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METHODS OF LEGAL INTERPRETATION, LEGITIMACY OF JUDICIAL DISCRETION AND DECISION-MAKING IN THE FIELD OF THE POLITICAL: A THEORETICAL MODEL AND CASE STUDY[1]

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Abstract. This article examines, on the one hand, the relationship between methods of legal interpretation used by judges, and on the other hand, the legitimacy of judicial discretion and the impact of judicial decisions upon structural social antagonisms (known as 'the political'). The paper explores these matters by means of a case study, namely, the judicial activity of the European Court of Justice ('Court'). The article posits a direct correlation between the method of interpretation chosen by the court, and the legitimacy of its discretion as well as the level of decision-making with regard to the political. Accordingly, if the Court chooses a linguistic method of interpretation, adhering to the objective will of the treaty-makers and legislators, the legitimacy of a decision has more weight, and the extent of judicial decision-making in the field of the political is correspondingly lower. However, this is not possible due to the general features of legal language, and especially specific features of the language used in European case law since the judge is unable to decide cases solely on the basis of the language of legal texts. This creates a need for the judge to arrive at a decision, which must be legitimised on the basis of the axiological choices made, and interests protected. To this end, a tentative normative theory of interpretation for the Court is proposed.

Keywords: legal interpretation, legitimacy, the political, social antagonisms, substantive justice, ECJ

Introduction

This article examines the relationship between three distinct, yet interconnected, problems: the methods of legal interpretation used by judge; the legitimacy of judicial discretion; and the impact of judicial decisions upon structural social antagonisms (i.e. the political). The paper will analyse these questions by applying the research framework of the critical theory of adjudication (Mańko, 2018a) to the judicial activity of the European Court of Justice (hereinafter: 'the Court' or 'Court of Justice'), which is treated as a case study for the purposes of building a narrative of applied legal theory. I put forward the argument that a direct correlation exists between the method of interpretation chosen by the court, and the legitimacy of its discretion as well as the level of decision-making with regard to structural social antagonisms ('the political'). Thus, if a judge chooses a linguistic method of interpretation, strictly adhering to the objective will of the treaty-makers and legislators, the legitimacy of a decision has more weight, and the extent of judicial decision-making in the field of the political is correspondingly lower. However, due to the general features of legal language (Gizbert-Studnicki, 1986), and specific features of the language of European law and its multilingualism (Kalisz, 2007, 153-154; Doczekalska, 2009; Beck, 2012, 236; Łachacz & Mańko, 2013, 81-82; Jedlecka, 2019, 142), this is not possible. Hence, the judge is unable to decide cases exclusively on the basis of the language of legal texts, but must resort to other

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methods of reasoning which increase their discretionary power, eg reasoning from principles, from precedent, or methods based on purposive-teleological criteria. Judges therefore need to make decisions that must be legitimised on the basis of other, non-textual criteria, and ultimately take ideological preferences into account when deciding the conflicting interests posed by structurally antagonistic social groups (section 3). In order to boost the Court's legitimacy (section 2) the paper presents a normative theory of interpretation for the Court (section 4), which in a situation where the Court cannot simply defer choices to the legislator, will, nonetheless, allow it to take decisions that enjoy a stronger degree of legitimacy

Thus, the paper's main argument is that the Court should remain faithful at all times, and to the extent possible, to the linguistic criteria of interpretation. Notwithstanding, given the fact that they cannot possibly be considered sufficient (Szot, 2019, 179), the Court should adopt a conscious axiological choice of defending weaker parties, which may include consumers in disputes with businesses, workers involved in industrial disputes with their employers, tenants in conflict with their landlords, and minorities in their assertion of rights vis-à-vis the majority. In other words, the paper invites the Court to take a consciously *ethical position on adjudication* (Mańko, 2018a, ch. 4), and not shy away from promoting substantive justice, especially social justice (cf. Douzinas and Gearey, 2005, 172-176).

The paper is structured as follows. Section 1 presents a discussion of the available methods of legal interpretation, drawing especially on the MST typology developed by MacCormick, Summers and Taruffo (MacCormick and Summers, 1996). I then demonstrate that the Court generally uses all methods of legal interpretation, but with an emphasis on teleological and purposeful *topoi*. Section 2 introduces the notion of legitimacy of adjudication and builds a link between the methods of legal interpretation used, on one hand, and the legitimacy of adjudication, on the other hand. Section 3 explores the concept of the political in adjudication, which can be understood as the relationship between the judicial decisions, and structural social antagonisms. I show that the choice of a method of interpretation influences the *level* at which decisions affecting antagonisms are made. The findings are detailed in Section 4. Finally, Section 5 addresses possibilities to boost legitimacy of the Court's case-law in connection with the findings in Sections 2 and 4, by proposing a normative theory of interpretation to guide the Court's decision making on social antagonisms, as identified in Section 3.

In terms of the methodology used, this paper is an exercise in *applied legal theory*. It assumes the theoretical foundations of critical legal theory, and especially the critical philosophy of adjudication (Mańko, 2018a), and applies them to the Court of Justice. As a result of the critical analysis of the Court's practice (sections 2-3), a normative theory of interpretation is developed (section 4) which is a response to the existing challenges and deficiencies.

1. Methods of Legal Interpretation and their Use by the Court

The concept of methods of legal interpretation refers to the ways in which the court approaches written legal materials (such as legislation or precedent) and also, but more generally, in which it builds its legal argumentation (also referring to concepts which cannot be described as 'legal materials', such as general legal principles (Tridimas, 2006; Hesselink, 2013) or canons of legal reasoning such as e.g. the maxim *exceptiones non sunt extendendae* (Mańko, 2016, 502; Case C–96/14 para. 31). Hence, the question of methods of legal interpretations is concerned, essentially, with the *type of arguments* used by a court. These arguments may be text-oriented (textual), i.e. take as their starting point some legal text (a treaty, a legislative act, a precedent), or non-textual, i.e. referring to some other concepts, such as interests, principles, or effects. Many non-textual arguments can be described as 'pragmatic' ones, especially if they focus on the economic or social effects of adopting one or another interpretive option.[3] One of the most well-known and recognised typologies of legal

[3] They could even be described as 'extra-legal' arguments (e.g. Mańko, 2015), emphasising that they do not refer to the *lex scripta*, although the fact that they are used in legal interpretation which, as such, is subject to certain rules of discourse, which some legal

arguments is the MST typology developed by MacCormic, Summers and Taruffo (Beck, 2012, 130). The MST typology divides arguments into 11 types, which are grouped into three groups – linguistic, systematic and teleological/evaluative, whilst one type – reasoning from the lawmaker's intent – is considered transversal (Beck, 2012, 130-133). The full list of types is as follows (ibid.):

A. *Linguistic arguments*: (A.1) arguments from standard ordinary meaning; and (A.2) from standard technical meaning;
B. *Systematic arguments*: (B.1) contextual-harmonisation arguments; (B.2) arguments from precedent; (B.3) *analogia legis*; (B.4) logical-conceptual arguments; (B.5) arguments from legal principles; (B.6) historical arguments;
C. *Teleological/evaluative arguments*; (C.1) teleological (purpose-oriented) arguments; (C.2) consequentialist arguments based on moral, political, economic or other social reasons;
D. *Arguments from legislative intent*.

The MST typology can be considered exhaustive in the sense that any legal argument used by a court can be attributed to one of the categories provided for.

The Court of Justice is well known for its preference for extra-textual legal arguments over legalistic (formalist) ones (Marcisz, 2015, 115; Mańko, 2015, 7). As a rule, in the Court's case-law linguistic arguments give way to systemic and teleological ones (Schilling, 2010, 60; Kalisz, 2014, 210), and legal arguments generally give way to policy considerations (Stawecki, 2005, 108; Arnull, 2006, 612; Paunio, 2007, 392; Paunio & Lindroos-Hovinheimo, 2010, 399; Łachacz & Mańko, 2013, 82-83).

Linguistic interpretation, even if overshadowed by teleological arguments, remains important for the Court of Justice (Beck, 2012, 188). As an example, one can refer to its judgment of 23 March 2000 (ECJ 2000b) in which it used a linguistic interpretation of the concept of 'evidence' in the Community Customs Code and its implementing provisions, using the 'wording' of the rule in question as the main argument (ECJ 2000b, paras. 28-31). Such cases are by no means isolated (Beck 2012, 188) and any interpretation of EU law must start from the linguistic layer (Szot, 2019, 178). In this context it should also be underlined that the Court of Justice uses a specific type of linguistic interpretation which, in effect, has a strongly creative element to it, namely the interpretative *topos* of 'autonomous interpretation' of EU legal concepts (see ECJ 2000a; Jedlecka, 2019, 151-152; Szot, 2019, 179). In this way the Court actually adds a third sub-type of linguistic arguments (A.3 – argument from autonomous Union meaning).

The Court readily uses systemic methods of interpretation, especially arguments from its own precedent (method B.3) and arguments from general principles of EU law (method B.5).[4] However, more classical arguments, such as those based on the preamble are also used (Beck, 2012, 191; see e.g. ECJ 2002). Concerning precedent (method B.3), one must keep in mind that until now one can speak only of *de facto* precedent, as there is no official doctrine of *stare decisis* at the Court (McAuliffe, 2013, 483). However, it must be emphasised that the Court has 'worked assiduously to develop what is now a robust and taken-for-granted set of practices associated with precedent' (Stone Sweet, 2004, 97-98), and it cannot be denied that in the EU legal order 'case law (in theory not formally binding) is often the most important source of law' (Schermers & Waelbroeck, 2001, 133). However, in the absence of a doctrine of binding precedent there are no precise criteria applied by the Court with regard to the conditions for departing from its own precedent, which sometimes even occurs tacitly (Komarek, 2009, 400-401). As I have already implied, a special place in the Court's reasoning belongs to teleological

theorists, like Artur Kozak, consider to be the *ius proper* (Kozak, 2010, 132; cf. Mańko, 2020a, 370-372) are a strong argument against treating them as 'extra-juridical', thereby underlining that they belong to the ius in the broad sense of the word.

[4] The ECJ uses at least 11 different general principles of EU law, including the principles of: (1) equal treatment and non-discrimination; (2) proportionality; (3) uniform application of EU law; (4) effectiveness; (5) legal certainty; (6) loyal cooperation; (7) respect for fundamental rights; (8) supremacy of EU law; (9) vertical direct effect; (10) harmonious interpretation/indirect horizontal effect; (11) restrictive interpretation of exceptions, exemptions and derogations (Beck 2012, 195).

methods of interpretation, including both functional and consequentialist criteria (Beck, 2012, 207-215). This allows us to conclude that 'purposive-functional interpretation, treated as a whole, is considered as the most characteristic method of interpretation' of EU law (Kalisz, 2007, 170).

2. Methods of Interpretation and Legitimacy of Adjudication

The concept of legitimacy must be differentiated from that of legality (Schmitt, 2004). Legitimacy as a concept is broader than legality, although the latter can be one of the factors building legitimacy (ibid., 6, 9). However, given the indeterminacy of judicial decisions and the fact that traditional models of legal interpretation, putting an emphasis on subsumption and automatism are no longer acceptable, the legitimacy of adjudication cannot be based exclusively on strict adherence to the letter of the law, especially if the letter of the law is deliberately open-textured or if the situation at hand was not foreseen by the law-maker (Peretiatkowicz, 1938, 98-100; Gizbert-Studnicki, 1986, 107-108). Moreover, even if legal texts have been carefully drafted and the situation is *prima facie* typical, it is not possible to eliminate completely a certain component of judicial discretionary power because 'a legal text cannot be directly applied to decisions of the law-enforcement bodies', which gives rise to 'the necessity to make choices, and consequently to take decisions' (Bekrycht, 2015, 190). In effect, a judicial decision, especially of a body such as the Court of Justice is, in so-called 'hard cases' at the very least, a 'sovereign decision […] which is not deducible from a pre-existing norm or from a higher authority: it establishes the law *ex nihilo*, becoming in this sense absolute' (Fusco, 2017, 134).
The legitimacy of adjudication can be built on a number of grounds. Firstly, as regards *institutional grounds*, such legitimacy can be built on the democratic mandate of the adjudicator, be it direct or indirect (Mańko, 2018a, 243-247). In the case of national courts such mandate can be stronger, especially if it comes directly from citizens (direct election of local judges) or from the parliament (direct election of constitutional court judges, appointment of judges by parliamentary committee), or weaker if it is based on a decision of a body which is itself indirectly legitimised, e.g. a minister of justice. As regards the Court of Justice, it is appointed by a special committee and then by a national government (Dumbrovsky et al, 2014).

If institutional grounds are unavailable or weak, legitimacy of a court can be built by deference to the choices made by the democratic legislator which entails the model of judicial restraint (Posner, 1983). However, even where such a stance is adopted, the judge will inevitably encounter this situation when textual and intentionalist arguments cannot provide an answer (Posner, 1983, 24). This prevails, particularly in cases entailing serious doubts as to legal interpretation; not that the great majority of cases before the Court of Justice belong to this category, so that deference to those choices may be very difficult to implement, even if the judge acts in a *bona fide* capacity. We should keep in mind that from the outset multilingual EU law has been drafted in a vague manner, expressing principles and objectives, rather than prescribing in detail concrete modes of action (Arnull, 2006, 612; Mańko & Łachacz, 2013, 81). It is also an established fact that legislative drafting is not only collective, but necessarily involves hundreds of actors from different institutions, from different cultural backgrounds, and showing more concern for reaching a compromise on the text rather than striving for clarity and precision (Kalisz, 2007, 152-153; Guggeis & Robinson, 2012, 51–81, 61–62). Judicial restraint faces additional challenges due to the 'inevitable discrepancies between the various language versions, their deliberate vagueness and the impossibility of identifying a psychological "legislator's" intent [that] obviously create challenges for traditional theories of legal interpretation' (Mańko & Łachacz, 2013, 81), especially those typical of judicial restraint. In fact, the Court of Justice has not shown any greater interest in the actual intent of the law-maker as an argument of legal interpretation (Szot, 2019, 181). Accordingly, consistent with the postulates of the critical philosophy of adjudication, it becomes necessary to shift our focus from fidelity to the legislator towards fidelity to justice (Mańko, 2018a, 249-250; cf. Douzinas and Gearey, 2005, 172-176), i.e. to *output legitimacy* (Milej, 2014, 239) otherwise known as the pragmatic aspect of legitimacy (Mańko 2018a, 249). My understanding is that the latter means taking the side of weaker (oppressed, dominated) parties within the structural social antagonisms, which the Court decides upon (see sections 3 and 4 below).

To these one should also add *procedural grounds* (pragmatic aspect of legitimacy – Mańko, 2018a, 247-249), such as the involvement of *amici curiae* in the proceedings, or the involvement of social judges (Juchacz, 2016) in the very process of adjudication. As Piotr Juchacz underlines, the participation of social (lay) judges in adjudication is an important factor strengthening the legitimacy of the judicial power (Juchacz, 2016, 162).

3. Methods of Interpretation and the Political

The concept of 'the political' (German: *das Politische*, French: *le politique*, Polish: *polityczność*) is used here following Chantal Mouffe (2000; 2005; 2013) to denote structural social antagonisms. As such, the political is contrasted, on the one hand, to politics (German: *die Politik*, French: *la politique*, Polish: *polityka*), i.e. the sphere of social practices connected to the exercise of state power and struggle for it, and on the other hand, to policies (German: *die Politike*, French: *les politiques*, Polish: *polityki*), understood as spheres or areas in which state power operates, such as economic policy, agricultural policy, social policy, defence policy, and the like (Sulikowski, Mańko & Łakomy, 2018, 5-6). Mouffe's agonistic theory of democracy is a vehement gesture of rejection of the post-political model of democracy in which conflict is replaced by the alleged possibility of rationally reaching consensus (Monteiro Crespo de Almeida, 2020, 466; cf. McNay, 2014, 67) as, in particular, *per* Rawls and Habermas (Menga, 2017, 540). In highlighting conflict rather than consensus, Mouffe nonetheless underlines the need to keep the former at bay by subjecting it to a set of rules – embedded in adequate institutional arrangements – preventing the dissolution of democracy itself (Mouffe, 2013, ch. 1 and 9; cf. Monteiro Crespo de Almeida, 2020, 467). Indeed, in line with Mouffe's theory, the *agon* can and should be kept within the borders of one political community (Mouffe, 2005, 14), rather than locating it 'outside the body politic' (de Ville 2017, 184), as may be the case with antagonistic visions of the polity. For this to be possible enemies are transformed into adversaries, sovereignty becomes overshadowed by proceduralism, and the singularity of the event gives way to the cyclical nature of democratic processes (Smoleński, 2012, 67, 74-75, 78). This aspect of Mouffe's thought allows to 'tame' (Mouffe, 2000, 107) and 'sublimate' (Mouffe, 2013, 9) the political, transforming the antagonism into an agonism, the latter being 'compatible with pluralist democracy' (Mouffe, 2005, 19). Agonistic adversaries, unlike antagonistic enemies, 'see themselves as belonging to the same political association, as sharing a common symbolic space within which the conflict takes place' (*Ibid*, 20).

According to traditional paradigms of interpretation the sphere of adjudication – the operative interpretation and judicial application of law – is insulated from the political, politics and policies, operating in the legal sphere as distinct from the political one. However, the critical philosophy of adjudication emphasises the structural links between adjudication and the political sphere (Łakomy, 2019, 55), especially with regards to the first aspect – the political understood as structural social antagonisms, opposing social groups or 'subjectivities' (Mańko, 2020, 7), such as employees vs. employers, consumers vs. traders, conservatives vs. liberals, ethnic majorities vs. ethnic minorities, and the like. Indeed, judges as legal interpreters do not exist in a void but rather they all 'occupy a determined place in the structure of social conflicts which constitute the political' (Łakomy, 2018, 26). It can therefore be said that: 'Broader social antagonisms finding their place in specific court proceedings undertake the form of debates on the "proper" interpretation of legal texts that are to shape the basis for the decision in the proceedings' (Łakomy, 2019, 51).

The link between the political (structural social antagonisms) and adjudication follows from the fact that the individual disputes decided by judges very often (perhaps almost always) affect such antagonisms and therefore, *nolens volens*, they encroach on the sphere of the political (Mańko, 2018b; cf. Sulikowski & Wojtanowski, 2019, 188-190). This occurs in two ways. Firstly, the decision of a judge affects the interests of individual parties (citizens, organisations) who belong to the groups (subjectivities) which are in a state of structural antagonism. For example, if a judge is deciding a civil-law dispute between a consumer and a bank (e.g. ECJ 2013a; ECJ 2019), the consumer (e.g. Mr Aziz in ECJ 2013a, or Mr and Mrs Dziubak in ECJ 2019) is in a position of structural antagonism with the other side of the litigation – the bank (e.g. Catalunyacaixa in ECJ 2013a or Raiffeisen in ECJ 2019). Of course, Mr Aziz and the lawyers for Catalunyacaixa are acting before the court to

defend their *individual* interests, but nonetheless it can be said that their judicial 'battle' is part of an on-going legal 'positional war' between banks and consumers more generally. Secondly and more importantly, if such a dispute is decided by a higher court (e.g. court of appeal or supreme court) or a supranational court whose case-law enjoys authority of *de facto* precedent (e.g. Court of Justice), the decision in an individual dispute (such as ECJ2019) affects not only the interests of Mr and Mrs Dziubak, on one hand, and Raiffeisen Bank, on the other hand, but *all consumers* and *all banks* which are in a similar position (*in casu* – have concluded a loan contract denominated in Swiss francs).

It follows from the above that the court, especially enjoying such great juridical authority as the Court of Justice, cannot look at its activity only as interpreting the objective law and protecting subjective rights, but must perceive itself as an *arbitrator in the field of the political*, because its decisions directly affect existing structural social antagonisms, such as those between labour and capital, consumers and banks, conservatives and liberals, or majorities and minorities. This brings us to the question of the extent to which the Court of Justice *qua* arbitrator of social antagonisms, acts on its own authority, or only gives effect to decisions taken elsewhere (*scil.* by the legislators). In that regard it can be argued that if the Court remains fully faithful to the letter of the law, understood as far as possible according to its original intent (i.e. applying methods A.1, A.2 and D, described in section 1 above), it is rather deferring the decision on the antagonism onto the legislator, and limiting itself – to the extent possible – to only applying those decisions in individual cases. In contrast, if the court engages into more open-ended methods of legal interpretation, such as arguments from legal principles (method B.5), purpose oriented-arguments (method C.1) or consequentialist arguments based on social interests (method C.2), it immediately enters into an area of greater discretional power. This is especially true of balancing as a method of reasoning (Kennedy, 2015; Kotowski, 2017, 47). If the court is asked to balance conflicting interests, or conflicting legal principles, or conflicting fundamental rights, the outcome cannot be predicted, but depends on the Court's decision. Finally, as concerns systemic arguments from precedent (method B.2), especially if they are based on the Court's *own* precedent, and are not based on a rigorous *stare decisis* doctrine (with its focus on *ratio decidendi* and analogy of facts) – which is not the case at the Court (Beck, 2012, 242-250) – also give it a great deal of discretionary power.

4. Towards a Normative Theory of Interpretation

The critical philosophy of adjudication, which is the theoretical basis of this paper, has both a descriptive and a normative element. The descriptive element consists in the analysis of the limits of judicial discretion (Mańko, 2018a, 95-146) and the involvement of the judge within the political (structural social antagonisms), conceptualised in the form of a 'juridico-political decision' (Mańko, 2018b). The normative element consists in the ethical aspects of adjudication (Kennedy, 1997; Mańko, 2018a, 171-220) and a theory of legitimacy of judicial decisions (Mańko, 2018a, 237-253). The critical philosophy of adjudication is a general theory which by design can be applied to any kind of court or tribunal (Mańko, 2018, 93). However, the specificity of the Court of Justice as a supranational court must be taken into account when formulating such a theory. The need for such a theory can be justified by pointing to the fact that a widely acceptable normative theory of interpretation for the Court would be an essential element strengthening the legitimacy of the court's decisions, especially in 'hard cases' i.e. those, where it takes politico-juridical decisions.

The contours of such a method of interpretation could be as follows. Firstly, in the interpretation of the Treaties, the Court should follow the principles enshrined in the Vienna Convention on the Law of Treaties, which in its Article 31(1) requires that treaties be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' In line with Article 32 of the Vienna Convention, which provides for supplementary means of interpretation: 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.' The provisions of Articles 31-32 of the Vienna

Convention reflect pre-existing customary international law (Dörr, 2012, 523) and universal custom (ibid., 254), and therefore enjoy a high degree of authoritativeness. They apply to all kinds of treaties, including those constituent of international organisations, where the 'object and purpose' is, of course, focused on the effective functioning of the organisation (ibid., 537).

The Vienna Convention therefore supports the classical triade of interpretive methods: linguistic ('terms'), systemic ('context') and teleological ('object and purpose'). Supplementary means (Article 32) may be used either in a confirmatory fashion, or to specify the meaning (if it s 'ambiguous or obscure') or finally to overcome an interpretive result which is unacceptable as being 'manifestly absurd or unreasonable'. The Vienna Convention clearly adopts 'the textual approach, ie (…) the view that the text must be presumed to be the authentic expression of the intentions of the parties. Consequently, the starting point of every interpretation is the elucidation of the meaning of the text, rather than of any external will of the parties' (Dörr, 2012, 541). However, concerning the mutual interrelationship between linguistic, systemic and teleological interpretation, there is no 'hierarchical or chronological order in which those principles are to be applied' (ibid.,), but rather they should be applied as 'a single combined operation taking account of all named elements simultaneously' (ibid.). The component of teleological interpretation in the case of treaties establishing international organisations presupposes the element of effectiveness which justifies attributing implied powers to the bodies of the organisation (ibid., 547). Nonetheless, '[t]he consideration of object and purpose finds its limits in the ordinary meaning of the text of the treaty' (ibid.) In contrast to the interpretation of domestic legislation (cf. Tobor 2013) or private-law contracts (see e.g. Article 65 § 2 of the Polish Civil Code), the common will of the parties is less important than its objective expression in the text of the treaty, read in its context and with regard to its *telos*. However, if that text remains ambiguous, the Court is entitled to make appropriate use of *travaux préparatoires*.

The normative principles of interpretation for secondary legislation (directives, regulations) differ in that they are not international treaties, and their interpretation is not necessarily guided by the Vienna Convention. Rather, the principles of legislative interpretation, developed in European legal culture, should prevail. Here, the intent of the legislator (Tobor 2013) comes to the fore as an important element to be taken into account but which has been, hitherto, by and large absent (Szot, 2019, 181).

Given the need for legal security, a formal doctrine of precedent as part and parcel of a normative theory of interpretation would certainly contribute to the legitimacy of the Court's case law. Specifically, such a theory should provide for clear-cut criteria as to the binding force of the Court's judgments rendered in different compositions (full court, grand chamber, five-judge panel, three-judge panel), and in different types of proceedings (preliminary references, action for failure to fulfil Union obligations, opinions). The model of the Polish Supreme Court could be followed, where a decision of the Court sitting in a seven-judge panel is binding on the Court itself only if expressly provided for, and a resolution of a chamber, joined chambers or the full court is *ex officio* binding (Supreme Court Act 2017, Art. 87). A resolution adopted by a seven-judge panel can be overruled by a chamber; a resolution adopted by a chamber – by that chamber or by joined chambers; by joined chambers – by the same joined chambers or by the entire Court; by the entire Court – only by itself (Supreme Court Act 2017, Art. 88).[5] Applying this *mutatis mutandis* to the Court of Justice, one could provide that if a panel of the Court considers that its decision should become binding precedent, it may adopt an explicit resolution to that effect. A resolution by a three-judge panel could be overruled by the resolution of a five-judge panel (in a subsequent case), a resolution of a five-judge panel – by a resolution of a 15-judge panel ('grand chamber'), and a resolution of the grand chamber – by the full court. This would certainly clarify which specific interpretations of law, adopted by the Court of Justice, are actually binding, from what moment, and until when,

[5] The principle according to which the Supreme Court cannot overrule its own precedent is to be avoided, as it is inherently inflexible. It was in force in the UK with regard to the House of Lords between 1898 and 1966, having been introduced the judgment of *London Tramways Co. v London County Council* [1898] AC 375, and abolished by Lorda Gardiner's Practice Statement of 26 July 1966 (Practice Statement [1966] 3 All ER 77).

greatly improving legal certainty. Given the position and role of the Court, its resolutions should be binding also on national courts.

The methods of interpretation and binding force of precedent would constitute the *formal* side of the normative theory of interpretation. However, the critical philosophy of adjudication places great emphasis on the scope of actual judicial discretion which escapes any formal formulae and exists even when the court performs linguistic or systemic interpretation, not to mention teleological reasoning (Mańko, 2018a, 113-114). Indeed, 'whenever a legal interpreter undertakes the activity of "reading the law," they inevitably enter into the space of the political, and each and every intellectual move they make is (…) inherently political' (Łakomy, 2019b, 136). As Duncan Kennedy underlines, the question of limits of judicial discretional power is not absolute, but rather one of the extent of interpretive work that needs to be performed by a judge to achieve a result which diverges from the *prima facie* result following from a cursory reading of legal texts and precedents (Kennedy, 1997, 160, 162, 166, 181; Kennedy 2008, 158, 160-162, 168). The key question that arises is the ideology[6] (or 'axiology') adopted by the Court, i.e. the decision whose interests should be given preference: those of consumers or those of traders, those of employers or those of employees, those of business or those of environment protection, to name but a few antagonisms which the Court decides upon (Mańko, 2020b, 10-13). Here, in the emancipatory spirit of critical legal theory (Skuczyński, 2014, 133-134; Sulikowski, 2015, 19, 23; Mańko, 2018a, 136), the *substantive guiding principle* for the Court should be the protection of so-called weaker parties (workers, consumers, tenants, members of minorities) and vulnerable common interests (environment, animal welfare, cultural diversity). Adopting such an openly axiological (value-driven) stance, in line with the postulates of critical philosophy of adjudication, would contribute to the substantive legitimacy of the Court's case law and to a progressive social transformation. Until now, the Court has indeed followed the proposed axiology in consumer cases (e.g. ECJ 2013a, ECJ 2019) and in environmental cases (e.g. ECJ 2018), but this has not been the case with regard to collective workers' rights (e.g. ECJ 2007; ECJ 2013b) nor with regard to social housing (Braga and Palvarini, 2013, 40; see e.g. ECJ 2013c; GC 2018), treating the free movement of capital more important than a broad housing policy (Korthals Altes, 2015, 209). The normative theory of interpretation, put forward here, would require the Court to take the side of weaker parties whenever, following the ordinary methods of interpretation, the Court is faced with a dilemma as to the proper legal interpretation. Such a decision should be preceded by an analysis of the structural conflicts that are at stake in a given case (Mańko, 2020b).

Conclusions

This paper demonstrates the strict connection between the methods of interpretation adopted by the Court, on the one hand, and the legitimacy of its decisions regarding structural social antagonisms, on the other hand. Assuming that all adjudication takes place within the field of the political, defined along the lines of Chantal Mouffe, as a response to the challenges revealed, the paper puts forward a normative theory of interpretation for the Court. Its application presupposes the identification of the nature of conflicts which are the object of adjudication, and siding with weaker parties in an effort to promote social justice as a vehicle of legitimacy. If implemented this method would not only lead to an increase of the Court's legitimacy, pending the implementation of more democratic methods of judicial appointments, but also lead to ethically superior outcomes in cases decided by the Court. As it has been underlined, although the Court has a significant track-record in protecting some weaker parties (consumers), this cannot be said about workers and tenants. Applying the substantive part of the normative methodology of interpretation put forward in this paper would lead to an improvement in this respect, making the Court of *Justice* truly worthy of this name, understood not merely as technical and formal '*Justiz*' but also, and above all, as substantive '*Gerechtigkeit*.'[7] Obviously, the limits to the

[6] Understood here as a 'universalization project of an ideological intelligentsia that sees itself as acting "for" a group with interests in conflict with those of other groups' (Kennedy 1997, 39).

[7] The English term 'justice' corresponds to two terms in German – *Justiz* in the sense of judiciary (administration of justice) and *Gerechtigkeit* in the sense of substantive justice (Hesselink, 2007, 338).

task of promoting social justice lies in the scope of jurisdiction of the Court which is, for instance, much more likely to decide on consumer cases rather than within the area of labour law.

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RESERVATIONS TO UN HUMAN RIGHTS TREATIES: SOVEREIGN STATES SEEKING TO AVOID THEIR OBLIGATIONS?

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Abstract. This article explores specific reservations that are being declared to international treaties intended to protect human rights, and also whether the 1969 Vienna Convention on the Law of Treaties is sufficient to ensure such rights. The author considers if reservations declared by a state(s) are incompatible with the object and purpose of a treaty, and what consequences might follow if such a declaration(s) is made. To this end, the article investigates the practice of states that are party to the International Covenant on Civil and Political Rights, International Covenant on Social and Economic Rights, United Nations Convention on the Rights of Persons with Disabilities, and the United Nations Convention against torture and other Cruel, Inhuman or Degrading Treatment. These treaties were selected because they lay down significant principles for the protection of specific human rights, and also because they are frequently challenged through reservations which seek to alter fundamental provisions. On a theoretical level the regulation of reservations does not appear to be problematic, however on closer examination various reservations point to the inadequacy of current regulation in the 1969 Vienna Convention in terms of the protection of human rights. Accordingly, this article considers a major group of states that seek to become parties to treaties pertaining to human rights, but then make reservations with the intention of diluting fundamental provisions. Specifically, this applies to Islamic countries whose reservations claim incompatibility with Islamic law and by reference to their own cultural diversity. By objecting to the reservations, state parties must decide whether or not their reservation is compatible with the object and purpose of the treaty. According to provisions of the 1969 Vienna Convention on the Law of Treaties, a treaty may prohibit reservations for some or all of the treaty's provisions, which complicates the position of state parties. Indeed, the withdrawal of reservations can be considered more problematic after analysis of practical cases of various states than it is shown in theory. The author's analysis is intended to ascertain whether or not the 1969 Vienna Convention on the Law of the Treaties régime is suitable for the process of making reservations to the human rights treaties, and how the applicable regulation could be improved and thereby offer possible solutions to the problems outlined above.

Keywords: human rights, reservations, harmful practice, object and purpose of the treaty, Vienna Convention on the Law of Treaties, International Covenant on Civil and Political Rights, International Covenant on Social and Economic Rights, United Nations Convention on the Rights of Persons with Disabilities, United Nations Convention against torture and other Cruel, Inhuman or Degrading Treatment

Introduction

For several decades, reservations to human rights treaties have sparked intense discussions, often reflecting conflicting views both in the doctrine and practice of international law. The 1969 Vienna Convention on the Law of the Treaties (hereinafter – VCLT)[2] defines a "reservation" as a unilateral statement made by a State when signing (however phrased or named) as ratifying, formally confirming, accepting, and approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

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[2] The Vienna Convention on the Law of Treaties was adopted on 23 May 1969, entered into force on 27 January 1980.

Just how important reservations are can be seen with the commencement in 1994 by the International Law Commission of The United Nations of its work on "the law and practice relating to reservations to treaties". Yet, it was only in 2011 during its sixty-third session that the Commission adopted detailed guidelines, "Guide to practice on Reservations to Treaties". While this document offers advice and guidance on the issue of reservations, it has failed to solve the treaty issues surrounding human rights with regard to reservations.

When the treaty itself expressly prohibits a reservation, there can be no space for subsequent consideration of reservation. However, the absence of a prohibition on reservations in the treaty does not necessarily mean that all reservations in general are permitted. States can only make reservation in the absence of express prohibition or permission if they perform a test that the reservations are compatible with the object and purpose of the treaty. Therefore, it is important to consider the reactions of other States that are parties to that treaty, i.e. make objections to the reservations.

Any discussion of reservations must take into consideration the legal powers of various bodies that comprise the United Nations, including significant documents such as the relevant reports, observations and announcements that assist in the interpretation of treaty provisions. With this in mind, the author will analyze the practice of international courts, monitoring bodies, as well as the works of the most significant researches in international law such as A. Pellet, M. N. Shaw and others.

One concern is whether state objections determine the invalidity of the reservation, or whether or not a reservation can be invalidated independently of state objection. Sh. Dey asserts: "it is difficult to reconcile with the progressive development of human rights if the consequences of the invalid reservation oust the reserving state from the scope of the treaty, or denounce the applicability of 'the provisions to which the reservation relates' between the objecting and reserving state" (Dey, 2018, 2). Hence, the article considers what practical issues remain important while implementing human rights instruments at the national level in the light of reservations made to treaties.

It is instructive to note that following international UN treaties are subject to the highest number of reservations: Convention on the Elimination of All Forms of Discrimination against Women (hereinafter – CEDAW); International Covenant on Civil and Political Rights (hereinafter -ICCPR); International Covenant on Social and Economic Rights (hereinafter - ICSER); United Nations Convention on the Rights of the Child (hereinafter -CRC); United Nations Convention on the Rights of Persons with Disabilities (hereinafter – CRPD); United Nations Convention against torture and other Cruel, Inhuman or Degrading Treatment (hereinafter – CAT); as well as the regional human rights instrument, the European Convention of Human Rights and Fundamental Freedoms (hereinafter ECHR). For the purposes of this article, the focus will be on specific reservations made to the following UN treaties: ICCPR; ICSER; CRPD; and CAT.

In summary, this article analyzes the VCLT régime related to reservations, and also distinguished what reservations might be incompatible with object and purpose of the specific treaties. "The long-standing universality versus integrity debate is facilitated by the VCLT reservations rules, rules that are frequently described along the lines of complex, ambiguous, and often counterintuitive. Applying these general reservations rules to human rights treaties that are challenged for many of the same reasons creates a system of ambiguity and confusion about the obligations owed by states. This perpetuates the failure of many State Parties to actually implement human rights obligations. As the cornerstone of international law, treaties demand clear legal rules yet, in practice, it is obvious that states relish the imprecise nature of the reservations rules, particularly in relation to human rights treaties" (McCall-Smith, 2014, 263). The article describes the various practices of states manifested in reservations. Finally, the paper seeks to identify how human rights treaties might be protected from invalid reservations that diminish the importance and integrity of landmark international treaties on human rights.

The methodology used in the analysis was comparative conduct, i.e. a comparison of international legal documents and regulations of the 1969 Vienna convention in the field of reservations. The historical methodology examined the genesis and evolution of the main rights and freedoms implicit in UN conventions. The legal methodology

employed was a study of the differences in definitions of "objects" and "purpose" of the treaty, the notion of reservations and the specification of human rights treaties (whether or not those treaties fall under 1969 Vienna convention's régime).

1. General Issues of Reservations Régime

"The power of making reservations to international treaties grows out of the principle of "sovereignty of states", so states can claim that they will not be bound with some particular provisions of an international treaty which they do not give their consent" (Yamali, 2004, 4). Consider also, "the international treaties, in particular the multilateral ones, are the results of a crucial need to regulate the relations between states and to provide stability and a control on the relations. In this context it can be said that treaties may lose their effectiveness if states are unwilling to enforce them, in other words if they make reservations to exclude or to modify the legal effect of certain provisions of the treaty" (Shaw, 2008, 915).

