have a stormwater discharge and stormwater pollution prevention plan and implemented according to the nature of each. In this type of audit, field observation technique is applied.

l) Compound Sewer System Audit: During the audit of the combined sewage system, the inspector assesses the suitability of an existing composite sewerage system in a sanction order, acceptance, or another legal document when it comes into force.

m) Sanitary Sewer System Audit: With this type of audit, a facility's compliance with the requirements of the National Pollutant Discharge Elimination System permits, sanction order, or other legal document is checked.

n) Livestock Breeding Enterprises Audit: In this type of audit, it is aimed to examine the compliance of livestock enterprises with permit requirements, permit conditions, applicable legal regulations and other requirements.

In reality, the above-mentioned types of environmental audits implemented by EPA appear as compliance audits. In these compliance audits, it is discussed whether there is compliance with the law or standards as a whole.⁷³

⁷³ Ergün (n 12) 254

2. European Union (EU)

Although the European Union has developed basic principles for environmental audit, unfortunately, it has not been able to propose a mandatory model for the member states of this union. However, it is possible to see that there are EU laws in the background of environmental legislation. This situation arises from the differences in the institutional and legal structure of environmental auditing that the member states of the union have themselves. However, the first of the audit methods valid for all EU member states is the existence of the permit system. In other words, the permission system is a priority in all EU member states for the establishment, operation, and continuity of industrial establishments. It is only possible to say that there are differences in the permission system. This is due to the different legislation of the countries.

In general, compliance with environmental legislation in the EU is ensured by administrative law, criminal law, and private law. Most of the EU member states have these categories of law. However, there are sanctions for the preparation of such laws, which constitute the legal mechanism of environmental audit, by the central government in some countries and by regions or states in others.⁷⁴ These laws are included in the environmental audit as follows:

✓ **Administrative Law:** Administrative law is the first tool to manage and organize institutions, facilities, real and legal persons, whether or not subject to the state. This tool is frequently used by the environmental inspector. Generally, administrative law enforcement is carried out by environmental auditors who explain the reasons for non-compliance with an enterprise. Here, auditors can be granted rights such as administrative law, requesting documents from businesses, searching shipments and cargo, searching facilities, inspecting products and production processes. In addition, the sanctions of administrative law are fines, obligation to take corrective actions, suspension of activities, or cancellation of permission.⁷⁵

✓ **Criminal Law:** In some EU member states, criminal law is another tool that can be used. Generally, judicial penalties applied as a result of the environmental audit are included here. In all countries, judicial penalties are foreseen for environmental crimes. When using this tool, environmental auditors come across an environmental crime writ-

⁷⁴ Environmental Auditors' Handbook (n 73) 6-7

⁷⁵ *ibid* 7

ten in criminal laws, they are obliged to forward the evidence related to this situation to the prosecutor. In this case, the prosecutor decides whether to initiate criminal practice.⁷⁶

✓ **Private Law:** Private law, on the other hand, is based on protecting a certain environmental value. Here, laws protecting historical and cultural values can be given as examples of private law.⁷⁷

As a result of this; since each country's geographical structure, industrialization, urbanization, administrative and political structure, and legal system are different, it does not seem possible to have an institutional structuring of environmental audit, which is included in the EU legislation, under a single roof. In other words, the institutional structure of environmental audits in the EU shows that there are different practices between countries. At this point, EU member states have a wide margin of appreciation.

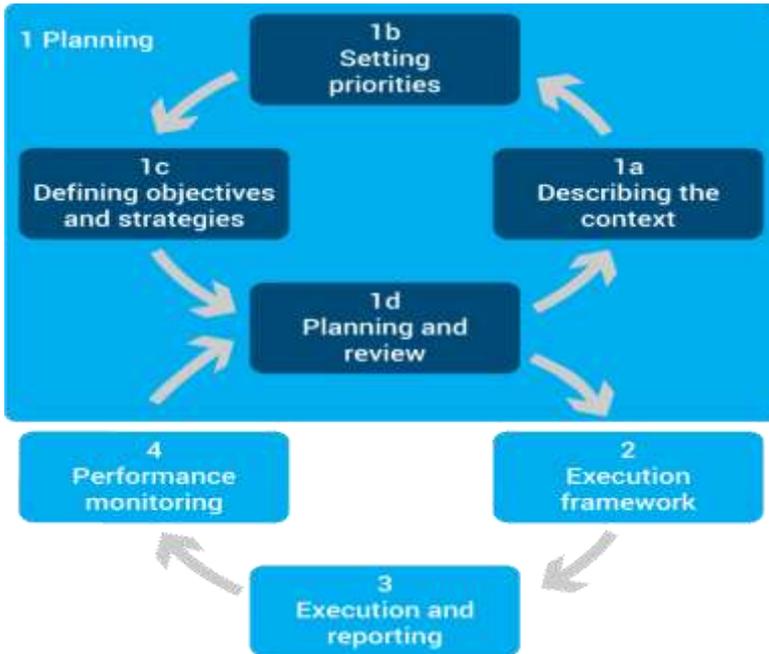
On the other hand, the European Union Environmental Audit Network, which is important in environmental auditing (European Union Network for the Implementation and Enforcement of Environmental Law-IMPEL). IMPEL⁷⁸ is an international association of environmental authorities in Europe for the Enforcement and Enforcement of Environmental Law.⁷⁹ The environmental audit cycle (Figure 1) created by this association provides information on the functioning of the process.

⁷⁶ ibid 8

⁷⁷ Ergün (n 12) 256

⁷⁸ IMPEL, of which our country is a member, has 58 members from 37 countries, including all EU member states. The Ministry of Environment and Urbanization from Turkey has also been a member of the organization since 2005 (Members and Observers, <<https://www.impel.eu/about-impel/members-and-observers/>> date of access 20 March 2024).

⁷⁹ Environmental Inspection Cycle, <<https://www.impel.eu/environmental-inspection-cycle/>> date of access 10 September 2020

Figure 1. Environmental Audit Cycle⁸⁰

Considering that the Environmental Audit Cycle consists of 7 steps;

1. Planning: It consists of 4 steps in itself. These steps are as follows:

1a. Describing the Context: Describing the context is the first step in a systematic approach to planning audits, a necessary input to identifying and analyzing risks. It is also important for determining the scope of the audit plan and the need for auditors to work in accordance with national, regional, and local policies. Auditors can gather information about companies or facilities that fall under the jurisdiction of the relevant authorities, including data on environmental impacts, and view their permit status. The collected data are also evaluated during the performance monitoring process; The data collected in this step is used to carry out the next step, the risk assessment process.⁸¹

⁸⁰ ibid

⁸¹ Describing the Context, <<https://www.impel.eu/environmental-inspection-cycle/describing-the-context/>> date of access 10 September 2020

Ib. Setting Priorities: The prioritization phase begins with a risk assessment. Every factor that an authority wants to consider when seeking priorities is included here as a risk. These risks can be in the form of environmental, social, or economic risks. While the method used for risk assessment should be objective; It is also possible to say that its implementation may differ between simple and supervisory authorities. Here, an overall assessment of all activities selected or identified with priority and their risks is determined using the result of the risk assessment.⁸²

Ic. Defining Objectives and Strategies: Based on priorities, the supervisory authority sets goals and strategies. Output and outcome need to be monitored to determine whether these goals and strategies will be met. This event is done using performance indicators. It is possible to exemplify the performance indicators that can be used as follows:

- ✓ The amount of incidents and complaints,
- ✓ Compliance level,
- ✓ The achievement of reduction targets for certain pollutants or specific risks at sites directly regulated or enforced by the supervisory authority,
- ✓ Improvement of air, soil, and water quality in cooperation with other authorities.

In order to achieve these objectives both effectively and efficiently, the supervisory authority has to link them to specific supervisory strategies.⁸³

Id. Planning and Review: Based on the previous steps (1a, 1b, and 1c), the supervisor should develop the supervisory plan. The audit plan can be viewed as a strategic plan and does not contain operational information. In addition, the public should know what the supervisory agency is planning for the specified period and the plan should be publicly available. The audit plan is used to create the audit program. This program should include information such as the names of the institution, dates, type of audits, auditors appointed, etc. In addition, the audit plan must be in balance with available resources and budgets and must be

⁸² Setting Priorities, <<https://www.impel.eu/environmental-inspection-cycle/setting-priorities/>> date of access 10 September 2020

⁸³ Defining Objectives and Strategies, <<https://www.impel.eu/environmental-inspection-cycle/defining-objectives-and-strategies/>> date of access 10 September 2020

compatible with the organizational structure. Also, review and revision of the audit plan is part of this step.⁸⁴

2. Execution Framework: The enforcement framework seeks to facilitate different audit activities (e.g. compliance check, enforcement actions, compliance assistance). In this step, protocols and work instructions, and realization conditions are developed. At the same time, this step is necessary for the effective, efficient, professional and consistent execution of audit activities. The execution framework should cover the following topics:⁸⁵

- ✓ Protocols and work instructions for routine and non-routine audits,
- ✓ Procedures for the enforcement of sanctions,
- ✓ Development of audit and implementation manuals,
- ✓ Communication protocols with public and industry,
- ✓ Knowledge management and knowledge exchange.

