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THE RIGHT TO FREEDOM OF CONSCIENCE: WESTERN AND ISLAMIC PERSPECTIVES

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Abstract. With the constant reoccurrence of the question of peaceful coexistence among people of different religions, legal traditions, and understandings of freedom and human nature, there is a need for a fresh study of the concept of freedom of conscience. This article addresses conceptual, doctrinal, and normative issues relating to the concept of freedom of conscience as a human right by examining it from Islamic and Western perspectives. Chapter 1 of this paper considers the Western perspective on the right to freedom of conscience in three key areas. The religious, philosophical, and legal aspects of this concept receive particular attention in an attempt to discern the essence of what freedom of conscience means in the West. To understand how this concept is articulated in legal terms, this article analyses both its national and international legal bases, alongside the relevant case law of the European Court of Human Rights. Chapter 2 of this paper is devoted to the study of the Islamic perspective on the concept of freedom in general and on the right to freedom of conscience in particular, in order to ascertain whether or not this right exists in Islamic legal tradition. In doing so, this paper explores the most fundamental Islamic sources – namely, the Quran and the Sunna – in order to understand the role that this freedom plays in them. Two constitutional examples from Jordan and Qatar are then analyzed, before final conclusions are delivered.

Keywords: conscience, right to freedom of conscience, religious freedom, Western legal tradition, Islam, Islamic law

Introduction

In seeking to understand the Western and Islamic origins of the concept of conscience, Christian and Islamic thought can provide us with a key. Both elucidate the human capacity to choose between what is right and what is wrong. As Jacques Maritain noted, the only practical knowledge that all men in the world naturally and infallibly have in common is that we do good and we avoid evil (Maritain, 2011). The question that then needs to be posed is: how independent and free does a person remain in their conscience-based decisions in the West and in Islam. How free is the conscience of a Muslim living in the West? Should a religion, a government, a positive law, or the inner moral code of an autonomous person be the main source of personal conscience from the Western and Islamic perspectives?

To consider an analogy which might illustrate the profound transformation of the status of the freedom of conscience in the West, one might look to the personal experience of Thomas Jefferson – specifically, his

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comparison between his attitude towards conscience (and religion) before and after his stay as an ambassador in France.[3] Jefferson's shift in attitude is similar to the transformation of both the role played by religion in the West and of the concept of conscience which, over time, became of profound importance. In fact, this importance grew to such an extent that conscience came to be treated as more of a universal part of human nature than religion in the secular West (Waldron, 2013). Despite the predominance of the principle of secularism, differences in understanding of the freedom of conscience are evident to this day in various Western states. As an example, one might consider the Constitution of Greece, which speaks exclusively of a religious conscience.[4] Or the statement of the US Supreme Court from the middle of the 20th century that described the people of the US as "a religious people whose institutions presuppose a Supreme Being" (*Zorah v. Clauson*, 1952). Whilst these examples might be seen more as an exception than a rule, at the same time they demonstrate the broad plurality of secular Western thought.

In contrast, the concept of personal conscience in Muslim states is mainly connected to religion, and the Islamic faith in the popular mind. People in the West sometimes believe that there is a lack of freedom of conscience in Islam because decisions are pre-determined by Islamic scriptures and their religious-legal interpretations. However, if we look closer, the concept of freedom in Islam is far richer than first assumed, and needs to be considered from a variety of angles. Within the Quran, one can find over twenty stipulations urging a person or a community to do good and to avoid evil in their daily activities.[5] According to a number of Muslim scholars, these and other exemplary provisions of the Quran reflect the essence of the autonomy of a personal conscience. Moreover, the Constitution of Tunisia – as a composite text written by influential religious and secular figures – might be seen as a liberal document that names Islam as the state's religion, while at the same time recognizing freedom of conscience and belief, and equality between the sexes.[6] Does this mean that the right to freedom of conscience is a constituent part of the entire concept of freedom in Islam? Or did Tunisia, a majority Muslim state, make an incorrect decision from an Islamic perspective? To answer these questions, we must consider whether freedom of conscience does not necessarily depend solely on religious textual prescriptions in Muslim states, but rather belongs to every person regardless of the system of beliefs to which they belong.

With this introductory paper we seek to open a series of discussions in order to foster more in-depth research into rethinking the entirety of freedom of conscience, both in the West and in Islam. The main purpose of this paper is to discuss the origins, meaning, and relevant statuses of this concept in these areas. The objects of research are the Western and Islamic perspectives on the very notion of the freedom of conscience. The methodology used in the analysis is one of comparative conduct, involving the comparison of primary sources, legal documents, and court judgments. The historical method helps to uncover the foundations of the concept of freedom of conscience across

[3] Thomas Jefferson's time as the ambassador of the US in France (1785–1789) coincided with the most antireligious period yet in Western history. As Noah Feldman writes, "not coincidentally, Jefferson's thoughts and writings from the years before he went to France and became immersed in the distinctive intellectual style of the French Enlightenment differ dramatically from those that came after. During his early phase of career, he rarely took an anticlerical tone in private, and certainly never in public. After his return from France, he became more radical about religious matters. The focus turned on the liberty of conscience and the necessity of individual judgment in finding truth." More on this topic can be found in: Feldman, N. (2006). *Divided by God: America's church-state problem and what we should do about it.* New York: Farrar, Straus and Giroux.

[4] According to Article 13 of the Constitution of Greece, "Freedom of religious conscience is inviolable. The enjoyment of civil rights and liberties does not depend on the individual's religious beliefs".

[5] The duty of commanding right and forbidding wrong, according to the Quran, is in its nature collective as well as individual. Here we might cite Quranic verse 3:110 which reflects the collective nature of the duty: "You are the best community brought forth unto mankind, enjoining right, forbidding wrong, and believing in God". In Quranic verse 7:165 it is said that God saved those who forbade evil, and punished those who did wrong. From this verse, it is clear that the duty belongs to each member of the community. One can pursue this topic with Cook (2001).

[6] Constitution of Tunisia (Article 6): "The state is the guardian of religion. It guarantees freedom of conscience and belief, the free exercise of religious practices and the neutrality of mosques and places of worship from all partisan instrumentalization".

various sources. The analysis of legal documents as well as the relevant case law is also necessary in order to produce a fully-fledged study.

Chapter 1 of this paper invites discussion on the concept of the right to freedom of conscience in the West, with the aim of demonstrating that this human right might be regarded as ultimate in the future directions of both Western society in general and Western law tradition in particular. The first section of the chapter reveals the religious, philosophical, and legal origins of the freedom of conscience in the West – a freedom which, after particular historical circumstances (namely the Reformation of the 16th century), came to be deemed a natural human right (Wilken, 2019). Further, paying attention to the legal interpretation of the freedom of conscience, the paper asks how national and international legal regulation describes the right to freedom of conscience. In addition, some landmark judgments of the European Court of Human Rights (ECtHR) are discussed.

Chapter 2 turns attention towards the question of the right to freedom of conscience in Islam. One might argue that this right is a purely Western liberal value that came solely out of the Enlightenment and secularization (Roy, 2019). It might even seem that the Islamic concept of freedom, as influenced by religion, has nothing in common with freedom of conscience. However, chapter 2 takes into consideration a number of fundamental sources in order to establish the essence of this question. Firstly, the primary sources of Islam are explored in order to argue that the freedom of conscience is a constituent part of the Quran and Sunna of the Prophet. In addition to this, Islamic legal tradition is analyzed alongside the constitutional examples of Jordan and Qatar in order to understand whether the right to freedom of conscience has a place therein.

1. The right to freedom of conscience in the West

In Chapter 1 of this paper, the right to freedom of conscience is approached from three directions. First, some religious and philosophical aspects of the concept are explored. Second, the paper considers national and international legal regulation in order to ascertain the place occupied therein by the right to freedom of conscience. Third, via the study of a relevant landmark case of the ECtHR, the paper looks at the legal interpretation of the right to freedom of conscience and related issues.

1.1. Some religious, philosophical, and legal aspects of freedom of conscience in Western thought

The term "conscience" came into the vocabulary of Christians with the writings of the apostle Paul. In the words of the letter to the Romans, Paul says that even though the Gentiles do not have the law, there is a law written in their hearts, and their conscience bears witness to what they have done – accusing them or excusing them (The Bible, Romans 2:15). Thus, conscience constrains people to doing what is written in their hearts. The very feeling of what is good and what is wrong is written inside a human being. In scholarly thought, a law written in the hearts means a moral law, and "heart" means the natural knowledge of moral good and moral evil inscribed into human reason itself (Gregg, 2019). Therefore, as outlined by Noah Feldman (2006), conscience is a distinctively human faculty for telling people what is right and what is wrong.

Further passages of the Bible speak of the guiding role conscience plays in order to discern what one should do. In Corinth, a dispute arises regarding whether Christians should eat meat that has been roasted in a ritual sacrifice and then sent out for sale in the market. If such meat is offered to you at a dinner party, Paul writes, let your conscience be your guide as to what you should do (The Bible, 1 Corinthians 10:29). For a person's liberty should not be determined by another man's conscience – that is, by another man's judgment as to what is right or wrong (The Bible, 1 Corinthians 10:29, 30). In addition to this, Paul mentions conscience by saying that the testimony of conscience in behavior involving others is based on holiness and godly sincerity (The Bible, 2 Corinthians 1:12). Here, the testimony of conscience is not about being true to oneself, but about obedience to the word of God. In Paul's writings, the term conscience has a dual role: inner knowledge and judgment of past actions, and tutor of future deed (Wilken, 2019). This knowledge and judgment, influenced by the word of God, comes from inside a

person. It is clear from this and other passages in the Bible that religious conscience plays the role of a guide, a companion within oneself, and a pedagogue in matters of right and wrong.

In philosophical terms, conscience might be understood in two ways: as a moral capability, and as a practical moral judgment. Moral capability sets out the duties of a person and encourages compliance, whereas a practical moral judgment outlines moral responsibilities in concrete situations (Peschke, 1997). To Aquinas, conscience is not simply composed of thoughts about what one has done or what one should do, because it is an act of judgment that leads to an action – knowledge with the force of command (Wilken, 2019). In the time of the Reformation, conscience was still not an appeal to private judgment, but the invocation of a living intelligence formed by the Scriptures and grounded in the tradition of the church (Wilken, 2019). John Lock was committed to the freedom of conscience which had come to be seen as an inalienable right in the pantheon that featured life, liberty, and justice (Witte, 2005). Locke's school of thought grew gradually out of the Christian notion of conscience, understood as a spark of inner moral guidance that exists in every soul. In the US, although it is uncertain why the final language of the First Amendment of the Constitution omitted reference to the freedom of conscience,[7] this concept – according to N. Feldman – played a major role in understanding how The Establishment Clause and The Free Exercise Clause, as the constituent guarantees enshrined in the First Amendment, should protect citizens and their personal autonomy[8] (Feldman, 2006).

It is certain that, unlike in previous eras of Western civilization when religion played a major role in society, human conscience in the West cannot now be limited to religious conscience, or replaced by religion. As concluded by Charles Taylor, the modern Western state is free from its connection to religious faith (Taylor, 2007) because Western modernity presupposes secularity in its three forms: secularized public spaces, the decline of belief and religious practice, and new conditions of belief (Taylor, 2007). It is important to note that the great majority of aspects of public policy in the secular West are affected by a growing number of conflicts in beliefs and moral values that lead to opposing opinions on how laws should be maintained or transformed. Disagreements about religious practices (*Holt v. Hobbs*, 2015), the norms of religious laws and their accommodation (*Molla Sali v. Greece*, 2018), the tolerance of diverse moral standards regarding same-sex marriage (*Oliari and others v. Italy*, 2015), abortion (*Planned Parenthood v. Casey*, 1992), assisted suicide, free speech, religious symbols, family issues, and many other issues that divide current opinion are influenced by varying beliefs and convictions in the West. Even the question of whether or not to sell a wedding cake can today be divisive in this regard (*Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 2018).

In the West, courts have become a major battleground for determining issues of conscience-based and religion-based belief systems, and even redrawing the boundaries of the freedom of conscience. The last judgment of the Constitutional court in Poland is perhaps the most relevant example of how laws changed by the government might attempt to transform the concept of the right to freedom of conscience in the West. The question then emerges as to whether the beliefs of religious people or secularists should play a specific role in politics in the West. Should religion or the moral values of secular groups guide Western governments when they regulate sensitive questions of contemporary society? Eventually, could religious faith or the moral beliefs of secular thought provide the values required by government to compose laws in order to resolve disputes? As Feldman (2006) rightly pointed

[7] The draft language of the First Amendment included the notion of liberty of conscience: "no religion shall be established by law, nor shall the equal rights of conscience be infringed".

[8] The First Amendment of the US Constitution sets out first that the government shall not compel anybody to support any religious teaching or worship with which they conscientiously disagree (The Establishment Clause). Second, it guarantees that the government shall not stop anybody from worshipping or practicing their religion as they choose (The Free Exercise Clause).

out, the so called "values evangelicals"[9] and "legal secularists"[10] are the two main factions in the West, and the question now is of the time when one or another group will take the lead and the right to somehow change the law.

1.2. Freedom of conscience in the West: some remarks on national and international legal regulation

Right to freedom of conscience occurs in all of the main international legal documents in the West. Usually, it takes its place alongside the other two freedoms, namely freedom of thought and freedom of religion. All three are simultaneously interconnected and unique in meaning and content. Freedom of thought is the freedom to formulate a set of minds and to take lessons from making mistakes in a time of expressing ideas and personal views. Freedom of religion relates to the freedom to possess a religious faith, to belong to a particular religious community, and to live according to one's chosen religious faith by expressing religious beliefs in public ways. In fact, the individual's conscience must be left free in order for religious faith to have any meaning at all (Feldman, 2006). Freedom of conscience involves a set of moral obligations whereby a person conducts their life. The moral responsibility of a person to live their life according to a particular moral philosophy plays a special role in the expression of personal convictions – convictions which are not somehow chaotic but, rather, reflect a particular system of personal views on life. As stated by the ECtHR, in order to consider views as personal convictions within the meaning of Article 9 of the Convention, they must attain a particular level of cogency, seriousness, cohesion, and importance; moreover, they need to be regarded as philosophical convictions (*Campbell and Cosans v. the United Kingdom*, 1982). When a person has freedom of conscience, they are free to live according to their own personal convictions in a private as well as a public space. This kind of personal freedom is guaranteed by law – more concretely, by the right to freedom of conscience.

Conscience and freedom of conscience is expressed twice in the text of the Universal Declaration of Human Rights (UN General Assembly, 1948), not to mention its close ties with the other human rights and related articles. The textual provision of the Declaration (Art. 18) affirms that people have the right to freedom of thought, conscience, and religion; this right, according to the Declaration, includes freedom to change religion or belief, and freedom to manifest religion in teaching, practice, worship, and observance. In addition to this, conscience receives a separate special place in the Declaration. The role and meaning of it is evident if one looks to the beginning of the Declaration, where it is affirmed that people are not only born with freedom and equality in dignity and rights, but they are also endowed with reason and conscience. It is necessary to note that both textual provisions reflect how significant it was for the forebears of the Declaration to enshrine the concept of freedom of conscience into the text. On this, it is important to mention two things: first, that the primary draft papers of the Declaration talked about a sacred conscience and reason; and second, that despite the absence of sacred elements the representative from Lebanon, Charles Maliki, convinced the others to integrate the concept of freedom of conscience into the text. Later on, some political figures in the West publicly declared that a representative of Lebanon had not been nominated to speak in the name of such Western ideas as human dignity and human rights (Hazard, 1947). This could suggest that the rights to human dignity and freedom of conscience are not necessarily solely Western.

The European Convention of Human Rights (ECHR) mentions the right to freedom of conscience in an explicit manner, stating that people have the right to freedom of thought, conscience, and religion. This right includes freedom to change religion or belief and freedom to manifest religion or belief in worship, teaching, practice, and observance (ECHR, 1950). In the second part of Article 9, it is stated that the freedom to manifest one's religion or belief can be subject to such limitations that are prescribed by law and are necessary in a democratic society. The content of this triple right is revealed in the interpretations delivered by the ECtHR where, in a number of cases, the Court explains the religious dimension of this right aimed at safeguarding the religious beliefs of people (*Bayatyan v. Armenia*, 2011). The secular dimension of rights that are of a religious nature was mentioned in

[9] The goal of this group is to evangelize values – more precisely, they promote a strong set of religious ideas about the best way to live one's life, and urge governments to adopt these values into law and public policy.
[10] This group, according to N. Feldman, see religion as a matter of personal belief and choice largely irrelevant to government. This group believe that government should be secular and laws should make it so.

another case where, discussing Article 9, the Court made a distinction between two protected sets of rights: personal moral beliefs and religious beliefs (*Blumberg v. Germany*, 2008). To conclude, Article 9 of the Convention consists of religious and secular dimensions which, respectively, guarantee the right to religious freedom and the right to freedom of conscience.

The Charter of Fundamental Rights of the European Union consists of a number of fundamental human rights, among which the right to freedom of conscience is enshrined in Article 10 (Charter of Fundamental Rights of the European Union, 2000). The right to freedom of thought, conscience, and religion is also mentioned in this article. This includes the right to publicly profess a religious as well as secular belief, and the right to change religion and personal moral philosophy. To more closely read the textual expression of the right to freedom of conscience in European law, there is a need to look at the national regulation of European states. A number of the constitutional provisions of European countries are selected for case study here in order to reveal a varying legal vocabulary that expresses the right to freedom of conscience.

Poland's Constitution states that Poland plays an impartial role in matters of personal conviction – whether religious or philosophical – or in relation to outlooks on life (Constitution of Poland, 1997). The Constitution of the Kingdom of Greece, on the one hand, speaks of the right to freely develop a personality (Article 5), whilst on the other hand affirming that freedom of religious conscience is inviolable (Article 13). According to Article 16, the aim of national education is the development of the religious conscience of youth (Constitution of the Kingdom of Greece, 2008). The Constitution of Ukraine states (Article 35) that everyone has the right to freedom of personal philosophy and religion (Constitution of Ukraine, 1991). According to the Basic Law of Germany (Article 4), freedom of faith and of conscience and freedom to profess a religious and philosophical creed is inviolable (The Basic Law of Germany, 1949). The Constitution of Croatia (Article 40) provides a similar stipulation by stating that freedom of conscience and religion and freedom to manifest religion and other convictions shall be guaranteed (The Constitution of Croatia, 1991). In the Constitution of the Netherlands, one cannot find the word "conscience", but in Article 6 the right to profess religion or belief is stated (The Constitution of Netherlands, 2018). The Constitution of Spain (Article 16) states that freedom of thought, religion, and worship is guaranteed (The Constitution of Spain, 1992). Finally, Finland's Constitutional act states that everyone in Finland has the right to freedom of religion and conscience. According to Article 11, the freedom of religion and conscience entails the right to express one's convictions (The Constitution of Finland, 2000).

It might be said that all around Europe freedom of religion and conscience is somehow expressed in constitutional texts. Sometimes, instead of using the word "conscience", constitutional texts speak of personal belief, personal philosophy, or convictions. This means that the religious and secular dimensions of personal views and beliefs are grounded at the constitutional level. In truth, the case of Greece shows that it's possible neither freedom of religion and freedom of conscience to exist without separate expressions in the text. Instead, the term religious conscience is used with the aim of reflecting the historical traditions of the state. It is evident that European states have much in common, whilst simultaneously being very different in terms of their traditions, historical development, and sense of public morality – the concept of freedom of conscience illustrates this perfectly. It is also true that these constitutional texts are usually expressed in a very general manner. This is why it is necessary to pay attention to the textual interpretations provided by the courts. In the following section of this chapter, two landmark judgments in one case of the ECtHR are analyzed in order to ascertain what the concept of the right to freedom of conscience consists of in Western jurisprudence.

1.3. Lautsi v. Italy, or personal conscience v. the traditions of the state

The Strasbourg court, having the task of safeguarding a set of fundamental human rights written in the European Convention on Human Rights, leaves a margin of appreciation to the national states. Therefore, national authorities have the right to decide – according to the state's historical traditions, local customs, and the prevailing morality among people – on a number of varying issues involving, for instance, freedom of thought, conscience, and religion. According to the ECtHR, this margin will be narrower where the right at stake is crucial to the individual's

effective enjoyment of "intimate" key rights (*Fernandez Martinez v. Spain*, 2014). These key or "intimate" rights, the ECtHR affirmed, relate to the individual's existence or identity. Besides this, the ECtHR stressed that, from the point of view of the right to establish and develop relationships with the outside world, the notion of personal autonomy is an important principle underlying the interpretation of the legal guarantees laid down in the Convention (*Pretty v. the United Kingdom*, 2002). Overall, this margin of appreciation, the concept of "intimate" or key rights, and the notion of personal autonomy are meaningful subjects for further discussion on the concept of the right to freedom of conscience in the interpretation of the Strasbourg court. The right to freedom of conscience is derived from autonomy of conscience, which is inseparable from personal autonomy (Feldman, 2006).

The ECtHR issued a landmark judgment – or, more precisely, two judgements – in the case *Lautsi v. Italy*. One judgement was delivered by the Chamber of Second Section in 2009, and the other by the Grand Chamber in 2011. It is important to note that both judgments were totally different in their conclusions. Generally speaking, this case touched upon the question of how free a person in Italy is in their personal convictions or conscience to raise their children in a religiously neutral and impartial state school. Two main issues were significant here: first, the case related to the freedom of parents to bring up their children in conformity with their own convictions – whether secular or religious; and second, the symbol of crucifix – being both religious and national, as argued by Italy – has close links to Italian history and the traditions of Western civilization itself, which is indelibly linked to Christianity (*Lautsi v. Italy*, 2009). In the first judgment, delivered by the Chamber of Second Section, the ECtHR unanimously affirmed that the compulsory display of a symbol of a particular faith restricts the right of parents to educate their children in conformity with their personal convictions and the right of schoolchildren to believe or not to believe (*Lautsi v. Italy*, 2009). In conclusion, the Strasbourg court concluded that the Convention and Article 9 had been violated.

In contrast, the Grand Chamber reversed the decision on this case and issued an entirely different judgment. Speaking of the traditions of the state, the Court affirmed that reference to tradition cannot relieve the state of its obligation to respect the fundamental rights and freedoms enshrined in the Convention (*Lautsi v. Italy*, 2011). The Court concluded that the matter of crucifixes and the place of religion fall within the margin of appreciation of the respondent states, as a consensus on these questions is not achieved in European countries. At the same time, as noted by the Court, this margin of appreciation goes hand in hand with European supervision (*Leyla Sahin v. Turkey*, 2005). In conclusion, the Grand Chamber did not agree with the previous judgment and found no violation of Article 9 of the Convention. In the final arguments, the Court noted that in deciding to keep crucifixes in the classrooms of the State school attended by the first applicant's children, Italian authorities acted within the limits of the margin of appreciation left to the state in the context of its obligation to respect, in the exercise of the functions it assumes in relation to education and teaching, the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions (*Lautsi v. Italy*, 2011).

In fact, cases that involve the sensitive questions of the day have the potential to answer popular questions on topics such as public education, family matters, and other controversial issues. Judgments in such cases draw a line between two major paradigms in Western (legal) thought – namely, the liberal and the communitarian. The former defends personal human rights issues and gives priority to the autonomy of a person in their relationship with community and state interests. The latter defends the interests and values of the community, and gives priority to the traditions, customs, and common ways of life which have the strength to unite the people of a state, region, and even civilization. The question of a predominant paradigm also applies to the court room and judges delivering such landmark judgments as in the case of *Lautsi vs Italy*.

2. The right to freedom of conscience: religious and legal perspectives in Islam

This part of the paper studies the right to freedom of conscience in Islam from several points of view. First, the origins of the concept of freedom and of the right to freedom of conscience are analyzed according to the letter and spirit of the Qur'an and the Sunnah of the Prophet. Then, legal traditions and practices regarding freedom of

conscience are taken into consideration. Lastly, the paper examines constitutional norms on the question of the right to freedom of conscience, where the constitutions of Jordan and Qatar are considered as examples.

2.1. Freedom of conscience in the Quran and Sunna

There are a good number of Quranic verses that discuss freedom of conscience. These verses might be explored by taking into account various Chapters of the Quran, as it is important to take into consideration the contexts of the verses and the topics of the chapters in which they are mentioned when studying them. It is also necessary to emphasize the significance of various verses, either direct or indirect. Thus, in this section, the most important of these Quranic verses are presented in order to ascertain the very meaning of freedom and freedom of conscience. As for the Sunnah, there is also clear evidence on this subject that will be discussed here.

Before presenting texts from the Qur'an and Sunnah, it must be noted that the focus of this paper is limited, and is not open to a more general discussion on the criticisms that have been directed towards Islam regarding freedom in general, and freedom of conscience in particular. There are other studies that can be referred to in this regard.

In this paper, the clear textual provisions of the Qur'an and the Sunnah are explored. All of these texts have authority over the behavior of Muslims, and play the role of a source of legal rulings that must be obeyed. As for behavior that contradicts the concepts of these texts, this represents individual behavior or individual reasoning that scholars refer to as a "slip" or an "error", and the principle in Islam is to avoid following people who behave in this way. It is commonly believed in Islam that such persons must be advised and guided towards the right path.

Here it is necessary to consider some facets of understanding these texts, whether from the Qur'an or the Sunnah, where they solve the problem of what appears to be a contradiction. These contradictions cause misunderstanding in general, whether in the Islamic text or elsewhere. First, every text of the Qur'an is general in its rulings. Often it is not possible to understand the ruling of a Quranic verse or a ruling written in the Sunna as they might both be very general. These situations create a contradiction if one seeks to answer a specific question. Here, it is necessary to remember that the text is sometimes restricted to application in special conditions, and in any given situation this clue should be identified through the process of interpretation of the primary sources of Islam. Second, in order to assess any religion, it is necessary to refer to comprehensive general texts and not to specific restrictions.

From here, a simple comment on these Qur'anic texts is sufficient as their implications are clear. As for the Sunnah, discussions relate to the topic of apostasy, the outward appearance of which indicates a violation of the concept of freedom of conscience. Therefore, a simple explanation is required that removes the problem and clarifies the issue.

2.1.1. The Qur'anic texts[11]:

- "There is no compulsion in religion. Verily, the Right Path has become distinct from the wrong path. Whoever disbelieves in transgress *(Tāghut)* and believes in Allah, then he has grasped the most trustworthy handhold that will never break. And Allah is All-Hearer, All-Knower". (The Quran, 2:257)
- "Not upon you (Muḥammad) is their guidance, but Allah guides whom He wills". (The Quran, 2:272)
- "And had your Lord willed, those on earth would have believed, all of them together. So, will you (O Muḥammad SAW) then compel mankind, until they become believers", (The Quran, 10:99).
- "Whoever chooses to follow the right path follows it but for his own good; and whoever goes astray goes but astray to his own hurt" (The Quran, 17:15).

[11] It should be noted that the Qur'anic translation followed in this paper is *Interpretation of the meanings of the Noble Quran* (2020), translated by Muhammad Taqi-ud-Dīn Al-Hilālī & Muhammad Muhsin Khān.

- "And say: The truth is from your Lord. Then whosoever wills, let him believe, and whosoever wills, let him disbelieve" (The Quran, 17:29).
- "And say, `It is the truth from your Lord; wherefore let him who will, believe, and let him, who will, disbelieve…." (The Quran, 18:29).
- "The Messenger's duty is only to convey (the message) in a clear way (i.e. to preach in a plain way)" (The Quran, 24:54).
- "Your task is only to exhort; you cannot compel them [to believe]" (The Quran, 88:21).

These texts, in their entirety, indicate the complete negation of coercion in religion and, *a fortiori*, that it is not permissible to coerce others into religion. Religion rejects the idea of coercion completely, and these verses show that the mission of the Messenger (which is also the task of his followers after him) is to convey the message, and after that, people are free to accept Islam or to remain with their other religions. Even more, Islam affirms respect for human rights and the enshrinement of the principle of freedom. Accordingly, a successful society is one whose members belong to it voluntarily, not by coercion, which leads to the stability, security, and prosperity of all.

In addition, the verses mentioned demonstrate that if faith is a form of guidance, then whoever wills should believe and whoever wills should disbelieve. If the Messengers themselves are nothing but missionaries and warning men, and if the Qur'an is universal (not only for the followers of Muḥammad), then all of this and more requires, *a priori*, complete freedom in religiosity and the banishment of all forms of coercion. In conclusion, it is important to note that the issue of religious freedom is fixed in the Qur'an through clear verses that cannot be abrogated or distorted from their meaning.

2.1.2. Evidences from the Prophet's Sunnah

As for the Sunnah of the Prophet, the excerpts discussed in this paper provide practical examples from the biography of the Prophet. At the beginning of his reign in Medina where Muslims, Jews, and polytheists lived, he did not coerce anyone into religion. Rather, the Medina document states that the rights belong to its people regardless of their religion. This means that the Prophet recognized religious freedom in the first constitution of Medina, when he recognized that Jews and Muslims constitute one nation.

This is generally the case with all people. On the other hand, as for Muslims who want to change their religion, the Prophet said: "The blood of a Muslim who professes that there is no God but Allah and I am His Messenger is sacrosanct except in three cases: in the case of a married adulterer, one who has killed a human being, and one who has abandoned his religion, while splitting himself off from the community".[12] It is worth noting that the Qur'an does not mention the punishment of an apostate – it is mentioned solely in the Sunna.

If one looks at the Sunna texts, a Muslim is not free to change their religion. According to this, anyone can object to Islam's claim to deny coercion into religion. However, it is necessary to clarify our understanding of these prophetic texts – they are not as they appear, and require more attention and comparison. Without this, the texts of the Sunna might appear to oppose to each other or, further, even to oppose the Qur'an itself.

In essence, there is a need to differentiate between someone who converts from their religion and keeps this a personal matter, without any intention to harm society, and someone who changes their religion in order to revolt against government and society by causing chaos. Perhaps what happened in the wars of the apostates is indicative of the latter, hence their branding as apostates even though they did not leave their religion completely, instead only denying some parts of their religion (*alms*) and siding against the caliph.

[12] Narrated by Al-Bukhāri, Muhammad bin Ismā'īl, No. 6878.

In addition, the reference here to "splitting himself off from the community" is interpreted to mean one who actively boycotts and challenges the community and its legitimate leadership. The various texts of the Prophet that appear to command Muslims to kill apostates from Islam must, therefore, be understood in their proper political context. Most Muslim scholars today rely on the legal reasoning of the classical jurists, without considering whether their reasoning should be considered authoritative or how changes in the political and legal conditions should shape our reception of that tradition's authoritative elements (Al-Alwani, 2006).

This explains why the Prophet used such strong words, warning those who tried to separate the community while it was united and describing it as a "horrible event".[13] In fact, this was a crime, which was committed against the whole community in order to disquiet it, and leniency in permitting it was perceived to lead to the upset of this system. Apostasy is regarded as a rupture in a Muslim's commitment to the religion they have chosen. Thus, punishment was legislated for this rupture and ensuing chaos, but not for choosing another religion (Zaydan, 1982). It is for this reason that some scholars regard this punishment as one of censure, just as some crimes that disturb the security of society call for harsh punishment that is prescribed by the state – even in secular countries.

2.2. The right to freedom of conscience in Islamic legal tradition

Muslim interpreters of the Qur'an, jurists, theologians, and historians agree on Islam's affirmation of the principle of freedom being the symbol of humanity and honor. Thus, freedom does not contradict Islamic principles and rulings, and this principle also applies to the freedom to choose religion and conscience.

From the standpoint of the religious freedom guaranteed by Islam, the second Caliph, Omar bin Al-Khaṭṭāb, said in his treaty signed with the people of Bayt al-Maqdis (Jerusalem) after its conquest: "In the name of God, the Compassionate, the Merciful. This is what Abdullah Omar, Commander of the Faithful, gave the people of Elyah (Jerusalem) the security over their lives, their churches and their crosses, neither of them is harmed nor compelled because of their religion".[14] The same was assured by 'Amr bin al-'As to the Egyptian Copts.[15] It is also important to remember that the period of Islamic rule in Andalusia (Spain) was an era of scientific and civilizational prosperity in various ways, during which the voice of religious freedom and discussions on the issues of religion and belief flourished.[16]

It is necessary here to consider some of the texts mentioned by jurists and representatives of the scholarly community in expressing the meaning of freedom in Islam. This might help to elucidate the content and meaning of the concept of freedom in Islam:

- It is logical that "the presence of reparation means the absence of choice, just as the presence of choice means the absence of reparation, as each party stops the work of the other and cancels it" (Al-Khatib, 1993).
- Ibn 'Ashur says: "Know that attacking freedom is one of the greatest injustices" (Ibn Ashur, 2001). He also says: "Among the rules of jurisprudence is the saying of the jurists: (The legislator seeks freedom)" (Ibn 'Ashur, 2001).
- "Freedom is a legitimate aim, and this is an extrapolation from the actions of Sharia, which indicated that one of its most important objectives is the abolition of slavery and the generalization of freedom, and this

[13] As reported by Muslim, 3/1479-80, No. 1852; al-Nasāʾī, 7/92-3.
[14] As acknowledged in many historical references, such as: Ibn 'Asākir, 'Alī bin al-Hasan. (2008). *The history of Damascus.* Beirut.
[15] See Ibn Kathīr, Isma'īl, *The Beginning and the End*, Beirut, 10:92.
[16] See for instance: https://www.21global.ucsb.edu/global-e/november-2017/tolerant-islam-andalusian-legacy retrieved on 10 April 2021.

confirms that the principle of legislation is the establishment of interests, and the overall purposes are not peripheral, and interests are subordinate to it".[17]

- "Religion and coercion cannot be combined; once the coercion is proven, the religion is void".[18]
- "Guidance from God, and be whoever you wish, because you do not guide the one you love". Coercion in religion is contrary to the wisdom of God Almighty.[19]
- "Variation is normal in humans, and it is God's wisdom that is not rejected".[20]
- "The Sharia warns of this that freedom is life, and slavery is death".[21]
- Omar bin Al-Khaṭṭāb said to Amr bin Al-'As regarding the Coptic man, and he was cruel to him: "When will you enslave people when their mothers give birth to them as free?"[22]

All of this might serve to illustrate that, in scholarly and juristic thought, freedom is a sacred issue in Islam, and any apparent restriction is necessary because personal freedoms sometime endanger the freedom and security of society.

2.3. The right to freedom of conscience in Jordan and Qatar: a constitutional perspective

Before presenting the constitutional provisions of both Jordan and Qatar that relate to respect for freedom of religion and conscience, one notion must be considered. Although Islam is the religion of these states, the dominant approach in Islamic countries, including in both Jordan and Qatar, is based on the principle of secularism. Religion has an effect on legislation solely regarding issues regulated by personal status laws.

Moreover, it is not an exaggeration to say that some habits and traditions in Arab countries supersede religion, especially in Jordan, where the law is transgressed by both Muslims and Christians. Specifically, the issue of murder is a clear example, whether in cases of so-called honor killing or in cases of converting to another religion. This confirms the idea that individual behavior in certain cases has nothing to do with religion.

2.3.1. Articles that relate to freedom of conscience in the Jordanian Constitution

There is more than one article of the Jordanian Constitution that speaks directly or indirectly of the right to freedom of conscience. Article 6 enshrines the principle of equality before the law (The Constitution of the Hashemite Kingdom of Jordan, 2014), in addition to stating that discrimination on the grounds of race, language, and religion is unlawful. Another provision of the Jordanian Constitution (Article 7) guarantees the personal freedom of all Jordanian people, adding that every infringement on rights and public freedoms or the inviolability of the private life of Jordanians is a crime punishable by law. Article 14 also warrants mention here, according to which the state is entitled to safeguard the free exercise of all forms of worship and religious rites in accordance with the customs observed in the Kingdom of Jordan, unless these are inconsistent with public order or morality. Article 15 of the Constitution of Jordan also guarantees freedom of opinion by affirming that every Jordanian is free to express their opinion in speech, in writing, or by means of photographic representation or other forms of expression, again provided that this does not violate the law. To conclude, these constitutional provisions clearly demonstrate that human rights and freedom are respected in the matters of religion and conscience. The law of Jordan protects the right to freedom of religion and conscience and punishes those that violate it. It is important to note, in the context

[17] See Al-Shāhibī, Abu Ishāq, Approvals in the Principles of Sharīa, 350/2.
[18] See Quhb, 1971, 1/315.
[19] For more detail, see: Al-Sa'idī, 'Abd al-Muta'āl, *Religious freedom in Islam*. Cairo: Arab Thought House.
[20] This is according to some Qur'anic verses such as: "And if your Lord had so willed, He could surely have made mankind one nation or community (following one religion only i.e. Islam), but they will not cease to disagree except him on whom your Lord has bestowed His Mercy, and for that did He create them" (11:118-119).
[21] Ibn 'Ashūr, Al-Tahir, Al-Tahrīr wa Al-Tanwīr, 5/159.
[22] See al-Muttaqī al-Hendī, Alī bin Husām al-Dīn (1990).

of the topic of this paper, that the abovementioned constitutional provisions were derived from the Islamic religion before they were taken from any other source.

In Jordan, there are two main religions. Islam is the religion of the majority, and Christianity is the religion of a minority (less than 5%). The Christian minority enjoys wide influence in government and trade activities, and a full social life. Christian sects and churches are protected – first by ordinary citizens and then by the state with the prestige of law – and relations between Muslims and Christians are solid and without disturbance. It might be said that in Jordan there is a real coexistence between Jordanians of different faiths, religions, and beliefs. It must also be noted that some members of the Christian minority in Jordan are accused of intolerance among themselves, especially with regard to those who change their religion and convert to Islam. Cases of assault have been known to escalate to murder,[23] and as a result some adherents conceal their Islamic faith for fear of invoking the oppression of their families. Undoubtedly, this is an act that follows tribal intolerance and the arbitration of customs and traditions over respecting the religions themselves.

2.3.2. Freedom of conscience in the Qatari Constitution

As in the case of the Jordanian constitution, the Constitution of Qatar consists of more than one article regarding the right to freedom of religion and conscience (The Constitution of Qatar, 2004). For instance, Article 34 of the Constitution states that the Citizens of Qatar are equal in public rights and duties. Another constitutional provision (Article 35) affirms that all persons are equal before the law, and that discrimination on the grounds of sex, race, language, or religion is unlawful. Constitutional Article 50 guarantees to all persons the freedom to practice religious rites in accordance with the law and the requirements of maintaining public order and morality. It is important here to note that the Qatari constitution stipulates this religion, although an absolute majority of Qataris are Muslims. With respect to non-Qatari residents, Qatar – much like the rest of the Gulf countries – is a country with many working nationalities, and in terms of Christianity, Buddhism, Hinduism, and others, religious freedom is guaranteed. There is also a religious building complex for all non-Muslim sects, in which they perform the rituals of their religions with freedom, respect, and safety.

Conclusions

1. Conscience in the West emanates from its roots in religious tradition. When religion played a major role in society, conscience took its strength from Scriptures. Later, although the concept of freedom of conscience underwent a huge transformation in the West during the period of the Reformation, it was still regarded as a religious conscience. In the modern period, conscience came to be treated as a more universal part of human nature than religion in the secular West.

2. In the long run the, courts became a major battleground in determining issues of conscience-based and religion-based belief systems, and even in redrawing the boundaries of freedom of conscience in the West. The borders of these boundaries depend on the predominant school of thought in a society and its representative government, which is capable of instilling or barring religion-based values from law and public policy.

3. The main international legal documents – the European Convention of Human Rights, the UN Declaration of Human Rights, and The Charter of Fundamental Rights of the European Union – are the primary safeguards of the right to freedom of conscience. In these documents, this right is enshrined alongside freedom of religion and freedom of thought. Although, in the majority of cases, national legal regulation in the West affirms the right to freedom of conscience (philosophical convictions), there are some case (for instance, Greece) where a constitution guarantees freedom of religious conscience. Very often, differences in legal terminology across Western countries reflect historical traditions, public morality, and the status of the church in these countries.

[23] For example refer to: https://www.al-monitor.com/originals/2014/05/honor-killings-jordan-surge.html

4. In Islam, there are clear Qur'anic textual provisions that affirm the principle of freedom in general and freedom of conscience in particular. There are texts from the Sunnah that support the Qur'an in general, although whilst the rule of apostates is mentioned in the Sunnah, the Qur'an says nothing on this subject. It might seem that the rules of the Sunnah contradict the entire concept of freedom in general and freedom of conscience in particular in Islam. In order to understand the Qur'anic and Prophetic texts, it is necessary to relate them to their time and context. They cannot be generalized, and this rule is especially important in understanding the concept of freedom of conscience in Islam.

5. The provisions of Sharia law and the writings of scholars affirm the Islamic principle of freedom, which is consistent with the humanity and honor of man. The texts and principles of Islam are not based on the behavior of individuals; they need to be read using a systematic method which necessitates the interpretation of Islamic sources in their relevant times and contexts.

6. The Jordanian constitution and the Qatari constitution protect the right to freedom of conscience. There are explicit provisions for guaranteeing human freedom, including freedom of conscience.

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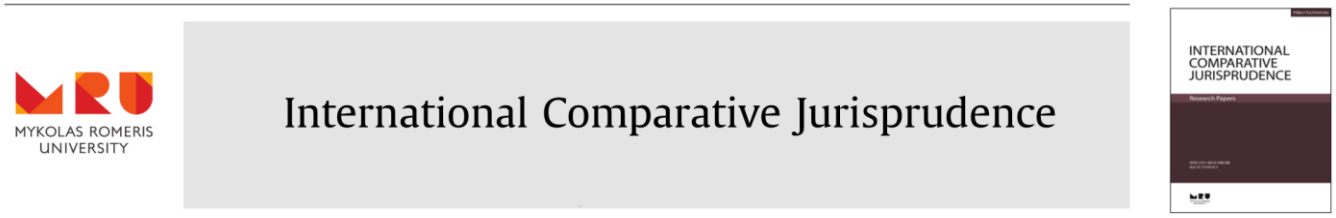

SHOULD THE EUROPEAN COURT OF JUSTICE DEVELOP A POLITICAL QUESTION DOCTRINE?[1]

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Abstract. This paper comparatively investigates the role of the so-called political question doctrine in contemporary adjudication. Equally hailed and criticized, the doctrine is an indirect discussion on the perennial question of the border between law and politics. Thus, this contribution firstly seeks to illustrate the idiosyncratic context in which the political question doctrine operates and to ascertain the instability of its meaning, as well as its evolving content over time. Second, this paper examines the scholarly debates that surround the existence of a political question doctrine in the practice of the European Court of Justice (ECJ), as well as the (in)desirability of an express articulation of the doctrine by the ECJ. This study is therefore imagined as an implicit comparison: the theoretical insights drawn from several common law jurisdictions inform the approach to EU law, while, in turn, the EU example is employed as a background against which to consider and revisit some of the doctrine's limits and possibly even perils. Without attempting to provide a taxonomy of cases in which "political question" types of arguments may arise before the ECJ, this paper identifies – mostly through doctrinal study – examples of alternative strategies or concepts so far employed by the Court in order to deal with issues generally defined as "political". Finally, this contribution weighs some of the advantages and disadvantages that the adoption of the doctrine would bring in practice, both in light of the Court's position within the institutional system, and of the specific features of the EU's legal construction as a whole.

Keywords: political question doctrine, law and politics, standards of review, US case-law, EU law, US Supreme Court, CJEU

Introduction

Courts resolve cases. Sometimes, however, they do more than just that – such as when they delve into theorizing about their very role. When this happens, judicial review becomes the locus of a meta-discourse. The courts' dicta are no less theory than the theory of a constitutional law treatise. At the same time, they are no less law than the law of the Constitution itself.