Article 27 of VCLT provides that a state may not invoke the provisions of its internal law as justification for its failure to perform its obligations under an articular treaty. "While the possibility of formulating reservations may be considered as an exception to this rule, since reservations are made because of the non-conformity of domestic law with international law, the 'right' to formulate reservations can never go so far as to give priority to domestic law in general, since this would not constitute implementation of the treaty in good faith" (Kamminga, Sheinin, 2009, 165). Even though the States should follow this requirement while formulating particular reservations, analysis of reservations to human rights treaties suggests that some states try to obey such regulation, justifying their reservations to the treaty provisions by claiming that they are incompatible with national legislation, customs and religious norms.

Taking a narrow view, "the International Court of Justice (hereinafter – ICJ) for the first time formed practice and had the opportunity to explain its approach to the effects of reservations to a multilateral human rights treaty in its 1951 advisory opinion on Reservations to the Genocide Convention. The Reservations to the Genocide Convention Advisory Opinion established new foundations in the practice of reservations to all multilateral treaties that protects human rights, as well. It may be said that until then the general practice of States concerning reservations was based on the so-called "unanimity rule" or the "League of Nations" rule." (Augustauskaitė, 2017, 105). According to Fitzmaurice, "under this principle, all parties to the treaty had to consent to all reservations. This was a very inflexible rule, which although securing the integrity of the treaty, did not attract wider participation" (Fitzmaurice, 2006, 134). Probably that is why this rule was not adopted in 1969 Vienna Convention. However, in the authors' view, this specific rule might be efficient in human rights treaties.

Of particular interest is the fact that the Genocide Convention did not have a rule on reservations when it was adopted in 1948, which may have encouraged certain to States to append various reservations to the Convention. The Court also explained that "the contractual rule of absolute integrity is not relevant in relation to the Genocide Convention, and that there is no absolute rule of international law that only permits a reservation upon the acceptance by all the parties, as evidenced by the practice of such organizations as the Organization of American States. However, it must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention; should this desire be absent, it is quite clear that the Convention itself be impaired both in its principle and in its application" (Fitzmaurice, 2006, 137). It is obvious that in this case, the ICJ established a new foundation in the practice of reservations to all multilateral treaties that protect human rights by explaining the mostly accepted view regarding the determination of validity of specific reservations.

In 2006, the ICJ delivered its judgment on jurisdiction and admissibility in the case concerning armed activities in the territory of the Congo opposing the Democratic Republic of the Congo (DRC) to Rwanda (ICJ Report, 2006, 6). In this case, the DRC sought to invoke the jurisdiction of the ICJ on the basis of (among other treaty provisions) Article 22 of Convention on the Elimination of All Forms of Racial Discrimination (CERD) (ICJ Report, 2006,

9), while Rwanda argued that the ICJ had no jurisdiction as it was precluded by its reservation to Article 22 (ICJ Report, 2006, 10). Furthermore, "the ICJ found that they had no jurisdiction in the case, as two-thirds of the state parties had not objected to the reservation. Again, the ICJ also found that they did not have jurisdiction under the Genocide Convention as Rwanda had a reservation precluding the ICJ's jurisdiction. The ICJ found that this reservation was not incompatible with the object and purpose of the treaty. In a joint separate opinion, Judges Higgins, Elaraby, Kooijmans, Owada, and Simma observed that since the 1951 opinion there have been many developments in international law that could not be taken into consideration, including the creation of human rights treaties, which have monitoring bodies—something seemingly unique to the human rights treaties" (Yamali, 2004, 33). The Court declared another important information: "We take the view that it is rather a development to cover what the Court was never asked at the time, and to address new issues that have arisen subsequently" (Subsidiary opinion, ICJ, 2006, 69). According to analysis in international law, "the ICJ asserts that there is no schism in international law. By asserting the unique characteristics of human rights treaties and the unity and coherence of international law, the ICJ attempts to placate both the traditionalists in international law and those looking for new interpretations for the purpose of furthering social justice" (Yamali, 2004, 34). The author upholds this provided position that human rights treaties are special instruments for human rights protection. Therefore, there cannot be united rule for all the mechanism of reservations to international treaties.

Following the practice of ICJ, monitoring bodies, controversy and disputes over reservations continues. "Instead of settling the issue, there has been a proliferation of working groups, reports and academic articles working out the "problem" of reservations since the ICJ issued their opinion, despite the appointment of the Special Rapporteur, Alain Pellet, and draft reports issued by the ILC" (Monforte, 2017, 2).

Even though the ICJ developed practice on a case-by-case basis, and highlighted the main features of the reservations, questions of validity of reservations and what are the legal consequences of invalid reservations (especially those made to the human right treaties) remain unanswered. Furthermore, the bilateral treaties do not include the case of reservations since "an agreement between two parties cannot exist where one party refuses to accept some of the provisions of the treaty" (Shaw, 2008, 915).

Any analysis of problems of reservations made to the multilateral treaties must take into account the régime of the VCLT. According to the norms of this document, there are three main elements of reservation. "Firstly, the reservation has to be unilateral act. Secondly, the state can be made only when entering the treaty. It cannot be made sometime after the treaty is entered and valid for the parties. A reservation must be formally confirmed by the State at the time of expressing its consent to be bound by a given treaty (Article 23 (2)), when ratifying, accepting or approving it" (Korkelia, 2000, 443). Thirdly, the purpose of the reservation is to modify or to exclude the legal effect of certain provisions.

The VCLT régime clearly provides that even if the state does object to a reservation, the multilateral treaty may still be in force between the objecting state and the reserving state. However, it should be mentioned that if the objecting state has declared that it does not regard the reserving state as a party to the treaty, then the treaty does not govern only their relations. The treaty is not in force between them, although it may remain in force in their relations with the other state parties.

It should be mentioned that in terms of reservations, VCLT followed the main structure of the Reservations to the Genocide Convention Advisory Opinion. However, "the system of reservations causes several problems in both the practice and theory of the law of treaties. VCLT has left gaps in the regulation of fundamental issues (such as the permissibility of reservations), and certain other provisions were ambiguous, such as the "object and purpose" of a treaty which, generally, is not well defined in the VCLT" (Korkelia, 2002, 440). "These problems proved to be particularly difficult to solve in human rights treaties, especially those relating to Islamic law where reservations raise many questions concerning their permissibility and/or compatibility with the object and purpose of a treaty." (Augustauskaitė, 2017, 106).

A reservation to the treaty is legal only when it is conforms to the object and purpose of that treaty. Is it possible to identify the illegal reservation, and what are the real consequences of illegal reservations? These aspects are of vital importance to human rights treaties. Article 19(c) of the VCLT prevents a state from formulating a reservation which is incompatible with the object and purpose of the treaty. "This provision reflects the view taken by the ICJ in the Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide" (Moloney, 2004, 155). The major issue is how to determinate whether the reservations are valid and most important here is whether the states by themselves are competent enough to decide this. The author believes this question deserves in-depth analysis, as the consequences of invalid reservations are crucial.

Besides those issues mentioned above, a perennial question has been whether the VCLT régime has sufficient authority to ensure adherence to human rights treaties. Even though treaties on human rights set the rules for the protection of individuals, first of all the states have certain obligations towards each other while entering the treaties. Reservations made by the state parties have certain influence not only for individuals of those states but also to the rest of the treaty members. While drafting the guidelines "Guide to practice on Reservations to Treaties", International Law Commission (hereinafter – ILC) expressed their position that VCLT régime is suitable for all treaties, including human rights ones. The author would like to agree on the position that "human rights treaties have some features that are different from the other multilateral treaties. First at all, human rights treaties do not create reciprocal relationships between states parties but envisage some obligations upon the states in the interest of individuals, in order to create an objective régime of protection of human rights" (Korkelia, 2002, 3). To be more specific, the individuals are the main subjects of those treaties (that receive certain rights and duties). The author concurs with this view which was also expressed in Human Rights Committee Comment No. 24 (General Comment 24 (52), 1994), and will demonstrate in this article that the VCLT régime is not enough to preclude invalid reservations to human rights treaties.

Another problematic issue related to reservations is how to determine correctly object and purpose of the treaty. We could not find a clear definition of the object and purpose in VCLT, although Article 19 (c) of VCLT explains it as "core obligations" of the treaty. The following question is who can decide on those core obligations. "Firstly, every treaty should have a clear and distinct "object and purpose" in order to distinguish what reservation is permissible and reserving state would not deny the obligations to the fundamental provisions of the treaty. Furthermore, as there are state parties who can object to the reservations and decide the validity of the reservation (its conformity with object and purpose), the monitoring bodies have to state clearly what provisions are considered to be essence of the treaty in their comments." (Akstinienė, 2013, 465). This will be considered later in more detail.

Let us consider the declarations themselves. It is sometimes the case that States attempt to hide their reservations under the guise of interpretative declarations. Also problematic is making a distinction between interpretative declarations and reservations, which need to be explicitly addressed through further discussion. We should remind ourselves that reservations and interpretive declarations are two different legal concepts. Whereas a "reservation" is intended to modify or exclude the legal effect of certain provisions of a treaty, the purpose of an "interpretative declaration" is to specify or clarify the meaning of a whole treaty or to certain of its provisions. Analysis of these legal concepts would suggest that if a reservation has direct legal effects, an interpretative declaration is most of all related with the methodological problem of interpretation, although having associated legal consequences. In order to compare reservations and interpretative declarations, we should apply the general rule of interpretation of treaties which is set out in Article 31 of the VCLT, that follows the rule "it shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Other scholars in this field believe that the context of the interpretative declarations deserves careful scrutiny.

With so many opinions as to who is best qualified to determine the validity of reservations to human rights treaties, expert opinion emphasizes the role of the monitoring bodies that are established under various international treaties. According to the reports on how the state parties implement treaties in national system and how they

ensure the protection of human rights, these monitoring bodies prepare relevant information to other state parties of the treaties about the relevant situation in various countries. According to these reports, if the state party that entered invalid reservation does not comply national legal system with treaty norms, other state parties should demand the withdrawal of invalid reservations that were entered, because the reserving state clearly avoids taking responsibility and implementing the treaty in its national law system. "International human rights law and the competencies of the human rights treaty bodies are evolving to meet the demands of an expanding and inter-connected world society. The work of the treaty bodies, comments from observers, the acquiescence of the States and the ILC Guide to Practice point to the competence of treaty bodies to determine the validity of reservations as well as to indicate the legal effect of invalidity" (McCall-Smith, 2011, 521).

"Even though there are no doubts that treaty bodies are the main observers on how the states implement the obligations under international treaties, the problem is that the reports of UN bodies do not have a binding effect. Furthermore, the fact remains that so long as the view of the monitoring body is not legally binding, there is the possibility that the view of other state parties may differ from the monitoring body's view" (Ando, 2013, 977). Therefore, one of the main suggestions is that the member states of the international human rights treaties should give more power to such treaty bodies. Furthermore, their decisions, mostly known as recommendations, should become binding documents to the state parties.

2. Reservations under the International Covenant on Civil and Political Rights

Having adopted the Universal Declaration, the international community then agreed on two covenants that spelled out in more detail the rights embodied in the declaration. These were the International Covenant on Civil and Political Rights (often referred to as the political covenant) that was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, and entered into force 23 March 1976. The other landmark document was the International Covenant on Economic, Social and Cultural Rights (often referred to as the economic rights covenant) which was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force 3 January 1976. These documents are legally binding on the member states that ratified them.[3] It is important that the state parties to the international treaties can make reservations to those parts of the treaty that seem to be problematic and cannot be applied in national level, as long as these reservations are not contrary to the object and purpose of the particular treaty.

Following the opinion in international law, "both of these covenants incorporated understandings based on the declaration, many of which have important implications with regard to gender and reproductive rights. These include the right of women to be free of all forms of discrimination, the right of freedom of assembly and association, and family rights. The political covenant, *inter alia*, recognizes the rights to "liberty and security of the person" (Article 9) and "freedom of expression", including "freedom to seek, receive and impart information and ideas of all kinds" (Article 19); and affirms that "no marriage shall be entered into without the free and full consent of the intending spouses" (Article 23)" (Women rights are human rights, 48).

According to the High Commissioner for Human Rights, the Covenant's goal is "to promote "the inherent dignity and equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world". To further this goal the Covenant proffers twenty seven articles which give individuals around the world various civil and political rights "without regard to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (The Office of the United Nations High Commissioner for Human Rights).

[3] However, many member states of international community have not done so, and many others have done so only with substantial reservations.

As of 20 May 2020, there are 74 signatories and 173 State parties to the International Covenant on Civil and Political Rights. There are over 150 reservations made to this Covenant. "Some of these reservations exclude the duty to provide and guarantee particular rights in the Covenant. "Others are couched in more general terms, often directed to ensuring the continued paramount of certain domestic legal provisions. The number of reservations, their content and their scope, may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States parties. The Human Rights Committee, in the performance of its duties under either Article 40 of the Covenant or under the Optional Protocols, must know whether a state is bound by a particular obligation or to what extent. This will require a determination as to whether a unilateral statement is a reservation or an interpretative declaration and a determination of its acceptability and effects." (Akstinienė, 2013, 462).

The author will show certain examples of reservations in this section. Article 26 on equality and non-discrimination is subject to 6 reservations, two of which have been objected to by other states (General Comment No. 24, 1994, 1). There is only one reservation (by France) to the minority rights provision in Article 27, and even that reservation has been contested by way of an objection. Three hereditary monarchies have entered a reservation in respect of Article 3 (equal rights of men and women) in the issue of succession to the throne. Kuwait's much more general reservation to Article 3 has been subject to objections by other states.

Reservations made by state parties that are close to the topic of this article deserve further mention. For example, Islamic countries usually make reservations that directly relate to culture practice and religious belief.

Consider the 46 Islamic States which have ratified the ICCPR, 14 of them having formulated reservations, with reservations based on equality as follows:

(a) Algeria: a reservation to Article 23 paragraph (4) (on equality of rights and responsibilities of married spouses);
(b) Bahrain: a reservation to Article 3 (equality of men and women in civil and political rights), Article 18 (freedom of religion) and Article 23 (family and marital rights);
(c) Kuwait: a reservation to Article 2 paragraph (1) (guarantee of all rights in the Covenant without discrimination of any kind), Article 3 (equality of men and women in civil and political rights), Article 23 (equal rights and responsibilities of marital spouses),
(d) Mauritania: a reservation to Article 23 paragraph (4) (equal rights and responsibilities of marital spouses).

Pakistan is a particular case in point. This country accepted the UN's International Covenant on Civil and Political Rights (ICCPR) on 23 June 2010. Upon ratification, however, the country entered a great number of reservations to Articles 3, 6, 7, 12, 13, 18, 19, 25 and 40 of the Covenant. As to the reservations that were entered in relation to Articles 3 (equal right of men and women), according to General comment No. 24, the Islamic Republic of Pakistan declares that the provisions of Articles 3 shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the *Shariah* laws.

The question arises here whether the reservations are compatible with the international law provisions and follows the object and purpose test. It has to be noted that in General Comment 24, the UN's Human Rights Committee has laid down general rules on incompatibility of reservations with the ICCPR. As an example, the reservation under Article 3 made by Islamic Republic of Pakistan is unspecific. General Comment 24 states "it is desirable for a State entering a reservation to indicate in precise terms the domestic legislation or practices which it believes to be incompatible with the Covenant obligation reserved." Moreover, the reservation is not transparent, but refers to a domestic legal document which is not easily understandable by other State, and which is subject to changes and interpretation.

It is doubtful whether the hierarchy of norms is lawful at all. By indicating that the mentioned ICCPR articles only apply as far as they are in line with Pakistan's Constitution, the reservation introduces a de facto hierarchy of norms by which national law supersedes international obligations.

No real international rights or obligations have been accepted which is contrary to what General Comment 24 requires. In a leading commentary on VCLT there was note: "reservations aimed at preserving the integrity of internal law may go against a treaty's object and purpose in view of their often undetermined and sweeping nature" (Vilinger, 2009, 272).

Pakistan's far-reaching reservations do not pass these tests, and may be regarded as unlawful and inapplicable. Such reservations are damaging in undermining the application of the ICCPR in Pakistan's legal and political practice, and also may expose Pakistan to objections from other States that are party to the treaty. Therefore, Pakistan's reservations to the ICCPR are incompatible with international law.

Given the consequences of impermissible reservations, "it would be useful for the Government of Pakistan to consider withdrawing its reservations, failing which those remaining could be made specific and not subject to domestic legislation. The Government should report to the UN Human Rights Committee and benefit from the Committee's expertise in identifying which areas of Pakistani legislation may need amendments in light of ICCPR obligations" (Vilinger, 2009, 272).

In is also worth to mention the objections made by the other state parties. They declared that the reservations made by the Islamic Republic of Pakistan are incompatible with the object and purpose of ICCPR. "The governments of the state parties recall that, according to customary international law as codified in VCLT, a reservation incompatible with the object and purpose of a treaty is not permitted.[4] It is in the common interest of States that they respect treaties to which they have chosen to become party, as to their object and purpose, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties." (Akstinienė, 2013, 464).

The author would like to attribute another important note to the objections for these reservations of the Islamic Republic of Pakistan. Some state parties argued "it is unclear to what extent The Islamic Republic of Pakistan considers itself bound by the obligations of the Covenant and therefore raises concerns as to the commitment of The Islamic Republic of Pakistan to the object and purpose of the Covenant. Moreover, the parties consider that the reservations to the Covenant are subject to the general principle of treaty interpretation, pursuant to Article 27 of the Vienna Convention of the Law of Treaties, according to which a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." (Akstinienė, 2013, 464).

To sum up, "at least two different forms of state practice emerge under the ICCPR: that of reserving states in entering, modifying and withdrawing their reservations; and the practice the Human Rights Committee in relation to reservations by states. As mentioned previously, the possibility to consider a state as a party to the ICCPR without the benefit of its impermissible reservation is absent from the text of the VCLT. However, this silence can be attributed to of other states in objecting to the reservations by reserving states. A third form of state practice could be said to emerge through states' action/inaction in respect of the pronouncements made by the fact that the VCLT only regulates the consequences of permissible reservations and objections to them." (Akstinienė, 2013, 464). What is very important to mention, that after General Comment No 24 by Human Rights Committee was released, state parties started objecting to the reservations even more explicit when they think the reservation is incompatible with the object and purpose of the ICCPR. This practice follows a sufficient path in order to reduce the number of impermissible reservations.

3. Reservations under the International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (hereinafter – ICESCR) was adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December

[4] Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Denmark, Ireland, Italy, Latvia, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, Uruguay made objections to the reservations of Pakistan

1966, following almost 20 years of drafting debates. It finally gained the force of law a decade later, entering into force on 3 January 1976.

ICESCR contains "some of the most significant international legal provisions establishing economic, social and cultural rights, including rights related to work in just and favorable conditions, to social protection, to an adequate standard of living, to the highest attainable standards of physical and mental health, to education and to enjoyment of the benefits of cultural freedom and scientific progress" (Aust, 2007, 33). The Preamble of the Covenant recognizes, *inter alia*, that economic, social and cultural rights derive from the "inherent dignity of the human person" and that "the ideal of free human beings enjoying freedom of fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as civil and political rights." Furthermore, the overarching principles of the Covenant are: (1) equality and non-discrimination in regard to the enjoyment of all the rights set forth in the treaty; and (2) States parties have an obligation to respect, protect and fulfil economic, social and cultural rights.

As of 20 May 2020, the Covenant has 71 signatories, with 170 States party to this Covenant thereby voluntarily undertaking to implement its norms and provisions. Compliance by States parties with their obligations under the Covenant and the level of implementation of the rights and duties in question is monitored by the Committee on Economic, Social and Cultural Rights.[5]

The Committee works on the basis of many sources of information, including reports submitted by States parties and information from such United Nations specialized agencies.[6] It is also important in the scope of reservations. Even though the state parties that made objections to the reservations did not preclude enter into force the treaty between them and the reserving states, these above mentioned institutions monitor how the state parties implement the norms of the ICESCR and informs rest of the parties how they keep their obligations (with the reservations made to the ICESCR also) under the treaty.

Approximately 27 percent of the States parties to the Covenant had entered several declarations and reservations of varying significance to their acceptance of the obligations under the Covenant. Yet, "unlike most other human rights treaties, the Covenant lacks a specific clause on declarations and reservations" (Manisuli, 2008, 315).

The Committee on Economic, Social and Cultural Rights (CESCR or the Committee) has made important comments on the reservations to ICESCR topic. As to the extent of the article, it is important to mention that the Committee in its Comment No. 16, stated that "Article 3 sets a non-derogable standard for compliance with the obligations of States parties as set out in articles 6 through 15 of ICESCR (General Comment No 16, 2005, para 16-17). Therefore, these articles formulate object and purpose of the ICESCR. Upon ratification of the ICESCR, some states have limited their legal obligations under the Covenant by formulating reservations, at times disguised as 'declarations', 'understandings', 'explanations', or 'observations', to some of the Covenant provisions (Manisuli, 2008, 15).

[5] The Committee on Economic, Social and Cultural Rights is the supervisory body of the International Covenant on Economic, Social and Cultural Rights. It was established under United Nations Economic and Social Council (ECOSOC) Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the ECOSOC in Part IV of the ICESCR.
The ECOSOC is the primary body dealing with the economic, social, humanitarian and cultural work of the United Nations system. ECOSOC oversees five regional economic commissions and six "subject-matter" commissions, along with a sizeable system of committees and expert bodies. ECOSOC is composed of 54 member States, elected by the United Nations General Assembly for three-year terms. The Committee on Economic, Social and Cultural Rights is composed of eighteen independent experts. Members of the Committee are elected by ECOSOC by secret ballot from a list of persons who qualify as "experts in the field of human rights" and who have been nominated for that purpose by the States parties. Members are elected for four years and are eligible for re-election.

[6] As International Labor Organization, United Nations Educational, Scientific and Cultural Organization, World Health Organization, Food and Agriculture Organization of the United Nations (from the Office of the United Nations High Commissioner for Refugees, and from the United Nations Centre for Human Settlements (Habitat) and others).

As stated earlier in this section, what is in question is whether or not the reservations made to the ICESRC are permissible. "In accordance with the rules of customary international law that are reflected in Article 19(c) of the VCLT, reservations can therefore be made, provided they are not 'incompatible with the object and purpose of the treaty" (Neumayer, 2007, 397).

The Committee of ICESRC clearly stated that a State party by making reservations cannot justify its non-compliance with these core obligations, which are 'non-derogable'. "One reason for core obligations of ICESRC rights being considered non-derogable is because their suspension is irrelevant and unnecessary to the legitimate control of the state of national emergency. For example, the undertaking to guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind and to ensure the equal right of men and women to the enjoyment of all ESC rights in Articles 2 and 3 would deserve greater rather than less importance in times of national emergency so as to protect vulnerable groups against discrimination" (Hüfner, 2010, 17). Therefore, the Committee once again explained the circumstances on making reservations to core obligations of the treaty.

Another question is who should determine the validity of the reservation to ICERC. According to S. Manisuli, "the compatibility of the reservation with the object and purpose of the treaty is subject to assessment by the competent (judicial and quasi-judicial) bodies. The compliance of States with their obligations under the Covenant is monitored by the CESCR. It can effectively monitor the measures adopted and the progress made if it can determine the extent of each State party's obligations under the Covenant, and this necessarily involves addressing the issue of the legality of reservations. In particular, whether a reservation is permissible, and whether it is compatible with the object and purpose of the Covenant" (Manisuli, 2008, 15). This statement is really important because the Committee attributed itself a role as much important as the state parties in terms of evaluating the compatibility of reservations.

As the Committee has stated, "when a State has ratified the Covenant without making any reservations, it is obliged to comply with all of the provisions of the Covenant. It may therefore not invoke any reasons or circumstances to justify the non-application of one or more Articles of the Covenant, except in accordance with the provisions of the Covenant and the principles of general international law" (CESCR, Concluding Observations: Morocco, 1994, para 9).

It is arguable whether the ICESCR is under an obligation or only has the option of entering into a 'reservations dialogue' with States. According to the role of Committee, it would seem that a 'reservations dialogue' with relevant States is more of an obligation than an option. "Therefore, as a body monitoring the Covenant, the ICESCR should consistently determine (a) whether a statement is a reservation or not; and (b) if so, whether it is a valid reservation; and (c) to give effect to a conclusion with regard to validity" (Hampson, 2004, para 27). It is obvious that according to the practice of monitoring bodies and general rules of international treaty law, reservations to the ICESCR must be interpreted according to the relevant principles of general international law within the general context of the Covenant, taking into account its object and purpose.

The next question deserving of an answer is: what is the legal outcome of an invalid reservation? Regarding ICESCR, if a reservation is found to be incompatible with the object and purpose of the Covenant, it should be considered invalid. "It follows that such an invalid reservation is to be considered null and void meaning that a state party will not be able to rely on such a reservation and, unless a State's contrary intention is incontrovertibly established, will remain a party to the treaty without the benefit of the reservation" (Goodman, 2002, 531).Therefore, it is very important to evaluate the relevance of reservations with the possibility to withdraw them if possible. "As yet there have been no major difficulties with States parties to the ICESCR on the subject of reservations, even where the Committee examined the Articles to which reservations were made." (Manisuli, 2008, 20). The author will consider the most problematic reservations further in this article.

The most problematic reservations to human rights treaties including the ICESCR are those which render the treaty subject (or some of its core provisions) to a national constitution or domestic law generally of a

reserving state. “Such countries as Egypt, Kuwait formulated specific Islamic reservations. Both labelled them as interpretative declarations. Yet this is contradicted by other states that made objections to those declarations” (Brems, 2001, 274).

The declaration by Egypt states, “taking into consideration the provisions of Islamic *Shariah* and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it.” It must be noted that although *Shariah* makes extensive provisions for economic social and cultural rights, it is far from complying with international human rights standards regarding equality between men and women, which is one of the key obligations States have to fulfil under the ICESCR. “Kuwait made interpretative declaration regarding Article 2, paragraph 2, and Article 3, stating that although the Government of Kuwait endorses the worthy principles embodied in Article 2, paragraph 2, and Article 3 as consistent with the provisions of the Kuwait Constitution in general and of its Article 29 in particular, it declares that the rights to which the articles refer must be exercised within the limits set by Kuwait law” (Chirwa, 2016, 16).

As mentioned previously, we first decide whether such interpretative declarations are not reservations by their nature and do not violate the object and purpose of the treaty. With regard to the declarations and the reservation made by Kuwait upon accession, the governments of other state parties in their objections noted that according to the interpretative declaration regarding Article 2, paragraph 2, and Article 3 the application of these articles of the Covenant is in a general way subjected to national law. Other state parties consider this interpretative declaration as a reservation of a general kind. The Governments are of the view that such a general reservation raises doubts as to the commitment of Kuwait to the object and purpose of the Covenant and would recall that a reservation incompatible with the object and purpose of the Covenant shall not be permitted. They also noted, “it is in the common interests of States that all parties respect treaties to which they have chosen to become parties, as to their object and purpose, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. However, the other states do not preclude the entry into force of the Covenant between Kuwait and them." (Chirwa, 2016, 20). Again, if the state party makes interpretative declarations, the other state parties can object to it and express their opinion if they think it is a reservation, and furthermore, question if this reservation covered under interpretative declaration is compatible with the object and purpose of treaty.

There is no legal obligation under the ICESCR, and no express provision for the withdrawal of reservations, however it would be in accordance with the Covenant’s object and purpose, and the spirit of the VCLT to envisage that laws and practices which necessitated existing reservations in some states would be examined carefully, progressively amended or repealed to ensure that the states parties complied, without reservation, with all the Covenant’s provisions. This has certainly occurred on some occasions,[7] and some of the reservations withdrawn appear clearly to have been incompatible with the object and purpose of the Covenant.[8] Indeed, it is pointless to maintain reservations, which are incompatible with the object and purpose of the Covenant since these reservations are invalid in law. However, the formal removal of such reservations is still useful as an indication of a State’s commitment to its human rights obligations.

To conclude, the abovementioned examples describe the main features of the interpretative declarations: the state parties can declare that the interpretative declaration has features of a reservation. If the state party does so, the consequences differ from the declarations themselves. Furthermore, if the other state parties find declaration as a reservation, they must decide whether it is incompatible with the object and purpose of the Covenant. While

[7] The States that have withdrawn some reservations to the ICESCR (on the dates shown in the brackets) include: Belarus (30 September 1992); Denmark (14 January 1976); Democratic Republic of Congo (21 March 2001); Malta (upon ratification 13 September 1990); New Zealand (5 September 2003)

[8] For example, on 21 March 2001 the Government of the Democratic Republic of the Congo informed the Secretary-General that it had decided to withdraw its reservation made upon accession which read as follows: ‘Reservation: The Government of the People’s Republic of the Congo declares that it does not consider itself bound by the provisions of Article 13, paragraphs 3 and 4 (...) In our country, such provisions are inconsistent with the principle of nationalisation of education and with the monopoly granted to the State in that area.

making arguments for and against, and why the objecting states agree that those reservations are compatible with the object and purpose or not, they must decide if they wish to maintain relations with the reserving state. Despitefinding the reservation incompatible with their own position, more often than not the other state parties maintain relations with the reserving state. Thus, the reserving state can either withdraw the reservation (that is incompatible with the object and purpose) or follow its arguments and continue to implement the treaty with the reservations. However, those general reservations are not transparent, for example other state parties may not be familiar with the religious norms or national legislation of the reserving states. For these reasons the reservations might violate obligations under the treaty. Nonetheless, after analysis of the reservations to ICESCR and objections to them, it would appear that the objections serve as an expression of opinion rather than a strict position on determining the validity of the reservation.

4. Reservations under CAT and CRPD

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter - CAT) was signed on 4 February 1985 and entered into force on 26 June 1987 As of 20 May 2020, the Convention has 83 signatories and 169 States are parties to this document. The purpose of the Convention is "to prevent and eradicate the use of torture and other cruel, inhuman or degrading treatment or punishment and to ensure accountability for acts of torture" (Guide to Reporting to the Committee against Torture, 2018, 5).

The Convention against torture does not exclude the possibility that States may enter reservations at ratification or accession to the treaty. Indeed, this Convention explicitly provides that reservations may be done in order to exclude certain provisions related to visits described in Article 20 (per Article 28) and the resolution of disputes (Article 30 (1)).

Furthermore, voluntary declarations may be made at any time after ratification or accession in order to allow communications by States and individuals to the Committee against Torture.[9] Reservations to the CAT have been limited: 48 State parties entered reservations to the treaty while entering it. However, several have since been withdrawn and only 38 reservations remain operative.

Many of the reservations describe areas explicitly permitted in the CAT but a few are legally problematic and have provoked numerous objections. The International Law Commission encourages States to conduct a periodic review of reservations made to the treaty and to consider, whether they continue to serve the purpose and encourages withdrawing the reservations that are no longer needed. Such review should take into account the importance of preserving the integrity of the treaty, the usefulness of reservations made, and developments in human rights protection.

As a matter of routine, the Committee against Torture recommends the removal of reservations during its interactive dialogues with State parties. It should be noted that according to Article 21 and 22 declarations maybe made at any time after ratification or accession to the Convention. Such declarations provide Committee against Torture competence to hear those communications or complaints from State parties and individuals, alleging violations of the Convention.

Both articles describe voluntary procedures, either of which the States may choose to accept or reject. "Where a State does not make the voluntary declaration, the Committee will have no jurisdiction to hear complaints. Approximately one third of all State parties have made declarations under Article 21 and 22, and therefore accepted the competence of the CAT to consider complaints from States parties and individuals. The quasi-judicial function of the CAT is not an appeal procedure. The Committee only has the competence to determine whether there is a violation of the Convention and make recommendations for how such a violation maybe redressed" (Cali,

[9] The Committee against Torture was established pursuant to Article 17 of the Convention and began to function on 1 January 1988. The Committee Against Torture is the body of 10 independent experts that monitors implementation of the Convention.

Montoya, 2017, 9). The procedure therefore helps to consider whether national implementation of the Convention is in full compliance with international law, human rights principles and recommends State parties to take remedial steps where it is necessary.

Perhaps the most interesting reservations are those relating to cultural, religion rights. "The CAT has attracted 16 religion-based reservations (representing around 35% of all reservations), extended by three States Parties. These religion-based reservations have in turn received 69 objections from 28 States. Article 16, under which each State Party commits "to undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment" has received the highest number of specific religion-based reservations (four reservations, two entered by Pakistan – withdrawn in 2011 – and two by Qatar)" (Çalı, Montoya, 2017, 25).

Other standing reservations concern those provisions that regulate the definition of torture or degrading treatment (Article 1), and the criminalization of acts considered as torture (Article 4). These reservations tend to make reference to domestic legislation, which is influenced by, or rooted in, broader religious precepts. "Examples of these restrictive acts are the reservation entered by Qatar to Article 1, which conditions its implementation to its compatibility with the Islamic *Shariah* law; and the (now withdrawn) reservation entered by Pakistan, which conditioned the applicability of the provisions of Article 4 to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the *Shariah* law." (Çalı, Montoya, 2017, 28).

In general, religion-based reservations under these various articles seek to secure a 'opt out' from States' obligations under the treaty for long established and/or traditional that in many cases are derived from or associated with religious belief or religious law. The vague nature of many of these reservations, and the severity of the nature of human rights violations associated with torture, may explain why so many of the reservations have been the subject of objections by other States parties. The curious exception to this rule is a declaration by the Holy See, which has not received any objections despite the fact that the reservation limits the application of the treaty "insofar as it is compatible, in practice, with the peculiar nature of that State" (Çalı, Montoya, 2017, 30). This analysis again shows that States want to maintain those general reservations, especially ones related to cultural, religion justification. This is puzzling in terms of how the international community tries to deal with those reservations: whether to be strict and object to them or to be open to the dialogue for longtime commitments.

The Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol were adopted on 13 December 2006 and entered into force on 3 May 2008. As of 20 May 2020, there are 163 signatories and 181 parties to this Treaty and its Optional Protocol. These documents are very significant because they came into existence through a forceful call from persons with disabilities around the world to have their human rights respected, protected and fulfilled on an equal basis with others.

Despite only being adopted in 2006, the CRPD has rapidly attracted a large number of ratifications - and reservations. However, "a relatively small proportion of those reservations (around a quarter – compared with over three quarters in the case of, for example, the CEDAW) are based on religion or belief. None of the religion-based reservations to the CRPD have been the subject to objections from other States parties." (Çalı, Montoya, 2017, 25)

What is particularly interesting in the case of the CRPD, is that Muslim-majority States that entered religion-based reservations to older treaties, like the CRC and the CEDAW (e.g. Algeria, Bangladesh and Saudi Arabia), ratified the CRPD with no general reservations (the exceptions to this rule are Qatar and Iran) and/or no specific reservations (the exception being Egypt). "It is noteworthy that prior to its ratification of the CRPD, Saudi Arabia had entered general reservations to all core human rights conventions at the time of ratification. Yet, it decided not to do so for the CRPD." (Cali, Montoya, 2017, 9). This does not mean, of course, that religion-based reservations are entirely absent from the CRPD. "Such reservations, where they exist, are clustered around two treaty articles: Article 23 on respect for home and the family (12 reservations); and Article 25 on health (nine reservations) (Smith, 2003, 2).

These reservations, put forward by six countries – Catholic-majority Lithuania, Malta, Monaco and Poland, together with Israel and Kuwait – mostly relate to those treaty provisions dealing with the sexual and reproductive rights of persons with disabilities (Article 25 (a)), and "the rights and responsibilities of persons with disabilities, with regard to guardianship, ward-ship, trusteeship, adoption of children or similar institutions" (Article 23 (3)) (Smith, 2003, 2).

It is important to note that the reservations to Article 25 (a), which refers to right of persons with disabilities to have "the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health" make no direct reference to religion." (Smith, 2003, 4). However, they are attributed to the religious concerns in Catholic states – in such sensitive questions of abortion, the conception of life, and the rights of the unborn child.

In the case of the CAT, ICCPR, CRPD and ICERD, the use of general reservations is comparatively limited, though where they do exist (or have existed), religion or belief has been one of the main motivations. Regarding the CAT, only Qatar and the Holy See have ever entered general religious reservations to the treaty – Qatar subsequently withdrew its reservation in 2012. According to data provided, Saudi Arabia is the only country with a general reservation to the ICERD (Smith, 2003, 5). However, those general reservations create the biggest danger for the lack of implementation of human rights in national level and leave a huge gap in enforcement of international norms between the State parties.

Conclusions

1. To conclude, there are different opinions of competitive authors and international organizations, as well as monitoring bodies, whether reservations are a necessity in order to imply minimal standards for individuals' protection in various countries around the world, or are they a break in the advancement of protections for human rights throughout the world. As the analysis showed, the purpose of making reservations varies in regard of different countries. It is reasonable to assert that there is no single solution applicable to all countries. Instead, we need to understand the political, social and economic conditions that exist in countries, and work with local and international agencies such as the NGOs. Their experience and reach could help to ensure the necessary protection of human rights.

2. The question to what extent the régime of VCLT is applicable to the human rights documents has been raised numerous times in this article. Despite treaties on human rights setting the rules for the protection of individuals, the states have certain obligations towards each other while entering the treaties. In the process of drafting the guidelines, the International Law Commission expressed the view that the VCLT régime is for all treaties, including human rights ones. That said human rights treaties have features that differ from the other multilateral treaties, so that, by itself, the VCLT régime cannot resolve the matter of reservations in the world.