3. Execution and Reporting: At this stage, the audit is carried out and various audit activities are prepared and carried out. Here, incidents are tried to be investigated with routine field inspections and non-routine field inspections. Many of these activities are performed according to protocols and work instructions. Information on the audit activities performed, their results and sanctions should be stored in an accessible database.⁸⁶

4. Performance Monitoring: Performance monitoring implies that inspectors can report and check whether targets are being met at the national or EU level. In addition, it is important to use meaningful performance indicators in order to evaluate the effectiveness of the audit plan. Performance monitoring is directly linked to the success of the plan.⁸⁷

⁸⁴ Planning and Review, <<https://www.impel.eu/environmental-inspection-cycle/planning-and-review/>> date of access 10 September 2020

⁸⁵ Execution Framework, <<https://www.impel.eu/environmental-inspection-cycle/execution-framework/>> date of access 10 September 2020

⁸⁶ Execution and Reporting, <<https://www.impel.eu/environmental-inspection-cycle/execution-and-reporting/>> date of access 10 September 2020

⁸⁷ Performance Monitoring, <<https://www.impel.eu/environmental-inspection-cycle/performance-monitoring/>> date of access 10 September 2020

CONCLUSION AND EVALUATION

The environment is a system of balance based on the interaction of living and non-living beings as a whole within nature. Disruption of harmony or balance in the environment presents environmental problems. The fact that these problems are global and life-threatening affects human life negatively. In order to prevent environmental degradation, human activities should be limited.

In fact, this limitation is possible with the effective use of environmental audit. The environmental audit is a mechanism that exists to prevent environmental problems before they occur. It should also be noted that this mechanism is aimed at maintaining the current situation. The important thing here is to control the dangers created by environmental problems, to impose restrictions, to ensure that global-scale rules can be created, and most importantly to put them into practice.

In order for the environmental audit to be successful; it is necessary to aim to protect the public interest, to have a systematic and holistic view of the environmental understanding, to consider future generations and to respect their rights, to prioritize the understanding of development (sustainability), to establish environmental cooperations, to create and internalize the awareness of protection.

It is possible to talk about the existence of a public organization in the US and EU environmental audit practices discussed in the study. Especially in the USA, it is seen that the environmental audit organization is gathered in one hand in the Environmental Protection Agency, which was established in 1970.

Accordingly, it should be emphasized that the existence of the concept of the environment over a wide area, and an organization in which environmental audit takes place in private organizations within this process, rather than from a single source before a public organization. Of course, this situation necessitates the participation of public and private organizations in a coordinated manner in a holistic and collaborative manner in environmental auditing.

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EU MOVES TO IMPROVE WORKING CONDITIONS IN PLATFORM WORK: A LOOK INTO THE PROPOSED DIRECTIVE

(BE MERR MASAT PËR TË PËRMIRËSUAR KUSHTET E PUNËS NË PUNËN NË
PLATFORMË: NJË SHIKIM NË DIREKTIVËN E PROPOZUAR)

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ABSTRACT

This article discusses the proposal for a “directive of the European Parliament and of the European Council on improving work conditions in platform work”. The Proposal aims to create cross-sectoral equality for all platform workers. The proposal includes: legal certainty and predictability regarding the legal status of workers in labour platforms; better communication arrangements for workers among labour platforms, and more accessible unionisation for platform workers; increased legal certainty and accountability for algorithmic management. Nevertheless, the Proposal also faces particular challenges on applicability.

Keywords: Platform Work, Labour Law, EU Law, Unionisation, Algorithmic Management

PËRMBLEDHJE

Ky artikull diskuton propozimin për një "direktivë të Parlamentit Evropian dhe të Këshillit të Evropës për përmirësimin e kushteve të punës në punën në platformë". Propozimi synon të krijojë barazi ndërsektoriale për të gjithë punëtorët e platformave. Propozimi përfshin:

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siguri ligjore dhe parashikueshmëri në lidhje me statusin ligjor të punëtorëve në platformat e punës; mënyra më të mira komunikimi për punëtorët midis platformave të punës, dhe sindikalizim më të aksueshëm për punëtorët e platformave; rritje të sigurisë ligjore dhe përgjegjësisë për menaxhimin algoritmik. Megjithatë, Propozimi përballet gjithashtu me sfida të veçanta në zbatueshmëri.

Fjalët kyçe: *Puna në platformë, Ligji i Punës, Ligji i BE-së, Sindikalizimi, Menaxhimi algoritmik*

I. Introduction

February 2023, the European Parliament voted in favour of the amendments made on the proposal for a “directive of the European Parliament and of the council on improving working conditions in platform work”, hereinafter referred to as “the Proposal”. The directive has not concluded its legislative journey. If adopted, the European Union (“EU”) Institutions will decide on a timeline for the member states to transpose the directive into national law. The proposal could be in force as a “Directive” in 2024 or 2025.

Researchers and academics regard the proposal as a “promising step” to level the playing field for digital platform workers.¹ The Proposal has been expected by the concerned parties: platform businesses, especially labour platforms that utilise algorithmic management tools, and workers of such enterprises.

Platform businesses have created business models that offer opportunities as well as risks in the data-driven economy. Companies use nimbleness, productivity and flexibility while consumers can enjoy faster and potentially cheaper delivery of goods and services. Marginalized groups like disabled persons, women, students and immigrants can also

¹ Aislinn Kelly-Lyth and Jeremias Adams-Prassl, ‘The EU’s Proposed Platform Work Directive’ (Verfassungsblog14 December 2021) <<https://verfassungsblog.de/work-directive/>> accessed 1 June 2022

enter the workforce more easily through platform work.² However, platform work gave rise to new precarious work forms where protecting workers' rights and freedoms is harder. Platforms are also reshaping the relationship between workers and employers.³

The key question this proposal answers is, "Which of these workers are 'employees' and which of them are truly self-employed, and how to tell the difference between them?"⁴ How platform workers' working conditions must be adapted or changed depends on the answer to this question, including their social security status and rights under labour law. For instance, whether or not they will have social security over the years will change and keeping in mind that most of these workers are around the age of 30, social security could be a significant issue for them.⁵

Platforms exert certain powers over workers and can organise labour activities. Organising labour activities (indicating how labour activities will be conducted, arranging work times) and having the capacity to ban workers from using the platform. These powers suggest that the relationship between the worker and the platform is similar to an employment relationship. From a legal standpoint, this is a condition to be identified as an employer.⁶ However, this indicator alone cannot conclude that the relationship is the same. Nevertheless, the proposing committee identified other problems as well.

The other key issue in the Proposal is algorithmic management. Automated monitoring and decision-making systems have had a vital role in the emergence of digital labour platforms. However, these sys-

² Gaye Baycık and others, 'Platform Çalışanlarını Yasal Güvenceye Kavuşturmak: Sorunlar ve Çözüm Önerileri' (2021) 0 Galatasaray Üniversitesi Hukuk Fakültesi Dergisi <<http://search/yayin/detay/507420>>

³ Joost Korte, Jean-Louis De Brouwer and European Policy Centre, 'Improving Working Conditions for Platform Workers' (www.youtube.com16 March 2021) <<https://www.youtube.com/watch?v=iQk0rN7CxFs>> accessed 6 June 2022

⁴ Joost Korte, Jean-Louis De Brouwer and European Policy Centre (n 3)

⁵ Eurostat, 'Employment Statistics - Digital Platform Workers' (ec.europa.euJune 2023) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Employment_statistics_-_digital_platform_workers#Main_concept_and_data_collection> accessed 30 November 2023

⁶ Erbil BEYTAR, 'Platform Çalışması: Çalışan Statüsünün Belirlenmesi Sorunu' (2023) 8 İstanbul Medeniyet Üniversitesi Hukuk Fakültesi Dergisi 239

tems can also cause power disparities between platforms and their workers, putting workers in vulnerable positions and enabling exploitation. Since these systems are often opaque to their workers, their use may also decrease human dignity and privacy in the workplace. Problems with discrimination may also arise in these systems.

In a study published in 2018, concerns were already raised about how algorithmic management systems may lead to adversarial effects because of the highly competitive online environment.⁷ Such high levels of competition and the fact that they are also evaluated, monitored and rated upon the completion of a task can mean, for platform workers, increased numbers of underpaid work. As a result, workers may suffer sleep deprivation and exhaustion all the while (over)working or due to irregular working hours.

A typical example of algorithmic management is Uber and its numerous algorithms. For example, the widely known “surge pricing” algorithm may be evaluated.⁸ A tool is used to direct drivers into areas with high demand and generate higher rates of income per ride. However positive it may seem at first glance, some workers may also be threatened with being “deactivated” for “surge manipulation”, and “deactivation” bears the same consequences as being fired from a workplace for a worker.⁹

Artificial intelligence systems such as these may have a fundamental role in changing the legal status of natural persons. For this reason, committees and commissions around the globe have been working on regulating these tools, including the European Parliament with the Proposal for the “Artificial Intelligence Act”. In the Proposal, it is also visible that the European platform workers (as well as the users) will enjoy

⁷ Wood, A. J. et al., ‘Good Gig, Bad Gig: Autonomy and Algorithmic Control in the Global Gig Economy’ (2019) 33(1) *Work, Employment and Society*, 56–75. doi: 10.1177/0950017018785616

⁸ This algorithm works by increasing prices for rides when there is a higher demand for rides than drivers in an area, at a given time. It also flashes up the areas where there is a “surge” for drivers. Alex Rosenblat, ‘The Algorithmic Boss’ (re:publica 2019 May 2019) <<https://19.re-publica.com/de/session/algorithmic-boss>> accessed 19 June 2022

⁹ Alex Rosenblat, *UBERLAND : How Algorithms Are Rewriting the Rules of Work*. (University Of California Press 2018)

specific rights and tools that enable workers to challenge these algorithms.

To sum up, this study will discuss the two main discourses in the Proposal by taking into account the novelties brought by the Proposal and will review and examine their aim and implications in different aspects.

II. Aim of The Proposal

A common set of EU rules will provide increased legal certainty, enabling digital labour platforms to benefit fully from the economic potential of the Single Market and a level playing field. As expressed by Joost Korte, Director-General of Employment, Social Affairs, and Inclusion of the European Commission, the Proposal fits into the EU's fifth pillar (the social pillar).¹⁰

The social pillar of the European Union aims to create “a genuine European social protection floor for all”.¹¹ Not only does it aim to have 78% of all adults employed by 2030, but it also aims to have at least 60% of all adults participate in job training every year to ensure they are qualified. Combating poverty is another main agenda item for the “common ambition” goals. With the rise of the data-driven economy, it is without a doubt that platform work and algorithmic management will play an even more significant role in shaping work relationships.