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Together with the matter of unconstitutional amendments to the Constitution, the political question doctrine comes perhaps closer than any other issue to confronting judges with the need to overtly expose their views regarding the distribution of power in the very process of adjudication. Conceived as a legal tool that serves to prevent judges from "entering political waters", the doctrine forces them (or rather judges force themselves) to reflect on the endless topic of the interface between law and politics (Cohn, 2011, p. 681). Should judges review the composition and training of the military (*Gilligan v. Morgan*, 1973), control the budgetary decisions of health authorities (*R. v. Cambridge*, 1995), determine police impeachment procedures (*Nixon v. United States*, 1993), discuss foreign policy matters (*United States v. Curtiss-Wright Export Corp.*, 1936; *Youngstown Sheet & Tube Co. v. Sawyer*, 1952), or decide whether a date can be declared a public holiday by the government (*Patriotic Party v. Attorney-General* (31 December Case), 1994)? These are just some of the myriad of questions that can and have raised puzzling issues concerning the reach of the judiciary's power. When it comes to the idea that judges engage in (judicial) politics, their reactions – as expressed in judicial opinions – vary from strong rejection to mild acceptance, with no judge openly admitting that they retain enough freedom to act politically within the constraints imposed by the law.

It is, of course, no surprise to anyone that constitutional and other apex courts have the "authority to promulgate doctrine that is supplemental to and different from the commands of the Constitution itself (…) because, taken by themselves, the Constitution's commands are too porous and general to be instantiated in everyday life" (Seidman, 2004, p. 470). In the context of the increased judicialization of politics (Ferejohn, 2002; Guarnieri & Pederzoli, 2002; Hirschl, 2004), the fact that judges have composed a doctrine of deference towards the political branches of government might appear to be an act of appeasing modesty. On the other hand, given that the judicialization of politics is sometimes a deliberate enterprise on the part of politicians who strategically invite courts to deal with highly controversial issues, this doctrine could also be seen as a riposte by courts who refuse to "taint" their legal purity. Depending on one's views on judicial review, then, the doctrine can be interpreted either positively, negatively, or – alternatively – there might be some who perceive it as neutral.

Indeed, the political question doctrine has been both celebrated as securing and enhancing the principle of the separation of powers and denounced as "the most dangerous concept in all of constitutional law" (Seidman, 2004, pp. 442–443). When applied to constitutional adjudication, the debate is essentially one between legal and political constitutionalism (for an applied discussion of the various types of constitutionalism, see Blokker, 2017a). Should courts be the exclusive interpreters of the Constitution, or should we entrust the other branches with the possibility of having the final say over the meaning of at least some constitutional provisions? This question is far from a purely theoretical one, without any real-world consequences. An important point is made by Paul Blokker (2017b), who maintains that "an intrinsic problem of legal constitutionalism in the post-communist transformations has been its tendency to isolate constitutional questions from the wider public", an observation in line with Gabor Halmai (2019) and Wojciech Sadurski's (2005) assessments, the latter of whom "argued that legal constitutionalism might have a 'negative effect' in new democracies and might lead to the perpetuation of the problem of both weak political parties and civil society" (Blokker, 2017b). Thus, if these authors are correct, legal constitutionalism could be linked – albeit indirectly – to the current wave of populism, at least in Central and Eastern Europe. However, to what extent does the presence of a political question doctrine actually result in the increased participation of the public in societal debates regarding values? In other words, does the existence of a political question doctrine in a court's vocabulary bring about less legal constitutionalism and more political constitutionalism?

In this paper, we argue that the contrary might, in fact, be the case. Assuming that the existence of political constitutionalism alongside legal constitutionalism is a desirable outcome, the doctrine under scrutiny merely creates the illusion of a superior distribution of powers. Our argument is organized into two main parts. The first part – the more theoretical of the two – draws mainly (but not exclusively) on US case-law and legal scholarship to show that the political question doctrine cannot be stabilized. Rather, its content changes from one jurisdiction to another, from one period to another, and from one interpreter/judge to another. As a consequence, no matter what judges pretend to do when using it, the doctrine itself remains a question of form rather than substance,

offering no principled basis for judicial decision-making. As such, it only adds to the already vast arsenal of formal self-abnegation. Alternatively, the focus on form is tributary to a "command model" of adjudication, which has been shown to have important limits and possibly deleterious effects on political and civic constitutionalism (2). In the second part of the paper – which is specifically dedicated to the political question doctrine at the ECJ – we aim to highlight that, besides its theoretical shortcomings, this doctrine might also be inadequate when applied to a particular institutional setting (3). Thus, the current study is imagined as an implicit comparison: the theoretical insights drawn from several common law jurisdictions will inform our approach to EU law – a legal order which, until now, has been much more reluctant to work with a so-called political question doctrine. In turn, the EU example will serve as a valuable background against which to consider and revisit some of the doctrine's limits and possibly even perils.

1. The Political Question Doctrine: Comparative Lessons

The notion of "generic law" features prominently among the theoretical notions developed by comparative constitutional lawyers in recent decades (see, for instance, Law, 2005). In short, it stands for the idea that judges around the world use similar tools of reasoning, whether or not this leads them to the same solutions – to such an extent that it might even be difficult to ascribe a specific language to a specific jurisdiction. If one were to choose what to include in a list of generic tools, proportionality would undoubtedly be the first candidate. The political question doctrine might well be the second. Having originated in the US, the doctrine gained traction in many other jurisdictions (see, for instance, Mhango, 2014) and has been said to "retai[n] a place of honour in other common-law systems" (Cohn, 2011, p. 679). *Marbury v. Madison* instituted judicial review, but at the same time "contain[ed] the seeds for the view that the authority to answer some constitutional questions rests entirely with the political branches" (Barkow, 2002, p. 239). Since then, the doctrine has been used with a certain constancy. However, with almost every iteration the doctrine has acquired new meanings, so much so that it has become difficult to talk about "the" political question doctrine. Indeed, while the name (the main signifier) might stay the same, what we put into the content of that which is signified varies in space (2.1), in time (2.2), and from individual to individual (2.3). Each of these sections will allow us to demonstrate that the political question doctrine has its own politics, and to anticipate some of the key aspects to be discussed later on in relation to the European legal order.

1.1. Culture Matters: From Israel to the US, Passing Through the UK

The idea that place matters is the first lesson to be learnt from a comparative study dedicated to the use of the political question doctrine in three common-law jurisdictions. Having investigated the functionality of the doctrine in Israel, the US, and the UK, Margit Cohn (2011) concluded that the way in which the doctrine is deployed depends on the country's constitutional ethos.

Thus, UK does not seem to have any "fixed formula" on which judges could rely should they wish to abstain from deciding a case deemed to be of a political nature, as:

> [The] British justiciability formula is linked to subject matter, a technical test that carries non substantive justification. (…) Additional explanatory and objective criteria have been proffered in the case-law, but in a haphazard fashion. To date, no court has been ready to advance a formula that would encompass these criteria (Cohn, 2011, p. 709).

The idiographic spirit of the common law, which understands justice as obtained through the flexibility of *ad hoc* adjudication, provides us with only a limited explanation for why the UK lacks a proper political question doctrine. After all, the US – another common law country – seemed ready to develop such a doctrine, and moreover did so

under the guise of a very specific test.[4] Therefore, a better explanation as to why the UK never embraced a fully-fledged political question doctrine lies, Cohn (2011) argues, in the transition that British public law has undergone from a "body of law based on history, tradition, the rule of law, and the sovereignty of Parliament" to a "body of law based on constitutionalism and liberalism" (p. 711), in relation to which courts are no longer as circumspect as they used to be. The recent decisions of the United Kingdom Supreme Court related to Brexit – informally known as *Miller I* and *Miller II* (*Miller; Cherry* (*R. (on the application of Miller) v. Prime Minister*, 2019) – might be regarded as confirmation of this transformation, although as this question continues to be hotly debated (see Craig, 2020a, 2020b; Loughlin, 2020) it could yet be too soon to pronounce a verdict. However, this shift in British constitutional law has not necessarily brought it closer to its American counterpart. Indeed, reading Jackson Myers (2020) – an author who compared the UK Supreme Court decision in the case of *Miller II* to the US Supreme Court judgement in *Rucho v. Common Cause* (2019) – one can see that, even though the two courts might operate under similar terms, they can still take different approaches and finally diverge regarding the solution in two particular cases:

> The U.K. Supreme Court's confident approach to a thorny question of justiciability in Miller/Cherry presents a striking contrast to the U.S. Supreme Court's. (…) [W]hereas the UKSC largely sidelined the manageability inquiry and instead focused on the dictates of the constitution, the *Rucho* Court was consumed by the question of whether an adequately clear and definite rule of decision could be found (Myers, 2020, p. 1026).

For its part, Israel's judiciary has not always cited the corresponding US doctrine with approval, and "never adopted its formula" (Cohn, 2011, p. 690). Justice Barak even went as far as to say that "this [the U.S.] doctrine is most problematic (...) its legal foundations are shaky (...) it is based to a great extent on irrational grounds; [and] it must be approached with caution" (*Ressler v. Minister of Defense*, 1988). In rejecting the notorious six-criteria test concocted by the US Supreme Court in *Baker v. Carr*, Israeli judges proposed, at least up until the mid-1980s, a distinct formula responding to their own views as regards adjudication. Thus, in *Jabotinsky v. Weitzmann* (1951), which was to be the leading case on justiciability for many decades, the Israeli Supreme Court retained "the rather fuzzy notion of 'the expert feel of lawyers'" (Cohn, 2011, p. 689) as a criterion to be used in determining which cases should be barred from review. When, in the late 1980s, Justice Barak introduced a new vision for the Court's role, the case of *Ressler* provided him with the opportunity to distance himself from at least one strand of the doctrine enunciated in *Baker* (Cohn, 2011). Thus, whereas *Baker* accepted the possibility that some questions might find themselves outside the scope of judicial decision-making since judges would lack the appropriate legal standards for their resolution, *Ressler v. Minister of Defense* – through the voice of Justice Barak – took a radically different view by contending that "every action can be 'contained' within a legal norm, and there is no action regarding which there is no legal norm" (*Ressler v. Minister of Defense*, 1988).

The comparative investigation of these three common-law jurisdictions is sufficient for highlighting the doctrine's diversity. The standards used to decide whether some issues are better left to the assessment of other branches are not culture-independent. Even where other courts resorted to citing the highly influential American case-law, they were not committed to following the exact steps of the American doctrine. Consequently, if the ECJ were to develop its own political question doctrine, we should expect that it would be designed in light of the EU's specific

[4] *Baker v. Carr* (1962). The test reads thus: "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

institutional design, with comparative references serving as a useful background against which judges can engage in what Gary Jacobsohn (2010) calls a "dialogical articulation" of the law (p. 103). We can maintain in confidence that today's European judges belong "to a generation for whom the law is not a matter of national systems each with their own specific concepts, relations, and symmetries (or asymmetries) (…) [but] a mélange of ideas, of schemes of intelligibility, of structures, of sub-systems and the like" (Samuel, 2015, p. 64). Thus, comparative law offers an imaginary third space to where judges can travel mentally in order to deconstruct their legal knowledge by way of confrontation with another legal order. When courts are ready to renounce the paradigm of authority, one that relies excessively on the perceived sanctity of legal sources, they will pave the way for cultivating dialogical predispositions within the broader legal community too, which, one can speculate, will potentially spill over into society at large.

1.2. Time Matters: From Marbury to Rucho, Passing Through Baker

The section will show that even within one jurisdiction the political question doctrine changes in meaning from one period to another. Scrutiny of the relevant American legal scholarship and case-law reveals different understandings of the doctrine across time. As Tania Leigh Grove (2015) demonstrates, the 19th century and the first half of the 20th century saw the application of what she calls the "traditional" political question doctrine, by virtue of which the courts considered themselves bound to take for granted the factual determinations of the other branches of government. In other words, "courts did not dismiss as nonjusticiable an issue that presented a political question but rather *enforced and applied* the political branches' conclusion" (Grove, 2015, p. 1911, original emphasis). For instance, in the case of *United States v. Holliday* (1866), the defendant was charged with violating a law prohibiting the sale of alcohol to "any Indian (…) under the charge of any Indian agent appointed by the United States". Holliday sold liquor to a man who allegedly belonged to the Chippewa tribe. The resolution of this case depended on whether the Chippewa were actually a tribe. The Supreme Court found it necessary to defer to the assessment of the political branches in this specific factual regard, but moved on to determine the other legal aspects of the case – ultimately confirming Holliday's conviction. Other cases can be cited which followed the same rationale: federal and state courts alike would not give up on their jurisdiction, but retained Congress' evaluation of the facts as binding.

With *Baker*, decided in 1962, we witnessed a shift of paradigm. Grove (2015) argues that the Supreme Court created a new political question doctrine that, contrary to the traditional one, demanded a dismissal for non-justiciability. As Grove notes, under the influence of the legal process movement, which advocated for a judiciary confined by procedure, already from "the 1930s through the 1950s, in both casebooks and articles, legal scholars increasingly ignored the traditional doctrine" (Grove, 2015, p. 1912). For instance, they started to emphasize the importance of *Pacific States Telegraph and Telephone Co. v. Oregon* – a case that was dismissed as early as 1912 as non-justiciable. However, it is arguable whether, at that point, the Supreme Court truly intended to have non-justiciability extended beyond sets of facts that would imply the application of the Guarantee Clause (under which the "United States shall guarantee to every state […] a republican form of government"; Grove, 2015, pp. 1942–1943). In any case, after *Baker* it might seem that the Court became prepared to step out more frequently as it enlarged the number of criteria which would allow it to refrain from adjudicating – indeed, the Court now referred to no less than six. However, on closer scrutiny, the modern political question doctrine entrenched, rather than undermined, judicial supremacy – as long as the Court used a seemingly constraining language only to "decide who decides any constitutional question" (Grove, 2015, p. 1914). The empirical data supports Grove's interpretation: "in the fifty-three years since Baker v. Carr, the Supreme Court has on only two occasions exercised its 'power to decide' to hold that another branch had final authority over a constitutional question" (Grove, 2015, p. 1966).

A chronological evaluation of relevant Israeli case-law would also point to fluctuating patterns in the understanding of the political question doctrine. Thus, Justice Barak was keen to introduce "a distinct constitutionalist vision of public law" (Cohn, 2011, p. 692), according to which judges must bridge the gap

between law and society and must defend democracy. Or "[t]his avowedly activist platform led, inter alia, to [his] call for lesser reliance on justiciability as a bar from review" (Cohn, 2011, p. 692).

Given this evolutionary context, what are the lessons to be drawn for the European legal order? First, the diversity of concepts, even within one jurisdiction, suggests that one cannot achieve any fixity of meaning. It is well-known that under the pen of judges who pertain to different epochs, each with its own concerns (ultimately the America of the Vietnam war is not the America of *Bush v. Gore*), doctrines do change in form as in substance. Yet, one might have asked for more stability from the political question doctrine given that it entails the perennial question of the boundaries between law and politics. Even supposing that the ECJ was willing in the future to develop a non-justiciability doctrine, we already know that it could never be anything other than a provisional framework. As the EU moves from an international legal order to a federation (and possibly back and forth between), the questions regarding the limits between law and politics will necessarily be different. There is no reason to believe that a judicial doctrine discussing these issues would not closely accompany (in the sense of reacting to) the various transitions. Tradition might weigh in, of course, but in the longue durée it always ends up conceding to transition(s).

Second, the examples in this section show that there is no automatic relationship between a doctrine's form and its consequences. Thus, what appeared both in the US and in Israel as less constraining language turned out to be a mechanism of restraint for judges, and vice-versa – i.e., some of the detailed tests deployed by judges did little to prevent them from having the final word on all of the questions brought before the courts. If anything, this highlights the importance of the will of interpreters that underlies the strategic tools conventionally employed in the judicial realm. Thus, rather than distancing themselves from the question under scrutiny, judges create the appearance of distancing. This brings us to point 1.3, the final section of the first part of this paper, where we argue that variation remains the rule as regards the interpretation of the political question doctrine, even if we look at one given jurisdiction throughout one given period.

1.3. The Interpreter Matters: From Roberts to Sotomayor, Passing Through Breyer

A look at the reasoning of individual judges pertaining to the same legal culture in their use of the political question doctrine will reveal that they are not speaking the same language. Indeed, these variations in understanding teach us that "if a reader shifts his reading lenses a little – if he moves sideways a bit – he promptly tells a different [story]" (Legrand, 2019, p. 302). After all, a law text – while being about precepts – stays a text, and no interpreter can approach it in a vacuum. Rather, as comparatists of laws (who have the benefit of multiple scales of reference) have made plainly clear:

> [a]ny understanding of the significance of world (…) comes not from cognitive distancing, but from a situation within world allowing the individual to look at things as they actually appear within the nexus of world in which he himself partakes, rather than as synthesised data instantiated by way of a purportedly detached discursive articulation (Legrand, 2011, p. 398).

This is to say that Justice Frankfurter's understanding of the political question doctrine was not his colleagues', not least because a rule – and even less so a doctrine – is not identical to its application. Even naively assuming that in theory all judges of a court understand a specific doctrine in the exact same manner, we are still left with the possibility of divergence when the rule is brought to bear on a specific set of facts. Let us take the example of *Coleman v. Miller*, a case decided in 1939 by the US Supreme Court which involved the validity of a constitutional amendment concerning child labour (the case was brought by a group of Kansas legislators who claimed that the amendment had not been properly ratified by their state). Two Justices proposed to decide the case on its merits, while the other seven Justices agreed that the case should not be heard. Yet even within the majority the decision was "fractured" in terms of its justification, and therefore "provided little insight into how a 'political question doctrine' might apply, if at all, to constitutional questions" (Grove, 2015, p. 1945).

In his analysis of the political question doctrine, Zachary Baron Shemtob (2016) provides us with another useful example which underlines the instability of the doctrine's meaning. He discusses a US Supreme Court decision from 2012 and the impact it had on subsequent cases by remarking that:

> [s]ince Zivotofsky was decided, two circuit and eight district courts have wrestled with the political question doctrine, with eight of these cases occurring in the realm of foreign affairs. So far, the majority of these courts have declined to adopt Zivotofsky's textualist view. The circuit courts have taken varied approaches (pp. 1023–1024).

The author goes on to note that "[i]f Zivotofsky has had an unclear impact in the circuit courts, its effect on the district courts has been even more uncertain. (…) Even those two courts that have acknowledged Zivotofsky's potential impact have adopted different standpoints" (Shemtob, 2016, p. 1024). The doctrine of precedent notwithstanding, one can see that courts do not replicate each other's decisions. Rather, in the realm of words as in law, there is always repetition with a difference – something which French philosopher Jacques Derrida captured well when he coined the word iterability (Derrida, 1972, p. 375). Drawing on the Sanskrit word *itara*, meaning *other*, Derrida invented this notion to demonstrate that alterity will reveal itself in any repetitive process. Repetition does not equal exact replication; thus, a doctrine repeats itself (by definition, otherwise it would not have achieved doctrinal status) both vertically (in time) and horizontally (from one judge to another thinking in the same space-time). But transformation always takes place alongside each repetitive occurrence, even if only very slightly.

It is not only judges' treatment of the doctrine that points to its inherent instability; scholarly engagement with the doctrine attests to the same idea. As has been observed, "[f]ew legal concepts have generated as much controversy as the political question doctrine. (…) [T]his is primarily due to the diverse ways in which this doctrine has been formulated" (Shemtob, 2016, p. 1004). An overview of the relevant scholarly research reveals a wide range of positions vis-à-vis the existence, content, and desirability of this doctrine. One can encounter opinions as diverse as those that suggest: the doctrine does not exist (Henkin, 1976); the doctrine is well and flourishing (Cohn, 2011); the doctrine used to exist but then ceased to (Barkow, 2002; Tushnet, 2002); the doctrine continues to exist but should disappear (Redish, 1984); the doctrine has two main versions (Grove 2015); the doctrine comprises four different conceptions (Shemtob, 2016); or the doctrine applies in three configurations (Harrison, 2017). The following illustration is telling. In an influential paper written in 1976, Louis Henkin asked whether the political question doctrine really did exist. In raising this issue, Henkin (1976) suggested that judges were not doing what they were saying. He proceeded, in fact, to reformulate their words so as to better express what he thought they intended to convey: "when [the Court used the political question doctrine], it was using it in a different sense, saying in effect (…)" (p. 601). The irony of this will not be lost on the reader. Not only is the doctrine susceptible to multiple interpretations, but among these it is even possible to count one interpretation that denies the very existence of what is being interpreted. If anything, this example shows that the spectrum of possible (and plausible) interpretations of a legal construct is extremely broad. Incidentally, it also reminds us that – as the French poet Paul Valéry put it – once it is written, a text no longer belongs to its author (Valéry, 1936, p. 68). Rather, its subsequent semantic lives shall be in the hands of readers.

The political question doctrine's deployment in space, its evolution in time, and its treatment by individual judges all converge to sustain the idea that the doctrine has a politics of its own (which, paradoxically, is not necessarily one of judicial restraint – see Choper, 2005, p. 1459; Pushaw, 2002). Its versatility relates to its entanglement in a nexus of contingencies – be they ideological, political, economic, or otherwise. Doctrines do not float in thin air. They are the products of a place, of a Zeitgeist, of men and women, necessarily situated, with their own interests and assumptions. As such, "it is (…) clear that the issue of justiciability and the criteria to determine it are not exhaustive and are developed as new disputes arise" (Lone, 2016, p. 15) in a process of ad hoc self-authentication.

On the face of it, the doctrine prevents judges from deciding, yet two important observations help nuance this presupposition. First, as has been remarked, "no a priori rejection (…) is possible without some considerations of the merits of the case" (Cohn, 2011, p. 680). Indeed, in a convincing argument, Seidman (2004) notes that courts

tend to invoke the political question doctrine only if they have already appreciated that the merits of a case would warrant no relief. Second, even in those cases where the law would textually commit the decision to a different branch, courts still have to interpret that law to make sure that this is actually the case. The question which then arises is: to which method of interpretation do they resort? Depending on one's answer, the outcome might be drastically different. One can clearly see that even the more conservative, textualist conception of the political question doctrine "reintroduces textual analysis [and therefore, we would add, discretion] through the back door" (Seidman, 2004, p. 456).

Now, knowing that the doctrine cannot keep courts out of politics (indeed, it cannot "serve as a refuge for those who believe [that judges] should not have the final word on all constitutional issues" [Grove, 2015, p. 1973]), it is worth asking whether we are better off with or without the doctrine – especially were the question to be asked in advance by jurisdictions which, like the ECJ, have yet to compose a definitive version of it. As long as its advantages are not allowed to reside in isolation from its merits, the doctrine's benefit might exist in the message it transmits to a public who remain unaware of the intricacies of adjudication and who, moreover, are generally accustomed to understanding the activities of judges as neutral enterprises meant to tell us "what the law is". Thus, "it is perhaps true that the Court can better hide its politics when it refuses to decide than when it decides" (Seidman, 2004, p. 463). However, formalizing language is a process not without controversy (see Perju, 2009; Mercescu, 2021), and judges should seriously consider whether they want to add another tool of "cloaking the exercise of judicial power in the language of self-abnegation" (Seidman, 2004, p. 448) to an already long list which includes, among others things, proportionality (Kennedy, 2012) and the so-called "methods" of interpretation.[5]

This section suggests that there is no reason to believe that if the ECJ were to develop a political question doctrine it would speak with one voice. Even in the context of its decisions per curiam which admit no dissent, one can still imagine multiplicity springing from the dualistic nature of the Court's decision-making activities (with the Advocates General playing a significant role – see Lasser, 2004) and the diversity of its judges' cultural, ideological, and professional backgrounds. Moreover, judges should ask themselves whether the specific context of their adjudication lends itself well to the application of a political question doctrine. Therefore, the next sections will explicitly consider the limits of the idea of a political question doctrine in the context of the European Union.

2. The Political Question Doctrine and the ECJ[6]

The first part of this paper sought to illustrate the framework in which the political question doctrine operates in different legal systems in order to highlight its ambiguity and instability of meaning, as well as its evolving content over time. In this part, we set out to analyse the scholarly debates that surround the existence of an implicit or explicit political question doctrine in the practice of the ECJ, as well as the (in)desirability of its express adoption of such a doctrine. Section 2.1 includes an overview of the academic literature that examines the setting in which the political question doctrine could potentially be adopted in the ECJ's jurisprudence. Section 2.2 discusses some examples of case-law in which the doctrine was proposed before the ECJ, either through arguments raised by the parties or in the opinions of Advocates General. In these sections, without attempting to provide a taxonomy of

[5] The old habit of referring to "methods of interpretation" is unlikely to disappear from the vocabulary of jurists anytime soon. However, this should not prevent us from remarking upon the contradiction in terms. Hermeneutics, as understood today, is antithetical to method. Interpretative processes cannot be reduced to a rule or method, other than through a significant dose of factitiousness. Indeed, as Simone Glanert (in press) shows, drawing on Gadamer's thought, "hermeneutics properly understood has nothing to do with method or objectivity [;] (…) [b]ecause understanding amounts to an 'event', it simply cannot be mastered through method".

[6] In this paper, we use the generic term "European Court of Justice" ("ECJ" or the "Court") to designate both the Court of Justice of the European Communities and the Court of Justice of the European Union, depending on the moment at which different judgments were passed (before or after the entry into force of the Lisbon Treaty). For ease of reference, we also use the umbrella term "European Court of Justice" to designate both the General Court (or the Court of First Instance, as the case may be) and the Court of Justice *stricto sensu*, except for in situations where we carry out a distinct analysis in regards to decisions issued at different jurisdictional stages by each court.

cases in which "political question" types of arguments may arise before the ECJ, we seek to identify – mostly through doctrinal study – examples of alternative strategies or concepts that have so far been employed by the Court in order to deal with issues generally defined as "political". Section 2.3 considers the (in)desirability of an express adoption of the political question doctrine by the ECJ. In this sense, we evaluate whether there are potential "gaps" in the current approach of the ECJ that a political question doctrine might prove capable of filling. Additionally, we weigh some of the advantages and disadvantages that the adoption of the doctrine could carry in practice, both in light of the Court's position within the institutional system, and of the specific features of the EU's legal construction as a whole.

2.1. Political Questions and the ECJ: No Doctrine or Several Doctrines?

While writing on the political question doctrine abounds in regards to the US Supreme Court and other constitutional courts, the legal community has not dedicated such ample work to the issue in regards to the ECJ. The explanation for this is simple: the ECJ has not (yet) adopted or developed its own political question doctrine; moreover, when invited to do so, it has so far steered clear of this wording and has refused to define the concept (Butler, 2018, p. 330). However, contributions exploring the topic from a comparative perspective have found fertile grounds for discussion by highlighting the tactics used by courts to handle the justiciability of politically charged questions, as these are strongly connected to matters of institutional balance, legitimacy, and, more generally, to the wider concept of the rule of law.

When approaching these themes from the angle of the political question doctrine, a first observation to be mindful of is the different context in which the ECJ operates compared to national constitutional courts. Initially designed as a primarily international jurisdiction with special features, the functions of the ECJ have shifted increasingly over time towards those of an administrative and constitutional court (Dehousse, 1998, pp. 21–27). However, even though the ECJ often performs as a constitutional jurisdiction ensuring the uniform application of the Treaties – by the Court's own characterization, the EU's "constitutional charter" – it has simultaneously maintained its international status (Odermatt, 2014, p. 717). Against this background, questions regarding interactions between adjudicators and political issues, as well as issues relating to the court's internal and external legitimacy, are infused with a whole new flavour when analysing the position of the ECJ. The Court is constrained not only by ties pertaining to the institutional structure of the European Union, but also by its place within the intricate network of national courts of the Member States, on which it relies for the uniform application of EU law. Additionally, the ECJ sometimes serves as an international jurisdiction, adjudicating on the conduct of Member States (acting either individually or jointly through the political bodies of the Union) in relation to third-party actors (non-EU states or international organisations). This complex environment increases the probability of multiple pressure points emerging between the legal and the political, forcing the Court to devise strategies in order to navigate each type of relationship. In light of this, we ask whether a unique political question doctrine, specific to the ECJ, may constitute an instrument that could benefit the Court in managing such tensions.

A second, connected observation relates to the usefulness of the political question doctrine as one of several available strategies for avoiding resistance. Both constitutional and international courts may face resistance against their judgments from a range of internal or external actors. This is especially true when, by adjudicating on certain matters, judges are perceived to have delved (too far) into the political realm. It is on this sensitive terrain that the political question doctrine is discussed as an instrument through which courts seek to avoid or mitigate resistance – a "resilience technique" (Madsen et al., 2018, p. 208). However, in the case of international and regional courts such as the ECJ, the phenomenon of resistance gains complexity, as it involves a larger number of actors – ranging from national governments, parliaments, or national courts to other international organizations and courts (see Madsen et al., 2018, pp. 215–216). Resistance may also take more diverse and dramatic forms in response to the judgments of international courts, varying "from criticizing the IC [international court] to leaving the IC altogether, […] often provoked by a particular judgment or line of judgments, in which the IC is viewed as having overstepped its boundaries, straying into the world of the 'political'" (Odermatt, 2018, p. 221). Given this wide array of potential sources of pushback, as well as the diversity of forms of resistance, courts such as the ECJ have in turn

developed avoidance and mitigation techniques that are themselves varied and may involve, among other methods: changes in legal reasoning; judicial diplomacy; adjusting the level of scrutiny (Madsen et al., 2018, p. 214); deference doctrines; the narrow framing of legal issues; or the "interpretation of rules of jurisdiction, standing and admissibility" (Odermatt, 2018, p. 222). In the panoply of strategies available to the ECJ, the political question doctrine would thus constitute merely one of many, whose usefulness we seek to ascertain in light of the paths already trodden by the Court in its previous case-law on politically sensitive questions.

A third point to be made at this stage is the notion that regardless of the strategies applied in cases involving politically sensitive questions, considerations of legitimacy permeate the debate at every step. To borrow terminology from the realm of the political question doctrine, the need to preserve judicial legitimacy (either internal or external) underpins both the principled and prudential approaches that justify the doctrine. Under a principled approach, "[e]ven where a dispute meets the criteria for admissibility and jurisdiction, an IC may exercise its discretion to not hear a dispute, since it involves a question that, due to its inherently political character, goes beyond the IC's authority" (Odermatt, 2018, p. 227). In the setting of the ECJ, a principled approach may correspond, for instance, to a situation of deference to one of the political institutions of the EU, in order to maintain institutional balance and the proper allocation of powers (internal legitimacy). Under a prudential or pragmatic approach, "ICs may seek to avoid adjudication to prevent them from being drawn into disputes that would potentially hurt their reputation and public image by delving (or appearing to delve) into the political arena". Such techniques may be used as "safety valves", with "the effect of preventing instances of resistance by states and other actors, thereby bolstering the IC's external legitimacy and compliance in the longer term" (Odermatt, 2018, p. 227). The concern with maintaining internal and external legitimacy has a significant bearing on the strategies developed by the ECJ when operating "at the border" between law and politics, and may better explain why the Court has so far refrained from developing a political question doctrine as an all-encompassing tool for managing this divide. Doctrinal contributions discussing such strategies at the ECJ help to further illustrate this point.

In his comprehensive study on judicial legitimacy in the EU, Koen Lenaerts identifies several techniques for reasoning developed by the Court in close connection with the three-stage evolution of its role at the heart of the European construction (Lenaerts, 2013, pp. 1307–1309). He posits that:

> [a]s the constitutional court of a more mature legal order, [the ECJ] now tends to be less assertive as to the substantive development of EU law. It sees its role primarily as one of upholding the "checks and balances" built into the EU constitutional legal order of States and peoples. […] This does not, however, prevent the ECJ from taking a more proactive stand in some areas of EU law, *yet overall it displays greater deference to the preferences of the EU legislator or, as the case may be, to those of the Member States*. *The ECJ thus favors both continuity of its role as a constitutional umpire and change in the substantive EU law achieved by the traditional interaction between the political and judicial processes* (p. 1309, emphasis added).

The four types of judicial strategies identified by Lenaerts for managing "hard cases" (understood here as cases touching upon various political areas) largely depend on the normative level at which the tension arises. Thus, firstly, "when the validity of secondary EU law is called into question, the ECJ strives to uphold the principle of separation of powers" and "to avoid inter-institutional conflicts which could arise if the contested act is annulled" (Lenaerts, 2013, p. 1370). In this classic scenario that could call for the application of a political question doctrine, the ECJ relies instead on the rule of "'reconciliatory interpretation', according to which secondary EU legislation must be interpreted in light of primary EU law in so far as the limit of '*contra legem*' is not overstepped" (p. 1370). Secondly, in cases that do not endanger the core values of the Union, "the ECJ favors 'value diversity'" and "will strive to interpret EU harmonizing measures in a way that accommodates the interests pursued at both national and EU level" (p. 1370). Thirdly, in relation to national apex courts – especially those of a constitutional nature – the ECJ is described as "committed to respecting the jurisdiction of national courts, in the same way as the former expects the latter to respect its own" (p. 1370). The Court is said to follow the rules of judicial comity and limit

itself to laying down "a framework of analysis" for the national courts to apply, rather than impose its own findings.[7] Lastly:

> in hard cases of constitutional importance, the legal reasoning of the ECJ follows a "stone-by-stone" approach. This means that, in order to guarantee consensus and as a token of judicial prudence, the argumentative discourse of the ECJ is limited to answering the legal questions that are necessary to solve the case at hand. […] [T]he incremental approach followed by the ECJ guarantees a solid and sound evolution of the case-law that allows room for the national courts to engage in a constructive dialogue (p. 1371).

Lenaert's findings lead toward the conclusion that while the ECJ is acutely aware of the political dimensions of the cases before it (see Mańko 2020; 2020), it decides to employ technical, interpretative instruments in order to navigate such questions, rather than to construct justiciability rules akin to a political question doctrine. Similar conclusions emerge when approaching the legitimizing strategies of the ECJ from the angle of the high/low politics distinction (with the former being the traditional domain of the political question doctrine): the Court's approach does not correspond to a coherent doctrine, but is rather modulated over time by narrower or wider interpretations of the Treaties and of their provisions regarding the division of competences between the EU and its Member States. For example, Pola Cebulak's study focusing on the EU's external relations reveals that the deployment of the administrative and constitutional paradigms for judicial review does not actually correspond to a pattern reflecting the distinction between low politics and high politics, but is in reality mostly issue-dependent (Cebulak, 2017, p. 265). Such findings further suggest that the ECJ's stance in regards to politically sensitive matters is not structured around a comprehensive set of justiciability criteria corresponding to a political question doctrine, but is instead composed of a wide range of issue-dependent techniques meant to avoid confrontations between its own "democratic credentials against those of the political branches" (Semple, 2007, p. 22).

In fact, the vast majority of legal literature approaches the topic of the political question doctrine at the ECJ in an area- and issue-specific fashion. Most studies focus on the area of the EU's external action and, in particular, on the Common Foreign and Security Policy (CFSP), given the express limits to the ECJ's power of review under Articles 24 (1) and 40 TEU and Article 275 TFEU (see Butler, 2018; Gutiérrez-Fons, 2009; Heliskoski, 2018; Lonardo, 2018). In other domains where political questions might arise, the general conclusion is that where the ECJ's role is limited this is "due to a division of competence between the EU and the Member States rather than to prudential considerations", thus the lack of support for the adoption of the doctrine (see Gutiérrez-Fons, 2009, p. 105). In the CFSP area, some scholars in search of the political question doctrine in the EU affirm that "[i]n contrast to the US, […] the doctrine is treaty-mandated, but only tenuously adopted by the judiciary" (Butler, 2018, p. 341). However, such a deduction is not only unwarranted under the limited jurisdictional carve-out in the field of CFSP, but also goes against the definition of the doctrine which is, by its very essence, a judge-designed rule operating as a self-imposed restraint on the exercise of powers of review. In fact, as observed elsewhere, the ECJ has rather tended to expand its review in CFSP matters in order to ensure a coherent, albeit incomplete, system of legal remedies (see Van Elsuwege, 2017; Lonardo, 2018). In this sense, it has been argued that while the ECJ's jurisdictional limitation in CFSP matters is "not uncommon and perhaps unavoidable with respect to sovereign foreign policy questions, the Treaty-based jurisdictional carve-out remains an anomaly in a Union based on the rule of law" (Van Elsuwege, 2017, p. 17; see also Gutiérrez-Fons, 2009, p. 119). Since the question of whether the ECJ should actually exercise review or not in certain CFSP matters exceeds the purpose of this article, we shall not be venturing into these specific arguments. We confine ourselves instead to a general analysis of the Court's approach to cases in which the political question doctrine (or arguments deriving therefrom) was either invoked by the parties or discussed by the Advocates General in their opinions. The cases examined in the following section can provide illustrative examples as to the Court's stance in this respect.

[7] In reality, it is often the case that the framework of analysis laid down by the ECJ will leave little or no room for the national court to decide on its own, thus attracting criticism against the former's expansive interpretations or activist rulings.

2.2. ECJ – the Sidestepper

If one searches the case-law database of the ECJ for the exact phrase "political question", the system returns only nine results. This figure in itself is not surprising, as the ECJ has so far refused to embrace a political question doctrine and, in any case, the notion might remain hidden under various terminologies. What is rather unexpected is that the Court also appears to refuse to engage with this specific wording even in cases where the Advocates General (AG) themselves expressly refer to it: out of the nine documents resulting from the search, only one is a Court judgment (*LTTE* [2014], including the wording "political question" in para. 156), while the rest are AG opinions.

As noted, the largest number of cases in which some form of the political question doctrine was invoked relate to CFSP matters, prompted also by the limited jurisdictional powers of the Court in this area. However, arguments that a dispute is not justiciable because "the dispute is not a legal one are usually given short shrift" (Odermatt, 2018, p. 229). In fact, the Court has frequently been criticized for its decision in *Rosneft* – where it extended the mechanism of preliminary rulings to CFSP measures (*Rosneft*, 2017, paras. 60–63) – for having overstepped its jurisdictional boundaries under the Treaties (see Lonardo, 2018, p. 552; Heliskoski, 2018, p. 19).

Non-justiciability arguments have also been raised by the Council and the Commission in *Kadi* (2008), but were rejected by AG Maduro, who reasoned that even in cases involving the political process – and especially in matters of public security – "courts ought to get involved, in order to ensure that the political necessities of today do not become the legal realities of tomorrow" (see Opinion of AG Maduro in *Kadi*, paras. 33, 34 and 45). The Court, however, chose not to approach the matter from this perspective, but instead focused on its powers to ensure the "review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law" (*Kadi v. Council and Commission*, 2008, para. 326). Similar arguments were discussed by AG Sharpston in *People's Mojahedin Organization of Iran* (Opinion of AG Sharpston, paras. 252–255), and by the Court in *LTTE* (2014, paras. 161–163). However, in these cases the Court chose to base its reasoning concerning the exercise of its powers not on conceptions about the legal nature of the dispute or about its judicial role, but rather on arguments regarding the applicable standards of review and the level of discretion which the Council enjoyed (see Odermatt, 2018; Butler, 2018).

In other situations, the Court chose to rely on strategies concerning standing and admissibility in order to avoid potential clashes with the competences of political institutions (see, for instance, the evolution of case-law on individual standing in annulment actions – discussed in Semple, 2007). The *Front Polisario* (2016) is a case in point, with AG Wathelet discussing the idea that the argument that the question brought before the Court was of a political nature (Opinion of AG Wathelet in *Front Polisario*, para. 141). The Court did not approach the issue from the perspective of its political nature, but chose instead to rule that the applicants did not have standing under EU procedural law, since the international agreement in question did not apply to the territory of Western Sahara; the question was therefore not of "direct concern" to the applicants (*Front Polisario*, 2016, paras. 125–127).

Perhaps the most eloquent syntheses so far concerning the ECJ's power of review in the context of political questions are those comprised in AG Bobek's opinions in *Puppinck* and *SatCen*, respectively. In *Puppinck*, in the context of a European Citizens' Initiative (ECI), AG Bobek examines the applicable scope and standard of review in relation to acts adopted by the Commission in the exercise of its power of initiative. Amongst other things, his analysis encapsulates the standards that relate to the preservation of the EU's institutional balance:

> the standard of judicial review limited to the verification of manifest errors of assessment attaches to situations where EU institutions enjoy wide discretion, in particular, when they adopt measures "in areas which entail choices, in particular of a political nature". Indeed, it is settled case-law of the Court that the intensity of its review varies with the discretion accorded to the institutions (Opinion of AG Bobek in *Puppinck*, para. 123).

In *SatCen*, on the other hand, AG Bobek engages in a thorough examination of the CFSP jurisdictional derogation under the Treaties, mapping the entire institutional framework and the law-politics interaction in this domain. He remarks that:

> despite the significant limitations with regard to the justiciability of CFSP measures – which led Advocate General Wahl to refer to the CFSP as lex imperfecta – the fact remains that, even for such acts, rules apply. Lex imperfecta does not mean absentia legis (Opinion of AG Bobek in *SatCen*, para. 66).

Further discussing the nature and depth of review performed by the Court in the CFSP area, the AG concludes:

> I would suggest understanding the jurisdiction of the Court of Justice of the European Union in those matters *as a scale or gradual continuum, and not as a matter of all-or-nothing extremes*, whereby the mere existence of dual content automatically renders everything open to review. At one end of the spectrum, there are decisions that, although formally based on a CFSP provision, have as to their content very little to do with the CFSP. At the other end, there are decisions that would clearly fall fully within the CFSP derogation. Then, *in the grey zone in the middle, there are the dual- or multiple-content decisions, in relation to which caution and self-restraint are advised*. If the non-CFSP content of an act is merely ancillary to its CFSP content, the latter may prevail and thus limit or even exclude judicial review (Opinion of AG Bobek in *SatCen*, para. 85, emphasis added).

Setting aside the fact that they all deal with some form of a political question before the ECJ, the examples above depict the variety of strategies available to, and implemented by, the Court in its exercise of judicial self-restraint. While the ECJ obstinately sidesteps and refuses to define a political question doctrine, it nonetheless restricts itself to exercising its power of judicial review within the limits of the Treaties by deploying doctrines, mechanisms, and instruments specific to the EU's own legal order. In this context, it is then worth asking: is there any need for a distinct political question doctrine in the ECJ?

2.3. One Doctrine Too Many

Most scholarly voices proposing an affirmative response to the question above substantiate their answer by invoking the need for more legal certainty in the exercise of judicial review, especially in matters of foreign affairs (see Butler, 2018, pp. 351–352; Lonardo, 2018, p. 555). Paradoxically, those opposing the adoption of a political question doctrine by the ECJ rely on precisely the same argument – that of legal certainty. In the latter view, by embracing the doctrine the Court would venture into treacherous waters, as it would find no legal basis in the Treaties and thus be likely to engender a great deal of uncertainty (see Van Elsuwege, 2017). In fact, Gutiérrez-Fons observes that, while the added-value of the doctrine would lie in its prudential foundation rather than in its classical construction, it is nonetheless "true that this strand of the doctrine renders outcomes more difficult to predict, reducing legal certainty" (Gutiérrez-Fons, 2009, p. 124). Additionally, the articulation of such doctrine could prove, at least in certain domains, difficult to reconcile with the ECJ's essential task of upholding the rule of law in the actions of the EU (Van Elsuwege, 2017, p. 18).

As this study has sought to demonstrate, the contours of the political question doctrine remain much too "fuzzy" and its application too controversial – even in the legal systems which expressly acknowledge it – for it to actually constitute a useful tool in the ECJ's arsenal of legal strategies. Rather than contribute to the consolidation of a higher degree of legal certainty, the articulation of the doctrine might produce the opposite effect, whilst also upsetting the Court's legitimacy in the process.