3. Within the analysis followed in this article, we might conclude that two UN human rights mechanisms in particular – the Treaty Bodies and the NGOs – could play an important role. Treaty bodies should engage in a substantive exchange about the justification of standing reservations, and the relationship between relevant treaty provisions and the contemporary domestic status quo as it pertains to issues of religion, belief, culture, or tradition. The reserving states should must keep reservations under active (re)consideration, and to this end State parties to the treaties should initiate processes of domestic consultation, reflection and, potentially, reform. Over time this may render any reservations either unnecessary or obsolete.

4. There are two different forms of making reservations under the ICCPR: the traditional practice of making reservations while entering, modifying and withdrawing them; and the new approach of the Human Rights Committee in relation to reservations by states. Following the practice under General Comment No. 24 objections by states have become more explicit when according to other parties a reservation is incompatible with the object

and purpose of the ICCPR. However, according to author's view, this is not enough in order to reduce the number of incompatible reservations.

5.Analysis of various practice under human rights treaties clearly shows that States want to maintain those general reservations, especially ones related to cultural, religion justification. This is puzzling in terms of how the international community tries to deal with those reservations: whether to be strict and object to them or to be open to the dialogue for long time commitments. Again, the subsequent practice of monitoring bodies, NGOs show that there is a significant number of withdrawn reservations. Therefore, a set of different measures should be taken into consideration while trying to diminish the number of reservations.

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THE EUROPEAN COURT OF HUMAN RIGHTS: INTERNET ACCESS AS A MEANS OF RECEIVING AND IMPARTING INFORMATION AND IDEAS

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Abstract. "The Internet has now become one of the principal means by which individuals exercise their right to freedom to receive and impart information and ideas." (European Court of Human Rights, cited in Cengiz and Others v. Turkey). Are these rights merely window dressing for some countries? Perhaps the most important question is what lies behind this so-called Potemkin village that is very much in evidence?[2] For example, in 2019 there were at least 213 documented internet shutdowns around the world, with the number of countries experiencing shutdowns increasing from 25 in 2018, to 33 in 2019 – or 17% of the countries in the world today. In this respect, Russian and Turkey are standouts as landmark cases that have come before the European Court of Human Rights (ECtHR). Here, the fundamental issue is blocking access to the Internet, regardless of the methods used by each State. This paper examines the use of shutdowns in Russia and Turkey with a view to understanding how these States in particular are responding to the propagation of fake news, hate speech, content that promotes violence, and how to balance drastic measures (shutdowns) with the need to ensure public safety and/or national security and freedom of expression.

Keywords: freedom of expression, media, human rights, internet shutdown, collateral blocking, excessive blocking, wholesale blocking

Introduction

It is generally accepted that the Internet has impacted our lives in many different ways, and not only in providing ready access to an astonishing amount of information, but also in dislodging old notions of the State, the economy, education, and our personal relations and anxieties about the world today. "Out of all the plethora of communication opportunities that the Internet has opened up, I would highlight the emergence of social media and the way they have intricately melded into our daily lives. Social media have changed our personal space, altering the way we interact with our loved ones, our friends, and our sexual partners; they have forced us to rethink even basic daily processes like studying and shopping; they have affected the economy by nurturing

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[2] Any literal or figurative construction whose purpose is to provide an external façade to a country which is faring poorly, the intention being to make people believe that the country is better. The term comes from stories of a fake portable village built solely to impress Empress Catherine.

business startup culture and electronic commerce; they have even given us new ways to form broad-based political movements." (Dentzel, 2014; Gelernter et. al., 2014).

The Internet has also raised numerous legal questions concerning media law, security, big data, fake news, privacy, and human rights. How can people feel protected against the threats posed by the Internet when they go online? As ECtHR stated in *Cengiz and Others v. Turkey*: "the Internet has now become one of the principal means by which individuals exercise their right to freedom to receive and impart information and ideas." (Cengiz and Others v. Turkey, 2015, 49). Indeed, the Internet has become not only the primary tool used to communicate, but also a platform where (at least it seemed at first glance) the ideas espoused by the nineteenth century English economist, John Stuart Mill, in his 'Marketplace of Ideas' (Gordon, 1997) would become reality. Again, according to ECtHR, "the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general. User generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression." (Cengiz and Others v. Turkey, 2015, 52).

Such a worthy and honourable vision of what might have been has turned out to be something else. In 2017 Nils Muižnieks, who was then Commissioner for Human Rights for Council of Europe, wrote that "Internet blocking is a widespread phenomenon in Council of Europe Member States." (Council of Europe, 2018) Over the last three years the situation has continued to deteriorate, hence it is useful to examine to what extent it is possible to enjoy freedom of access to Internet as a mean of receiving and imparting information and ideas. Further, what legal avenues are available to resist the growing incidence of the use of this measure by certain States to block their own citizens from accessing information?

1. Overview of Historical and Technical Background

In the UNHRC 2011 annual report, the UN Special Rapporteur spoke on the promotion and protection of the right to freedom of opinion and expression: "some of the ways in which States are increasingly censoring information online, namely through: arbitrary blocking or filtering of content; criminalization of legitimate expression; imposition of intermediary liability; disconnecting users from Internet access, including on the basis of intellectual property rights law; cyber attacks; and inadequate protection of the right to privacy and data protection." (UNHRC, 2011, Summary) The report mentioned various measures and attempts by States to prevent contents from reaching the end user, which includes:

- denying users access to specific websites, Internet Protocol (IP) addresses, domain name extensions
- removing websites from the web server where they are hosted
- using filtering technologies to exclude pages containing keywords or prevent specific content from loading.

Removing or preventing access to existing content is problematic and just one aspect of the question. We should state that without Internet connection the marginalised groups of any given society remain even more marginalised and this one also applied to less-developed States. "The Internet offers a key means by which such groups can obtain information, assert their rights, and participate in public debates concerning social, economic and political changes to improve their situation." (UNHRC, 2011, Summary) How to manage the digital divide among States in the world (and also among different groups in a State) is a vexed question and has caught the attention of world leaders. For example, see the Plan of Action adopted at the 2003 Geneva World Summit on the Information Society, and Connect the World adopted at the 2005 International Telecommunication Union's Forum.

Perhaps the most pressing question is what is the reality behind the Potemkin-village that some countries have adopted? The #KeepItOn report (AccessNow, 2020) on internet shutdowns in 2019 is cause for concern.

"From Bolivia to Malawi, India, Sudan, and beyond, 2019 was a difficult year, both online and off. The #KeepItOn coalition has documented an increase in shutdowns in 2019, as well as a trend toward sustained and prolonged shutdowns, and targeted internet shutdowns." (AccessNow, 2020, 1.) In fact, around the world in 2019 there were at least 213 documented shutdowns, with the number of countries involved rising from 25 in 2018 to 33 in 2019. This figure represents 17% of the world's countries, which begs the question: how many countries are there in the world today that used this measure, as of 2020? The top three on the list comprise India, Venezuela and Yemen, yet not only authoritarian regimes or countries in transition blocked the Internet. In 2019 there were at least five Internet shutdowns in Europe (AccessNow, 2020, 2.) It is well to remember that the aforementioned instances of shutdown is not only of short duration; 16% of the documented 213 cases lasted for more than seven days.

Even where a State has been unable to shut down the Internet within its geographical borders, it has used other means to achieve much the same. One avenue is to restrict bandwidth which effectively slows down Internet traffic, while others targets only social media sites, both methods disrupting the free flow of information. Ascertaining the real number of shutdowns and/or slowdowns is almost impossible. In 2019, the governments that form the subject of this study acknowledged only 116 shutdowns[3] from a monitored 213, or 54%. Their stated legal aims included: "fighting fake news, hate speech, or content promoting violence, public safety, national security, third-party actions, school exams." (AccessNow, 2020, 13.) The States also used the excuse of the growing number of technical problems, although observers and critics dispute this assertion, believing that the real reasons are quite different, and relate mainly to: protest, violence, and elections or political instability. According to the report it seems that in exceptional circumstances, e.g. elections, military actions, religious holidays, visits by government officials, the States tend to use extraordinary (non-regular) measures to thwart open criticism of real and/or imagined problems. Precautionary measures, a somewhat bureacractic term, "are almost always used by the Indian government to justify shutting down the Internet in situations of military action, such as in Jammu and Kashmir" (AccessNow, 2020, 13.).

2. Landmark Cases of the European Court of Human Rights

Article 10 of the European Convention on Human Rights (Council of Europe, 1952) states that "everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." Article 10 goes on to say that this right may be subject to formalities, conditions, restrictions or penalties, yet it should be compatible with the three-part-test of the ECtHR. That means that the contested measures should not be arbitrary: the interference "(a) should be suitable to achieve the legitimate aim pursued (*suitability or legitimacy*), (b) should be the least intrusive instrument (*necessity*), and (c) should be strictly proportionate to the legitimate aim pursued (*proportionality sensu stricto*)." (Oster, 2015).

In this particular matter, the landmark cases of the ECtHR apply to two countries: Russia and Turkey (Ahmet Yildirim v. Turkey, 2012); (Akdeniz v. Turkey, 2014); (Bulgakov v. Russia, 2020); (Cengiz and Others v. Turkey, 2015); (Elvira Dmitriyeva v. Russia, 2019); (Engels v. Russia, 2020); (Kablis v. Russia, 2019); (OOO Flavus and Others v. Russia, 2020); (Vladimir Kharitonov v. Russia, 2020). The basic issue in all these cases is the blocking of access to the Internet, although the States used different methods.[4] In some cases, we find collateral blocking (several sites including the one targeted shared the IP address that was blocked), excessive blocking (the entire website was blocked due to a single page or file deemed unacceptable), or wholesale blocking (all, or part of the Internet was blocked). In most instances, the ECtHR found that the measure taken

[3] That is still an increase from the number of 81 in 2018.
[4] It should be noted that a different aspect to examine the question would be the restrictions placed on prisoner's access to the Internet, see (Kalda v. Estonia, 2016); (Jankovskis v. Lithuania, 2017).

violated Article 10 of the European Convention on Human Rights (ECHR) as they mostly failed the necessity and/or the proportionality part of the above-mentioned test.

2. 1. Akdeniz v. Turkey

Somewhat different from other cases that follow in this paper is the matter of Akdeniz v. Turkey, 2014), although since it pertains to admissability we will describe it first. Thus, in June 2009 the media division of Turkey's public prosecutor's office ordered the blocking of access to the websites myspace.com and last.fm on the grounds that these sites were in breach of copyright through the dissemination of musical works. The applicant had lodged their application as a user of those websites, the main question being: who could be a 'victim' of an internet blocking? In 2014 the ECtHR declared the application inadmissible (incompatible *ratione personae*) on the grounds that since the applicant had been indirectly affected by a blocking measure, there was insufficient evidence they could be regarded as a 'victim'. As the ECtHR stated "the fact that the applicant had been deprived of access to those websites had not prevented him from taking part in a debate on a matter of general interest" (Akdeniz v. Turkey, 2014), which means that if one could obtain the needed information (in this particular case, music) from different sources, it might justify the State's use of some form of restrictions.

2. 2. Ahmet Yildirim v. Turkey

The Denizli Criminal Court of First Instance blocked all access to Google sites under the Turkish law, and this interim injunction was promulgated in a criminal proceeding against the owner of a website hosted by Google (Ahmet Yildirim v. Turkey, 2012). The problem was that this given site contained content that was alleged the State found offensive to the memory of the father of the nation, Mustafa Kemal Atatürk, who established the modern State of Turkey in 1923. Ahmet Yildirim, a Turkish student, also ran a website at Google, so that the above-mentioned blocking also affected his domain. The ECtHR found this to be a violation of Article 10 of the European Convention on Human Rights, the main reason being that the measure taken by Turkey was not the least intrusive method, and also that the State did not try to find a better way to reach its goals, such as blocking the specific site at Google. The ECtHR also found that there was no strict legal framework in domestic law regulating the scope of the ban and the guarantee of judicial review. "In the Court's view, they should have taken into consideration, among other elements, the fact that such a measure, by rendering large quantities of information inaccessible, substantially restricted the rights of Internet users and had a significant collateral effect." (Ahmet Yildirim v. Turkey, 2012, 66.)

2.3. Cengiz and Others v. Turkey

In another case, the Ankara Criminal Court argued that a post on YouTube had infringed the country's criminal law which prohibited insulting the memory of Mustafa Kemal Atatürk. The court ordered that YouTube be completely blocked (Cengiz and Others v. Turkey, 2015), which prompted Serkan Cengiz, a law professor, and other law professors from various Turkish universities, to respond. They claimed that as they were unable to use YouTube for a longer period, their human rights were infringed. In this case, the ECHR found that the measures taken by Turkey violated Article 10 of the European Convention on Human Rights. Meanwhile, the ECtHR acknowledged that YouTube was an important means by which the applicants exercised their right to receive and impart information and ideas through the Internet, and that both the damage and its effect were also collatera (Cengiz and Others v. Turkey, 2015, 64.) The Honourable Court had more to say, questioning the legal framework in Turkey's domestic laws regulating the scope of the ban. And – as a new element to consider – the Court also found important that the block was upheld for a lengthy period of time.

2. 4. Kablis v. Russia, Elvira Dmitriyeva v. Russia

In this Russian case, (Kablis v. Russia, 2019), Kablis informed the Syktyvkar Town Administration of his intention to organise a protest. His request was refused, whereafter he criticised the decison on his social networking blog site, Vkontakte, and as a consequence his account was blocked. The case of Dmitriyeva is similar (Elvira Dmitriyeva v. Russia, 2019). Not a single court order was issued in either case, and therefore the Russian Prosecutor's measures amounted to a prior restraint. In the Dmitriyeva case, both Article 10 and Article 11 were examined. In both cases, the European Court of Human Rights ruled that the Russian state was in violatino of Article 10 of the ECHR. The Honourable Court reiterates that the Russian "Information Act lacks the necessary guarantees against abuse required by the Court's case-law" (Kablis v. Russia, 2019, 97.).

2. 5. Wikimedia Foundation Inc. and Others v. Turkey

The third case in which Turkey sought to block differs in the outcome from the previous examples of Ahmet Yildirim v. Turkey, 2012, and Cengiz and Others v. Turkey, 2015. In the case of Wikimedia Foundation Inc. ve Diğerleri Başvurusu, 2019, the ECHR did not find the organisation had violated Article 10 of the ECHR. The background is as follows: in 2017, all foreign (non Turkish) language editions of Wikipedia were blocked by the Turkish Information and Communication Technologies Authority on the grounds that Wikimedia had refused its request to remove content which asserted that Turkey was a sponsor of ISIS and other terrorist organisations. At this point, it should be underlined that by 2019 "more than 15 institutions and organizations are authorized to issue or request access-blocking orders under various regulations and most of these powers are exercised by submitting administrative blocking orders (...) without the need for judicial approval." (Akdeniz & Güven, 2020) Following Turkey's failure in the ECHR, it then claimed that Wikipedia was part of a 'smear campaign' against the country. As the blocking remained intact, Wikipedia filed an application in the ECHR in 2019. Not long after, the Turkish Constitutional Court concluded that the wholesale blocking violated the right to freedom of expression guaranteed under Article 26 of the Turkish Constitution. It also found the Turkish interpretation of the grounds for the interference was overly broad, making the legal basis unforeseeable and could have a substantial chilling effect.[5]

2.6. Vladimir Kharitonov v. Russia, OOO Flavus and Others v. Russia, Bulgakov v. Russia, Engels v. Russia

Russia was the respondent in the most recent cases of website blocking, which includes: Bulgakov v. Russia, 2020; Engels v. Russia, 2020; OOO Flavus and Others v. Russia, 2020; Vladimir Kharitonov v. Russia, 2020.[6] All of these cases have similarities, the European Court of Human Rights having ruled on the same day (23 June 2020), although the applications were lodged between 2013 and 2015. Vladimir Kharitonov found the IP address of his website was blocked because the Russian Federal Drug Control Service wanted to deny access to another website which had the same hosting company and IP address. In the case of OOO Flavus and Others, website access was blocked at the request from the Russian Prosecutor General without having first obtained a court order. Russia failed to identify the applicants of the specific offending material, so they could not even remove it in order to restore their access. Bulgakov's access was denied based on a court order, because his website stored an electronic book in the extremist publication section of the website. Even after he deleted the given book, the Russian Court upheld its decision stating that the block was a wholesale block, and not only for the material itself. Engels found himself in a very similar situation because his website contained information on how to bypass content filters. The blocking was decided even if the information did not violate domestic law. Inall courcases, the ECtHR was unanimous in finding a violation of Article 10 of the European Convention on Human Rights, and clearly stated that the proceedings lacked the well-needed legitimacy because the provisions of

[5] More on chilling effect, see (Fatullayev v. Azerbaijan, 2010, 102; Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt.v. Hungary, 2016, 86.; UNHRC, 2011, 28)
[6] Note: the request for referral to the Grand Chamber is pending at the moment.

Russia's Information Act used to block the websites had excessive and arbitrary effects, and had not provided proper safeguards against abuse. The Honourable Court also declared that "the wholesale blocking of access to an entire website is an extreme measure which has been compared to banning a newspaper or television station." (Vladimir Kharitonov v. Russia, 2020, 38).

Conclusions

In conclusion, during the last decade almost all media outlets have made explicit on their news sites that the "UN declares Internet (access) a human right" (Kravets, 2011; Velocci, 2016; Jackson, 2011). However, the exact wording of the UNHRC documents did not go as far as to say that. Despite having stated that "for the Internet to remain global, open and interoperable, it is imperative that States address security concerns in accordance with their international human rights obligations, in particular with regard to freedom of expression, freedom of association and privacy" (UNHRC, 2016), this is not as stating the Internet to be a human right.[7].

The threat of State action to prevent access to the Internet remains. In 2020, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression raised concerns about "governments increasingly resort to shutting down the Internet, often for illegitimate purposes but in all cases having a disproportionate impact on the population." (UNHRC, 2020, 25.) It has become increasingly apparent that the COVID-19 pandemic is exposing more and more examples of limitations on free expression and the right to obtain information worldwide. In their July 2020 report (Mapping Media Freedom, 2020) the European Federation of Journalists and the International Press Institute showed that from March to June 2020 there had been a wide range of threats against media freedom (e.g. "during this time, Turkish authorities continued to use media regulators to shut down outlets broadcasting critical or sensitive topics.") (Mapping Media Freedom, 2020, 19.)

It would appear from decisions made by ECtHR that Internet blocking could be compatible with human rights only if it complies with some requirements. All three parts of the ECtHR's test (legitimacy, necessity and proportionality) should be addressed carefully, yet the States considered in this article usually fail to comply with the requirements of the necessity part of the above-mentioned test (e.g. there are less intrusive methods) and/or the proportionality part (e.g. there are collateral damages as such websites are taken down or blocked that has nothing to do with the targeted materials).

What is a possible way forward? Article 19 articulates the requirements. First, law must provide for blocking measures. A legal provision must establish clear and predictable rules concerning what content can be blocked, and to what extent. When it comes to assessing what content can be blocked, domestic legislation should follow the standards set by international human rights law. Secondly, a court or an independent adjudicatory body must issue blocking measures. Non-independent government agencies are likely to enforce overly restrictive measures, as their primary goal is to protect interests that conflict with freedom of expression. Thirdly, Internet users and Internet service providers (ISPs) must be allowed to challenge blocking measures. To that end, they must be given sufficient information on how to mount that challenge whenever they attempt to access a blocked site. Finally, blocking measures should be strictly targeted in order to avoid blocking lawful content. IP-address technologies should only be implemented in order to target non-shared IP servers." (Article-19, 2020).

Given that the Internet has become the tool for so many people to enjoy and express their human rights, to receive and impart information and ideas, and to fight against the marginalisation of States and groups in different societies, the growing number of cases sound a clear warning. Landmark cases ruled on by the ECtHR's show the different approaches of States in trying to block the Internet and make materials unreachable for end-users. Regardless, the mechanism of international jurisprudence has prevented them from doing so. The case law

[7] More on this (Szoszkiewicz, 2018).

described in this paper is emphatic: any kind of restrictions to Internet access is drastic, and must be the final, and the most reasoned, measure taken by governments around the world.

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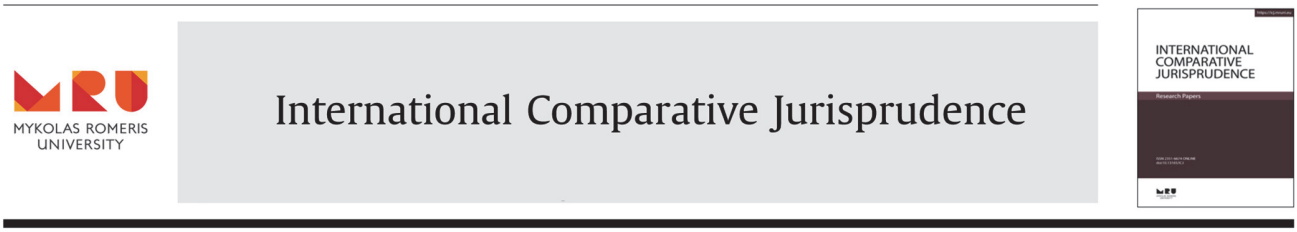

PRIVILEGE AGAINST SELF-INCRIMINATION: THE DILEMMA OF APPROPRIATE STANDARDS IN COMPETITION LAW

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Abstract. The procedures of the European Commission regarding privilege against self-incrimination and its application in competition law proceedings have come under intense scrutiny, yet there has been little analysis of how it is applied in national proceedings. What analysis there is has been confined to how the standards developed by the Court of Justice of the European Union are applied, with little or no reference to the case law of the European Court of Human Rights. In the context of Lithuania and its legal practises, this article presents an analysis of privilege against self-incrimination from the perspective of Lithuanian procedural rights of the administrative process, human rights, and the European Union law. It finds that neither case law of the European Court of Human Rights nor the European Court of Justice of the European Union provide a definitive answer on the implementation of privilege against self-incrimination in competition law proceedings, since undertakings and employees may have a different status in the procedure in order for different guarantees to be applied. Thus, a systematic approach should prevail with national authority applying these standards, taking into consideration distinct features of both competition law and national administrative law.

Keywords: competition law, privilege against self-incrimination, European Court of Human Rights, Court of Justice of the European Union, Convention for the Protection of Human Rights and Fundamental Freedoms

Introduction

In recent decades human rights law has evolved from a set of rights applied only to natural persons to a universal legal system that applies to both natural and legal persons. Today, it is accepted that legal persons deserve to be treated in accordance with human rights standards. In competition law, however, business and human rights often intersect in one core issue, due process, which includes privilege against self-incrimination.

Privilege against self-incrimination is a well-established principle in criminal law, meaning that anyone who is accused of committing a crime has the right not to provide the authorities with information that may incriminate them. Originally, this privilege was applied to natural persons; to this day there are some states which continue to rule out its application to legal persons. For example, the Supreme Court of the United States of America ruled in *Hale v Henkel* that "*there is a clear distinction between an individual and a corporation, and the latter, being a creature of the State, has not the constitutional right to refuse to submit its books and papers for an examination at the suit of the State*" (*Hale v Henkel*, 1906). In Europe, the principle seems to have undergone a metamorphosis, with European states taking a different approach, recognising that legal persons may also enjoy privilege against self-incrimination (*Petrolia ASA and others v The public prosecution authority*, 2011).

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The majority of European Union member states regulate the area of due process in competition law in three ways: through national regulation; application of European Union law; and by the application of human rights law developed mostly by the European Court of Human Rights (hereinafter – ECtHR).

Any meaningful discussion of the issue must first turn to the different sources of the law of privilege against self-incrimination. Due to the limited scope of this Article, the Lithuanian legal system will be used as an example, briefly summarizing the *lex lata* in Chapter 1. Chapter 2 focuses on the *lex lata*, providing insights into the practical application of privilege against self-incrimination in competition proceedings, as well as how the triade of legal sources tends to diverge on core issues. Chapter 3 focuses on the *lex ferenda*, addressing the matter of the possible future evolution of privilege against self-incrimination in competition proceedings, and taking into consideration current trends and unique features of these proceedings. Chapter 4 considers the conceptual issue relating to the application of privilege against self-incrimination to a legal person. This issue is often overlooked. Legal personality is, in fact, a legal fiction, since a legal person exercises their rights and duties only through a natural person. Naturally, the question of dual privilege against self-incrimination arises: is the company and its employees privileged to enjoy a different set of rights, including privileges against self-incrimination? This question is considered in Chapter 4 which seeks to provide some arguments regarding the issue.

Analytic, systematic, generalisation, analogy and comparative methods are used in this paper. Systematic and analytical methods critically examine the criteria and scope of privilege against self-incrimination in the context of the competition law. Comparative and analogy methods distinguish the similarities and differences between the practice of national competition authority and Lithuanian national courts and international courts. Conclusions are drawn based on the generalisation method.

1. *De lege lata*: Privilege Against Self-Incrimination in Competition Law Cases and the Plurality of its Sources

Legal systems in the European Union have recourse to a wide corpus of legal sources, which is largely due to the legislation, and also the European Union and the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – ECHR). The same triumvirate of legal sources referred to previously is also part of privilege against self-incrimination. Thus, privilege against self-incrimination is analysed from the perspective of the ECHR and then with reference to European Union law. Finally, Lithuanian national legal regulation is addressed.

Of all the possible legal sources of privilege against self-incrimination, the ECHR is the most complex. As part of the right to a fair trial (Article 6 of the ECHR), privilege against self-incrimination is applicable under the criminal limb of Article 6. Therefore, the starting point is to determine if the administrative nature of competition law proceedings under Lithuanian legal regulation fall under the criminal limb of Article 6 of the ECHR.

Under the well-established case law of the ECtHR, cases fall under the criminal limb of Article 6 of the ECHR, provided they satisfy the so-called *Engel* criteria (*Engel and Others v the Netherlands*,1976). While the mere existence of such criteria may give rise to a proposition that not all proceedings based on competition law may fall within Article 6 of the ECHR, further analysis of these criteria quickly dispels such a notion.

The first criterion, and the least important, is the classification of the offence in domestic law. This criterion is determinative only if the offence is criminal under national law (*Benham v United Kingdom*, 1996). Notwithstanding, if for example the offence is administrative or disciplinary, then it may not carry much weight in the determination if it is criminal under the autonomous meaning of the ECHR. According to Lithuanian legal regulation, administrative courts hear disputes concerning decisions or actions of the Competition Council of the Republic of Lithuania (hereinafter – Competition Council). Accordingly, this

circumstance has no legal bearing for the determination if Lithuanian competition proceedings fall under the criminal limb of Article 6 of the ECHR.

The second criterion is the nature of the offence. To evaluate this criterion, the ECtHR considers several factors. It considers if the legal rule has a general binding character or is it just applicable to a specific group (*Bendenoun v France*, 1994). Furthermore, the ECtHR takes into account the nature of an institution which has the power to institute proceedings (*Benham v United Kingdom*, 1996). Other factors must be taken into account, for example the purpose of a legal rule; is it a deterrent or punitive? Further, does the legal rule seek to protect interests that are usually protected by criminal law, whether the imposition of any penalty is dependent upon a finding of guilt, and classification of comparable procedures in other states? Under the Law on Competition, the Competition council of the Republic of Lithuania (hereinafter – Competition council) is an independent authority which investigates infringements of competition law and also imposes fines for these infringements. The Law on Competition applies to all undertakings and the fines imposed are punitive (*UAB "Eksortus" v Competition Council*, 2012). Therefore, the procedure of the infringement of competition law is regarded as criminal under the second *Engel* criterion.

The third criterion concerns the maximum potential penalty which the relevant law provides (*Campbell v the United Kingdom*, 1984). Under the Law on Competition, the Competition council may impose a fine of up to 10 per cent of annual turnover in the preceding business year on undertakings for any infringement of competition law. The Supreme administrative court of Lithuania (hereinafter – Supreme administrative court) found that infringement of competition law is criminal under the third Engel's criterion in the case where the Competition council imposed a fine of almost 36 million euros for the infringement of concentration conditions established by the Competition council. The Supreme administrative court emphasised that severity of the sanction should be the subject of the safeguards provided in Article 6 of the ECHR and that a sanction is criminal only in so far as it relates to the scope of the ECHR (*Gazprom v Competition Council*, 2016).

Even though criteria are not cumulative, it does not prevent the adoption of a cumulative approach if the analysis of separate criterion does not lead to a straightforward conclusion (*Sergey Zolotukhin v Russia*, 2009). The ECtHR took this approach in *Orlen Lietuva Ltd* and concluded that sanctions imposed to undertakings under the Law on Competition are criminal. The ECtHR explained that the Competition council imposed a fine under the Law on Competition and emphasised that fines under this law might be imposed on all undertakings and not just a particular group. The ECtHR also accentuated that the fine imposed on the applicant was not intended to serve as pecuniary compensation for breaches of competition law, but as a penalty to deter reoffending because the penalty the applicant risked incurring was severe, because it amounted to up to 10 per cent of its annual turnover in the preceding business year (*Orlen Lietuva Ltd v Lithuania*, 2019).

Therefore, proceedings under Lithuanian competition law fall under the criminal limb of Article 6 of the ECHR and privilege against self-incrimination applies accordingly.

Under European Union law the question of privilege against self-incrimination is straightforward since undertakings are directly granted privilege against self-incrimination. The preamble of the Regulation 1/2003 stipulates: "*undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement*." The Court of Justice of the European Union (hereinafter – CJEU) addressed privilege against self-incrimination for the first time in *Orkem*, and later it was confirmed by the CJEU on numerous occasions even though the approach adopted in *Orkem* has not been changed.[2] Though privilege against self-incrimination established in Regulation 1/2003 and

[2] For example, CJEU, 18 October 1989, judgment in *Orkem v Commission of the European Communities* (case No. 374/87); CJEU, 15 October 2002, judgment in *Limburgse Vinyl Maatschappij NV (LVM), DSM NV and DSM Kunststoffen BV, Montedison SpA, Elf Atochem SA, Degussa AG, Enichem SpA, Wacker-Chemie GmbH and Hoechst AG and Imperial Chemical Industries plc (ICI) v Commission of the*

case law of the CJEU concerning self-incrimination is only directly applicable to the European Commission, nevertheless the importance of these sources to national competition authorities is not debatable. Practise of the European Commission and the CJEU is the only source that directly addresses specific issues of competition law and therefore are often considered as guidelines for national competition authorities.

Last, but not least, Lithuanian national legal regulation has its peculiarities. For example, the Constitution of the Republic of Lithuania enshrines privilege against self-incrimination. The Supreme administrative court also found that privilege against self-incrimination applies in competition law cases (*Orlen Lietuva v Competition Council*, 2008). Even though the Law on Competition and the Law on the administrative procedure of the Republic of Lithuania are silent on privilege against self-incrimination, the Competition council directly addresses the issue in an explanatory note, stipulating that privilege applies (Competition council, 2020). Furthermore, the latest amendment to the Law on Competition implementing ECN+ directive also stipulates that officials of Competition Council must uphold the rights enshrined in Constitution, ECHR, Charter and rights and freedoms guaranteed under EU law.

Thus, privilege against self-incrimination essentially has three distinct legal sources, with the result that such a plurality gives rise to the problem of the diverging substance of said sources. The following chapter examines the extent to which privilege applies against self-incrimination in competition proceedings from the perspective of the ECHR. The chapter also compares applicable standards of the ECHR to those standards employed by the CJEU and the European Commission and Lithuanian national competition authority.

2. *De lege lata*: the Extent of the Privilege Against Self-Incrimination in Competition Proceedings

Although not directly mentioned in Article 6 of the ECHR, the case law of the ECtHR reveals that every person charged with a criminal offence has privilege against self-incrimination (*Bykov v Russia*, 2009). The general notion is that privilege against self-incrimination is an element of the presumption of innocence, which is closely related to the burden of proof and the notion that the accused should not be forced to contribute in meeting the evidentiary threshold, which should be established by the prosecuting authority (Schabas, 2017).

While all three legal sources of privilege against self-incrimination essentially share the notion of its definition, the substance (scope) is where the legal sources start to diverge. Divergence, however, is completely natural, since privilege against self-incrimination is now applied in areas, which traditionally were never included in its scope, such as competition law, tax law and related proceedings. The fact that such matters often fall into the administrative sphere of national regulation amplifies the lack of true identity of privilege against self-incrimination in such cases.

Another issue is that any new legal construct must have synergy with an existing legal system. In this respect privilege against self-incrimination in criminal procedure and administrative procedure again diverge greatly.

Under the case law of the ECtHR, privilege against self-incrimination does not protect against the making of an incriminating statement *per se*, but it prohibits obtaining evidence by coercion or oppression (*Ibrahim and Others v the United Kingdom*, 2014). Privilege against self-incrimination also does not extend to the use of material, existing independently of the will of the suspect, which authorities may obtain from the accused through recourse to compulsory powers. For example, documents acquired under a warrant, breath, blood and urine samples and bodily tissue for DNA testing (*Saunders v the United Kingdom*, 1996). Thus, if competition authorities obtain such evidence, for example, during the inspection or under the court warrant, privilege against self-incrimination would not be infringed.

European Communities, (case No. C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P), most recent in CJEU, 9 April 2019, judgment in *Qualcomm, Inc.v European Commission* (case No. T-371/17).

The ECtHR in examining whether a procedure has extinguished the very essence of privilege against self-incrimination assesses the following elements: the nature and degree of compulsion; and the existence of any relevant safeguards in the procedure and the context in which authorities use obtained material (*O'Halloran and Francis v. the United Kingdom*, 2007).

The ECtHR distinguishes three situations where an accused person might be forced to give evidence, and accordingly privilege against self-incrimination might be infringed. The first one is when a suspect testifies under the threat of sanctions (*Saunders v the United Kingdom*, 1996) or institution imposes sanctions for refusing to testify (*Heaney and McGuinness v. Ireland*, 2000). The second is where authorities use physical or psychological pressure to obtain evidence or statement (*Jalloh v Germany*, 2006). The third is where the authorities use deception to extract information that they were unable to obtain by other means (*Allen v the United Kingdom*, 2013). Another aspect, which was highlighted by the ECtHR, is that an accused should have access to a lawyer (*Salduz v Turkey*, 2008) and the accused should be informed about privilege against self-incrimination (*Stojkovic v France and Belgium*, 2012).

In comparison, Regulation 1/2003 *expressis verbis* stipulates that the European Commission must respect privilege against self-incrimination. While there is no binding legal regulation, which would specify the European Commission's obligation in implementing privilege against self-incrimination, the European Commission follows the procedure established in a soft-law document – Antitrust Manual Procedures of the European Commission. Under the Antitrust Manual Procedures of the European Commission, undertakings are informed about privilege against self-incrimination (Antitrust Manual Procedures, 2019). The CJEU ruled that if an undertaking answers questions or provides information that self-incriminates, the European Commission should reduce fine due to voluntary collaboration (*Commission of the European Communities v SGL Carbon AG*, 2006). Nevertheless, such information should not be used to prove the infringement unless the representative or duly authorised staff member was in full knowledge that the undertaking was not obliged to answer (Blanco, 2013). Furthermore, if the undertaking raises doubts about infringement of privilege against self-incrimination, the Hearing Officer of the European Commission might make a recommendation as to whether privilege against self-incrimination applies (Antitrust Manual Procedures, 2019).

The CJEU on the element of coercion stated that an infringement of privilege against self-incrimination might occur if authorities use coercion against the suspect in order to obtain information (*Limburgse Vinyl Maatschappij NV (LVM) et al v Commission of the European Communities*, 2002). The decision of the General Court in *SGL Carbon* illustrates that the element of coercion is crucial for the finding of an infringement of privilege against self-incrimination. The General Court admitted that the European Commission asked to provide incriminatory information. However, the Commission did not threaten to impose sanction in case if an undertaking would not provide answers, so that the General Court did not find an infringement of privilege against self-incrimination (*Tokai Carbon Co. Ltd v Commission of the European Communities*, 2004).

Even though, and as noted above, the ECtHR and the CJEU follow a similar approach to the element of coercion, the CJEU giving a more significant meaning to the content of the requested information. The position of the CJEU is that the European Commission has a right to ask questions which require only factual disclosure. It means that undertakings do not have an obligation to provide an opinion or qualification of certain events or facts (Faull, 2014). Accordingly, the CJEU only finds an infringement if the European Commission asks questions which seek to determine the purpose of the action (*Orkem v Commission of the European Communities*, 1989; *Commission of the European Communities v SGL Carbon AG*, 2006).

The approach taken by the CJEU raises the question of whether the European Commission could use the information obtained indirectly (Andersson, 2018). For example, under the case law of the ECtHR (despite testimony obtained under compulsion appears not to be incriminatory) the prosecuting authorities might use information regarding simple facts or exculpatory remarks in support of their case, i.e. to cast doubt or contradict statements of the accused (*Harun Gürbüz v Turkey*, 2019).

Lithuanian national regulation also has its own course in regard to privilege against self-incrimination. The courts in Lithuania generally follow the practise of the CJEU. For example, the Supreme Administrative Court adopted generally the same approach as the CJEU and stated that an undertaking could not refuse to provide information relevant to the investigation because it may be incriminatory. However, the Competition Council may not force undertaking to admit their guilt (*The Lithuanian Chamber of Auditors v Competition Council*, 2008).