About 28 million people in the EU worked through nearly 500 digital platforms in 2021. However, that number of employees is predicted to rise as much as 25 million by 2025, making the total workforce in platforms rise to 43 million. As much as 19.6% of these workers are estimated to be wrongly classified as “freelancers”.¹² This means around 5.5 million people working without labour law protections they would

¹⁰ *ibid*

¹¹ European Parliament Think Tank, ‘European Pillar of Social Rights: Gothenburg, Porto and beyond | Think Tank | European Parliament’ (www.europarl.europa.eu/7May2021) <[https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2021\)690591](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)690591)> accessed 12 June 2022

¹² Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work 2021

have enjoyed were they not working for a platform.¹³ For this reason, the Proposal tackles the issue of correctly determining the employment status of people working through digital labour platforms.

In platform work, conventional management methods are often replaced by algorithmic management. Whilst working for a platform without the legal protection of a labour contract, platform managers may easily manipulate or change their working conditions. As it is a common practice to experiment with new features within platforms, both visible and invisible, such differences may adversely affect workers without having their explicit consent or any warning to the workers.

For this reason, “transparency” is introduced as a legal requirement for all platform relationships. Along with this development, new rights for workers and self-employed people are introduced regarding algorithmic management, defined as “automated systems to match supply and demand for work” in the Proposal. These new rights are also in parallel with the latest artificial intelligence trustworthy principles introduced by the European Commission.¹⁴ Transparency, accountability and fairness are visibly taken into consideration in this proposal.

As explained in detail above, the general objective of the Proposal is to improve the working conditions of people working through platforms. To achieve this broader objective, three specific goals were identified. These are: to ensure that workers can obtain the correct legal status for their work; enforce fairness, explainability and accountability in algorithmic management; “to enhance transparency, traceability and awareness of developments in platform work and improve enforcement of the applicable rules for all people working through platforms, including those operating across borders”.¹⁵

¹³ European Commission Press corner, ‘Commission Proposals to Improve the Working Conditions of People Working through Digital Labour Platforms’ (European Commission - Press Corner 9 December 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6605> accessed 19 June 2022

¹⁴ High-Level Expert Group on AI, ‘Ethics Guidelines for Trustworthy Artificial Intelligence’ (2019) <<https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai>> accessed 8 June 2022

¹⁵ Explanatory memorandum of the Proposal, Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work 2021

The objectives listed above protect the freedoms and rights of EU citizens recognised in the Charter of Fundamental Rights of the European Union (“the Charter”). These workers’ rights include fair and just working conditions (Article 31), the right to information and consultation in the undertaking (article 27), the right to the protection as well as rectification of and access to personal data (Article 8), freedom of assembly and association (Article 12); right to engage in work and pursue an occupation (Article 15); right to non-discrimination (Article 21). Along with these rights, the Proposal also mentions and aims to protect the freedom to conduct business recognised in Article 16 of the Charter.

III. Implications of The Proposal

The Proposal starts by giving three-step explanations of “digital labour platform”, “platform worker”, “persons performing platform work”, and “representative”. Here, the Proposal distinguishes a platform worker from someone performing platform work through an “employment contract or employment relationship”.

A. Burden of Proof and Legal Assumption (Article 4)

One of the new steps the draft regulation brings to the table is the shift in the legal assumption of the relationship between the worker and the platform. As a result, the burden of proof for employment also shifts towards the platform.

The UK courts have already had rulings on the legal status of platform workers. Notably, in 2016, the legal status of Uber employees was upheld by the UK Supreme Court.¹⁶ Platform working has been a centre of controversy. The main lash arises as platforms provide work and call their workers "self-employed" or "freelancers," in the case of Uber.

The majority of the workers currently employed by platforms are labelled as "self-employed". However, while most of the workers are independent, a large population that is subordinate to their employers in

¹⁶ Jennifer Rankin, ‘Gig Economy Workers to Get Employee Rights under EU Proposals’ *The Guardian* (9 December 2021) <<https://www.theguardian.com/business/2021/dec/09/gig-economy-workers-to-get-employee-rights-under-eu-proposals>> accessed 5 June 2022

terms of working conditions also exists.¹⁷ Thus, the worker unions asked for such a provision.

This article created a clear distinction between persons performing platform work and puts platform workers into two categories; “persons performing platform work” and “platform workers”. Through this distinction, it is understood that all platform workers would also be classified as a person performing platform work. Thus, it makes “persons performing platform work” overarch “platform worker” as a term.¹⁸

B. Transparency of Platform Management (Article 6)

Platforms will be responsible for communicating the changes they have made to their algorithms regarding monitoring and other issues significant to their workers. This might include a new mechanism to calculate fees or terms for deactivation, for example. It must be noted that the list provided in the article is not *numerus clausus*.

Before this proposal, employers had to inform workers about their working conditions as dictated by the Directive on Transparent and Predictable Working Conditions. However, this directive doesn’t cover algorithmic management systems specifically. Thus, workers could be left in the dark about how decisions were made and what key factors were considered. According to Article 6 of the Proposal, workers will be informed about these issues and notified whenever a fundamental change is made regarding the monitoring methods or their working conditions.

The manner in which and when such communications will be made is also regulated within the Proposal as well. According to the article, these communications will need to be concise, transparent, intelligible and in an easily accessible form and should be done using clear and plain language.

¹⁷ European Parliament Legislative Observatory, ‘Improving Working Conditions of Persons Working through Digital Labour Platforms’ (oeil.secure.europarl.europa.eu/12 September 2021) <<https://oeil.secure.europarl.europa.eu/oeil/popups/summary.do?id=1685563&t=d&l=en>> accessed 9 June 2022

¹⁸ Hazal Tolu Yılmaz, ‘İş ve Sosyal Güvenlik Hukuku Bakımından Dijital Platform Çalışanlarının Hukuki Statüsü’ (2022) <<https://tez.yok.gov.tr/UlusalTezMerkezi/TezGoster?key=kIrIdtdJ31bRgjb6fHvMUbWPvItujd2BYaQqCWdzEUK3q-MG7oSGlpHEjvbjPoK>> accessed 27 January 2024

In Amendment 122 of the Proposal, automated decision-making tools are prohibited from taking any decisions that have an impact on the health and safety or the contractual relationship between the platform worker and the platform, as well as any decisions to apply disciplinary measures. This is also parallel to the recent Artificial Intelligence Act of the EU.

C. Human Oversight as A Rule (Article 7)

This article, in parallel with the draft European Artificial Intelligence Act, includes risk based approach for algorithmic management systems. The aforementioned risks of mental distress for the workers shall be noted by the platforms. After identifying the risks, these risks shall be countered by appropriate measures. Platforms shall account for these risks by having adequately trained personnel.

Along with this requirement, member states shall need to take measures to ensure the monitoring and decision-making done by algorithms will also be evaluated regularly. This human oversight is also in parallel with Article 8 of the proposal.

D. Human review of decisions significantly affecting working conditions (Article 8)

In this article, a contact person is required to be matched with workers. This way, workers will have a point of contact that is a natural person. To this point of contact, workers will be able to obtain information about any decision “taken or supported by an automated decision-making system”. This is an offset of Article 6 of the Proposal regulating transparency in the labour platform.

E. Communication channels (Article 15)

Since people working through platforms do not have a physical space to meet and discuss, they have tried different methods to tackle that issue. For instance, Uber workers have Facebook groups through which they discuss various updates and changes and their negative experiences.¹⁹ In the Proposal, Article 15 introduces communication channels for workers in labour platforms.

¹⁹ Rosenblat, UBERLAND: how algorithms are rewriting the rules of work (n 9)

This article aims to ensure proper communication channels are made available for workers. Platforms shall be responsible for making such communication channels available and open. How this shall be done is not directly specified. Thus, the channels could be made public in the application itself or elsewhere as long as they are “similarly effective”.

Even though platforms will be responsible for creating these channels, they are also inhibited from accessing and monitoring the content of such communications.

IV. The Expected Effects of the Proposal

Substantial improvement of working conditions for workers misclassified as “self-employed” or “freelancer” before. These include social and economic rights that were not previously available to the workers.

A. Increased Human Interaction

As Alex Rosenblatt points out in her research, a lot of the time, it is not possible for platform workers to reach a non-automated point of contact, let alone a human point of contact.²⁰ Minor cuts in fees, problems with customers, and deactivation are just some topics that people engaged in platform work may need assistance with. Not being able to reach out to a human response about a complaint may *de facto* mean no human point of contact.

For this reason, the Proposal, in particular Article 8, shall positively contribute to the workers as they will be able to not only form complaints but also communicate them with a human agent. The lack of this could potentially mean workers are facing undue mental distress, even emotional harassment from customers without repercussions.

B. Reduced Information Asymmetry and Transparency

Articles 6,7, and 8 of the Proposal aim to tackle the information asymmetry of the labour platform working space. Before the Proposal, in most cases, significant changes to the system could be made without workers' consent. All they could do was tap “I agree” if they wanted to

²⁰ *ibid*

keep being a part of the platform.²¹ Along with these, Labour platforms' responsibility to process transparently shall come into effect.

If workers do not know how and why a decision is made, they do not have the power to challenge it; the platforms will never be held accountable for these decisions. With the application of the Proposal, workers will have adequate information to be able to challenge decisions made by algorithms in court proceedings. By doing so, they can better and more easily exercise their rights, and platforms will be held accountable for their unlawful decisions.

C. Unionization

As mentioned above, having proper communication channels for people working through platforms is essential for them. Platform workers lack the social space of conventional workers; for this reason, they may face difficulty forming unions. These private communication channels will provide confidence and a secure mindset for workers to participate in union movements. As such, the Proposal clearly expresses that Platforms must refrain from accessing ("other than for their functional maintenance") or monitoring them.