In addition to concerns about legal certainty and legitimacy, considerations of efficiency also support the case against the adoption of the doctrine by the ECJ. On the one hand, as our doctrinal and case-law analyses have sought to illustrate, the ECJ's approach to politically sensitive topics is issue-dependent to too large an extent to render the adoption of a coherent political question doctrine either practically feasible or desirable. On the other

hand, the Court's toolbox is already replete with original EU doctrines, judicial scrutiny standards, and interpretation techniques that have so far enabled it to navigate the political questions that have emerged in various fields of EU law. As we have seen, the Treaties themselves subtract from the Court's jurisdiction through express provisions – those areas deemed by the Member States too politically charged to form the subject of judicial scrutiny. Moreover, the strategies employed so far in the ECJ's practice touch upon everything – from rules on standing and admissibility, through methods of interpretation, to standards on the scope and depth of judicial review, and the evaluation of the limits of discretion (with judicial power of review understood as a "scale or gradual continuum", depending on the level of discretion of the political institution, rather than as a fixed point).

In this context, it becomes apparent that while the existing strategies applied by the Court at the boundary between law and politics are certainly not perfect (and are therefore subject to critique), they nonetheless perform the systemic function entrusted to them – that of allowing the Court to exercise judicial restraint and keeping it from veering (too far) into the political realm. In the absence of the precise parameters necessary for the coherent framing of a political question doctrine, there is no guarantee that the criteria fixed by the Court would actually ensure a smoother interaction with the political realm – in fact, the evidence from the experience of the US in the implementation of the doctrine rather suggests the contrary.

Thus, in our view, juxtaposing a political question doctrine over the currently extant strategies of the ECJ and the complexities that accompany them would likely generate a cacophony of legal tests and criteria, requiring continuous adjustment and severely weakening the position of the Court. This prospect is all the more probable in the context of the ECJ's relationship with the national courts of the Member States, whose individual understandings of the concept of political questions and judicial self-restraint might not correspond to the ECJ's articulation of the doctrine (see also Butler, 2018, p. 350). From the perspective of systemic evolutions, cementing non-justiciability criteria through the formulation of a political question doctrine could hamper the future organic development of the Union's internal checks and balances, as well as its relationship with third parties in the international arena.

Conclusions

In theory, the political question doctrine sets out to tame the possible inclinations of judges to act politically in their adjudication. Through an apparent gesture of conscious self-restraint, sophisticated tests are thus devised by judges themselves in order to keep their interpretative power in check. As we have shown, the political question doctrine remains more of a rhetorical device than a genuinely constraining tool. Indeed, the political question doctrine bends from one space to another, from one time to another, and from one judge to another so much so that its content is never fixed. Far from capturing what would be the immutable relationship between law and politics, the doctrine "is a formal cloak in which a court wraps up a belief that, having examined a decision, the decision is not apt for application of the general principles of judicial review" (Daly, 2010, p. 160).

As our exploration of the ECJ's approach to politically sensitive issues has revealed, the wide range of solutions already embraced by the Court and the normative differences between the various areas of the EU's legal framework render the articulation of a political question doctrine both unfeasible and undesirable. The ambiguity of the doctrine and its volatile content over time – even in its original formulation in the US system – point to its inherent limits as an instrument of self-restraint for judges. In addition, the articulation of a form of the doctrine by the ECJ in the complicated setting of the EU's own wealth of specific doctrines and existing judicial strategies would likely generate difficulties that would far outweigh its hypothetical benefits, as outlined in the sections above. In effect, the adoption of a political question doctrine by the ECJ would merely add another instrument to adorn the imaginary wall separating law from politics, without effectively contributing to a "neater", more tangible division between the two.

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NON-JUDICIAL DIVORCES AND THE BRUSSELS II BIS REGULATION: TO APPLY OR NOT APPLY?

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Abstract. This paper aims to analyse the international consequences of private divorces, which are available in several European countries. Particular attention is drawn to the amendments suggested by the Lithuanian legislator, which intend to transfer certain functions of the courts to notaries. In particular, Lithuanian notaries would have competence in the dissolution of marriage provided there is mutual consent between spouses. The authors discuss how private divorces are regulated in different countries, whether the amendments suggested by the Lithuanian legislator would introduce a "private divorce" into Lithuanian law, and what the implications of private divorce are in private international law. In particular, the scope of application of the Brussels II bis Regulation is addressed. As yet, there is no consensus as to whether the Regulation applies to private divorces. However, the analysis in this paper shows that it would be beneficial to include such divorces in the above-mentioned Regulation. This would ensure a greater legal certainty for international couples.

Keywords: private international law, notaries, jurisdiction, recognition, private divorce

Introduction

The caseload of courts around Europe varies significantly (European Commission, 2020). According to the EU Justice Scoreboard, since 2012 caseload has decreased in the majority of EU member states, and has remained stable for several years (European Commission, 2020). Lately, in several EU member states, a trend in releasing indisputable cases from courts – by, for instance, introducing non-judicial divorces – can be observed (Kramme, 2021).

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Some initiatives to relinquish non-judicial functions have also been taken in Lithuania. One of these suggestions is to hand over divorces to notaries by mutual consent. It is worth mentioning here that Lithuanian courts are some one of the busiest in the entire European Union in terms of the number of civil cases received (European Commission, 2020). Lithuanian courts rank third by number of civil cases received in courts of the first instance, surpassed only by Belgium and Romania. This is partly due to the peculiarities of national legal regulation, which requires cases to go to court even in the absence of a dispute. For instance, in a case of divorce by mutual consent, the role of the court is essentially limited to confirming the agreement between spouses. In 2020, 15,709 family relationship cases were heard in the district courts of Lithuania, of which 7,488 were cases of divorce by the mutual consent of both spouses. Thus, approximately half of all family cases examined by the district courts in 2020 consisted of simple indisputable family cases. Such excessive litigation results in the loss of time and financial costs for both the people and the state. This excess also does not contribute to the efficient functioning of the judiciary.

However, removing divorces from the court can have an additional, not necessarily expected results – namely the international recognition of non-judicial divorces. Within the EU, the latter is regulated by the Brussels II bis Regulation (2003), which will be replaced by the Brussels II ter Regulation (2019) in 2022. It is unclear whether, for instance, notaries can apply the Brussels II bis Regulation's jurisdictional rules, or whether non-judicial divorce will be recognized according to the rules of the Regulation. Neither the Brussels II bis Regulation nor the case-law of the Court of Justice of the European Union (hereinafter – CJEU) give a clear answer to this question. The literature on the topic is similarly limited. The issues of private divorce in private international law have been addressed in some recent studies. Kramme (2021) discusses this issue in light of the Brussels II ter Regulation, while Dutta (2019) addresses the applicable law issues of private divorce. Some general comments regarding non-judicial divorces can be found in Magnus and Mankowski (2017), and several works discuss the 2017 case of Soha Sahyouni v. Raja Mamisch (Sellens & Zimmer, 2016, 2018; Gössl, 2017).

This paper aims to contribute to the ongoing discussion of whether private divorces fall within the scope of the Brussels II bis Regulation. To this end, a brief comparative analysis of private divorces in particular states will be provided. This will allow for the identification of different types of private divorces, which can be important in determining whether the Brussels II bis Regulation applies. The analysis of the application of the above-mentioned Regulation will comprise the following interconnected questions: whether non-judicial divorce falls within the scope of application of the Regulation; whether a notary can be considered a "court"; and if or how non-judicial divorce can be recognized according to the Brussels II bis Regulation. The issues at stake raise theoretical questions on both the limits of the application of the Brussels II bis Regulation, and the practical problems within member states (Lazić, 2018b).

1. Private divorces in national law – one name, different faces

Divorce laws are becoming increasingly liberal across Europe (Ryznar & Devaux, 2018). National legislators are removing judicial authorities from the process of divorce because of the long duration of court proceedings even in simple cases (Kramme, 2021). For instance, in Lithuania, the idea of releasing the courts from uncharacteristic functions was prompted by the need to address the issue of balancing the workloads of district and regional courts. According to the calculations of the Lithuanian Ministry of Justice (Explanatory note on Draft Law, 2020), the exemption of district courts from some currently-heard cases, as proposed by amendments to the law, would reduce the workload of district courts in civil cases by almost 10%, as well as simplify the resolution of many family issues.

In the subject literature, a private divorce is characterized as a divorce without the involvement of the judicial authorities (Kramme, 2021). Private divorces vary in particular countries; however, the common feature is the involvement of a public authority in the divorce process. Therefore, it is important to distinguish them from informal religious divorces among Muslims, which do not involve public authorities and do not have binding effects (Scherpe & Bargelli, 2021).

So far, several European countries have introduced private divorce in their legal systems, including Estonia, France, Italy, Latvia, Slovenia, Spain, Portugal, and Romania. A brief comparative analysis of how the issues surrounding private divorce are regulated in these countries can be beneficial for the consideration of the implications of private international law, as the application of a European legal instrument can depend on the national legal peculiarities of member states. For instance, under Regulation 650/2012 (2012), EU member states shall inform the European Commission of the type of authority which has competence in succession cases. Some member states include notaries among these authorities. Moreover, in the case of E.E. (2020), the CJEU left the national court to decide whether, according to national law, the state's notaries act pursuant to a delegation of power by a judicial authority, or act under the control of a judicial authority. Against this background, the differences between national laws can be crucial in terms of the application of EU regulations.

Latvia (Lazić, 2018b), Estonia (Family Law Act, 2009), Slovenia (Kraljić, 2020), France (Scherpe & Bargelli, 2021), Spain (Cerdeira, 2016), and Romania (Explanatory note on draft laws, 2020) allow notarial divorce provided there is the mutual consent of the spouses. In Latvia (Lazić, 2018b), France (Scherpe & Bargelli, 2021), Romania (Explanatory note on draft laws, 2020), and Estonia (Family Law Act, 2009), it does not matter whether spouses have or do not have minor children or common property. However, in cases where spouses have minor children, Latvian and Romanian laws require an additional agreement regarding custody of the child, access rights, and child maintenance (Lazić, 2018b; Explanatory note on Draft Law, 2020). Spain (Scherpe & Bargelli, 2021) and Slovenia (Kraljić, 2020), however, allow a notarial divorce only in the absence of common minor children.

Slightly different procedures are provided by Italian and Portuguese legislators. In Italy (Scherpe & Bargelli, 2021) and Portugal (Civil Code), marriage can be dissolved at a civil registry office. However, if the spouses have minor children, their divorce agreement is additionally checked by the public prosecutor's office as to whether the children are duly protected (Scherpe & Bargelli, 2021; Civil Code, 1966).

The Lithuanian legislator, in its proposed amendments, suggests an amendment to Article 3.51 of the Civil Code of the Republic of Lithuania, which would provide for the possibility of divorce by notarial procedure if there is the mutual consent of the spouses and if the spouses have not managed a joint household for more than one year, do not live a married life, and do not have minor children. The legislator also proposes to provide for the possibility for both spouses to apply to a notary with a joint application for the confirmation of legal separation if the spouses do not have minor children. It is noteworthy that the Lithuanian notarial system belongs to the group of Latin notary systems. Notaries are non-judicial authorities acting in non-contentious cases, and in the case of a dispute or any doubts they must refrain from making decisions. Only the courts can adjudicate in case of a dispute.

It can be stated that these amendments would introduce so called "private divorce". However, a notary would be still involved in the process, and thus the agreement of the spouses would be controlled in terms of its lawfulness. In fact, the Lithuanian legislator seems to be following the general European trend of the liberalization of divorce law.

Another important issue is whether in case of mutual consent spouses can choose between a judicial and a non-judicial divorce. The majority of countries – for instance, France (Scherpe & Bargelli, 2021), Estonia (Family Law Act, 2009), Latvia (Civil Law, 1937), and Portugal (Civil Code, 1966) – do not provide alternatives in this regard; in other words, if spouses achieve mutual consent, they cannot have a judicial divorce. However, some countries – Spain, for instance – allow spouses to choose a judicial divorce as an alternative to a non-judicial divorce (Scherpe & Bargelli, 2021).

Finally, in terms of further analysis, it is important to point out the potential consequences of private divorce. In all of the countries discussed, the final effect of the decision, agreement, or the notarial deed will be the dissolution of marriage. In fact, the final result will not be different from that of a judicial divorce (Scherpe & Bargelli, 2021). It is noteworthy that the laws presented are not discriminatory for either of the spouses – they require their consent regarding the divorce and its consequences. Moreover, often such a non-judicial divorce is possible provided the

spouses do not have minor children. If they do, additional protective measures, as controlled by the prosecutor's office, are in place.

2. Non-judicial divorce in light of the Brussels II bis Regulation

2.1. Non-judicial divorce and the scope of application of the Brussels II bis Regulation

The legislative initiatives discussed above would have implications not only on national cases, but also on cases with an international element. From the standpoint of international cases, there are two questions that have to be addressed: jurisdiction; and the recognition of the judgment, or other authentic documents. Within the European Union, these questions are currently regulated by the Brussels II bis Regulation (2003) (hereinafter referred to as the Regulation). This Regulation applies in matters of divorce, legal separation, and parental responsibility. Article 2 of the Regulation defines the "court" as "all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1 and the "judge" as "the judge or an official having powers equivalent to those of a judge in the matters falling within the scope of the Regulation". Finally, the regulation defines the "judgment" as "a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision".

Until now, divorces and legal separations in Lithuania were within the competence of the courts, and the notions presented by the Regulation were, therefore, not considered problematic. This can change due to the transfer of some court functions to other institutions. In cases of divorces and separations based on the mutual consent of spouses, these functions would be transferred to notaries. Therefore, it is important to answer the questions of: whether "divorce" by a notary can be understood as "divorce" in the meaning of Article 1 of the Regulation; whether a notary can be considered a "court" or a "judge"; and whether the notary's conclusions can be considered a "judgment" within the meaning of Article 2 of the Regulation.

In other words, it needs to be discussed whether Lithuanian notaries would be able to apply the Regulation in order to determine jurisdiction, and whether their decisions could be recognized on the grounds provided by the Regulation. So far, the CJEU has not had the opportunity to address all of these questions. It was recently approached with a question regarding the notion of divorce in case of non-judiciary proceedings for the first time – fifteen years after the Regulation came into force. On 1 December 2020, the Bundesgerichtshof (Germany) lodged a request for a preliminary ruling asking whether a non-judicial marriage dissolution on the basis of Article 12 of Decreto Legge (Italian Decree-Law) No. 132 of 12 September 2014 (DL No. 132/2014) is a divorce within the meaning of the Brussels II a Regulation (CJEU, C-646/20, 2020). The main question in the case concerned the recognition of non-judicial Italian divorce in Germany. Neither the opinion of the Attorney General nor the ruling of the CJEU have been provided thus far. However, on several occasions the CJEU has had the opportunity to elaborate on the notions of "court" and "divorce" within the meaning of the EU regulations related to jurisdiction and recognition of judgement in civil matters. The legal doctrine has also addressed the issues mentioned earlier.

Perhaps the most well-known example of this is the case of Soha Sahyouni v. Raja Mamisch (2017). Although this case concerned the scope of application of the Rome III Regulation (2010), the CJEU referred explicitly to Article 1(1) and Article 2(4) of the Brussels II bis Regulation. The Court pointed out that different understandings of "divorce" in both regulations would lead to divergence in the scope of their application, which would be inconsistent. The Court reiterated the opinion of the Advocate General, stating that at the time of the adoption of the Regulation divorces were pronounced by the courts or by, or under the supervision of, another public authority (Soha Sahyouni v. Raja Mamisch, 2017, para. 45). Both the Court and the Advocate General agreed that private unilateral declaration of the intent to divorce pronounced before a religious court cannot be considered divorce under the Rome III Regulation. Moreover, the inclusion of private divorces into the scope of application of the Regulation would require legislative steps within the competence of the EU. In light of the Soha Sahyouni v. Raja

Mamisch case, it remains unclear whether notarial divorce would fall under the notion of divorce in the Rome III and Brussels II bis regulations.

Legal doctrine is also not unanimous in this regard. The Regulation covers both judicial and non-judicial proceedings concerning divorce (Magnus & Mankowski, 2017, p. 54). However, non-judicial proceedings include mainly administrative proceedings (Magnus & Mankowski, 2017, p. 54), which was also confirmed by the CJEU in the Soha Sahyouni v. Raja Mamisch case. As was pointed out earlier, non-judicial divorce is being introduced in different EU member states as a faster alternative to a judicial divorce. For instance, notary divorce is available in Spain (Cerdeira Bravo de Mansilla, 2016), Latvia, and Romania (European Commission for the Efficiency of Justice…, 2019). In her report, A. Borrás (Council of the European Union, 1998) confirms that the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (1998) also applies to non-judicial divorces, provided there is consent between spouses regarding all of the relevant matters – such as maintenance, property, and custody.

Considering notarial divorce within the scope of the Brussels II bis Regulation would allow for the maintenance of uniformity and legal certainty in determining jurisdiction in international divorce cases within the EU. This has been confirmed by the explicit mention of notaries in the preamble to the Brussels II ter Regulation (2019), where it is explained that notaries can be considered public authorities even when they are exercising a liberal profession. Therefore, the new regulation leaves no doubt in this regard. However, it still remains unclear what the CJEU will say in the case lodged by the German court (CJEU, C-646/20, 2020).

Kramme (2021) claims that it can be expected that the CJEU will reiterate the position it expressed in the Soha Sahyouni v. Raja Mamisch case – that private divorce falls outside the scope of the Brussels II bis Regulation. The author recalls CJEU considerations regarding the need for an aligned understanding of the term "divorce" in the Brussels II bis and Rome III regulations. Dutta (2019) is less strict in this regard, noting that from the standpoint of private international law it is difficult to protect the idea of the separation of private and judicial divorces, particularly when unilateral or mutual intent is a prerequisite for divorce in both cases. He claims that the boundaries between judicial and non-judicial divorces are drawn formalistically (Dutta, 2019). The opinions of both authors are in favor of the recognition of private divorce as falling within the scope of the Brussels II bis Regulation.

It is noteworthy that in the case of Soha Sahyouni v. Raja Mamisch the CJEU did not differentiate between types of private divorces. Such differentiation could bring greater clarity to the position of the CJEU regarding private divorces that are different from the one in the Soha Sahyouni v. Raja Mamisch case. In light of the report prepared by Borrás (Council of the European Union, 1998), it seems that notarial divorce can still be considered as falling within the scope of the Brussels II bis Regulation. It seems that the CJEU could, in its forthcoming judgement regarding the notion of "divorce", still take a different point of view from the one it occupied earlier in the Soha Sahyouni v. Raja Mamisch case. According to the CJEU, the terms used in the Rome III and Brussels II bis Regulations have to be explained in a uniform way. It can be expected that the CJEU will also wish to maintain the uniform interpretation of the terms used in the Rome III Regulation and the new Brussels II ter Regulation. The latter accepts notarial divorces. Therefore, the CJEU could go further than in the Soha Sahyouni v. Raja Mamisch case, and explain more thoroughly what it means in stating that the divorce was pronounced by the court or by, or under the supervision of, another public authority.

Therefore, it cannot be dismissed that the CJEU might conclude that under some circumstances private divorce will fall within the scope of application of the Brussels II bis Regulation. This would allow for continuity to be maintained between the two regulations – Brussels II bis and Brussels II ter.

2.2. Will Lithuanian notaries be considered "courts"?

Potential doubts regarding non-judicial divorce can come about due to several circumstances. The CJEU has already had possibilities to approach the question of the definition of "court" within the meaning of private international law (Eco Swiss China Time Ltd v. Benetton International NV, 1999). In its recent E.E. judgment (2020), the CJEU decided on whether a "notary who opens a succession case, issues a certificate of succession rights and carries out other actions necessary for the heir to assert his or her rights [is] to be regarded as a "court" within the meaning of Article 3(2) of Regulation No 650/2012". The CJEU held that Lithuanian notaries are not courts within the meaning of Article 3(2) of Regulation 650/2012 (2012), unless they act pursuant to a delegation of power by a judicial authority or act under the control of a judicial authority. The latter was left for the national court to examine. Subsequently, the Lithuanian Supreme Court found that Lithuanian notaries are neither courts nor do they either act pursuant to a delegation of power by a judicial authority or act under the control of a judicial authority (Lithuanian Supreme Court, 2020). The main reason for this was the fact that notaries cannot solve disputes between parties. These judgments can also be relevant when considering notarial divorces.

Neither Regulation 650/2012 nor the Brussels II bis Regulation distinguishes between cases solved by the consent of the parties and cases without such consent. However, the definitions of "court" in the Brussels II bis and Succession regulations are not identical, thus considerations as to whether a notary can be considered a "judge" or a "court" within the meaning of each of these regulations may also differ. Within the meaning of the Brussels II bis Regulation, a notary can still be considered to constitute "another public authority", as mentioned by the CJEU in the Soha Sahyouni v. Raja Mamisch case. However, the Brussels II ter Regulation (2019) does not leave any doubt. Although the wording of Article 1(2)(a) of the new regulation is almost the same as in the Brussels I bis Regulation, paragraph 14 of the Preamble to the Brussels II ter Regulation mentions notaries expressis verbis as authorities that can be considered a "court" under this regulation. These changes could be important for future interpretation of the new regulation.

2.3. Cross-border recognition of notarial divorces.

The transfer of some divorces to notaries would also have implications on the recognition of these divorces abroad. The Brussels II bis Regulation distinguishes the recognition of judgments and the recognition of authentic documents; however, it provides the same rules of recognition and enforcement for both . The new Brussels II ter Regulation introduces changes in this regard – notably, it no longer mentions "judgments". Instead, it distinguishes "decisions", "authentic instruments", and "agreements", and provides separate rules for their recognition and enforcement. Therefore, it is important to consider which of these rules would apply to Lithuanian notarial divorces.

Article 26(1) of the Lithuanian Law on Notaries provides a non-exhaustive list of cases where the notarial deed is available. For the moment, a notary can provide a notarial deed confirming different legal transactions. Whilst this law does not name these transactions, it does provide strict formal requirements for the notarial deed. From the standpoint of private international law, the most important question is how to qualify the deed of a Lithuanian notary confirming the divorce: is it an "authentic instrument", a "decision", or an "agreement"? This will depend on the actual content of notarial reform in Lithuania, and the delimitation of notarial functions from those of the court. Presently, it seems that the function of a notary will not differ from the function of a court in regard to divorce by mutual consent; neither interfere with the content of the spouses' agreement, provided it is lawful.

Some guidance is provided in the preamble to the Brussels II ter regulation. In point 14 of the preamble, the legislator tries to make a delineation between "decisions" and "other agreements". An agreement approved by a court after an examination of the substance according to the national law is considered a "decision". Other legally binding agreements following the formal intervention of the public authority should be recognized as "authentic documents" and "agreements". Agreements that do not fit either classification can still circulate, provided they are registered by a public authority. In case of the proposed amendments in Lithuania, most probably a notarial deed

can be considered an "authentic document" within the meaning of the Brussels II ter regulation. In the subject literature, an "authentic document" has been described as "a public document by which an agent of the state in question formally and authoritatively records declarations made by the parties so as to constitute those declarations as legal obligations" (Fitchen, 2011, p. 33). It seems that this definition quite precisely describes the function of a notary within a notarial divorce: the notary does not interfere in the content of the spouses' agreement, provided it is lawful. The function of the notary is limited to confirmation of the parties' mutual declarations and obligations.

Since the adoption of the Brussels II Convention, however, it is clear that a lawful dissolution of marriage or declaration of legal separation must be recognized in the entirety of Europe. The very fact that the marriage has been dissolved should be recognized automatically, and should also happen under the Brussels II ter Regulation. The situation is more complicated in light of the Brussels II bis Regulation. In fact, the recognition of notarial divorce will mainly depend on whether such a divorce falls within the scope of the Regulation or not. Therefore, the CJEU judgement in case C-646/20 will be crucial in this regard. Under the present legal framework, the member states face difficulties in understanding whether a private divorce can be recognized according to the rules of the Brussels II bis Regulation (Lazić, 2018a).

Considering the fact that a growing number of EU member states are beginning to allow non-judicial divorces, the CJEU's answer will have great meaning for EU citizens obtaining such a divorce in another member state (Kramme, 2021). The decision of the CJEU would have very important practical implications for international couples. It could be even claimed that the interpretation of the Court would affect the possibility of EU citizens to fully enjoy the freedoms enshrined in the EU treaties. The Brussels II bis Regulation is imperative for the courts of the member states. It is not difficult to imagine a situation where, according to the Brussels II bis Regulation, jurisdiction belongs only to member state X. In that member state, divorce by mutual consent is possible, however only in the form of non-judicial divorce. If such a divorce would not be recognized in other EU member states, the legal certainty and the value of the Brussels II bis Regulation in international divorce cases would be undermined.

Conclusions

Private divorce, available in several European countries, allows spouses who have attained mutual consent to avoid entering a judicial procedure. However, it still requires the participation of the public authority. In many instances – such as in Spain, Latvia and France – this takes the form of a notary, who confirms the spouses' agreement. However, a civil registry or a public prosecutor's office can also be involved – as in Italy and Portugal, for example. Although the non-judicial divorce procedure differs from the judicial one, the consequences of both are similar: the ending of the personal bond between spouses; the distribution of their property; and a decision on the custody and maintenance of children. The latter applies only in cases where non-judicial divorce is available for spouses who have minor children.

The Lithuanian legislator seeks to follow the European trend and to introduce private divorce into its legal system. The Draft Law foresees amendments that could significantly reduce the workload of courts. It would also make divorce proceedings faster and easier in cases that do not involve any disputes. It also seems that these amendments follow the recent European trend of making divorces more accessible.

Private divorces have significant implications in private international law. There is currently a case pending before the CJEU that addresses the recognition of private divorce. Whilst the CJEU has already approached private religious divorce, the private divorces discussed in this paper – unlike informal religious divorces – have a binding effect. Moreover, their effect does not differ from the court's decision in similar situations – namely in cases of uncontested divorce.

Neither the literature nor the case-law provides unambiguous support for excluding private divorces from the Brussels II bis Regulation. In the Soha Sahyouni v. Raja Mamisch case, the CJEU mentions "other public authority" – thus, notaries can be considered as such.

Finally, the Brussels II ter Regulation explicitly mentions notaries among the public authorities eligible to pronounce a divorce. Therefore, legal certainty and continuity between the Brussels II bis Regulation and the Brussels II ter Regulation would benefit from "court" and "other public authorities" having the same meaning in both regulations.

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WHAT CAN FRANCE LEARN FROM THE CZECH REPUBLIC'S APPROACH TO THE ISSUE OF WEARING (ISLAMIC) RELIGIOUS SYMBOLS

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Abstract. The latest "(Anti)Separation Bill" in France stirred new waves of discussion and criticism. Given the fact that France and the Czech Republic are European secular states and members of the EU – with the former acting as a trendsetter and the latter being the second most agnostic state in the EU – this paper attempts to understand the path down which Europe is heading on the question of freedom of conscience, religion, and expression. The author examines the approach of the Czech Republic to the issue of wearing Islamic religious symbols through the prism of the Czech Supreme Court and EU experience in the European court of human rights in the fields of education and employment. The problems associated with the wearing of religious symbols, especially Islamic ones, as scarves for women that cover their heads (i.e., the hijab) have been relevant for the past few decades, and remain open questions even in democracies such as the EU member states. This paper will discuss the position of one secular state – the Czech Republic – through the case law in this area, as well as providing an overview through the decisions of the European Court of Human Rights in the cases of the EU member states. The aim of this article is not to compare political trends and judicial approaches between France and the Czech Republic, but rather to provide alternative approaches to the right to manifest religion as demonstrated by latest judgement of the Czech Supreme Court – a source of inspiration in the vein of the motto "Liberty, equality, fraternity".

Keywords: human rights, the right to freedom of religion, religious symbols, ECtHR, Czech Republic, France's separation bill

Introduction

In the modern democratic world, freedom has become an indisputable milestone on which not only our entire understandings of civilization and the degrees of development of societies are based, but also our impressions of the countries that represent it. The slogan of Robespierre and the symbol of the French Revolution – "Liberté, égalité, fraternité" – runs like a red thread through all international legal acts, rooting the concept of fundamental human rights. However, even this recognizable motto has lately become controversial due to its use by French politicians and the provision of new laws that separate those who should or should not, according to politicians, fully enjoy human rights.

On April 11, 2021, the French Senate approved a toughened version of the controversial bill against separatism, or the "separatism bill" (Woods, 2021). This bill is accused of stigmatising Islam and has been discussed by lawyers and activists around the world. Whilst it is ostensibly aimed at "ensur[ing] respect for the principles of secularism and neutrality of public service" (Tidey, 2021), critics of the bill state that it expands the alleged principle of neutrality by forbidding not only civil servants but "all private contractors of public services" from sharing political opinions, or even wearing physical representations of their religion (Griffin, 2021; Yeung, 2021).

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Attitudes towards religious symbols differ, even across the EU member states. The reasons for these different approaches to regulation lie in different historical and political contexts, namely: the number of believers; the number of immigrants of a particular religion; their level of assimilation or integration into society; and many other factors.

In order to understand the path trodden by European states regarding freedom of religion, expression, and conscience, this article will examine the approaches of the European Court of Human Rights (ECtHR), as well as the attitude of particular states, to a number of cases which were heard in court. Alongside this analysis of key cases, the approaches of judicial bodies and the overriding political discourse in a secular state that is one of the most agnostic in the EU – the Czech Republic – will be considered. This consideration will provide a reflection on the recent restrictive laws in a state which represents the cradle of modern European democracy – France.

France, being the host-state of the largest Muslim population in Western Europe (approximately 8–10% of the population of France; US Department of State [2010]), can hardly be compared with the Czech Republic regarding its religious – specifically, Muslim – community, especially in regard to the coherency of such a religious community given the quantity of Muslim immigrants in France. Moreover, the legal system in France is established in a different way than in the Czech Republic, and there are also differences in the relationship between state and religion. The aim of this paper is not to compare these states either in terms of their statistical and historical data or their approaches to such incomparable situations, but rather to provide alternative views on or approaches to equitable treatment and the right to manifest one's religion through the wearing of religious symbols – not least since France is always considered to be somewhat strict in regard to its attitude to Islamic religious symbols. In addition, legislation prohibiting the use of religious symbols by schoolchildren and students can scarcely be found almost anywhere in Europe, except for in France.

This article will be structured as follows. In the first chapter, the approach of the ECtHR to the issue of the manifestation of religion through the wearing of religious symbols in places of employment or education will be discussed. In the second chapter, an overview of the French approach to wearing Islamic religious symbols will be provided. In the third chapter, discussion will be followed by a summation of the approach of the Czech Republic to this issue, including its judicial bodies, the opinions of official authorities, and political trends.

1. The ECtHR's approach to the issue of wearing religious symbols

Since time immemorial, spirituality – the religious principle of the individual – has been a cornerstone on the path to the perception and understanding of the human essence. Equally, religion has been the regulator of morality, culture, and even way of life for entire societies, and has formed the basis for the ethical and legal norms that have been adopted. Moreover, in the modern world there are entire countries where legislation is based on religious law. However, even in a secular state – the measure of which is democracy – one of the fundamental foundations of this system is freedom of religion.

Article 9 of the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms) proclaims that "Everyone has the right to freedom of thought, conscience and religion", and further stipulates that this is not an unlimited or absolute right: "it shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection in the interests of the rights and freedoms of others". In other words, everyone's rights should be equally balanced, and discrimination of any kind should be avoided.

A person's religion is manifested not only in their inner conviction, or hidden worship, but also through the wearing of various religious symbols. Nevertheless, not a single legislative document explains the meaning of religion, faith, or – crucially – a religious symbol. Evans (2009), in his "Manual on the Wearing of Religious Symbols in Public Areas", speaks of a religious symbol as an "object of religious veneration", considering all of

those things that form elements of the religious life of a believer and contribute to the exercise of freedom to practice their religion or belief in worship, teaching, and observance. This can include a wide variety of clothing, tools, writing materials, images, structures, and a variety of additional items that are difficult to specify. Evans stresses the importance of the subjective interpretation, that is, the individual's intention to wear or show elements of religion. In terms of law enforcement, some scholars believe that the freedom of a certain religion is related to a specific territory, while others deny territorial limits, calling them unjustified (Edge, 2006).

Fundamental rights and freedoms are enshrined in the constitution of each democratic state in different ways. In some states, a broad concept– such as freedom of conscience – is given, whereas in some the concepts of freedom of religion are more precisely defined. Regarding the European Union and its member states, along with their national legislation, the observance of the right to religion in the field of employment is regulated by Council Directive 2000/78/EC, which establishes a general framework for equal treatment in employment and occupation. Several EU member states have extended the basic principles of non-discrimination to the field of education in their national jurisdictions – for example, the Equality Act (2010) in the United Kingdom, the Allgemeines Gleichbehandlungsgesetz in Germany, or the Antidiskriminační zákon [Anti-Discrimination Act] (No. 198/2009 Coll.) in the Czech Republic.

National courts interpret legislative acts in their own ways, using an objective approach and taking into account the realities of the society to which the decision will be applied. In cases where all of the stages of the national courts have been applied and a satisfactory solution has not been achieved, the applicant has the right to seek the observance of their rights at the ECtHR.

In regard to non-EU member states, the ECtHR recognizes the legality of wearing symbols as a declaration of religious belief, as in cases such as *Moscow Branch of the Salvation Army v. Russia* (2007) or *Leyla Şahin v. Turkey* (2005). This was also clarified in the case of *Ahmet Arslan and Others v. Turkey* (2010), where the application of this right in public places was stressed, but not in public institutions as these are places where religious neutrality may take precedence over the right to practice one's religion.

However, the ECtHR cannot always satisfy an applicant's attempt to protect their fundamental rights. The international non-profit organization Human Rights Watch noted in its 2010 report (Human Rights Watch, 2010) that the ECtHR interprets the right of authorities to restrict the wearing of religious clothing by civil servants and in state institutions rather liberally. Thus, in the case of *El Morsli v. France* (2008), the court declared the applicant's complaints inadmissible. A Moroccan citizen who had married a French man was denied a French visa because she did not agree to remove her Islamic headscarf during an identity check in the presence of male employees at the French Consulate General in Marrakech. The court, in its inadmissibility decision, argued that the identification served the legitimate purpose of ensuring public safety, and that the applicant only had to take off her headscarf for a very short period of time.

The controversial decisions of the ECtHR in the field of employment are illustrated in the cases of *Eweida and Others v. United Kingdom* (2013) and *Chaplin v. United Kingdom*. In the first case, the court granted the claim of the applicant, a Christian woman employed by the private company British Airways, whose request to be allowed to wear a pectoral cross on a chain had previously been denied by her employers. According to the company's internal regulations, employees were not allowed to wear ostentatious jewellery, including religious symbols, but exceptions were made for representatives of other religions – such as Sikh employees wearing a turban and bracelet, or Muslim women wearing a hijab. As part of its analysis, the ECtHR stated that the conflicting interests in this case were not fairly balanced by the courts of the United Kingdom, since the freedom to express one's convictions in public is one of the fundamental rights necessary to ensure pluralism and diversity in a democratic society.

The ECtHR took the opposite position in the case of *Chaplin*, a nurse in a public hospital who also wanted to openly demonstrate her attitude towards her religion in her workplace by wearing a pectoral cross. The hospital

prohibited the wearing of any jewellery or religious symbols for reasons of hygiene and safety. However, the hospital made an exception for Muslim female employees; they could cover their hair with a sport hijab made of dense fabric that hugged their heads. In this case, the ECtHR did not find a violation of rights, since – in the analysis of proportionality – the religious freedom of the employee was less important than the hospital's fear of non-compliance with the basic rules of safety and hygiene, as the pectoral cross might potentially come into contact with an open wound.

The difference between these cases is in the conflict of interests in the approach. The ECtHR put out a clear message in its decisions: that efforts to preserve pluralism and democracy should be within the limits that are permissible for others to express their beliefs openly. Limitations, however, may be acceptable where there is a threat to the health of third parties, which may well be assessed by national authorities on an individual basis. With regard to the educational sector, the situation is different – the court has in the past rejected applicants who tried to challenge bans on the wearing of turbans and headscarves by students and teachers in schools and universities (for example, the 2009 cases of *Aktas v. France*, *Bayrak v. France*, *Gamaleddyn v. France*, *Ghazal v. France*, *J. Singh v. France*, and *R. Singh v. France*).

Thus, in *Dogru v. France* (2009) and *Kervanci v. France* (2008) the ECtHR declared the complaints inadmissible, considering the domestic authorities' conclusions on the inadmissibility of wearing an Islamic headscarf in physical education classes justified for health and safety reasons. A similar decision was issued by the ECtHR in 2009, ruling that interference with the freedom of students to express their adherence to religion was provided for by French law and pursued the legitimate aim of protecting the rights and freedoms of others and protecting public order, but also emphasizing the role of the state as a neutral and impartial creator of conditions for practicing various cults, religions, and beliefs.

The court's position on the wearing of religious symbols by teachers is illustrated in the case of *Dahlab v. Switzerland* (2001). Here the applicant, who had converted to Islam, was a primary school teacher, and complained that her school's administration had forbidden her from teaching lessons while wearing a headscarf. For several years prior to this, the applicant had been teaching her lessons while wearing a headscarf, and this did not cause any tangible inconvenience. In 2001, the ECtHR declared the complaint inadmissible, considering that there was a threat of proselytism since the applicant, as a state representative, was responsible for children aged four to eight, and schoolchildren of this age are more easily influenced than older students.

In accordance with court rulings on cases in the field of the wearing of religious symbols in educational institutions, the right to an individual's access to education may be subject to certain restrictions imposed on this right by the state itself. At the same time, a contradiction exists between freedom of religion, the right of a parent to raise a child in accordance with their religious beliefs, and restrictions on the right to education within the framework of state policy. Trying to strike a balance between extremes, with discrimination on the one hand and proselytism on the other, the ECtHR imposes on the state the obligation to maintain neutrality in the conduct of religious policy.

2. The French approach to the issue of wearing religious symbols

Following the direction of the ECtHR, which gives more freedom to states when regulating the right to manifest their religions, France – being a state based on the principle of secularism – applied its approach of the absolute liberation of public space from religious symbols. The French law, however, specifically targets the Muslim community rather than religious communities as a whole (Barnett, 2011).

France, being the host-state of the largest Muslim population in Western Europe (about 8-10% of the population of France; US Department of State [2010]), acts to protect its principles of secularism. For the past decade, it has been criticized for its approach in this regard – especially its attitude toward Islamic religious symbols covering a woman's head and/or face, as it was the first EU country to ban the niqab in 2011. Although the debate has taken place over several decades (since at least 1989), in 2004 France passed a law banning the use of religious symbols

in public elementary and secondary schools, which was intended to neutralize the learning environment (Bowen, 2008b).

France applies the principle of *laïcité* or *status quo* in the relationship between the state and any organized religion in the educational sector, where students are supposed to leave their religious identity outside the classroom and participate in lessons as equal members of the French nation (Bowen, 2008a). In 2011, France continued to ban religious symbols, tackling mostly Muslim women by passing Law No. 2010-1192 prohibiting concealment of the face in a public space.

On the day that this law came into force, a complaint against it was immediately filed with the European Court of Human Rights (Willsher, 2014). In addition to the cases discussed in the first part of this paper, one of the more recognizable cases on this issue is *S.A.S. v. France* (2014), where the applicant complained that this law deprived her of the possibility of wearing a full-face veil in public. She alleged that there had been a violation of her freedom of thought, conscience, and religion, and of her right to respect for her private and family life, as well as alleging that she had been discriminated against. The ECtHR, however, unanimously ruled that the French law did not violate the European Convention, and confirmed its legitimate aim of ensuring the respect of the French principle of "living together". As in the above-mentioned cases of *Dogru v. France* (2009) and *Kervanci v. France* (2008), the expulsion of students from school for wearing headscarves was justified for reasons of health and safety.

The law on banning religious symbols in public schools was confirmed by the French supreme courts (of both administrative and private law) in 2004, which ruled against Muslim students wearing headscarves.[2] In 2013, the French Council of State (the Administrative Supreme Court) supported the priority of public order over the freedom of religious expression.[3]

The Council of State also explained that the principle of secularity shall apply to public sector employees, leaving the decision with employers in the public sector.[4] However, a few years later a law was adopted in accordance with EU Directive 2000/78/EC86, providing the right for employers to prescribe the principle of neutrality and stipulate restrictions on the religious freedoms of employees.

Several protests were held as a result of the legislative and judicial approaches to regulating the wearing of Islamic religious symbols, and many international organizations criticized the French position – including the Office of the United Nations High Commissioner (OHCHR, 2018). Furthermore, scholars produced analyses confirming the adverse effect of these Laws on the community (Human Rights Watch, 2014; Abdelgadir & Fouka, 2020; Agha, 2015; Barnett, 2011; Beckford, 2016; Chin, 2019).

Notwithstanding public and academic opinions, ten years later the Law on the prohibition of niqabs and religious symbols in public places has received indirect amendment. The French approach to Islamic religious symbols in fact toughened, and in 2021 the so-called "anti-separatism bill" was approved – a bill directed against the alleged separatism of some parts of the population, aiming towards neutrality of public service (Tidey, 2021).

This document tackles the Muslim community in France, aiming at preventing its radicalization through deeper adaptation to the basic values of France and its social and political conditions. The strategy of the French government involves countering the attempts of radical Islamists to legalize the phenomenon of "political Islam". Whilst the bill does not mention "Islamic or Muslim separatism" or "Islamist radicalism", it was referred to in the government submission, as well as in a speech given by France's president addressed to the Muslim population which even contained the phrase "Islamist radicalism"[5] (Wires, 2021).

[2] Conseil d'Etat 2009 Melle Myriam A; Cour de cassation chambre civile, Audience publique du mardi 2005 N° de pourvoi: 02-19831.
[3] Conseil d'Etat, Etude demandée par le Défenseur des droits, adopted 19 December 2013.
[4] Conseil d'Etat, Etude demandée par le Défenseur des droits, adopted 19 December 2013.
[5] Speech of President Macron (Ministère de l'Europe et des Affaires étrangères, n.d.)

The bill confirms the importance of the principle of neutrality, amongst others, by prohibiting the wearing of Islamic religious symbols such as the hijab by the civil servants. Moreover, it extends this principle to the employees of private companies that are in contractual relations with the public sector. This bill is a topic of discussion for lawyers and activists around the world (Griffin, 2021; Yeung, 2021; Pistorius, 2021).

This legislative act could become a radical way of outlining the priority of the principle of secularism in the country. Moreover, it might even become a model for some EU member states to follow.

3. The Czech approach to the issue of wearing religious symbols

The position of the Czech Republic on the wearing of religious symbols is noteworthy, given the fact that the state is a republic with a low number of people declaring that they belong to any religion or church community.[6] Only 10% of the respondents of a recent survey were adherents of Roman Catholicism; less than 1% Protestantism; and the remaining 9.4% adherents of other religions, most of which professed Czech Evangelical, Hussite, and Orthodox Churches. Less than 0.1% of the total population professed Islamic (including Czech converts), Jewish, or Buddhist beliefs (Czech Statistical Office, 2011, 2014). Within the European Union, the Czech Republic ranks second in terms of the non-believing proportion of the population; in other words, many consider themselves to be agnostic. However, in the Czech Republic, religious holidays such as Christmas or Easter are celebrated at the state level.

The issue of wearing a pectoral cross did not cause as much publicity as the wearing of Islamic headscarves has recently, due to the current political situation. Even though most cases of this nature do not reach court (due to the applicants' fear of the instability of political trends and the ambiguity of decisions), there are precedents – one of which finally received a decision in the Supreme Court of the Czech Republic.

The first of these high-profile media cases – which did not, however, reach court – involved a primary school teacher who converted to Islam in 2013 and came to class with her head covered (Beneš, 2013). The principal of her school received many complaints from parents demanding the dismissal of this teacher – however, the principal's position was supported by the law. Czech law does not address the question of whether wearing a religious symbol constitutes propaganda of religion, or proselytism, or whether a teacher's religion could be an obstacle in fulfilling their obligations.