For national law the main issue was to somewhat balance the emerged privilege against self-incrimination in competition law with the powers granted to the authority to pursue successful investigations, given that these powers pale in comparison to the tools of prosecution in criminal cases. This still remains the case.

A prime example of this is that under the Law on Competition, the Competition council may impose a fine of up to one per cent of the annual turnover in the preceding business year on undertakings if they do not provide the information required, also for providing incorrect and incomplete information. Also, the Competition Council may impose a fine of up to five per cent of the average daily turnover in the preceding business year on undertakings for each day of the continuation of a violation in the event of failure to comply promptly with the instructions to provide information. Therefore, under the Law on Competition, undertakings must provide information, evidence and answer questions under the threat of sanctions. Accordingly, undertakings are coerced to provide information and privilege against self-incrimination, as it is stated in Article 6 of ECHR, and might be infringed due to the element of coercion (*Ibrahim and Others v the United Kingdom*, 2014).

While the duty of the undertaking to provide all information may be strict, this duty is balanced with several core procedural rights.

Under Regulation of the Competition Council, a lawyer may participate during an inspection, although in their absence this does not prevent officials from conducting an inspection. In practice, undertakings receive an explanatory note regarding their rights and duties. Furthermore, officials do not prevent undertakings from contacting their lawyers and lawyers may participate during the interviews. The same applies if an interview is conducted not during an inspection but at the premises of the Competition Council.

Under the Law on Competition, undertakings have also a right to appeal decisions or actions of the officials directly to the Competition Council. Since officials conduct an investigation and accordingly file requests for information and conduct interviews, these requests and questions during the interview may be appealed to the Competition Council if, for example, they infringe privilege against self-incrimination.

An important question is whether undertakings should appeal alleged infringement of privilege against self-incrimination immediately or wait for the final decision of the European Commission or national competition authority. In *LVM,* an undertaking appealed the final decision of the European Commission. The CJEU stated that the illegality of the questions did not affect the legality of the final decision and noted the importance of assessing whether the European Commission had used such answers to prove an infringement (*Limburgse Vinyl Maatschappij NV (LVM) et al v Commission of the European Communities*, 2002).

This approach taken by the CJEU leads us to conclude that undertakings should appeal the measures immediately and not wait for the final decision. If undertakings appeal requests of the European Commission immediately, not waiting for the final decision of the European Commission, they would only need to prove that privilege against self-incrimination was infringed and would not have an obligation to prove that the infringement affected the final decision. Nevertheless, under the case law of the Supreme administrative court, it might be complicated. Even though under the Law on Competition, undertakings have a right to appeal actions and decisions of officials, it seems that Lithuanian administrative courts hold that measures taken during an investigation should be appealed together with the final decision and not in a separate procedure (*Kesko Senukai Lithuania v Competition Council*, 2018) or stage of the final decision is more appropriate to evaluate the legality

of the measure taken by the authorities (*UAB "EVRC" v Competition Council*, 2020). The case law of the Supreme administrative court shows that undertakings claiming infringement of privilege against self-incrimination at the stage of the final decision must provide arguments proving that this infringement might have influenced the outcome of the proceedings (*Lithuanian Chamber of Auditors v Competition Council*, 2008).

The takeaway is that the ECtHR and the CJEU apply diverging standards to privilege against self-incrimination. Therefore, institutions and national courts should identify applicable standards. The most important aspect is that ECtHR and CJEU standards differ in respect of the content of information. While the ECtHR admits that even non-incriminatory or factual information may infringe privilege against self-incrimination, the CJEU holds that factual information is not incriminatory. Furthermore, the case law of the CJEU demonstrates the importance of appealing actions and decisions of the officials immediately and not waiting for the final decision.

As it was noted in this chapter, standards employed by the ECtHR, the CJEU and Lithuanian authorities differ. Nevertheless, the ECtHR has never addressed privilege against self-incrimination in a competition law case. The following chapter analyses if specific features of competition law might influence the substance of privilege against self-incrimination.

3. *De lege ferenda*: Possible Limits of Privilege against Self-Incrimination Due to the Specific Features of Competition Law

Privilege against self-incrimination has a significant bearing on the effectiveness of investigations. Investigations of infringements of competition law are challenging due to the complexity of infringements and efforts to hide evidence. Therefore, it can be argued that such complexity of these infringements may impact the scope of privilege against self-incrimination. For example, the Supreme administrative court underlined that privilege against self-incrimination does not apply to the full extent in competition law cases comparing to criminal cases (*Orlen Lietuva v Competition Council*, 2008). Furthermore, the ECtHR also stressed that competition law is not a *"hard-core"* criminal law. Thus, different standards apply to guarantees of a fair trial (*Jussila v Finland*, 2006).

The ECtHR on the issue of complexity of infringement has explained that fair trial standards, including privilege against self-incrimination, apply in all criminal proceedings "*without distinction from the most simple to the most complex."*(*Harun Gürbüz v Turkey,* 2019). Thus, the ECtHR rejected the government's claim that compulsory powers that may infringe privilege against self-incrimination could be used to defend public interest due to the complexity of the infringement (*Saunders v the United Kingdom*, 1996). It seems that the ECtHR is not willing to accept the notion that individual features of infringements may differentiate the application of privilege against self-incrimination.
Notwithstanding, the ECtHR developed most of the fair trial standards in the case law concerning *"hard-core"* criminal cases. Even though competition law falls under the criminal limb of Article 6 of the ECHR, it is not the so-called "*hard-core*" criminal law. The ECtHR in *Jussila* states that "*it is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly "criminal charges" of differing weight. What is more, the autonomous interpretation adopted by the Convention institutions of the notion of a "criminal charge" by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example <…> competition law.*" These proceedings differ from the "*hard-core"* criminal law. Therefore, not all guarantees of Article 6 of the ECHR should apply with their full stringency (*Jussila v Finland*, 2006). It is understandable since authorities investigating *"hard-core"* criminal cases have more powers than those authorities that investigate infringements, which under national law are administrative. For example, while most of the institutions investigating *"hard-core"* criminal cases have a right to use measures such as secret surveillance, national competition authorities do not have such rights. Hence, it is not clear if the lack of powers of authorities such as Competition council should not influence the standards of the fair trial, such that these standards should not be applied more leniently.

This lack of clarity is even more confusing due to the ECtHR judgments concerning privilege against self-incrimination and its position that this right should apply in all procedures (*Harun Gürbüz v Turkey*, 2019).

The case law of the ECtHR reveals that in some instances it grants a different standard of protection to legal persons as opposed to natural ones. The case law shows that companies enjoy more limited protection under Article 8 of the ECHR, guaranteeing the right to private and family life than individuals. For example, the ECtHR stated that a wider margin of appreciation could be applied since the authorities aimed this measure at legal persons (*Bernh Larsen Holding AS, Kver AS and Increased Oil Recovery AS v Norway*, 2013). Thus, it is not yet clear if legal persons might be and should be the full beneficiaries of privilege against self-incrimination under Article 6 of the ECHR.

Furthermore, the duty of the undertaking to cooperate also raises an issue. During an investigation of the infringement of competition law, undertakings are obliged to actively cooperate, and make available to the European Commission all information relating to the subject matter of the investigation (*Orkem v Commission of the European Communities*, 1989; *Aalborg Portland A/S v Commission of the European Communities*, 2004; *Commission of the European Communities v SGL Carbon AG*, 2006). The Supreme administrative court has also stated that undertakings must cooperate (*Orlen Lietuva v Competition Council*, 2008). The CJEU explained that it could not recognise an absolute right to silence because this would go beyond what is necessary to preserve the rights of the defence of the undertaking. Accordingly, it would constitute an unjustified limitation to the European Commission's performance to ensure observance of competition law (*Mannesmannröhren-Werke AG v Commission of the European Communities*, 2001; *Limburgse Vinyl Maatschappij NV (LVM) et al v Commission of the European Communities*, 2002).

For example, Helen Andersson agrees that an undertaking must cooperate during an inspection; however, she demurs at the extent of the cooperation, suggesting that the undertaking must let officials in and provide access to IT systems. Note that it is not apparent that a company representatives is required to answer all factual questions posed by the inspectors, because the ECtHR has stated that privilege against self-incrimination also covers factual questions which authorities may later use in the investigation (Andersson, 2018).

Furthermore, under Article 53 of the Charter of Fundamental Rights of the European Union (hereinafter – Charter), in so far as the Charter contains rights that correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR. Therefore, Article 48 of the Charter, guaranteeing the presumption of innocence and right of defence, should reflect the provision of Article 6 of the ECtHR as a minimum standard (Peers, 2014). Consequently, it may seem that differences between the ECtHR and CJEU in respect of the content of the requested information and its effect on the infringement of privilege against self-incrimination must resolve in favour of the ECtHR. Nevertheless, the CJEU in response stated that the power of the European Commission to obtain information does not fall out of either Article 6 of the ECHR or the case law of the European Court of Human Rights (Tokai Carbon Co. Ltd v Commission of the European Communities, 2004) and this approach has not changed even after the Charter became legally binding (*Qualcomm, Inc.v European Commission*, 2019). However, this can be explained by the fact that ECtHR has never applied privilege against self-incrimination when investigation was conducted against legal person, and it may be argued that since the case law of the ECtHR concerning privilege against self-incrimination is developed concerning the right of natural persons, there is no need for the CJEU to change its approach.

The analysis of arguments, which might be invoked to justify the application of a lower standard of privilege against self-incrimination in competition law cases, does not provide clear guidance. While the case law of the CJEU demonstrates the importance of undertakings duty to cooperate and effectiveness of the European Commission's powers, Charter stipulates that the same standards as established in the ECHR should apply. Nevertheless, even though the CJEU or national competition authorities would follow this argumentation, the case law of the ECtHR lacks clarity on this issue. The ECtHR found that fair trial standards should not apply to the full extent in cases like competition law infringements and offers narrower protection to legal persons than to

natural ones. Therefore, it may seem that standards developed in natural person cases (mostly in *"hard-core"* criminal cases) may not apply to the full extent in competition law cases.

4. *De lege ferenda*: Employees of Undertakings as Beneficiaries of the Privilege Against Self-Incrimination

One difference that is often overlooked between the applications of privilege against self-incrimination is that legal persons exercise their rights and duties through natural persons. In this event, the application of privilege against self-incrimination might become dual layered and further complicated when authorities interview employees, including the executive officers, of undertakings. Should they be treated as part of an accused entity and accordingly, privilege against self-incrimination should be applied, or they should they be treated as witnesses?

Under Regulation 1/2003, the European Commission for collecting information relating to the subject-matter of an investigation may interview any natural person who gives their consent. Therefore, it is not clear if officials of the Commission at all have a right to ask questions about investigated infringement during an inspection or were it to occur during voluntary interview (Blanco, 2015). It is apparent that when the European Commission conducts an investigation, infringement of natural person's privilege against self-incrimination is almost non-existent. The European Commission can interview natural persons on a voluntary basis and has no power to impose sanctions on natural persons. Therefore, there is no relevant case law of the CJEU or guidelines of the European Commission on privilege against self-incrimination applicable to natural persons.

In contrast, the Law on Competition stipulates more extensive rights of the Competition council. Article 25 of the Law on Competition specifies that officials of the Competition council have the right to receive oral and written explanations from persons who may have relevant information for the investigation, including answers to factual questions and documents from persons involved in the activities of the entities under investigation, to request their presence at the premises of the investigating officer. To obtain documents, data and other information necessary for the investigation from undertakings, other natural and legal persons and public administration entities. Furthermore, the Competition council may impose fines for refusing to provide information or other evidence not just on undertakings but also on natural persons.

These rights raise the question of the status of employees. First, should privilege against self-incrimination be taken into account while questioning employees who may not be personally liable for the infringements? Moreover, should privilege against self-incrimination be respected by the questioning executive officers who may be personally liable for the infringements of competition law?

Privilege against self-incrimination has great importance when the executive officer of an undertaking is interviewed. Under Article 40 of the Law on Competition, if the executive officer of an undertaking contributes to the infringement of the prohibited agreement concluded between competitors or abuse of a dominant position, a court may impose sanctions to the executive officer. The court might restrict a right to be executive officer of a public and/or private legal entity, or a member of the collegial supervisory and/or governing body of a public and/or private legal entity for a period from three to five years and also impose a fine of up to 14 481 euros. Under the case law of the ECtHR, the Supreme administrative court and the Constitutional Court of the Republic of Lithuania (hereinafter – Constitutional Court), such sanction would fall under the criminal limb (*Case No. 71/06-12/07*, 2008; *Storbråten v Norway*, 2007; *Kulių medžiotojų būrelis v Ministry of Environment of the Republic of Lithuania*, 2015).

Therefore, during an interview the executive officer risks providing incriminating information, so that the authorities might use this information in subsequent proceedings. For example, the executive officer of undertaking tried to appeal the decision of the Competition council to impose fines upon the undertaking. He claimed that after the decision comes into force, authorities might initiate subsequent proceedings concerning that person's liability, in which case he should be allowed to appeal the decision. The Supreme administrative

court explained that a contested decision did not impose sanctions on the applicant, concluding that a contested decision has no legal effect for the applicant (*K. N. v Competition Council*, 2018). Accordingly, the executive officer may choose not to represent themself during the infringement procedure of an undertaking; privileging themself against self-incrimination during the interview may seem even more crucial.

In principle, privilege against self-incrimination does not *per se* prohibit the use of compulsory powers to obtain information outside the context of criminal proceedings against the person concerned (*Weh v. Austria*, 2004). Nevertheless, if an executive officer is interviewed, privilege against self-incrimination should be respected due to their status and expectancy that subsequent proceedings concerning liability might be brought.

Another question arises: should the employees of undertakings be granted the same level of protection as executive officers? To the best of the author's knowledge, this issue was raised before the ECtHR on once occasion only. Regardless, the application was found inadmissible (*Peterson Sarspobrg AS and Others v Norway*, 1994).

Since there is no clear standard in the case law of international courts, it seems that this question is left to the national law. For example, the Constitutional Court considered if employees could refuse to testify, thereby claiming privilege against self-incrimination. After due consideration, the court emphasized that legal persons (the same as natural persons) are entitled to equality before the law, and persons having the same status in the criminal case must be treated equally (*Case No. 21/98-6/99*, 2000; *Case No. 7/03-41/03-40/04-46/04-5/05-7/05-17/05*, 2006). Under the Constitution of the Republic of Lithuania, no one can be compelled to give evidence against themself, their family members, or close relatives. The Constitutional Court ruled that this provision ensures protection to natural rather than legal persons since legal persons may not entail themselves into family relations. The Constitutional Court explained that this provision entails a right for a natural person to refuse to testify in cases where authorities may bring criminal charges against them, their family members, or close relatives.

Despite the Constitutional Court having ruled in the context of Lithuanian criminal law, this ruling may be relevant in competition law cases, since the court stated that this right extends not only to traditional criminal cases, but also to those which are criminal due to the severity of the sanction (*Case No. 34/2008-36/2008-40/2008-1/2009-4/2009-5/2009-6/2009-7/2009-9/2009-12/2009-13/2009-14/2009-17/2009-18/2009-19/2009-20/2009-22/2009*; 2009), and it was mentioned previously competition law should be considered as criminal.

It follows from the reasoning of the Constitutional Court that the employees of undertakings do not enjoy privilege against self-incrimination. Accordingly, authorities may interview employees of undertakings as any other witnesses and do not have an obligation to ensure privilege against self-incrimination.

Nevertheless, this conclusion might be flawed, taking into account that legal persons exercise their rights through natural persons. To minimise risks of the infringement of privilege against self-incrimination, authorities may ascertain if a particular employee acts on behalf of the undertaking. Thus, an employee could provide the authorisation from an undertaking to act on behalf of it, except the executive officer of an undertaking, since they act as representatives of undertakings under their legal obligations arising out of laws. If an employee participates at the interview under the authorisation of an undertaking, their statements should represent the position of the undertaking, and thus, privilege against self-incrimination should apply. Accordingly, in case if an employee does not have such authorisation, they should possess the status of a witness, and as a consequence, privilege against self-incrimination would not apply.

Conclusions

Legal regulation of Lithuanian competition law falls under the criminal limb of Article 6 of the ECHR, because the investigation of infringement of competition law is criminal under the second and the third Engel criteria. The CJEU also found that privilege against self-incrimination should apply in competition law proceedings. The Supreme administrative court found that privilege against self-incrimination applies in competition law cases. Thus, privilege against self-incrimination applies in competition law proceedings under the case law of the ECtHR, the CJEU and national administrative courts.

The ECtHR and the CJEU apply different standards to privilege against self-incrimination. The ECtHR admits that even non-incriminatory or factual information may infringe privilege against self-incrimination. Nevertheless, the CJEU holds that factual information is not incriminatory. Therefore, it is clear that standards differ substantially. National courts and national authorities face a challenge in determining the extent of privilege against self-incrimination. It may be argued that standards employed by the ECtHR are not suitable for several reasons. The ECtHR developed most of the fair trial standards in the case law concerning "hard-core" criminal cases. Authorities investigating these infringements are granted more extensive powers than those which investigate infringements which under national law are administrative, such as Competition Council. Therefore, it is not clear if the same standards should apply in the so-called "hard-core" criminal cases as in cases like competition law infringements. The fact that the ECtHR has never applied privilege against self-incrimination in competition case, might be determinative, and application of the ECtHR case law to the full extent might be premature. On the other hand, complete reliance on the case law of the CJEU and practise of the European Commission may also be incorrect since most of the national competition authorities have a right to interview natural persons while the European Commission is allowed to conduct interviews of natural persons only on a voluntary basis. Therefore, practise of the European Commission and the CJEU of privilege against self-incrimination is developed only regarding legal persons.

There is a risk that during interview the executive officers of undertakings may provide incriminating information, since under Lithuanian legal regulation the Competition council may initiate proceedings concerning the personal liability of executive officers. Therefore, privilege against self-incrimination should be ensured. The case law of the Constitutional Court demonstrates that employees of undertakings may not enjoy privilege against self-incrimination, however authorities may ascertain if a particular employee acts on behalf of the undertaking. If they do, privilege against self-incrimination should apply and statements of these employees should represent the position of an undertaking.

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JIHADIST, FAR-RIGHT AND FAR-LEFT TERRORISM IN CYBERSPACE – SAME THREAT AND SAME COUNTERMEASURES?

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Abstract. This paper investigates whether the counter-terrorism measures developed and implemented within the European Union have a universal character and are equally effective in the context of various types of terrorism. The authors focus on the strategies applicable to the terrorist activities online, since information and communication technology is perceived as the fastest growing and continually changing field of the terrorist threat. So far, most of the counteractions and security strategies have been subordinated to the jihadism combating. However, in recent years, the significant growth of threats coming from far-right and far-left terrorist activities has been observed. It raises questions about the capability of instruments to prevent and combat other types of terrorism as well as jihadism.
The research was conducted in particular, on the basis of international organizations' reports, the authors' observations, and practitioners' remarks. As follows from its results, there are significant differences in the phenomenon, current trends, and modus operandi of the perpetrators in the jihadi, far-right, and far-left terrorism. Consequently, it is possible to conclude that the effectiveness of chosen countermeasures, subordinated - as a rule – to the fighting of the jihadi extremists, is doubtful in preventing and combating far-right and far-left terrorism.

Keywords: counter-terrorism, cyberspace, far-right, far-left, jihadi terrorism

Introduction

Since the terrorist attack on the WTC on 11 September 2001 through all the attacks committed by perpetrators associated with Al-Qaida and ISIS that took place in the last two decades, jihadist terrorism has been considered as the biggest threat for western democratic societies. Therefore, it has been the center point for constructing counter-terrorism policies, strengthening the capacity of national law enforcement and justice systems, and implementing new legal instruments. Unfortunately, the major drawback of such an approach is the distorted perception of the threat sources. It cannot be forgotten that "terrorism" is a much broader concept than just jihadism-motivated extremism. The phenomenon of terrorism is very complex, multi-threaded and constantly changing. It takes many forms and can involve the activities of very diverse groups, including right-wing and left-wing extremists, nationalist-separatist organizations, political and religious networks, or perpetrators who

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carry out terrorist acts based on other ideologies or motivations[3]. In the face of all this diversity, it is beyond comprehension that efforts in the field of broadly understood counteraction are, as a rule, focused on the threat arising from jihadists. Building security strategies based on the assumption that jihadism is the biggest headache of the international community, while other types of terrorism do not require such increased attention, and are left without proper control and counteraction, has presumably contributed to a significant development of the activity of far-right and far-left groups in recent years.

Referring to the terrorism counteraction strategies, they include comprehensive activities of various entities, i.e., not only political and legal instruments developed by states and international organizations, but also initiatives developed in cooperation with the private sector, in particular with tech-companies. For the purposes of this study, the authors decided to narrow the research down to the counter-terrorism instruments and methods developed within the EU and collaborating institutions. Such a choice has been required to ensure the clarity of disquisition. It is also legitimate because the EU is very active in this field and therefore often sets trends and continually contributes a lot to counteracting terrorism at the global level. Therefore, it will be possible to draw more general conclusions from the specific analysis.

The data presented by Europol in the TE-SAT 2020 report clearly demonstrates the changing picture of the terrorist threat in Europe. Due to the strengthening of efforts and, consequently, also the increased effectiveness of EU counteraction strategies, the number of jihadist activity in recent years shows a downward trend – less than 18% of 119 completed, failed, and foiled terrorist attacks in 2019 were jihadism-motivated, while far-right and far-left radicals carried out 34 attacks[4], which makes 29% of all attacks. With 20 far-right and far-left terrorist acts reported in the year 2018, this is a significant increase.

In light of such statistics and trends, the following question arises, namely, why do we emphasize jihadist attacks? Hitherto, it was assumed that they cause both most tremendous human losses, as well as the most extensive material damages and at the same time have severe political and socio-psychological consequences. However, now it becomes clear that for two decades of the 21st century, we have been focusing our attention on combating jihadist terrorism while ignoring or overlooking the fact that the threat from far-right and far-left extremists is dangerously growing. This observation leads us to a further question - if our actions were subordinated to the jihadism combating, will the developed and implemented solutions be equally effective in countering far-right and far-left radicals' activities? It is precisely the question that we are looking to answer in this study.

The main objectives of the paper are to present the considerable distinction between chosen types of terrorism, demonstrate differences in the profiles of attacks perpetrators, and explore methods of exploiting cyberspace for terrorist purposes and subsequently assess whether developed countermeasures share universal character, i.e., are just as effective in combating any type of terrorism.

Following such goals, the considerations aim to confirm or disprove the put-forward thesis that the developed legal solutions and other counteraction methods do not take into account the specificity of far-right and far-left extremists, which makes the effectiveness of such measures questionable. Consequently, another hypothesis emerging from this assumption is that underestimating the recently escalating problem of far-right and far-left terrorism may lead to a situation where the international community will be unable to counteract this threat effectively due to the lack of dedicated countermeasures.

[3]Terrorist groups and organizations are usually classified on the basis of the motivation and ideology of their members. Relatively often, however, we are dealing with a mixture of motives, goals, and beliefs, which makes the proper classification much more problematic. Europol's report TE-SAT 2020 mentions such types of terrorism as jihadist, right-wing, left-wing and anarchist, ethno-nationalist, separatist and single issue. Security experts and scholars mention as well state-terrorism, racial terrorism, gender-selective or criminal terrorism, however, such typological classification is somewhat debatable.

[4] Including two attacks not classified as terrorist but carried out by far-right extremists.

It is worth stating at this point, that one of the complexities of the analyzed issue is the lack of the universally accepted, legal definition of terrorism. This circumstance may sometimes cause difficulties in classifying whether a specific act is a terrorist act or an action that does not meet the criteria of terrorism. Since this paper is not aimed at terminological considerations, we will only briefly refer to the issue of understanding the concepts of jihadist, far-right and far-left terrorism. For the purposes of this study, the term "terrorism" is used in a broad sense, referring to both terrorist offenses and other deliberate violent acts by extremists. Such an approach is justified, especially as we broadly describe counteracting the terrorist activities online - at this stage, there are no grounds for differentiation.

Due to the limited scope of this study, the analysis will focus on the specificity of terrorist activities in cyberspace and the assessment of the adopted counteraction measures in a given field. In order to further narrow the area covered by the study, we analyzed groups that, objectively speaking, should raise the greatest concerns of states, namely jihadists, far-right and far-left groups.

The seeking of a remedy for the problem of terrorism has gained continued popularity and remains of interest not only to governments and international organizations but also to experts of the academic community. The constantly evolving threat has been noticed in every aspect, including particularly activity in cyberspace. However, to the authors' best knowledge, very few researches that address the issue of the effectiveness of countermeasures in the context of the far-right and far-left terrorist online activities have been published so far. Furthermore, there are practitioners' voices claiming that in the legal doctrine, there is a lack of "the comparative research of far-right/left and Islamist narratives in order to establish whether there is a case for commonalities and thus common elements to counter-narratives" (RAN, 2016). Taking all of the aforementioned into consideration, the subject of this study all the more appears to be legitimate and desirable.

The study concerns the scrutiny of the counter-terrorism instruments created in the frames of the European Union and cooperating organizations. The authors focus on their efficiency in preventing and combating the spread of terrorist content online in the context of various types of terrorism. Observations and conclusions have been devised based on the conscientious analysis of statistics and comparison of data published in several subsequent reports of well-established organizations and institutions - such as TE-SAT or Global Terrorism Index, as well as on authors' remarks on the current affairs and opinions of practitioners experienced in preventing and combating radicalism in the cyberspace.

The paper is organized as follows. Section I analyzes the current trends, distinguishing features and the *modus operandi* of jihadists, far-right and far-left terrorists, emphasizing their activities in cyberspace as it became the main operational field for them. In Section II the selected countermeasures developed within the UE for preventing and countering terrorism online are discussed. Finally, Section III refers to the previously formulated hypotheses, as assessment of the countermeasures' effectiveness is made. Within the end of this paper, thoughts summarizing the results of research and drawing conclusions are presented.

1. The Comparative Analysis of the Distinguishing Features and the *Modus Operandi* of the Selected Terrorist Types: Jihadists, Far-Right and Far-Left Terrorists

The study of the features that distinguish particular types of terrorism and the presentation of their methods of operation is outstandingly important in light of the discussed issue, as there is a clear correlation between the above-mentioned elements and the effectiveness of the counteracting and combating policies. This interdependence is even bigger than one might expect because the specificity of terrorist activities in cyberspace determines anti-terrorist strategies, and the effectiveness of these strategies can affect, in turn, the possible change of the tools terrorists use and the ways they act. Bearing this in mind, it is particularly alarming that over the past two decades, fear of jihadist terrorism has obscured the threat of far-right and far-left extremism, allowing them to develop, specifically to improve and expand online activity.

1.1. Jihadist terrorism

1.1.1. Understanding the concept of jihad

Jihadist or Jihadi terrorism is difficult to define, even though it has been a much-discussed term. There is not just one single set of motivational factors, but the multiplicity of incentives and at the same time, considerable uncertainty about the genuine motivations of jihadists as they take full advantage of all circumstances to justify their acts of violence.

The ideology of jihadism is built on the concept of jihad. While the comprehensive analysis of it is beyond the scope of this study, it should only be mentioned that there is a lack of consensus about the definition of jihad. Moreover, one can observe that jihad is often considered as the synonym for religious extremism aimed at sowing fear, uncertainty and distrust of the authorities, and being used to relate to the fight against Western democracies. Furthermore, jihad is stereotypically translated as "a holy war" of Muslims against non-believers. However, it is worth noting that terrorists are often misrepresenting the religious sources they cite, therefore the modern perception of the meaning of jihad they have disseminated contradicts the linguistic and contextual meaning of this word which can be found in the Quranic text[5].

Despite the authors' approach that armed struggle does not reflect the full essence of jihad, adapting to the terminology used by Interpol, the narrow sense of the term "jihadist terrorism" will be used in this paper to describe a radical movement aimed at confrontation with everyone whom they consider to be enemy to carry out particular sociological and political changes (TE-SAT, 2020, 35)[6].

1.1.2. Characteristics and current trends

In order to provide a comprehensive picture of the contemporary jihadist terrorism, first of all, we should emphasize that currently, we are dealing with a new generation of terrorists, who are unpredictable and much more challenging in terms of developing countermeasures than their predecessors. Intending to explain why, let us continue with the demonstration of the significant changes that have occurred in their functioning along with the presentation of how the profile of the perpetrator of jihadist attacks evolved.

The description of the jihadist's profile is complex, as it consists of several features. First of all, it should be noted that most attacks in Europe in recent years have been carried out by home-grown, independently acting jihadists – so-called "lone wolves". These are individuals usually born on the territory of European states or living there for many years, identifying themselves with the jihadist ideology and - as a rule – being radicalized through information and communication technologies (ICT). In the majority, they are not listed as belonging to terrorist organizations. Unlike them, individuals explicitly involved in terrorist activities are closely monitored and strictly controlled by special units of EU institutions and law enforcement agencies of the Member States. In contrast, lone actors are hard to detect, as they have no history of radical activity and sometimes do not even express their radical views publicly or do it anonymously with extreme caution, e.g., using encryption software. As a result, the application of countermeasures and implementing prevention mechanisms regarding individuals acting alone is highly complex and challenging.

The threat posed by lone actors is reflected particularly in the statistics published by Europol. According to the report TE-SAT 2020, the perpetrators of 6 out of 7 jihadist attacks completed and failed in 2019 were "lone wolves". It is noticeable that all 14 thwarted attacks were prepared by multiple perpetrators, and the majority of

[5] The word "jihad" literally means in Arabic "struggle" or "effort" and does not mean "war" (war in Arabic is "harb"). Hence, "jihad" embedded in the context of Islamic texts, means a moral or ethical struggle to live in accord with faith, as well as striving to build a good Muslim society or efforts to defend Islam, wherein armed struggle is not a key understanding of the concept.
[6] See also Sedgwick, 2015, 34-41.

the attacks that States failed to contain were carried out by single persons, which clearly shows the problem with the detection of lone actors' activities (TE-SAT, 2020, 14).

Other elements that make up the profile of the jihadism-motivated perpetrator include the proficient use of ICT, the young age – approx. 70% of attackers in 2019 were people aged 20-28 and in overwhelming majority male – comprising 85% (TE-SAT, 2020, 15). Furthermore, mental disorders are considered to have played a role in motivating individuals to commit violent jihadism-inspired attacks. The latest Europol report notes the link between the psychological instability of the individual and the vulnerability to radicalization. According to the report, people with mental health issues are easier to influence through hate speech, fake news and other propaganda tools in the Internet (TE-SAT, 2020, 36).

Europe's jihadist structures are based on loosely connected networks, particularly online communities, acting without a joint strategy, conducting certain activities through relatives and friends, thus increasing effectiveness and reducing the risk of betrayal or information leakage (TE-SAT, 2020, 41).

Referring to the current trends in the discussed area, the impact of the pandemic should be mentioned. Namely, in the first months of the pandemic, with many countries entering a lockdown, an atmosphere conducive to radicalization had developed. The pandemic and the lockdown, in particular, had both economic and social consequences. Some individuals locked in their homes, restricted in the freedom of movement, sometimes in a worse-off financial situation, pursuing their social activity limited to the Internet and social media, are becoming easy targets for propaganda and radicalization. Radicals involved in various types of terrorism, including jihadists, attempt to seize this opportunity to pursue their goals further. Worth mentioning is also the fact that both Al-Qaeda and ISIS claim that COVID-19 is a “divine” retribution for the moral and intellectual degradation of the West and call followers to conduct attacks when authorities are distracted by fighting the pandemic.

One of the recent tendencies in the last few years is also the problem of radicalization in prisons and detention centers. It is a serious security threat that requires active counter-efforts by states, as convicts and detainees are susceptible to engage in criminal behavior and thus are prone to radicalization, violence promotion, and pose a threat both during the imprisonment or detention and after their release (TE-SAT, 2020, 5, 13).

Finally, a noticeable shift in the very concept of jihadist terrorism can be observed. While their predecessors pursued clearly defined ideological and political goals through attacks, the main objective of the new generation of terrorists is to intimidate the European community, destroy the existing order and democracy in EU countries. Jihadist acts are characterized by the efforts of the perpetrators to inflict mass casualties and a tremendous material loss, whereas, in the past, an attack was often an end in itself. Jihadist attacks in Europe are aimed at “soft targets”, i.e. facilities or places with large groups of people (e.g. theatres, museums, shopping malls, hotels, restaurants), as well as against “hard targets”, i.e. essential facilities and so-called critical infrastructure, the destruction or damage of which may disrupt the functioning of the state, its organs, and institutions or cause other long-term harmful effects, e.g. in the sphere of economy, trade or tourism.

1.1.3. Jihadists' use of the Internet

Referring to jihadists' *modus operandi*, particular attention should be paid to the way online tools are used, as they have become one of the fundamental elements of terrorists' activities. Jihadists exploit Internet tools very skillfully and to a considerable extent. If anyone is wondering why cyberspace is so attractive to jihadists, the answer is simple. The Internet enables cost-free communication regardless of the location of the interlocutors, facilitates spreading propaganda, conducting radicalization and recruitment with the possibility of reaching a very wide audience, planning, controlling and carrying out attacks with a lower risk of detection due to maintaining a high level of anonymity of Internet users, huge possibilities of obtaining and sharing information, as well as fundraising from various sources. To sum up, the advantages of the Internet are colossal: 1) almost cost-free, 2) far-reaching, 3) ensuring anonymity, 4) an excellent source of information and funds, and 5) giving

worldwide audience. Accordingly, with the absence of appropriate, precise and effective countermeasures cyberspace could become an ideal place for terrorist activity.

When classifying jihadists' activities in cyberspace, we can distinguish the following categories of their online activity: a) terrorist acts carried out in cyberspace, e.g. cyber-attacks against key state infrastructures and private entities; b) planning and organization of attacks in the real world; c) organization of terrorist network's functioning - communication, management and control over terrorist cells and individual members; d) propaganda and radicalization - uploading and disseminating terrorist content, including materials depicting extremist ideology, as well as content intended to intimidate, spread anxiety and demonstrate force; e) recruitment and training of new members, f) financing terrorist activities, e.g. fundraising, illicit trade in drugs, weapons and other illegal goods, financial frauds in the digital space.

Let us start a brief overview with a few general remarks on platforms and websites most frequently used by jihadists. Initially, extremists intensively exploited the high popularity and wide audience of such social media giants as Facebook, Twitter, or Instagram. The ability to distribute propaganda on these platforms is perceived as an essential factor that contributed to the initial success of cyber-jihad[7]. However, after the platforms have intensified their efforts to eliminate and prevent terrorist-linked content and launched various countering initiatives[8], the reduction of extremist online activity was expected, but did not happen. Though, according to Facebook's transparency reporting, 99% of terrorism-related content is detected and removed before being reported, research clearly shows that the platform remains an essential place for terrorist activities, through means such as exploiting the weaknesses of security protocols and the hijacking of accounts and hashtags later used for propaganda dissemination, content masking (visual modification as overlaying jihadist videos with the iconography of popular news outlet like BBC and others, allowing to bypass the detection algorithms), gaming text analysis ("broken text" tactics, the use of specialized fonts or misleading, offensive content descriptions – methods to deceive moderators and avoid takedowns), link sharing or coordinated raids on such Facebook pages like US army page or US government pages (Ayad, 2020, 2-4).

As confirmed by the Institute for Strategic Dialogue (ISD) research, social media platforms remain an essential tool in the hands of terrorists. Extremist groups not only can easily be found on social media, but they were able to game the algorithms and keep conducting terrorist activity in a very active and expanded way. For instance, recently the ISD revealed the incredibly high activity of the Fuouaris Upload group – pro-ISIS account network on Facebook, consisting of several hundred accounts and reaching the audience of tens of thousands recipients. As emphasized by the ISD, "the Fuouaris Upload network is not just a case study into the tactics and strategies of a new generation of ISIS supporters online, but it highlights an integrated, multilingual and multiplatform approach to seeding official and do-it-yourself terrorist content on platforms such as Facebook, Twitter and SoundCloud" (Ayad, 2020, 6). The Fuouaris Upload network was brought to life when the world faced pandemic and lockdown, and consequently, people have turned to online communication more than before. Furthermore, currently, the network is quite successfully deceiving both automated and manual content moderation on Facebook.

In addition to the opportunities offered by social media, jihadists take the full advantage of photo, audio and video hosting websites, such as YouTube and LiveLeak, communication applications, e.g. Telegram, Snapchat, WhatsApp and Skype, as well as microblogging platforms such as Tumblr. Their popularity makes the dissemination of ISIS videos, photos, and other propaganda material more successful and far-reaching (Lakomy, 2017).

[7] Cyber-jihad was initiated by the Islamic State at the turn of 2013 and 2014 with the creation of a propaganda machine consisting of specialized cells, including al-Hayat Media Center, Amaq News Agency, al-Himmah Library, Furqan Media Foundation, and al-I'tisam Media Foundation. It was considered the most advanced and probably also the most effective mass terrorist propaganda campaign of this type in history. Currently the network no longer poses a significant threat, as it has lost its effectiveness and influence (Lakomy, 2017).