The Challenges of Applicability

Platform work involves a vast number of sectors, and a "one-size-fits-all" approach would decrease the efficiency of such a directive. For this reason, a margin of flexibility should be introduced when transposing this directive into national law, which could be challenging, given that the Proposal itself is rigid.

Another particular challenge that will test the applicability of the Proposal is time. Platform work is dynamic. Different platforms can evolve in days, whereas regulation takes time to prepare, implement and change. For this reason, a very detailed approach to platform work will make it difficult to survive the test of time. This may be the main downfall of this proposal over time.

²¹ Gaye Baycık and others, 'Platform Çalışanlarını Yasal Güvenceye Kavuşturmak: Sorunlar ve Çözüm Önerileri' (2021) 0 Galatasaray Üniversitesi Hukuk Fakültesi Dergisi <<http://search/yayin/detay/507420>>

The other problem with the proposal's applicability is that since platform work is a highly competitive and innovative sector, the increased legal burden has the potential to move innovation out of the EU. This would directly contradict the EU's economic growth and employment goals.

V. Conclusion

Although platforms make life easier for users and help get tasks done in a timelier and cheaper way, the “gig economy” actors are creating new challenges for employees. The general tendency to protect employees in business relationships has raised flags in this manner through court rulings. Yet, the European Union has yet to establish a comprehensive and inclusive application. However, the application of the Proposal helps achieve a unified approach across the Single Market.

However, as mentioned above, these labour platforms could also help the Union grow and head towards its data-driven economy goals. Creating many job opportunities and business relationships in the field of e-commerce to meet users' expectations are just some of the benefits of these companies' actions. Yet it is also argued that some of these companies' business plans will not survive the application of this regulation.²²

In means of algorithmic management, these new rights are only going to be exercised by those in platform work. However, algorithmic management is also widely used in non-platform work environments. The same risks of overwork are similarly present for those. Therefore, it is regrettable that these new rights exclude non-platform work.

The clauses that regulate algorithmic management will also be necessary for users since users and customers are increasingly aware of their consumption choices' social and environmental implications.²³ Ethical consumption trends also affect the image and credibility of brands in

²² Aaron Benanav, 'Why Uber's Business Model Is Doomed' *The Guardian* (24 August 2020) <<https://www.theguardian.com/commentisfree/2020/aug/24/gig-economy-uber-lyft-insecurity-crisis>> accessed 12 June 2022

²³ Ethical Consumer and The Co-op Group, 'Ethical Consumerism Report 2021' (The Co-op Group 2021) <https://www.ethicalconsumer.org/sites/default/files/inline-files/EC_Market_Report_2021.pdf> accessed 19 June 2022

the market. Therefore, companies also invest in their global image by improving the working conditions on platforms.

As mentioned in Amendment Recital 6a, labour and social protection laws in most Member States are less than ready for the current challenges of digitalised labour realities. This amendment helps to increase legal certainty across the EU on this subject. This is a favourable situation since platform workers tend to work from all parts of the EU and even the world. This borderless working situation is best regulated in this manner, and it is parallel to recommendations of the International Labour Organization (“ILO”).²⁴

The Proposal can potentially bring a great deal of positive change for platform workers. These include legal certainty and predictability in terms of the legal status of workers in labour platforms, greater worker communication and more accessible unionisation for workers, and increased legal certainty and accountability for algorithmic management. However, the Proposal also faces particular challenges regarding applicability, especially since it is a very volatile and dynamic sector, and increased regulation trends could drive potential investors and innovators out of the EU.

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²⁴ International Labour Organisation, ‘Policy Dialogue between the EU and NEDLAC on Digital Labour Platforms Meeting Report Policy Dialogue under the Joint EU-ILO Project “Building Partnerships on the Future of Work”’ (2023) <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/meeting_document/wcms_871176.pdf>

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Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work 2021

ARBITRATION IN LONDON UNDER THE MARITIME LAW

(ARBITRAZHI NË LONDËR NË KUADËR TË TË DREJTËS MARITIME)

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ABSTRACT

This article provides an in-depth analysis of arbitration in maritime law with a specific focus on London, a globally recognized center for maritime dispute resolution. It explores the vital role of arbitration in the maritime sector, where disputes are complex due to the international nature of maritime activities. The article highlights the historical evolution of London as a hub for maritime arbitration, anchored by the London Maritime Arbitrators Association's guidelines and experienced professionals. It further investigates the advantages and challenges of maritime arbitration in London, comparing it with other jurisdictions. Finally, the article offers insights into future trends in maritime arbitration, examining how these developments might influence London's role in this field. By providing a comprehensive view of maritime arbitration in London, this article contributes to the understanding and advancement of this important area of law.

Keywords: Maritime Law, Arbitration, London, Dispute Resolution, London Maritime Arbitrators Association (LMAA)

PËRMBLEDHJE

Ky artikull ofron një analizë të thelluar të arbitrazhit në të drejtën detare, me një fokus të veçantë në Londër, një qendër e njohur ndërk-

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ombëtarisht për zgjidhjen e mosmarrëveshjeve detare. Ai shqyrton rolin jetik të arbitrazhit në sektorin detar, ku mosmarrëveshjet janë komplekse për shkak të natyrës ndërkombëtare të aktiviteteve detare. Artikulli thekson evolucionin historik të Londrës si një qendër për arbitrazhin detar, i mbështetur nga udhëzimet e Shoqatës së Arbitratorëve Detarë të Londrës dhe profesionistët me përvojë. Më tej, ai heton avantazhet dhe sfidat e arbitrazhit detar në Londër, duke e krahasuar atë me juridiksionet e tjera. Së fundi, artikulli ofron njohuri mbi tendencat e ardhshme në arbitrazhin detar, duke shqyrtuar se si këto zhvillime mund të ndikojnë rolin e Londrës në këtë fushë. Duke ofruar një pamje gjithëpërfshirëse të arbitrazhit detar në Londër, ky artikull kontribuon në kuptimin dhe avancimin e kësaj fushe të rëndësishme të së drejtës.

Fjalë kyçe: E Drejta Detare, Arbitrazh, Londra, Zgjidhja e Mosmarrëveshjeve, Shoqata e Arbitratorëve Detarë të Londrës (LMAA)

Introduction

Arbitration, as a form of alternative dispute resolution, has become an increasingly critical method of resolving disputes arising from various sectors, including maritime law. Distinct from traditional court litigation, arbitration provides a platform for parties to resolve their disputes in a more flexible, confidential, and timely manner¹. The practice is now deeply rooted in the global legal landscape, with its appeal stretching across diverse jurisdictions and sectors. A key sector where arbitration has made a significant impact is maritime law.

Maritime law, often called admiralty law, governs legal issues related to nautical matters and marine trade. In this vast, complex, and international field, disputes are not uncommon². These disputes can arise

¹ Jonathan Herring, *Legal Ethics*, (2nd edn, Oxford University Press 2017), 305; Hakan Pekcanitez, Oğuz Atalay and Muhammet Özokes, *Medeni Usul Hukuku Ders Kitabı*, (10th edn, On İki Levha Yayıncılık, 2022), 608; Clyde Croft, Christopher Kee and Jeff Waincymer, *A Guide to the Unictal Arbitration*, (1st edn, Cambridge University Press, 2013) 251

² Leoline Jenkins, 'The Law Maritime - An Argument, in Behalf of a Bill to Ascertain the Jurisdiction of the Admiralty in the House of Lords' (1817) 6 (4) *American Law Journal* 557, 580

over a variety of issues such as shipping, navigation, towage, marine pollution, marine insurance, and more. Resolving such disputes can be intricate due to the complex nature of maritime activities and the involvement of parties from different jurisdictions with diverse legal systems³. As a result, arbitration has emerged as a preferred dispute resolution method in this sector due to its inherent flexibility, the ability to choose specialized arbitrators with maritime law expertise, and the enforceability of arbitral awards across borders.

At the heart of this arbitration landscape, especially about maritime law, sits London. Long recognized as a leading global center for dispute resolution, London offers a well-established and reliable infrastructure for conducting arbitrations⁴. Over the years, the city has developed a wealth of expertise in maritime law and arbitration, attracting disputing parties from around the globe. Its status is further fortified by renowned institutions like the London Maritime Arbitrators Association (LMAA), which has set procedural guidelines and provided skilled arbitrators for maritime disputes. London's significance as a global center for maritime arbitration cannot be overstated⁵. The English legal system's reputation for transparency, predictability, and fairness, coupled with the wealth of experienced maritime arbitrators, legal practitioners, and expert witnesses, makes London a favorable choice for maritime arbitration. English law is often chosen as the governing law in international contracts, further increasing London's relevance in international arbitration. While other jurisdictions have emerged as contenders, London continues to hold a strong position in maritime arbitration. Its blend of historical legal expertise, supportive legislative framework, and a solid track record in handling complex maritime disputes make it an attractive venue for parties seeking a robust and fair resolution of their maritime disputes. In the pages that follow, we will delve deeper into the intricacies of maritime arbitration in London, examining its historical development, procedural aspects, advantages, challenges, and future in the evolving landscape of international maritime dispute resolution.

³ Michael Collett, Karen Maxwell and Clare Ambrose, *London Maritime Arbitration*, (4th edn, Informa Law from Routledge, Abingdon, 2018) 68

⁴ Baatz, Yvanne, *Maritime Law*, (5th ed., Informa Law from Routledge, London, 2020), 128

⁵ Jenkins (n2) 558

I. Historical Overview

Arbitration, as we understand it today, has its roots deeply embedded in the annals of history. The application of arbitration in maritime law, however, began to take a more definite shape in the late 18th and early 19th centuries, coinciding with the rapid growth of global sea trade. During this period, maritime disputes became more frequent and complex, necessitating a specialized form of dispute resolution⁶.