In the Charter of Fundamental Rights and Freedoms of the Czech Republic (No. 2/1993 Coll.), which is part of the constitutional order of the Czech Republic, articles 15 and 16 expressly stipulate that "the state is based on democratic values and should not be bound by any ideology or religion", which is interpreted by the Czech Constitutional Court as a guarantee of religious pluralism and tolerance.[7] Freedom of thought, conscience, and religion is guaranteed in Article 15 (1) of the Charter. Article 16(1) further establishes that "everyone has the right to freely exercise their religion or belief, otherwise individually or together with others, privately or publicly - in worship, teaching, religious activities or rituals". All of these specifications of the Court stipulate that the right is "limited by law if the protection of the democratic system is necessary to ensure public safety, order, health and morality, or the rights and freedoms of others". Issues that relate to the prohibition of discrimination are also raised in other legal acts, for example, in the Civil Code or Labour Code as well as in the Anti-Discrimination Act.

After weighing the importance of upholding fundamental rights, the principal decided to keep the teacher in her position and let her continue to teach. It is noteworthy that a similar position to that taken by the Czech Republic

[6] Almost a third of all those who declared their affiliation to the faith chose the option of "Believers – not professing any church or religious society" (Czech Statistical Office, 2014).
[7] Decision of the Constitutional Court of the Czech Republic 1. 7. 2010, Pl. ÚS 9/07.

was taken by a neighboring state – Germany, whose federal constitutional court also faced a similar case in "*Kopftuch*" ("headscarf").[8]

The decisions of the Czech school principal and the Federal Constitutional Court of Germany at the national level are indicative of how the state itself can, within the framework of international law, solve the problem, meeting the needs of humanism without following the decision of the ECHR in this case.

The second case relates to a medical student from Somali studying in a Czech secondary school. In 2012, a female student wearing an Islamic headscarf was indirectly discriminated against in a secondary education medical school. The girl was forbidden from coming to classes wearing a hijab, and was thus forced to leave the school. The school inspection supported the position of the school's principal on the exclusion of the student. However, the Public Defender of Rights, or Ombudsman, of the Czech Republic – Anna Šabatová – became involved in the case, clarifying that "equal treatment does not mean equitable treatment. The ban on wearing a headscarf is fundamentally different for a believer and an unbeliever. The universal ban on wearing religious symbols is an interference with religious freedom, and this behaviour of the medical school and its principal violates anti-discrimination laws and the law on education".[9] Emphasizing the importance of religious rights, she also cited a decree from the Ministry of Health that restricts the wearing of the hijab within the legitimate framework of ensuring health and safety, but nevertheless establishes the obligation to cover the hair for the same purpose.

Nevertheless, the school did not consider the suggestions and opinion of the ombudsman, and the student took the case to court. The case itself received broad media coverage, with a wave of action from Islamophobic supporters of the school principal. The student had to abandon her studies at the school after the principal invited her to take off her hijab for theoretical classes, although it was originally agreed by both sides that the hijab would be put aside only during nursing practice.

The student proceeded in the court, demanding an apology from the school and material compensation for the moral damage caused by discrimination. She was not able to succeed either in the first instance at the District Court, nor in the second instance at the Municipal Court of Appeal. However, the final decision of the Czech Supreme Court offered a different interpretation, whereby the court stated that banning the hijab from a school's theoretical lessons had no legitimate aim.

In its judgment[10] (2019), the Supreme Court referred to international and national regulations. The court mentioned Article 9 of the European Convention on Human Rights, emphasizing that everyone has the right to freedom of religion and its manifestation, unless it is subject to the lawful limitations necessary in a democratic society in the interests of public security, public order, health or morals, or the rights and freedoms of others. In the national law of the Czech Republic, such an idea is stipulated in the Charter of Fundamental Rights and Freedoms. Further, the implementation of this right to freedom of religion regarding education and its provision is stipulated among others in the provisions of § 7 para. 1 of the Anti-Discrimination Act, which allows for different treatment in access to education and its provision on the grounds of religion if it is objectively justified by a legitimate aim.

[8] In its judgment in this case, the German court noted that the Islamic headscarf can express respect for the wishes of the family, be a sign of abstinence, or an expression of cultural identity – not necessarily a political symbol of fundamentalism and opposition to Western values.
[9] In Czech, Anna Šabatová stated: "*Rovné zacházení neznamená vždy stejné zacházení. Pro osoby bez vyznání či osoby vyznávající náboženství s méně striktními pravidly není zákaz nosit pokrývku hlavy obecně důležitý. Pro muslimské ženy má však nošení muslimského šátku zásadní význam jako projev náboženského vyznání. Plošný zákaz tedy nepochybně představuje zásah do náboženské svobody a jednání ředitelky školy bylo v rozporu s antidiskriminačním i školským zákone … Podle mého názoru není pochyb, že v rámci teoretického vyučování na zdravotnické střední škole neexistuje rozumný důvod zakazovat studentům nosit pokrývky hlavy, pokud jsou vyjádřením jejich náboženského vyznání.*" (The Ombudsman, 2014).
[10] Judgment No. 25 Cdo 348/2019, issued on November, 27, 2019 https://nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/6645282FBB8A9222C125851800296BFE?openDocument&Highlight=0

The Municipal Court, in its decision, implied the legitimate aim of protecting the rights and freedoms of others by banning the hijab, stressing that the school should be a neutral environment and utilizing a somewhat politicized reasoning. It stated that in the Czech Republic there is no legal basis for mandatory tolerance of religious symbols; that the use of such a symbol is contrary to the right to freedom of religion – i.e., freedom not to be exposed to these symbols – especially when it comes to foreign symbols that represent the political nature of religion (Islam), which is contrary to Western liberal ideals.

The Supreme Court did not follow up on this statement, its connection with the politicization of religion, or the phrase regarding western liberal ideas, instead referring to Article 2 of the Czech Charter of Fundamental Rights and Freedoms and noting that the state is based on democratic values and "may not be bound by any exclusive ideology or religion". Further, it stressed the significance of the law, as state power can be exercised only in cases within the limits set by law, in the manner prescribed by law. It followed by concluding that the Czech Republic must accept and tolerate religious pluralism – i.e., above all, it must not discriminate against or unreasonably favour one religion. The maintenance of religious neutrality by the state means that it does not interfere with the fundamental right to freedom of religion or expression, but creates the conditions for its realization, protects the exercise of these rights and freedoms from disruptive interference, and establishes conditions for the coexistence of conflicting worldviews and people who profess different religions. The Supreme Court further stated that the ban on wearing the hijab could not be justified based on any interest in the protection of public security and order, as the wearing of the hijab alone does not increase security risks.

In terms of this connection, communication No. ČŠIG3601/14-G21 from the Ministry of Education, Youth and Sport in 2014 is noteworthy, which referred to the perspective of the student. It approached this issue in such a way as to suggest that the school must not restrict the possibility of wearing religious symbols with the intention of restricting the religious rights of individuals (e.g., that it considers the wearing of certain religious symbols to be inappropriate, unethical, unsuitable for the cultural area of Central Europe, etc.), with an exception occurring only when it would be difficult to identify the person (Právo svobody projevu…, 2014).

In their arguments, the courts of the first and second instances were referring to France and its approach to this issue. Other than this, a remarkable reference to Germany was made in the judgement, as a state with a similar legal system and position of religion in the public space (the judgment "Kopftuch"). The decisions of the Czech Constitutional Court No. Pl. ÚS 9/07, Pl. ÚS 6/02 and the Supreme Administrative Court No. 5 As 65/2015 were also referred to in this respect.

The Supreme Court discussed neutrality and concluded that the mere wearing of a visible religious symbol cannot be seen as a violation of such neutrality. This decision was intended to give the priority to humanistic principles and balances of powers rather than political trends, but was perceived in the media as being unpopular in Europe (Rozehnal, 2019). The school was not satisfied with this, and in 2021 announced that it would proceed with the case using its right of appeal. This is perhaps an unsurprising step given the widespread support of the Czech far-right SPD political party, with its known Islamophobic agenda, and the support that school has received from the current president of the Czech Republic, who awarded the principal with a state award in 2018 and described her as "a brave woman in the fight against intolerant ideology".[11]

Nevertheless, above all of this the judicial system of the Czech Republic continues to remain separate from political speculation following the best practices of democratic society.

[11] "*Hnutí SPD se v žádném případě s tímto postojem nesmiřuje. A připomínám, že ve Sněmovně jsou dva návrhy zákonů z pera SPD*", translated as "The SPD movement is by no means in line with this position. And I remind you that there are two bills in the House from the pen of the SPD" – Tomio Okamura, the chairperson of SPD Tomio Okamura (Veselá, 2019).

Conclusion

In summing up the above, it becomes clear that the position of the ECtHR – which operates within the framework of the European Convention on Human Rights, balancing the predominance of one right over another – regarding the right to wear religious symbols is ambiguous. The court uses different approaches in making its decisions, considering the priorities of certain factors (for example, public safety over the rights of the individual) and offering particular states greater freedom within the framework of international law. The state, in turn, may decide not to follow the decisions of the ECtHR, giving priority to humanistic principles as in the example of the Supreme Court of the Czech Republic.

As is clear from the discussion in this article, the approach of the Czech Republic to the wearing of religious symbols – Islamic religious symbols, specifically – is not uniform due to political trends and vectors and the views of functionaries. Despite this, the Ombudsman and the Supreme Court provided well-argued analyses of the balance between equal and equitable treatment and the manifestation of religion. Although only two examples of wearing religious symbols at work and at study were provided, they received widespread media coverage, and both demonstrated the different approaches of the judicial bodies and of the political sphere. In addition, two drastically different approaches taken by school principals were provided, as well as the opinion of a political party and even of the president of the Czech Republic. It is significant to note that the stance taken by the Supreme Court did not follow the stance taken by the president, emphasizing the separation of powers between executive (president) and judiciary (Supreme Court) and legislative powers, again a phenomenon described by French political philosopher Baron de Montesquieu.

The Czech Supreme Court emphasized two important ideas regarding neutrality and equitable treatment: 1) the state must accept and tolerate religious pluralism, without any discrimination, whilst creating the conditions for the realization and protection of religious balance or neutrality; and 2) the fact that some religious elements or symbols (in this case the hijab) are foreign elements in society does not constitute a violation of the norms of this society, including the norms of social behaviour, morality, or ethics.

This ought to serve as an inspiration to the EU member states – France in particular, given its recent political circumstances – when adopting laws aimed at discriminating against particular communities that wear religious symbols. When, instead of the just and equitable treatment of its citizens and residents, the state applies stricter laws to a selected target group, thus artificially separating it from the rest of society, a contradiction described by Cicero as *summum jus, summa injuria* (Cicero, 44/1913, Book I, x, 33) is created. In other words, the excessively precise exercise of the right gives rise to the greatest injustice. Such a contradiction is revealed in the process of the implementation of legal norms. A certain role in overcoming such contradictions is played by the restrictive or diffuse interpretation of these norms by judicial practice – a good example of which was provided by the Czech Supreme Court.

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THE ASSOCIATION AGREEMENT AND THE IMPLEMENTATION OF DOMESTIC REFORMS TOWARDS STRENGTHENING THE RULE OF LAW, IN GEORGIA, MOLDOVA, AND UKRAINE[1]

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Abstract. The European Union has an Association Agreement with Georgia, Moldova, and Ukraine. One of the important commitments of this document is to bring the rule of law, democracy, and human rights systems closer to European standards. This article discusses the reforms carried out in the above mentioned Eastern Partnership countries in the field of rule of law and the developments, achievements, and current challenges of democratic institutions. It also analyzes the role of the European Union and the legal significance of the Association Agreement in ensuring progress towards the rule of law and democratic transformation.

Keywords: association agreement, European Union, reforms, rule of law, Georgia, Moldova, Ukraine

Introduction

Georgia, Moldova, and Ukraine share challenges in developing democracy since the restoration of their independence. The main obstacles in the process of democratic transformation are corruption, economic instability, oligarchic rule, the weakness of state institutions, and the "capture" of the state (Hellman, Jones, & Kaufmann, 2000, p. 11). For the past few decades, the European Union has been cooperating with these countries in various formats in the field of building democratic institutions. Notable among them are the European Neighborhood Policy and the Eastern Partnership. In March 2003, the EU launched Wider Europe – Neighborhood: A New Framework for Relations with Neighborhoods to the East and South, as a platform for defining a political direction among new neighbors. On 14 June 2004, the Council of the European Union approved the Policy Strategy developed by the European Commission, which involved the inclusion of Georgia, Moldova, and Ukraine into the European Neighborhood Policy. One of the basic principles of the European Neighborhood Policy is the desire to help neighboring countries implement internal reforms. The European Neighborhood Policy is committed to supporting the political process between the EU and its neighbors, which serves to implement the idea of a united and free Europe by strengthening democracy. In particular, the neighborhood policy envisages enhanced cooperation in such priority areas as democracy, good governance, the rule of law, the promotion of the independence of the judiciary, public administration, and the fight against corruption.

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The second important format of cooperation between Georgia, Moldova, and Ukraine and the European Union is the Eastern Partnership Initiative, launched on 26 May 2008, which was officially declared one of the most important Eastern Partnership platforms in Prague on 7 May 2009. The first platform in this initiative is Democracy, Good Governance, and Stability. The EU's relations with its neighbors will be guided by the EU Global Strategy and the Renewed European Neighborhood Policy, according to which building resilience at home and abroad means creating a more responsive union. The EU will strengthen the resilience of states and societies by supporting good governance and accountable institutions, and by working closely with civil society (EEAS, 2018).

It should be noted that the EU formed its priorities for EU relations with the Eastern Partnership countries in the European Parliament Resolution of 12 March 2014 on assessing and setting priorities for EU relations with the Eastern Partnership countries (Priorities for EU…, 2014), where the main priorities involved strengthening democratic institutions, protecting human rights, and ensuring the rule of law. An entirely new format of cooperation between the EU and the three Eastern Partnership countries in the field of democracy and the rule of law was provided by the conclusion of association agreements, which were implemented at different times in all three countries. On 1 July 2016, the Association Agreement between the European Union and the Republic of Moldova fully came into force, following ratification by all 31 signatories (Association Agreement of Moldova, 2016). On 18 December 2014, the European Parliament approved the Association Agreement with Georgia. Member states ratified the treaty (European Parliament Decision, 2014), and the agreement entered into force on 1 July 2016 (Association Agreement of Georgia, 2016). The Association Agreement between the European Union and Ukraine – Titles III, V, VI, and VII – and the related Annexes and Protocols of the Agreement have been provisionally applied since 1 November 2014, while Title IV has been applied since 1 January 2016 (European Commission, 2015). Provisions came into force on 1 September 2017 following the ratification of the Agreement by all signatories (Association Agreement of Ukraine, 2017). The Association Agreements set out the commitments of countries on democracy, human rights, and the rule of law, and serve as a kind of agenda for countries to transform and move closer towards the EU.

In relation to the EU, it is important that under the current plan, entitled "20 Results for 2020", a new series of long-term political objectives of the Eastern Partnership – 20 Deliverables for 2020 – focusing on key priorities and tangible results was adopted on 18 March 2020 (Joint Staff Working Document, 9.6.2017, SWD(2017). This Communication sets out the tasks of the Eastern Partnership after 2020. These tasks are based on five priorities, the first of which is the Partnership on Accountable Institutions based on the Rule of Law and Security. This sets out that, together with accountable institutions, the rule of law and security, the good governance of democratic institutions, successful anti-corruption policies, the fight against organised crime, and respect for human rights and security (including support for populations affected by conflict) are the backbone of strong and resilient states and societies. This document particularly emphasizes that the rule of law is a key factor in ensuring an effective business climate, and an important consideration in attracting foreign direct investment (European Commission, 2020).

Today, the stages of reforms in all three countries are different, but they face the same challenges in terms of developing democratic institutions and fulfilling their obligations to the EU in the field of rule of law. This article will discuss the challenges facing Georgia, Moldova, and Ukraine in the area of democratic reforms, and the achievements and challenges that these countries face in the implementation of the Association Agreements.

1. The Association Agreement of Georgia, Moldova, and Ukraine with the European Union

In several places, the texts of the Association Agreements define the commitment of states in the areas of domestic reform. Firstly, to strengthen respect for democratic principles, the rule of law and good governance, human rights, and fundamental freedoms is declared one of the main goals of political dialogue. The Association Agreement contains specific articles on the obligations of states in the areas of democracy, the rule of law, and the protection of human rights. Treaties vary from country to country in terms of the formulation of these obligations. Particularly

noteworthy in the Association Agreements are the norms on the implementation of the country's internal reforms. For example, according to Article 4 of the Agreement of Georgia, the Parties shall cooperate on developing, consolidating, and increasing the stability and effectiveness of democratic institutions and the rule of law; on ensuring respect for human rights and fundamental freedoms; on making further progress on judicial and legal reform, so that the independence of the judiciary is guaranteed, strengthening its administrative capacity and guaranteeing impartiality and effectiveness of law enforcement bodies; on further pursuing the public administration reform and on building an accountable, efficient, effective, transparent, and professional civil service; and on continuing the effective fight against corruption, particularly in view of enhancing international cooperation on combating corruption and ensuring the effective implementation of the relevant international legal instruments, such as the United Nations Convention Against Corruption of 2003. Article 13 of the Agreement, entitled "Rule of Law, Protection of Human Rights and Fundamental Freedoms", provides, more specifically, that in the area of freedom, security, and justice the Parties shall attach particular importance to further promoting the rule of law, including the independence of the judiciary, access to justice, and the right to a fair trial. The agreement states that the Parties will cooperate fully on the effective functioning of institutions in the areas of law enforcement and the administration of justice (OJ L 261, 30 August 2014, pp. 8–11). Under Article 4 of the Moldova Association Agreement, the Parties undertake to cooperate on specific internal reforms related to consolidating democratic institutions and the rule of law, human rights and fundamental freedoms, the independence of the judiciary, the reform of public administration, and in ensuring the effectiveness of the fight against corruption. The Moldovan Association Agreement places particular emphasis on public administration reform to ensure transparent decision-making and a strategic planning process, including the introduction and implementation of e-Governance, the creation of a professional civil service, effective and professional human resource management, and the promotion of ethical values in the civil service (OJ L 260, 30 August 2014, pp. 8–14).

Article 6 of the Association Agreement of Ukraine defines cooperation in the field of internal reforms of the country, where the document stipulates that the Parties shall cooperate in order to ensure that their internal policies are based on principles common to the Parties – specifically, the stability and effectiveness of democratic institutions and the rule of law, and in respect for human rights and fundamental freedoms, in particular as referred to in Article 14 of this Agreement. Article 14 of the agreement stipulates that in their cooperation on justice, freedom, and security, the Parties shall attach particular importance to the consolidation of the rule of law and the reinforcement of institutions at all levels in the area of administration in general, and in the areas of law enforcement and the administration of justice in particular (OJ L 161, 29 May 2014, p. 8).

It is important to define the place of the Association Agreement as an international agreement in the national legal system. In this respect, all three countries have an essentially similar approach. According to Article 4, paragraph 5 of the Constitution of Georgia, the legislation of Georgia shall comply with the universally recognised principles and norms of international law. An international treaty of Georgia shall take precedence over domestic normative acts unless it comes into conflict with the Constitution or the Constitutional Agreement of Georgia (Constitution of Georgia, 1995). Article 78 of the Constitution of Georgia, entitled "Integration into European and Euro-Atlantic Structures", specifically stipulates that constitutional bodies shall take all measures within the scope of their competences to ensure the full integration of Georgia into the European Union and the North Atlantic Treaty Organization (Constitution of Georgia, 1995). Therefore, it is considered that the constitutional provision, in fact, stipulates that Georgia gives obvious priority to the Association Agreement as a choice between the state and the people of Georgia, a vector of the rule of law and legal development, otherwise there can be no European integration (Kardava, 2021, p. 25).

Especially interesting is the Constitution of Ukraine, according to Article 9 of which international treaties that are in force and are agreed to be binding by the Verkhovna Rada of Ukraine are part of the national legislation of Ukraine. The conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution (Constitution of Ukraine, 1996). This provision implies that, after ratification, the EU–Ukraine association agreement will be an integral part of the Ukrainian legal order.

Pursuant to Article 19(2) of the Law of Ukraine "On International Treaties of Ukraine", it will enjoy priority over conflicting national legislation. However, this is not the case if there is a conflict with the provisions of the Ukrainian Constitution (Petrov, Van der Loo, & Van Elsuwege, 2016, pp. 15–16). The Constitution of Ukraine went further in terms of integration with the European Union when, in February 2019, the words "and confirming the European identity of the Ukrainian people and the irreversibility of the European and Euro-Atlantic course of Ukraine" were added to its preamble. In addition, the powers of the Verkhovna Rada of Ukraine include the implementation of the strategic course of the state for the acquisition of the full membership of Ukraine in the European Union and in the North Atlantic Treaty Organization, and the President of Ukraine is the guarantor of the implementation of the strategic course of the state for Ukraine's full membership in these organizations. Finally, the Cabinet of Ministers of Ukraine ensures the implementation of the strategic course of the state for the acquisition of the full membership of Ukraine in the European Union and in the North Atlantic Treaty Organization (Vedomosti Verkhovnoi Rady, 2019, No. 9, p. 50).

As yet, the Moldovan Constitution does not contain a direct reference to EU integration, although it should be noted that, according to Article 8 of the Constitution of the Republic of Moldova, the Republic of Moldova commits to observe the Charter of the United Nations and the treaties to which it is a party, to ground its relationships with other states on the unanimously recognized principles and norms of international law. The coming into force of an international treaty containing provisions which are contrary to the Constitution shall be preceded by a revision of the latter (Constitution of the Republic of Moldova, 1994).

In view of all the above, one must agree with the opinion that the relevant provisions of the Constitutions of Georgia, Moldova, and Ukraine imply that properly ratified association agreements will not only be equated to the same status as national laws, but will also enjoy a priority over conflicting national legislation (Petrov, 2015, pp. 241–253). Thus, the Association Agreement and the norms of the Constitution are an important binding legal obligation for countries to implement appropriate reforms in their domestic legislation.

2. Domestic Political Reforms and Democratic Development in Georgia

Since the entry into force of the Association Agreement, Georgia has made significant changes towards the rule of law, human rights, and the building of democratic institutions. If we look at the results of the changes implemented over the years, it can be said that these reforms were not always effective and were characterized by some instability, delays, and frequent changes. The first year of the Agreement was marked by significant challenges for Georgia, primarily related to the 2016 parliamentary elections. The main challenge in this case was adopting fair election legislation and ensuring the free participation of political parties and citizens in elections. In this regard, it should be noted that amendments to the Election Code of Georgia were made in 2015, although the EU report still indicated that the calm and open campaign atmosphere was impacted by allegations of unlawful campaigning, cases of a lack of transparency and effective redress, and a number of violent incidents. The existing legal framework allows for the free establishment and operation of political parties and civil society organisations (Joint Staff Working Document, SWD (2016) 423, p. 3).

The independence of the judiciary, the qualification of judges, and effective justice remained problems for Georgia at the time of the entry into force of the Association Agreement. For this period, the drafts of the "third wave" of judicial reform, which were initiated in 2015, were considered. These changes anticipated transparency in judicial management, the functioning and accountability of the High Council of Justice, and the random allocation of cases. Also important was the issue of selecting candidates to be judges, as judges were appointed for a three-year probationary period which was the subject of criticism (Coalition for an Independent and Transparent Judiciary, 2013). The bill provided for some steps in this direction, although heavy delays to its adoption were criticized by observer organizations (Burjanadze, 2017). The EU report also stated that the transparency in the allocation of cases, in the selection of judicial candidates, and of court administrators was not fully ensured (Joint Staff Working Document, SWD (2016) 423, p. 3).

In 2015, Georgia also began reforming the prosecution system to ensure its independence. The Prosecutorial Council was established in 2016 for this purpose. However, transparency in the appointment, evaluation, transfer, and promotion of prosecutors, as well as in the correct implementation of existing disciplinary procedures and ethical standards, remains to be addressed (Joint Staff Working Document, SWD (2016) 423, p. 3). At the same time, the reform of public administration is noteworthy, first reflected in the adoption of a new law on civil service (The Law of Georgia on Public Service, 2015) by the Parliament of Georgia in 2015, which included the transition to professional public service, political neutrality, and many other significant improvements in legislation. Georgia also accepted a new Human Rights Action Plan for 2016–2017 (Human Rights Secretariat, 2015) and the Equality and Integration Strategy and its Action Plan 2015–2020 (2015). The Juvenile Justice Code (Law of Georgia on Juvenile Justice, 2015) entered into force in 2016, and provided a comprehensive legal framework for children facing judicial proceedings, child victims, and child witnesses. It is also noteworthy that Georgia has ratified the 3rd Optional Protocol to the Convention on the Rights of the Child (Additional Protocol…, 2019), providing vulnerable children with possibilities to seek redress if their rights are violated. At the same time, Georgia has adopted a National Strategy for Combating Organised Crime 2015–2018 (National Strategy…, 2015) and a related Action Plan (2015–2016), and has ratified the Budapest Convention on Cybercrime. However, in parallel with the steps taken by the European Union, it indicated that, in terms of the political transformation, attention should now gradually shift towards ensuring the full and sustainable implementation of newly adopted legislation. Further, it is increasingly important to ensure the proper functioning of and cooperation among fundamental institutions, in full respect of their independence and of the principle of separation of powers (Joint Staff Working Document, SWD(2016) 423).

The year 2017 was different for Georgia as the country underwent a fundamental constitutional reform that moved it from a semi-presidential government to a parliamentary system. It should be noted, however, that opposition parties did not take part in the preparation and adoption of the constitutional amendments, which was a problem in terms of reaching a political consensus and led to questions regarding the legitimacy of the document. The key issue in these constitutional changes was the electoral system. The opposition demanded the abolition of the mixed electoral system and the transition to a fully proportional one, but the ruling party did not agree with this, and eventually the mixed electoral system was again maintained with minor changes for the 2020 elections. In 2017, some steps were taken in the field of human rights, and in particular in the protection of women's rights. Georgia ratified the Council of Europe (Istanbul) Convention on Preventing and Combating Violence against Women and Domestic Violence (Convention…, 2017). An Inter-agency Commission on Gender Equality, Violence against Women, and Domestic Violence was established in June 2017. In the same year, a revised National Anti-Corruption Strategy and a new Anti-Corruption Action Plan for 2017–2018 were adopted by the Government on 26 September (Resolution of the Government of Georgia, No. 443, 2017). In January 2017, Georgia introduced a monitoring system for asset declarations submitted by public officials.

Justice reform remained a major challenge for Georgia after December 2016, when a package of legislative amendments on the third wave of judiciary reform was adopted. These changes concerned the publication of all rulings, the progressive introduction of the random electronic allocation of cases, and the selection of judicial candidates and disciplinary procedures, but did not address the application of the probation period (Organic Law of Georgia, 2017). At the same time, a first comprehensive Judiciary Strategy and its five-year Action Plan were adopted by the High Council of Justice in May 2017 (Decision of the High Council of Justice, No. 1/162, 2017). It should also be noted that, for the first time in the history of Georgia, the new Constitution introduced the appointment of judges to the Supreme Court by Parliament upon nomination by the High Council of Justice, as well as lifelong tenure for Supreme Court judges. In 2017, Georgia also adopted a prosecutorial strategy (Strategy of the Prosecutor's Office of Georgia, 2017), the new ethics code, and an appraisal system for prosecutors. However, these changes were not enough, and the EU report also stated that the constitutional amendments should further increase the independence of the Prosecutors Office from the Ministry of Justice (Joint Staff Working Document, SWD(2017) 371).

Although Georgia occupied the best position in the region in terms of the fight against corruption, by 2018 the focus shifted to elite corruption, and it was important to make changes in the separation of powers, an independent judiciary, and the Prosecutor's Office. Institutional changes were related to the constitutional reform that was finally adopted by Parliament in 2018, which introduced a fully proportional election system as of 2024 and abolished direct presidential elections. The same year saw significant changes in political life. In May 2018, former Prime Minister and businessman Bidzina Ivanishvili was elected as the Chair of the Georgian Dream party. The prime minister was replaced, and a new president, Salome Zurabishvili, was elected. She was formally considered an independent candidate, but in reality her victory in the second round of elections in October was secured by the open support of the ruling party. The opposition believed that the election was rigged, and that the government managed to use administrative resources to win the presidency. In 2019, the issue of the reform of the electoral system was still relevant, and was the subject of controversy between the ruling party and the opposition parties. It was important that all major political parties signed the internationally-mediated Memorandum of Understanding and the Joint Statement of 8 March 2020, which established the key features of the electoral system based on 120 proportional and 30 majoritarian seats – a fair composition of electoral districts – and enabled this system to be used for the October 2020 parliamentary elections (Civil.ge, 2020). The EU and US embassies in Georgia played an important role in reaching this agreement. In order to fully implement the agreement, President Zurabishvili pardoned two people who were considered by the opposition to have been the subject of politically motivated arrests. Amendments to the Electoral Code were also made to improve the electoral system.

In 2019, the issue of selecting judges for the Supreme Court of Georgia engendered great resistance and criticism. The public hearings of candidates in parliament revealed many shortcomings, and showed that the majority of them did not even meet the minimum criteria of qualification and professional integrity. Nevertheless, the Georgian Parliament appointed 14 candidates to the Supreme Court of Georgia for life. These appointments were made without the participation of the opposition and in the wake of protests by civil society organizations. In fact, the ruling party completed the selection of judges for the Supreme Court of Georgia in a one-party manner, which can be described as an attempt to influence the court (Nakashidze, 2020). The EU report also noted that the recent selection procedure of Supreme Court judges was not entirely in line with these recommendations and was marred by serious shortcomings, emphasizing the importance of a depoliticised judiciary free from political interference and of respect for transparency, meritocracy, and accountability in the appointment of judges to the Supreme Court of Georgia and other judicial institutions. In the same period, the issue of political polarization in Georgia was especially noteworthy, and the European Union emphasized the importance of reducing antagonism and the polarisation of politics and of ensuring constructive cooperation in the country's democratic institutions, in particular in the Parliament of Georgia. The EU also considered the improvement of the political climate to be a necessity, along with building trust among all political and institutional actors as well as between them and the Georgian people. Further, the EU called on Parliament to make full use of the opportunities available to Georgia as a priority country for the European Parliament's democracy-support activities and to engage in a dialogue to identify its needs (Committee on Foreign Affairs, 2020).

The year 2019 was marked by special tension in Georgia. The most significant protest started on 20 June, after the 26th General Assembly of the Inter-Parliamentary Assembly of the Orthodox Church (I.A.O.) opened in Tbilisi. Protests were sparked by the arrival of the Russian I.A.O. delegation to the plenary hall of the Georgian Parliament, and the decision to let a Russian lawmaker, Sergei Gavrilov, temporarily sit in the chair of the speaker. This act was considered very insulting by Georgian opposition members and the public at large, as the Russian Federation occupies 20% of the territory of Georgia, and Georgia does not have diplomatic relations with Russia. Opposition MPs protested the appearance of the Russian MP in Parliament. The government was forced to suspend the assembly and remove the Russian MP from the building, but citizens had begun gathering. Finally, tear gas and rubber bullets were used against the protesters, but to no avail, and several hundred people were injured as a result of the violent dispersal, including police officers, journalists, and peaceful protesters. Three participants of the rally lost their eyesight after being hit by rubber bullets. Later, protesters made three demands: the resignation of the Interior Minister; the adoption of proportional representation for the next parliamentary elections; and the immediate release of detainees. On the second day, Irakli Kobakhidze resigned from the position of Speaker of

Parliament and on 24 June 2019, the Georgian Dream coalition announced that the 2020 parliamentary elections would be conducted through a proportional system under a zero electoral threshold (Nakashidze, 2020, pp. 134–135). However, this promise was not eventually fulfilled.

In 2019, significant legislative changes were made in the field of human rights. In May, the Labour Code and a number of other laws were amended, with sexual harassment being defined as a form of unlawful discrimination in the workplace and administrative penalties being introduced for sexual harassment in public spaces. Amendments to improve enforcement of the Law on the Elimination of all Forms of Discrimination were adopted in May (Legislative Herald of Georgia, 25/02/2019), and in September Georgia also adopted a Child Rights' Code which fully entered into force on 1 June 2020 (Child Rights' Code of Georgia, 2019). This document introduced legal grounds, safeguards, and guarantees for the realisation of the overarching principles, rights, and freedoms of children. In addition, a cooperation mechanism involving prosecutors, police officers, lawyers, social workers, and psychologists was established to support the implementation of the Juvenile Justice Code. In the same year, the Government adopted a 2019–2020 action plan to implement the roadmap of public administration reform (Resolution of Government of Georgia, No. 274, 2019).

The issue of selecting judges remained a major challenge in the field of justice and the rule of law. In March 2019, Parliament approved amendments to the Law on Common Courts that established the necessary selection criteria. The power to select judges rests entirely in the hands of the Council of Justice. On 12 December, Parliament appointed 14 candidates for life tenures to the Supreme Court. This overall process failed to ensure the necessary transparency and meritocracy. In December, Parliament also passed amendments to the fourth wave of judicial reform, which concerned disciplinary action, the rules of procedure of the High Council of Justice, and the reform of the Council itself, especially the substantiation of decisions made by members of the High Council of Justice (Parliament of Georgia, 2019). Prior to the adoption of the law, observers had argued that this reform was not in the interests of the judiciary but in the interests of politics, and that the government was trying to maintain a friendly judiciary (Mshvenieradze, 2019). In 2019, changes were also made to the prosecution system. In particular, the powers of investigators and prosecutors were somewhat separated as part of a significant police reform that also sought to disentangle the operational and investigative functions of police officers. In July, the Anti-Corruption Council adopted a new anti-corruption strategy and action plan for 2019–2020 (Government of Georgia Resolution No. 484, 2019). The Ministry of Justice presented the first comprehensive crime prevention and penitentiary strategy in February (Order of the Minister of Justice of Georgia, No. 385, 2019). In May, the Inter-Agency Coordinating Council on Drug Abuse adopted a strategy against drug use, which included the establishment of a national monitoring centre. While civil society was discussing the liberalization of drug policies, on 2 August the Constitutional Court declared that it was unconstitutional to impose administrative detention and criminal imprisonment for the production, purchase, or storage of drugs that are for private use and do not lead to rapid addiction and/or aggressive behavior (*The Public Defender of Georgia v. Parliament*, 2019). Despite some steps towards the rule of law, the EU 2020 report noted that the implementation of the fourth wave of reforms would be important throughout 2020. Georgia's commitment to upholding the highest standards of ethics and integrity in its judiciary remains critical (Joint Staff Working Document, SWD(2020) 30).

Georgia faced a political crisis in 2020, in which the European Union ultimately played an important role. Parliamentary elections were held on 31 October 2020, where the ruling Georgian Dream party again won a majority. Elections were again held under a mixed electoral system, with 30 members elected to a 150-member parliament by majority vote. With the help of the majoritarian seats, the ruling party finally achieved the formation of a majority. Georgian Dream then formed a new cabinet led by Prime Minister Gakharia, and, in January 2021, the party's founder – billionaire Bidzina Ivanishvili – announced his departure from politics. The party then elected a new chairman, Irakli Kobakhidze. Opposition parties did not recognize the results of this election, announced a boycott of the election results, and refused to enter parliament.

Significant legislative changes have been implemented in terms of the protection of human rights. In particular, for the 2020 parliamentary elections, quotas were set for women on proportional party lists, and of 150 members

elected to parliament, 31 were women. Parliament also made changes to the Labour Code, introducting paid maternity leave, provisions protecting pregnant women and women who have recently given birth, and protection against discrimination, e.g., direct and indirect discrimination, harassment (Organic Law of Georgia, 2020). In February 2020, the Government adopted an Equality Chapter to the National Human Rights Action Plan addressing the needs of those belonging to the Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) community (Resolution No.116 of Government of Georgia, 2018). It is also noteworthy that in July 2020 the Law on the Rights of Persons with Disabilities was adopted.

The EU expressed its position on Georgia's reforms in the 2020 Association Report, which stated relatively softly that a demonstrable reform commitment as regards the consolidation of democracy and the reform of the judiciary will be crucial to further advance Georgia's European path. The EU also noted that the implementation of the fourth wave of judicial reforms, upholding the highest standards of ethics and integrity in the judiciary, the reform of the High Council of Justice, and the selection procedure for Supreme Court judges being brought into line with European standards will remain essential throughout 2021 (Joint Staff Working Document, SWD(2021)18). Thus, in 2021, the issue of selecting the members of the Supreme Court of Georgia – where reforms are necessary to ensure the independence of the judiciary and the rule of law – remains on the agenda.

In 2021, an unprecedented case of EU participation in domestic policy was observed in Georgia. European Council President Charles Michel, who has been to Georgia several times in person, had been involved in resolving several months of opposition protests against the 2020 parliamentary elections and the country's political crisis. Finally, with the involvement of the European Union, an agreement was reached between the political parties, which contained very important provisions on the rule of law, human rights, power-sharing, and accountability in Georgia's electoral system and future reforms. The signed agreement specifically mentions: addressing perceptions of politicized justice; ambitious electoral reform; election thresholds; the formation of electoral commissions; trust in electoral administration; the rule of law/judicial reform; enhanced transparency and merit-based selections in the appointment of judges; rules for the publication of judicial decisions and appointments to the supreme court; reform of the high council of justice to increase transparency, integrity, and accountability; ensuring the broadest, cross-party political support for the appointment of the prosecutors general; power sharing in parliament; and future elections. To this end, early parliamentary elections shall be called in 2022 if the Georgian Dream party receives less than 43% of valid proportional votes in the October 2021 local self-government elections (A way ahead for Georgia, 2021). This document, together with its support, represents recognition of the difficult situation in recent years in the field of democratic reform by the Georgian government and the signatory parties. Georgia needs serious work in the coming years to implement the reforms placed in the Association Agenda, especially when the government of the country announces that it plans to apply for EU membership by 2024.

3. Domestic Political Reforms and Democratic Development in Moldova

Since 2016, Moldova has made a number of legislative changes to fulfill its obligations under the Association Agreement in the areas of democracy, the rule of law, and human rights. Political life marked 2016, in that the presidential election, held in October/November, was the first direct presidential election since 1996, and was conducted largely in line with international standards. However, shortcomings were evdient in campaign financing, the use of administrative resources, and media coverage (OSCE, 2017, pp. 28–31). These elections were won by a pro-Russian candidate, Igor Dodon, from the Party of Socialists of the Republic of Moldova, which represented a significant delay in the implementation of legal and political domestic reforms.

Reforms in Moldova have always been difficult as a result of the political situation, but it is still worth noting that, based on the recommendations of the European Commission and development partners, the government adopted the Public Administration Reform Strategy in July 2016, together with the action plan in December 2016 (Public Administration Reform Strategy, 2016). The National Preventive Mechanism against Torture resumed its activities in December 2016, and the law on the rehabilitation of victims of torture was adopted in September 2016 and entered into force in March 2017. On 14 December 2016, the government adopted the Strategy for the

Consolidation of Interethnic Relations in the Republic of Moldova for 2017–2027 (Government of the Republic of Moldova, 2016). At the same time, Moldova has ratified most international human rights treaties, including the Convention on the Elimination of All Forms of Discrimination against Women and the European Convention on Gender Equality (Ratification Status for CEDAW, n.d.). Based on the Anti-Discrimination Law of 2012, an Equality Council was created in 2014 (Law of Republic of Moldova No. 298, 2012), and Parliament adopted a legislation on gender equality in April 2016 that set out a quota to ensure at least 40% of candidates in central and local elections, government ministers, and members of political parties were female (UN Women, 2016). Moldova signed the Convention on preventing and combating violence against women and domestic violence in February 2017 (Council of Europe, 2017), and adopted the Child Rights' Strategy (Government Decision No. 434, 2014) and appointed an ombudsman for children in 2016.

In 2016, Moldova began implementing changes in the direction of justice, and a reform of the judicial map was adopted in 2016 which reduced the number of courts. A new law on the Prosecution Service entered into force in August 2016, which included strengthening the independence of the prosecution, limiting the powers of prosecutors, and reducing their number. On 8 December 2016, the President appointed the new Prosecutor General in accordance with the amended constitution. With the court, corruption has been a major challenge for Moldova since the very first years of the signing of the Association Agreement. The 2011–2015 National Anti-Corruption Strategy was extended to 2016, and the adoption of a new strategy in 2017 was planned. Thus, some changes were made to the legislation in this way, although the EU noted that 2016 was a year of new beginnings. These have yet to translate into a more consistent implementation of the steps of reform. Based on this legislation, it is crucial that implementation takes place in a way that is geared towards tangible results. The importance of these reforms was also one of the main concerns of the Eastern Partnership Summit in Brussels in late 2017 (Joint Staff Working Document, SWD(2017) 110).

In terms of democratic development, it is noteworthy that in July 2017 Moldova changed its electoral system from proportional to mixed proportional-uninominal representation. The Venice Commission and the Office for Democratic Institutions and Human Rights, in a joint opinion, noted in particular a lack of consensus on this reform, and (based on specific concerns such as: risk of influence at constituency level; high thresholds; and vague criteria for the definition of constituencies) indicated that "such a fundamental change, while a sovereign prerogative of the country, is not advisable at this time" (European Commission for Democracy through Law & OSCE/ODIHR, 2017a). The Venice Commission and the OSCE/ODIHR, in another joint opinion, raised concerns related to the necessary improvement of the legal framework on the funding of political parties and campaigns, and on strengthening the implementation of, and mechanisms for, sanctions (European Commission for Democracy through Law & OSCE/ODIHR, 2017b).

Significant legislative changes in the field of human rights have continued to be implemented since 2017. In particular, in May 2017, Parliament amended the constitution on the guarantee of the activities of an Ombudsman's Office (International Ombudsman Institute, 2017), the Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Council of Europe, 2021) was signed, a new Law on persons with disabilities was adopted by Parliament, and a new Human Rights Action Plan 2018–2022 was adopted by the Government in November 2017 (National Human Rights Action Plan, 2018). In 2017, the Government also approved a new National Gender Equality Strategy 2017–2021 (Order of the Government of the Republic of Moldova No. 259, 2017), and Moldova continued to work on the 2016–2020 Action Plan for the Child Protection Strategy (Government Decision No. 434, 2014) for the adoption of relevant legislative acts and the full implementation of the document. Judicial reform and the improvement of the human rights situation were strategic issues in Moldova's cooperation with the EU Association Agreement. For this purpose, the government prepared a new justice sector reform strategy for 2018–2024.

The fight against corruption was remarkable during this period in Moldova, and a new National Integrity and Anti-Corruption Strategy for 2017–2020 came into force in May 2017 (Republic of Moldova Parliament Decision Decision No. 56, 2017). Separate anti-corruption plans were adopted for different sectors to implement the

strategy, and a new Law on preventing and combating money laundering and terrorism financing was adopted in December 2017 (Law of the Republic of Moldova No. 308, 2017). Amendments were also made to avoid conflicts of interest in the public sphere, and to introduce electronic declarations. Moldova adopted the National Programme on Cyber Security for 2016–2020 (Order of the Government of the Republic of Moldova No. 811, 2015) to bring its national legislation closer to the EU's legal standards. Despite these changes, according to the EU, considerable efforts were necessary to strengthen the rule of law in Moldova by tackling high level corruption, recovering funds from banking fraud, and bringing to justice those responsible. Ahead of upcoming parliamentary elections (at the end of 2018), it was important to ensure inclusiveness in the electoral process. Public administration reform also continued, with the goal of creating a more efficient civil service and reinforcing these respective institutions (Joint Staff Working Document, SWD(2018) 94).

One of the major challenges for Moldova in transforming democratic governance has been the electoral system and the holding of free, fair elections at all levels. Significant criticism from the EU (European Parliament resolution of 5 July 2018) and other international organizations (Eastern Partnership Civil Society Forum, 2018) emerged in 2018 after the invalidation of the election of the Chişinău mayor, which was won by an opposition candidate. The 2019 parliamentary elections took place using a mixed proportional-uninominal electoral system, following the change in the electoral system in 2017. According to the final report of the OSCE/ODIHR of 22 May 2019, these elections were competitive and fundamental rights were generally respected, but there was one recommendation: that authorities should consider a comprehensive review of the electoral legal framework to eliminate inconsistencies and ambiguities, and to address the reccomendations of ODIHR and the Council of Europe (ODIHR, 2019a, p. 25).