[8] E.g. the creation of a digital "fingerprints" database for identification of terrorist content initiated by Facebook, Twitter, Google and Microsoft.

It is worth mentioning that messaging and communication app Telegram was the key platform for dissemination of jihadist propaganda online, but due to counter-terrorism actions, it lost its popularity among extremists. Although their presence on the platform is still noticeable, they began to look for new areas for their activity, moving to TamTam or Hoop Messenger, as well as to such marginal apps like BCM or Riot (TE-SAT, 2020, 43). Attempts have been made to use blockchain or peer-to-peer technologies, e.g. Rocket.Chat and ZeroNet (King, 2019). Although these efforts have proved underperforming, however, they show the willingness of terrorists to change and improve their *modus operandi*, while following the latest technological trends.

The above-mentioned online jihadists ecosystem serves them not only for communication, planning, organizing and disseminating propaganda, but also is an excellent set of tools for radicalization, acquiring followers and recruitment of new members of a terrorist network.

Referring to cyber-attacks, we must notice that - according to Europol's research - the probability of them is very low. Furthermore, jihad-inspired hackers so far have not developed their own effective tools and techniques to carry out cyber-attacks. Instead, they only rely on the available instruments offered by the cybercrime market, including the purchase of web-hosting services, download of ready-made software, and rental of botnets to launch DDoS attacks.

An essential element of the jihadists' activity in cyberspace is searching for financial resources. The basic methods in this area include direct fundraising, raising funds through online payment tools, raising funds through pseudo-charity or non-profit organizations (e.g. fundraising allegedly to support the families and orphans of killed militants, to build mosques or wells), money laundering, and online brokering (Cohen-Almagor, 2016). Among other methods we can mention as well are the Hawala money transfer system the use of cryptocurrencies (mainly Bitcoin), and receiving online donations via the Dark Web, which remain important tools for raising funds by jihadist networks. One of the recent trends is the use of cryptojacking technologies.

Summarizing the above, the Internet for jihadists is both a target and a weapon, as they use cyberspace for operational, defensive, and offensive purposes. In operational terms, communication, propaganda, and recruitment are vital for jihadists' online success. Recently we have noticed a renewed expansion of jihadist propaganda to many websites, platforms, and online applications. The methods of spreading propaganda, beside the above-mentioned ones (i.e. overlaying terrorist-related materials with permitted content, "broken text" method, content dissemination through hijacked accounts), include as well: posting links to ISIS-linked websites in the comments section of social media accounts, graphically overlaying such links into videos, publishing propaganda e-books, press[9] and newsletters, audio-video files, cartoons, radio broadcasting[10], composing music with religious and propaganda content (nasheeds), and creation of radicalizing and training computer games[11].

Referring to the defensive sphere, the main point for undetected extremist functioning is the dissemination of the instructions and training on security and anonymity measures, secure and encrypted communication, safe use of mobile phones, and others. Finally, among the offensive capabilities we can notice hacking social media accounts, planting malware, or an opportunity to launch a cyber-attack.

[9], E.g. “Istok” and “Rumiyah” magazines; for more see Matusitz, Madrazo, Udani 2019.
[10], E.g. Al Bayan Radio, renamed later to Radio Al-Tawheed.
[11] The effectiveness of the ISIS strategy and the ability to reach millions of Internet users, even those who are not really interested in terrorist content, rely in particular on the so-called “snowball effect”. Namely, after posting of a shocking content (e.g. decapitation, torture) it is instantly transmitted both by news services and shared by ordinary social media users and therefore reaches further recipients from trusted sources, to which they reach more willingly. As a result, the content reaches millions of people with only a small effort of terrorists.

1.2. Right-wing terrorism

1.2.1. Right-wing terrorism phenomenon

Right-wing terrorism does not create a coherent and easy to define movement. The right-wing scene is perceived as extremely heterogeneous in its structure and ideology (TE-SAT, 2020, 67). One can describe the right-wing phenomenon as the ambiance of individuals and small groups united in their rejection of diversity and minority rights and a strong belief in the supremacism of particular groups of people who share some common features – nationality, race, tradition, or culture. It is connected with a variety of sub-currents, which are based on different preconceptions and hatred and includes movements such as, for example, neo-Nazi, racists, anti-Muslimism and anti-Jewish or hooligans groups. Therefore, right-wing ideology is firmly combined with the following political and social beliefs: extreme nationalism, racism, antisemitism, anti-immigration, xenophobia, anti-feminism, and others. The common feature of right-wing terrorists is that they challenge the existing political, economic, and social system and aspire to change it on the radical right model. Following the commonly adopted terminology (ex. used by EUROPOL in TE-SAT and other papers), the authors decided that in this study, the term "right-wing terrorism" will cover all terrorist groups and individual perpetrators sympathetic to the above-mentioned ideas and sharing those characteristics. However, it is worth noting that it does not mean that every far-right group is automatically a terrorist or a violent one (GTI, 2020, 61).

The characteristic feature of right-wing ideological motivated offenses is that they often have "fluid boundaries between hate crime and organized terrorism" (CTED, 2), therefore the same act may sometimes constitute a terrorist crime, while in other cases being perceived as a crime motivated by hate or even an ordinary crime.

1.2.2. Characteristics and current trends

To provide a complex description of the contemporary far-right terrorism that also enables comparison of this phenomenon with jihadist terrorism, we need to address the issue of the perpetrator's characteristic. The noticeable and current trend in the far-right terrorism activity is that most perpetrators of violent radical acts may be qualified as "lone wolves," (TE-SAT, 2020, 19) like the above-mentioned characteristic of jihadi terrorism. It is additionally justified by the "leaderless resistance" doctrine (TE-SAT, 2020, 70), which is popular among right-wing radicals and provides justification for radicalized perpetrators to commit an attack without any guidance, direction, or previous cooperation in planning. The "lone actors" tactic is entwined with online activity because, without having to participate in the big and structured organizations, cyberspace ensures the best way to communicate, share information, and maintain international relations. Therefore, the far-right radicals are considered to be unpredictable and hard to detect. Furthermore, another emerging development of the far-right phenomenon is the increasing number of individuals taking part in extremist activities that have not had any previously detected contact with the radical environment (Weimann, Masri, 2020, 3).

The notable trend is also that far-right terrorists and extremists currently show increasing interest in using explosives and the knowledge about which is mostly facilitated online (TE-SAT, 2020, 20). It is a gradually arising phenomenon that needs to be a subject of concern because traditionally far-right perpetrators were mostly associated with shootings.

Similar to the case of jihadi-motivated perpetrators, a predominant number of far-right-wing radicals that committed, planned, or prepared the violent attack were men. The predominant group consisted of people of young age – between 22 and 30, however, their number in the case of right-wing offenders reached just 40% (TE-SAT, 2020, 18). It is worth emphasizing that, according to some research, far-right activists have a significantly higher previous criminal record than has been noted within jihadists (Ronen, 2020, 8). Despite maintaining international relations, predominant right-wing perpetrators are citizens of the country of attack (TE-SAT, 2020, 18). However, contrary to home-grown jihadi terrorists, in most cases, they not only have

citizenship but also strongly identify with the nation and perceive themself as members of the only ethnically and culturally clean group that has a right to exist in the country.

Like in the case of jihadi terrorism, one can also observe the impact of the ongoing pandemic situation on the far-right functioning. For right-wing terrorists, it creates an unprecedented opportunity "to spread hate, fear, panic and chaos" (Weimann, Masri, 2020, 12). As the pandemic began, it has become the central topic of discussions of right-wing radicals. Like jihadists, right-wing movements have benefited from the above-described consequences of emerging atmospheres conducive to radicalization. However, they also have seized the opportunity to create and disseminate conspiracy such as theories pondering the roles of "the Jewish global elite" and Chinese government or migrants in the creation and spreading of coronavirus (Weimann, Masri, 2020, 12). Radical content, fake news, and conspiracy theories are not the only means used by far-rights according to the pandemic. They also appeal to use the SARS-CoV-2 as a biological weapon to conduct real-world attacks and, for this purpose, launch online campaigns encouraging to spread the virus among the "enemies" and providing tips on how to avoid detection (Weimann, Masri 2020, 12).

Referring to the current trends among far-right terrorism, it is required to discuss briefly the problem's scale. TE-SAT 2020 provides that in 2019, six right-wing terrorist attacks were reported (compare to one in 2018). Moreover, several EU Member States reported the detection of other forms of right-wing activities motivated by anti-immigrant, anti-Jewish, or anti-Muslim ideology that have not met the criteria of terrorist offenses. However, in the same period, the number of arrested decreased more than twice - from 44 to just 21 (TE-SAT, 2020, 18), suggesting that the detecting mechanisms do not work correctly.

Although official data indicates that the number of right-wing terrorist incidents is still relatively low, the factual social hunch of threat remains relatively high. Such an observation has found its manifestation in the words of the German Justice Minister, who claimed that "far-right terror is the biggest threat to democracy right now" (Eddy, 2020). Such a thesis is also supported by practitioners' observations about "an unprecedented influence from violent right-wing extremist groups has developed throughout Europe over recent years" (RAN Network, 2020, 5).

1.2.3. Far-rights use of the Internet

Like the jihadi ones, Far-right extremists actively use the Internet and online tools as one of the fundamental elements of their activities. Moreover, it should be emphasized that they are often considered "the earliest adopters of Internet technology for extremist purposes" (Conway, Scrivens, Macnair, 2019, 2). Therefore, their online activity's intensification has been a natural and fluent process coming from technological development, and policymakers and law enforcement organs should have predicted such. The Institute for Economics & Peace (IEP) analyzed 32 far-right terrorist attacks that occurred between 2011 and 2018 and found out that less than a quarter of perpetrators had significant personal contacts with other right-wing radicals, while over a third were radicalized online. Nevertheless, legislators, policymakers, and academics' closer attention to the widespread use of the Internet by right-wing terrorists and extremists are relatively recent (Conway, Scrivens, Macnair, 2019, 2). Under greater scrutiny, far-right online activity has truly landed only after the Christchurch terrorist attack on 15 March 2019, in which 51 people died. This attack has brutally shown the power and wide range of the use of the Internet. Sometimes, it is even called an "Internet-centric attack" (Conway, Scrivens, Macnair, 2019, 2) because it was both - pre-planned online and live-streamed[12]. Thousands of users had watched the broadcast of Tarrant's attack before Facebook removed it. What is even more terrifying, within the subsequent 24 hours, the clip was copied and posted around 1.5 million times, counting just Facebook (Hoffman, Ware, 2019)[13]. The attack and

[12] Live streaming may be considered nowadays as an arising trend in far-right attacks. Not only the Christchurch attack was live streamed, but also, for example, the attack in Halle on 9 October 2019.

[13] Other social media platforms also were "infected" by the mass posting of the video of the Christchurch attack. The amount of it spreading on YouTube and the fact that users were able to omit its automated flagging system by for example posting modified copies or

the Internet's role made it clear that both – governments and tech companies need to multiply their efforts in the fight against terrorism and violent radical content online.

To emphasize the need for reaction on far-right activity online, we can cite TE-SAT 2020, which states that "despite a recent pushback from major social media platforms, right-wing extremists continued to enjoy much greater freedom to act online in 2019 than, for example, jihadi" (TE-SAT, 2020, 72). It may be caused by the nexus between right-wing political activity, which is socially acceptable and legitimate, and far-right terrorism. That makes it hard to distinguish which content should be removed and to which extent we can treat far-right ideology as being in the frame of the freedom of speech[14].

Let us take a closer look at the far-right extremists' presence online. Right-wing extremists are aware of and, in their online activity, often inspired by methods and tactics of propaganda developed by jihadist factions. They are present on major social media platforms, which is especially important because it gives them a chance to reach millions of people. According to the research, online extreme-right activity has the kind of traction and reach that IS's (Islamic State) and its supporters' content did not have even at the highest point of their social media presence (Conway, 2020). Hence, many far-right extremists, including perpetrators of violent offenses, had their first contact with right-wing ideology there, which makes it justified to claim that the early stage of radicalization often occurs on the popular social media platforms. For many future offenders, content spread there was like "taking the red-pill"[15] - an eye-opening event that let them into a radical ideology (Weimann, Masri, 2020, 5). "Manifestos" distributed online by far-right extremists, often perpetrators of violent attacks, who perform the function of leaders and mentors for many new recruits and "lone wolves", play a crucial role in the radicalization process (Ronen, 2020). They are posted simultaneously on many web platforms and blogs, from the most popular like Facebook or YouTube to those smaller, famous for their weak moderation and high level of users' anonymity - for example, 4Chan or 8Chan[16]. However, contrary to those observations, until recently, some researchers observed an emerging trend among far-right perpetrators of the lack of public communications regarding carried attacks (e.g. publicly claiming responsibility, threats about future acts). It was associated with the "tension strategy", which means raising political and ideological capital on the chaos and social insecurity after the incident (Koehler, 2016).

The characteristic of far-right extremists' activity in social media is the adaptation of the Internet troll-culture with its use of sarcasm and innuendo, (TE-SAT, 2020, 72) and the heavy adaptation of meme culture (Conway, 2020, 2). Both forms let them avoid personal responsibility for their hate speech, incitement of violence, labels, or other content at risk of criminal liability. The memes, jokes, and specialized jargon that dominate far-right online communication channels, while taken separately, cannot be interpreted as terrorist content. However, it does not change the fact that they create "a constant stream of highly distilled ideological thought," and for this reason, pose a significant risk of radicalization (Conway, 2020, 2). Another practice representative for far-right Internet trolls is "doxing". It is an accumulation of information about their opponents gained from open sources or via hackers' attacks. The purpose of gathering personal, often sensitive, data is intimidation and victimization of persons or groups of people perceived as their enemies (ICT, 2020). Popular and effective right-wing extremists' strategy also uses disinformation and spreading fake news (Weimann, Masri, 2020).

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recordings forced YouTube to some rapid reaction, such as temporally blocking of some search functions, primarily the "recent uploads" section (Conway, Scrivens, Macnair, 8). YouTube algorithm was also a subject of Global Network on Extremism & Technology report, which confirmed that the recommender system of YouTube prioritizes extreme right-wing material after interaction with similar content, supporting the findings of a previous study (see: Reed, A. et al. (2020). *Radical Filter Bubbles. Social Media Personalisation Algorithms and Extremist Content* [in:] Global Research Network on Terrorism and Technology: Paper No. 8.

[14] It is related to the concept called "the Overton window".

[15] "Red pill – beliefs, choices, or information that allow you to see the world as it really is, even though you would feel safer or happier if you did not. This refers to a scene in the film "The Matrix" where a character is offered a choice between a red pill, which reveals the true world, and a blue pill, which keeps it hidden", https://dictionary.cambridge.org/pl/dictionary/english/red-pill, (accessed: 1.12.2020)

[16] The particular problem is radical content, which apparently has a peaceful character, however, consists of core ideological elements and indirectly encourages hatred. Often, they are perceived as the inspiration for perpetrators of attacks and therefore should also be subject to legal debate.

Among all major social media, special attention should be put on YouTube since a study on radicalization provides "strong evidence for radicalization among YouTube users" (Riberto et al., 2020, 10). Extremists use it to propagate their views, spread hate and even live stream. YouTube uses the algorithm that determines which videos appear as recommended for users. Far-right YouTubers have learned how to utilize it to put their radical violent videos high on the recommendation list for viewers of less extreme content (Weimann, Masri, 2020). In 2019 YouTube itself was subject to accusations stemming from concerns that abusive and violent content posted by YouTubers with broad reach was moderated less harshly because it could bring more financial gains for the company (Conway, 2020)[17].

Another feature of far-right extremists' activity on the Internet is also their use of gaming subculture. They use video gaming platforms to recruit new members[18]. Games often brutal and nested in war scenery, where the player is engaged to combat virtual enemies, create a conducive environment for radicalization. Moreover, this method guarantees straight access to targeted groups – mostly young males – especially vulnerable to radicalization. Online gaming sites are used to communicate via chat features among video gamers and as a platform to broadcast violent materials (e.g. video of terrorist attacks). Gamers on such platforms enjoy much greater freedom than users of traditional social media (Ronen, 2020).

Restrictions emerging on the major social media platforms that continuously develop their policy and methods of eliminating terrorist content motivate radicals to move to so-called "fringe platforms". The most popular among right-wing extremists are *Reddit*, *4Chan*, *8Chan*, *Voat,* and *Gab*. Many researchers have identified the last one as "a safe haven for extreme right-wing movements" (TE-SAT, 2020, 73). Nowadays, it is also observed that the Russian-based platform *VKontakte* is gaining far-right activist interest and is becoming widely used, especially among radical young people (TE-SAT, 2020, 73).

Another separate issue that needs to be addressed in the context of far-right terrorist use of the Internet is the phenomenon of financing terrorist activity. According to TE-SAT 2020, right-wing groups use traditional as well as innovative methods of financing their activities. They collect fees from its members and donations from sympathizers. The characteristic feature is that some of them also gain funds via online merchandising. They produce and distribute the propaganda materials – such as clothes and gadgets with far-right pictures and slogans (often based on the memes' culture mentioned above). Online donations in bitcoin or other cryptocurrencies via various websites have also been detected (TE-SAT, 2020, 23).

1.3. Left-wing terrorism

1.3.1. Left-wing terrorism phenomenon

Left-wing terrorism is a phenomenon frequently nearly omitted in the studies and research. Therefore, due to the lack of data, the authors could not provide as broad or similar a comprehensive analysis for this subject as was done with respect to both previously characterized types of terrorism. Even the look at the TE-SAT 2020 (as well as previous editions) support such observations – for the description of far-left terrorism dedicated twice less space than for far-right and four times less than for jihadi. Such a statement is meaningful and proves that adequate attention is not drawn to this issue, making it questionable if countermeasures meet this phenomenon.
Providing some definitional remarks, we need to note that left-wing terrorism is often combined with anarchist terrorism. For this article, whenever it is not literally distinguished, we will treat those phenomena together. Left-wing terrorism is a term to describe radicals whose primary motivation for activity is triggering revolution

[17] YouTube has recently expanded its hate speech and anti-harassment policy, however, there is no data and research to verify the effects of its new policy.
[18] A separate, but equally important and interesting issue is the use of video games as a tool for radicalization. About the most recent far-right produced games read: https://www.counterextremism.com/blog/emerging-threat-extremist-made-video-games.

that can lead eventually to establish a classless, communist society (TE-SAT, 2020). At the same time, anarchist terrorism is an umbrella term referred to acts committed by people supporting different anarchist ideologies. They are united in the negation of capitalism and authoritarian agenda (TE-SAT, 2020). Their enemies are represented in institutions and people associated with the political, economic, and social system– such as MPs, police and other officials. Therefore, a significant amount of attacks is targeted.

What distinguishes the threat of far-left terrorism from other types is that so far in Europe, it has been polarized on three states – Greece, Italy, and Spain – with only a few occasional, individual attacks in other states. Last year EU Member States reported 26 left-wing and anarchist terrorist attacks, which means that except for a slight decrease in 2018 (19 reported attacks), the total number of attacks perpetrated by far-left radicals has been since 2016, on a stable, but relatively high level. As it can be seen, the number of far-left attacks is much higher than those perpetrated by the far-right. However, it needs to be mentioned that left-wing terrorist attacks are around seven times less lethal than far-right attacks and over 30 times less deadly than jihadi terrorism in average deaths per incident[19] (GTI, 2020).

1.3.2. Characteristics and current trends

Even if associated with organizations, Far-left extremists mostly commit leaderless attacks and often may be described as lone actors. In most cases, perpetrators and organizations claimed responsibility for their actions and published proclamations (the equivalent of far-right "manifestos"). Research shows that most published materials are written in native languages and posted on like-minded online platforms and only occasionally translated into English to reach an international audience (TE-SAT, 2020). It contrasts the far-right publications, where regardless of a country, English plays lingua franca.

When discussing the far-left activities and modus operandi, we should highlight that it is often strictly associated to right-wing terrorism. Far-right sympathizers represent the most natural enemies for them because of their belief and support for opposite values. Therefore, they engage in violent confrontations with them that occasionally take the form of a violent, targeted attack on representatives of far-right organizations or political parties (TE-SAT, 2020, 61).

One of the characteristic features of far-left terrorists and violent offenders in the EU is their strong support of the Kurdish population, especially in Turkey and Syria. Some well-grounded rationales believe that radicalized far-left have travelled to join Kurdish militias in Syria (TE-SAT, 2020). The danger connected with their return from the war places has been raised in public discourse a few years ago and remains a matter of concern for the EU authorities. The activity in the EU Member States of The Turkish Marxist-Leninist terrorist organization (DHKP-C) should be treated as a separate, but not least, issue. The threat of attacks by the DHKP-C on the territory of the EU is relatively low. However, there is strong evidence that European states are a safe logistic base, ensuring finances and military equipment for violent operations aimed at Turkey (TE-SAT, 2020). Therefore, while combating terrorist danger, the EU should take this danger seriously because a tacit approval of radical organizations functioning may easily backfire on those who have let them peacefully grow.

1.3.3. Far-lefts use of the Internet

In detailing the far-left terrorists and radicals' activity in cyberspace, it is justified to claim that they operate in the same way as far-right or jihadi offenders in many areas. What is significant, their online activity has not been a subject of studies or detailed analysis by law enforcement so far (authors have not found at least such reports), as it was in the case of the far-right. The probable reason is that left-wing attacks are often less harmful despite being committed in larger numbers and almost often with no fatalities. From our standpoint, proper and specific research on left-wing content online (on major social media platforms, as well as on fringe ones) should be done.

[19] The average based on data gathered from 1970 to 2018.

The remark needs to be recognized that some groups of far-left extremism consciously resign from using the Internet or restrict it to a minimum, ensuring that the tools used are well-encrypted and do not include GPS or other tracking facilities (TE-SAT, 2020, 62). In relation to this, remains the observation that they display "a high level of security awareness". To communicate, they use mostly encrypted applications and "clean" mobile phones (to lower the risk of tracking their personalities, localization). They also developed their own communicational infrastructure, a specific set of examples being *Riseup.net* (platform for communication that also provides links to other "radical services" – both public and private – with detailed information on how to gain access), *Espiv.net* (platform in the Greek language, that was blocked for some time this year, but in June 2020 its servers have been switched back on), and *Noblogs* (blog mostly in Italian, that promotes itself with a slogan "Connecting radical people. Noncommercial, antifascist, antisexist, privacy-orientated blog platform"[20]).

Therefore, we can summarize that the Internet among left-wing terrorists remains a preferred tool for awareness-raising, propaganda, and recruitments of new sympathizers (TE-SAT, 2020, 62). To spread ideological content, they mostly use websites or weblogs that gather like-minded individuals. It makes it easier to radicalize those most vulnerable because the left-wing rhetoric is close. As mentioned before, they also mostly use native languages, which allow them more transparent and more persuasive communication with supporters from a particular state.

Concerning financing, there have been many similarities between far-left and far-right terrorism. Left-wing organizations also use traditional funding sources, such as members' fees and donations, and what was remarked in TE-SAT 2020 also as coordinating to – collect funds in cryptocurrencies via different online platforms (TE-SAT, 2020, 23).

2. Selected EU Countermeasures Aimed at Preventing and Combating the Terrorist Use of Cyberspace

The European Union is very active in the field of counter-terrorism measures. It is supported by the view that "Member States cannot address those (the most serious and urgent – authors) threats effectively acting on their own" (European Commission EU Security Strategy, 2020). Therefore, there is a necessity to create the tools, infrastructure, and environment for broader collaboration among governments that can help to strengthen their chances of effectively tackling security challenges. The EU competencies in this field are based on Article 83 TFEU (OJ C 326, 26.10.2012), according to which, the European Parliament and the Council have competencies to establish minimum rules concerning severe crimes, among which terrorism is explicitly mentioned. The basis for all of the EU's counter-terrorism responses constitutes the European Union Counter-Terrorism Strategy adopted in 2005. The strategy is grounded on four pillars, that are: prevention, protection, pursuit, and response. Further works on this issue comprise the more concrete elaboration of particular interests generally framed in the strategy.

For the purposes of this article, we can divide recent EU activities on the counter-terrorism field into three major groups:

1) developing and facilitating EU collective cooperation and capability. That means establishing and evaluating common legal mechanisms among others acting on terrorist activity in cyberspace, as well as formulating and developing security strategies and methods for internal EU security in the future years, in which preventing and combating the phenomenon of using cyberspace for terrorists' purposes is one of the priorities;
2) strengthening the internal capabilities of EU Member States, with the aid of studies and research providing them with highly professional, up-to-date, and practical information. This objective is strictly connected with the creation of specialized agencies and other institutional structures gathering politicians, law-enforcement professionals, and non-governmental experts;

[20]See https://noblogs.org/

3) promoting external partnership and cooperation with non-state entities, such as IT Companies. It is an answer to diagnosed danger connected with a borderless character of the terrorist threat.

Counter-terrorism measures require a complex and specific approach. In this article, the authors focus on a matter of terrorist activity in cyberspace and, therefore, analyzes instruments and mechanisms most important for combating this sphere of terrorist activity. Terrorism and radicalization have been isolated as one of the EU Security Union Strategy (2020-2025) priorities. Due to the evolving character of means and patterns of radicalization and terrorism, mechanisms used to prevent, detect, and fight them also need to be continuously revised and updated. The limited extent of the paper makes it impossible to discuss all of the counter-terrorism measures created under the auspices of EU institutions, in collaboration with them or with their support. Therefore, the authors have made a subjective, individual choice of instruments that draw on two grounds: 1) practical importance and adequacy to counter terrorist activity online and 2) representativeness for each of the above-distinguished categories. The chosen instruments and initiatives are the European Union Internet Forum (EUIF) and Radicalization Awareness Network (RAN), Christchurch Call, Directive (EU) 2017/541 on combating terrorism, and the proposed European Council regulation on Preventing the Dissemination of Terrorist Content Online.

2.1. European Union Internet Forum and Radicalization Awareness Network

Terrorism has been appointed in the European Agenda of Security (2015-2020) to be one of the priority threats for the EU's security due to its powerful cross-border and multi-sectorial dimension; a coordinated action plan at the European level is needed. The changing methods of radicalization and strong evidence for the connection between terrorist and violent extremist content online with recent real-world incidents in the EU Member States highlighted the need for closer and more complex cooperation in this field. It was considered that effective counter-terrorism policy demands both – legislative initiatives and legally binding acts, as well as soft law instruments and mechanisms with more voluntary character, which can engage a broader range of entities. For this reason, the European Commission Agenda committed to launching an EU-level Forum to bring together the Commission, EU Member States, and IT companies. Therefore, the EU Internet Forum has been established and gathered a wide range of participants/collaborators, including Europol, academic society and separate EU networks, such as Radicalization Awareness Network (RAN).

The EU Internet Forum (EUIF) has two main objectives: to reduce the accessibility of terrorist content online and empower civil society with effective counter-narratives. Its activity is a subject of the ministerial meeting's annual evaluation that also provides guidance and steers further actions. On 17 July, 2017, the members of EUIF adopted the Action Plan, which includes measures to improve the capabilities of automatic-based detection and removal of terrorist content online. It also contains the commitment to share the technology and tools with other entities, with particular emphasis on smaller IT platforms, which creates a crucial element of building a coherent and stable system.

Considering the task of detecting and quickly removing the terrorist and violent extremist content from the Internet, the authors will discuss two significant EUIF achievements. The first one to mention is “the Database of Hashes”[21], which was announced during the 2nd EUIF meeting in 2016 and launched a few months later. This instrument aims primarily at preventing material from reappearing from one platform to another. Using such a method makes the removal permanent and irreversible. Forasmuch terrorist and violent extremist misuse of the Internet is a subject of continuous and fast changes, and the database also needs to be regularly revised and extended. At the end of 2019, the database has gathered over 300 000 hashes (GIFCT Transparency, 2020) and was perceived as an instrument that significantly helped Internet platforms in quick removal of the terrorist content (European Commission 2029, October 7 Press release). Nowadays, shaping of the database is complemented by the Global Internet Forum to Counter Terrorism (GIFCT) and its Hash-Sharing Consortium

[21] "Hashes" are unique digital "fingerprints" of every known terrorist imaginary or video that had been removed from online service.

based on and connected with the EUIF database. Currently, the Hash-Sharing Consortium consists of 13 companies with access to the database. The system is voluntary, and the members have the freedom to decide how to use it within the frame of terms of services and technical capabilities.

The second instrument that needs to be mentioned in the context of the EUIF is the European Union Crisis Protocol which gained its endorsement at the 5th annual EU Internet Forum meeting on 7 October, 2019. It is the voluntary and subsidiary mechanism helping coordinate the response to the viral spread of terrorist and violent extremist content online in an emergency, when national procedures turned out insufficient. Primary functions of the Protocol are 1) facilitation of a coordinated and rapid reaction to the spread of terrorist or violent extremism content by the EUIF, authorities of Member States, Europol, and the GIFTC; 2) empowerment of public and private sector cooperation through encouraging those entities and supporting voluntary sharing of relevant information (e. g. URLs, metadata) as well as developed technological solutions. The crisis response mechanism consists of four stages – detection, notification, coordination and information sharing, and post-crisis report[22]. The adoption of the Protocol was the EU's response to the far-right extremism incident that occurred in March 2020 in the New Zealand city of Christchurch. This brutal attack betrayed the gap of past mechanisms that were not empowered to efficiently prevent live stream posting and sharing of incidents on a wide range of online platforms. Therefore, it is legitimate to consider the EU Crisis Protocol to contribute to efforts undertaken at the global level, such as the UNGA Crisis Response Protocol or the Christchurch Call (European Commission, 2019, July Fact sheet).

In the field of the development of alternative and counter-narratives strategies, the EUIF works within the frame of the Civil Society Empowerment Programme (CSEP). It is based on the view that violent terrorist and extremist narration online needs a positive counterbalance. Developed in 2015 CSEP, works with civil society organizations and cooperates with them to launch and support "campaigns designed to reach vulnerable individuals and those at risk of radicalization and recruitment by extremists" (CSEP website). CSEP not only establishes campaigns, prepares strategies, and organizes workshops, but also creates a network for European organizations engaged in the field of counter-terrorism. In its database, there are 616 organizations interested in campaigning against radicalization and open for cooperation. CSEP in its last ex-post paper, has also raised the distinction between the online presence of jihadist and far-right extremism. The problem of "the mainstreaming of the extremist language and narratives of far-right extremism (RAN Centre for Excellence, 2019 December)" was noticed and diagnosed as to why countering it is challenging.

Before the EUIF had been launched, in 2011 European Commission founded the RAN. This unique entity brings together first-line practitioners from all Member States engaged in the work with those who have already been radicalized, as well as those diagnosed as vulnerable to radicalization. The RAN – a part of supporting activities of the Member States, other institutions, and programs – consists of a platform for knowledge sharing. It creates a dozen working groups for practitioners from different fields (such as psychologists, IT engineers, law-enforcement organs employees and others) to share experiences and approaches, as well as to review each other's work. Though the meetings are dedicated to professionals, their cooperation's effects and conclusions are shared with the public in a series of publications. Especially important in this article's context is that recently, RAN puts a substantial emphasis on the differences between various kinds of terrorism and points out the need for comprehensive research and appropriate, conscious counter-terrorism measures.

2.2. Christchurch Call

In the fight against terrorist and violent extremist content online, European Union institutions have spotted the need to get involved in actions that range across the EU's borders. As a reaction, they acceded to the Christchurch Call – the action plan announced on 15 May 2019 at the Paris summit to extend cooperation among the wide range of actors involved in the cybersecurity issue. Initiators of the Call appreciated significant steps

[22] There is no information provided if and how many times the Protocol was used (state on 1 December 2020).

that had been already taken by international actors – among other EU institutions. However, they noticed that there is still an area for enhanced actions. Currently (state on 1 December 2020), this initiative gathers 48 countries, the European Committee, two international organizations (Council of Europe, UNESCO), and ten of the largest high-tech corporations – among others Microsoft, Google and Facebook (christchurchcall.com). The Call focuses on a few significant aspects, which are in particular: 1) the development of tools to prevent downloading of terrorist and violent extremism content; 2) combating the causes of violent extremism, 3) the review of the operation of algorithms and modification of them to prevent direction users towards violent extremist content.

It is too soon for general evaluation of the Christchurch Call. Still, after one year of functioning, we can draw some initial conclusions and measure the Call's progress so far, emphasizing its efficiency in combating different types of terrorism and extremism. One of the Call's most significant achievements is the restructuring of the Global Internet Forum to Counter Terrorism (GIFCT). The GIFTC was launched by Facebook, Microsoft, Twitter, and YouTube in 2017. The Call reformed it into an independent organization with dedicated resources capable of wide-range collaboration across multiple entities. The most significant partnerships are those with Tech Against Terrorism[23] and Global Network on Extremism & Technology (GNET)[24]. A significant achievement in combating terrorism content online has been the development and distribution of technological solutions: Hash-sharing consortium, Content Incident Protocol (CIP)[25] and URL-Sharing[26]. Those tech-industrial developed mechanisms are integrated with Christchurch Call Shared Crisis Response Protocol and collectively has been arranged to allow for the far-quicker, more efficient, and better-coordinated response to the online impacts of the attack (European Commission, 2019, October 30 press release). So far, most efforts have been focused on dealing with the problem of livestreams of real-world acts. This activity reaches a broad consensus among governments, tech companies, and civil society, which agree on what content should be removed. Its crisis response protocol has been used twice – in October 2019 and February 2020 (both in case of far-right attacks) – and demonstrated a more efficient and far-quicker response mechanism to the online posting content about attacks, preventing it from turning into a significant online crisis (Arden, Macron, 2020).

2.3. Directive (EU) 2017/541 on combating terrorism

Despite the increasingly extensive set of tools aimed at combating terrorism being developed in the second decade of the XXI century, there were still legal gaps to be filled and the need to address and penalize various forms of actions supporting terrorist activities.

Therefore, in March 2017, the EU took a step towards intensification of the legal struggle against terrorism and adopted the Directive (EU) 2017/541 on combating terrorism. The Directive was supposed to strengthen and extend the scope of already binding EU legislation and among its essential goals were, in particular; to set out a legal framework for judicial harmonization; to improve the exchange of information; to develop investigation tools; to enhance cooperation in the field of preventing, countering, and penalization of terrorist offenses; the enlargement of the list of such offenses that underlie terrorist activity in European countries and extending the protection of terrorism victims. The Directive penalizes such actions as 1) travelling within or outside the EU for terrorist purposes (e.g. aiming to join a terrorist group or to carry out an attack); 2) providing logistical and material support for such trips (e.g. purchase of a ticket, route planning); 3) conducting terrorist training or

[23] The initiative of an interdisciplinary team of counter-terrorism experts supported by the United Nations Counter-Terrorism Executive Directorate (UN CTED) that works with the global tech industry to combat terrorist content online with the maintenance of human rights.
[24] Academic research background of GIFCT that aims to understand better how terrorists use the technology.
[25] The Protocol is based on the online existence of content related to the real-world terrorist or violent extremist attacks, and it aims to prevent the potential distribution of it. By declaring a CIT all hashes are immediately shared in the database with other GIFCT members (GIFCT.org).
[26] Only the tech-company has the jurisdiction to remove the content from their service. This cooperative project guarantees a safe mechanism to share the URL links with the industry partner to whose servers the link direct. Since its launch, it has shared near 24,000 URLs (GIFCT.org).

consciously undergoing it (e.g. training on the production or use of explosives, firearms, harmful and dangerous substances); 4) providing and raising funds with the intention or knowledge that they would be used to commit or finance terrorist offenses.

Referring to the problem of the Internet use for terrorist purposes, it was essential to extend the concept of terrorist offenses not only to new categories of activities considered illegal but to broaden the scope especially to those carried out via the Internet, including the exploitation of social media. The Directive penalizes online incitement of terrorist acts and the online dissemination of terrorist content, such as texts and images supporting the ideas of extremism or serving to intimidate the population. Moreover, the Directive considers it a crime, both providing online training in carrying out terrorist acts, and consciously undergoing such training. The Directive also highlights that simply downloading training material for the purpose of committing a terrorist offense may be considered as undergoing terrorist training and may therefore be subject to criminal liability.

The Directive places particular emphasis on operational and legislative measures to counteract the dissemination of online content inciting commitment of terrorist acts. For the effectiveness of counteractions, it is considered particularly important to remove the source of terrorist content promptly or at least to block access to it. At the same time, the Directive highlights that the means and methods used to combat terrorist content on the Internet should guarantee an appropriate level of legal certainty and foreseeability to Internet users and service providers, as well as accessibility to remedies in domestic procedures.

It should be pointed out that the Directive is not aimed at increasing the accountability of Digital Service Providers (hereinafter DSP) and imposing on them a general obligation to monitor transmitted and stored data or to seek out actively illegal content[27]. Moreover, the Directive stipulates that hosting service providers cannot be held liable for illicit Internet content unless they had a knowledge of it.

The Member States had a duty to transpose the Directive's provisions into domestic law by 8 September, 2018. After the deadline has expired, the European Commission began assessing notifications received from the Member States regarding implementation. It is noteworthy that 16 states have failed to communicate the transposition of the Directive and, therefore, the Commission launched infringement procedures against them. By the end of July of this year, 15 of them have notified completing the implementation (European Commission, 2020, September 30, Report).