Arbitration, with its principles of neutrality, flexibility, and confidentiality, emerged as a viable solution to resolve such disputes efficiently. Particularly in maritime law, the ability to appoint arbitrators with specialized knowledge and experience in nautical matters became an attractive feature, especially for disputes involving technical issues related to navigation, shipbuilding, and marine insurance⁷.

As maritime arbitration began to take hold globally, London emerged as a leading hub in this field. London's historical status as a global maritime and trade center, coupled with the English legal system's reputation for fairness and transparency, made it a natural choice for international maritime arbitration. Moreover, English maritime law had, over centuries, developed a sophisticated body of legal principles and precedents that addressed the unique needs of marine commerce⁸.

In the late 19th century, the importance of arbitration in maritime law was further reinforced by the formation of several London-based organizations committed to resolving maritime disputes. Notably, the Baltic Mercantile and Shipping Exchange, founded in 1900, was one of the earliest organizations to provide arbitration services for maritime disputes in London⁹.

However, the post-World War II era marked a significant turning point in London's evolution as a global maritime arbitration hub. In 1960, the London Maritime Arbitrators Association (LMAA) was estab-

⁶ Robert Force, Athanassios N. Yiannopoulos and Martin Davies, *Admiralty and Maritime Law* (Beard Books 2005) 1

⁷ John A.C. Cartner, Richard P. Fiske and Tara L. Leiter, *International Law of the Shipmaster* (Taylor and Francis 2009) 19

⁸ Ambrose (n3) 69

⁹ Maritime London, 'The Baltic Exchange' (Maritime London) <<https://www.maritimelondon.com/member/the-baltic-exchange>> Date of access 10th of August 2023

lished, which led to more structured arbitration procedures and cemented London's position in maritime arbitration¹⁰.

LMAA, with its well-defined terms and distinguished panel of arbitrators experienced in maritime law, has become one of the world's leading maritime arbitration bodies. London's maritime arbitration scene has been further enriched by the London Court of International Arbitration's (LCIA) and the International Chamber of Commerce's (ICC) contributions¹¹.

Over the years, maritime arbitration in London has seen significant developments. The introduction of the English Arbitration Act of 1996 was a key milestone. The Act, with its modern and comprehensive approach, further boosted the efficiency and reliability of arbitration proceedings in London. Moreover, London's well-established maritime cluster of shipbrokers, insurers, maritime lawyers, and other related professionals have all played a part in maintaining London's standing as a leading center for maritime arbitration.

The journey of arbitration in maritime law and London's rise as a global hub for such arbitration is a testament to the constant evolution of dispute resolution methods in response to the changing needs of global commerce. As we delve deeper into the current state of maritime arbitration in London, it is essential to remember this historical context and the factors that have shaped its development¹².

¹⁰ Craig Neame and Holly Colaço, 'The Maritime Arbitration Universe in Numbers: London Remains Ever Dominant' (HFW, July 2020) <<https://www.hfw.com/downloads/002203-HFW-Maritime-Arbitration-in-Numbers-July-2020.pdf>> Date of Access 11th of August 2023

¹¹ Lexology, 'LMAA Arbitration – Quietly Big, On The Increase And Not Just For Maritime Disputes' (Lexology, 2006) <<https://www.lexology.com/library/detail.aspx?g=659d3982-f7a4-42c0-b1ae-ef9a7b004774>> Date of Access 10th of August 2023

¹² Ian Gaunt, 'London Maritime Arbitration Adapts To The Changing Times: English Law Remains 'Lex Franca Of The Maritime World'' (Hellenic Shipping News, 18/05/2021) <<https://www.hellenicshippingnews.com/london-maritime-arbitration-adapts-to-the-changing-times-english-law-remains-lex-franca-of-the-maritime-world/>> Date of Access 11th of August 2023

II. The London Maritime Arbitrators Association (LMAA)

The London Maritime Arbitrators Association (LMAA) is a premier institution for international maritime arbitration. Established in 1960, it boasts an impressive record in handling a high volume of arbitration cases each year¹³. Over the years, it has cultivated a robust reputation for managing disputes efficiently, ensuring fair decisions based on a comprehensive understanding and knowledge of maritime law¹⁴.

The LMAA is not an arbitral institution in the traditional sense¹⁵. Instead, it is a professional association comprising members experienced in maritime arbitration. Most LMAA arbitrators are either practicing maritime lawyers or have spent years in the shipping industry, granting them detailed insights into the intricate aspects of maritime law¹⁶.

The role of the LMAA in London, and more broadly in international maritime arbitration, is multifaceted. The association does not administer the arbitrations itself but provides a framework for maritime arbitration proceedings. It does this through several sets of terms, which offer flexible procedures designed to handle the varying complexity of maritime disputes. The LMAA Terms, Small Claims Procedure, and Intermediate Claims Procedure are prominent examples.

The LMAA's guidelines provide clarity and direction, allowing for efficient dispute resolution. By setting procedural parameters, the LMAA ensures that the dispute resolution process remains streamlined, reducing the time and costs involved in arbitration proceedings¹⁷. However, it also allows for flexibility, enabling the parties to agree on different procedures based on their specific needs. This balance between structure and flexibility is one of the key factors behind LMAA's popularity¹⁸.

¹³ 'The History of the LMAA' (LMAA, 2023) <<https://lmaa.london/history/>> Date of Access 11th of August 2023

¹⁴ Ben Chivers, 'The Legal 500 Ranking' (Travers Smith) <<https://www.legal500.com/firms/3341-travers-smith-llp/526-london-england/>> Date of Access 11th of August 2023

¹⁵ 'Guidelines for Full Membership' (n 13) <https://lmaa.london/guidelines-for-full-membership/> Date of Access 11th of August 2023

¹⁶ 'What is the LMAA and what does it do?' (n 13) <<https://lmaa.london/faq/>> Date of Access 11th of August 2023

¹⁷ 'How to Initiate an LMAA Arbitration' LMAA' (n 13) <<https://www.acerislaw.com/how-to-initiate-an-lmaa-arbitration/>> Date of Access 12th of August 2023

¹⁸ C. Mark Baker, 'International Arbitration Report' (2020) (14) Norton Rose Fulbright 4 <<https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/knowledge-pdfs/in>

The LMAA plays an integral role in maintaining and enhancing London's reputation as a global hub for maritime arbitration¹⁹. As an institution based in London, it capitalizes on the city's historic ties to maritime trade and its robust legal infrastructure. The LMAA also benefits from and contributes to London's extensive network of maritime professionals, including lawyers, shipbrokers, insurers, and technical experts, which collectively form a comprehensive support system for maritime arbitration²⁰.

Internationally, the LMAA's role is equally significant. Its well-defined procedures, expert arbitrators, and commitment to efficiency and fairness have made it an appealing choice for parties involved in maritime disputes worldwide²¹. The decisions rendered under LMAA arbitration are respected and enforceable in most jurisdictions around the globe due to the New York Convention of 1958, to which the UK is a party.

While the LMAA is an independent body, its close relationship with other major maritime organizations and institutions in London, such as the Baltic Exchange and Lloyd's of London, further solidifies its standing²². As a result, the LMAA remains at the forefront of shaping best practices and standards in maritime arbitration, influencing the development of maritime arbitration both in London and globally. In summary, the LMAA is a central pillar in London's maritime arbitration scene. Its existence underpins the city's prominence in this sector, ensuring London remains a preferred choice for maritime arbitration, domestically and internationally²³.

ternational-arbitration-report---issue-14.pdf?la=en&revision=6edf090e-2dae-4845-a812-c912f12016d0> Date of Access 12nd of August

¹⁹ 'Shipping, Trade, Offshore Energy' (n 13) <<https://lmaa.london/about-lmaa/>> Date of Access 12th of August 2023

²⁰ 'London International Shipping Week 2023' (London International Shipping Week, 7/09/2023) <<https://londoninternationalshippingweek.com/supporting-organisations-2/>> Date of Access 12th of August 2023

²¹ 'Notes on London Arbitration and Frequently Asked Questions' (n 13) <<https://lmaa.london/notes-on-london-arbitration/>> Date of Access 12th of August 2023

²² 'London Maritime Arbitrators Association is a Corporate Member of Maritime London' (Maritime London, 2023) <<https://www.maritimelondon.com/member/london-maritime-arbitrators-association>> Date of Access 12th of August 2023

²³ Guant Ian, London Maritime Arbitration Adapts To The Changing Times: English Law Remaining 'lex Franca of The Maritime World 2021 (n 12) <<https://www.hel->

III. LMAA Terms and Procedures

At the heart of the London Maritime Arbitrators Association's operations lie its terms and procedures, which are carefully designed to manage the varying complexity of maritime disputes²⁴. The LMAA offers a flexible framework through several sets of terms, which provide different dispute resolution procedures, notably the LMAA Terms, the Small Claims Procedure (SCP), and the Intermediate Claims Procedure (ICP)²⁵.

The LMAA Terms are the cornerstone of the LMAA's procedural framework, setting out the basis upon which most LMAA arbitrations proceed. The LMAA Terms highlight the arbitrators' powers and responsibilities, the parties' obligations, the proceedings' conduct, and the final award²⁶.

The LMAA Terms encourage the arbitrators and parties to conduct the arbitration in a manner that provides a fair resolution of the issues while avoiding unnecessary delay and expense. They underscore the importance of an "arbitration-friendly" approach, highlighting cooperation, practicality, and expediency.