The steps taken by Moldova since 2018 in fulfilling its obligations in the field of human rights protection should be noted. In this respect, the new 2018–2022 Human Rights Action Plan adopted by Parliament in May 2018 (National Human Rights Action Plan 2018–2022, n.d.) is noteworthy. However, the ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, signed in February 2017, had not yet been ratified by Parliament by 2019. Despite this, the National Strategy for preventing and combating violence against women and domestic violence for the years 2018–2023 (Government Decision No. 281, 2018) and the first report on the implementation of the 2017–2021 National Gender Equality Strategy were adopted by the government of Moldova (Strategy, 03/09/2017). In addition, in 2018, the government also approved the 2018–2019 Action Plan for the National Council for the Protection of Children's Rights (Decision of the National Council no.1, 2018).

The Moldovan court was faced with significant challenges in the area of judicial independence, including: nontransparent decisions by the Superior Council of Magistracy on the selection, appointment, career, evaluation, dismissal, and investigation of judges; and a five-year initial appointment period for judges. In July 2018, Parliament adopted amendments improving disciplinary procedures for judges, including the strengthening of the judicial inspector's role – as in Georgia. Alongside this, in October 2018, amendments to the Law on judiciary and the Law on the status of judges, the selection criteria for judges, and the promotion of judges based on transparency were published (Law of the Republic of Moldova, No.544, 20/07/1995). In 2019, Moldova also initiated the new 2021–2024 Strategy for ensuring the independence and integrity of the justice sector and the Action Plan for the years 2021–2024 (The Strategy for Ensuring…, 2019).

The biggest challenge faced by Moldova was the fight against corruption, and the country has taken some steps in this regard. First, relevant legislative changes related to conflicts of interest and procedures were adopted. It is especially noteworthy that Moldova developed the National Integrity and Anticorruption Strategy 2017–2020 (Republic of Moldova Parliament Decision No. 56, 2017), and a mandatory system for the e-declaration of conflict of interest statements was established in January 2018. In August 2019, the government formed the Coordinating Council and Consultative Bureau for anti-corruption and justice reform (Cotidianul, 2019). Despite the existence of these documents, their actual implementation was slow and inefficient due to the political instability in the country.

After the February 2019 parliamentary elections, the country entered into a political crisis and the process of forming a government lasted three months. Finally, in June 2019, parliament sided with the government of Igor Dodon's pro-Russian "Socialists" and the left-wing pro-European bloc against the ASHUM ruling coalition of Plahotniuc, and formed a government with Maia Sandu as prime minister. However, on the same day, the Moldovan Constitutional Court declared the appointment of the Prime Minister and the formation of the government unconstitutional (The Constitutional Court, 2019a), which deepened the crisis. Later, however, on June 15, the Constitutional Court reviewed all of its decisions and declared the government of Maia Sandu constitutional (The Constitutional Court, 2019b). This court decision was followed by the resignation of the President of the Constitutional Court (The Constitutional Court, 2019c), and then the resignation of the entire court (Radio Free Europe/Radio Liberty, 2019). The political crisis in Moldova was responded to by the European Union, which was interested in ending it. The statement announced that the European Union stands ready to work with the democratically legitimate government, on the basis of a mutual commitment to reforms and to the core principles enshrined in our Association Agreement. The respect for the rule of law and democracy should remain the pillars of our relations.This is also foremost what the citizens of the Republic of Moldova expect and deserve (European Commission, 2019).

On 24 June 2019, the new government published its programme, which included following changes: releasing the state from captivity and strengthening the independence of the institutions, especially in the field of justice; consolidating elective democracy; returning to the proportional electoral system; ensuring the rule of law via priority actions, and ensuring that the rule of law will strengthen the functioning of democratic institutions; implementing the anti-oligarchic package of laws and the definitive removal of the oligarchic regime from power; and "cleaning up" the system of corrupt judges and prosecutors. This programme also noted that the immediate and determined fight against large-scale corruption is the only way in which state institutions can regain legitimacy and trust from citizens, and through which the sustainable and real implementation of future reforms in economy, education, health, social assistance, etc. can be achieved (Activity Program of the Government of the Republic of Moldova, 2019). However, this government was dissolved in November 2019 (Tanas, 2019) and replaced by the socialist-dominated government of Ion Chicu until 23 December 2020, when Ion Chicu resigned (Euronews, 2020b) after Maia Sandu, of the Party of Action and Solidarity (PAS), won the presidential election and took office the following day. The government of Ion Chicu was replaced by acting Prime Minister Aureliu Ciocoi on 31 December 2020.

With the change of government, a new government program was adopted on 16 December 2019, which also envisioned significant reforms in the area of rule of law. These reforms included: the adjustment of the Concept for the Reform of the Supreme Court; the Extraordinary Evaluation of Judges and Prosecutors; the appointment of an independent and upright Prosecutor General; the identification and removal of the vulnerabilities of justice to unjustified political, business-related, and criminal pressure; the investigation and prosecution of those responsible for the devaluation of the country's banking system; the implementation of schemes of misappropriation of public and private property; and the identification of urgent solutions to prevent blockages in the functioning of the judicial system. The program also included reforms in the field of public administration (Activity Program of the Government, 2019). In the areas of rule of law, human rights, and corruption, the Government's Action Plan for 2020–2023 was important. This plan was approved by the Government of the Republic of Moldova on 11 December 2019, and envisaged justice reform, fighting corruption, and respect for fundamental rights and freedoms. More specifically, the government focused on issues such as evaluating judges, reviewing the role of the Supreme Court of Justice, streamlining the disciplinary liability of judges and prosecutors, ensuring the successful implementation of anti-corruption policies, reviewing the legal framework for strengthening fundamental freedoms, and other issues (Government of Republic of Moldova Decision No. 636, 2019).

Currently, all attention is focused on the 2021 snap parliamentary elections, which will be held in Moldova on 11 July 2021 and were announced when President Maia Sandu signed a decree dissolving parliament on 28 April

2021. Gaining a solid majority in parliament will enable the pro-European government to implement fundamental reforms on the EU–Armenia agenda for Moldova's democratic transformation.

4. Domestic Political Reforms and Democratic Development in Ukraine

It is widely known that work on the Association Agreement in Ukraine was proposed during the presidency of Viktor Yanukovych, and there was a plan to sign this agreement at the EU Vilnius Summit in late 2013. However, due to its relationship with Russia, the Maidan protests, and subsequent Russian aggression, the Association Agreement with Ukraine, unlike in the cases of the other two countries, was signed in two stages – the political part of the document in March 2014, and then its economic component in June of the same year by the new President, Poroshenko. In the context of such a development, the offer and signing of the Association of Ukraine was a demonstration of the significant support of the European Union, and placed before the Ukrainian authorities the commitments of the most important reforms. With new free parliamentary and presidential elections, Ukraine took significant steps towards democratic development. However, the newly elected government needed to implement the democratic reforms envisaged by the Association Agreement, including constitutional reforms, to uphold the principle of separation of powers and to establish an accountable government.

In this regard, in June 2016, the Rada adopted the Law on Amendments to the Constitution towards a major reform of the political system (CMS Law Now, 2016). This law provided for significant changes to the judiciary. In particular, it strengthened the independence of the Constitutional Court of Ukraine (giving any natural or legal person the right to appeal to the Constitutional Court on the constitutionality of the law to be applied in their case by the Court of First Instance), the appointment of judges, career advancement, and new rules of responsibility. It also established that the majority of the members of the High Council of Justice will be elected by judges, abolished the five-year probationary period for the appointment of judges, extended the term of office, and appointed the President of Ukraine to replace judges (Kyrychenko, 2017). Legislative changes increased the powers of the High Council of Justice that related to the appointment of judges, disciplinary proceedings against judges, the dismissal of judges, and adjudicating a judge on arrest or detention (Vedomosti Verkhovnoi Rady, 2016, No. 28, p. 532).

In the first years after the entry into force of the Association Agreement, Ukraine began to implement significant reforms in the field of democratic governance and the fight against corruption. In this regard, the launch of a new agency – the National Anti-Corruption Bureau – was significant, along with the creation of the Specialized Anti-Corruption Prosecution Office. The National Agency for Prevention of Corruption has also been operating in Ukraine since 2016, which mainly focuses on political corruption, party funding, and conflict of interest issues. An important function of this agency is the system of declarations, the creation of which also began in 2016. Despite such changes, some experts noted that one year after the formation of the second cabinet led by Arseniy Yatsenyuk (2 December 2014), and 18 months after the inauguration of Petro Poroshenko as president (7 June 2014), the reform process in Ukraine was still moving at a snail's pace, and was far from fulfilling its post-Maidan declarations. This also provoked increasing frustration among the public due to the lack of expected effects (Olszański et al., 2015). Ukrainian society had extremely high expectations, and perhaps the EU's support for the reform process engendered even more hope. However, as Ukraine has remained at the highest level of corruption in the Transparency International Corruption Perceptions Index for the past 15 years, rapid reforms have required serious effort from the government. The judiciary, police, and state administration were largely perceived as the most corrupt institutions in the country. After the 2014 revolution, the government seems to have launched a series of reforms aimed at increasing the rule of law and preventing corruption. To this end, the state decided to open state registers and databases to the public, and to introduce an electronic public procurement system. Particularly noteworthy was the adoption of a new law on public service in 2016, which also provided for the selection of public servants on the basis of open competition and the depoliticization of public service (Vedomosti Verkhovnoi Rady, 2016, No. 4, p. 43). Work began with the help of the EU, and at the same time the issue of setting up a new anti-corruption court was actively on the agenda.

Steps towards decentralization were also important for Ukraine in the process of democratic transformation, as the country was still effectively governed by the Soviet system. Changes were made in the area of financial and budgetary decentralization, and also to the budget and tax legislation, on the basis of which significant powers were transferred to local self-government. EU assistance was important here, in particular its active support for the decentralisation process (U-LEAD with Europe: Ukraine, n.d.). In the fight against corruption, public administration reform, implemented in 2016 with the adoption of the Civil Service Law, was very important. A special part of this reform was the selection of public servants, which had not been the practice in previous years in Ukraine and was an important step forward. In particular, the 2016–2020 Strategy for Public Administration Reform and its accompanying implementation plan were adopted (Cabinet of Ministers of Ukraine Order, No. 474-r, 2016). In June 2016, constitutional amendments were adopted in the field of justice to ensure the independence of the judiciary, providing for the establishment of a new Supreme Court, increased guarantees of independence, and the start of the process of selecting new judges. At the same time, a Police Reform was launched, a number of powers were transferred from the Ministry of Internal Affairs to the National Police of Ukraine (Vedomosti Verkhovnoi Rady, 2015, No. 40–41, p. 379), and the formation of a new structure of patrol police was completed in October 2016 (Order of the National Police of Ukraine, No. 73, 2015).

In 2017, Ukraine continued the implementation of the 2015–2020 National Strategy and Action Plan on Human Rights (Decree of the President of Ukraine No. 501, 2015). In this context, it is noteworthy that the term of office of the Ombudsman expired, and a new procedure for their selection was approved in July 2017 (Kryklyvenko, 2017). Gender-based discrimination was relevant at the same time, as the Vice Prime Minister for European and Euro-Atlantic Integration was appointed to coordinate the protection of rights and the post of gender policy commissioner was created (Press Service of Vice Prime Minister of Ukraine, 2017). Of particular note was a draft law on the ratification of the Council of Europe's Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), which was signed on 7 November 2011. Then, in November 2016, the Ukrainian Parliament considered but failed to ratify the Council of Europe Convention (News Agency Unian, 2016), which was not yet accepted for 2017. In Ukraine, it was believed that ratification was postponed, in particular, because of the words "gender" and "sexual orientation" in the text of the document. According to some of the MPs, they represented the ruin of "Ukrainian identity" and the "basics of Christianity" (UCMC, 2017). In the field of human rights, it should be noted that a new Public Defender, Liudmyla Denysova, was elected in March 2018 (Ukrainian Parliament Commissioner for Human Rights, 2018). In addition, the Government Commissioner for Gender Equality Policy was officially nominated in early 2018 (Government Portal, 2018) and, in April 2018, a State Social Programme on Equal Rights and Opportunities for 2018–2021 was approved (Cabinet of Ministers of Ukraine Resolution, 2018). Parliament adopted amendments to the Criminal Code and the Criminal Procedural Code related to sexual and gender-based violence (Vedomosti Verkhovnoi Rady, 2018, No. 5, p. 34). It was especially important that a new law on domestic violence was adopted (Vedomosti Verkhovnoi Rady, 2018, No. 5, p. 35) which complied with the Istanbul Convention, although Ukraine itself had not yet ratified the Convention by 2018.

In 2018, Ukraine took a significant legislative step in the fight against corruption when legislation to establish a High Anti-Corruption Court was adopted (Vidomosti Verkhovnoi Rady, 2018, No. 24, p. 212). This law provided for the creation of a Public Council of International Experts, which assists the High Qualification Commission of Judges with the selection of judges and has the power to disqualify a candidate. In 2018, international experts were appointed (Anti-Corruption Action Center, 2018), and the renewal and reform of the judiciary continued. This was an important step, although some experts noted that it appeared that the High Qualifications Commission of Judges and the High Council of Justice, which conducted the selection of judges, were unable to ensure confidence in the fair results of the competition and the absence of political influence on them (Kuybida, 2017). In the same year, several hundred new judges were appointed to the courts of first instance and specialized courts, and, in February 2018, the Constitutional Court appointed its president (Constitutional Court of Ukraine, 2018).

On 21 June 2018, Ukraine's Parliament adopted the Law on National Security (Vedomosti Verkhovnoi Rady, 2018, No. 31, p. 241), and a Law on Cybersecurity entered into force in May 2018 (Vedomosti Verkhovnoi Rady,

2017, No. 45, p. 403). In 2018, the reform of the National Police of Ukraine continued to be implemented. The EU maintained its support for rule of law reforms in Ukraine through the EU Advisory Mission for Civilian Security Reform (EUAM) (Council Decision 2014/486/CFSP, of 22 July 2014), and the EU-funded support programmes on Rule of Law and Anti-corruption (EEAS, 2020b). Despite legislative changes, the conflict in eastern Ukraine and the annexation of Crimea and Sevastopol by the Russian Federation had a great impact on the development of the country (Joint Staff Working Document, 7.11.2018 SWD(2018) 462). According to many experts, to achieve effective results, the EU needs to support formal institutional change with socialisation strategies targeting informal norms and institutions. Moreover, its assistance to domestic actors has to diversify beyond central government institutions and to enhance the capacity of local governments, professional organisations, civil society, and the media (Králiková, 2021, p. 12).

Reform of the electoral system was important for Ukraine, but Ukraine failed to adopt a new Electoral Code before the presidential and parliamentary elections of October 2019. As we know, a new draft electoral code was passed only for the first reading in 2017, and the Constitutional Court invalidated the provision adopted in February 2017 (Decision the Constitutional Court of Ukraine, No. 3-r/2017). Recommendations were issued for the 2016 draft law by the Venice Commission (European Commission for Democracy through Law, 2016), but since 2017 there has been a lack of consensus among MPs on the choice of electoral system for parliamentary and local elections and the procedure for establishing lower-level election commissions. As such, the adoption of the draft election code before the fall 2019 elections was not realistic (IFES, 2019, p. 6). The election code was adopted into law in July 2019, but President Zelensky vetoed this version of the Code in September 2019 and returned it to the new Parliament, together with proposals for its improvement. Finally, in December 2019, the Verkhovna Rada adopted election code (U.S.–Ukraine Business Council, 2019).

A significant change in the governance of Ukraine took place in 2019. After two rounds of presidential elections, Volodymyr Zelensky was elected President of Ukraine, who then dissolved Parliament and called early elections for July 21, 2019. On this, the International Election Observation Mission concluded that "fundamental rights and freedoms were overall respected and the campaign was competitive, despite numerous malpractices, particularly in the majoritarian races" (ODIHR, 2019b). It should be noted that, before the presidential elections, a new electoral commission of Ukraine was appointed at the initiative of President Zelensky. This change was prompted by the presidential election and the change of the parliamentary majority. As in Georgia and Moldova, however, the independence and transparency of the election commission in Ukraine remained a major challenge. Before the parliamentary election of July 2019, Parliament adopted a new Electoral Code, which introduced a full proportional system with open lists after December 2023. However, the new president vetoed this law, and parliament started working on the relevant changes.

In 2019, the Parliament of Ukraine amended the Law on Civil Service, which provided for significant changes to illegal enrichment, claims for unfounded assets (Verkhovna Rada of Ukraine, 2020, No. 2, p. 5), and management of the National Agency (Vedomosti Verkhovnoi Rady, 2019, No. 47, p. 311). At the same time, changes in the direction of e-government regarding public administration reform were noteworthy. For this purpose, a new law was adopted in 2017 on electronic trust services (Vedomosti Verkhovnoi Rady, 2017, No. 45, p. 400), an agency for the implementation of e-Governance policies was created, and a strategic framework (Cabinet of Ministers of Ukraine Order No. 37-r, 2019) for e-Governance was adopted (Cabinet of Ministers of Ukraine Order No. 67-r, 2018). A new interoperability framework called Trembita was also introduced (National Health Service of Ukraine, 2019).

In the field of justice in 2019 it was important to note that the judges of the newly created High Anti-Corruption Court (HAAC) were selected in February, following a transparent procedure that involved the Public Council of International Experts. In April 2019, the President appointed 38 judges who elected their chairperson in May. The Court began operating officially on 5 September of the same year (UCMC, 2019). An amendment to the Law on the High Anti-Corruption Court was adopted in September, limiting its mandate to high-level corruption cases and preventing its potential overburdening by minor cases. The High Anti-Corruption Court received adequate

temporary premises, pending the completion of work on permanent buildings. In February 2019, the Constitutional Court ruled the Criminal Code article on illicit enrichment to be unconstitutional (Coynash, 2020). In June 2019, the Constitutional Court of Ukraine made several decisions. In a judgement on 6 June 2019, the Constitutional Court found the norm forcing anti-corruption activists to provide declarations of their income, and that of members of their families, to be unconstitutional. In another judgement issued on 5 June, the Court found norms in the Law on the National Anti-Corruption Bureau that enabled the bureau to challenge what they believed to be corrupt dealings in court unconstitutional (Coynash, 2019). It should also be noted that, on May 14, the Constitutional Court of Ukraine dismissed Stanislav Shevchuk from office, a judge of the constitutional court who at that time was the Chairman of the Constitutional Court, and elected a new Chairman (Constitutional Court of Ukraine, 2019). In October 2019, the district administrative Court of Kyiv reinstated Stanislav Shevchuk in the post of Head of the Constitutional Court (112.UA News Agency, 2019).

According to the EU, in 2019 Ukraine underwent a democratic transition with the renewal of its key institutions and the election of new political leaders. The swift advance of the reform process by the new authorities after the 2019 electoral cycle built on achievements attained since the 2014 Revolution of Dignity. The EU expects this to continue, including in cooperation with civil society and other stakeholders (Joint Staff Working Document, SWD(2019) 433).

Following the 2019 presidential and parliamentary elections, in 2020 Ukraine met with a renewed government. The "Servant of the People" party associated with President Volodymyr Zelensky achieved parliamentary majority and formed a government. In March 2020, a new Prime Minister was appointed and a cabinet was formed. The new president, who had a solid parliamentary majority, was given a unique opportunity to implement new reforms. In 2020, Ukraine also held local self-government elections. Prior to these elections, Parliament made fundamental changes in the electoral legislation which applied to both local elections and those of all other levels, and which entered into force in December 2019 ahead of nationwide local elections in October 2020. Later, in July 2020, shortly before the election, Parliament adopted changes on electoral justice. According to the OSCE-ODIHR Election Observation Mission for 2020 local elections, the revised Code did not address a number of ODIHR's recommendations. Consideration should be given to reviewing the Election Code to eliminate regulatory fragmentation and to address any remaining gaps, errors, and conflicting or ambiguous formulations. To ensure legal certainty and the stability of the law, the reform process should be completed well in advance of the next elections (ODIHR, 2021, p. 8).

In 2020, the Government of Ukraine continued the reform of public administration and civil service. To this end, amendments have been made to the Civil Service Law to simplify procedures for replacing and renewing civil servants. Human resource management information systems have also been set up in the ministries, a reform of public servants' pay has been implemented, and a unified portal of public servants' vacancies has been launched. In addition, it should be noted that in September 2020, after many years of preparation, the draft Law on General Administrative Procedure was submitted to Parliament (Verkhovna Rada of Ukraine, 2020). Ukraine has also made significant changes in the direction of digital transformation. Formed in 2019, the new Ministry of Digital Transformation (Ukrayinska Pravda, 2019) proceeded with e-government and administrative service modernisation reforms, the TREMBITA system, the creation of the new "DIYA" interface (112.UA News Agency, 2020a) for users of digital public services, and the creation of some other public services such as "e-baby" (112.UA News Agency, 2020b). One year's worth of activity from the High Anti-Corruption Court also took place. However, in August the Constitutional Court of Ukraine declared the 2015 presidential decree appointing the Director of the National Anti-Corruption Bureau of Ukraine unconstitutional, and in September applied the same judgement to certain provisions of the law on the National Anti-Corruption Bureau of Ukraine, including the provisions empowering the President to establish the National Anti-Corruption Bureau of Ukraine, to appoint and dismiss the Director, and to delegate representatives to the panel choosing the Director (Decision the Constitutional Court of Ukraine, No.11-r, 2020). The Constitutional Court of Ukraine also declared, on 27 October, elements of the anti-corruption legislation in Ukraine related to the electronic declaration system for public officials and politicians unconstitutional (Decision the Constitutional Court of Ukraine, No. 13-r, 2020). The court rulings

hampered anti-corruption reforms, and in their wake Parliament passed amendments to the normative acts to restore the agency's authority (Euronews, 2020a). The same year, the Ukrainian government adopted a new anti-corruption strategy for Ukraine for 2020–2024, and sent it to Parliament for approval (CMS Law Now, 2020).

The EU issued a statement on the decisions of the Constitutional Court, noting that the fight against corruption is one of the key benchmarks and commitments that Ukraine has undertaken within the framework of the Association Agreement, the recently agreed Macro-Financial Assistance programme between the EU and Ukraine, and the Visa liberalisation process (EEAS, 2020c). In response to the court's actions, President Zelensky submitted to parliament a law on the reform of the Constitutional Court, on which the Venice Commission also expressed its views (European Commission for Democracy through Law, 2020).

The Constitutional Court of Ukraine was still active in 2020 with regard to the legislation on the judiciary. On 11 March 2020, the Constitutional Court adopted a decision on the judiciary and the status of judges, and found parts of the law regarding the number of Supreme Court judges, the High Qualification Commission of Judges, and the Integrity and Ethics Commission unconstitutional (Decision of the Constitutional Court of Ukraine, No. 4-r/2020). Later, on 28 July, the Constitutional Court declared a presidential decree dated 16 April 2015, on the appointment of Artem Sytnyk as National Anti-Corruption Bureau Director unconstitutional (Decision of the Constitutional Court of Ukraine, No. 9-r/2020). Such decisions of the Constitutional Court were seen by the government as hindering the reforms envisaged in the Association Agenda with the European Union.

The EU itself, in its 2020 assessment, noted that having undergone a successful democratic transition and the renewal of key institutions in 2019, Ukraine advanced swiftly in the implementation of both its Association Agreement with the European Union and reforms demanded by its citizens in the earlier part of 2020. The European Union will continue to support Ukraine’s reform efforts, constantly adapting and calibrating its support through engagement and dialogue, with the all the means at its disposal (Joint Staff Working Document, SWD(2020) 329). At the same time, experts believe that that there have been some important successes in conducting reforms – especially from autumn 2019 to spring 2020. However, the fundamentals of the Ukrainian political and economic system have not yet been radically changed. Oligarchs have positions of influence in Ukrainian politics, and have succeeded in slowing some reforms with the help of their supporters in parliament (Neljas, 2020, pp. 21–22).

Despite the changes, one of the main obstacles to Ukraine's reforms is the influence of oligarchs on politics (Konończuk, Cenuşa, & Kakachia, 2017, pp. 17–19). Most recently in response to this challenge, on 2 June 2021, the President of Ukraine Volodymyr Zelensky submitted to the Verkhovna Rada an urgent draft law “On the Prevention of Threats to National Security Related to the Excessive Influence of Persons Who Have Significant Economic or Political Weight in Public Life (Oligarchs)” (Office of the President of Ukraine, 2021). If the Verkhovna Rada passes this law, people recognized as oligarchs will be barred from directly or indirectly funding political parties, holding political and governmental positions, and participating in the privatization of large facilities. The decision to recognize a person as an oligarch will be made by the National Security Council of Ukraine (Draft Law on Prevention of Threats…, 2021). Weakening the influence of oligarchs was also a pre-election promise of President Zelensky, and the public expects him to fulfill this condition. Over 10 Ukrainians could be included in the list of oligarchs, including Ihor Kolomoisky, the owner of the 1+1 TV channel that gave then-comedian Zelenskiy a significant platform during the presidential campaign, and as such it is difficult to say how the president will actually end the oligarchy in Ukraine.

5. Objectives and Prospectives of Reform Implementation

After considering the above changes, it is important to determine the results that these countries have achieved in the fields of rapprochement with the EU and democratic transformation. Numerous legislative changes have been made, if political decisions indicate that countries had some will, yet the second question remains as to how sustainable and consistent these reforms will be. Conclusions can be made based on the results of the EU

monitoring itself. In this respect, it is noteworthy that, on March 18 2020, the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy initiated a proposal for the long-term policy objectives of the Eastern Partnership beyond 2020 (EEAS, 2020a). The aims of this proposal were: strengthening democratic institutions, the rule of law, and environmental and climate resilience; supporting the digital transformation; and promoting fair and inclusive societies (European Commission, 2020).

The results of the reforms implemented in the Eastern Partnership countries are reflected in the special recommendations developed by the European Parliament in 2020. In particular, the European Parliament recommends engagement with the EaP countries via further assistance in: strengthening institutions and their accountability; developing existing and new EU tools in the area of rule of law and good governance; enacting comprehensive reforms of the judicial and public administration aimed at ensuring the independence, competence, and merit-based recruitment of judges and civil servants; and prioritizing the fight against corruption by reducing the space for corruption through increased transparency and the acknowledgement that strong, independent, and efficient institutions at the central and local levels are key to democratic accountability, deoligarchisation, and the fight against corruption and state capture (European Parliament, 2020).

We must remember that the 2017 Eastern Partnership Brussels Summit endorsed the "20 Deliverables for 2020" as an ambitious work plan for reforms in the eastern partnership countries. According to the monitoring document on the implementation of "20 Deliverables for 2020" and the results achieved by February 2020, key achievements in the strengthening of the rule of law and anti-corruption mechanisms are: the legal frameworks on confiscation that are in place in Georgia, Moldova, and Ukraine covering different confiscation regimes; systems for declaring assets and conflicts of interest that are in place in Georgia, Moldova, and Ukraine; and the High Anti-Corruption Court set up by Ukraine, where judges were selected for this court in cooperation with international experts. Initial steps towards setting up a system to monitor the track-records of judges and prosecutors in the field of support for the implementation of key judicial reforms, including the creation of an online appraisal system for prosecutors in Georgia and planned initiatives in Ukraine, are also considered as key achievements (Joint Staff Working Document, SWD(2017) 300).

At the same time, the results in public administration reform are key achievements, as the strategies in line with the 'Principles of Public Administration' in Georgia, Moldova, and Ukraine were developed, paving the way for more open and accountable state administrations in the EaP countries. The document defines the following priorities for action in strong governance: tackling high-level and complex corruption across the region; setting up an anti-corruption institutional framework, which should include the creation of track records of cases and the effective use of financial investigation tools; making all registry data on beneficial ownership publicly available; encouraging merit-based recruitment; reducing case backlogs; enforcing judgments in civil and administrative cases; fighting organised crime; and addressing hybrid threats, including cyber threats, to strengthen critical infrastructure (20 Deliverables for 2020, 2020). In terms of evaluating the results achieved, it is noteworthy that, at its December 2019 session held in Tbilisi, Georgia, the Euronest Parliamentary Assembly adopted a resolution on "The Future of the Trio Plus strategy 2030: Building a Future of Eastern Partnership". The resolution states that the Trio Plus strategy 2030 would serve as "an ambitious European geopolitical instrument employing a new generation of institutions and policies, sustainable trade and stabilisation agreements and their instruments". This document also notes that the success of implementing EU integration reforms in the EU-associated Trio countries will create new incentives for the remaining Eastern Partnership countries to choose an ambitious path to European integration (Euronest Parliamentary Assembly, 2019).

In addition to EU assessments, studies by other international organizations should be considered to measure the results achieved in these countries. According to the World Justice Project's Rule of Law Index, Georgia is in a leading position among the three countries. Although if we look at a more detailed comparison, Moldova and Ukraine have improved results in terms of rule of law in the last 4–5 years, while the situation in Georgia has deteriorated slightly (Rule of Law Index 2020, 2020). Another area where Georgia, Moldova, and Ukraine required significant efforts to move closer to the EU is corruption. According to the Transparency International Corruption

Perceptions Index, Georgia is at the forefront in the fight against corruption, followed by Moldova, with Ukraine falling slightly behind and having ranked last for some years. There has been little improvement regarding corruption in Moldova and Ukraine since 2015, although the situation has not changed drastically either way. For example, Moldova had a score of 33 in 2015, while it improved by just one point in achieving a score of 34 in 2020. Ukraine had a score of 27 in 2015, while it improved by just six points in achieving a score of 33 in 2020 (Transparency International, 2020). Overall, then, these three countries improved their situation in 2020 compared to previous years, and hopefully the reforms that they have implemented will further improve the corruption situation in the coming years.

Conclusions

Georgia, Moldova, and Ukraine have implemented many changes since the signing of the Association Agreement with the European Union, although these reforms have been accompanied by considerable political tension. Effective reforms require a stable political situation in the country, and cooperation and agreement between the government and the opposition. In this regard, the situation has changed positively in Ukraine, where Zelensky was elected President with a strong parliamentary majority, which facilitates the implementation of reforms. It is important to end Plahotniuc's oligarchic capture of the state in Moldova, to elect a pro-European president, and to form a pro-European parliamentary majority and cabinet after the 2021 parliamentary elections to facilitate rapid and effective reforms. The situation is somewhat different in Georgia, where an agreement reached in April 2020 ended with a high level of EU engagement and a majority of parties had some representation in parliament, although tensions have not yet been fully overcome as early elections depend on local elections in October 2021. Georgia's ruling party is also still under the influence of Georgian billionaire Bidzina Ivanishvili, despite the fact that he has officially announced his departure from politics. For this reason, the stability of the political system and the consent and trust of citizens are necessary to continue the reform that has begun in the process of European integration.

Reforming the judiciary and ensuring the independence of the judiciary remain particular challenges for the democratic development of Georgia, Moldova, and Ukraine. Despite not a single change in recent years, the courts remain under political influence. Without achieving the independence of the judiciary, it is impossible to protect human rights, ensure the rule of law, fulfill obligations in all other strategic areas defined by the Association Agreement, and ensure the well-being of citizens. All three countries need special changes in the procedure for selecting judges impartially, free from political influence. In this regard, the reform of the High Council of Justice in Georgia, where the dominance of judges is discussed, as well as the total domination of judges in decision-making in the High Qualification Commission of Judges, the High Council of Justice, and the Superior Council of Magistracy in Moldova, is problematic because the integrity of these judges is questionable.

The main obstacle to democratic reforms for Georgia, Moldova, and Ukraine over the years has been oligarchic rule and the capture of state institutions. In recent years, the situation seemed to have changed slightly when Moldovan oligarch Plahotniuc was ousted from power, Zelensky became president in Ukraine, and Bidzina Ivanishvili announced his departure from politics in Georgia. However, perhaps this did not go far enough, because despite Zelensky's intentions in Ukraine, his election campaign was financed by the oligarch Kolomoyskyi, and getting rid of his influence completely is not an easy task. In Moldova, the victory of pro-European forces allied with President Sandu in the parliamentary elections is crucial for the final consolidation of reforms, while in Georgia the ruling Georgian Dream party is still under the influence of billionaire Ivanishvili, who has more financial resources than the entire opposition combined.

All three countries face many challenges in the fight against corruption. Whilst Georgia has achieved the best results among them, a challenge remains in terms of some high-level corruption, the involvement of high-ranking officials, and their impartial investigation, as the ruling party has access to these bodies. Although Moldova has many institutions to fight corruption, such as the National Anti-Corruption Center, the Anti-Corruption Office, the Agency for the Recovery of Criminal Property, and the Office for Prevention and the Fight against Money

Laundering, the problems of low trust in institutions and the adequate enforcement of anti-corruption laws remain. Similarly, a number of anti-corruption institutions have been set up in Ukraine in recent years, such as the National Anti-Corruption Bureau, the Specialized Anti-Corruption Office, the High Anti-Corruption Court, the National Agency for Corruption Prevention, and new legislation that restricts oligarchs. The main problems here are the systemic nature of corruption, low trust in institutions, a lack of severity in appropriate punishments, and the ineffectiveness of their execution. It is therefore essential for successful change that systemic reforms gain public support and trust.

Finally, a significant obstacle to the implementation of reforms in all three countries is the military-political aggression of the Russian Federation, which continues today in the form of the occupation of the territories of these sovereign states. Russia continues to interfere in the domestic politics of countries and weaken institutions by using various methods of disinformation. This has been well demonstrated in recent years in Georgia, Moldova, and Ukraine. The response of the Associated States must be the rapid, consistent implementation of reforms, democratic transformation, and rapprochement with the European Union. The support of the European Union is extremely important in the implementation of internal reforms, which are implemented in various formats. The consolidation of the pro-Western government in these countries and the political will of the authorities to carry out legal reforms are crucial in this regard.

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ACCESS TO MODERN ENERGY SERVICES THROUGH THE PRISM OF CHILDREN'S RIGHTS: AN OVERVIEW FROM THE PERSPECTIVES OF THE CONVENTION ON THE RIGHTS OF THE CHILD AND THE POLICY AND LAW APPROACHES OF CERTAIN EU MEMBER STATES AND UKRAINE

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Abstract. The aims of this research are: to explore the connection between the right to access to modern energy services and children's rights, as stipulated by the Convention on the Rights of the Child; to analyze how the rights of children are addressed in the energy policy and law of certain EU Member States and Ukraine; and to develop recommendations on how to make national energy policy and law more child-sensitive. To achieve these goals, the following objectives were set: 1) to explore the correlation between the right to access to modern energy services and children's rights under the Convention on the Rights of the Child; 2) to analyze the Integrated National Energy and Climate Plans (NECPs) of certain EU Member States in order to find out how children's rights are addressed in policy and law and to identify the most common practices; 3) to analyze the current and prospective legislation in Ukraine that relates to children's rights to modern energy services; and 4) to develop recommendations on how to make national energy policy and law more child-sensitive. The main results of this research are: 1) access to modern energy services is vital for children's enjoyment of their rights (e.g., the right to life, survival, and development, the right to health, the right to education, the right to adequate housing, the right to be protected from any form of violence, neglect, or negligence, and the right to be heard); 2) states shall specifically address issues of children's rights (in particular, by tackling energy inequality, considering the risks for the concrete category of children, targeting certain rights of children that depend on access to modern energy services, and introducing concrete actions and outcome indicators) in the strategic documents and legal acts that relate to universal access to modern energy services; 3) the social protection of low-income families with children in the form of discounts for energy bills and state support for the implementation of energy efficiency improvement measures in residential buildings (as mechanisms for tackling energy poverty), the encouragement of the energy renovation of pre-school and school buildings, and the development of special educational tools on sustainable energy for pupils are considered the most common practices in certain EU Member States; 4) whilst Ukrainian energy policy and law includes some instruments that relate to children's rights as energy consumers, it lacks a complete approach; and 5) the energy policy and law of Ukraine should specifically address children's rights as energy consumers, specifically those based on the common approaches used in EU Member States, in order to consider the peculiarities of children's energy needs.

Keywords: access to modern energy services, children's rights, energy poverty, vulnerable energy consumers

Introduction

Access to modern energy services is essential for the full enjoyment of all human rights and the active participation of people in their economic and social lives. However, many people around the world lack access to sustainable, reliable, environmentally-friendly, and affordable energy services, which has a negative impact on the quality of their lives. UN Sustainable Development Goal 7 (SDG 7) requires states to take necessary actions in order to encourage universal access to modern energy services, to improve energy efficiency, and to increase the share of

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renewable energy sources in the global energy mix. Despite significant steps made towards the achievement of these targets, 840 million people lack access to electricity globally, and 2.90 billion people do not have access to clean cooking (IEA et al., 2019).

In recent decades, the human rights dimension of the universal access to modern energy services has attracted the attention of scholars, in particular: A. Bradbrook (2005); A. Bradbrook, J. Gardam, & M. Cormier (2015); S. Tully (2006); D. Smolin (2009); M. Solis (2015); L. Löfquist (2019); L. Aviles (2012); G. Walker (2015); and K. Danielsen (2012). These researchers have explored the importance of access to modern energy services for the realization of fundamental human rights, and put forward arguments for the establishment of the right to modern energy services (firstly, to a supply of electricity) as a separate human right in itself.

Currently, access to modern energy services (i.e., electricity and heating) is considered a key element of the right to adequate housing (General Comment No. 4, 1991).

The key features of modern energy services are defined as: accessibility; affordability; equal access for all categories of citizen; life, health, and environmental safety; continuity; reliability; diversification of energy supply sources; efficiency; sustainability; and the use of renewable energy resources (Vashchenko, 2017).

Access to modern energy services is essential for all people. Every member of a household can potentially benefit from increased access to energy services, but the degree to which they do so depends on gender, age, and ability. Children, for example, may benefit from increased access to media, improved lighting for reading, and safer streets (Danielsen, 2012).

However, women and children are considered among the most vulnerable categories of people in the absence of such access. Although these social groups are usually discussed together in connection with issues of energy poverty (e.g., pregnant women and infants; women and children in rural areas being mostly responsible for household work, including gathering biomass for heating and cooling), women's right to universal energy access attracts more attention (Danielsen, 2012). This can be partially explained by the fact that the importance of access to electricity for women in rural areas is explicitly emphasized in the Convention on the Elimination of All Forms of Discrimination against Women (Art. 14(2(h))) (UN General Assembly, 1979), whereas the corresponding instrument of special international human rights law on the rights of children – the Convention on the Rights of the Child (hereinafter – CRC; UN General Assembly, 1989) – lacks such a direct connection to access to modern energy services.

In recent years, the issues of children's rights in connection with access to modern energy services has attracted more attention due to the activities of international organizations, first among which is UNICEF (2015).

It is clear that children have peculiarities as energy consumers due to their specific energy needs and the possible negative impacts that lack of access to modern energy services can have on their health, development, and even life.

Therefore, the aim of this research is to explore the connection of the right to access to modern energy services with children's rights, to analyze how children's rights are addressed in the energy law and policy of certain EU Member States and Ukraine, and to develop recommendations on how to make energy policy more child-sensitive.

To achieve these goals, the following objectives were set: 1) to explore the correlation between the right to access to modern energy services and children's rights under the Convention on the rights of the child; 2) to analyze the Integrated National Energy and Climate Plans (NECPs) of certain EU Member States in order to establish how children's rights are addressed and to separate the most common practices; 3) to analyze the current and prospective legislation of Ukraine related to children's right to modern energy services; and 4) to develop recommendations on how to make national energy policy more child-sensitive.

The research in this paper was carried out on the basis of a number of different methods: document analysis, systematic analysis, the comparative method, and the generalization method.

1. The right to access to modern energy services in light of the Convention on the Rights of the Child

The CRC is the core international human rights law instrument that specifically addresses children's rights. Despite the lack of a special provision devoted to it, access to modern energy services is undoubtedly crucial for the expression of all groups of children's rights, whether universal (i.e., belonging to all human beings), special (i.e., belong especially to children), or specific (i.e., belonging to children from specific social groups).

Access to energy is a precondition for the full enjoyment of the majority of children's rights. These include: survival rights (the right to life and the right to health); development rights (the right to education, play, leisure, cultural activities, access to information, and freedom of thought, conscience, and religion); protection rights (against all forms of abuse, neglect, and exploitation); and participation rights (the right to the expression of one's own opinion and to participation in decision-making processes at the national, regional, and local levels).

Firstly, sustainable access to modern energy services is vital for the right to the highest attainable standards of physical, mental, and social wellbeing (i.e., the **right to health**). Two aspects of this matter must be considered: the negative impact on children's health of air pollution emitted by the energy sector, in particular, by technology based on fossil fuel; and the lack of access to modern energy services. In recent years, the first aspect has attracted the attention of a plethora different stakeholders (e.g., young people, human rights defenders, politicians, and scholars) in connection with issues of climate change. Children, especially infants, are particularly vulnerable to air pollution. The Committee on the Rights of the Child emphasizes the negative impact of environmental pollution on children's health, and encourages State Parties to put child health concerns at the center of their climate change adaptation and mitigation strategies (General Comment No. 15, 2013). The negative impact of fossil fuel-based energy industries on children's rights and their environment was debated in 2016, during the Day of General Discussion devoted to children's rights and the environment (Committee on the Rights of the Child, 2017). The second aspect of this issue relates to the negative impact on children's health of a lack of access to the modern energy services necessary for the satisfaction of basic energy needs (e.g., for cooking, heating, and cooling). The CRC (Art. 24) stresses the importance of adequate nutrition and clean drinking water for children's health, which is not possible without sustainable access to modern energy services. Sustainable energy services (firstly, an electricity supply) are essential for healthcare providers, particularly in tackling the problem of infant and child mortality as they are vital for the sterilization of instruments and the use of specific medical equipment. In the current climate, a stable supply of electricity is crucial for the usage of the special medical equipment (e.g., oxygen plants; World Health Organization, 2020) necessary for treatment of COVID-19.

As was mentioned above, access to energy services is mostly considered a core element of the right to adequate housing (which is part of the right to an adequate standard of living). Art. 27 of the CRC focuses on the right of every child to a standard of living adequate for their physical, mental, spiritual, moral, and social development. Adequate housing also features among the key elements of this right. When households lack access to modern energy services, this situation is defined as energy/fuel poverty. This can be caused by technical (due to a lack of technical access, particularly common in remote areas) or financial (lack of affordability) issues. Energy poverty can be combined with poverty in general, and alleviating the former is considered to be a key precondition in tackling the latter.

Energy poverty is a barrier to the full enjoyment of children's other rights. In particular, the **right to education**, which is essential for the full development of children, can be violated in many ways by a lack of access to modern energy services. For example, children (girls especially) in the rural areas of developing countries typically spend a lot of time gathering wood and biomass for cooking and heating, and thus spend less time on their education (UNDP, 2013). Another example involves children from households without access to electricity, who can only

study during the day-time. In recent times, this situation has worsened due to the restrictions imposed by the COVID-19 pandemic, where children who lack access to electricity and the internet are not able to attend school lessons that have moved online.

Another aspect of the correlation between the right to education and access to modern energy services is the provision of adequate learning conditions, including access to modern energy services, in educational institutions:

> [o]ver 230 million children go to primary schools without any electricity, compromising educational and development outcomes (SDG 4). Electrification at primary schools stands at a mere 69%. Enabling policies are needed to incentivize and facilitate a more coordinated approach, along with investments in sustainable and clean energy and education infrastructure and services, in order to close the electricity access gap in education, and also drastically improve girl-to-boy ratios in schools (Accelerating SDG achievement, 2019).