The Directive has raised many concerns and criticism. Firstly, it posed a challenge for national legislators, law enforcement authorities, and practitioners, mainly due to indeterminacy of some provisions and doubts as to their consistency with the rule of law and human rights. Secondly, some of the offenses enshrined in the Directive's provisions were perceived incompatible with the principle; that prosecuting and punishing individuals has to be based on their culpable conduct and intent. Thirdly, chosen modes of liability, i.e. facilitating, aiding and inciting, has raised serious concerns as to their limits and implications after the transposition to domestic law. Finally, judges and prosecutors were left with a challenge of applying vague or non-existent definitions.

[27] It is the role of the Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union, OJ L 194, 19.7.2016, so-called NIS Directive. The Directive does not directly address the online safety and security of EU citizens and does not authorize them to act on the reporting of cyber incidents. The NIS Directive is addressed to two categories of recipients: Digital Service Providers (DSP) and Operators of Essential Services (OES). Since the provisions of the NIS Directive do not apply to most of the terrorist activities in cyberspace discussed here, its presentation is beyond the scope of this study.

2.4. Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online (TCO-Regulation)

Further steps by the EU legislator in the field of combating terrorism activities in cyberspace were directed towards intensifying efforts to eliminate the problem of disseminating terrorist content on websites and Internet platforms. Such a step was forced, among others, by the awareness that the jihadists' online propaganda is technologically advanced, well-thought-out and undoubtedly poses a severe challenge to the EU's anti-terrorism strategies. At the same time, combating terrorist content is extremely important, bearing in mind the dangers of disseminating it online and the role it played in carrying out attacks on the territory of EU countries in recent years. The general legal framework for removing illegal content from the Internet was established in 2000 by the so-called E-commerce Directive, however, there was a need for a more effective and up-to-date legal tool.

The European Commission, in its Communication of 28 September 2017 on Tackling Illegal Content Online, emphasized: "What is illegal offline is also illegal online", and unquestionably incitement of terrorist activity, hatred and violence, and racist and xenophobic speech should be considered inadmissible content. The Commission called on Internet platforms to step up their efforts to eliminate illegal content, and opted for an extension of their liability for posted materials, as well as encouraged the dissemination of good practices for prevention, detection, and effective removal of illegal content and implementation of appropriate monitoring mechanisms. The Commission underlined that it expects online platforms to take immediate actions and announced that it will monitor progress and take further measures, including the development of legislative initiatives to complement the existing legal framework. The end of works on the legal instruments for combating illegal content online was then announced for May 2018.

After that first announcement of the new legal initiative aiming to tackle terrorist content, many NGO's expressed their concerns (e.g. Human Rights Watch). They mainly have argued that such a step was neither necessary nor justified and considered the draft regulation very flawed.

Following the recommendations of the European Commission, the largest IT companies, such as Facebook, Instagram, Twitter, YouTube, Microsoft, Google+, Snapchat and Dailymotion, obliged themselves to conduct analyses and, if necessary, remove xenophobic and racist content as quickly as possible (mostly within 24 hours).

On 1 March 2018 the European Commission, considering the necessity to take further action, issued the Recommendation on measures to effectively tackle illegal content online, which changed the rules of liability of DSPs, at the same time postulating an increase in speed and effectiveness of their response to reporting of suspicious content and implying to take proactive actions by them. The "notice and takedown" procedure in the case of terrorist content should be completed within one hour after receiving the notification from the competent state authorities.

In addition to the above-mentioned, the European Commission initiated legislative work on the draft regulation for preventing the dissemination of terrorist content online and consequently presented its TCO-Regulation proposal on 12 September, 2018. The proposed provisions cover hosting service providers who offer their services within the territory of the European Union, regardless of whether their headquarters are in the EU or outside it. The draft regulation obliges them to remove terrorist content from the Internet or block access to it within one hour of receiving an order from state authorities. In case of failure to comply with this obligation, the provider may face a severe financial penalty (up to 4% of its annual turnover).

However, the imposition of sanctions was left to the discretion of the Member States.

In addition to the path of removing illegal content on the order of competent authorities, the proposal of TCO-Regulation also provides for a parallel procedure whereby a state authority sends a non-binding notification of

suspicious material. In such a situation, the assessment and decision to remove or block the indicated content will be entirely up to the portal administrator.

The proposal defines the concept of terrorist content as "encouraging participation in terrorist offences", "promoting the activities of a terrorist group", "inciting to commit terrorist offences" and "instructing on methods or techniques for the commission of terrorist offences".

The proposed provisions require DSPs to develop appropriate mechanisms to allow users to challenge actions taken against them, as well as maintain a certain level of diligence and apply proactive measures to prevent the reappearance of removed terrorist content, while state authorities have the right to force providers to apply "specific" measures[28].

Work on the legislative proposal presented by the Commission is still ongoing, as there have been significant divergences of opinion among EU bodies regarding its provisions. The European Parliament has called for strengthening the protection of fundamental rights, in particular freedom of expression, and upon that, has advocated removing the obligation for providers to generally monitor Internet content in line with the E-commerce Directive, and excluding the possibility of forcing them to use proactive measures. Parliament has commented negatively on algorithms and re-upload filters, which compare disseminated content with that already removed and stored as illegal. Parliament has underlined that these mechanisms are not suitable for a complex analysis of the legality of online content as they do not understand the context which was posted. Moreover, such "databases" of illegal content are not transparent and are generally not based on court rulings, and therefore are not subject to control, which may result in abuse and removal of legal content, but constitute polemics or controversial views on specific sensitive political issues.

On 17 April 2019, the European Parliament presented the modified proposal of the TCO-Regulation and consequently, the European Parliament, the Council of the EU, and the European Commission, started trialogue aimed at reaching an agreement on the final shape of the Regulation. On 29 September 2020 the most recent text – Presidency package proposal – was presented (JHD 2020, Presidency). It is a compromise solution between the proposals of the European Parliament, the Council, and the Commission. The Presidency proposal highlights that the main objective of the TCO-Regulation is to establish an institutionalized mechanism ensuring the cross-border cooperation aimed at fast and effective removal of terrorist content online. The developed measures should be harmonized, proportionate, and based on "a clear scope and a targeted definition of terrorist content". Particular emphasis is put on adopting a uniform, targeted definition of terrorist content online throughout the EU, aligned to the Directive (EU) 2017/541. The definition should be based on the assumption that combating is aimed at prohibited, illegal content, while ensuring the protection of fundamental rights, including freedom of expression, thus protecting the publication of materials for educational, journalistic, artistic or research purposes.

The EU's proposed legislation to combat the dissemination of terrorist content online has been the subject of severe criticism not only from NGO's and tech-companies but also from the Member States. It is mainly accused of posing a serious risk to freedom of expression, media pluralism and access to information. The proposed legal solution presents a broad understanding of the concept of "terrorist content", which may lead to the so-called "over-blocking", i.e. excessive restriction of the content distributed, arbitrary removal, and censorship of legal statements with no real threat. According to the assumptions of the proposal, online platforms are to act as arbitrators assessing the legitimacy of the notification, and in case of receiving an order to remove content from the competent state authorities, they are obliged to verify the materials within one hour. In practice, carrying out an in-depth assessment in such a short period of time is unattainable and, as a result, would likely result in the automatic removal of such content as portal moderators would not dare to challenge government orders. The initial proposal

[28] In the initial version of the Regulation proposal the term "proactive measures" was used, however, as a result of the European Parliament's protest and the compromise reached, it was replaced with the term "specific measures".

to introduce the requirement to apply proactive measures by hosting service providers was also strongly criticized, as it means the use of automated solutions that do not guarantee adequate access to the appeal mechanisms.

3. The Assessment of the Effectiveness of the Countermeasures

Unambiguous assessment of the EU counter-terrorism efforts is a comprehensive and very complicated issue. In this paper, the authors decided to point out its applicability and efficiency in different types of terrorism and leave beyond the study's scope, occasionally rising in literature, more general concerns and doubts about the nature, adequacy, and functioning of the whole EU counter-terrorism system.

The authors have made general remarks on the jihadi, far-right, and far-left terrorism characteristics, emphasizing their differentiated features. In the authors' opinion, those diagnosed differences are the main reason for the weaknesses in the adequacy of the measures targeted on jihadi terrorism to combat the remaining two and make the possibility of creating a universal tool doubtable.

The first observation refers to a terminological issue and is common to jihadists, far-right, and far-left extremists – namely, the issue concerning the currently dominant "lone wolf" tactics. Some Member States' domestic law recognizes as terrorist offenses only those committed by a terrorist group or individuals acting as members of such a group[29]. As a consequence, the offense committed by a person acting alone, even if it factually constitutes a terrorist act, is not qualified as such. This means that lone perpetrators are not the target of anti-terrorist strategies. Given that the "lone wolf" method is currently dominating in Europe, such tactics by national authorities undermine the effectiveness of the entire EU terrorism counteraction system.

The problem with the lack of definitive boundaries between hate crimes, terrorism, and ordinary crimes is even more visible in the context of far-right and far-left terrorism than with jihadism. The lack of a universal definition of terrorism and terrorist acts among the EU Member States leads to situations where the same act may constitute a terrorist crime in one state while being perceived as a crime motivated by hate or even an ordinary crime in another. That enforces the thesis about probable underestimation of the number of terrorist attacks in some statistics and reports (e.g., TE-SAT) based on classifications prepared according to state law. The definitional difficulties seem to relate to all kinds of terrorism equally. However, they are particularly evident in the far-right and far-left context because of their nature and strong connections with legal movements[30].

There are well-grounded opinions that right-wing terrorists in Europe, in many cases, intentionally and strategically "blend in with the surrounding societies" (EU CTC, 2019) to minimalize the risk of detection and repressions that would meet them in case of adopting the counter-terrorism measures. Far-right extremists often devote themselves to broader ideological, political, or quasi-political organizations and support like-minded protests and initiatives. They can thereby remain in the shadow while simultaneously strengthening and radicalizing their own beliefs and preparing attacks that outwardly may seem to be unprepared and spontaneous. Those remarks apply to far-left perpetrators as well. Therefore, the general observation on the efficiency of the EU counter-terrorism measures in the context of far-right and far-left terrorism is that without a precise and – equally important – unified definition of terrorism, it will be difficult to assess if they work correctly. Forasmuch every instrument only finds the use of the limited amount of acts and behaviors[31].

[29] E.g. The German Penal Code.
[30] As the authors mentioned in the II section, not many studies concern the far-left terrorism in the EU. Therefore, the defining problem has not been so clearly raised in the literature. However, based on observation of the scene of NGO's, political entities and other movements, the authors conclude that the situation is analogical as with the far-right wing.
[31] It is worth stating at this point, that the TCO-Regulation proposal is an attempt to fill the definition gap, however, as already mentioned, it is so far a largely imperfect project.

Except for the difficulties connected with notably different characteristics of every type of terrorism, their diverse fundaments also present a challenge for counter-terrorism measures. Far-right and far-left ideologies are stronger culturally adopted in Europe. The language and some postulates used by the radical wings have also become part of ongoing political debate, especially in areas of so-called political correctness, minority rights, or gender equality (Kfir, 2019). Such an atmosphere creates an opportunity for far-right and far-left radicals to share their views and recruit like-minded without consequences. Jihadi radicals do not have as much space for the public sharing their content in the early stage of activity.

It is also connected with the problem of algorithmizing of the Internet. Internet platforms suggest its users content that – according to the algorithm – potentially will interest and delight them. So far, only GFCT explicitly declared to carry out the work to modify algorithms to avoid directing users for extremist content. However, the authors believed that this issue demands not only voluntary cooperation of tech-companies, but also legislative countermeasures.

Another issue related to the popularization of the use of algorithms concerns their effectiveness in detecting extremist content online. Europol's report appears to be very optimistic about the effects of automated and manual content moderation strategies, stating that terrorists' online position has been significantly weakened: "The measures taken by social media platforms to counter the spread of terrorist propaganda led some groups, including al-Qaeda and its affiliates, to return to more 'traditional' ways of online communication" (TE-SAT, 2020, 43). Meanwhile, the ISD revealed recently the terrorist accounts network, which was (is?) quite successful in disseminating extremist content on Facebook. This means, that intensified and coordinated actions tackling terrorists' presence in cyberspace, launched by Internet service providers, website owners, and law enforcement authorities of the Member States slightly hinder terrorist activity in cyberspace, but so far have not been able to eliminate it. Moreover, the ISD highlights that "automated and manual moderation practices need to be coupled with real "street-level" understanding of these users' tactics and behaviors" (Ayad, 2020, 5). The aggressive attitude in online content control is not the solution, as it causes more damage than brings benefits.

Another observed issue addressed to counter-terrorism measures is the use of an AI detection and removal system along with concern for far-right and jihadi online activity. Right-wing extremists adopted a meme culture, often using jokes or seemingly neutral symbols with entirely different meanings among like-minded people. For this reason, spread content encroaches into the sphere that is protected by the freedom of speech and freedom of political beliefs. It is then complicated to distinguish right-wing supporters' ordinary and legal content from unlawful hate speech and terrorism. In this context, it is crucial to emphasize that the measures for detection and removal of terrorist content online can be made efficient only if adopted practically on the morrow of that content appearing on the worldwide web. However, that demands a database and code of conducts that are sensible for every characteristic of extremist content and have the capability of contextual analysis that allow distinguishing, non-harmful content; all the while given a high potential of hatred and radicalization being spread.

Conclusions

When answering the question about the universal nature of the developed strategies and countermeasures, as well as the assessment of their effectiveness in fighting the activity of both jihadists and far-left, far-right extremists, we should first consider whether the differences they reveal – in terms of the perpetrator's profile and methods of action – enable the development of effective, universal instruments. The European Union, when proposing legal solutions, has repeatedly emphasized that for the effectiveness of actions and the achievement of the assumed goals of counteraction, a very precise tool is necessary, a tool aimed at the specifics of terrorists' modus operandi and their distinguishing characteristics. Bearing in mind that the methods of operation of jihadists, as well as far-right and far-left extremists have far-reaching differences; the possibility of adopting a universal, highly effective method is somewhat questionable.

Worth noting is the lack of full awareness of the threat posed by far-right and far-left extremists. Primarily there is insufficient available data on the scale, used methods, perpetrators' profiles, and other far-left terrorism phenomenon characteristics. Quite recently we have turned our attention towards far-right extremism, and it was only due to bloody attacks they have carried out. On the basis of the conducted research, we can see, that far-left groups are barely-examined, whereas far-right extremists have not shown their full face at all. We can say with high probability, they may still "surprise" us, as they have been gathering their strength standing in the shadow over the last two decades, i.e. since 9/11, while we have been focusing our efforts on fighting jihadists.

From the outcome of this research, we can conclude that it may be impossible to develop a universal counteraction mechanism, especially with regard to terrorist activities online. There is a need for a clear legal framework ensuring compliance with fundamental human rights, defining the limits of states' responsibility in countering terrorism online, and enabling the prosecution and punishment of attacks' perpetrators, including extremists motivated with far-right and far-left ideology. If it is not possible to create one universal legal tool, as long as it ensures effectiveness, we should focus on developing self-contained solutions – created separately for each type of terrorism. Suppose it is not possible to create one universal legal tool, if it is expected to be effective and precise. In that case, we should focus on developing self-contained solutions – created separately for each type of terrorism.

Undoubtedly, technical capabilities to counter the terrorist threat in cyberspace are also indispensable. Social media and other platforms desperately need effective algorithms, that would be capable of removing most of the terrorist content disseminated by both jihadists and far-right, far-left extremists. So far, unfortunately, we haven't found a golden mean in developing such an algorithm. On one hand, if we set too strict boundaries in such algorithms, there is a risk that even neutral, non-threatening content would also be removed. On the other hand, if we develop measures with broader acceptance boundaries, eliminating the above-mentioned "side effects", they could be so imprecise that it would be hard to target particular terrorist activities in cyberspace. Hence, their effectiveness could be compared to the effects of trying to catch a fly with a fishing net.

While looking for a satisfactory solution eliminating the terrorist threat in cyberspace, we should keep in mind the words of Maj. Gen. Yair Golan he said during the ICT's 18th World Summit on Counter-Terrorism in 2018: "The terrorist threats today are not the same terrorist threats from long ago. There's no bearded guy holding a Kalashnikov in the streets anymore. The threat is much more sophisticated".

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THE ROLE OF QUASI-COURTS IN CONTROLLING THE LEGALITY OF PUBLIC ADMINISTRATION: PREREQUISITES FOR SYSTEMATISATION OF PRE-TRIAL TAX DISPUTE RESOLUTION IN LITHUANIA

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Abstract. In many countries today, the practice of establishment, a kind of hybrid of the judiciary and public administration, and the so-called quasi-courts – various commissions, tribunals, etc., have recently become common practice of administrative justice functions implementation not only in courts, but also in quasi-courts. Proceedings in such institutions are commonly referred to as quasi-judicial; as the administration of administrative justice in quasi-courts follows, a procedure similar to those in administrative courts and ensuring of the basic principles of judicial proceedings, e.g. the principle of legality, the principle of the right to be heard, and so on. The aim of the authors' research is to reveal the preconditions for the systematization of quasi-judicial control of the legality of the activities of public administration entities and the settlement of tax disputes in Lithuania. To achieve the goal, the following tasks were singled out: 1) to present the concept of quasi-court and to reveal the essential characteristics of quasi-court; 2) to disclose the essence of the control of the legality of the subjects of public administration and the possibility of quasi-courts to exercise the control of the legality of the administration; 3) to present a case study: the problems of the status and legal regulation of the Tax Dispute Commission of Lithuania. The main results of the research: the concept and characteristics of quasi-judicial institutions were clarified and the advantages of such institutions and directions of improvement were identified.

Keywords: quasi-court, pre-trial investigation of administrative disputes, tax disputes

Introduction

Only two types of decision are possible in the public sphere of the state: administrative and judicial. This follows from the doctrine of separation of powers, which is enshrined in the legal systems of all democratic states, including Article 5 (1) of the Constitution of the Republic of Lithuania, which states that "In Lithuania, state power shall be executed by the Seimas, the President of the Republic and the Government, and the Judiciary". The principle of separation of powers is based on the checks and balances of the different branches of the government, their close links, mutual control, and their roles in serving as important components of a complex mechanism that prevents unlimited, indivisible, and uncontrolled concentration of power. This doctrine creates a framework in which the legislative branch creates laws, which are then exercised by the executive branch and the courts.

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Depending on who applies the law, administrative and judicial models of law are distinguished (Wroblevski, 1992, 6). Administrative law is usually applied in the absence of a conflict, or when conflict exists but the facts are clear and do not require further investigation or the conflict itself is considered to be of minor importance to the public interest (Mikelėnienė & Mikelėnas, 1999, 49).

Today, many countries have established quasi-courts, which are hybrids between the judiciary and the public administration, and include various commissions, tribunals, agencies, etc. For example, in the United Kingdom, there are tribunals, which deal with the complaints of individuals in the field of social security, immigration, taxes, special education needs, disability, etc. (more about the system of tribunals in U.K. in Bradley et al., 2018, 573-574). The United States of America operates many administrative agencies (such as the Environmental Protection Agency) and services (such as the United States Citizenship and Immigration Services) which have the power of adjudication in specific matters of public administration. These kinds of quasi-judicial bodies provide "a built-in dispute resolution mechanism under more sympathetic procedures" (Harter, 1983, 7). Such practices have made it so that administrative justice functions are exercised not only in courts but also in quasi-courts, and litigation in such institutions is commonly referred to as quasi-judicial, since administrative justice in quasi-courts follows a similar procedure to administrative courts and guarantees the basic principles of judicial process, e.g. the principle of legality, the right to be heard, and so on. However, it must be acknowledged that the term 'quasi-court' (quasi-judicial institution) is still new in the Lithuanian legal system and it is natural that discussions on the legal status of quasi-courts are ongoing among practitioners, scholars, and politicians alike. According to Hilaire Barnett (1996), even though the principle of separation of powers goes hand in hand with the rule of law and is very important in every modern state, strict and absolute separation of powers basically does not exist anywhere. Therefore, some authors suggest interpreting the principle of separation of powers as follows: the essence of this principle lies not in the fact that one authority cannot perform the functions of another authority, but rather in the fact that neither authority acts arbitrarily and uncontrollably (Vile, 1967, 84-85). Consequently, certain types of cases can be heard by authorities which are not formally attributed to the judiciary branch, as long as, the powers and foundations of such authorities are outlined by the law.

Such a provision is directly related to the rule of law, which emphasizes the importance of creating opportunities for a person who is defending his rights to seek out an independent and impartial arbitrator and to protect his violated rights in a real way rather than formally. The Constitutional Court of the Republic of Lithuania has repeatedly shown that, under the Constitution of the Republic of Lithuania, the legislator has a duty to establish such legal regulation that all disputes regarding violation of individual rights or freedoms could be settled in court; pre-litigation dispute resolution may also be established, but no legal regulation may be established that would deny a person who considers that his or her rights or freedoms to be violated the right to defend his or her rights or freedoms in court (The Constitutional Court of the Republic of Lithuania, 2012a, 2012b). Thus, although the court is considered to play a key role in the defense of human rights and freedoms, the establishment of pre-trial (quasi-judicial) disputes between individuals and public administration does not contradict the court's objective. It is important that legislation establishes a regulatory framework that allows dispute resolution entities to have real procedural opportunities to defend violated individual rights or legitimate interests and to ensure everyone's right to a fair administrative process.

Certain issues of pre-trial investigation of administrative disputes in Lithuania were investigated by the following scientists: L. Paškevičienė (2018, 2019), B. Pranevičienė (2003), D. Bereikienė, T. Gagys, J. Ramanauskaitė (Bereikienė et al., 2019). It is noteworthy that recently the Lithuanian Institute of Pre-trial Administrative Dispute Resolution has been strengthened in order to optimize and improve efficiency of the settlement of all types of administrative disputes at all stages of the administrative process: in 2019 a working group on the extension of the competence of the Lithuanian Administrative Disputes Commission, formed by the Ministry of Justice of the Republic of Lithuania, prepared a package of proposals regarding the Law on Administrative Proceedings of the Republic of Lithuania (2020), Law on the Procedure of Pre-trial Administrative Disputes of the Republic of Lithuania (2016), Law on Civil Service of Republic of Lithuania (2019), and Law on Tax Administration of the Republic of Lithuania (2004).

These circumstances determine the relevance of the topic under discussion and imply the necessity to re-examine the aspects and practical problems of relevant legal regulation, taking into account the opinion of some authors that "although legislative measures seek to solve various social problems, the formation of legal provisions in public policy and the administration of its implementation in Lithuania have an interface, but also demonstrate significant gaps between the two processes" (Urmonas, 2019). The last version of proposals (package of aforementioned legal acts' projects) was officially registered by Lithuania Ministry of Justice on 2020-05-28. On 09-11-2020, The Law and Law Enforcement Committee of Seimas adopted these projects. If Seimas adopted the projects, these would be in force from 01-01-2022.

The purpose of this article is to reveal the preconditions of the systematic control of the legality of activities of quasi-judicial public administration entities and the settlement of tax disputes in Lithuania. The objectives of this article are:

1. Introduce the concept of quasi-court and reveal the essential characteristics of quasi-court.
2. Disclose the essence of the control of public administration entities and the ability of quasi-courts to exercise administrative control.
3. To present a case study: the issues of the status and activities of the Tax Disputes Commission.

Given that the legislation of the Republic of Lithuania does not use the term "quasi-judicial", while the term is already wildly used in the scientific literature, this article will consider quasi-court to be any institution dealing with the proceedings of administrative disputes at the pre-trial stage, and quasi-judicial litigation will be considered synonymous with pre-trial administrative litigation.

1. The Concept and Features of Quasi-Court

'*Quasi*' is used as a prefix to adjectives and adverbs. For example, the term "quasi-judicial" is widely used in legal literature. This term describes an act that is specific to the operation of the courts, but that is performed not by a court, but rather by a non-judicial authority (The American College Encyclopedic Dictionary, 1952). Some sources describe quasi-judicial bodies as having some of the characteristics and powers of a court, such as leading a case investigation and so on (The Living Webster Encyclopedic Dictionary of the English Language, 1967). In Merriam-Webster's academic dictionary, the meaning of the term "quasi-judicial" is as follows: "quasi-judicial – partially judicial, i.e., an institution with quasi-judicial powers can investigate and conduct contentious claims and to make decisions in a similar way that a court can. Thus, in terms of its activities, such an institution is similar to a judicial institution, even though under the Constitution it will not be part of the judiciary" (Merriam-Webster's Collegiate Dictionary).

Quasi is not a very clear, precise word. On the one hand, it shows similarity, and, on the other hand, implies the existence of differences between the two objects. In legal language, this term is used to indicate that one thing or phenomenon is similar in some respects to another thing or phenomenon it is compared to, but at the same time, there is also a substantial and important difference (s) between the two.

There were many reasons for the emergence of quasi-courts. As public relations changed and diversified, the role of the state in people's lives changed as well. The need to intervene and regulate complex commercial and social relationships by law became more apparent. Scientists note that the biggest leap in administrative law and legislation was seen in the 19th and 20th centuries when the adoption of legal norms became very intensive (Pierce et al., 1992; Breyer & Stewart, 1985; Kelman, 1981; Weidenbaum, 1981, Peterschuk, 1982).

It has been observed that the more the state intervenes in the socio-economic relationships, the more the number of claims against it increases. As a result, the courts could no longer cope with the abundance of complaints. At the same time, it was difficult to ensure effective protection of human rights because, while being an important guarantor of human rights in every country, the court proceedings are complex, formal, time-consuming, and

costly to litigants. Additionally, for many people, litigation is inaccessible and frightening due to many factors, such as, financial opportunities, education, stress from the process, etc. (Cane, 1996).

Changes in administrative justice have been driven by a growing need in society to resolve conflicts efficiently, more cost effectively, and rapidly and to avoid, whenever possible, formal and tedious litigation. The search for rationality in the legal system encouraged countries to develop alternative mechanisms for resolving administrative disputes and to seek new ways of resolving conflicts between administration and citizens, leading to two paths in many states: firstly, the existing administrative authorities were given the power to deal with disputes, in other words, they received quasi-judicial powers; and, secondly, special institutions were set up with the purpose (usually the only one) of dealing with administrative disputes.

These institutions, known as quasi-courts, were supposed to relieve the financial burden on not only the state but also the victims of the actions of the administration, since litigation in quasi-courts is considerably cheaper than in ordinary courts. One of the most important reasons for the emergence of quasi-courts was the desire to provide a clear, rational, accessible, informal, prompt, and specialized way of resolving disputes (Cane, 1996).
Quasi-court is best described as an institution similar to, but not identical to a court. Consequently, quasi-court has some intrinsic qualities that are also characteristic of the court, but at the same time, it also possesses fundamental differences, making them non-identical.

The most important feature that makes quasi-court similar to an actual court is that quasi-court acts as an institution for the protection of human rights. In many states, quasi-court is generally seen as an element of the administrative justice system, and, therefore, it is also intended to protect human rights against unjust decisions and arbitrariness by government officials. As it is stated in joint vision statement by the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals of U.K.: "Tribunals are an essential component of the rule of law. They enable citizens to hold the state and employers to account for decisions that have a significant impact on people's lives. The hallmark of the tribunals system is the delivery of fair, specialist and innovative justice" (Transforming Our Justice System, 2016).

Human rights and their protection are a priority for every democratic state. It is, therefore, understandable that courts, as the main institutions for the protection of human rights, are an integral part of the rule of law. However, it must be acknowledged that it is not only courts that can effectively help to protect citizens' rights – in many modern states quasi-courts can also do so.

Regarding measures to improve the accessibility of legal defense, recommendation No. R(81)7 adopted by the Council of Europe Committee of Ministers on 14 May 1981 (Council of Europe Committee of Ministers, 1981) points out that there are three main obstacles impeding the access to justice: the complexity and formalism of litigation, the length of legal proceedings, and high litigation costs. Recommendation No. Rec (2001)9 adopted on September 5th, 2001 by the Council of Europe Committee of Ministers (Council of Europe Committee of Ministers, 2001) regarding alternative means of dispute settlement between public authorities and private individuals also points out that the ever-increasing number of administrative cases in the courts makes it difficult to examine a case within a reasonable timeframe established by the article 6 part 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Council of Europe Committee of Ministers recognizes that choosing to pursue judicial procedure is not always the most appropriate way of resolving an administrative dispute.

Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". It should be noted that the term "tribunal" (Latin *tribunal*) is sometimes translated into Lithuanian as a special court (Vaitkevičiūtė, 2001). According to Ingman, "Every court is a tribunal, but not every tribunal is a court" (Ingman, 1996).

An analysis of the case-law of the European Court of Human Rights (ECHR) reveals that generally states have the discretion to determine the institutional framework for the exercise of jurisdictional function (with the sole exception of the obligation to set up a two-tier system for criminal cases), therefore, any institution created to resolve certain legal disputes, whether called a court, a tribunal, a commission, etc., in the context of the European Convention on Human Rights and Fundamental Freedoms, will be considered a court if it has the following essential features (European Court of Human Rights, 1984, 1985, 2000, 2002, 2010): 1) The institution can make binding decision (Benthem v. the Netherlands, 1985); 2) The institution is established by law (Coeme and Others v. Belgium, 2000); 3) The institution is independent (Campbell and Fell v. UK, 1984, Urban v. Poland, 2011); 4) The institution is impartial (Lavens v. Latvia, 2002).

Concerning the structural aspects of the court (tribunal), the ECHR states that the court (tribunal) must be constituted by law and its organizational structure must also be regulated by law and not be subjected to the discretion of the executive (Coeme and Others v. Belgium, 2000).

"Principles of judicial and quasi-judicial independence are fundamental to all democracies" (Comtois, de Graaf, 2013). In regards to the independence of the court / tribunal, the ECHR sets out certain criteria for assessing whether a court / tribunal can be considered independent: the procedure for appointing members; term of office; safeguards against external influences in decision-making.

So, in essence, we are talking about two types of criteria: institutional, which include independence, term of office, permanent presence, etc. and functional, which include administration of justice, dispute resolution, and adjudication.

The Court of Justice of the European Union (the CJEU) assesses whether an institution is independent through determining its independence regarding the main proceedings, the executive, and the legislature (for example, in the case of Kollensperger and Atzwanger (The Court of Justice of the European Union, 1999), the relationship between the reference for a preliminary ruling to the CJEU and the authorities concerning the nature and place of the act providing for the establishment of the authority in the hierarchy of legislation, the procedure for appointing judges, etc. was analyzed).

Thus, summing up the analysis above, we can conclude that quasi-courts must be established by law, meet the institutional criteria, which include independence, tenure, standing, and so on., and the functional criteria, which include administration of justice, dispute resolution, and adjudication. Since 1999, there are pre-trial dispute resolution institutions in Lithuania that meet the above-mentioned criteria - Lithuanian Administrative Disputes Commission and Tax Disputes Commission under the Ministry of Finance of the Republic of Lithuania.

2. The essence of the control over the legality of public administration and the role of quasi-courts in administrative control

While reviewing a complaint of infringement of rights made by a natural or legal person against a decision or a conduct of an administration, the quasi-court is also conducting a review of the legality of administration's actions.

The Lithuanian administrative law doctrine does not have a well-developed and generally accepted theory that clearly distinguishes between control and supervision; therefore, this article considers the term "control" to be most appropriate for analyzing the ways of ensuring the legitimacy of an administrative action, as 'supervision is a type of control' (Current Lithuanian Language Dictionary, 1993).

The term "control" is derived from the French word "*controle*", which means to check something (Current Lithuanian Language Dictionary, 1993). So, control over the actions of the administration means evaluation of the actions of the administration according to the established requirements and rules. The entities performing the control seek to find out whether the administration was functioning properly or improperly.

All this indicates that the control always has the following elements: the subject of control (the controlling), the object (the controlled), certain rules, standards, and requirements that the controlled must comply with. During the control, the actual situation is compared with the required one in order to evaluate how the object of control and its activity complies with the established rules, standards, and requirements.

Control of the legitimacy of the actions of the executive authorities and their officials is essential for consolidation and upholding of the rule of law's main priority – protecting human rights. According to A. Dziegoraitis, "The rule of law must guarantee a genuine and effective protection of its citizens against the administrative authority's encroachment of their administrative rights" (Dziegoraitis, 1997). In addition, the system of judicial review of the legality of administrative actions contributes to the efficiency of public administration.

Tax administration is one of the broadest and most important areas of public administration. Controlling the legality of tax administration is complex and special, and many complex disputes exist in this area that require an appropriate state model and an efficient institutional framework. For example, some countries even have separate tax or fiscal (Germany, Austria, and Italy) (Whitehead, 2018; E-Justice Portal). Meanwhile, Lithuania has opted for a different model – together with the two-tier administrative courts of special justice, there is also a two-tier system of pre-trial tax litigation. Tax disputes over rulings by territorial tax administrations must be examined by the Central Tax Administrator, while appeals against decisions of the Central Tax Administrator may be dealt with by the Tax Disputes Commission under the Ministry of Finance of the Republic of Lithuania. Meanwhile, other pre-trial tax disputes are resolved either by the Central Tax Administrator itself through the administrative procedure established by the Law on Public Administration of the Republic of Lithuania (2020) or by another quasi-judicial body – the Lithuanian Administrative Disputes Commission. Article 2 (15) of the Law on Tax Administration of the Republic of Lithuania (2004) provides that tax administration is the fulfillment of the functions of the tax administrator, as well as the fulfillment of the duties and rights of the tax administrator and the taxpayer. Clearly, the tax administrator's primary function is to calculate and administer taxes, rather than to settle tax disputes. The latter is performed by the Tax Disputes Commission. Below we will discuss in more detail the issue of legal regulation of the activities of the Tax Disputes Commission.

3. Legal Issues of the Tax Disputes Commission under the Ministry of Finance of the Republic of Lithuania

Article 27 (3) of the Law on Administrative Proceedings of the Republic of Lithuania (2016) states that "The necessary pre-litigation of tax disputes shall be determined by tax laws". Article 148 (2) of the Law on Tax Administration of the Republic of Lithuania (2004) (hereinafter LTA) defines that "the purpose of this tax commission is to objectively investigate a taxpayer's complaint and to make a lawful and reasoned decision". Government of the Republic of Lithuania September 2 2004 resolution no. 1119, "On the Approval of the Regulations of the Tax Disputes Commission under the Government of the Republic of Lithuania" (hereinafter also the Regulations of the Tax Disputes Commission) regulate the competence of the Commission, procedure of its formation, organization of work, and recruitment and working conditions of public servants and employees (Government of the Republic of Lithuania, 2004).

Article 145 (1) of the Law on Tax Administration of the Republic of Lithuania (2004) provides that this law shall establish and regulate a mandatory pre-litigation procedure for tax disputes. This provision is without prejudice to the right of the taxpayer to bring an action directly before the courts following a decision of the relevant central tax authority concerning a tax dispute. The tax litigation procedure provided for in this Law shall also apply to the appeals of the taxpayer against the decision of the tax authorities not to exempt them from payment of fines and / or penalties and to the deduction of the taxpayer's overpayment by the tax administrator. Under Article 147 of the Law on Tax Administration of the Republic of Lithuania, tax disputes are heard by the central tax administrator, Tax Disputes Commission, and the court. Pursuant to Article 150 of the Law on Tax Administration of the Republic of Lithuania, tax disputes between a taxpayer and a local tax authority are settled by a central tax administrator. Article 151 of the same law provides that Tax Disputes Commission shall deal with: 1) tax disputes arising between the taxpayer and the central tax administrator; 2) tax disputes between the taxpayer and the central

tax administrator regarding the decisions of the central tax administrator after the consideration of taxpayers' complaints against the decisions of the local tax administrator; 3) tax disputes between the taxpayer and the central tax administrator, when the central tax administrator has not taken a decision on the tax dispute within the terms established by this Law (Law on Tax Administration of the Republic of Lithuania, 2004).

Thus, the Law on Tax Administration of the Republic of Lithuania establishes that the Tax Disputes Commission only deals with tax disputes, while Article 2 (22) of the Law on Tax Administration of the Republic of Lithuania provides that tax disputes are disputes between the taxpayer and the tax authority concerning the approval of the inspection report or other similar decision whereby the new tax is calculated and is ordered to be paid by the taxpayer as well as disputes regarding the tax administrator's decision to refuse to refund the tax overpayment (Law on Tax Administration of the Republic of Lithuania, 2004). Thus, the Law on Tax Administration of the Republic of Lithuania (2004) states that Tax Disputes Commission only deals with tax disputes, while Article 2 (22) of the Law on Tax Administration of the Republic of Lithuania (2004) provides that tax disputes are disputes between a taxpayer and a tax authority concerning the approval of an inspection report or other similar decision whereby the taxpayer the tax is calculated and ordered, as well as the tax authority's decision to refuse to refund (offset) the excess tax (difference) (Law on Tax Administration of the Republic of Lithuania, 2004).

Consequently, tax disputes are a narrower concept than disputes over taxes, so disputes which do not fall within the definition of tax disputes but are disputes regarding taxes may be dealt with by other pre-litigation administrative bodies, such as, Lithuanian Administrative Disputes Commission. Such a situation implies that a person who has not yet initiated a tax dispute, but already disagrees with the tax authorities' preliminary assessment of specific taxes, cannot solve the dispute by complaining about the tax authority's relevant writings and actions until after the tax inspection. It is noteworthy that the tax authority uses phrases such as "must pay" or "required to pay" when sending various letters to the taxpayer, but does not explain that such letters are not binding instructions of the tax administrator, but rather only informative letters that do not result in any legal consequences. Likewise, such letters do not explain to the taxpayer that appealing against these letters does not initiate a tax dispute and that the resolution of the complaint will not resolve the tax issues.