Key provisions within the LMAA Terms cover issues such as the formation of the tribunal, pre-conditions to the arbitration, exchange of submissions, disclosure of documents, hearings, closing of proceedings, awards, and costs²⁷. Importantly, the LMAA Terms vest significant powers in the tribunal to control the proceedings, including the ability to limit the scope of document disclosure and witness evidence and to decide the dispute on a documents-only basis, thereby promoting effici-

lenicshippingnews.com/london-maritime-arbitration-adapts-to-the-changing-times-english-law-remains-lex-franca-of-the-maritime-world/> Date of Access 11th of August 2023

²⁴ Bruce Harris, 'The LMAA Terms and Procedures 2021' <<https://lmaa.london/wp-content/uploads/2021/04/LMAA-Terms-Procedures-2021-FINAL.pdf>> Date of Access 12th of August 2023

²⁵ 'LMAA terms and Procedures Revised' (UK Defence Club) <<https://www.ukdefence.com/insights/may-2021-lmaa-terms-and-procedures-revised-155604/>> Date of Access 12th of August 2023

²⁶ 'More of The Same But Better: The New LMAA Terms 2017, April 2017' (HFW) <<https://www.hfw.com/More-of-the-same-but-better-the-new-LMAA-Terms-2017-April-2017>> Date of Access 12th of August 2023

²⁷ Harris (n 24) <<https://lmaa.london/wp-content/uploads/2022/11/LMAA-Terms-2021.pdf>> Date of Access 12th of August 2023

ency. In recognition of the fact that not all maritime disputes require full-blown arbitration proceedings, the LMAA has introduced simplified procedures to deal with less complex or lower-value claims, namely the SCP and the ICP.

The SCP is designed to provide a simplified and cost-effective method of resolving lower-value disputes, typically with a monetary limit defined by the LMAA. Under the SCP, the dispute is resolved by a sole arbitrator, and the proceedings are typically conducted on a documents-only basis²⁸. It provides a fast-track process, with awards typically required within 6 weeks of receipt of the final submissions. The ICP serves as a middle ground between the LMAA Terms and the SCP, intended for disputes of intermediate complexity or value²⁹. The ICP also involves a sole arbitrator but allows for limited oral hearings if required. The procedure under the ICP is streamlined, and the arbitrator is vested with powers to avoid unnecessary costs and delays. The arbitration process under the LMAA begins with a party issuing a Notice of Arbitration, which sets out the general nature of the dispute, the relief sought, and the proposed arbitrator(s)³⁰. The respondent is then invited to agree on the arbitrator(s) or to propose alternative arbitrator(s). Following the formation of the arbitral tribunal, the proceedings primarily involve an exchange of written submissions (pleadings) and evidence. The parties may agree, or the tribunal may decide, to hold an oral hearing, especially for complex disputes.

After considering the parties' submissions and evidence, the arbitrators render their award. Under the LMAA Terms, the award must be "reasoned," i.e., the arbitrators must provide the reasoning behind their decision, which promotes transparency and fairness³¹.

²⁸ LLMA 'The World-Wide Leaders In Commercial Maritime Dispute Resolution' <<https://lmaa.london/the-small-claims-procedure/>> Date of Access 12th of August 2023

²⁹ Shawn Kirby & Alex Hookway, 'LMAA Terms 2021: What's New For End Users?' (Lexology, 2006) <<https://www.lexology.com/commentary/shipping-transport/united-kingdom/wikborg-rein/lmaa-terms-2021-whats-new-for-end-users>> Date of Access 12th of August 2023

³⁰ Harris (n 24) <<https://lmaa.london/wp-content/uploads/2021/04/LMAA-Terms-Procedures-2021-FINAL.pdf>> Date of Access 12th of August 2023

³¹ 'Legal Instruments and Practice of Arbitration In The EU' (European Parliament, 2014) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU\(2015\)509988_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf)> Date of Access 12th of August 2023

IV. Role of Maritime Arbitration in London

London, with its long-standing maritime history, has established itself as a leading hub for international maritime arbitration. The capital's reputation as a maritime arbitration center is built on several key factors, ranging from the application of English law, the reputation and expertise of London-based arbitrators, and the presence of several esteemed arbitration institutions, such as the London Maritime Arbitrators Association (LMAA).

Several reasons explain why parties involved in maritime disputes frequently choose London as the venue for their arbitration³².

Firstly, English law is often the law of choice in international contracts, not least because of its well-established and predictable rules, particularly concerning contract law. Maritime law is no exception, with English maritime law renowned for its comprehensive and sophisticated body of case law and statutes. The application of English law in London-seated arbitrations provides parties with a degree of certainty and predictability³³.

Secondly, the expertise and experience of London-based arbitrators are world-class. Many arbitrators in London have extensive legal or maritime industry backgrounds, ensuring that they possess the necessary technical knowledge to handle complex maritime disputes³⁴. The LMAA, for instance, is renowned for its panel of arbitrators who specialize in maritime matters.

Thirdly, London is home to some of the world's leading maritime arbitration institutions. The LMAA, the London Court of International Arbitration (LCIA), and the International Chamber of Commerce (ICC)

³² Rory Mac Neice, 'Why Is London A Global Capital For International Arbitration?' (ashfords, 2023) <<https://www.ashfords.co.uk/insights/articles/why-is-london-a-global-capital-for-international-arbitration#:~:text=Furthermore%2C%20arbitration%20in%20London%20is,trial%20in%20their%20home%20state.>> Date of Access 12th of August 2023

³³ Justin Williams, Hamish Lal, Richard Hornshaw and Akin Gump 'Arbitration Procedures and Practice in the UK England and Wales: Overview' (Thomson Reuters Practice Law, 2023) <[https://uk.practicallaw.thomsonreuters.com/4-502-1378?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/4-502-1378?transitionType=Default&contextData=(sc.Default)&firstPage=true)> Date of Access 12th of August 2023

³⁴ 'The Advantage of London and hoc Maritime Arbitrations' (CIARB evolving to resolve, 12/03/2019) <<https://www.ciarb.org/resources/features/the-advantages-of-london-ad-hoc-maritime-arbitrations/>> Date of Access 12th of August 2023

all provide well-structured, efficient arbitration services. In particular, the LMAA's terms and procedures have been crafted to deal effectively with the complexities of maritime disputes³⁵.

Finally, the supporting infrastructure in London, including experienced maritime law firms, shipping experts, and a mature insurance market, all contribute to making London a preferred choice for maritime arbitration.

London's role in resolving global maritime disputes is substantial. According to recent LMAA statistics, the association handles a significant number of cases each year, making it one of the busiest maritime arbitration centers worldwide³⁶.

Furthermore, London's influence extends beyond the cases it directly handles. The arbitration procedures and practices developed in London, particularly by the LMAA, are often emulated in other jurisdictions. Similarly, London-seated arbitration awards are highly respected and carry considerable weight in maritime law globally³⁷.

In summary, London's importance as a global maritime arbitration hub cannot be overstated. The city's legal expertise, arbitration-friendly legal framework, and sophisticated maritime law infrastructure make it a leading choice for parties seeking to resolve their maritime disputes through arbitration. The role of London-based institutions, particularly the LMAA, continues to ensure that London remains at the forefront of maritime arbitration globally³⁸.

London's prominence as an international center for legal practice contributes significantly to its status as a global maritime arbitration hub. The city's legal infrastructure is one of the most sophisticated in the world, comprising a multitude of experienced law firms, expert barristers, and knowledgeable legal academics, many of whom specialize in maritime law and arbitration. This environment fosters a deep pool of maritime law expertise that ensures parties involved in maritime arbitration in London have access to high-quality legal advice and representation.

³⁵ LLMA 'Procedural Rules & Guidelines' <<https://lmaa.london/the-lmaa-terms/#:~:text=The%20LMAA%20Terms%20are%20terms,adopted%20in%20the%20arbitration%20reference.>> Date of Access 11th of August 2023

³⁶ 'Neame and Colaço (n 10)

³⁷ *ibid*

³⁸ *ibid*

London's courts also play a crucial role in supporting the city's maritime arbitration scene³⁹. The Commercial Court in London, which includes the Admiralty Court, is highly respected internationally and has vast experience in dealing with maritime disputes⁴⁰. This creates a safety net for arbitration, as parties can rely on the English courts to enforce arbitral awards and support the arbitration process when necessary, for example, in matters of interim measures, challenges against arbitrators, and set-aside applications⁴¹.

The impact of London as a hub for maritime arbitration goes far beyond the disputes directly handled there. English maritime law has been incredibly influential in shaping maritime laws around the globe, with many countries adopting English legal principles into their maritime or admiralty laws⁴². English law is often chosen as the governing law in international shipping contracts due to its predictability and the detailed way it handles typical maritime issues.

The arbitration procedures and practices developed in London have also gained traction worldwide. LMAA terms and procedures, due to their efficacy in handling maritime disputes, are often adopted in arbitral proceedings even outside of London.

Furthermore, the English language itself is another factor that adds to London's appeal. Being the international language of business, the use of English in arbitral proceedings makes London a convenient choice for parties from different nationalities.⁴³ In essence, London's dominance in

³⁹ 'London rules the waves in maritime arbitration cases' (Global Legal Post, 12/08/2020) <<https://www.globallegalpost.com/news/london-rules-the-waves-in-maritime-arbitration-cases-19652908>> Date of Access 12th of August 2023

⁴⁰ Admiralty Solicitor Group, 'London Arbitration' (Maritime London) <<https://www.maritimelondon.com/wp-content/uploads/2016/09/London-Arbitration-Lo.pdf>> Date of Access 12th of August 2023

⁴¹ Macfarlanes LLP, (In brief: enforcing and challenging arbitral awards in United Kingdom), (n 11, 2006), <<https://www.lexology.com/library/detail.aspx?g=114c9ef6-b4bb-4c73-afbe-09fa8f9590ec#:~:text=In%20keeping%20with%20a%20generally,is%20in%20England%20or%20abroad.>> Date of Access 12th of August 2023

⁴² Schechter Shafer and Harris LLP, (SSH, 2023) <<https://maintenanceand-cure.com/maritime-blog/the-intriguing-history-of-maritime-law/>> Date of Access 13th of August 2023

⁴³ Eva Lein, Robert McCorquodale, Lawrence McNamara, Hayk Kupelyants and Jose del Rio, 'Factors Influencing International Litigants' Decisions to Bring Commercial

maritime arbitration is not by chance. It is the result of a sophisticated legal system, centuries of maritime history, a city teeming with legal and shipping experts, and the continual development of fair and effective arbitral procedures. All of these factors interact to ensure that London remains a preferred and leading choice for maritime arbitration globally. As global trade continues to grow, and with the potential for maritime disputes, the need for an efficient, fair, and expert place to resolve these disputes becomes increasingly paramount. It is in this environment that London, with its unique combination of history, expertise, and infrastructure, is expected to continue to play a significant role.