On the topic of the connection between the right to access to modern energy services and the right to education, the role of education in the promotion of clean energy is crucial. Children should be considered **ambassadors of energy efficiency** to their families, who can contribute to changes in the behaviors of energy consumers. Therefore, it is important to include special study disciplines (or special modules) devoted to topics such as: the efficient use of energy in houses/flats; energy efficiency measures; and the changing of options from conventional to renewable sources of energy. Professionals encourage schools to "Enhance public awareness and education for adults and children about sustainable energy, in order to facilitate necessary behavioral changes, build a technical skill base, and encourage youth innovation to advance sustainable energy solutions" (Accelerating SDG achievement, 2019).

Access to modern energy services is a precondition of the adequate **protection of a child from any form of violence, neglect, or negligence** (Art. 19 of the CRC). In particular, lack of access to electricity in a household makes it impossible to receive prompt information regarding domestic violence, and the absence of street lighting supports violence against children during the evening. The number of domestic injuries among children increases with lack of access to modern energy services. It should also be noted that there is data to suggest that burns are among the most common accidents and injuries suffered by children at home. "Heating and lighting sources and cooking equipment, especially those relying on fossil fuels, all carry risks. In particular, heating or cooking on open fires that are at ground level pose significant dangers to children" (World Health Organization & UNICEF, 2008). Surveys outline the fact that children from poor families, single-parent families, multi-child families, and families that use gas and wood for heating are at the biggest risk of burns, and in one survey "the burn surface was more extensive in children whose homes had coal heating" (Kawalec & Pawlas, 2020).

As has arisen from the principle of non-discrimination (CRC, Art. 2), all children should be promoted access to modern energy services without discrimination of any kind, irrespective of the child's, their parent's, or their legal guardian's race, color, sex, language, religion, opinions (political or otherwise), national, ethnic, or social origin, property, disability, birth, or any other status. However, many children in the world still face the problem of energy inequality due to their "double" vulnerability – being a child whilst simultaneously belonging to another **vulnerable group** (e.g., people who live in rural/remote areas, minorities or indigenous people, refugees, persons with disabilities, poor people, or marginalized social groups).

Thus, access to modern energy services is crucial for the full enjoyment of many of the rights of children. States should specifically address issues of children's rights (in particular, by tackling energy inequality, considering the risks for the concrete category of children, targeting certain children's rights that depend on access to modern energy services, and introducing concrete indicators of actions and outcomes) in the strategic documents and legal acts that relate to energy access for all. Moreover, it should be stressed that, in accordance with Art. 12 of the CRC, the right of children to be heard should be encouraged. The CRC Committee, in General Comment No. 12 (2009), provided a broad understanding of the right to be heard which includes, *inter alia*, the encouragement of

the participation of children in decision-making processes. Therefore, it is important to involve children in the processes of the development and consideration of draft laws, regulations, strategies, and plans devoted to children's right to access to modern energy services. Children's **right to be heard** will be addressed via participation in energy-related decision-making. As the experience of the Netherlands demonstrates, children's right to be heard can be successfully combined with their right to education on energy-related issues. A pilot study in the South-Eastern district of Amsterdam revealed that the involvement of children in the processes of planning the transition of households from traditional to sustainable energy using a game-based approach helped both to obtain information from children as key stakeholders regarding their preferences for renewable energy solutions, whilst also teaching children about which buildings were suitable for which specific technologies (Hettinga et al., 2020).

2. The energy-related rights of children in the NECPs of certain EU Member States

According to the Regulation on the Governance of the Energy Union and climate action (EU/2018/1999), EU Member States had to approve 10-year integrated national energy and climate plans (NECPs) and submit final documents to the European Commission by the end of 2019. These NECPs aimed at the achievement of the EU's energy and climate targets for 2030, and cover the five dimensions of the Energy Union's approach to decarbonization: greenhouse gas reduction and the encouragement of renewables; energy security; energy efficiency; the support of the internal energy market; and research, innovation, and competitiveness (European Commission, 2018). This Regulation emphasizes that the Paris Agreement reaffirms that the Parties should, when taking action to address climate change, respect, promote, and consider their respective obligations on human rights and gender equality. Therefore, Member States are obligated to adequately integrate human rights and gender equality into their NECPs and long-term strategies, and to report on the progress achieved. If a Member State allows its most vulnerable citizens (e.g., children and elderly people) to be disconnected from the electric grid, these people cannot experience appropriate nourishment, health, or quality of life (Alives, 2012).

Therefore, it is necessary to analyze how NECPs address energy-related children's rights, and to define the most common practices.

At first glance, one would presume that children's rights were not specifically targeted in the majority of the NECPs presented. Few NECPs include information directly related to children as energy consumers, or even mention children at all. Therefore, it is necessary to search for issues that relate to children' rights via other adjacent categories – such as "school", "pre-school", "kindergarten", "schooling", "curriculum/curricula", "study", "education", "pupils", "students", "vulnerable consumers", "parent", "family/families", and "energy poverty". No special provisions related to children were included in the NECPs of Poland, the Czech Republic, Romania, Bulgaria, Austria, or Greece.

The NECP of **Poland** presents information on protection measures for vulnerable energy consumers (e.g., on energy allowances for vulnerable electricity consumers), and the improvement of energy efficiency in schools is mentioned among energy efficiency measures (Ministry of National Assets, 2019). It should be noted that, despite the fact that 60% of schools have had their energy performance improved, a significant number of educational facilities still require modernization (Michalak, Szczotka, & Szymiczek, 2021).

Children are mentioned once in the NECP of the **Czech Republic** – in relation to the possible increase in the incidence of allergic diseases in children as a result of PM10 air pollution. As to energy poverty, it is stated in the NECP that the definition of energy poverty has not yet been stipulated by the legislation (NECP of the Czech Republic, 2019).

As an indirect connection to children's rights, the reference to the Energy Strategy of **Romania** for 2019–2030, with an outlook towards 2050 concerning the need for qualified staff in the field of energy, can be mentioned. For

this purpose, the development of the specific educational packages at all levels, starting from secondary schools, is prescribed (The 2021–2030 Integrated…, 2020).

General information on the protection of vulnerable consumers as a key element of full liberalization is provided in the NECP of **Bulgaria**. It is noted that Bulgaria is currently implementing a support scheme for persons who meet certain income-tested and property-based criteria for poverty, granting heating allowances to eligible recipients via the social assistance system throughout the colder period. It is also stated that a definition of vulnerable users, a set of criteria for identifying them, and some measures for their protection are currently being developed (Ministry of Energy & Ministry of the Environment and Water, n.d.). Thus, it is perhaps time for Bulgaria to pay more attention to the different energy needs of different groups of energy consumers, including children.

There are some issues related to energy poverty, the significance of education in raising awareness of a sustainable future, and the role of the household in energy transition in the NECP of **Austria** (Federal Ministry of the Republic of Austria…, 2019).

The NECP of **Greece** includes provisions related to tackling energy poverty via support mechanisms provided to energy-vulnerable households (Hellenic Republic…, 2019).

Special provisions that relate to children's issues can be found in the NECPs of Lithuania, Latvia, Estonia, the Slovak Republic, Spain, Hungary, Belgium, Cyprus, Italy, and the Netherlands.

The NECP of **Lithuania** mentions children in particular among the socially vulnerable groups in relation to energy poverty, and calls for a comprehensive political approach that combines social and environmental policies. Despite significant improvements, Lithuania "remains one of the European countries with the highest levels of energy poverty, with more than 30 percent of families unable to heat their homes adequately" (Murauskaite, 2020). In order to change the behavior of energy consumers, special educational tools should be implemented, in kindergartens and schools in particular. Lithuania's NECP also states that educational programs on the benefits and practical possibilities of using renewable energy sources are included in the curricula of Lithuanian general education schools. It adds that Lithuania is currently developing a long-term national strategy for the renovation of the public and private residential and non-residential building sectors, which might cover issues of children's rights (NECP of the Republic of Lithuania…, n.d.).

Latvia's NECP contains information on the reduction of energy tariffs for a specific amount of electricity consumed by families taking care of a child with a disability. It plans to introduce studies on resource-efficiency and sustainable lifestyle, starting from pre-school educational institutions (Latvia's NECP 2021–2030, 2020). It should be noted here that "Latvia's performance in the expenditure-based indicators is better than the EU average. 12.7% of households spend a high share of their income on energy expenditure" (EU Energy Poverty Observatory, 2020b).

In **Estonia**, around 2.5 % of children live in absolute poverty, whereas 15.2 % of children are at risk of poverty (Statistics Estonia, 2019). Further, "18.7% of households spend an unusually high share of their income on energy expenditure. This is higher than the EU-average" (EU Energy Poverty Observatory, 2020a). Support for low-income families with many children is available for the purposes of energy saving measures and improving living conditions. In particular, SA Kredex provides a housing grant for families with many children (Estonia's 2030…, 2019).

Raising energy efficiency awareness among children and young people is referred to as one of the key energy efficiency improvement measures in the NECP of the **Slovak Republic**. Developing a National Strategy for raising awareness in the field of energy efficiency is advised, targeting the public from children to specialists and manufacturers (Slovak Ministry of Economy, 2019). The task of raising awareness regarding energy efficiency

and sources of renewable energy belongs to the Slovak Innovation and Energy Agency (SIEA, n.d.). The promotion of renewable energy sources should be focused on the "support of educational programs for children and youth through creating clubs and interest groups, where students acquire new information on energy and its use" (Furmanczuk, 2018).

In the NECP of **Spain**, Children are mentioned in connection with social support to vulnerable consumers, with particular attention being paid to households with children (Integrated NECP, 2020). The issue of children's rights in connection with access to electricity attracted the attention of wider society in January 2021, when nearly 2000 vulnerable children and their families were left without electricity in freezing temperatures in the Madrid region. Save the Children called for a ban on cutting families off from electricity during the cold periods, and for more flexible payment options to be available for vulnerable families (Save the Children, 2021).

The Government of **Hungary** plans to extend the subscription-based electricity connection scheme for households living in buildings that are dilapidated or unsuitable for renovation, which ensures the electric heating of at least one room for families with small children. The importance of establishing an energy- and climate-literate society is also emphasized: special information campaigns targeting different age groups are planned, along with measures that raise educational awareness focusing on younger generations (Ministry of Innovation and Technology, n.d.).

The task of implementing educational programs on the use of renewable energy sources in kindergartens and schools is also present in the NECP of **Croatia** (Ministry of Environment and Energy, 2019).

It is stated in the NECP of **Cyprus** that the category of vulnerable customers of electricity includes, in particular, five-member families or families with 3 or more dependent children that receive child benefits from the Welfare Benefits Administration Service of the Ministry of Labour, Welfare, and Social Insurance, and have an annual gross family income of up to €51,258. The income criterion of €51,258 increases by €5,126 for each additional child beyond four. Energy efficiency measures targeted at schools are defined among financial incentives and other measures. Awareness-raising campaigns such as lectures at schools are mentioned (Cyprus' Integrated National…, 2020).

According to its NECP, **Italy** provides special social support in the form of electricity and gas bills discounts for large families (those with more than three dependent children). In order to launch information, training, and awareness-raising campaigns in schools, a specific fund named "Io sono Ambiente" (I am the environment) was established, with €6 million allocated for 2020–2022. This funding can be used for improving the safety and energy efficiency of buildings owned by municipalities, with priority provided to school buildings (Integrated NECP of Italy, 2019).

In the **Netherlands**, the term "energy poverty" is not used, and there are no special objectives related to energy poverty. Instead, households with a lower income are supported via schemes of general social policy. Special provisions devoted to tackling child poverty have been included in the NECP, which specifically states that in the next few years the government will focus on reducing the number of households with children that are unable to cope with a low income. Different forms of support to employed parents with low incomes will be introduced (most often related to taxation). As far as raising the awareness of children on sustainable energy and climate issues is concerned, it is prescribed that all pupils – including those in primary education – should be taught on energy transition issues in particular. Thus, it is necessary to make changes to the curriculum. Special provisions in the NECP are devoted to the energy renovation of national building stock. These measures are focused on reducing energy consumption and increasing the share of renewable energy in the built-up environment (Ministry of Economic Affairs and Climate Policy, 2019).

In the NECP of **Belgium**, significant attention is paid to the issues of energy renovation in schools (e.g., the transition to RES, energy loans, and school energy management) and campaigns that raise energy efficiency

awareness. Energy poverty issues are specifically presented in the NECP. It is stated that there is a federal policy for the protection of low-income or vulnerable residential energy consumers. Based on a survey of energy vulnerability, it was concluded that single-parent families are at an increased risk of energy poverty (Belgian Integrated National…, 2019).

According to the NECP of **Portugal**, energy poverty has an impact on not just the well-being and comfort of citizens but also on the health, mortality, performance, and professional income of adults and the social isolation of families and young people. Families are considered to be among the vulnerable categories of energy consumers, and there are mechanisms for tackling energy poverty and ensuring the protection of vulnerable consumers (e.g., the social tariff). As to the energy renovation of buildings, it is stated that the solutions to be adopted include the electrification of buildings and an increased use of renewables by installing thermal solar collectors that can provide heat – in particular, in schools. Concerning raising young people's awareness of energy efficiency and climate issues, the promotion of environmental educational programs at schools is prescribed (Portugal…, 2019).

In the case of **France**, it should be mentioned that the NECP includes provisions regarding the protection of the most vulnerable households, as well as the provision of a task force aimed at accelerating the energy renovation of school buildings. This should then raise awareness of the implications of energy savings for new generations, as educational buildings represent around 50% of the building stock of local authorities (Integrated NECP for France, 2020).

In **Luxembourg**, as referred to in the NECP, three main directions can be identified as those that relate to children's right to access to modern energy services. Firstly, raising children's awareness on energy- and climate-related issues via: workshops on sustainable energy; the use of renewable energy sources; the introduction of the themes of energy efficiency, renewable energy, climate change, and sustainability into the school curriculum; and even the participation of pupils in the installation of solar panels on school roofs. A second direction is the implementation of energy renovation measures in schools. Luxembourg has adopted a strategy for sustainable and energy-efficient public buildings in relation to both new constructions and existing structures, in order to improve energy efficiency and the use of renewable energy in government and government-related buildings. The aim is for all suitable public buildings to be equipped with photovoltaic installations by 2025. In addition, better integration of photovoltaic installations and increased use of renewable heat, especially that which is based on medium-depth geothermal energy, will be promoted in schools and their infrastructures. The third direction is the provision of social support measures to energy-poor people. Luxembourg's NECP mentions a comprehensive strategy for tackling poverty in general (involving the minimum wage, social inclusion income (REVIS), etc.), as well as a number of measures offering targeted help to people affected by energy poverty. Such help can be provided in the form of social assistance to people unable to pay their electricity or gas bills, or in the form of financial incentives for homeowners to switch from fossil to renewable energy sources (Luxembourg's integrated…, 2018).

It should be noted that several countries – in particular, **Finland**, **Denmark**, and **Malta** – include neither provisions that relate to children's right to energy services nor information that relates to energy poverty, which is due to the fact that there are very few households that face the problem of energy poverty in these countries (Finland's Integrated…, 2019; Danish Ministry of Climate, Energy and Utilities, 2019; NECP of Malta 2021–2030).

Bases on the analysis provided, it can be concluded that the NECPs of the majority of the EU Member States include provisions that directly (e.g., the provision of state support to families with children) or indirectly (i.e., those that concern more broad targeting strategies – e.g., the energy renovation of public and private buildings) relate to children's rights. The most popular actions that contribute to the protection of energy-related children's rights are as follows: firstly, some EU Member States provide social support to families with children in vulnerable conditions (e.g., families with small children, multi-child families, single-parent families, and families with a child with disabilities) to cover the cost of energy bills and energy efficient renovations; secondly, almost all of the EU Member States have already introduced, or plan to introduce in the near future, special study

disciplines/modules/training for pupils in pre-schools and schools devoted to energy efficiency and the use of renewable energy sources; and, thirdly, kindergarten and school buildings are subject to energy renovation that relates to the transition to renewable energy sources.

3. Children's rights in the energy policy and law of Ukraine

In Ukraine, the legal framework for the protection of children's rights includes the Constitution of Ukraine and special laws on the encouragement and protection of children's rights. It should be emphasized that Ukraine ratified the CRC and all three optional protocols.

Some provisions related to children's right to access to modern energy services can be found both in special legislation related to children's rights and in the energy legislation. The majority of these relate to the issue of energy poverty and the necessity of protecting vulnerable energy consumers, including children. However, there are no complex provisions that consider all of the aspects of children's right to sustainable energy services.

As to the special legislation on children's rights, provisions related to the protection of the right of children to modern energy services are included in Art. 13 of the Law of Ukraine on the protection of childhood (2001). Here, it is stated that multi-child families are provided with state aid in the form of discounts on payments for utilities (gas, electricity, heat supply, or other services), and in the price of fuel used for heating (in case of the absence of a district heating supply).

In recent years, a number of legal acts have been approved in the energy sector. A set of legislative proposals were also elaborated and are currently awaiting approval. Some of these are of significant importance in the field of children's rights.

The approval of the Law of Ukraine on the Electricity Market (2017) was one of the most remarkable reforms of the energy sector of Ukraine. This Law contains the term "vulnerable consumers", which is considered to constitute domestic consumers defined in accordance with the procedure established by the Cabinet of Ministers of Ukraine, who have a right to aid for the compensation of payments for electricity consumed and/or protection from disconnections in certain periods, as prescribed by law. In order to implement actions aimed at reducing the spread of COVID-19 and the special social protection of some categories of electricity consumers, the Regulation of the Cabinet of Ministers of Ukraine on the provision of compensation to certain categories of electricity consumers (2021) was approved. In accordance with this Regulation, special compensation is to be provided, *inter alia*, to multi-child and foster families, as well as to family-type orphanages.

The Law of Ukraine on the Energy Performance of Buildings (2017) includes mechanisms for the improvement of the energy efficiency of buildings (e.g., the energy certification of buildings) that shall contribute to tackling energy poverty. However, this law has no special provisions relating to energy poverty, nor to children's right to access to energy services.

When discussing the correlation between access to modern energy services and the right to education, the role of the energy service of buildings occupied by publicly-owned educational institutions should be noted. Public buildings are traditionally considered to be large energy consumers with significant potential for the improvement of their energy efficiency. However, such energy efficiency measures require investments that are frequently unaffordable for state or local budgets. Following from the best practice of other countries, the energy service can be considered a good instrumental solution. This instrument is relatively new in terms of its application to the public buildings sector in Ukraine; however, it has become very popular in recent years after necessary changes were made to the legislation. Thus, the Law of Ukraine on the Introduction of New Investment Opportunities and Guaranties for the Rights and Legal Interests of Economic Entities in the Implementation of Large-Scale Energy Modernization (2015) introduced the definition of energy service, essential conditions of the energy service contract, and certain peculiarities of the public procurement procedure for energy service. Changes to the

Budgetary Code of Ukraine (2015) on the long-term obligations of energy service enabled the use of energy services for public institutions. According to the information provided by the State Agency on Energy Efficiency and Energy Saving of Ukraine (SAEE), the majority of concluded energy service contracts involved supplying kindergartens and secondary schools with individual heating units, featuring hour-based regulation and dispatching control (Department of City Infrastructure of Sumy City Council, 2021).

Concerning the energy efficiency-related education of children in Ukraine, it should be noted that some successful projects are already in place. In particular, the "Energy Efficient Schools" program – the first of its kind in Ukraine – was established within the framework of the "Municipal Energy Reform in Ukraine" (MERP) USAID Project in 2009, and was implemented in 24 schools from eight partner cities in the period from 2010–2011. Since 2012, the "Energy Efficient Schools: New Generation" (n.d.) project has been implemented by the Institute of Municipal Development in partnership with the Ministry for Education and Science of Ukraine, and sponsored by the DTEK energy company. This project provides online studies in utility literacy and energy-saving behavior for a large-scale audience, including pupils, their parents, friends, and acquaintances, preparing future leaders in energy-efficiency and utilities management. Another interesting project – Science City "New Energy" – was established at the Ivano-Frankivsk National Technical University of Oil and Gas. This project offers the "New Energy" study course (2018), which is specifically designed for children of primary school age (7–12 years). During the course, children become acquainted with the concept of energy, traditional and alternative types of energy, and the methods of its transformation. For the visual demonstration of alternative energy systems, models from the Ivano-Frankivsk scientific museum are used. The positive experiences generated by the projects mentioned, along with other similar initiatives, should be actively used by the responsible authorities in Ukraine. It is recommended that, in national and local action plans devoted to energy and climate change, the development of study disciplines/modules on energy-related issues (e.g., on the efficient use of energy, renewable energy sources, energy savings, and energy consumer rights) designed for children of different ages is included, along with their introduction into the study curricula of kindergartens and secondary schools.

As to the strategic documents of the Ukrainian legislation, it should be mentioned that the Action Program of the Cabinet of Ministers of Ukraine (2020) includes separate provisions regarding the protection of children's rights, and the reduction of energy poverty via mechanisms of improving the energy performance of buildings. However, no special provisions regarding children's rights in connection with access to modern energy services are explicitly provided.

As referred to in the Strategy on the National Security of Ukraine (2020), encouraging an increase in people's welfare and providing targeted social support to multi-child families and poor people, in particular, are among key tasks (p. 57). In accordance with this document, the Energy Strategy of Ukraine, as well as the Strategy of Environmental Security and Climate Change Adaptation, are to be developed.

On the 4th of March 2021, the draft Law on Energy Efficiency (registration No. 4507 of 17 December 2020) was approved in its first reading. This draft law aims, *inter alia*, at tackling energy poverty. It includes the Cabinet of Ministers of Ukraine's tasks of developing the indicators of energy poverty in households and approving the long-term aims and actions that seek to reduce energy poverty. Special provisions of this draft Law are devoted to the energy service (Art. 16) as a tool for the implementation of energy efficiency measures. However, no provisions related to children's rights are included.

On the 1st of March 2021, the Ministry of Environmental Protection and National Resources of Ukraine announced the draft Regulation of the Cabinet of Ministers of Ukraine on the approval of the Strategy of Environmental Security and Climate Change Adaptation until 2030. Here, it is stated that the climate change can have additional negative impacts on vulnerable groups of citizens, including children. However, no concrete indicators or actions are prescribed.

The National Energy and Climate Plan of Ukraine is currently under development and consideration by the responsible public authorities. Considering the information provided in this paper, it is suggested that this plan and other related acts specifically address the issue of children's rights in connection with access to modern energy services based on the common approaches of the EU Member States. These include: provisions on the social protection of vulnerable families with children; the improvement of the energy efficiency of pre-schools and secondary schools; and the introduction of special study programs related to sustainable energy, energy transition, renewable energy sources, energy saving behavior, and the rights of energy consumers.

Conclusions

1) Access to modern energy services is vital for the enjoyment of children's rights, such as: the right to life, survival, and development; the right to health; the right to education; the right to adequate housing; the right to be protected from any form of violence, neglect, and negligence; and the right to be heard.
2) States shall specifically address issues of children's rights (in particular, by tackling energy inequality, considering the risks faced by the concrete category of children, targeting certain children's rights that depend on access to modern energy services, and introducing concrete actions and outcomes indicators) in the strategic documents and legal acts related to universal access to modern energy services.
3) The social protection of low-income families with children in the form of discounts for energy bills and state support for the implementation of energy efficiency improvement measures in residential buildings (as mechanisms for tackling energy poverty), the encouragement of the energy renovation of pre-school and school buildings, and the introduction of special educational tools for pupils regarding sustainable energy are considered to be the most common practices in certain EU Member States.
4) Ukrainian policy and law includes some instruments that address children's rights in connection with their access to modern energy services (in particular, social support to multi-child families and the energy renovation of educational buildings), however, their approach in this direction lacks complexity and detail.
5) It is suggested to specifically address the issues of children's rights in connection with access to modern energy services in the draft NECP of Ukraine and other related documents. In particular, this should be based on the common approaches used by the EU Member States (e.g., on the social protection of vulnerable families with children, the improvement of the energy efficiency of pre-schools and secondary schools, and the introduction of compulsory study programs related to sustainable energy, energy transition, renewable energy sources, energy-saving behavior, and the rights of energy consumers into the curricula of pre-schools and schools).

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THE LEGAL SITUATION OF A CHILD IN MEDIATION IN LIGHT OF THE REGULATIONS OF INTERNATIONAL LAW

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Abstract. In light of international law, children should be participants in family mediation. International law creates a basis for the extensive use of mediation in resolving conflicts to which children are party. These include not only family mediations, but also civil mediations and those that take place in connection with the use of educational measures, as a reaction to prohibited acts committed by children or in the event of conflicts in educational institutions in which children participate. The participation of children in mediation may take the form of direct participation in mediation sessions, but it may also take the form of various types of direct and indirect consultations in which the child expresses their opinion on the proposed decisions.
Mediation enables children to obtain appropriate information on their legal and factual situation, adjusted to their cognitive resources. Mediation in which children participate is of considerable educational importance as a result of the fact that, in conditions of personal experience, children learn non-confrontational methods of resolving conflicts in social relations.
The accession by a state to an international agreement, which within the scope of its regulation also covers the procedural rights of children or specific legal solutions applicable in mediation, means that the state is obliged to apply legislative solutions that will ensure the application of the standards provided for in these agreements with regard to the legal and factual situation of a child who is a party to mediation or in relation to a child whose interests are affected by mediation between other persons.

Keywords: child, mediation, international law, children's rights, self-determination, parental responsibility

Introduction

The development of the concept of children's rights is a natural consequence of the recognition of its subjectivity and its recognition in the field of legal relations. In practical terms, the implementation of the standard of respecting children's rights is materialized by granting them a number of rights and procedural options in legal proceedings to which the child is party or which concern their legal or factual interests. Mediation should be a tool for the implementation of children's rights during these proceedings. Mediation should also be considered as an independent out-of-court method of dealing with conflicts in which the child is a party or which concern the interests of the child. It should be used in disputes within the territories of certain countries, but also in cross-border disputes – especially in cases where, in practice, there are doubts as to the jurisdiction of the judiciary or other public authorities, and in situations where there are difficulties with respecting the cross-border judgments of national authorities. Mediation should be used as a tool for resolving conflicts in which children participate, which should also apply to peer mediation, school mediation, and mediation in proceedings in which a child has the status of a minor perpetrator of a criminal act.

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The provisions of international law are able to set a universal standard for the use of mediation as a legal tool for the protection of children's rights. Firstly, international law should define a specific axiology of a child's participation in mediation. The fundamental value is, of course, respect for the child's right to express an opinion on matters of their life, and respect for their reasonable and realizable wishes as expressed in conflict management procedures – of which the child is an essential element. The subject of this article is, therefore, an examination of the scope of international law regulations regarding the participation of children in mediation, and the determination of the potential scope of their impact on the child's situation in legal proceedings concerning them, their rights, obligations, legal situation, and factual situation. Indicating the scope of the impact of international law is particularly important in a globalized world where human affairs have long since grown beyond the local dimension. The family matters of migrant people are subject to judicial review in various countries, and the rapid development of IT communication tools has created a situation where interpersonal conflicts may take on a cross-border nature. Mediation is widely recognized as one of the most effective methods of seeking agreement in conflicts, which are visible in the legal and social spheres of human functioning. Therefore, it is also worth learning about the scope of regulation on mediation in international law.

1. The axiology of a child's participation in mediation

In individual contemporary state systems, respecting the possibility of self-determination and a person's right to decide on their own affairs is usually related to the legal recognition of the age limit, exceeding which means acquiring full legal capacity. This not only means the possibility of disposing of one's rights within the meaning of civil law and the possibility of incurring legally effective obligations, but also the obligation to bear the criminal-law consequences of one's own actions. Thus, the law delimits the boundary between adulthood and childhood, setting it in principle – according to the regulations of national legislation and international law – at 18 years of age, pursuant to Art. 1 of the Convention on the Rights of the Child, adopted by the United Nations General Assembly on November 20, 1989 (hereinafter: the Convention on the Rights of the Child). For the purposes of this convention, "child" means any human being under the age of eighteen, unless the law applicable to the child attains an early age of majority. The European Convention on the Exercise of the Rights of Children, drawn up in Strasbourg on January 25, 1996, applies to persons under the age of 18 (hereinafter as: European Convention on the Exercise of Children's Rights).[2] The same age determining the application of the provisions of the Convention is provided for in Art. 2 of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement, and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereinafter – the 1996 Hague Convention).

The division between adults and children is not strict.[3] The age limit at which adulthood begins is determined by cultural and psychological factors that justify the recognition of individual aspects of a person's life as signifying whether they are capable of deciding on certain issues or capable of responsibility. Therefore, the age limit of 18 may be modified in specific individual cases on the basis of an act by a public authority in recognizing the age of majority of a younger person or extending the privileges of a child over the age of eighteen – although the provisions of international law may explicitly limit their application to children of a certain age. For example,

[2] However, this convention finds, in accordance with Art. 1, that clauses 2 and 3 apply to proceedings before a judicial authority which, within the meaning of this Convention, means proceedings in family matters, in particular relating to the exercise of parental responsibility, such as the place of residence of the child and the right to contact the child.

[3] For example, in the Polish legal system there is a category of "nieletni" – a minor (literally: underage) – on the basis of the provisions governing conduct in relation to this category of persons who have committed a prohibited act under penalty of a penalty. Provision 1 § 1 of the Act of October 26 1982, on proceedings in juvenile cases (Journal of Laws of 2018, item 969), provides for educational impact measures in the field of preventing and combating demoralization in relation to people under 18 years of age, but at the same time provides for special educational measures for people over the age of 13 but under the age of 17, which in certain circumstances may be extended to the age of 21 if educational or corrective measures have been issued against them. In addition, under civil law, the provisions use the concept of "małoletni" – which, in accordance with Art. 10 § 1 of the Act of April 23, 1964 Civil Code (Journal of Laws of 2020, item 1740) – represents a person under 18 years of age.

according to Art. 4 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction in accordance with Art. 14, this convention ceases to apply when a child reaches the age of 16. On the other hand, Art. 2 of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (hereinafter – the 2007 Hague Maintenance Convention), indicates that this applies to maintenance obligations arising from a relationship between parents and children towards a person under the age of 21, although States Parties may, pursuant to Art. 2 clause 3, extend the scope of application of this convention to dependent persons.

Regardless of recognizing a specific person as an adult, an expression of the development of civilization in modern societies is the capacity to grant people who are still formally children procedural rights and to respect the subjectivity of such people, as well as respecting their right to active participation in the process of their upbringing and to active participation in family and social life.

One example of this being provided to children is the legal guarantee of the opportunity to participate in proceedings before public authorities, including court proceedings concerning their interests, and the possibility of expressing their opinions on matters that are important to them. Firstly, this concerns the legal obligation to hear the child, but also the legally guaranteed possibility for the child to participate in conciliation processes during or outside court proceedings or other proceedings before state authorities, which also applies to participation in mediation. It is particularly important to guarantee the child's participation in family matters in which their fate is decided – that is, who will look after the child and how, what contact with parents and other family members will look like, where the child will live, and in matters where it is decided to provide material security for children. In cases where a child has committed legally prohibited acts under penalty of punishment, an expression of respect for the child's subjectivity is indicated in the use of educational measures that are a reaction to such acts or other legal measures, including mediation, under conditions of non-arbitrary application of punishment – i.e., under conditions of the active participation of the child in determining compensation and hearing their opinion on events. It should be remembered that mediation is used to resolve conflicts in which the child may also be an active party to the dispute.

The participation of a child in mediation concerning their rights is an expression of respect for their right to self-determination, because – as D. Kuznicka (2016, pp. 185–188) noted while analysing Art. 16 of the International Covenant on Civil and Political Rights (1996), according to which everyone has the right to have their legal subjectivity recognized everywhere – today it is recognized that the right of everyone to legal subjectivity is a permanent attribute of the individual, an immanent feature of every human being that constitutes an indispensable element of human dignity and has a legal and natural character (Kuznicka, 2016, pp. 185–188).

The basic value of a child's participation in mediation is the educational value of such a process. The aim of raising a child is to prepare a young person to function independently within the network of social norms. This is a long-term process that involves the gradual shaping of attitudes of responsibility for one's own actions and an active ability to express one's own needs. The preamble to the Convention on the Rights of the Child indicates the direction of educational activities that should be carried out to prepare the child for a responsible and appropriate – for the development of an understanding of human rights – existence in society. Universal values are cited there, stating that a child should be fully prepared to live in society as an individually formed person, brought up in the spirit of the ideals contained in the United Nations Charter (1945) – in particular in the spirit of peace, dignity, tolerance, freedom, equality, and solidarity. Mediation can therefore be an educational tool that teaches the child these values using the practical example of their own life in relation to the real needs manifested in the child's life. This corresponds to principle 10 of the Declaration of the Rights of the Child (1959), according to which a child should be protected from practices that may lead to racial, religious, or any other form of discrimination. They should be educated in the spirit of understanding others, tolerance, friendship between peoples, peace, and universal brotherhood. They should be instilled with the conviction that they should devote their energy and their talents to the good of others. This declaration therefore introduces a standard of conciliation in the actions of the state and the family, whose addressees are children.

Therefore, another important value of the participation of children in mediation is the establishment of a standard of interpersonal contacts during mediations carried out in order to control a specific conflict, which will mean exercise of the law that, in specific cases, will lead to the satisfaction of the child's needs.[4] Therefore, the child should participate in mediation in matters to which they are party (for example, in civil law disputes or in cases resulting from the child's commission of a prohibited act) and in matters relating to their interests (both in civil law matters concerning the child's property and family cases), and this should also take place before the case is formally brought to court or submitted to the jurisdiction of a state authority. This standard is based on family matters in Art. 13 of the European Convention on the Exercise of the Rights of Children, which states that, in order to prevent and settle disputes and to avoid legal proceedings concerning children, States Parties should encourage the introduction of mediation, other forms of dispute resolution, and the use of these methods in reaching a settlement in the appropriate types of cases as determined by the parties.

The educational role of children's participation in mediation is, therefore, to introduce children to the standard of amicable conflict resolution at the earliest possible stage in the existence of these conflicts, and to negotiate solutions that will allow for the development of a mutually or universally accepted compromise. Mediation is generally considered to be the form of conflict management that produces lasting results as quickly as possible. In the case of family conflicts or other conflicts to which children are parties, efforts should be made to resolve them as soon as possible, so that a long-lasting conflict does not leave its mark on the child's psyche. The recommendation in the preamble to the European Convention on the Exercise of Children's Rights justifies the use of mediation as soon as possible, the moment a family conflict arises. In line with the preamble to that act, "in cases of conflict, it is desirable to try to reach an agreement within the family before bringing the matter before a judicial authority".

2. Mediation and the self-determination of a child

The provision of Art. 16 of the Convention on the Rights of the Child introduces a standard for the protection of the subjectivity of the child, which should be respected in intra-family relations and in relations between the state and the child – and which, of course, also applies to mediation in both of these aspects. As provided in paragraph 1 of said article, no child shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, nor to unlawful attacks on their honour or reputation. This was additionally reinforced by the guarantee specified in paragraph 2 of said regulation, according to which the child is entitled to the protection of the law against such interference or attacks. The tools of legal protection are not limited to proceedings before state authorities aimed at bringing legal liability to persons violating the honour, reputation, or private sphere of a child's life, but also extend to mediation – whether taking place within or outside of the framework of such proceedings.

When it comes to family matters, especially those related to care and contact, the child's self-determination is particularly desirable due to the fact that, during the separation of the "founders" of the family, the existing family structure undergoes a serious transformation.[5] This requires negotiation to develop new rules for the coexistence

[4] For this reason, mediation is an excellent method of resolving peer conflicts in educational institutions in which children participate. The results of the analyses conducted by Fulya Turk (2018) show that conflict resolution, peace education, and peer mediation education are widely effective in strengthening the constructive conflict resolution skills of the students. The results of these studies show that school-based educations such as these may be an important part of preventing violence at school. The author also notes that these results indicate that providing these skills to students at all education levels will contribute to their academic success while also enabling them to acquire new life skills.

[5] Empirical research on mediation in cases of parental breakups carried out with the participation of children and without their involvement in the process of establishing the framework and rules for the functioning of the family after the breakup of partners has clearly proven that the participation of children in mediation and respect for their position positively affect the well-being and realization of the rights of all those involved in the separation. One year after mediation with the child, the

of parents and children in all configurations. Articulating the child's expectations regarding contact helps to avoid the trap of wishful thinking into which conflicted parents fall, who might expect the child to play the role of a "witness to their harm". The child's presentation of their expectations as to the shape of the family after the parents break up allows the family to avoid a situation where the parent who wants to continue taking care of the child is treated by the other parent as the attacking party. Thanks to the fact that the child had the opportunity to present their point of view, it is then possible for parents to build new relationships. Parents will also be aware that they are acting in the best interests of the child. Therefore, the European Convention on the Exercise of Children's Rights introduces a principle that should be applied in proceedings concerning the position of children in the family, including mediation. The provision of Article 1, paragraph 2 of the Convention states that its purpose is, in the best interests of children, to promote their rights, to grant them procedural rights, and to facilitate the exercise of these rights by ensuring that children are, themselves or through other persons or bodies, informed and allowed to participate in proceedings affecting them before a judicial authority. Therefore, it should be noted that recognizing the subjectivity of children enables the actual fulfilment of human needs and rights, even in the dimension of such a small social system as the family. To put it bluntly: all family members (including the child themselves) should have no doubt that the child is the subject and not the object of care and educational interactions, regardless of the situation in which the family finds itself.

The effect of family mediation, in which the issues of childcare and the scope of parent–child contacts are negotiated, should be to create conditions for the child to live well. This quality is important, regardless of whether these conditions are created in a full or incomplete family, or one that has been joined by the new partners of parents. Providing a child with optimal living conditions that will be adapted to their needs and the capabilities of the family will not be possible if the child and their affairs are "managed" authoritatively. It should be remembered that children will find a way to affirm their own will and relieve their suffering. This may take the form of speaking out against parents or attendants, may take the form of self-destructive actions, or may have a negative effect on the child's somatic condition. Only by including the child in the decision-making process, for example during mediation, can family relationships be re-established in post-conflict conditions in a non-violent way.

Of course, arbitrary actions by parents or public authorities may, in fact, be in line with a child's interests. However, as J. Ignaczewski (2019) notes, the interests of parents cannot be decisive for the resolution of the case in such a situation when failure to take these interests into account is a sine qua non condition for ensuring the protection of the minor's interests. On the other hand, if the protection of the child's best interests can be reconciled – even on the assumption that the decision will result in some temporary negative consequences for the child – with the interests of the parents, the court cannot disregard their interests. Ultimately, however, the parents' interests are relegated to the background when they cannot be reconciled with the child's legitimate interests (Ignaczewski, 2019, p. 68). Nevertheless, in the context of a specific family, mediation should be treated as a specific negotiating platform for reaching a compromise between the interests of parents or other adults and children. As Christine Hallett notes: In the ECHR, the rights of children are not expressed as paramount or privileged over those of adults; adults and children have equal rights as individuals. According to the Hallet, the Act has the potential to protect children and young people from intervention in their lives which they regard as unhelpful or unwanted, but it also has the potential to allow adults to claim rights and freedom from intervention which may conflict with children's wishes and interests (Hallet, 2000, p. 390).

fathers that participated in the study stated that there had been both a reduction in acrimony with their former spouse and improvement in their parental alliance. Children were more likely to report the improved emotional availability of their fathers and a greater feeling of closeness to them. Mothers had the opportunity to analyze their relationship with their child from both perspectives. Both parents and children recognized that they achieved greater contentment with care and contact arrangements and less inclination to want to change these arrangements. The general conclusion of the study was that, as a result of the child's inclusion in mediation, families achieved greater stability of care and contact patterns over time and between parents (McIntosh et al., 2008, p. 111).

In the case of family mediation, especially in the case of the separation of partners who are parents, it should be remembered that the mediation session is a forum where more than one relationship is negotiated on various levels: parent–child, but also child–child, and both parents in configuration with all children if there are more than one in a family. The point of reference is the legal category of the best interests of the child, but, as Melissa J. Schoffer (2005, p. 334) notes, the determination of what is in one child's best interest does not necessarily coincide with what is in another child's best interest.

The possibility of a child's self-determination thanks to their participation in mediation is not in opposition to parental responsibility, which in some legal systems – for example in Poland[6] – is called parental authority. Under international law, the concept of parental responsibility is defined in Article 1, paragraph 2 of the 1996 Hague Convention. According to this provision, the term 'parental responsibility' includes parental authority, or any analogous relationship of authority determining the rights, powers, and responsibilities of parents, guardians, or other legal representatives in relation to the person or the property of a child. The provision of Art. 2 of the European Convention on the Exercise of Children's Rights, in Art. 3 point b, directly indicates the catalogue of persons who bear parental responsibility. According to this regulation, these are: parents or other persons or institutions authorized to exercise some or all parental responsibility.

Exercising custody of a child as part of parental responsibility during mediation involves, inter alia, the fact that parents should be sensitive to signals of the child's real intentions. In the case of mediation used during parental breakup, the practice shows a decrease in parental competences, therefore in such mediations – but also in others in which children participate – the mediator plays a special educational role towards parents. The observations made by Ernest A. Sanchez and Sherrie Kibler-Sanchez are significant here, according to which it is important to educate parents regarding the difficulties that children face in any personal expression of preference, even in intact families. This paper agrees with the authors' opinion that the term "preference of a child" oversimplifies a child's attachment to their parents and their often complex feelings and needs, which require great sensitivity and attention from the mediator. Most children try not to hurt their parents' feelings, instead telling them what they believe they want to hear for fear of punishment or abandonment (Sanchez & Kibler-Sanchez, 2004, p. 560).

The standard of respect for a child's right to self-determination requires that both parties to the mediation (in the case of family mediation, parents or attendants), the mediator, and the public authority approving the outcome of the mediation respect the child's right to express their own position. This right correlates with the regulations governing the child's participation in proceedings before a court or other competent authority in matters of contact and custody. The European Convention on the Exercise of Children's Rights sets out in Art. 3 a number of obligations for judicial authorities to enable the child to affirm their views. Point b of said article sets out the obligation to allow the child to present their views. Further guarantees for the child can be found in Art. 6 of this Convention, which sets out that, in accordance with these provisions in proceedings affecting a child, before making a decision the judicial authority shall: consider whether it has sufficient information at its disposal in order to make a decision in the best interests of the child and, where necessary, obtain further information, in particular from the holders of parental responsibilities; in a case where the child is considered by internal law as having sufficient understanding, ensure that the child has received all relevant information; consult the child in person in

[6] The Polish legal system uses the concept of parental authority, however, Art. 95 § 3 of the Family and Guardianship Code (2020) establishes the best interests of the child and the social interest as premises limiting the exercise of parental authority. Both of these concepts are vague, offer a wide field for assessing specific actions in individual cases, and may also be in conflict with each other, but they exclude the arbitrariness of parents in deciding on matters that are important for the child. Moreover, § 4 of this article stipulates explicitly that, before making decisions on more important matters concerning the child's person or property, they should hear them out – if the child's mental development, health, and maturity allow it – and take into account their reasonable wishes as far as possible. This obligation to take into account the child's reasonable wishes, despite the fact that their assessment as reasonable or unreasonable may depend on the ethnocentric conditions of the functioning of parents in society, de facto determines the obligation to also take into account the views and expectations of the child in mediation regarding this matter.

appropriate cases, if necessary privately, itself or through other persons or bodies, in a manner appropriate to their understanding, unless this would be manifestly contrary to the best interests of the child; allow the child to express their views; and give due weight to the views expressed by the child.

On the other hand, the general clause concerning the obligation to respect the right of children to present their position is provided for in the Convention on the Rights of the Child. The provision of Art. 12 also relates to the situation of the child in mediation. Pursuant to paragraph 1 of said provision, States Parties must ensure that a child who is capable of forming their own views has the right to express their views freely on all matters concerning them. This provision specifies the obligation to adopt this position with due weight, according to the age and maturity of the child. The means to achieve this goal is, in particular, the provision of the possibility for the child to speak in any judicial and administrative proceedings relating to the child, as indicated in paragraph 2 of said article, directly or through a representative or appropriate body, in accordance with the procedural rules of domestic law. Moreover, Art. 13 of this convention guarantees freedom of expression for children, which should be understood broadly to include cases in which decisions are made regarding the child's property and person.