The Supreme Administrative Court of Lithuania noted that the purpose of the institute for Pre-trial Administrative Dispute Resolution is to enable the competent authorities to examine and resolve a legal issue (administrative dispute) to the maximum extent and under the same conditions as in the Administrative Court. This means that the purpose of such method of dispute resolution is not to obstruct the defense of the allegedly violated rights or interests, but, on the contrary, to establish an additional mechanism that could solve the mentioned legal conflicts (Supreme Administrative Court of Lithuania, 2010). Therefore, assigning all tax disputes solely to Tax Disputes Commission would simplify the process and allow the taxpayer to defend its allegedly infringed rights more efficiently and quicker. The double appeal procedure provided for in the Law on Tax Administration of the Republic of Lithuania is currently confusing the taxpayer and should be amended.

The pre-litigation phase of any administrative dispute is designed to resolve the dispute quickly and at low cost, thus avoiding the long and often costly litigation of the same dispute. However, the two-tier pre-litigation system established by the Law on Tax Administration of the Republic of Lithuania does not meet this objective, as it usually takes several years to resolve the dispute and the taxpayer loses the funds frozen by the tax administrator. Furthermore, the two-tier pre-litigation system fails to comply with the Supreme Administrative Court of Lithuania principle that a person may apply to the pre-litigation authority provided for by law only once before the pre-trial dispute resolution procedure. Repeated referral to the pre-litigation institution regarding the same matter may be regarded as an inadequate remedy (Supreme Administrative Court of Lithuania, 2009a, 2009b).

The dual system of pre-trial settlement of tax disputes and the unclear procedure for appealing against decisions of the tax administrator established by the Law on Tax Administration of the Republic of Lithuania are inconsistent with the previously mentioned practice of the Supreme Administrative Court of Lithuania and the legal principles enshrined in Article 3 (2) of the Law on the Legislative Framework of the Republic of Lithuania of clarity (legal

regulation must be logical, coherent, concise, understandable, precise, clear and unambiguous) and systematics (the rules of law must be compatible with each other; lower-ranking legal acts must not conflict with higher-level legal acts). Therefore, it would be efficient and logical to process all tax disputes in Tax Disputes Commission's.

Tax disputes are a type of administrative dispute, but because of their complexity, they are classified into a separate category, whose resolution requires not only legal but also economic education. According to Tax Disputes Commission's Annual Activity Report 2018 (Tax Disputes Commission under the Government of the Republic of Lithuania, 2018), in 2018 Tax Disputes Commission had investigated 202 complaints and 129 claims. Of the 202 complaints examined, 94 decisions of the Central Tax Authority were annulled, modified, or remitted either entirely or partially, meaning that 46.5 percent of the decisions were unreasonable. Of these, 59 percent were not contested by the parties, meaning that they were satisfied with the decision of Tax Disputes Commission.

Although the handling of a tax dispute by a central tax administrator is considered to be a pre-litigation procedure, such a procedure does not comply with the principles of impartiality and independence since the central tax administrator is a public administration entity. Law on Public Administration of the Republic of Lithuania (2007) states that public administration is the activity of public administration entities regulated by laws and regulations for the purpose of implementation of laws and other legal acts: adoption of administrative decisions, control of implementation of laws and administrative decisions, provision of services, administration of public services, and internal administration of a public administration entity. It does not, therefore, include the quasi-judicial function, namely the independent pre-litigation procedure. The Law on Administrative Proceedings of the Republic of Lithuania (2016) only provides for the Institute of Administrative Procedure, which determines that administrative procedure is a mandatory action taken by a public entity under this Act to investigate a complaint of alleged violation of the rights and legitimate interests of a person complained of by acts, omissions, or the decision of that administrative procedure. The current legal framework gives certain entities of public administration the right to deal with pre-litigation complaints, as is the case with Law on Tax Administration of the Republic of Lithuania (Law on Tax Administration of the Republic of Lithuania, 2004). However, it is necessary to distinguish between public administration and pre-trial litigation, as these activities are neither identical nor over Law on Administrative Proceedings of the Republic of Lithuania (2016) ping, so pre-trial tax litigation must be conducted by independent quasi-judicial bodies such as Tax Disputes Commission. Tax administration and pre-trial litigation cannot be governed by the same law, as they are two different activities that serve two different functions. And the public administration entity, in this case the tax administrator, can only deal with complaints under the administrative procedure set up by the Law on Administrative Proceedings of the Republic of Lithuania (2016), since Tax Disputes Commission is a quasi-judicial body, acting as an independent arbitrator—something that cannot be said about the public administration itself. Because of Tax Disputes Commission's independence and the objectives it pursues, it would be expedient to establish a mandatory pre-litigation procedure for a tax dispute with Tax Disputes Commission by law, rather than keep the current practice of obligatory hearing by the central tax administrator and only optional role of Tax Disputes Commission.

To date, all pre-trial litigation of tax disputes is governed jointly by Articles 26 and 27 of Law on Administrative Proceedings of the Republic of Lithuania (2016) (Law of Administrative Proceedings of the Republic of Lithuania, 2016), Chapter 9 of the Law of Tax Administration of Lithuania (Law of Tax Administration of Lithuania, 2004) and Law of the Republic of Lithuania on the Procedure of Pre-trial Administrative Disputes 2020). Meanwhile, the settlement of tax disputes is governed by Articles 145, 147, 148 and 150-160 of the Law on Tax Administration of the Republic of Lithuania (Law on Tax Administration of the Republic of Lithuania, 2004) and by-laws: Tax Disputes Commission Regulations and Tax Disputes Commission Rules of Procedure (Tax Disputes Commission under the Government of the Republic of Lithuania, 2004). Tax Disputes Commission's regulations over Law on Administrative Proceedings of the Republic of Lithuania (2016) as they relate, and the complaint handling process at MGK in a very laconic and incomplete state; for example, there are no grounds for terminating cases and there are other important procedural issues. The current regulation is inappropriate in terms of legislative principles, as the settlement of tax disputes is enshrined in the law, which is intended for tax administration as a public administration activity and only in secondary legislation, This situation is at odds with the principles of legislative

clarity and systematicity, since, as mentioned above, tax administration is an entirely different activity and does not involve a quasi-judicial function.

As stated above, it is essential that all tax disputes are dealt with by a single quasi-judicial body, Tax Disputes Commission, and that such disputes are clearly separated from the functions of the tax administrator. It is also important to distinguish between tax authorities and an independent quasi-judicial body. A separate law must be enacted to ensure Tax Disputes Commission's independence and proper handling of tax disputes. Such a law should consist of two main parts: the first would consolidate and define the status and independence of Tax Disputes Commission's members, requirements for Tax Disputes Commission members, the selection process, their general rights and obligations, social guarantees, etc.; and the second would establish the stages and characteristics of the pre-litigation dispute settlement procedure. We could also draw on examples from other countries, for example, Austria even has a separate Tax Code (Whitehead, 2018). In Lithuania, however, the status of an institution such as Tax Disputes Commission is not explicitly enshrined in the laws that govern the administration of individual taxes. Furthermore, in Lithuania, the pre-trial administrative dispute resolution and the status of the Lithuanian Administrative Disputes Commission are clearly separated by a separate law, rather than enshrined in the Law on Public Administration of the Republic of Lithuania (Law on Public Administration of the Republic of Lithuania, 2020). For the sake of consistency, only general provisions on the procedure for appealing against decisions of the tax authorities should remain with the Law on Tax Administration of the Republic of Lithuania, analogous to the provisions of Article 36 of the Law on Public Administration of the Republic of Lithuania.

The status of Tax Disputes Commission has been upheld by the European Court of Justice in its judgment of 21-10-2010 in case no. C385 / 09 Nidera Handelscompagnie BV v State Tax Inspectorate under the Ministry of Finance of the Republic of Lithuania (European Court of Justice, 2010). The European Court of Justice noted that Tax Disputes Commission is in fact affiliated with the Ministry of Finance of the Republic of Lithuania, to which it is required to submit annual reports and with which it is obliged to cooperate. The European Court of Justice has stated that it takes into account all circumstances: whether the body is established by law, is operating on a permanent basis, has binding jurisdiction, has an adversarial process, applies legal rules, and is independent (Judgment of the Court of 17 September 1997 in Case C 54/96, Dorsch Consult, ECR I 4961, paragraph 23 and the case-law cited). The European Court of Justice has held that the Tax Disputes Commission has the necessary independence to be considered a "court" within the meaning of Article 234 EC. However, the CJEU noted that this analysis is not called into question by the fact that this panel is linked to the organizational structure of the Ministry of Finance and is required to submit annual reports to it. Thus, the above-mentioned European Court of Justice ruling emphasized the importance of Tax Disputes Commission's independence from the Ministry of Finance, which exercises the rights and duties of the owner of the tax administrator (Customs Department and State Tax Inspectorate) (Government of the Republic of Lithuania, 2004).

To sum up, it can be concluded that it would be expedient to reorganize and reform the pre-litigation dispute settlement system and institutional system in order to strengthen Tax Disputes Commission's status and competence. Tax Disputes Commission must become a fully independent quasi-judicial body dealing with all types of disputes concerning taxes, not just tax disputes. For disputes concerning taxes, a separate special law should be adopted, consisting of two main parts regulating Tax Disputes Commission's status and selection of members, ensuring Tax Disputes Commission's independence from the executive (especially the Ministry of Finance, which also controls tax administrations), labor rights, and procedures for pre-litigation tax disputes. Tax Disputes Commission must become the only mandatory quasi-judicial body for pre-litigation tax disputes, as the current practice of handling such disputes by the tax authority itself is flawed and contrary to the principles of independence and impartiality.

Conclusions

1. Quasi-court can be described as an institution similar to a court, but not identical to it. It has certain intrinsic characteristics similar to a court, but at the same time has substantial differences. The purpose of setting up quasi-courts was to relieve the financial burden from the state and from the victims of the actions of the administration, since litigation in quasi-courts is considerably cheaper than in ordinary courts. Quasi-courts, as an integral part of administrative justice, perform the functions of administering justice and controlling the activities of the administration. After analyzing the case law of the European Court of Human Rights and the European Court of Justice, it can be concluded that quasi-court can effectively fulfill its assigned role as long as it meets the institutional criteria covering independence, term of office, permanent activity, etc. and the functional criteria, which include the justice function, the dispute resolution and the adjudication.

2. The control exercised by the quasi-courts extends to various areas of administration. Control of administration actions requires evaluation of the actions of the administration according to the established requirements and rules. Quasi-courts seek to answer whether the administration is functioning properly or improperly. Tax administration is one of the most important and quite broad areas of public administration. Controlling the legality of tax administration is complex and special, and there are many complex disputes in this area that require an appropriate state model and an effective institutional framework.

3. One of the most important reasons for the emergence of quasi-courts was to seek clear, rational, accessible, informal, fast, and specialized ways of resolving disputes. An analysis of the relevant legislation in the Republic of Lithuania suggests that in order to meet these objectives, it would be best if the settlement of disputes between taxpayers and tax authorities would be entrusted to the Tax Disputes Commission under the Government of the Republic of Lithuania. Accordingly, it would be appropriate to adopt a separate special law such as that governed by other quasi-judicial bodies, Activities of the Lithuanian Administrative Disputes Commission (Law on the Procedure of Pre-trial Administrative Disputes of the Republic of Lithuania), which could regulate analogously the status of the Tax Disputes Commission under the Government of the Republic of Lithuania; This would allow for the more successful implementation of the principles of systematicity and clarity enshrined in the Law on Legislative Framework of the Republic of Lithuania.

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GLOCALIZATION AND THE DECENTRALIZATION OF PUBLIC POWER IN UKRAINE

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Abstract. This article explores the constitutional reform intended to promote decentralization in Ukraine. The reforms are currently being implemented and represent the manifestation of glocalization in the territorial organization of public power and local self-government. For the purposes of this article, glocalization is understood to mean a process of social development. Thus, in the context of globalization, regional and local differences are maintained or even strengthened rather than being dissolved. We assert that glocalization can be used to analyse – in-depth – the impact of reforms in the redistribution of power and financial resources on local (socio-political, legal, mental, and other) specifics. Notwithstanding, decentralization defines only the strategy and the main direction of relevant reforms, whereas their content, scope, consistency, and timing may vary depending on the tactics and ideology of the reformers. The article sets out the ways in which glocalization manifests itself in the decentralization of public power in Ukraine, in particular, how local self-government is being transformed by numerous factors. These include: conditions of "asymmetric" unitarism and social democracy; a combination of political and fiscal types of decentralization; specifics of power redistribution at the oblast (region), raion (district) and basic levels; as well as preference for bureaucratic forms of local self-government over municipal forms of direct democracy.

Keywords: globalization, glocalization, decentralization, local government, constitutional reform

Introduction

Since the turn of the twenty-first century the phenomenon of decentralization and glocalization have significantly impacted the territorial organization of power. Numerous legal reviews and article have explored decentralization, yet glocalization resides mostly in the study of sociology and/or political science, and is deemed not to meet the needs of modern statehood. The issue is particularly acute in Ukraine, especially in recent decades with the ongoing

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transformation of the territorial organization of public power and local self-government, although the specific directions and legal parameters of such reforms still need to be clearly defined.

This article explores the specifics of reforms implemented by Ukraine in the direction of decentralization, and asserts that these reforms are an example of glocalization in the system of territorial organization of power and local self-government. Further, the article contributes to the strengthening of the positive potential of decentralization in Ukraine and the ionization of its possible negative impact on the efficiency of public authorities and the provision of public services to the population.

The methodology applied was the analysis of fundamental documents that were developed as part of the constitutional reform on decentralization. These comprise, inter alia: the Concept of Reform of Local Self-Government and Territorial Organization of Power in Ukraine, which was approved by the Cabinet of Ministers of Ukraine in April of 2014 (hereinafter – the Concept); draft laws on amendments to the current Constitution of Ukraine of 1996 submitted to the Verkhovna Rada of Ukraine by Presidents Petro Poroshenko (in 2015) and Volodymyr Zelensky (in 2019); as well as the administrative practices of local self-government in Ukraine.

1. Globalization, Glocalization, Decentralization: Correlation of Concepts

Decentralization is an expression that captures a number of actions intended to have far-reaching consequences in terms of governance, specifically the transfer of power and responsibility from national/central government to subsidiary levels, which may be regional, municipal, or local. In the case of states with a federal structure, power is divided between a federal, central, or union government and constituent provinces, states, or cantons. In short, this usually means transferring power(s) – devolution – from the primary and/or secondary level of government to tertiary levels. In non-federal states, the transfer may be to secondary levels – to districts or regions or departments – as well as sublevels such as city, town, or village councils (Local Rule Decentralization and Human Rights, 2002, 5). Decentralization can also be understood as a process of transferring power to popularly elected local governments (Decentralization and Democratic Local Governance Programming Handbook, 2000, 6).

In recent years, the notion and practice of decentralization is increasingly common, and is being considered or attempted in an astonishing diversity of developing and countries in transition. This can include solvent and insolvent regimes, mature and emergent democracies, autocracies, regimes making the transition to democracy and by others seeking to avoid that transition, by regimes with various colonial inheritances, and by those with none. In fact, it is being pursued where civil society is strong, and where it is weak. It appeals to people with political leanings to the left, the centre, and the right, and to groups that disagree with each other on a number of other issues (Ahikire, 2002, 6).

Decentralization is a multidimensional process consisting of political, fiscal, and administrative reforms intended to strengthen local autonomy and political self-governance, thereby enabling a political decision-making process that is competitive. Successful decentralizations result in political decisions that are more democratic, political processes more open, and civil liberties that are expanded.

The decentralization of public power commenced in the final decade of the twentieth century and gathered pace thereafter, so that today has entered the mainstream of political and legal reforms, from Western Europe to South-East Asia. The combination of globalization and localization processes, resulting in a changing landscape of social development, has acquired the name “glocalization” in modern science (Khondker, 2005, 181).

R. Robertson defined glocalization as the universalization of particularism and particularization of universalism (Robertson, 1992, 100). H. Khondker regarded it as a process uniting double processes of macro localization and micro globalization (Khondker, 1994, 23). The latter term was widely used in the 1980s to refer to goods and services designed for the world market but adapted to local cultures. Subsequently, the term came to be used in state studies as well. With the emergence of the global nature of the decentralization of power, it was thought that

"glocalization" was the most appropriate summation. The expression best characterized the extent to which reforms on the redistribution of power and the transfer of financial resources to lower levels of public administration take into account local (socio-political, legal, mental and other) specifics. Decentralization articulates strategy and the main direction of relevant reforms, however content, scope, consistency, and timing may vary significantly depending on the tactics and ideology of those implementing the reforms.

Today, the process of decentralization is evident throughout the developed world, in particular member states of the European Union (hereinafter – EU). Central governments at a fiscal, administrative and political level continue to decentralize through the transfer of certain powers and material and financial resources to the governments or lower-level authorities and even to civil society institutions (public organizations, business structures, etc.).

In the EU, such reforms consolidate both the base level and strengthen regional and sub-regional levels of territorial self-government, which is unsurprising. The fact is, many countries carry an excess of local government bodies that are small in terms of geographical area and population, making it difficult to exercise administrative functions assigned to that level. Above all, this is a result of the broader application of the subsidiarity principle, i.e. tasks are assigned to the level of governance closest to citizens. "Simplifying" the administrative map of the municipalities has been a constant aim, pursued in many ways. Sometimes, this has meant the application of radical policies such as the merger of several municipalities in order to create a new and larger administrative body. There has also been policies to create associative, collaborative bodies vested with varying degrees of authority. However, the resulting weak associations leave the municipalities with separate administrations that coordinate their actions, or strong associations, which gives rise to unified local administrations operating according to directives given by associative governance bodies. If we consider the policies to merge the municipalities, this process (long-established in a number of European countries) was also pursued throughout the period 2007-2020 in Albania, the Czech Republic, Denmark, Greece, and Ireland (Merloni, 5).

The results are plain to see. In Denmark, there has been a drastic reduction in the number of local government bodies, with the number of municipalities having fallen from 275 to 98, and the 14 counties replaced by five regions, with completely new boundaries. Ireland has drastically reduced the number of municipalities from 114 to 31, and also removed one of the two tiers of supra-municipal government (the former 29 county councils). The single remaining tier comprises three regional assemblies (instead of the previous eight) whose main task is to coordinate and support development planning, but they do not have any active functions and are not directly elected.

In Spain, Act no. 27, passed in December 2013, strengthened the role of the diputaciones, the provincial councils. As second-tier local entities (whose bodies are elected by the province's municipalities), they already perform functions specific to the municipalities, particularly in the case of the smaller ones. The new law, however, stipulates that municipalities with a population of less than 20,000 must exercise their more significant functions via the diputaciones. No real merger policy is likely unless direct provision for a policy of this kind is made by the comunidades autónomas (autonomous communities), which have this competence within their remit.

As for France, for some time now it has been pursuing a policy of strengthening inter-municipal associations (municipal, agglomeration, and urban communities). These are associations established in France's largest conurbations. Recently, (2010) the metropoles have been given further prominence among the urban communities. However, the policy of gradually phasing out the intermediate level, corresponding to the department, is still only at the draft stage. Successful implementation should redistribute the functions hitherto performed by the local bodies, firstly to the regions, and secondly to the associations mentioned above. Local bodies are difficult to remove given that their territory coincides with that of the prefectures. However, one significant development, more symbolic than as having resulted in actual institutional change, was the adoption of the new Map of France in December 2014, with the number of regions reduced from 22 to 13. This reform cannot be included among territorial reorganization policies, because it is based not on a new set of competencies and powers, but on a more general desire to "strengthen" the institutions at the regional level (Merloni, 6).

This global trend is combined with a growing interest in the partners to government – civil society and the private sector – looking for fair, efficient and cost effective ways to provide public services to the population.

In recent years, the problems inherent in glocalization, including the relationship between the processes of globalization and decentralization, have received wide coverage in the sociological and legal literature (Ebel & Yilmaz, 2003; Yamashita, 2003; Swyngedouw, 2004; Khondker, 2005; Sharma, 2009; Porto, Porto & Tortarolo, 2015; Boadway & Dougherty, 2018; Marosevich & Bosnjak, 2018; Roudometof, 2018; Jurado & León, 2020, etc.). It is disappointing that constitutionalists in Ukraine have no similar locally-researched and published literature to inform their deliberations on glocalization. There is some urgency in encouraging wide and wider discussion in Ukraine, with a particular focus on specific manifestations of glocalization and their importance in terms of effective reforms of territorial organization. This will be discussed in the following section of our study.

2. Constitutional Reform of Decentralization in Ukraine as a Manifestation of Glocalization

2.1. Decentralization in the context of "asymmetric" unitarianism and social democracy: the Ukrainian model

Until about the mid-1980s there was heated discussion in the legal and political literature of Western European about whether to decentralize public power. Today, decentralization is no longer questioned, but rather the specific ways and forms that decentralization should proceed. There is no single, unambiguous answer to this question – each country chooses its own path towards decentralization, based on the experience of other countries and its own political and legal realities. Ukraine is no exception and has been pursuing decentralization for more than fifteen years, if we define as a starting point the Draft Law on Amendments to the Constitution of Ukraine of 8 of December 2004, which, having received preliminary approval in the first reading, was never finally adopted by the Verkhovna Rada of Ukraine.

The decentralization of public power in Ukraine is a clear example of glocalization of social and political life, and manifests itself through reforms that borrow from European standards of local self-government, which are reflected in various protocols, convention and practices. These include: the European Charter of Local Self-Government and its additional protocols; conventions adopted within the framework of the Council of Europe and ratified by the Verkhovna Rada of Ukraine (in particular, the European Framework Convention on Cross-Border Cooperation of Territorial Communities and Authorities); and the experience of municipal reforms introduced early in the twentieth century in other European countries, primarily in Poland and France (see.: Petryshyna & Kolodiazhnyi, 2016, Krat&Sofii 2017, Hudz, 2020 and others).

Implementing the relevant reforms in Ukraine means addressing several fundamental issues: from the election of a specific model of local self-government and type of decentralization, to determining the list of powers to be transferred to lower levels and defining the amount of financial resources that should accompany the transfer of these powers. It is well to keep in mind the problem of correlation of the selected parameters of decentralization with the general principles of the constitutional order (in particular with the specific form of the political regime and the form of state structure). For Ukraine, this is about the correlation of decentralization to the principles of "asymmetric" unitarity and social democracy.

"Asymmetric" unitarism refers to the possibility that there may be differences in legal status among single-level administrative-territorial units. This concerns primarily the intermediate, regional level of administrative-territorial structure and manifests itself in the presence, along with 24 regions and one administrative-territorial autonomy (Autonomous Republic of Crimea), of two cities with special status – Kyiv and Sevastopol (Constitution of Ukraine, Article 133). Thus, the possibility of "asymmetric" decentralization cannot be ruled out, although none of the relevant projects on amending the Constitution of Ukraine has ever used such an option. At present, this issue is aggravated by the armed conflict in Donbas, the outcome of which under the Minsk agreements of 12 February 2015 involves the adoption of permanent legislation on the special status of certain districts of the Donetsk and Lugansk regions. In this context, the settlement of this conflict and the redistribution of power must

be carried out without violating the unitary nature of the Ukrainian state and without threatening its territorial integrity.

The balance between decentralization and the political regime is a complex and multidimensional issue. It should be noted that the problem of public power decentralization usually arises in a democratic political regime since authoritarianism objectively gravitates towards centralization. Generally, experts note a positive connection between decentralization and democracy, although this connection is not always causal and may vary from country to country (Pandey, 2005). In modern Constitutional and Legal Science, the prevailing opinion is that decentralization has many advantages, including positive results both in terms of democracy and social development, and by extending political representation to the local level and increasing political participation of the local population, democratic processes are strengthened and deepened. With decentralization, local governments are expected to be more responsive to citizens' needs and more accountable to the population. Extensive popular representation and active political participation at the local level can lead to better public service delivery appropriate to the local context, adding value to democratic governance. These doctrinal approaches are also reflected in the Concept of Local Self-Government Reform and Territorial Organization of Power in Ukraine (2014), where the above problems are intended to be solved, in particular, by maximizing the involvement of the population in decision-making, promoting the development of forms of direct democracy.

Given that democracy is a rather contentious category in jurisprudence, we can briefly define at least two basic democratic principles in the context of this study: people's control over public decision-making and political equality in exercising such control. These two dominants can be most effectively implemented in small groups or associations, where direct popular control allows everyone to directly discuss relevant issues in public life and vote for certain decisions. It is evident that in large associations, including national states or federal subjects, people's control should be carried out mainly indirectly through elected representatives (deputy corps), but at the same time there are continuous questions as to whether this control is comprehensive and effective.

We should emphasize that the present Constitution of Ukraine (1996), as the overwhelming majority of modern constitutions, does not define a specific model of political regime, limiting itself to the statement that Ukraine is a democratic state (Article 1), in which the bearer of sovereignty and the only source of power is the people (Article 5). However, the combination of these provisions with the principle of the social state (Art. 1 of the Constitution) gives grounds to assert the normative consolidation of the regime of social democracy, which, in turn, means the orientation of the state policy towards prioritizing the satisfaction of the social needs of citizens, support of vulnerable segments of the population, and influence on the distribution of material benefits following the principle of social justice, etc. (Serohin, 1999, 54). We concur that the concept of the social state is an attribute of European constitutionalism (Boryslavska, 2018, 92), so its comprehensive introduction into the political and legal practice of Ukraine is an important achievement on the way to European integration.

The principle of social democracy imposes an obligation on the state to develop and implement social programs aimed at improving the general standard of living of its citizens, support of socially vulnerable segments of society, and equalization of incomes of the population, implementation of measures to expand the network and strengthen the material and technical base of social institutions, i.e. the paternalistic function. Duties of the social state according to the Constitution and the current legislation of Ukraine are as follows: ensuring the social orientation of the economy; labor protection and establishment of a guaranteed minimum wage; healthcare; providing support for family, childhood, maternity, and paternity; development of a system of social services that provide social protection of citizens; and the establishment of pensions and other types of social payments and benefits. Accordingly, when implementing decentralization, it is necessary to decide which of these powers the state should retain, and which should be transferred to local self-government. Under any circumstances, we should state that decentralization in the conditions of social democracy presupposes finding consensus on the transfer of a considerably greater scope of powers than liberal democracy requires. Accordingly, the conceptual basis of this reform should be formed by the socially oriented model of local self-government, where territorial community, social interests, and social rights of its members are of priority importance (Drobush, 2017, 4). It should be

considered that the social activities of territorial communities in most countries of the modern world are implemented in various spheres (social protection of the population, housing and communal services, health care, etc.), while the bolstering of social activities of local self-government is a practical expression of general destination of municipal development and municipalization of local economies.

2.2. Decentralization in Ukraine as a combination of political and fiscal decentralization

Legal literature usually identifies three main types of decentralization:
1. Administrative decentralization or deconcentration, i.e. relocation of structural units of the central government to the local level, which entails the transfer of powers to local departments, offices, and sections that remain part of and are accountable to the central executive bodies.
2. Fiscal decentralization, i.e. transfer of financial resources and power to generate income, including power on budget and tax issues, to deconcentrated structural units of central power formed by the government or locally elected politicians.
3. Political decentralization or devolution, i.e. the transfer of power and resources from government bodies to those that are: a) largely or totally independent from the central government; b) democratically elected by the local population.

Therefore, when discussing the positive link between decentralization and democratization, it should be noted that the nature of the link between them depends primarily on the type of decentralization. Deconcentration is poorly related to democracy, as it can be carried out both in the conditions of democracy and full authoritarianism. Indeed, under the slogans of increasing administrative efficiency, deconcentration can serve as a tool for the central authoritarian government to try to take control of the periphery of the state through a greater presence at the regional and local levels, as well as a means for the ruling party to maximize its political support by granting political privileges.

On the other hand, political decentralization removes institutional and legal obstacles to self-organization and self-government and encourages innovative forms of solving local problems. Empowerment of local authorities allows finding various ways of solving the aforementioned problems. At the same time, it is easier to mobilize local resources for socio-economic development if relevant projects are adopted and implemented at the local level. When the government assumes the corresponding responsibilities, it also takes upon the responsibility – a critical element of democratic governance. In turn, responsibility provides for accountability – the duty of local governments to report and justify their decisions.

One of the more obvious advantages of decentralization is better awareness of local problems and needs among residents. But decentralization itself, even political decentralization, does not guarantee that leaders or deputies will act in accordance with these needs and preferences – what is required is a system of constitutional and legal forms of local democracy aimed at ensuring accountability of officials to the population. The most common and effective form of such accountability is local elections, but there are other mechanisms envisaged in Articles 7-9, 13 of the Law of Ukraine On Local Self-Government in Ukraine – local referendums, local initiatives, public hearings, and meetings of citizens at the place of residence.

Referring to the text of the above-mentioned Concept and the content of the presidential draft laws on amending the Constitution of Ukraine on decentralization, we can say that they refer to political decentralization. At the same time, the scientific discourse on the legal nature of local self-government has been relegated to the background. Indeed, in any approach to the understanding of local self-government – state-based, community-based or dualistic – the content of political decentralization remains unchanged: autonomous local bodies elected by residents and under their control and accountability must be vested with the maximum amount of powers they are able to exercise effectively.

Political decentralization is usually combined with fiscal decentralization, i.e. some powers of control over budget revenues and expenditures are transferred to lower management levels. At the same time, it is important to establish clearly at the legislative level when local governments can determine the distribution of expenditures, and simply when the center approves expenditures and local levels implement them. After all, one important factor in the implementation of decentralization is the measure that grants autonomy to regional and local authorities in determining their cost allocation. In this context, it is undoubtedly positive that one of the tasks of the constitutional reform of local self-government and territorial organization of power in Ukraine is to create appropriate material and financial conditions to ensure that local self-government bodies perform their own and delegated powers, which should be carried out, in particular, in compliance with such principles as the availability of resources necessary for the implementation of the powers of local self-government bodies determined by law, as well as the definition of the federal, regional and local levels of authority. Unfortunately, the share of local budgets in the consolidated budget of Ukraine over the past five years has increased by only 0.8% (from 21.8% in 2014 to 23.6% in 2020), although the share of local budgets (general fund) in local budget revenues for the same period has increased by 16.1% (from 2.2% in 2016 to 18.3% in 2020) (Monitoring of decentralization of power and local government reform). In such a situation it is premature to talk about the financial independence of local self-government in Ukraine.

2.3. The principle of subsidiarity as a key principle of the distribution of powers in the process of decentralization in Ukraine

A key role in the implementation of political decentralization is played by the principle of subsidiarity, which defines criteria for democratic and rational redistribution of power between the levels of public administration. It should be noted that for the first time in Ukrainian political and legal practice, this principle is expected to be enshrined at the level of the Basic Law. Its content is quite extensively documented in parts 2 and 3 of Article 4 of the European Charter of Local Self-Government: 'local authorities shall, within the limits of the law, have full discretion to exercise their initiative concerning any matter which is not excluded from their competence nor assigned to any other authority; public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen'.

According to the Concept, the main powers of basic level local self-government bodies (i.e. community level), are as follows: local economic development (attraction of investments, development of entrepreneurship); development of local infrastructure, in particular roads, heat, gas, electricity, and water supply networks, information networks, social and cultural facilities; planning for community territory development; addressing issues of territorial development (allotment of land plots, issuance of construction permits, acceptance of buildings for use); provision of housing and communal services (centralized water and sanitation services, etc.); organization of passenger transportation on the territory of the community; maintenance of streets and roads in settlements; public safety; fire services; management of institutions of secondary, preschool, and extracurricular education; provision of emergency medical services, primary health care, disease prevention; development of culture and physical culture (maintenance and organization of houses, clubs, libraries, stadiums, sports grounds); provision of social assistance through the territorial centers; provision of administrative services through specified services provision centers. As evidenced by the list presented, local self-government of the basic level is positioned as the main provider of services to the population, the main provider of socio-economic and cultural rights and freedoms of citizens in Ukraine.

In turn, the main powers of raion level local governments under the Concept are to facilitate care and education for children in general boarding schools and the provision of secondary level medical services. It should be noted that under this 'narrow' approach, raions will soon lose the status of one of the main links of administrative and territorial division, turning into specialized educational and medical districts. In terms of glocalization, it should be noted that this approach is typical for some Northern European countries, in particular Denmark and Sweden, but its prospects in the Ukrainian political and legal realities remain rather vague due to the lack of similar

experience in the past. There is a potential risk that the mismatch of special districts with the basic administrative-territorial division could lead to the loss of manageability in the respective areas.

Finally, the main powers of local self-government bodies of the oblast level under the Concept are to provide: regional development; environmental protection; development of the oblast infrastructure (first of all, the roads, the network of inter-district and inter-regional routes of public transport); vocational education; and the provision of highly specialized medical care; development of culture, sport, tourism. A wide range of competences attributed to this level of public administration requires a rather ramified and highly organized local government apparatus, represented both by representative and executive bodies. However, today regional councils (as well as *raion* councils) do not have their executive bodies under the current legislation and are forced to delegate the implementation of their decisions to local executive bodies – local state administrations. Therefore, it is quite natural that the constitutional reform on decentralization in Ukraine provides for the restoration of full local self-government at the regional level: district and regional councils should receive their executive bodies of general and special competence, and the appropriate material and financial basis, while local state administrations are to be replaced by prefects built on the French model.

It should be noted that in each state the list of powers of local self-government, on the one hand, is the result of a social and political compromise, recognition of political expediency, and, on the other hand, a statement of what municipal bodies are capable of. If a decision of local authorities meets the needs and interests of local residents, public services are provided on a qualitatively higher level and residents are more willing to pay for them. As a result, decentralization may increase revenue mobilization and expand the tax network. We believe that under these conditions the distribution of powers among local governments of the basic, *raion*, and oblast levels envisaged in the Concept can be regarded as an invitation to a broader professional political discussion rather than as a final vision of how to address this problem.

2.4. Municipal Authorities or Municipal Forms of Direct Democracy: the Problem of Political Choice

Reforming the territorial organization of power and local self-government necessarily requires solving the key issue of who should be given preference in the organizational and legal mechanism for exercising public power at the local level: local self-government bodies (municipal authorities) or municipal forms of direct democracy. Every state undertakes a difficult but essential political decision for itself.

A systematic analysis of the presidential draft laws on amendments to the Constitution of Ukraine regarding the decentralization of power, as well as the current state of the legislation on local self-government, gives grounds to assert that in our case the choice was made in favor of local self-government bodies. Out of seven articles of Section XI of the Constitution of Ukraine titled, Local Self-Government, only two mention forms of direct democracy briefly. Among 79 articles of the current Law of Ukraine "On Local Self-Government in Ukraine" only 4 are devoted to the forms of direct democracy, and those are very concise. Back on November 22, 2012, due to the entry into force of the new Law "On All-Ukrainian referendum" (which was declared unconstitutional in 2018), the Law of Ukraine "On All-Ukrainian and local referendums" lost its force, but the new law on local referendums was never adopted. As a result, for eight years now, in a state that proclaims itself democratic and lawful, where local self-government is constitutionally recognized and guaranteed, direct democracy at the municipal level is impossible due to the lack of special legislation that would define the subject matter and procedure for organizing and holding local referendums. At the same time, the situation is quite remarkable: the legislator is not in a hurry to adopt the law on local referendums for lack of political will on this issue (probably due to the fear that local referendums can be used by destructive forces inside the country with separatist intentions), and territorial communities show complete indifference and do not even attempt to force the legislator to ensure their right to direct participation in local self-government (probably due to the lack of confidence in their ability to influence the situation in any way).

According to the Laboratory of Legislative Initiatives in Ukraine from 1991 to 2012, 178 initiatives to hold local referendums were recorded (Chernukha, 2017). Taking into account the fact that during this period in Ukraine, in addition to the Autonomous Republic of Crimea, 24 regions and two cities with special status, there were 490 more districts and almost 11,000 territorial communities, the above-mentioned number of initiatives indicates that local referendums, even with the appropriate legislative framework, were extremely rare, if not exotic. In our opinion, the reasons for such an attitude to the referendum by members of territorial communities can be divided into two groups. On the one hand, the reluctance to use the referendum as a constitutional form of direct democracy lies in the traditional disorganization of Ukrainian citizens and their inability to effectively use constitutional forms of political activity, and on the other hand, it has powerful historical grounds, because neither in the pre-revolutionary period nor under the Soviet rule, were local referendums held on the territory of present-day Ukraine. Thus, a referendum for an ordinary Ukrainian citizen remains a rather unreliable instrument to express the people's power. There is a willingness to participate only when specifically addressed to be a part of by the parliament or the head of state.