V. Arbitration in Maritime Law: Key Aspects

Maritime arbitration involves various distinct and complex aspects of maritime law⁴⁴. These aspects often revolve around issues related to charter party disputes, cargo claims, shipbuilding disputes, and maritime insurance. In many of these areas, London has seen precedent-setting cases and decisions that have shaped the industry.

Charter-party disputes form a significant part of maritime arbitration⁴⁵. These disputes often concern the interpretation of charter party clauses and terms related to issues like hire and off-hire, speed and performance, safe port warranties, and laytime and demurrage. The decision in "The Achilleas"⁴⁶ case, a landmark case that took place in London, set a significant precedent in English law regarding the remoteness of damages in charter party disputes⁴⁷.

Claims to the London Based Courts' (Ministry of Justice, 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/396343/factors-influencing-international-litigants-with-commercial-claims.pdf> Date of Access 13th of August 2023

⁴⁴ Hugh R. Williamson, 'International Maritime Arbitration: Dispute Settlement without Recourse to the Courts' (Brill, 2016) <https://brill.com/view/journals/ocyo/7/1/article-p94_.xml> Date of Access 13th of August 2023

⁴⁵ 'Chartering Disputes' (Handy Bulk) <<https://www.handybulk.com/chartering-disputes/>> Date of Access 13th of August 2023

⁴⁶ *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48 <<https://lawprof.co/contract/remedies-for-breach-cases/transfield-shipping-inc-v-mercator-shipping-inc-the-achilleas-2008-ukhl-48/>> Date of Access 13th of August 2023

⁴⁷ *ibid*

Cargo claims are another frequent subject of maritime arbitration. These claims usually involve issues like damage or loss of cargo, delays in delivery, or misdelivery. The decision in the "Aqasia"⁴⁸ case, which involved a London arbitration, shed light on the interpretation of package limitation provisions under the Hague-Visby Rules⁴⁹.

London also sees a significant number of shipbuilding disputes, which often revolve around issues such as delay, quality of construction, and refund guarantees. A noteworthy London arbitration case is the "Rainy Sky"⁵⁰ case, which clarified the interpretation of refund guarantee clauses in shipbuilding contracts.

Maritime insurance-related disputes are a common subject of maritime arbitration in London. These disputes often relate to issues such as coverage, disclosure obligations, and interpretation of insurance policy clauses. The "Brillante Virtuoso"⁵¹ case is a significant case that resulted from a London arbitration, which involved complex issues relating to maritime insurance fraud. This exploration into key aspects of maritime law in arbitration underscores the diversity and complexity of cases handled in London. Through handling these disputes, London continues to contribute significantly to the development and clarification of maritime law, reinforcing its status as a leading global hub for maritime arbitration⁵².

VI. Advantages of Arbitrating Maritime Disputes in London

London's stature as a premier hub for maritime arbitration is a result of numerous inherent advantages that this city offers over many other jurisdictions worldwide. These benefits encompass a robust and stab-

⁴⁸ *Vinnlustodin Hf and Another v Sea Tank Shipping as (The Aqasia)* [2016] 2 Lloyd's Rep. 510

⁴⁹ *De Wolf Maritime Safety BV v Traffic-Tech International Inc* 2017 FC 23

⁵⁰ *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50

⁵¹ Terry Gangcuangco, 'Insurers win in Brillante Virtuoso fraud case' (Insurance Business, 08/10/2019) <<https://www.insurancebusinessmag.com/uk/news/marine/insurers-win-in-brillante-virtuoso-fraud-case-179966.aspx>> Date of Access 13th of August 2023

⁵² Lucy Espley and Carrie Radford, 'The most spectacular fraud in shipping history' (Riviera, 12/09/2019) <<https://www.rivieramm.com/news-content-hub/news-content-hub/ldquomost-spectacular-fraud-in-shipping-historyrdquo-56777>> Date of Access 13th of August 2023

le legal system, an advanced supporting infrastructure, and a wealth of expertise.

The English legal system, famed for its predictability and stability, plays a vital role in London's appeal as an arbitration venue. The comprehensive nature of English maritime law, with its extensive body of case law and legislation, provides clarity and assurance for parties involved in maritime disputes. It's particularly attractive for international parties as English law often governs their contracts. Furthermore, the English legal system is particularly supportive of arbitration, with the English Arbitration Act 1996⁵³ providing a robust framework for the conduct of arbitration. The Act ensures the enforceability of arbitral awards, gives considerable autonomy to parties in managing their arbitration, and restricts court interference, thereby ensuring a level of confidence and certainty in the arbitral process.⁵⁴

Another significant advantage of arbitrating in London is the specialized expertise that the city offers. London boasts a pool of highly qualified, experienced arbitrators, many of whom have backgrounds in the shipping industry or maritime law, thus offering technical proficiency vital in complex maritime disputes.⁵⁵ Institutions such as the LMAA further contribute to this expertise. Their members, renowned for their maritime arbitration skills, contribute to maintaining the high standards expected of London arbitrators. Additionally, the procedural rules and guidelines developed by these institutions, tailored for maritime disputes, ensure the efficient handling of cases.

London offers a sophisticated supporting infrastructure for maritime arbitration. The city hosts numerous law firms with specialist maritime and arbitration departments, offering parties a broad choice of expert legal representation. It also houses many maritime consultants, experts, and surveyors who can provide the necessary technical insights during arbitration proceedings. Arbitral awards made in London carry significant weight globally and are generally readily enforceable around

⁵³ Arbitration Act 1996 (Chapter 23) <<http://www.legislation.hmso.gov.uk/acts/acts/1996/996023.htm>> Date of Access 10th of August 2023

⁵⁴ *ibid*

⁵⁵ 'International maritime arbitration: how to get those skills ship-shape' (n 34, 12/10/2021) <<https://www.ciarb.org/resources/features/international-maritime-arbitration-how-to-get-those-skills-ship-shape/>> Date of Access 13th of August 2023

the world, thanks to the UK's ratification of the New York Convention.⁵⁶ This global recognition adds another layer of security for parties choosing London as their arbitration venue.⁵⁷

VII. Challenges in London Maritime Arbitration

Despite London's pre-eminence as a maritime arbitration hub, it faces its share of challenges. Some of these challenges, both intrinsic and extrinsic, have prompted discussions and initiated changes aimed at ensuring London's continued dominance.⁵⁸

A significant challenge for London maritime arbitration is the perception of it being costly and time-consuming. This perception arises from several factors. Complex maritime cases require specialized, experienced legal and arbitration practitioners, who often command high rates. Additionally, protracted proceedings contribute to higher costs and longer resolution times.

To combat these issues, the LMAA has made considerable efforts to streamline processes and control costs. The introduction of expedited procedures and small claims procedures allows for faster resolution and is more cost-effective for claims of smaller monetary value. The LMAA Intermediate Claims Procedure is another initiative aimed at controlling the time and cost of arbitration for mid-sized disputes.⁵⁹

Diversity among arbitrators, in terms of both nationality and gender, has become a topic of discussion across the globe. It is perceived that London, like other established arbitration venues, has a concentra-

⁵⁶ Albert Jan van den Berg, 'United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)' (New York Arbitration Convention) <<https://www.newyorkconvention.org/english>> Date of Access 13th of August 2023

⁵⁷ '2021 International Arbitration Survey: Adapting arbitration to a changing world' <https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf> Date of Access 13th of August 2023

⁵⁸ Yarik Kryvoi, 'London as the world's leading dispute resolution hub: numbers and challenges' (British Institute of International and Comparative Law, 17/05/2023) <<https://www.biicl.org/blog/58/london-as-the-worlds-leading-dispute-resolution-hub-numbers-and-challenges>> Date of Access 14th of August 2023

⁵⁹ 'The Small Claims Procedures' (n 13, 2023) <<https://lmaa.london/the-small-claims-procedure/>> Date of Access 14th of August 2023

tion of white, male arbitrators. Organizations like the London Chapter of the Women's International Shipping & Trading Association (WISTA) and Arbitral Women are working towards promoting and supporting the progression of women in the maritime and arbitration fields.

London's pre-eminent position is being challenged by emerging maritime arbitration centers around the globe. Notably, Singapore, Hong Kong, and Turkey have made significant strides. Singapore offers an attractive proposition for maritime arbitration. The Singapore International Arbitration Centre (SIAC) and the Singapore Chamber of Maritime Arbitration (SCMA) provide strong and efficient maritime arbitration services. Their rules are modern and sophisticated, and they boast a diverse panel of arbitrators.⁶⁰ Singapore's strategic geographical location and supportive national arbitration laws are further drawcards. Moreover, initiatives like the Singapore Convention on Mediation provide additional avenues for dispute resolution.

Hong Kong, with its common law system similar to England and strategic position as the gateway to China, has seen significant growth in maritime arbitration. The Hong Kong International Arbitration Centre (HKIAC) provides efficient case management and progressive arbitration rules. Hong Kong's connection with China and the Belt and Road Initiative enhances its appeal, particularly for Chinese and international parties involved in disputes with a Chinese element.⁶¹

As a country bridging Europe and Asia, Turkey is uniquely positioned to become a regional hub for maritime arbitration. This ambition is being led by Istanbul, Turkey's largest city and an important international shipping hub, making it an increasingly attractive venue for maritime arbitration.