Detailed regulations on hearing a child can be found in Art. 9 of the Convention on the Rights of the Child. In par. 2, this regulation requires that all interested parties – including children, of course – are able to participate in proceedings which would result in the separation of the child from their parents, and to express their views in these proceedings.

A specific sanction in the event of the child's right to be heard is provided for in Art. 23 of the 1996 Hague Convention. The provision of para. 2, point b of this article introduces an exception to the principle of recognition of a measure taken in a given state. This exception occurs if the measure was taken without the child being given the opportunity to hear it, which thus violated the essential rules of conduct of the state in the context of judicial or administrative proceedings, except in urgent cases.

Mediation can be a form of protecting a child's identity, which is a necessary condition for actual self-determination. The right to identity is one of the fundamental human rights and, with regard to the legal situation of children, it is guaranteed by Art. 8 of the Convention on the Rights of the Child, which in its first paragraph imposes on States Parties the obligation to take measures aimed at respecting the child's right to preserve their identity, including nationality, surname, and lawful family relations, excluding unlawful interference. The second paragraph of Article 8 of this Convention requires States Parties to provide the child with appropriate assistance and protection in order to restore the child's identity as soon as possible.

Mediation can also be a platform on which ideological conflicts between parents and children or between parents are resolved with regard to their influence on the shaping of ideological attitudes important for the child's identity, and the most reasonable decision is to respect the child's free choice in this regard. The provisions of international law establish the rules of conduct in this respect. Peculiar guarantees are included in Art. 14 of the Convention on the Rights of the Child. The first paragraph of this regulation is straightforward: States Parties shall respect the right of the child to freedom of thought, conscience, and religion. However, the second paragraph stipulates that States Parties shall respect the rights and obligations of parents or, where applicable, legal guardians to guide the child in exercising their right in a manner consistent with the child's developing abilities. The regulation of the third paragraph, on the other hand, contains a general clause that should be treated as an interpretative guideline with regard to the application of the previous two provisions. Pursuant to this provision, freedom of expression of one's religion or belief may be subject only to such limitations as are provided for by law and are necessary for the protection of national security and public order, health or social morals, or the fundamental rights and freedoms of others, the provision of which is the setting of standards resulting from the principle of proportionality in this substantive scope. These provisions repeat the declarations contained in Art. 9, paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), according to which: everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change religion or belief and freedom,

either alone or in community with others and in public or private, to manifest religion or belief in worship, teaching, practice, and observance.[7]

International law also provides for special protection of the identity of children belonging to ethnic and national minorities, which is extremely important in the context of the tragic experiences of institutionalized violence. These experiences have resulted not only in the disappearance of cultures of specific communities, but in some cases in the physical extermination of ethnic or national groups – both in the past and on an ongoing basis. According to Art. 30 of the Convention on the Rights of the Child: in those states in which ethnic, religious, or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. This is a regulation that determines both the relationship between the child and state authorities and the relationship between the child and their family members, which in such cases should also be expressed in mediation.

Because a conflict of worldviews can occur – as practice shows, it often occurs in the case of attitudes affirmed by parents and their efforts to socialize children in the cultural influence of a specific religion or philosophical current – mediation seems to be one of the most appropriate instruments for dealing with conflicts of interests or conflicts of values. Mediation can also prevent a conflict of interest from turning into a conflict of values.[8]

During mediation involving children, in cases where mediation requires an intercultural perspective, or when mediation will have to come to an agreement in terms of an ideological conflict, it is worth using the experiences described by Marilou Giovannucci and Karen Largent. This will avoid the problem of collision between competing cultural norms concerning the communication and education of children. As said authors note, the mediation process – essentially a formal decision-making meeting – can be alienating to individuals and families from some cultures and ethnic groups for whom the process is not a familiar or common practice. Efforts to establish cultural resonance are very important, and can be facilitated by a thoughtful approach to who acts as a mediator, how the process is conducted, how parents are prepared, who is invited to participate, the setting and time, and the inclusion of cultural rituals (Giovannucci & Largent, 2009, p. 47).

3. Support and care for the child during mediation

A child is not a fully formed individual. They also do not have full legal capacity and, consequently, are not legally independent. They need support even when regulations provide for their active participation in decision-making.

The need to provide children with special care during mediation is part of the general obligation to provide support and care to children.[9] This right has been declared in a number of international human rights acts, in particular in:

[7] See Tabernacka, 2018, for a broader analysis of the issue of the treatment of freedom of religion and the worldview of children as human rights. It is worth noting that the mediator should be particularly sensitive when it comes to the influence of their personal views on the process of agreement. The mediator should be aware of their own views on non-denominational religion in order to be able to maintain their neutrality and not to subjectively judge the parties to the mediation or the child that the mediation concerns, as this could disrupt the process of reaching an agreement.

[8] See Tabernacka, 2010, for more on this. The essence of the conflict of values is the dispute concerning the realization or recognition of values that are significant due to the tradition or moral system adopted in a given community or professed by a given person. A value conflict, however, is different from a value collision. Value collisions are not a source of conflict if there is a culture of tolerance in a given social group or if, for some (most often economic) reason, involvement in a conflict is not beneficial.

[9] In some circumstances, such support may require the involvement of a large number of adequately educated actors. It is worth taking advantage of experience gained during the implementation of programs for the protection of children in mediation. M. Giovannucci and K. Largent presented the conclusions of running such programs in California, Colorado, and Connecticut. The authors noted that the programs introduced in these States were targeted at the following stakeholders: child

the General Declaration of Human Rights; the International Covenant on Civil and Political Rights (in particular in Articles 23 and 24); the International Covenant on Economic, Social, and Cultural Rights (in particular in Article 10); and in acts developed to provide a basis for regulating the position of the child in the family, the state, and in cross-border relations. In particular, these include: the Geneva Declaration of the Rights of the Child of 1924; and the Declaration of the Rights of the Child, adopted by the General Assembly on November 20, 1959, which indicates that "a child, due to its physical and mental immaturity, requires special care and care, including appropriate legal protection, both before and after birth".

As a rule, such support should be provided by parents or other persons entitled to care, but this is not always possible, which results in certain obligations on the part of the state. Article 4 of the European Convention on the Exercise of Children's Rights introduces an obligation to provide such support. Pursuant to this provision, in proceedings relating to a child before a judicial authority, where, under domestic law, persons with parental responsibility cannot represent the child due to a conflict of interest between them and the child, the child has the right – either personally or through other persons or institutions – to request the appointment of a special representative to represent them in these proceedings, although, as stipulated in the second paragraph of said article, States Parties to the Convention may limit this entitlement to children who are considered under domestic law to have sufficient knowledge.

Moreover, Art. 9 of this convention recommends that in such situations judicial authorities have the right to appoint a separate representative to represent the child in these proceedings, and in justified cases – a lawyer. In addition, Art. 5 of this convention stipulates that in proceedings concerning children before a judicial authority, States Parties should also consider granting additional rights to children, in particular: to request the assistance of persons designated by them who could facilitate their expression of position; to request, in person or through other persons or institutions, the appointment of a separate representative; or to appoint their own representative.

These regulations should, of course, be assessed very positively. The participation in mediation of a child's representative who would look after their interests plays an important educational role for the whole family, including for parents. The appropriate action of the child's representative – often combined with the suitably neutral attitude of the mediator – may factor into breaking the barrier of parents' ethnocentrism when assessing whether individual arrangements developed during mediation are in the best interests of the child or not.

4. Reliable information as a condition of adequate decisions made by the child during mediation

A child can make a specific decision and communicate it during the mediation process only if they have reliable and complete information on their legal and factual situation. However, due to the emotional immaturity of children, the lack of in-depth life experience that characterizes them, and their often limited amount of knowledge, the process of informing the child should compensate for these deficiencies and correspond to the psychological determinants of the child's perception of information. Nevertheless, mediation, as a non-formalized negotiation process, is an excellent opportunity to provide the child with information and explain its meaning, so that the child can adapt their expectations in light of the social and legal realities.

The European Convention on the Exercise of Children's Rights expressly grants children the right to be informed. As stated in Article 3, a child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting them, shall be granted, and shall be entitled to request, the following rights: to receive all relevant information; to be consulted and to express their views; and to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.

protection workers and their legal counsel, guardians ad litem (GALs), Court Appointed Special Advocates (CASAs), public and private attorneys representing family members and other parties, tribal representatives, mediators, and the judiciary. Other possible stakeholders – or perhaps consultants to the group – might include representatives from the fields of domestic violence, mental health, substance abuse, or developmental disabilities (Giovannucci & Largent, 2009, p. 39).

This convention defines, in Art. 2 under section d, the term "relevant information" which, according to this regulation, means information which is appropriate to the age and understanding of the child, and which will be given to enable the child to exercise their rights fully unless the provision of such information would be contrary to the welfare of the child.

Additionally, Art. 6 of this Convention imposes an obligation on the judicial authority to ensure that the child has received all relevant information before deciding in proceedings relating to children who, according to domestic law, are considered to have sufficient knowledge. It should be noted that this information could be passed on to the child during mediation.

Information relevant to the child, both during and before mediation, should be provided either by parents or by authorities having the status of the child's representative. According to Art. 10 of the Convention on the Exercise of Children's Rights, unless it is obviously contrary to the best interests of the child, in proceedings relating to the child before a judicial authority, the representative should:
a) provide all relevant information to the child, if the child is considered by internal law as having sufficient understanding;
b) provide explanations to the child if the child is considered by internal law as having sufficient understanding, concerning the possible consequences of compliance with their views and the possible consequences of any action by the representative;
c) determine the views of the child and present these views to the judicial authority.

The content of the above-mentioned provision is a detailed description of the general regulation of the Convention on the Rights of the Child in relation to family matters, where Art. 13 is determined by the child's right to freely seek, receive, and impart information and ideas of all kinds, regardless of the boundaries and the form that they might take. This right may be limited only by regulations established with the necessity of respecting the rights or reputation of other persons, or to protect national security or public order, health, or social morality.

5. Counteracting the threat to the child's welfare in mediation

The necessity of taking care of a child and providing them with protection suited to their age and maturity level determines the form of their participation in mediation. This applies to issues such as determining how many mediation sessions can be attended by a child and what their substantive scope should be – which is important, for example, in the case of family mediation in which the child's parents are participating. This entails the obligation to provide the child with appropriate emotional and legal support in mediation, which has already been discussed above.

The child may participate in mediation sessions directly, and the scope of this participation should be limited by the child's best interests, which should be assessed in each specific case taking into account the child's social maturity and their mental and substantive preparation for confrontation with the situation.

Agata Gojska, on the basis of the analysis of a number of views expressed in the doctrine, proposes forms of involving children in mediation so that their participation is adjusted to their individual situation. These methods include: joint consultation of parents and the child in the presence of a mediator as to the concluded agreement, which not only enables the transfer of information to the child, but also results in positive emotional outcomes and allows for possible corrections to be considered; interviews with the child, especially at the beginning of mediation, which may be conducted with the participation of a psychologist; consultation with the child throughout the mediation process; the presence of the child throughout the process; and the participation of the child in decision making (Gojska, 2014, p. 212). Regardless of these methods, as noted by Giovannoucci and Largent, the primary way to involve a child in mediation is by the mediator interviewing the child and bringing their interests to the table. The child can also write or dictate something to be read in mediation (Giovannoucci & Largent, 2009, p.

43). The child may therefore participate directly in mediation, but may also offer proposals for future arrangements. According to A. Cybulko, techniques that do not require the child's personal involvement in mediation are based on verbally directing parents to the child's perspective and needs. In this regard, the mediator may refer to the child's perspective directly – e.g., by asking the parents appropriate questions such as: What do you think your child would want? Alternatively, some mediators use symbolic tools. For example, one method involves an empty chair or chairs "intended" for children being placed at the negotiating table, or a child's picture being placed on the table (Cybulko, 2018, p. 309).

A child taking responsibility for a family may take the form of parentification syndrome. This is a factor that must be taken into account by the mediator when helping the parties to the family conflict to resolve their dispute. Parentification is defined as a reversed role in the family, and concerns the change of roles between parent and child. It occurs when a parent partially or completely gives up their parental duties and responsibilities (Zarczynska-Hyla & Piechnik-Borusowska, 2018, p. 289). Parentification may take two forms: instrumental parentification, which occurs when assigning duties and practical matters to children; and emotional parentification, which is considered by most researchers to be more destructive for the development of the parentified individual, and concerns meeting the parent's emotional needs. A child with this syndrome can act as an advisor, confidant, therapist, controller, partner, scapegoat, buffer, mediator, or judge in parental conflicts (p. 292).

Article 18 of the Convention on the Rights of the Child can be read as an expression of the declaration of the equal rights of parents in bringing up children, but it can also be treated as a kind of barrier against parentification. The regulation of paragraph 1 of this article stipulates that States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of a child. Parents or legal guardians, as the case may be, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

Children can therefore participate in mediation sessions, although the child's involvement in the mediation process cannot mean that the child takes responsibility for the actions of their parents, because the parents are responsible for the conflict in which the child is also involved.

Conclusions

The international standard of respecting the possibility of children's participation in mediation in relation to individual aspects of their factual and legal situation is an expression of respect for their legal subjectivity. Of course, the child, as a dependent being, should be able to use, in the field of non-confrontational methods of reaching a compromise, the support provided by relatives, and when the child's problems are related to family conflict, this support should be offered by public authorities. International law applies without state coercion, which is a security for the implementation of individual resolutions. The obligations of states to guarantee the possibility of children's participation in mediation at the level of inter-state obligations are part of the global culture of respecting the individual. More precisely, these obligations represent a culture of taking into account the needs of individuals, which should be guaranteed by states; they are an expression of the development of culture and respect for human rights.

States Parties to international agreements should therefore make every effort to ensure that the standards of international agreements in the field of enabling children to participate directly in mediation are implemented in their territory. Depending on the legal and systemic standards adopted in a country, this requires either the ratification of the agreement or another way (via the introduction of appropriate legislative solutions) to guarantee the application of the standards to which the country has committed itself by signing an international agreement.

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CONDITIONS FOR THE BANKRUPTCY OF NATURAL PERSONS: WHICH BALTIC STATE IS THE MOST ATTRACTIVE FOR BANKRUPTCY?

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Abstract. In recent years, lawmakers have struggled with a multitude of negative effects caused by the rapidly rising tide of debt distress among natural persons. Data from 2020 confirm the relevance of the bankruptcy of natural persons in the Baltic states. One of the factors that determine the choice of a natural person to go bankrupt is the provision of reasonable grounds to open bankruptcy proceedings. This article uses comparative analysis to answer, from the perspective of the debtor, the question of: in which Baltic state does the most favourable regime for initiating a bankruptcy case exist for a natural person?

Keywords: natural person, individual, Baltic state, conditions of bankruptcy, indebtedness

Introduction

There are many natural persons who can no longer meet their debt obligations in the Baltic states. For them, over-indebtedness is not just a temporary problem – various factors have led to an increase in the number of insolvent

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natural persons. As shown by economic examples, the insolvency[5] of natural persons is caused by excessive borrowing for consumption, housing, investment, private business needs, farming, taxes, and inflation, as well as the development of the credit market which stimulates consumption. On the one hand, the number of borrowers is decreasing due to the improvement of the payment administration system and the strengthening of payment discipline. On the other hand, however, the rapid growth of lending and borrowing for both consumption and business inevitably increases the number of borrowers. In economic terms, this is to be welcomed, since the development of the credit supply serves as a stimulus to the economy, even when the overall economic situation is favourable. From a social perspective, the insolvency of a natural person is typically caused by unforeseen life events such as: loss of employment, sometimes due to health problems; family changes such as marriage/divorce or the birth of children; excess credit beyond appropriate expenditure incurred by socially vulnerable persons such as seniors, single parents, or students; or start-ups who have overestimated their financial capabilities. Reasons for insolvency can also stem from personal attitudes, such as: "buy first, then pay"; an inability to accept responsibility for personal financial problems; or a lack of understanding of the essence of financial services. No research has ever conclusively established the extent to which the actions of such debtors are due to a lack of financial education or reckless spending/wilful extravagance.

Traditionally, there are two different legal models for the bankruptcy of a natural person: the Anglo-American model, which is known as the "fresh start"; and the continental European model, referred to as the "earned fresh start". The former model is, in general, more favourable for the debtor, whereas the latter emphasises the need to meet the interests of creditors. Moreover, the continental European model can, in turn, be divided into three main models: the Nordic model, which emphasises the good faith of the debtor; the German-Austrian model, which emphasises the fulfilment of the payment plan; and the French model, which rather provides for preventive measures and prescribes somewhat harsh conditions for release from debt. As can be seen from the objectives of bankruptcy proceedings and the case law discussed below, the bankruptcy law of the Baltic countries has aspects of both the Nordic and German models (Ambrasaitė & Norkus, 2014, pp. 176–185).

According to data from the Authority of Audit, Accounting, Property valuation, and Insolvency management under the Ministry of Finance of the Republic of Lithuania, from the entry into force of the Republic of Lithuania's Law on Personal Bankruptcy (hereinafter, the Lithuanian BA) on the 1 March 2013 until the 31 December 2020, bankruptcy cases were initiated against 2,833 natural persons. In Latvia, approximately 13,700 insolvencies of natural persons have commenced[6] since the introduction of these types of proceedings on the 1 January 2008, the vast majority of which came after the entry into force of the current Insolvency Law, Latvijas Vēstnesis, on the 1 November 2010. Meanwhile in Estonia,[7] according to data from the Ministry of Justice of Estonia, 1,055 bankruptcy petitions were submitted against natural persons in 2020 (Ministry of Justice of Estonia, 2021).

[5] Under Article 2(2) of the Republic of Lithuania's Law on Personal Bankruptcy, the definition of insolvency (of a natural person) constitutes a condition where a person is unable to discharge his liabilities as they mature, exceeding the amount of 25 times the minimum monthly wage as approved by the Government of the Republic of Lithuania. Article 1 of the Estonian Bankruptcy Act provides the definition of bankruptcy as constituting the insolvency of a debtor declared by a court ruling. A debtor is insolvent if they are unable to satisfy the claims of creditors, and if such an inability, due to the debtor's financial situation, is not temporary. A debtor who is a legal person is also insolvent if their assets are insufficient for covering their obligations and, due to the debtor's financial situation, such an insufficiency is not temporary. The Latvian Insolvency Law does not provide a definition of the insolvency of a natural person as such, but this term can be ascribed a meaning such that insolvency is a state of a natural person with respect to whom insolvency proceedings have been commenced. Despite differences in the terminology, the terms *insolvency* of a natural person and/or *bankruptcy* of a natural person are used interchangeably (as synonyms) in this article.

[6] i.e., the insolvency application has been satisfied by the court.

[7] In Estonia, regular official statistics on bankruptcy cases are not published. Information can be obtained through inquiries in the court information system or in the official publication *Ametlikud Teadaanded*. Therefore, bankruptcy statistics may differ from source to source.

The data in Table 1 show that, of all three Baltic states during the years of 2015–2020, Latvia had the highest number of insolvency proceedings commenced against natural persons, whereas Lithuania was quite significantly behind the other two countries in this regard. There is no doubt that one of the reasons for these numbers is the date when the law on the bankruptcy proceedings of natural persons came into force, with Lithuania being the last Baltic state to adopt such legislation (Estonia did so in 2004, Latvia in 2008, and Lithuania in 2013).

Table 1.
The number of insolvency proceedings commenced against natural persons in the Baltic states in 2015–2020.

State / The year	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**
Lithuania (The Authority of Audit of the Republic of Lithuania, 2021)	448	456	473	398	306	264
Estonia[8]	approx. 750	approx. 750	approx. 750	release of debtor from obligations (approx. 700 petitions) and debt restructuring petitions (approx. 50 applications)	release of debtor from obligations (approx. 700 petitions) and debt restructuring petitions (approx. 50 applications)	1,055
Latvia (Lursoft, 2021)	1,632	1,550	1,537	1,281	1,242	1,040

It is important to note that Lithuania differs from the other Baltic states in its public presentation of detailed statistics regarding the number of bankruptcies of natural persons, as it has an official institution which presents data on the bankruptcy proceedings of natural persons. We may also state that the "boom" in the bankruptcy of individuals is fading, but the issue remains relevant – especially during the pandemic period. One of the factors determining the decision of a natural person to seek bankruptcy is the regulation of reasonable grounds (i.e., entry criteria) for initiating bankruptcy proceedings. Therefore, this article further analyses the conditions set forth in the bankruptcy-related legal acts of Lithuania, Latvia, and Estonia that are required for the initiation of the bankruptcy proceedings of natural persons. The main bases (criteria) of the evaluative comparison that seeks to find the Baltic state with the most attractive insolvency regimes are: the definition of the subject; the initiator of insolvency proceedings; and the entry criteria (i.e., grounds) for opening insolvency proceedings. Indeed, the conditions required to open bankruptcy proceedings against a natural person are only one element among others on which the attractiveness of insolvency regimes is based. Therefore, in order to reach a conclusion on the most favourable regime, the authors of this article also amend the evaluation that follows their comparative analysis by considering the criteria of: the cost of such proceedings; the period of discharge; and the dischargeable debts.

[8] For example, during the period of 2015–2018, 2,996 bankruptcy petitions of natural persons were submitted to the court, an average of approximately 750 applications per year. In addition, during the period of 2017–2019, 2,089 petitions for the release of a debtor from obligations (approximately 700 petitions per year) and 150 debt restructuring petitions (approximately 50 applications per year) were processed.

1. The legal regulation in the Republic of Lithuania

Until April 2010, Lithuania did not have an effective modern law on the bankruptcy of natural persons (the Resolution of the Government of the Republic of Lithuania No. 189 on the approval of the measures for the implementation of the program of the Government of the Republic of Lithuania for 2008–2012, 2009), and until May 2012 there was also no national act regulating the legal dimension of the bankruptcy of natural persons. After the Seimas adopted the Lithuanian BA,[9] Lithuania was removed from the list of archaic European Union member states in which the bankruptcy of a natural person is not possible.

1.1. The subject and initiator of insolvency proceedings

The common feature of the subjects of insolvency proceedings of natural persons in Lithuania is the absence of the status of a legal personality. Such persons (subjects under the Lithuanian BA) that can apply for the initiation of bankruptcy proceedings are divided into three groups: natural persons[10]; farmers[11]; and other natural persons pursuing individual activities, acting in good faith, as defined by the Law of the Republic of Lithuania on Personal Income Tax.[12] Thus, it can be stated that a wide range of unincorporated persons are now able to go bankrupt in Lithuania. Under the Lithuanian BA, the subject and the initiator coincide – i.e., personal bankruptcy proceedings may be initiated only by a natural person themselves (Article 1(4) of the Lithuanian BA).

1.2. Entry criteria (grounds) for opening insolvency proceedings

The courts and the legislator of Lithuania have established three main grounds for opening bankruptcy proceedings against a natural person: the natural person must be at least 18 years old; the natural person must be deemed technically insolvent, i.e., unable to fulfil their debt obligations, the payment terms of which have expired and the amount of which exceeds 25 months of minimum wage as approved by the Government of the Republic of Lithuania[13] (hereinafter, the MMW); and the natural person must comply with the criterion of fairness.

Natural persons linked to joint assets and/or joint obligations towards creditors may go bankrupt under a single case in the Republic of Lithuania. Natural persons seeking to file bankruptcy in one case may submit a joint application to the court to open bankruptcy proceedings against them or, before the approval of the satisfaction of creditors' claims and the restoration of the solvency of the natural person (hereinafter, the Lithuanian plan), submit an application to the court to intervene in proceedings initiated by another natural person (Article 41 of the Lithuanian BA).

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[9] The Lithuanian BA was adopted on the 10 May 2012 and came into force on the 1 March 2013.

[10] A natural person is understood as an ordinary consumer – i.e., someone who is not engaged in commercial activities (such as individual activities or farming).

[11] "Farmer" means a natural person who, alone or with partners, engages in agricultural activities and forestry, and whose farm is registered in their name and represented by them in the Register of Farmers' Farms (Law of the Republic of Lithuania on Farmer's Farms, 1999, Art. 2(2)).

[12] Individual activities shall mean any independent activity in pursuit whereof an individual seeks to derive income or any other economic benefit over a continuous period: 1) independent commercial or industrial activities of any nature, except activity for the sale and/or rental of immovable property by nature, as well as transactions in financial instruments; 2) independent creative or professional activities (for example: attorneys-at law, notaries, bailiffs) and other similar independent activities, including those exercised under a business certificate; 3) independent sports activities (activities of an athlete (a resident who performs a certain physical or mental activity, based on certain rules and organized in a certain form specially established for this activity) for competitions and participation in competitions); 4) independent performing activities (performer, actor, singer, musician, conductor, dancer or other resident, singing, reading, reciting or otherwise performing literary, artistic, folklore or circus numbers) preparation for and participation in a public performance (Law of the Republic of Lithuania on Personal Income Tax, 2002, Art. 2).

[13] From the 1 January 2021 the MMW in Lithuania was set at EUR 642 (the Resolution of the Government of the Republic of Lithuania No 1114 due to the MMW applicable in 2021, 2020).

Regarding the aforementioned essential conditions, it must be said that, first of all, the condition of adulthood is rather clear – in Lithuania, a natural person over the age of 18 is considered an adult who has the right to file for bankruptcy.

Second, the essential and mandatory condition of declaring a natural person bankrupt is economic in nature. Article 2(2) of the Lithuanian BA provides the definition of insolvency of a natural person as constituting an inability to fulfil their debt obligations, the payment terms of which are overdue and the amount of which exceeds the respective amount approved by the Government of the Republic of Lithuania. The approach of legislators is confirmed by the case law of Lithuanian courts: "<...> a bona fide natural person shall be considered completely insolvent when the financial condition of the bona fide natural person is critical and they are unable to fulfil debt obligations that have expired ..." (Vilnius Regional Court, 2013). It is emphasized that natural persons may only initiate bankruptcy proceedings if they are actually insolvent and incapable of paying their overdue debts and meeting their debt obligations due to lack of funds. Insolvency indicates the material situation of a natural person (the debtor) when their available assets are insufficient to fully satisfy their creditors' claims, and when the debtor is unable to settle with their creditors. The corollary is that a natural person whose debt obligations have not matured cannot be considered insolvent. This provision presumably seeks to ensure the stability of civil legal relations and prevent any abuse of insolvency proceedings by either creditors or debtors. A qualifying debt amount of 25 MMW was selected to avoid unnecessary insolvency proceedings involving minor amounts. The drafters of the Lithuanian BA chose one of the main social indicators of the state for determining the insolvency of a natural person, by taking into account the practice of a neighbouring country with a similar level of economic development and the economic situation within the state. It should be noted that the established threshold amount has more than doubled over the past 8 years since the entry into force of the Lithuanian BA. On the 1 March 2013, this sum amounted to LTL 25,000 (equivalent to EUR 7,246), whereas on the 1 January 2021 this amount was equal to EUR 16,050. In view of this, said threshold will only continue to increase in the future as a result of Lithuania's increasing MMW (which increases at least once and sometimes several times per year).

It is important that the Lithuanian BA is applied to natural persons, regardless of the period during which their debts arose. That is to say, the insolvency of a natural person is determined by assessing all of their debt obligations, including those assumed before the entry into force of the Lithuanian BA (Article 1(7) of the Lithuanian BA).[14] Determination of insolvency is one of the essential factors in deciding whether to initiate bankruptcy proceedings against a natural person, which is determined via the third condition – the criterion of fairness (*bona fide*) (Vilnius Regional Court, 2013). The aspect of fairness is left to the assessment of the courts, whereby: an analysis of the reasons for the insolvency of a natural person is performed; the circumstances of the occurrence of the debtor's liabilities are examined; and an assessment of their efforts to find paid employment, a better-paying job, or engage in other income-generating activities is conducted. As well as this, the natural person's use of consumer credit, amount of debt obligations, amount of assets held, the prospects of the debtor fulfilling their debt obligations, the natural person's harmful habits, and other similar factors are taken into account. It should be noted that if, for example, a natural person becomes insolvent due to their harmful habits such as abuse of alcohol, drugs or other psychotropic substances, or gambling (a natural person must submit to the court a certificate issued by the Centre for Addictive Disorders), the court, in light of the criterion of fairness, must in all cases establish a causal correlation between the circumstances proving the person's misconduct and their insolvency (Tamošiūnienė, Terebeiza, & Bolzanas, 2013, p. 79). Even if the natural person's financial obligations are greater than their assets, if the income received by that person allows them to fulfil all of their financial obligations within a reasonable period of time, this would mean that the person is able to meet their debt obligations and should not be permitted to use bankruptcy proceedings to avoid liabilities.

[14] In accordance with the decision of the Constitutional Court of the Republic of Lithuania (1998), which emphasizes the fact that the adoption of retroactive legislation is possible if this is specified in the law itself, and if such legislation would not worsen the legal situation for legal entities (*lex benignior retro agit*).

2. The legal regulation in the Republic of Latvia

Insolvency proceedings of a natural person were introduced into Latvian legislation with the adoption of the (previous) Insolvency Law (Latvijas Vēstnesis, 2007) that entered into force on the 1st of January 2008 (hereinafter, the Latvian IL 2008). These proceedings were lengthy, complex, and costly. It can be argued that the regulation of these proceedings was more suited to complex corporate restructuring rather than the fresh start of an ordinary over-indebted consumer. Thus, the law required the debtor to submit an extensive bundle of documents to the court, such as documentary proof of their income during the past 12 months (Article 154 (3) of the Latvian IL 2008). In addition, the debtor had to prepare a plan of sale of their property and the satisfaction of creditors' claims (Article 155 of the Latvian IL 2008) which, if the debtor had assets, proved to be a rather complex exercise. Often, the aforementioned plan had to be amended over the course of the proceedings, and the amendments had to be filed with the court accordingly (Article 164 of the Latvian IL 2008). Both the preparation of the aforementioned plan and its amendments could have incurred substantive legal costs. Moreover, the regulation provided for the extensive work of an insolvency administrator prior to the initiation of the proceedings and during their course (Articles 157 and 159 of the Latvian IL 2008). The debtor had to pay monthly remuneration to the administrator and cover the other costs of insolvency proceedings accordingly (Article 154 (3) of the Latvian IL 2008). If the debtor could not prove that they were able to cover these costs, a fresh start by means of insolvency proceedings was not available to them. The length of insolvency proceedings was rigidly set at seven – later, five – years, irrespective of the circumstances of the particular insolvency proceedings (Article 174 (2) of the Latvian IL 2008).

Unsurprisingly, the Latvian legislator's first attempt at providing an opportunity for a fresh start for over-indebted individuals was unsuccessful. The previous Insolvency Law was in force for slightly less than three years, and was substituted by the current Latvian IL (Latvijas Vēstnesis, 2010) (hereinafter, the Latvian IL 2010) that has been in force since the 1st of November 2010.[15] The regulation of the insolvency proceedings of a natural person in the current Insolvency Law has increased the availability of these proceedings, and substantially increased an over-indebted consumer's chances of successfully discharging their debts – as can be seen from the statistics presented in the introduction to this paper.

2.1. The subject and initiator of insolvency proceedings

A subject of the insolvency proceedings of a natural person may be any natural person who has been a taxpayer in the Republic of Latvia in the previous six months and who is in financial difficulty (Article 127 of the Latvian IL 2010). Only the debtor themselves may file for insolvency (Article 133 (1) of the Latvian IL 2010). Taking into account that the purpose of these proceedings is to provide a fresh start for an individual (while ensuring that their debts are settled from their assets), it is the debtor's right to make themselves available to these proceedings. Hence, the debtor is not obliged to file for insolvency in case of financial difficulty. There is an additional option to submit a joint insolvency application for spouses or persons in relation or affinity to the second degree.

2.2. Entry criteria (grounds) for opening insolvency proceedings

The entry criteria for the insolvency proceedings of a natural person are as follows (Article 129 of the Latvian IL 2010): the debtor does not have the possibility of settling debt obligations for which the due date has passed, and the debt obligations exceed EUR 5,000 in total (i); in connection with provable circumstances, it will not be possible for the debtor to settle debt obligations which will be due within a year, and the debt obligations exceed EUR 10,000 in total (ii); the debtor does not have the possibility of settling debt obligations out of which at least one debt obligation is based on an unsettled ancillary obligation or joint obligation between the debtor and the

[15] Hereinafter, references to the "Insolvency Law" are references to the current Insolvency Law in force.

debtor's spouse, or a person who is in relation or affinity to the debtor to the second degree, the amount of which exceeds EUR 5,000 (iii).

According to the court practice, the court must restrict itself to the formal establishment of the aforementioned entry criteria and must not assess the causes of the debts (Senate of the Supreme Court of the Republic of Latvia, 2013)

There are also negative entry criteria. Thus, the insolvency proceedings of a natural person shall not be applicable or terminable for a person (Article 130 of the Latvian IL 2010): who in the last three years prior to the commencement of insolvency proceedings of a natural person has deliberately provided false information to his or her creditors (i); who has spent the granted loan for purposes other than those stated in the agreement and a ruling of the competent authority has entered into effect in criminal proceedings (ii); who has, within the last 10 years prior to the declaration of insolvency proceedings of a natural person, had insolvency proceedings of a natural person terminated within the scope of which obligations have been discharged (iii); within the last five years prior to the commencement of insolvency proceedings of a natural person or during insolvency proceedings of a natural person, a ruling of the competent authority has entered into effect in criminal proceedings under which it has been established that the debtor has avoided tax payment (iv); who has had insolvency proceedings of a natural person terminated without discharging the obligations within the last year prior to the commencement of insolvency proceedings (v).

3. The legal regulation in the Republic of Estonia

Estonian insolvency law recognises two different types of proceedings for natural persons: debt restructuring and bankruptcy. Debt restructuring proceedings are regulated by the Debt Restructuring and Debt Protection Act (hereinafter, the Estonia DRDPA) (Võlgade ümberkujundamise ja võlakaitse seadus, 2010), and their purpose is to facilitate the restructuring of the debts of a natural person with problems of solvency in order to overcome these problems and avoid bankruptcy. Bankruptcy proceedings, on the other hand, are regulated by the Bankruptcy Act (hereinafter, the Estonian BA) (Pankrotiseadus, 2004), and are conducted if a debtor is insolvent. According to Article 1 (2) of the Estonian BA, a debtor is insolvent if they are unable to satisfy the claim of a creditor that has fallen due and such an inability, due to the debtor's financial situation, is not temporary. According to Article 2 of the Estonian BA, a debtor who is a natural person is also given the opportunity to be released from their obligations through bankruptcy proceedings pursuant to the procedure prescribed in the Estonian BA. The provisions for the proceedings of the release of a debtor who is a natural person from obligations entered into force in 2004 (Chapter 11 of the Estonian BA).

3.1. The subject of insolvency proceedings

Estonian applicable bankruptcy law does not give a definition of who a natural person is and to whom the Estonian BA applies. Only Estonia DRDPA Article 4 (1)–(2) provides the definition that a debtor is subject to debt restructuring proceedings regardless of their status as an enterprise. Debt restructuring may be applied for by a debtor whose place of residence is in Estonia and who has resided in Estonia for a period of no less than two years before submitting the debt restructuring petition.

3.2. Entry criteria (grounds) for opening insolvency proceedings

The Estonian bankruptcy law recognises two different stages of proceedings for natural persons: bankruptcy proceedings, and proceedings for the release of a debtor from obligations which were not addressed during the bankruptcy proceedings. In fact, it could be said that the proceedings for the release of a debtor from obligations are the most important part of the bankruptcy proceedings of a natural person.

A bankruptcy petition may be filed by a debtor or a creditor (Article 9 (1) of the Estonian BA). The creditor shall substantiate the debtor's insolvency and prove the existence of a claim. Also, the total amount of the claims that form the basis for the bankruptcy petition of the creditor must exceed EUR 1,000 in the case of a natural person (except if unsuccessful execution proceedings have been conducted with respect to the abovementioned claims within one year prior to the filing of the bankruptcy petition (Article 10 (1), Article 15 (3)) of the Estonian BA). The debtor, on the other hand, shall submit an explanation concerning the cause of the insolvency and a list of debts (Article 13 (2) of the Estonian BA). In fact, natural persons in Estonia are not obliged to submit bankruptcy petitions in cases of insolvency.

After accepting a bankruptcy petition, the court shall decide on the appointment of an interim trustee or, taking into account the financial situation of the debtor, refuse to appoint an interim trustee and instead declare bankruptcy (Article 15 (2) of the Estonian BA). However, a court shall not declare bankruptcy regardless of the insolvency of the debtor who is a natural person if a basis for refusal to appoint an interim trustee (specified in Article 15 (3) of the Estonian BA) exists. Nevertheless, the court may declare bankruptcy in situations where the debtor or a third party has, before the appointment of an interim trustee, performed the obligation on which the bankruptcy petition is based or provided sufficient security for the performance of the obligation (Article 31 (2) of the Estonian BA).

In a situation where bankruptcy has been declared, there are in general no different procedural acts in the bankruptcy proceedings of natural persons compared to those of legal persons: creditors' claims are defended, bankrupt estates are sold (if there are any), and payments from are made from the bankrupt estates. However, a court may prohibit a debtor who is a natural person from acting as a sole proprietor, a member of the management body of a legal person, the liquidator of a legal person, or a procurator, until the end of the bankruptcy proceedings (Article 91 (1) of the Estonian BA). In fact, it can be argued that the most important procedural act in the first stage (of bankruptcy proceedings) is to determine the creditors' claims.

Moreover, the main difference between the bankruptcy proceedings of legal and natural persons arises after the proceedings are terminated. Whilst a legal person shall be deleted from the commercial register, a debtor who is a natural person may be able to enter the second stage of proceedings. This means that after the termination of bankruptcy proceedings (by approval of the final report (Article 163 of the Estonian BA) or in the event of abatement of the bankruptcy proceedings (Article 158 of the Estonian BA)), the commencement of proceedings for the release of a debtor from obligations may be decided by the court. In fact, this is generally the purpose of the bankruptcy proceedings of natural persons. However, without going through the first stage (the bankruptcy proceedings), it is not possible to enter to the second stage (the proceedings for the release of a debtor from obligations).

In fact, the petition for the release of a debtor from obligations should be provided with the bankruptcy petition. In a situation where a debtor's assets are insufficient for covering the costs of the bankruptcy proceedings and it is impossible to recover or reclaim the assets, the court will declare bankruptcy only if the debtor has submitted a petition for the release of the debtor from obligations. Otherwise, there is no purpose of the bankruptcy proceedings, and the court may terminate the proceedings by abatement without declaring bankruptcy regardless of the insolvency of the debtor.

However, there are currently many amendments planned that concern the insolvency proceedings of natural persons in Estonia. According to the draft law of March 2021, there would be a single act (hereinafter, the Natural Persons' Insolvency Act) for a debtor who is a natural person, which enables them to submit an insolvency petition to the court (Ministry of Justice of Estonia, 2021). The purpose of the proposed amendments is to make the bankruptcy proceedings of a natural person cheaper and quicker, and to simplify the judicial and extra-judicial proceedings under the Estonian BA and Estonian DRDPA. Therefore, a person shall be required to complete a (mandatory) pre-trial debt counselling, where the debtor's economic situation will be determined. In justified cases, an insolvency petition together with a repayment plan shall be prepared for the court. Taking into consideration the circumstances set out in the petition and the concrete situation of the debtor, the court will

provide guidance on whether bankruptcy or debt restructuring proceedings are to be undertaken. As the activity of a sole proprietor is secured by a natural person's assets, one proceeding is conducted in respect of a natural person and sole proprietor. Therefore, based on the insolvency petition, the court decides whether to initiate: (i) bankruptcy proceedings of a natural person; (ii) bankruptcy proceedings and proceedings for the release of a debtor from their obligations; or (iii) debt restructuring proceedings. Bankruptcy proceedings, however, are conducted in accordance with the provisions of the Estonian BA. In previous cases, the creditor has also had the opportunity to file an insolvency petition (Ministry of Justice of Estonia, 2021). However, according to the applicable law, the creditor cannot submit a debt restructuring petition (Article 10 of Estonia DRDPA).

In fact, the law will apply to all natural persons, irrespective of whether the debtor is an enterprise. However, debt restructuring proceedings cannot be initiated against a debtor whose place of residence is in Estonia and who has resided in Estonia for a period of no less than one year before submitting the petition. A two-year period (as in applicable law) was found to be too long (Ministry of Justice of Estonia, 2021).

In addition, legal proceedings will be reduced in duration, and procedural deadlines shortened. According to the proposed amendments, the proceedings for the release of a debtor from obligations, conducted during bankruptcy proceedings, will be reduced from a duration of five years to a maximum of three (Ministry of Justice of Estonia, 2021). Taking into account that the debtor submits the insolvency petition with a repayment plan, then the court will be able to approve the repayment plan earlier and therefore the release of the debtor from obligations is also initiated earlier. However, the term may be extended by up to one year in case of dishonest debtors. In order to exclude potential abuse by the debtor, the court may annul the ruling on the release of the debtor from obligations.

Moreover, in case of abating proceedings under the Estonian BA, the court will have the right to decide on the commencement of proceedings for the release of a debtor from obligations without bankruptcy proceedings (the so-called first stage). Additionally, several minor amendments are envisaged for the more efficient and faster conduct of proceedings (such as the sale of pledged property through a bailiff, a positive credit information register, the termination of enforcement proceedings, a prohibition on business and entrepreneurship, and an official bank account).

4. A comparative analysis of the legislation of the Baltic states

4.1. Legal regulation on subject of insolvency proceedings

Following the adoption of the EU regulation on insolvency proceedings by the EU Council (Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings (OJ L 160) which was changed by the Recast Regulation EU (2015/848) of the European Parliament and of the Council, dated 20 May 2015, on insolvency proceedings), the Baltic states established the concept of personal bankruptcy in their national laws at different times: Estonia in 2004; Latvia in 2008; and Lithuania in 2013. Although it was one of the last countries in the EU to adopt its own legislation in this regard (the Lithuanian BA), the conditions for bankruptcy in Lithuania are relatively complicated. Consolidation of the conditions for the bankruptcy of natural persons reaffirms the notion that the Lithuanian BA regulates only the bankruptcy process of natural persons who comply with the principle of fairness – i.e., insolvency cannot be the result of abuse or criminal activity. When comparing the grounds established in the laws of the aforementioned countries under which bankruptcy proceedings would not be opened against a natural person, one can conclude that Lithuania is the only country where a person cannot initiate bankruptcy proceedings if their insolvency results from their harmful habits. The establishment of this condition expresses the legislator's concern and their strict attitude towards the irresponsible behaviour of natural persons. The weakness of such a requirement is that the extent of the irresponsibility required to disallow bankruptcy is subjective, especially as we have to assume that those completely without sin are a very small minority of the population. The result of this is that the application of such a term lacks the certainty and predictability tests of a good law.

With respect to Latvia, there is a criterion that the applicant must be unable to settle their debt obligations – i.e., that they lack the ability but not the will to settle debt obligations. In essence, a similar principle is applied in Estonian bankruptcy proceedings – the bankruptcy petition can be submitted to the court in situations where the debtor is permanently unable to satisfy the creditors' claims which have fallen due. However, if a debtor's assets are insufficient to cover the cost of the bankruptcy proceedings and the debtor has only obligations from which release is impossible by law (such as the obligation to compensate for damage intentionally caused by unlawful action, or the obligation to pay for the support of a child or parent), then the court may refuse to initiate bankruptcy proceedings. In this case, there would be no purpose for bankruptcy proceedings, because the release of the debtor from these obligations is impossible.