In the eyes of ordinary citizens, local self-government bodies and their officials are a somewhat bureaucratic, though traditional means to address local issues. Local self-government bodies and their officials also look more advantageous and convenient for the central government, as their activities are more predictable, and they are more susceptible to accept instructions 'from above'. Thus, we can state that the phenomenon of local bureaucracy is a "national tradition" in Ukraine, which should be considered when implementing any important reforms, including decentralization. Representative democracy, combined with municipal service, acts as the main elements of the legal and organizational mechanism of local self-government, and they should remain the main focus of decentralization reforms. This approach is also endorsed by the content of the European Charter of Local Self-Government, which in its definition of local self-government (part 1 of Article 3) proclaims it as the right and the ability of local authorities rather than the local population.

Conclusions

1. Ukraine's experience in reforming the territorial organization of power and local self-government is supported by the relevant draft law basis. This stands as a convincing example of constitutional and legal glocalization as a strategy of conscious social and political development in the context of globalization and European integration. The strategy has not always been flawless and miscalculations have been made from time to time, yet Ukraine shows that the adoption of international legal standards and learning from the foreign experience of state-building and local self-government are valuable, especially if they are used to achieve the desired ideals of a democratic, legal and social state. Naturally, the aforementioned must take into consideration the specifics of the national legal system and legal consciousness.

2. The sociological concepts of globalization in general, and glocalization in particular, are important if we are to understand the dynamic socio-political transformations taking place from Western Europe to South-East Asia, including the processes of public power decentralization. At the same time, we should guard against being carried away with 'methodological nationalism' where every country or society is explored through the appropriate national methodology. Such an approach may lead to intellectual closure and exclude dialogue and mutual understanding between societies. There is little room for such discourses in an increasingly globalized world. Of course, it is important to consider local contexts and variables and not to fall into the trap of merely copying Western ideas and concepts. Instead, Ukraine must choose a globally significant concept that will help in the processes of socio-political transformation, which is inextricably linked with globalization. Indeed, the use of such a concept implies careful, reflective, and balanced preservation and development of national, regional, and local specifics.

3. We should keep in mind that the success of decentralization reforms in Ukraine is strategically important. Failure to perform and deliver on its responsibilities at the local level by central government impacts the entire local population, especially the socially vulnerable – the disabled, women, and children. Indeed, failures in local self-

government harm the central government and the state as a whole. If a government cannot fix leaking pipelines or address the shortage of doctors in a local hospital, then citizens are unlikely to trust the central government to solve more crucial problems. The assessment of certain measures on decentralization from the point of view of glocalization should become one of the factors that ensure the efficiency of the proposed reforms. There is the expectation that it contribute to a more positive perception of the process of globalization by territorial communities, while strengthening the democratic foundations of local self-government. The outcome would be to bring government closer to the people, both territorially, but also in terms of an emphatic understanding of its citizens.

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THE PAST AND PRESENT OF MYANMAR (BURMESE) PATENT LAW

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Abstract. In recent years, Myanmar has taken its place on the world stage, causing both disquiet and uncertainty in the international community in terms of its policies relating to various legal and political matters. This former kingdom with its long and impressive history, and comprising many different ethnic groups, has experienced long periods of occupation and colonial rule, the most recent being as a British colony prior to independence in 1948. Today, despite having a democratically elected government, Myanmar continues to live under the shadow of the former military dictatorship which ruled the country from 1962 to 2011. Many aspects of its legal system have recently come under scrutiny, including its policies towards intellectual property rights. This paper explores the history of patent law in Myanmar, making the connection with the country's turbulent past, as well as offering a glimpse of what may be a possible future regarding patent protection. It will also examine the international treaties and organizations to which Myanmar is a signatory, and its recognition of foreign patents. There will be some discussion of patent rights in neighbouring countries and other intellectual property protections.

Keywords: Myanmar, patent, intellectual property, Southeast Asia

Introduction

Shrouded in secrecy, Myanmar remained hidden from the outside world until relatively recently. The increasingly authoritarian military junta that seized power in 1962 ruled for nearly 50 years, despite partial democratisation after 1990. Military control resulted in Myanmar being ostracized by the international community and the imposition of economic sanctions intended to bring about a change in policies and the easing of political repression. However, with the election of the dissident and political prisoner, Aung San Suu Kyi in 1990 as prime minister, the situation has improved. In recent years the majority of the global powers have dropped their sanctions as the government makes progress toward a truer democracy, such that the country can once again take its place on the international stage and more fully participate in regional affairs. Indeed, the country now presents itself as an emerging market, and one ripe with opportunity for foreign investors, although global corporations are still reluctant to embrace Myanmar as a trade partner and as a developing nation until the government introduces crucial reforms, such as establishing a legitimate system of patent law which has been absent for quite some time.

This paper will examine the history of patent law in Myanmar with reference to the country's troubled history, and will also suggest how in the future patents might be protected under law. It will consider the international treaties and organizations to which Myanmar is a party and their relationship to intellectual property. Particular emphasis will be given to Myanmar's role in Southeast Asia as a former regional power, which after gaining its independence from Great Britain in 1948 became an isolated autonomous entity.

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Throughout, reference is made to *Myanmar* rather than *Burma, since the* current government adopted this name in its dealings with the international community. The demonym, *Myanmar,* will also be used, although the language of the country will be referred to as *Burmese*.

1. Historical Overview

The land that now constitutes the modern state of Myanmar has a long history of occupation starting in the ninth century AD, followed by a brief period as a powerful regional imperial power, to eventual domination by the British East India Company in the late eighteenth century which consolidated its hold after the Anglo-Burmese Wars of the nineteenth century. It was during these wars that British forces overthrew a constitutional monarchy (Konbaung Dynasty) that governed the largest unified kingdom on the peninsula. Conquest began in the south, with the result that the kingdom was gradually reduced until the ruling dynasty was overthrown (Chew, 1979). British colonial rule followed a similar pattern as with other kingdoms across Southeast Asia where native peoples were subject to control by the competing colonial powers of France, Holland and Spain. At the time of its occupation by Great Britain, the British Crown determined that the ruling power in Myanmar was unable to govern itself and that little opposition could be expected.

1.1. Prior to Colonization

Nevertheless, a contrary view holds that prior to colonization Myanmar possessed many attributes of what Europeans would themselves have deemed civilized culture. Despite its monarchical system of government, Myanmar had a well developed and extensive administrative framework and codified international relations (Messeri, 2006). By the mid-eighteenth century, the country had established borders that approximate to those of today. Within there existed a complex network of provincial administrations supported the centralized government, which focused on effective communication and mobilization throughout the kingdom (Lieberman, 1996). In fact, by the turn of the nineteenth century Myanmar had attained unprecedented levels of internal control, unmatched by many of its neighbours until after the end of European intervention and the introduction of their own systems of control and administration. Such political prowess made the nation either a formidable foe or a worthy ally to other countries in Southeast Asia, most notably Thailand, which had achieved similar levels of development (Chew). These two countries emerged as the peninsula's sole superpowers, often going to war against each other over border disputes, although they were resolute in their resistance to the ever-encroaching Empire of China.

Notably, culture and society in pre-colonial Myanmar were far from underdeveloped, especially in matters of faith and religion. It was certainly the case that Buddhist monks were the most revered and venerated members of society, a sentiment that is still true today, but there is no evidence to suggest they had nearly as much influence as the Catholic Church in Europe. Surprisingly, men and women enjoyed high rates of literacy (Lieberman, 2003); even before British colonial rule, the country's government was publishing indigenous chronicles, contemporary literature, and the first official history of the nation (Charney, 2009). Theatre thrived with stories taking inspiration from everyday social issues and legendary tales (Lieberman, 2003). Generally speaking, society was moving further away from many of the repugnant cultural practices that existed in similar countries of the pre-imperial era.

Prior to British rule, Myanmar had made significant strides in the uptake of engineering, industrial technologies and agronomy. For example, complex metallurgy and advanced architecture allowed for the construction of towering pagodas that exist to this day (Messeri, 2006). Rural industry was booming, especially the cultivation of rice which meant that the country could feed itself, build reserves in case of drought, and export the surplus (Resnick, 1970). By the early nineteenth century, Myanmar's economy was advanced compared to its neighbours, it was sustainable, and it was also growing across all sectors.

Pre-colonial Myanmar might well have developed into a valuable trading partner for Great Britain rather than become one of its imperial conquests. Moreover, the political complexion of the nation could have made the kingdom an ally for many other European nations. Myanmar's cultural potential was blunted by western attitudes towards its people and their traditions, as evidenced in the somewhat demeaning photos of natives in traditional dress that circulate in European countries from about the middle of the nineteenth century. The people or Myanmar were engaged, alert to the ideas of progress and enjoyed a stable economy, which could have led to even greater developments in production and prosperity. Nevertheless, the growing British Raj consumed Myanmar, effectively stalling political, social, and technological growth for over a century.

1.2. British Imperialism

Myanmar was considered part of greater India while it was a colony of Great Britain. Following colonization, Myanmar's parliamentary monarchy was abolished and all former member of the government stripped of their titles (Chew). It is fair to say the general population was traumatized by such a radical change, so that society was irreparably damaged (Furnivall, 1953). The introduction of Christianity also progressively undermined the authority and influence of the Buddhist monks who were central figures in the culture of Myanmar (Messeri). Unwilling to accept that Myanmar and its people were developing rapidly, Britain's primary focus was to impose its control through tyranny and a total disregard for the rights of its subjects, which effectively deterred active resistance.

Notwithstanding, Myanmar experienced an economic boom soon after colonization commenced. In particular, Great Britain quickly grasped the potential of Myanmar's ability to produce a rice surplus, introducing European economic and commercial practices. Before long Myanmar was exporting rice, creating a stable market for it around the globe so that by 1870 the country's rice exports stood at over 2 million tons of rice annually (Resnick, 1970), which reached 3.5 million tons in 1940. By this date 250,000 tons of timber was being exported, as well as 10,000 tons of minerals, and over 250 million gallons of petroleum being refined from the country's reserves of crude oil (Furnivall, 1953). However, this economic boom did nothing for the welfare of the native people of Myanmar. Nearly all profits went to the British Crown, with what remained given to a small, emerging class of Anglo-Burmese – the children of marriages between British citizens and indigenous peoples. The resulting social disintegration provoked quarrels between the many different ethnic minorities over the limited resources that were available. The British did not intervene to quell the discord, and actually promoted ethnic fragmentation by treating individuals from different groups with favoritism, making it visible that there was no unified nation (Furnivall). Essentially, while stifling development and leaving many aspects of the country's identity stagnant, Britain also managed to reintroduce ethnic division to Myanmar, something that had not been present for centuries.

During the Second World War, Myanmar was briefly occupied by Japanese forces. After 1945 and decolonization of the Indian subcontinent in 1948, Britain established an independent monarchy in Myanmar with a democratic framework (Charney). Unlike many former colonies, Myanmar did not become a member of the British Commonwealth, but was left to govern itself. Having lived under almost a century of colonial oversight, western influence and stripped of its autonomy, the country (which until independence in 1948 possessed a functioning government and economy) was handed a new political structure based on principles that were more in keeping with European values.

1.3. Modern Myanmar

The country of Myanmar emerged as an independent sovereign nation on 4 January 1948 following the partition of greater India. Most visible remnants of British rule and Japanese occupation had all but disappeared by the time the new democratic republic emerged. For the next twenty years Myanmar experienced relative peace without any notable incidents involving neighboring states. The economy was stable and technological advances began to catch up with the developed world (Resnick). However, on 2 March 1962, a coup d'état by the

country's military imposed a stranglehold on the country and its government. Despite its reasoning being multifaceted, Soviet-inspired communist ideologies played a significant role in the military's decision to rebel (Holiday, 2005). In due course every aspect of society was brought under central control, including education, healthcare, and the media, with executive orders expropriating private businesses by diktat that could not be legally reversed; from thenceforth, the military government effectively isolated the country and its economy from the rest of the world (Nyun, 2008). There began an era of isolation and sanctions, which still colours attitudes and perceptions of many outsiders towards modern Myanmar.

Public indignation at high levels of corruption and the corresponding rise of a broad-based pro-democracy movement provoked an internal coup against the authorities, which led to an internal coup and the establishment of a formal military junta in 1989. The ruling military then announced that it would hold democratic elections (Nyun), however, it was displeased with the results of the nationwide general election, promptly ignored them, placing the president-elect (Aung San Suu Kyi) under house arrest for twenty years. During this time, the military government became increasingly tyrannical, showing little or no concern for even basic human rights. Opposition figures were intimidated and the practice of democracy thwarted (Holiday), and foreigners deported without reason. Mounting protests by students usually ended in bloodshed, and the ethnic stratification that began during the colonial period reached its peak. At the same time, international agencies began to investigate claims of human rights abuses in Myanmar, including forced labor and unlawful imprisonment.

In 1991, much of the developed world imposed economic sanctions on the country, with the result that Myanmar entered a period of governmental instability with frequent changes in the power structure and new leaders emerging with no idea how to handle the disgruntled population (Holiday). In 2007, a spate of demonstrations forced the military government to reevaluate its control of the country, recognizing that force had been less than successful in suppressing dissent than it had done so in the past. It was now that the military tried to introduce a series of pragmatic reforms in order to quell the unrest that was brewing within the populace (Kyaw, 2019). A new constitution was drafted and ratified in 2008, although its provisions allowed the military to retain a significant amount of power. Moreover, critics were skeptical about the legitimacy of the referendum elections that led to the formation of this new government.

Accordingly, under the 2008 constitution Myanmar's military automatically received one-third of all parliamentary seats, regardless of the results of the general election. Human rights abuses against different ethnic minorities continued in many of the rural areas, as did clashes between local insurgent groups and the military. Some aspects of modernity were permitted, such as access to the Internet and international banking, which became available in urban areas, although many rural villages still lacked electricity and reliable sources of clean water. Caught somewhere in the middle, between modern technology and pre-colonial cultural practices, Myanmar and its people, politics, and future as a member of the developing world found itself in a complicated situation.

Following the 2015 elections, the National League for Democracy emerged victorious, which seemed to welcome a new age of legitimate democratic practices for the people of Myanmar. However, the military government stalled the transfer of power through arbitrary laws aimed at specific individuals (Kyaw), which meant that the newly elected leaders were only been able to take office nominally in some cases, and not at all in others. Nonetheless, the new parliament established in 2016 did succeed in codifying democratic practices and restricting the influence of the military. The election results bode well for Myanmar citizens, yet the county has still to resolve many pressing issues relating to the economy, international relations, and basic human rights.

2. Discussion of Patent Law in Myanmar

Prior to the colonial era the notion of intellectual property was little known in Myanmar, much like many other countries in Southeast Asia. This applied equally to patents, copyrights and trademarks. It was not that the government of the day, a highly literate society, efficient administrative network, and centralized agencies of

government were unknowing or incapable of issuing patents. Surely, advances in manufacturing and increasing agricultural and industrial output that allowed for durable architecture and monuments were enough of an inventive step to warrant protection? Indeed, the recorded history of Myanmar makes no reference to intellectual property or the law around it prior to colonization, which can be explained by philosophical differences that existed between Southeast Asia and Europe at similar stages of societal development. While the notion of intellectual property may have been addressed by scholars in Ancient Greece, the first patents and copyright were not granted in Europe until the late medieval period, and done so with far less sophistication than we see in patents being issued after the Venetian Patent Statute in 1474. It is well to remember that pre-colonial Myanmar had just emerged from Asia's medieval period; had it followed the European model we would most likely have seen patents, copyrights, and trademarks being issued at this time. Whereas post-medieval Europe upheld the moral worth of the individual and their contribution to society, Buddhist philosophies in post-medieval Southeast Asia continued to emphasize the interconnectedness of the world and the oneness of self and environment (Messeri). Hence, prior to colonialization, recognizing an individual for their contribution to science or technology was unimportant in the prevailing cultures of Myanmar and Southeast Asia. Even so, the incentive to continue to invent prevailed since it was considered vital to civilization as a whole. Ergo, since the main reasons for a patent system were either moot or covered by another facet of society in pre-colonial Myanmar, there was essentially no need for a patent system, and the issuance of patents would have been contradictory to public policy at the time.

2.1. India Patents and Design Act

During the period of the British Raj, Myanmar was treated as part of greater India, its patents governed under the *India Patents and Design Act, 1911.* This legislation applied to practically all of Great Britain's possessions in Southeast Asia, including the lands that would become present-day Pakistan following Partition, as well as areas that were still under dispute between the British military and indigenous militia forces (Balida, 2004). Drafted entirely in English, and apparently without any contribution by the Indian scientific community, it reflects many of the same basic principles of European patent law of the early twentieth century. Inventions had to be novel, useful, and non-obvious, and patents were granted on a first-to-file basis. Under this act, they could be filed by anyone (inventor or otherwise) regardless of citizenship, as long as it was filed in the prescribed manner (Balida). While this does make it seem as if the British government was making the patent system accessible to all citizens of the Indian subcontinent, its prescribed manner instituted precepts that systematically barred indigenous peoples from making application. While the act never specifies, it is reasonable to assume that all patents needed to be drafted in the English language and any submissions to the contrary would be rendered null and void. Certainly, much of the educated community under the Raj would have spoken at least a modicum of English, but the provisions blithely ignored the legitimacy of intellectual property rights of non-English speakers. This reveals that the provisions in the act allowing patents to be filed by anyone proved superficial at best, and had only been included to mask the real colonial agenda. This was to ensure that inventions could only be patented by British nationals or those with very close ties to the British government, effectively depriving the peoples of Myanmar and other Southeast Asian nations of patent rights.

2.2. Original Patent System & Emergency Provisions

The first legitimate patent act in Myanmar came to an abrupt end at the time of the British retreat from empire when the Myanmar people were left to govern themselves. An initial act, *The Burma Patents and Designs Act, 1939, was* drafted although it as never fully applied. All of its provisions were reused in a subsequent draft six years later in the form of *The Patents and Design Act of 1945*, which established a very basic patent system for the former colony (Balida). It was also drafted in English, most likely by the learned élite of the Myanmar population, but that was the only resemblance it bore to its predecessor. There were no provisions as to who could apply for a patent, what was considered patentable, and how this was to be done. The act merely outlines the continued protection of patents granted when Myanmar was considered part of greater India (Messeri). The preamble of the act is clear about its shortcomings, stating, "Whereas it is expedient to make legislative

provision for the protection of inventions and designs, relatively it will be more essential for the present age than the time it was passed." While it was prudent for the fledgling Myanmar government to establish protection for the patents that had been granted during its time as a British colony, the lack of planning for the issuance of patents in the immediate future was surely a gross oversight. There may have been a notion that after the colonists left there would be no more interest in the patenting; the population would go back to making advancements in science and technology for public benefit alone. This was not the case, and not the only issue with this first patent act.

The appropriately named *Patents and Design (Emergency Provisions) Act of 1946* was the result of hasty legislation intend to correct the state of affairs in Myanmar's patent system after decolonization. Prior to its enactment there was essentially no way that Myanmar citizens could obtain new patent rights. This was mentioned by the 1945 act, which suggests that the fledgling government was aware of issues with its patent system that could not be readily addressed. However, these emergency provisions left much to be desired. The act itself is less than a page long, much of which is a throwback to the convoluted past of intellectual property law in Myanmar during the period immediately after decolonization. The mandate of the act is that the *India Patents and Design Act, 1911* would again be the law of the land concerning patents. This means that, yet again, a significant portion of the population was shut out of the patent process due to the language requirement, as patent applications still needed to be filed in English despite that not being the official language of the country. The *Emergency Provisions* installed a few domestic authorities who could review applications and grant patents, which alleviated some of the geographical issues with operating under the old system, but still denied access for the majority of the people of Myanmar to the patent process.

Throughout the transition to a dictatorship and the decades that followed, there was little or no improvement in Myanmar's patent practices, and equally little activity within the intellectual property community. This can be explained as follows: under the military régime almost all of the country's limited scientific and technological resources were the property of the government in which many of the intellectual élite held position, often in concert with military establishments, including scientific laboratories. Thus, few of the people outside of military laboratories had the requisite tools or knowledge to develop something worth patenting, while those within said laboratories were not eligible to receive patent rights as their inventions and innovations immediately became property of the government. Also, few Myanmar citizens at this time would consider opposing the military régime out of fear of retaliation, which equally true for many tangible aspects of civil rights and even more so for something as abstract as intellectual property.

2.3. Abolishment by the Military Regime

In 1992, the government of Myanmar abolished its patent system almost entirely, in part a move towards a more restrictive form of socialism in response to further economic sanctions by other countries (Holiday). The military régime at the time was a dictatorship, something regarded as abhorrent by most of the rest of the world. The political intent was to show that while the military did rule and control the country, the people of Myanmar were actually reaping the benefits of prudent socialism. During this time, not only intellectual property, but also healthcare, education, and many aspects of housing became completely socialized (Nyun). This ploy for a rebranding of the country was not very effective, as economic sanctions have only recently been lifted, some twenty years later.

The notion of dissolving the patent system in Myanmar can be traced back to differences in the philosophical outlook between Europe and Southeast Asia prior to the colonial era. In the western world, inventors were rewarded for their innovation with exclusive rights to create and gain wealth from their inventions. In the East, since the betterment of society as a whole from an advancement in science or technology could be seen as compensation in and of itself, the idea that one needed exclusivity over one's invention could be seen as contrary to public policy. By dissolving Myanmar's patent system the military government did not entirely remove the

potential for pecuniary gain; it was merely the case that the socialization of intellectual property meant inventors and innovators could not hold a monopoly on their creation.

Abolishing the patent system also meant that the government was able to eradicate all avenues of gaining legal recognition for an invention. Myanmar citizens at the time were still able to register their inventions with the Myanmar Registry Office of Deeds and Assurances, and doing so won them recognition, at least nominally, for their contribution to science or technology. A similar process was established for copyrights, but not trademarks, though there was no codified policy for rights that had previously been granted. Registering with this office did not entail any sort of examination or thorough review, nor was there a formal publication in any sort of public patent gazette. Registrants were merely issued a certificate that confirmed they had filed the proper forms to have their invention registered. The annals of the Myanmar Registry Office of Deeds and Assurances do not even include processes for reviewing applications and comparing them to the current state of the art. This suggests that there may be several Myanmar citizens who have been erroneously granted these pseudo-patents despite their lack of novelty or inventive step.

Under this registration system, a Myanmar citizen could sue anyone who infringes their rights as an inventor. In certain cases the Myanmar Penal code allows for an action to be brought against a third party who has misappropriated another's invention. However, the courts in Myanmar have yet to hear or rule on such a complaint (Thu, 2015), which may be due to a number of factors. The current judiciary in Myanmar must cope with innumerable claims arising from the theft of land and human rights abuses; a suit brought to the court concerning a lack of nominal recognition when no exclusive rights had been granted would probably be thrown out for either lack of merit or frivolity. Furthermore, the requirements to bring such an action, or even the fact that such an action is possible, were not widely publicized so that many citizens may not even realize there is legal redress available should their invention be misappropriated. With the arrival of the Internet in Myanmar and other advances in communication technology there is a pressing need for the government to establish a legitimate patent system for the simple reason that news of an invention can now be easily broadcast across the entire country, and also that Myanmar's citizens are more aware of stronger patent rights available in other developed and developing countries.

2.4. The Draft Patent Act

It was in July 2015 that Myanmar's government released a draft of its new Patent Act, which was intended to benefit rapid economic development, and also to bring it into line with several international treaties, which we will discuss later.

The primary aim of the Myanmar Draft Patent Act was to provide legitimate protection to innovations in the realm of science and technology for the peoples of Myanmar. We have already noted that prior to colonization the notion of intellectual property was practically nonexistent, obviating the need for a patent system, or one that was at least comprehensible to commercial interests in the western world. The 2015 patent act has the potential to usher in the first era where genuine patent rights will be readily available to the general population of Myanmar.

The draft act also intended to promote foreign investment with the lifting of economic sanctions by an increasing number of countries. Many different players in the building of vital infrastructure were obliged to reevaluate their practices to prepare for the anticipated influx of foreign people and products, especially from outside Southeast Asia. Understandably, foreign investors, whether large or small corporations, have certain minimum expectations, intellectual property rights being the most important. By establishing a system for patents, copyrights, and trademarks that is on a par with other developed countries, Myanmar aspired to join the ranks of the developed nations, or at least let it be known that it could be a worthy trade and investment partner.

Finally, the act aimed to boost local industry and encourage citizens to make their own advances in science and technology that could receive a patent after due consideration. During the military dictatorship when patents were available, applications were rare; many inventors sought patent protection outside of Myanmar in countries whose patent systems were established and not likely to be ruled null and void in the near future. It was clear that the inevitable hurdles associated with obtaining a patent in Thailand, India, or China, were worth the effort in being able to prove property rights over what they had created.

The draft Patent Act contained many provisions that were similar to those found in the United States and the European Union, all of which stipulated that patents require novelty, involve an inventive step, and should be industrially useful. These are the very tenets of patent law worldwide, and it should come as no surprise that Myanmar chose to include them in the basics of its patent eligibility. The draft further defined novelty, inventive step, and utility, in terms that are similar, if not identical, to those of the European Union. Where the draft differed from standards we see in the West is in what prohibits the investor from receiving a patent on their invention. Scientific breakthroughs and thought processes alone could not earn a patent. The same would apply to trivial things that may in fact be innovative, but have made no significant contribution to science or technology, or are merely too abstract to justify applying for a patent.

2.5. Patent Act of 2019

In March 2019, the Myanmar Patent Act became law. The act itself contains most of the same provision and stipulations as its draft predecessor (Thean-ngam, Chua, & Oo, 2019), although there was notable reorganization. One of the most significant additions act was to clarify that applications for patents can now be submitted in both English and Burmese. While there exists in Myanmar a significant population of ethnic minorities who do not speak Burmese at all, the fact that the English-only barrier has been removed is a huge improvement from previous patent legislation in Myanmar. This shows that the government and scientific community have made steps to further the country from its history of colonial oppression and solidify its independence. However, as of May 2020, the act has yet to be ratified.

3. Discussion of International Relations and Patent Cooperation

Despite being isolated and subject to economic sanctions, Myanmar was still able to join a number of international organizations and in doing so became a party to treaties that affect its consideration of intellectual property protections.

3.1. International Organizations

Since 1997, Myanmar has been a member of the Association of Southeast Asian Nations (ASEAN), an economic and political association dedicated to “partnership in dynamic development and in a community of caring societies” (Nguyen, 1999). Other members include Indonesia, Malaysia, Singapore, Thailand, Brunei, Cambodia, Laos, Vietnam and the Philippines. ASEAN was established in 1967. As the Southeast Asian equivalent of the European Union, member states do have some semblance of economic and political interdependence, but each is still a sovereign nation (Calboli, 2019). The official language of correspondence and diplomacy in ASEAN is English, despite this not being an official government language for the majority of member states. When Myanmar joined ASEAN, the other eight members at the time all maintained stable governments, many of which were fully democratic. What impelled Myanmar to join ASEAN in 1997 is unclear, although there is some irony in that its joining correlates with increased sanctions imposed by Western countries that followed months later. While other ASEAN countries criticized the Myanmar government for what has been called a counterfeit democracy, the country has continuously benefitted from sound political and economic relations with other members of ASEAN. Indeed, many countries have been critical of ASEAN for not taking stronger action against Myanmar for its repression and corruption, but there are other member states with similar issues that go unmentioned as well (Nguyen). While ASEAN promotes partnership and international

support, its overall mission prefers to maintain the *status quo* and make only marginal improvements in areas such as pollution and literacy. Some would describe this as window dressing, which, true or not, will most probably reflect well on Southeast Asia's outward appearance without causing major resistance from civilians or the military.

ASEAN has an internal covenant that focuses on intellectual property. The ASEAN Framework Agreement on Intellectual Property Cooperation came into force in 1995 and was subsequently ratified by its members (Calboli). As Myanmar did not join ASEAN until 1997, its acceptance was automatic upon accepting membership. The agreement aims to promote intellectual property rights in a region of the world where historically they had been largely absent. By the same token, the covenant also binds ASEAN countries to work together "to contribute to regional dynamism, synergy and growth" (Nguyen). The effects of this agreement manifest themselves in an increase in the legitimate recognitions of patents between ASEAN countries, as well as a codified search network within the region. However, this is problematic because not all member countries provide the same basic protections for intellectual property.

Myanmar has been a member of the United Nations (UN) since independence in 1948. In the same year it also became a signatory to the General Agreement on Tariffs and Trade (GATT), and also the World Trade Organization (WTO). When the latter was established in 1995 Myanmar was at its inception. Despite governmental discord in Myanmar, the economic sanctions against it, and allegations of human rights abuses, the country's membership of the UN, GATT, and WTO has never come under question. This means that Myanmar was a member of GATT during the 1986 Uruguay Trade Rounds which discussed, among other things, intellectual property rights (Calboli). At this point, Myanmar still had a functioning patent system but one that provided few legitimate protections. The focus on intellectual property from the Uruguay Trade Rounds may have prompted a review of the Myanmar patent system, which may have led the military government to abolish the patent system six years later. Rather than fix the problems with the patent system that had surfaced during these rounds, the government found it easier to eliminate the system entirely.

In 2001 Myanmar joined the World Intellectual Property Organization (WIPO), at which time there was virtually no patent or other intellectual property protection in the country. Meanwhile, it is not a member of the Paris Union for the Protection of Industrial Property, and neither is it a member of the Berne Union for the Protection of Literary and Artistic Works, both of which are the basic prerequisites to become a member state to WIPO. Myanmar satisfies this prerequisite through its membership to the UN, making it subject to all of the provisions of the WIPO Convention, despite not having a patent system or providing protection for copyrights and trademarks when it joined. While the practicality of this arrangement may be questionable, it is important to note that WIPO only concerns itself with international intellectual property rights and regulations and does not govern internal intellectual property affairs. As long as Myanmar accords with the other international players when it comes to patents and other international property, WIPO is not concerned as to whether or not the country properly manages the intellectual property rights of its citizens. Unsurprisingly, Myanmar is not a signatory to any of the other WIPO-administered treaties besides the establishing convention; not only is there no reason for it to be a part of these treaties, it most probably does not meet the requirements established by the other nations in a multi-lateral treaty through the absence of its own system of intellectual property. This may change if and when Myanmar's president ratifies the new act.

3.2. International Treaties

Not being a signatory to any of the WIPO-administered treaties concerning intellectual property has not prevented Myanmar from being party to a number of multilateral treaties, which include provisions that address, at least tangentially, intellectual property. The International Covenant on Economic, Cultural, and Social Rights (ICECSR) concerns many different rights that are to be enjoyed by all citizens. These include specifications on standards of living, education, labor, and health. The covenant was drafted in 1954 and the first signatories joined in 1966 before it came into force in 1976. Myanmar signed the covenant in 2015, most likely as part of

the country's attempts to move away from military dictatorship, believing that by focusing on improving the rights of all citizens, the government would be seen as moving to join the developed world. Myanmar has yet to ratify the covenant, though it seemed highly likely that it would do so after recent elections. Besides a few small nations, the only country besides Myanmar that has signed but not ratified the ICECSR it the United States. Article 15 of the ICECSR comments on intellectual property, with the assertion that obtaining protection for developments in science and technology should be available to everyone. At the same time, this clause also mentions that all should enjoy the benefits of scientific progress. Balancing recognition and credit with societal gain is something that all countries need to take into consideration when evaluating their patent systems, especially those countries who are still in the development stage. While the provisions in the ICECSR do not enumerate any specific requirements for countries and rather list goals and aspirations, ratifying it would mean that a country has committed itself to at least consider, among other things, a fair and effective intellectual property system.

Myanmar is a full member of the Global System of Trade Preferences Among Developing Countries. This agreement only includes developing countries, mainly those in South America, North Africa, as well as southern and Southeast Asia. It was signed in 1988 and came into force the following year. While Myanmar was not one of the original signatories, it was one of the first additional member states to join. The agreement proposes full cooperation between developing nations as they move to join the developed world. Later rounds of the agreement confirmed that such cooperation includes support and recognition of each other's patent systems (Nguyen, 1999). This is important for Myanmar, as it still plans to debut its new patent system; according to the agreement, other developing countries are required to support the system it will have established. At the same time, Myanmar's patent system will have to recognize the legitimacy of patents granted by the other developing member states of this agreement.

As a member of ASEAN, Myanmar was a default party to the Agreement on Comprehensive Economic Partnership between Japan and Member States of the Association of Southeast Asian Nations which came about in 2008. The goal of this partnership agreement was to strengthen the relationship between Japan and ASEAN, and expanding it to include different aspects of the economy. Article 53 stipulates this is to include intellectual property. Intellectual property protections in Japan are far more robust and intricate than those in Southeast Asia, especially when it comes to things patentable. As a party to this agreement, the Myanmar government will have to consider the interplay between its patent system, those of other ASEAN countries, and the patent system of Japan as its patent act approaches ratification.

3.3. Recognition of Foreign Patents in Myanmar

Without a working intellectual property system of its own, it is hardly surprising that the government of Myanmar did not generally recognize patents, trademarks, and copyrights granted by other sovereign entities. However, this did not actually present itself as an issue due to the timing of Myanmar's abolition of its intellectual property system and the economic sanctions imposed by many of the developed nations. The majority of economic sanctions (many of them severing the country's access to modern luxuries) were imposed in 1991 in response to international objections to increasing government corruption and human rights abuses in Myanmar. It was not until 1992 as part of the government's socialist rebranding, that it eradicated any viable protections for intellectual property from its laws. Thus, when Myanmar abolished its system of intellectual property (which normally would have been met with alarm by the rest of the world), it went unnoticed because few countries were doing business in Myanmar at that time.

With the lifting of economic sanctions it was quite evident that Myanmar had no legitimate patent system. Foreigners were still able to register their inventions in the same way as the country's citizens, affording little more than nominal rights. Myanmar's legal system is not restricted to its citizens, but extends equal rights in courts of law, albeit limited by the military régime. It is quite possible for a foreign individual or corporation to file for nominal intellectual property rights in Myanmar, which is what many attorneys working in Southeast

Asian intellectual property recommend. They could also bring a suit in a Myanmar court over infringement, something that the country's citizens are denied. In practice, most foreigners have relied upon the patents they received in their home countries or other Southeast Asian nations to protect them in Myanmar, citing as their rationale Myanmar's acceptance of international patent treaties.

3.4. Comparison with Local Patent Systems

Many other countries in Southeast Asia have had a similar experience of patent law throughout their history, however today's practices vary significantly, two distinct examples being India and Thailand. India's first legitimate patent system was established under the *Indian Patents and Designs Act, 1911*. This was replaced by the *Patents Act, 1970*, which consolidated and clarified many of the provisions of the original act, although without making substantive changes. The aforementioned act was amended and rightly named *Patents (Amended) Act, 2005*, thereby expanding the field of patentable technology to include matters such as food, chemicals, and microorganisms. Further amendments in 2006, 2012, 2013, and 2014 addressed examination and filing requirements. The current act mirrors many of the general trends that we see in most patent systems used by the European Union. India has introduced numerous reforms to its patent system are part of its ongoing efforts to become a leader in the global patent industry. In 2013, the country was empowered as both an International Search Authority and an International Preliminary Examining Authority, and in 2014 the India Patent Office received nearly 43,000 patent applications, including direct and PCT national phase entries. This is more than any other country in the region. The robust bureaucratic framework in India surrounding intellectual property and the broad expanse of governmental affairs is one beneficial effect of British colonization and the influence of the Commonwealth. Note that Myanmar is not a member of this organisation of former British colonies.

The Kingdom of Thailand enjoys an extensive intellectual property system covering patents, copyrights, and trademarks, and also trade secrets, utility models, and even traditional knowledge. Unlike much of Southeast Asia, Thailand was never officially colonized by any European power. Instead, as the independent kingdom of Siam, Thailand served as a buffer state between the British Raj and French Indochina. While both France and Great Britain did have significant interests in the kingdom, there was an overarching fear of all-out warfare should either colonial power breach too far into its borders. This allowed the country to remain autonomous without significant impediments to its development while still benefitting from certain colonial influences. This is apparent in many aspects of contemporary Thailand, including its patent system. The Thai Patent Office has departments that focus solely on the issuance and administration of patents in the fields of physics, mechanical engineering, petro chemicals, technology chemistry, pharmaceuticals, biotechnology, as well as an entire examination team dedicated to certifying petty patents. Thailand has even instituted an online service, which allows Thai citizens to search for patents via the Internet. It also provides basic training in matters of intellectual property. Thailand has become a leader in the intellectual property sector in Southeast Asia, with more patents being issued to domestic and foreign applicants than any other ASEAN country. This can be attributed to its unique history and experience during the colonial period that stifled the development of many other neighboring countries.

Conclusions

Prior to colonization, Myanmar was a superpower in Southeast Asia, technologically advanced and innovative and rules by expert administrators. British colonization set back economic progress, which left a moribund economy when the British Raj came to an end in 1948. Subsequently, despite democratic intentions, Myanmar entered a dark period of military authoritarianism in which social and economic life suffered and from which the country is only now beginning to recover.

Unsurprisingly, from a very low base for which British colonial occupation was responsible, intellectual property law have failed to develop in Myanmar. Left to its devices, in all probability Myanmar would have

established a viable patent law system similar to that of Thailand. Furthermore, had Great Britain pursued different policy during decolonization, a succession government could have fostered the healthy growth of its patent law system into a leading regional power like India. Even with the new patent act, Myanmar remains years behind where it could have been in development across all sectors, including intellectual property due to colonial oppression and euro-centric views of scientific innovation.

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