Turkey's geographic advantage is twofold. Its location makes it easily accessible to both European and Asian parties, potentially cutting travel times and costs. Furthermore, Turkey is at the center of significant maritime trade routes, including the Bosphorus, one of the busiest mariti-

⁶⁰ 'London Retains Pole Position In Maritime Arbitration' (London International Shipping Week, 7/09/2023, 07/09/2023) <<https://londoninternationalshippingweek.com/london-retains-pole-position-in-maritime-arbitration/>> Date of Access 14th of August 2023

⁶¹ 'What is Arbitration?' (HKIAC, 2023) <<https://www.hkiac.org/arbitration/what-is-arbitration>> Date of Access 14th of August 2023

me passages in the world.⁶² This strategic position has allowed Turkey to develop a robust shipping industry, providing a steady stream of maritime disputes that could benefit from local resolution.

The Istanbul Arbitration Centre (ISTAC) plays a central role in these efforts. Established in 2015, ISTAC aims to make Istanbul an attractive venue for both domestic and international arbitration. To this end, it has developed a set of procedural rules that incorporate modern arbitration practices, offering a reliable and effective framework for maritime arbitration.⁶³

ISTAC's rules include provisions for expedited arbitration and emergency arbitrator procedures, which can be particularly beneficial in maritime disputes where quick interim measures might be required. Furthermore, ISTAC offers the option to conduct the arbitration in English, addressing potential language barriers for international parties.⁶⁴

In addition, Turkey has been working on strengthening its legal infrastructure to support arbitration. The Turkish International Arbitration Law No. 4686⁶⁵ is based on the UNCITRAL Model Law, which is a widely accepted standard for arbitration legislation. Turkey's ratification of the New York Convention also ensures the enforcement of foreign arbitral awards, assuring international parties.

The Turkish maritime industry itself has seen significant growth in recent years. The number of maritime companies, along with the volume of maritime trade, has been on an upward trajectory.⁶⁶ This growth provides a wealth of industry expertise and a pool of potential arbitrators with deep sector-specific knowledge, further strengthening Turkey's bid as a maritime arbitration hub.

⁶² Oral Erdoğan and Oktay Çetin, 'The Effect of Maritime Transport on the Turkish Economy' (SSRN, 01/07/2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3880804> Date of Access 14th of August 2023

⁶³ Ayça Aydın, 'Istanbul Arbitration Centre' (Kluwer Arbitration Blog, 04/03/2016) <<https://arbitrationblog.kluwerarbitration.com/2016/03/04/istanbul-arbitration-centre/>> Date of Access 14th of August 2023

⁶⁴ 'Arbitration' (Istanbul Arbitration Centre) <<https://istac.org.tr/en/dispute-resolution/arbitration/>> Date of Access 15th of August 2023

⁶⁵ International Arbitration Law 24452, 05/07/2001

⁶⁶ United Nations, 'Review of Maritime Transport 2021' (UNCTAD, 2021) <https://unctad.org/system/files/official-document/rmt2021_en_0.pdf> Date of Access 15th of August 2023

However, it's important to note that while Turkey is making significant strides, it faces challenges too. It's relatively new to the international arbitration scene, and the body of maritime arbitration precedents is not as extensive as in more established centers like London. The dominance of English law in maritime contracts might also limit the appeal of arbitrating in Turkey for some parties.⁶⁷ Despite these challenges, Turkey's geographic position, the growing expertise in maritime law and arbitration, and the efforts to improve its arbitration infrastructure, all contribute to making it an emerging player in the field of maritime arbitration.

Each of these jurisdictions has its unique advantages, providing a competitive edge over London. However, they also have their challenges. For instance, Singapore and Hong Kong, while geographically advantageous for Asia-based disputes, are not as convenient for European parties. Language may pose a barrier in Turkey for international parties, and their relatively recent emergence in the international arbitration landscape means they lack the deep-rooted tradition and wealth of precedent that London has. In conclusion, while London faces challenges, it remains a leading choice for maritime arbitration. With continued efforts to address its challenges, adapt to changing needs, and capitalize on its strengths, London's position in maritime arbitration remains strong.⁶⁸

VIII. The Future of Maritime Arbitration in London

Maritime arbitration in London, though well-established and highly respected, is not immune to the rapid changes sweeping the legal and maritime sectors. As the global maritime industry evolves, so too must the structures that resolve its disputes. London's ability to adapt to these changes will be key to its future as a global maritime arbitration hub.⁶⁹

⁶⁷ Beril Yayla Sapan, Asena Aytuğ Keser and Kardelen Özden, 'Arbitration Procedures and Practice in Turkey: Overview' (Thomson Reuters Practice Law, 2023) <[https://uk.practicallaw.thomsonreuters.com/3-634-5848?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/3-634-5848?transitionType=Default&contextData=(sc.Default)&firstPage=true)> Date of Access 15th of August 2023

⁶⁸ Gary Born, 'A New Generation of International Adjudication' (2012) 61 (4) Duke University School of Law 775, 801

⁶⁹ 'The maritime arbitration universe in numbers: London's crown under threat?' (n 11, 2006) <<https://www.lexology.com/library/detail.aspx?g=88f2cebb-c8a4-4335-a785-c38f5a92afa0>> Date of Access 15th of August 2023

One of the major trends impacting maritime arbitration is the increasing digitization of processes. The COVID-19 pandemic accelerated this trend, with arbitration hearings being conducted virtually out of necessity. The London Maritime Arbitrators Association (LMAA) has already incorporated provisions for virtual hearings into its terms.

Another significant trend is the increasing importance of environmental, social, and governance (ESG) issues in the maritime industry. As the shipping sector faces pressure to reduce its environmental impact, disputes related to sustainability and environmental regulations are likely to increase.⁷⁰ This may result in arbitrators needing to familiarize themselves with environmental law and ESG standards, and possibly the creation of specialist panels for such disputes. Finally, there's a continuing trend towards greater diversity in arbitration, with calls for more women and individuals from various backgrounds to serve as arbitrators. The LMAA and other institutions have acknowledged the need for this and are taking steps towards greater diversity.

These changes and trends present both opportunities and challenges for London. The shift towards digitization, for example, may reduce the importance of geographic location for arbitration. Parties may be less concerned about where the arbitration is seated if the majority of the proceedings can be conducted online. However, it also offers opportunities to streamline proceedings and make them more efficient, which could enhance London's appeal if it can effectively leverage digital tools. The emergence of ESG-related disputes could be an opportunity for London to again lead the way, given its breadth of expertise and the strength of English environmental law. London-based arbitrators could become leading experts in this emerging area of dispute resolution. The push for greater diversity could see London broaden the pool of arbitrators, leading to a wider range of perspectives and experiences in dispute resolution. However, it also presents a challenge to the traditionally male-dominated world of maritime arbitration.⁷¹

⁷⁰ Elias Makris and Michalis Stergiou, 'ESG in the Shipping Sector' (Deloitte, 2021) <https://www2.deloitte.com/content/dam/Deloitte/gr/Documents/consumer-business/gr_esg_in_the_shipping_sector_noexp.pdf> Date of Access 15th of August 2023

⁷¹ Kryvoi (n 58)

In conclusion, the future of maritime arbitration in London will be shaped by how it responds to these changes and trends. With its rich history, extensive expertise, and commitment to adapt, there is every reason to believe that London will continue to be at the forefront of global maritime arbitration.⁷²

IX. Conclusion

This exploration of arbitration in London within the context of maritime law paints a complex picture. From its historic rise as a premier maritime arbitration hub to the specific workings of the London Maritime Arbitrators Association (LMAA), London has demonstrated a long-standing commitment to addressing the unique needs and challenges inherent in maritime disputes.

At the crux of London's effectiveness in maritime arbitration is the LMAA. Founded in 1960, it has continually provided a robust, reliable framework for the resolution of maritime disputes. With an explicit focus on efficient, cost-effective procedures, the LMAA underlines London's continued appeal as an arbitration venue. The terms and procedures it set forth have been meticulously designed to address the particularities of maritime law, offering both clarity and flexibility for disputing parties.

The significant role London plays in global maritime arbitration is not by chance but the result of a combination of advantageous factors. These include the strength and stability of English law, the city's reputation for judicial impartiality, and the wealth of maritime law expertise available within its borders. This expertise extends beyond the legal profession to embrace a network of support services vital to the arbitration process, from technical experts to highly experienced arbitrators.

London's status, however, is not without challenges. Rising costs and time considerations are persistent issues that have provoked criticism and resulted in parties considering alternative arbitration venues. Furthermore, the lack of diversity among arbitrators and the increasing competition from emerging centers such as Singapore, Hong Kong, and

⁷² Neame and Colaço (n 10, July 2020) <<https://www.hfw.com/downloads/002203-HFW-Maritime-Arbitration-in-Numbers-July-2020.pdf>> Date of Access 11th of August 2023

Turkey add further pressure. Despite these hurdles, London continues to be a leading venue for maritime arbitration. Its ability to adapt its procedures to address its shortcomings demonstrates the resilience and flexibility of London as an arbitration hub. For instance, the LMAA has introduced expedited procedures and small claims procedures to handle smaller claims cost-effectively, highlighting London's commitment to remain attractive to a wide range of disputants.

Looking to the future, London's position within maritime arbitration is set to evolve. Digitization, the rising importance of ESG issues, and the push for increased diversity are factors that will shape the future of maritime arbitration. These emerging trends present a unique set of opportunities and challenges. Yet, given London's track record and its demonstrated capacity to evolve, there is confidence that it can adeptly navigate these changes. The future will likely see London continue to leverage its strengths while also embracing change and addressing its shortcomings. This balance between tradition and innovation, consistency and adaptation, is what has cemented London's position in the past and what will likely ensure its continued prominence in the world of maritime arbitration.

In closing, this article provides an overview of the landscape of maritime arbitration in London, tracing its development, its current practices, and its prospective future. While the city faces significant challenges, its robustness, adaptability, and unparalleled expertise offer a strong foundation. As the global maritime industry continues to evolve, London, with its dynamic blend of tradition and innovation, remains well-equipped to retain its position as a leading center for maritime arbitration.

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