It should also be emphasized that the initiators of the Lithuanian BA did not incorporate provisions on the bankruptcy of natural persons into the pre-existing legal regulation on the bankruptcy proceedings of legal entities in the country (as in the case of Latvia – the Latvian IL 2008 and/or Latvian IL 2010 (Latvijas Vēstnesis, 2007; Latvijas Vēstnesis, 2010) and Estonia – the Estonian BA (Pankrotiseadus, 2004)), instead adopting a separate special law exclusively regulating the bankruptcy proceedings of natural persons. The adoption of a unified legal act regulating the legal relations of bankruptcy (insolvency) is to be welcomed, as this would help achieve a smoother, more rational, more economical, faster, and more efficient implementation of provisions. It is important to stress that, by considering the application of different concepts, different laws have been adopted in neighbouring countries to regulate the bankruptcy proceedings of natural persons. For example, an insolvency law has been adopted in Latvia, while bankruptcy laws have been adopted in Lithuania and Estonia. Although the terms "insolvency" and "bankruptcy" are often used interchangeably in legal literature, in truth they have different meanings. The term "insolvency" describes the financial situation of a natural person when they are unable to pay their creditors due to their poor financial situation. Bankruptcy, on the other hand, is a legal process that provides one way to solve the insolvency problems of a natural person, consisting of "economic liquidation" (restoration of solvency) procedures and debt reconciliation with creditors. Consequently, the main difference between the concepts of bankruptcy and insolvency is that "bankruptcy" is an official legal term that explains how to resolve the insolvency of a natural person and lays down procedures for sharing insufficient assets equitably among creditors. Once this has taken place, some semblance of a "fresh start" permits the restoration of the solvency of the debtor. The aspiration to consider the insolvency of a natural person in a broader sense by providing further solutions to this problem (for example, by providing the opportunity for an agreement between the debtor and the creditors before the commencement of bankruptcy proceedings), as well as taking into account the aim and concept of insolvency, determines the need to follow the example of Latvia and change the current title of the law to a more relevant one that is more commonly used in foreign countries and would summarize the insolvency of a natural person (the draft of Natural Persons' Insolvency Act of the Republic of Estonia, 2021).

The fact that a relatively wide range of natural persons have the opportunity to take advantage of the possibility of bankruptcy in the Baltic states without dividing them as entities (Mikuckienė, 2003) into entrepreneurs (natural persons engaging in certain economic/commercial activities) and consumers (natural persons participating in civil turnover) characterized by a common element – lack of legal entity rights – is received positively, and unifies different countries (Lithuanian BA, Article 1(1); Estonian BA, Article 2; Latvian IL 2010, Article 1 (2)). In Latvia, one exception is that a natural person who is registered with the Commercial Register of Latvia as an individual merchant (*individuālais komersants*) or who is a general partner in a partnership or a member in a farm or a fishery must undergo insolvency proceedings of a legal person, first, in order to become eligible to apply for insolvency proceedings of a natural person (Latvian IL 2010, Article 123).

4.2. Legal regulation on the entry criteria (grounds)

One important condition is that, according to both Lithuanian and Latvian laws, insolvency (bankruptcy) proceedings may be instituted against a natural person only if the amount of the creditor's claim is higher than the minimum threshold amount of debt established by law. The position of the Lithuanian legislator in linking the threshold of debt (starting point) with one of the main social indicators and evaluation criteria of the state – the

MMW of the Republic of Lithuania – was welcomed, as personal consumption habits and debt obligations change with the increasing development and economic capacity of the state. The following criteria must be assessed and applied to verify insolvency in Lithuania: 1) the amount of debt obligations must exceed 25 MMW; 2) these debts must be overdue; and 3) the person must no longer be (objectively) able to cover these debts with their assets (the balance sheet test) or income (the cashflow test).

The following criteria must be established in order to commence insolvency proceedings in Latvia: (i) the person must have been a taxpayer in the Republic of Latvia in the previous six months; (ii) the person must be in financial difficulties; (iii) the amount of overdue debt obligations (debts) must exceed EUR 5,000 (including under an unsettled ancillary obligation or joint obligation between the person and the person's spouse or a person who is in relation or affinity to the second degree, if it exceeds EUR 5,000) or, in connection with provable circumstances, it must not be possible for the person to settle debt obligations which will be due within a year, and these debt obligations exceed EUR 10,000; and (iv) the person must no longer be (objectively) able to cover these debts with their assets or income.

In Estonia, the most important criterion is that the insolvency of the debtor is substantiated in the bankruptcy petition, regardless of whether the bankruptcy petition has been submitted by the debtor or the creditor. However, the burden of obligation for substantiation of the bankruptcy petition depends on whether it has been submitted by a debtor or a creditor. There are several circumstances prescribed in the law for the creditor to substantiate the bankruptcy petition (Article 10 (1) of the Estonian BA), while in the case of the debtor's bankruptcy petition, it is sufficient that the debtor provides an explanation concerning the cause of the insolvency and a list of debts (Article 13 (2) of the Estonian BA). In addition, the specific amount of the creditors' claim(s) is only important in the case of the bankruptcy petition of the creditor – the total amount of the claims which are the basis of the bankruptcy petition shall be higher than the minimum amount established by law (EUR 1,000; except in cases of unsuccessful execution proceedings within one year prior to the filing of the bankruptcy petition; Article 15 (3) p 3 of the Estonian BA). In essence, in case of a debtor's bankruptcy petition, the total amount of the creditors' claims is irrelevant.

When a natural person's financial obligations are greater than their assets but the income received by that person allows them to fulfil all of their financial obligations within a reasonable period of time, that person is still able to meet their debt obligations. The mere fact that a person's debts exceed the value of their assets does not mean that that person is insolvent if they receive an income that is sufficient to cover the debts falling due for payment. Conversely, the fact that a person receives a large income does not automatically imply their solvency if the income received is still insufficient to cover their obligations as they fall due. To ascertain whether or not a person is able to meet their obligations, it is necessary to determine and assess the person's amounts payable, income received, actual amounts received, and the funds necessary for subsistence during the reporting period (month). Determination of insolvency is one of the essential factors in deciding whether to initiate bankruptcy proceedings against a natural person, which is determined via the criterion of fairness.

The integrity of the debtor as a core value and principle in the initiation of personal bankruptcy proceedings is important in all of the Baltic States. However, it is most clearly defined in Article 6 of the Latvian IL 2010, which states that a debtor may not use bankruptcy proceedings to earn a living unfairly (Article 6 of the Latvian IL 2010). In Lithuania and in Estonia, problematic aspects related to the determination of the criterion of fairness are left to the discretion of the courts. To this end: an analysis of the causes of insolvency of a natural person is performed; signs of exploitation and/or criminal activity are ascertained; the circumstances of the occurrence of debts are examined, including the efforts of the natural person to find a job or engage in other income-generating activities; and the person's efforts to find a better paying job, the person's use of consumer credit, and the amount of debt obligations are assessed, including the weight of assets held, possible prospects for the debtor to fulfil their debt obligations, the debtor's harmful habits, etc. By considering the provisions of the Lithuanian BA, the integrity of the debtor is assessed both before the commencement of (to determine whether the natural person has become

insolvent by acting honestly, and is therefore qualified to enter bankruptcy proceedings) and during bankruptcy proceedings (to determine the integrity of the natural person in the performance of relevant obligations arising from the bankruptcy laws after the commencement of the bankruptcy proceedings (Ambrasaitė & Norkus, 2014, p. 180), and as such whether the person is therefore qualified to exit bankruptcy proceedings with "a fresh start"). In fact, in Estonia, the criterion of the fairness of the debtor is more evident in the termination of bankruptcy proceedings and during the proceedings of release of a debtor from obligations. A debtor who has wrongfully violated the interests of creditors may not have the opportunity of release from obligations and thus a "fresh start". At the same time, in Latvia, there are specific negative criteria that preclude a debtor from accessing insolvency proceedings set forth in the law (such as the deliberate provision of false information to creditors in the three years prior to the commencement of insolvency proceedings), and until now the courts have not usually assessed the integrity of the debtor as a precondition for the commencement of insolvency proceedings, except in assessing whether the debtor is objectively unable or is merely unwilling to settle their debt obligations.

The exclusion of such aspects is justified as they help courts to determine whether the debtor acted in good faith or not during the bankruptcy proceedings. It should be noted, however, that there must be a causal link between a person's dishonest conduct and their insolvency – the person's dishonesty must have had a direct or indirect impact on their insolvency. This means that transactions that do not directly or indirectly affect solvency and the other conduct of the applicant must not prevent them from going bankrupt. When assessing the integrity of a person in terms of the Lithuanian BA (Article 5(8) of the Lithuanian BA), a strictly set period of three years must be followed. No actions taken by the debtor outside of this period can be assessed in terms of integrity, regardless of whether they were the cause of their insolvency. The Latvian IL 2010 prescribes that the deliberate provision of false information to creditors in the three years prior to the commencement of insolvency proceedings is a condition precluding the commencement of insolvency proceedings (Article 130 of the Latvian IL 2010). At the same time, a wider debate might be required as to whether to allow dishonest debtors who have not committed serious violations from accessing insolvency proceedings and discharging their obligations by means of these proceedings, but under special/less favourable conditions (e.g., applying longer discharge periods) than for honest debtors (The Insolvency Control Service and Law firm Novius, 2018).

In Estonia, for example, the court refuses to release a debtor from obligations if they have violated the obligation to provide important information (i.e., regarding changes in residence or place of establishment, or income or assets received) and have thereby damaged the interests of the creditors.

4.3. Legal regulation on initiators and those who have the right to initiate insolvency proceedings

The fact that, unlike in Estonia, in Lithuania and Latvia only the debtor themselves has the right to initiate bankruptcy proceedings, and creditors have no right to do so, is viewed critically. It has been pointed out that vesting creditors with the right to initiate insolvency proceedings against individual debtors could have a positive effect on the payment discipline of said debtors, and on promoting proactive action in addressing financial difficulties from their side. At the same time, care should be exercised when implementing this option, as it also has some obvious negative features which should be properly mitigated in the regulation (Sallam, 2015).

4.4. Legal regulation on the cost of insolvency proceedings

Pursuant to Item 8 of Paragraph 1 of Article 83 of the Civil Procedure Code of the Republic of Lithuania (2002), a natural person who has been the subject of bankruptcy proceedings and other persons participating in these proceedings shall be exempt from the payment of stamp duty for appeals and appeals in cassation filed in this bankruptcy case.

Another issue of note is that Estonian, Lithuanian, and Latvian debtors have no legal obligation to file when they know that they are insolvent. In this context, it is appropriate to mention the provision laid down in Article 129 of the Latvian IL 2010, which establishes that the payment of the deposit for an insolvency proceeding into a special

account, in order to cover remuneration for the work performed by the administrator and the expenses of insolvency proceedings before the commencement of bankruptcy proceedings, is a prerequisite for instituting insolvency proceedings. Payment of an appropriate amount as one of the prerequisites for initiating bankruptcy proceedings is to be regarded as a means of preventing the debtor from exploiting the institute for debt relief. Therefore, the aim is to follow the tendency in Lithuania, where favourable conditions are created for honest debtors (until they are found to be dishonest) to apply for the initiation and conclusion of bankruptcy proceedings, in terms of being released from paying their remaining debts to creditors, even if they do not have the funds to cover their court costs. However, the necessity of paying the deposit has been mentioned as an obstacle for accessing insolvency proceedings in Latvia, especially for particularly vulnerable categories of debtors such as disabled persons. With respect to this, the introduction of schemes aimed at alleviating this precondition has been proposed in the doctrine (e.g., payment in instalments, or full or partial relief from the payment) (The Insolvency Control Service and Law firm Novius, 2018).

4.5. Legal regulation on the period of discharge and dischargeable debts

The period of implementation of the Lithuania plan is 3 years (Article 5(7) of the Lithuanian BA). The unsatisfied claims of creditors, including those secured by pledge and/or mortgage, that remain in the Lithuanian plan upon the closing of the personal bankruptcy process (except for cases when a bankruptcy administrator (IP) submits to the court documents evidencing that a natural person is able and will be able to discharge their liabilities in the future) shall be written off. There are three exceptions to this rule: claims for child support for the maintenance of a child/adopted child; claims arising from the natural person's obligation to pay penalties to the state imposed for administrative offences or criminal acts committed by the natural person; and claims of creditors secured by a pledge and/or mortgage, if these creditors and the natural person have agreed on the preservation of the pledged property during the bankruptcy proceedings of the natural person, unless otherwise agreed in the agreement on the preservation of mortgaged property during the bankruptcy proceedings of the natural person (The Estonian Supreme Court, 2013).

In Estonia, the objective of the release of a debtor from their obligations is to enable a new economic start for them in a particularly difficult financial situation when they have tried their best to satisfy the claims of creditors (The Estonian Supreme Court, 2016). Thus, the release of a debtor from obligations should ultimately give them a fresh economic start, and a new chance for a normal economic and social life (The Estonian Supreme Court, 2013). In order to obtain a fresh start, a debtor is required to engage in reasonably profitable activity or to seek such activity if they do not have it. They are also required not to conceal income or assets received, and shall provide information at the request of the court or the trusted representative concerning their activities or search for activity, and concerning their income and assets.

However, the possibility of release from obligations is not every debtor's right (The Estonian Supreme Court, 2016). This means that, firstly, the court has the discretion to decide whether or not to initiate proceedings for release from obligations (The Estonian Supreme Court, 2017). If the debtor has not wrongfully violated the interests of creditors, the court has to initiate the proceedings of the release of the debtor from obligations (The Estonian Supreme Court, 2013; The Supreme Estonian Court, 2011; The Estonian Supreme Court, 2013). Secondly, five years[16] (generally) after the commencement of the proceedings for the release of the debtor from obligations, the court has the discretion to decide whether or not to refuse to release the debtor from their obligations. The court refuses to release the debtor from obligations if they have been convicted of a bankruptcy offence or have wrongfully violated their obligations in the proceedings (specified in Article 173 of the Estonian BA) and thereby damaged the interests of the creditors. This also occurs in cases where the debtor does not submit

[16] Taking into account the circumstances, the court may release a debtor from obligations before five years, but not before three years have passed from the commencement of the proceedings (Article 175 (1^1) of the Estonian BA), or extend the proceedings, but the term in total cannot not exceed seven years from the commencement of the proceedings (Article 175 (5^19 of the Estonian BA).

information concerning the performance of their obligations to the court under oath, or fails to submit information within the term granted by the court. In fact, these are the absolute bases on which the release of a debtor from obligations is not granted (The Estonian Supreme Court, 2016; The Estonian Supreme Court, 2016). In addition, the release of a debtor from obligations which were not performed during the bankruptcy proceedings shall not terminate obligations to compensate for damage intentionally caused by unlawful action or obligations to pay support for a child or parent (Article 176 (2) of the Estonian BA).

The Latvian IL 2010 prescribes certain categories of debts that cannot be discharged by means of the insolvency proceedings of a natural person (e.g., debts for penalties applied in administrative offence proceedings). In such cases, the court cannot commence insolvency proceedings with respect to a person who does not have a viable prospect of discharging debts (Article 129 (2) of the Latvian IL 2010). Prior to filing for insolvency, the debtor must pay a deposit in the amount of two months of the minimum wage (EUR 1,000), and a state duty in the amount of EUR 70 (Article 34 (1) 3) of the Civil Procedure Law).

There is a general consensus that it would be premature to identify a single approach (or "best practice") for the legal treatment of the insolvency of natural persons not engaged in business activities. The insolvency of natural persons is intertwined with social, political, and cultural issues that present too many differences to be treated uniformly. It would be difficult for a homogeneous approach to emerge out of this effort. Policymakers should be aware of the social, legal, and economic peculiarities that may affect the functioning of a regime for the insolvency of natural persons (World Bank Report on the Treatment of the Insolvency of Natural Persons, 2012).

Conclusions

1. Compared to Lithuania, its neighbouring countries established the institute of bankruptcy of natural persons in their national laws much earlier (Estonia in 2004, Latvia in 2008, and Lithuania in 2013). Nevertheless, in all Baltic states the institute of bankruptcy of natural persons emphasises the good faith of the debtor and the "earned fresh start". Pursuant to the bankruptcy laws of all three countries, in case of the successful outcome of the insolvency proceedings, the debtor is released from the obligations (with some exemptions) which were not performed during the bankruptcy proceedings.

2. Both in Lithuania and Latvia there is a downward trend in the number of bankruptcy proceedings initiated against natural persons, while in Estonia the number has been growing in the period from 2015–2020.

3. There is no single answer as to the question of which Baltic state has the best conditions for a natural person to go bankrupt, instead the debtor/natural person needs to make their own decision based on whether they meet the legal requirements. Restoring the solvency of a natural person with the help of a bankruptcy institute must be an exceptional measure, and not a universally encouraged or desirable one. Ensuring the well-being of the society and the state requires the promotion of stable legal relations based on integrity, justice, morality, and other principles. Bankruptcy must not be artificially encouraged in order to make it available to as many people as possible. It is not always necessary to declare the bankruptcy of a natural person, as the primary objective should be the avoidance of bankruptcy. Therefore, there is a need to increase the impact of pre-trial debt counselling, where the debtor's economic situation shall be determined. However, if bankruptcy cannot be avoided, bankruptcy proceedings must be cheap, short, and simple, to provide an "earned fresh start" to the debtor. According to the proposed amendments, Estonia may be on the correct path towards achieving all of these goals, having more efficient insolvency (including bankruptcy) law for natural persons, and being able to proclaim itself the most attractive Baltic state in which to go bankrupt.

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A STAY OF INDIVIDUAL ENFORCEMENT ACTIONS AS A BASIS FOR EFFECTIVE RESTRUCTURING PROCEEDINGS

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Abstract. This article focuses on the implementation of a stay of individual enforcement actions in corporate restructuring proceedings. The authors analyse the general goals of a stay of individual enforcement actions in restructuring proceedings by considering, for instance, the economic reasons for such a stay, when it should be applicable, and the exceptions that should be established for its application. The Directive on restructuring and insolvency, adopted on 20 June 2019, reforms the regulation of a stay of individual enforcement actions in Member States of the European Union, aims to increase the efficiency of restructuring proceedings by providing legal instruments to facilitate a debtor's negotiation of a restructuring plan, and provides certain rules as to how a debtor's assets should be protected during these negotiations. Namely, a stay of individual enforcement actions and the protection of essential executory contracts should protect a debtor and ensure the equality of all creditors (pari passu) during the negotiation of a restructuring plan. However, in practice these goals result in less protection – especially for ordinary creditors. The authors analyse which aspects of a stay of individual enforcement actions are harmonized under the Directive on restructuring and insolvency, and whether they are sufficient to ensure the effective negotiation of a restructuring plan. Nevertheless, a fair balance between the interests of the debtor and their creditors should be ensured in restructuring proceedings, and the authors assess whether or not such a balance is established.

Keywords: restructuring proceedings, European Union law, pari passu, a stay of individual enforcement actions

Introduction

It is commonly agreed that restructuring is a business rescue process which is the opposite of bankruptcy proceedings, with the latter leading to the liquidation of the debtor (Bork, 2020, p. 181; Westbrook, 2010, p. 122).

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In restructuring proceedings, the financial well-being and viability of a debtor's business can be restored and the business can continue to operate via the use of various means – possibly including debt forgiveness, debt rescheduling, debt-equity conversions, or the sale of the business (or parts of it) as a going concern (European Law Institute, 2017, p. 71). Thus, insolvency law shall provide instruments to enable the restoration of a debtor's business and facilitate the conclusion of an agreement with creditors for the modification or fulfilment of obligations. The issue with insolvency is that creditors tend to rush to enforce their claims when they notice a debtor's financial problems. This race to secure repayment can quickly deprive a debtor of their assets, meaning that not only is the debtor unable to continue to operate their business, but also other creditors may be unable to resolve their financial claims. To tackle this problem, insolvency law proposes a temporary (automatic or not) stay of enforcement on the actions of individual creditors, which should focus on two economically significant goals: i) the continuation of the debtor's business, as their assets are protected; ii) maintaining an equal chance of satisfying the respective claims of all debtors (pari passu). The satisfaction of these two goals is a win-win situation for both the debtor and the creditors. Nevertheless, these goals can lead to other problems – for instance, for how long should the enforcement of individual claims be stayed? Should a stay encompass all claims, or only some specific ones? Should creditors have the right to dispute a stay of individual enforcement actions?

Insolvency (restructuring) law is a branch of national law. Nevertheless, the number of international insolvency law instruments has increased significantly in recent years, showing that the harmonization of insolvency proceedings and the establishment of common international standards are significant economic tools in tackling the financial and economic problems of enterprises. Unsurprisingly, the Legislator of the European Union also seeks to step in and propose common solutions for the rescue of viable companies which encounter financial (or other) problems which may lead to their liquidation. Some authors have pointed out that the European Union has responded to market developments by embarking on an aggressive new phase of corporate rescue-oriented legislative endeavour that focuses on so-called pre-insolvency, or preventive insolvency, proceedings (Mevorach & Walters, 2020). To achieve these goals, the Directive on restructuring and insolvency (hereinafter – the Directive) was adopted on 20 June 2019.

The aim of the Directive is to increase the effectiveness of restructuring proceedings, and it demonstrates a willingness to harmonize certain procedural and material aspects of restructuring proceedings in the Member States. Some authors have rightly pointed out that the Directive is based on the idea of "structured bargaining proceedings", in which a debt rescheduling plan is proposed and negotiated amongst all (or certain types of) creditors (Eidenmüller, 2017). One of the major tools for ensuring the effectiveness of this bargaining procedure of a restructuring plan is a stay of individual enforcement action, which is regulated by Articles 6–7 of the Directive. Some of these provisions are mandatory for Member States, but some of them are optional, meaning that Member States are free decide whether or not to transpose them into their national legal systems. The Directive acknowledges that it is crucial to ensure that the debtor is be able to continue to conduct business during negotiations for a restructuring plan, and that a stay of individual enforcement actions could contribute to this goal. However, the question then arises as to how the interests of creditors should be protected in such proceedings. Insolvency law cannot prioritize only the debtor's interests, and should instead aim for a fair balance between the interests of the debtor and the creditors. Thus, this article will seek to analyse whether the Directive establishes a fair balance between these interests in restructuring proceedings.

The analysis of a stay of individual enforcement actions established in the Directive is relevant for a few reasons. First, it is a new instrument of EU law which shall not be transposed into the laws of Member States until 17 July 2021, meaning that, as yet, there is no case law relating to this new legal regulation. Second, the current global financial situation – one of widespread insolvency – demonstrates that restructuring proceedings may become extremely important in a post-pandemic world in which debtors will seek to restore business activities. Third, the analysis of a stay under the Directive has not yet attracted the attention of scholars, and thus the legal analysis of this topic is vitally necessary.

The goal of this article is to analyse the aims and goals of a stay of individual enforcement actions, and to assess whether the Directive increases the effectiveness of restructuring proceedings in Member States. Therefore, the authors assess the general goals of a stay of individual enforcement proceedings in restructuring law alongside the regulations of the Directive. The authors also focus on the specific issues related to a stay of individual enforcement proceedings under the Directive, such as the basis for and duration of a stay and exceptions to the general rules.

1. The need for a stay of individual enforcement actions in insolvency proceedings

A stay on enforcement actions suspends the right of a creditor to enforce their claim against a debtor, and reflects the collective nature of these proceedings. Insolvency proceedings are "collectivized debt collection" (Jackson, 1986, p. 7), meaning that they include all of a debtor's creditors. This is a fundamental aspect of insolvency proceedings, as creditors should participate in them as a group. This problem of insolvency proceedings is referred to as "grab law" – reflecting its first-come first-served (Jackson, 1986, p. 9) nature – meaning that creditors who are aware of a debtor's financial difficulties may seek to quickly enforce their claims, which may result in the debtor becoming assetless. Other authors argue that the imposition of a stay on an individual creditor's enforcement action aims to address a common problem of the creditors and the associated "asset race" (Eidenmüller, 2016; Madaus, 2018), whilst giving the debtor time to file a plan for reorganization or simply relieving them of the financial pressures that drove them into bankruptcy (Murphy, 1986). A stay of individual enforcement actions against a debtor's property is crucial in restructuring proceedings, as the safeguarding of the debtor's assets is necessary to ensure the possibility of satisfying creditors' claims to the fullest possible extent. Nevertheless, a stay serves another crucial purpose – ensuring the continuation of the debtor's business activities during restructuring proceedings. The basic principle of restructuring proceedings is that a debtor shall continue business activities during their execution, concluding contracts and competing in the market. Thus, in contrast to bankruptcy (liquidation) proceedings, during restructuring proceedings creditors should play an active role in the rescue of the debtor's business.

However, as insolvency proceedings signalize a debtor's solvency problems, some creditors may seek to satisfy their claims before others by using the most efficient debt recovery tools. In such a scenario, a debtor could be quickly deprived of assets that should primarily be used to maintain business activities. This situation can then quickly lead to the problem of a debtor lacking the assets required to continue to operate their business, and consequently the satisfaction of other creditors' claims in the future becomes more difficult. Therefore, insolvency law shall respond to this problem of the individual enforcement actions of creditors and establish rules to stay such actions. However, whilst a stay of individual enforcement actions is undoubtedly economically and socially beneficial for a debtor, it may be detrimental to creditors. If a stay of individual enforcement actions is imposed, all creditors temporarily lose their individual enforcement rights against a debtor. Thus, not only the basis of such a stay, but also strict rules regarding its duration shall be clearly established in the law. A stay shall also ensure the fundamental principle of pari passu, which means that all creditors shall be equal in insolvency proceedings.

Some international studies on insolvency law define a "stay" or a "stay of individual enforcement actions" as a temporary suspension of the right to enforce (or supporting contractual rights to terminate or accelerate) a claim by a creditor against a debtor, ordered by a judicial or administrative authority (European Law Institute, 2017, p. 73). Other international soft-law documents define a stay as a measure that prevents the commencement, or suspends the continuation, of judicial, administrative, or other individual actions concerning the debtor's assets, rights, obligations, or liabilities, including actions to make security interests effective against third parties or to enforce a security interest; and prevents execution against the assets of the insolvency estate, the termination of a contract with the debtor, and the transfer, encumbrance, or other disposition of any assets or rights of the insolvency estate (UNCITRAL, 2004, p. 7).

One of the most well-known examples of a stay of individual enforcement actions in restructuring proceedings is established in US bankruptcy law, which recognizes an automatic stay (Kennedy, 1978). According to Article 362 of Chapter 11 of the US Bankruptcy Code, an application filed for bankruptcy operates as a stay, applicable to all

entities, such as of: (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title; (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title; (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate; (4) any act to create, perfect, or enforce any lien against property of the estate; (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title; (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title; (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and (8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title. Some authors argue that this provision protects a debtor and/or their property against most of the collection or proceeding actions of creditors. In other words, it prevents formal and informal actions and proceedings regarding the collection of assets or the recovery of claims by the creditor against the debtor, the property of the estate, or property of the debtor. The scope of an automatic stay in US bankruptcy law is intended to be broad to protect both creditors and debtors (Restrepo, 2018). It seems that the regulation of a stay in the Directive is also based on similar ideas of a stay in restructuring proceedings, and that Chapter 11 of the US Bankruptcy Code served as a source of inspiration for the Directive.

2. The goals of a stay in restructuring proceedings in the law of the European Union

Before the adoption of the Directive, the European Commission acknowledged that a properly defined "stay" of individual or collective enforcement actions is a crucial element of any useful restructuring procedure. Inadequate or overly restrictive stay provisions are likely to reduce the chance of a successful turnaround, and damage the overall value of the business. The European Commission also found that during the negotiation of a restructuring plan a debtor should be able to apply to court for a suspension of individual enforcement actions (a "stay"), otherwise the success of the restructuring process is in jeopardy. A stay could be requested against any type of creditor. A stay would not be effective if, at the same time, a debtor's duty to file for insolvency was not suspended for the period of the stay, or if creditors were allowed to enforce their rights through collective action during this time (Commission Staff Working Document Impact Assessment, 2016/0359 (COD)).

According to the *travaux préparatoires* of the Directive, the goal of a stay is to ensure that a debtor can effectively conduct restructuring negotiations, and to provide "breathing room" from creditors' claims. Nevertheless, it was recognized that the exact configuration of a stay can vary, but it should also suspend the duty to file for formal insolvency procedures in order to be effective (Commission Staff Working Document Impact Assessment, 2016/0359 (COD)). A debtor should be able to benefit from a temporary stay of individual enforcement actions, whether granted by a judicial or administrative authority or by the operation of law, with the aim of supporting negotiations on a restructuring plan, in order to be able to continue operating or at least to preserve the value of the debtor's estate during negotiations (Recital 32 of the Directive).

According to Article 2(1)(4) of the Directive, a stay of individual enforcement actions means a temporary suspension, granted by a judicial or administrative authority or applied by the operation of law, of the right of a creditor to enforce a claim against a debtor and, where so provided for by national law, against a third-party security provider, in the context of a judicial, administrative, or other procedure, or of the right to seize or realise out of court the assets or business of the debtor. This definition of a stay reveals more technical aspects of it as an instrument, and reflects the dominant approach to a stay of individual enforcement actions in restructuring proceedings. However, in this definition there is no indication as to when and for what purposes a stay should be imposed in restructuring proceedings.

Article 6(1) of the Directive establishes that Member States shall ensure that debtors can benefit from a stay of individual enforcement actions to support the negotiation of a restructuring plan in the framework of preventive restructuring. Nevertheless, said article establishes that judicial or administrative authorities can refuse to grant a stay of individual enforcement actions where such a stay is not necessary, or where it would not achieve the objective of supporting the negotiation of a restructuring plan. The wording of this provision is crucial as it reveals the aim of a stay of individual enforcement actions in restructuring proceedings, which is to support the negotiation of a restructuring plan. This is a clear indication that a stay can be granted only if it is necessary for these negotiations (McCormack, 2020). It seems, then, that an important precondition of a stay is that the negotiation of a restructuring plan is ongoing, and that it is a burden of the debtor to prove that these negotiations are taking place. This requirement would allow for the separation of frivolous attempts to negotiate a restructuring plan from real efforts to conclude it.

The Directive lays down grounds for the imposition and non-imposition of a stay of individual enforcement action. It establishes that Member States should be able to establish, on a rebuttable basis, presumptions for the presence of grounds for refusal of a stay. Such a basis could be the "typical conduct of a debtor", such as previous failure to pay debts as they fall due (e.g., substantial default vis-à-vis employees or tax or social security agencies), or where a financial crime has been committed by the debtor or the current management of an enterprise which gives reason to believe that the majority of creditors would not support the commencement of negotiations (Recital 33 of the Directive). However, such rebuttable grounds are only an option for Member States. The rationale of such a basis is that only good faith debtors should enjoy a stay of individual enforcement actions, meaning that a failure to pay debts before the commencement of restructuring proceedings should serve as an indication that a debtor's perspective on the rescue of their business is somewhat opaque. Nevertheless, such a vague criterion for the non-imposition of a stay of individual enforcement actions is debatable. Restructuring proceedings are primarily designed to tackle issues of solvency (i.e., failure to pay debts), thus the fact that a debtor fails to pay debts should not curb access to effective restructuring proceedings. Therefore, it seems that the Directive couples the restriction of a stay of individual enforcement proceedings only with a failure to pay certain debts which have particular social relevance (for instance, failure to pay debts to tax authorities or employees).

Another significant aspect to consider is whether a stay of individual enforcement actions is collective or individual. The Directive establishes that a stay should apply only to some individual creditors or categories of creditors, and gives a wide margin for Member States to add specific creditors (Recital 34 of the Directive). It seems that the Directive provides both options to Member States, and therefore national legislators should provide guidance on whether a stay of individual enforcement actions can be general, covering all creditors, or limited, covering one or more individual creditors or categories of creditors (Article 6(3) of the Directive).

An important question also arises as to whether, when restructuring proceedings are commenced, a stay is automatic or not (Eidenmüller, 2016). The laws on restructuring proceedings often establish an automatic stay of individual enforcement actions, meaning that a debtor receives immediate respite from the claims of creditors and the debtor's assets are protected from individual enforcement. For instance, such a stay is established in Article 28(1)(2) of the Law on Insolvency of Enterprises of the Republic of Lithuania and Article 89(1) of the Insolvency Law of Germany. Since the Directive does not prohibit the establishment of an automatic stay, Member States can choose to employ this model to increase the effectiveness of the negotiation of a restructuring plan (McCormack, 2020).

A stay of individual enforcement actions significantly restricts the rights of creditors. The Directive provides few solutions to the problem of achieving a fair balance between the interests of the debtor and their creditors. The general rule is that a stay of individual enforcement actions can cover all types of claims, including secured claims and preferential claims (Article 6(2) of the Directive). However, a few exceptions can (indeed, should) be established. First, a stay is not applicable to an employee's claim (Article 6(5) of the Directive). This is a socially justified restriction, as often the satisfaction of an employee's claim is a priority. Further, it is intended that a

company shall continue business activities, which in most cases means that labour relations must be maintained. Second, Member States may exclude certain claims or categories of claims from the scope of the stay of individual enforcement actions, in well-defined circumstances, where such an exclusion is duly justified and where: (a) enforcement is not likely to jeopardize the restructuring of the business; or (b) the stay would unfairly prejudice the creditors of those claims (Article 6(4) of the Directive). It seems that the Directive recognizes the importance of enforcement proceedings and justifies a stay of enforcement actions only in cases when enforcement could jeopardize the restructuring of the business. Such a situation might occur when enforcement proceedings relate to the specific, significant assets of the debtor which are crucial to the continuity of business, or when the amount of the sum to be enforced is so significant that the debtor may be unable to maintain their business.

However, a question arises as to whether such a suspension of enforcement proceedings is compatible with the right to a fair trial established in Article 6 of the European Convention on Human Rights (hereinafter – the Convention). Since the European Court of Human Rights (hereinafter – ECtHR) found in *Hornsby v. Greece* (1997), a landmark case, that that execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6, procedural guarantees deriving from the right to a fair trial shall be guaranteed in enforcement proceedings. The ECtHR has not yet dealt with the question of whether a debtor's restructuring proceedings may suspend enforcement proceedings, but the court has emphasized that an unreasonably long delay in the enforcement of a binding judgment may therefore breach the Convention (*Arbačiauskienė v. Lithuania*, 2016). The Directive justifies the suspension of enforcement proceedings only when they would jeopardize restructuring proceedings. However, such an exception is particularly vague, and may trigger unwanted disputes as to whether the enforcement of a particular claim would jeopardize restructuring proceedings or not. The term "jeopardize" also engenders legal riddles, as it has no concrete definition in the Directive and its interpretation may lead to significantly different results. The authors of this paper believe that, considering the obligation of ensuring a reasonable length of enforcement proceedings alongside the goals of restructuring proceedings, only the enforcement of major financial claims could jeopardize restructuring proceedings. In such a case, the debtor has to prove that the enforcement of a particular claim would be so detrimental to the business that it would simply cease to operate.

A further exception is very broad, and gives courts significant discretion to decide whether a concrete individual enforcement action may harm the rights of another creditor. Nevertheless, the wording of this provision also raises difficulties. There is no guidance in the Directive for how the term "unfairly prejudice claims" should be interpreted. Again, it seems that the Directive seeks to establish a certain balance between the interests of the debtor and their creditors but leaves too much room for interpretation, which may trigger additional disputes regarding its understanding and application in practice.

3. The time limit of a stay of individual enforcement actions

Since the imposition of a stay of individual enforcement actions restricts the rights of creditors to enforce a claim, it shall be strictly provisional. The Directive recognizes the need to ensure the temporal limitation of a stay of individual enforcement actions, and establishes strict time limits for their duration. It seems that the provisions governing the duration of a stay are mandatory, from which no derogations can be established in the laws of Member States.

The initial duration of a stay of individual enforcement actions shall be limited to four months (Article 6(6) of the Directive). This period can be shorter, but the maximum period cannot be longer. The idea of this rule is that it ensures that a stay is a strictly limited instrument which should facilitate the negotiation of a restructuring plan. The total duration of a stay of individual enforcement actions, including extensions and renewals, shall also not exceed 12 months (Article 6(8) of the Directive). It may be debatable whether such regulation of the duration of a stay is reasonable and compatible with Article 6 of the Convention. However, the presence of such clear rules regarding time limits for the duration of a stay are, at least, a positive result. The Directive establishes the grounds on which the time period of a stay can be prolonged, and who has the right to demand such a prolongation. A

debtor, a creditor, or a practitioner in the field of restructuring may request that the court extend the stay period (Article 6(7) of the Directive). Interestingly, the right to request the extension of the duration of a stay is also granted to creditors, although creditors do not have the right to initiate restructuring proceedings under the Directive. Furthermore, other authors also share the view that the regulation of the duration of a stay and its consequences may bring about imbalance between the interests of a debtor and their creditors. According to Tollenaar (2017), the combination of exclusivity in favour of the debtor and the possibility of a stay lasting up to 12 months enables the debtor to keep creditors from exercising their rights for longer than might be in their interests.

According to Article 6(7) of the Directive, the extension or commencement of a stay of individual enforcement actions shall be granted only if well-defined circumstances show that such an extension or commencement is duly justified, such as: (a) relevant progress has been made in the negotiations on the restructuring plan; (b) the continuation of the stay of individual enforcement actions does not unfairly prejudice the rights or interests of any affected parties; or (c) insolvency proceedings which could end in the liquidation of the debtor under national law have not yet been opened in respect of the debtor. Since these exceptions are not cumulative (the disjunction "or" is used), it seems that any one of them could justify the extension of the duration of a stay or the imposition of a new stay, and the applicant has the burden of proving that such an exception exists. Nevertheless, the wording of these exceptions is again vague (aside from the third exception, which is coupled with the non-commencement of liquidation proceedings). Interestingly, this provision not only provides for the possibility of the extension of a stay but also allows for a new stay to be established.

The Directive requires that Member States shall ensure that judicial or administrative authorities can lift a stay of individual enforcement actions in the cases established in Article 6 (9) of the Directive. The authors of this paper believe that the wording of this provision is mandatory, meaning that Member States do not have the discretion to choose whether to implement this provision or not. As such, these requirements to lift a stay of individual enforcement actions are not optional. However, said article establishes, under the first subparagraph, that Member States may limit the power to lift the stay of individual enforcement actions to situations where creditors have not had the opportunity to be heard before the stay came into force, or before an extension of the period was granted by a judicial or administrative authority. Member States may provide a minimum period, which does not exceed the period referred to in paragraph 6, during which a stay of individual enforcement actions cannot be lifted.

4. The consequences of a stay of individual enforcement actions

A stay of individual enforcement actions brings about several consequences. Though, in general, a stay means a stay of the enforcement of all creditors' claims against the debtor, the Directive establishes some concrete consequences of a stay in restructuring proceedings. First, it suspends the obligation to commence bankruptcy (liquidation) proceedings. Second, it protects the execution of essential executory contracts during the negotiation of a restructuring plan. Both consequences are analysed in this article.

4.1. A stay of obligation to commence insolvency proceedings

A stay of individual enforcement actions means that a debtor's obligation to commence insolvency proceedings in case of insolvency during the negotiation of a restructuring plan is suspended. Pursuant to Article 7(1–2) of the Directive, where the obligation of a debtor, provided for under national law, to file for the opening of insolvency proceedings which could end in the liquidation of the debtor arises during a stay of individual enforcement actions, that obligation shall be suspended for the duration of the stay. In accordance with Article 6, a stay of individual enforcement actions shall suspend, for the duration of the stay, the opening, at the request of one or more creditors, of insolvency proceedings which could end in the liquidation of the debtor. The rationale of these provisions is based on the idea that the debtor's bankruptcy (liquidation) proceedings shall not be opened during the negotiation of a restructuring plan. First, the Directive suspends the debtor's obligation to file for bankruptcy, and, second, it suspends creditors' right to file for bankruptcy. Thus, during a stay of individual enforcement actions a debtor

should concentrate only on negotiating a restructuring plan, and bankruptcy (liquidation) proceedings should not be commenced. This is a particularly significant advantage for the debtor, and provides "breathing room" during negotiations with creditors. However, the question then arises as to whether directors have to follow the duties under Article 19 of the Directive. The authors of this paper believe that, since the debtor has encountered solvency problems, a director should act diligently during the negotiation of a restructuring plan and fulfil said duties, which are important for the protection of creditors.

Nevertheless, the Directive also establishes certain derogations from these provisions. According to Article 7(3) of the Directive, Member States may derogate from the provisions of Article 7(1-2) of the Directive in situations where a debtor is unable to pay their debts as they fall due. In such cases, Member States shall ensure that a judicial or administrative authority can decide to keep in place the benefit of the stay of individual enforcement actions if, taking into account the circumstances of the case, the opening of insolvency proceedings which could end in the liquidation of the debtor would not be in the general interest of creditors. Thus, the Directive acknowledges that only solvent companies are supposed to use restructuring proceedings, and actual insolvency should annul a stay of individual enforcement procedures. Interestingly, in this case the Directive employs cash flow insolvency (the inability to pay debts as they fall due), but not balance sheet insolvency.

4.2. The protection of essential executory contracts

During the negotiation of a restructuring plan, the continuation of a debtor's business activities can be ensured if creditors do not terminate the necessary contractual obligations which are important in the running of the debtor's business. According to Article 7(4) of the Directive, Member States shall provide for rules preventing creditors to which the stay applies from withholding performance or terminating, accelerating, or in any other way modifying essential executory contracts to the detriment of the debtor, for debts that came into existence prior to the stay solely by virtue of the fact that they were not paid by the debtor. It seems that the Directive found inspiration for the protection of essential executory contracts in Chapter 11 of the US Bankruptcy Code, which establishes executory contracts and unexpired leases in bankruptcy proceedings. Pursuant to Article 365(a) of Chapter 11 of the US Bankruptcy Code, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

For executory contracts, any legal framework must balance the competing interests of the debtor's estate (and its creditors) with the interests of the counterparty in light of the general goals of the laws in which such a framework functions (European Law Institute, 2017, p. 232). Thus, restructuring law should assist in the separation of prospectively profitable contracts which are necessary for business from burdensome and loss-bearing contracts that would only add to the debt pile (Bork, 2020, p. 181). International standards also suggest considering specific legislation for executory contracts that are essential for continuing the business of the debtor – such as, for instance, real estate leases, energy supply contracts, intellectual property and domain services, or license agreements. Moreover, it is recognized that the rules prohibiting the termination of executory contracts should be strictly limited in time, and such prohibitions should be lifted as soon as efforts to continue the business fail and (piecemeal) liquidation is inevitable (European Law Institute, 2017, pp. 238–239). In other words, the termination of executory contracts should be prohibited until it is necessary for effective restructuring proceedings, and this prohibition should end immediately when liquidation proceedings are commenced. The supervision of the court over the performance of executory contracts may be required in insolvency proceedings (Chuah & Vaccari, 2019, 1.26).

The Directive requires that Member States should provide that creditors to which a stay of individual enforcement actions applies, along with those whose claims came into existence prior to the stay and who have not been paid by the debtor, are not allowed to withhold performance of, terminate, accelerate, or in any other way modify essential executory contracts during the stay period, provided that the debtor complies with their obligations under contracts which fall due during the stay (Recital 41 of the Directive). Therefore, the Directive essentially provides protection for essential executory contracts which the debtor has failed to fulfil prior the imposition of a stay.

Creditors are not only restricted from terminating such contracts, but also from modifying them in any way which would be detrimental to the debtor's business.

The Directive also establishes a definition of an essential executory contract. According to Article 7(4) of the Directive, an essential executory contract shall be understood to mean executory contracts which are necessary for the continuation of the day-to-day operations of the business, including contracts concerning supplies, the suspension of which would lead to the debtor's activities coming to a standstill. However, it also acknowledges that Member States are not precluded from affording such creditors appropriate safeguards with a view to preventing unfair prejudice against such creditors as a result of said subparagraph. Member States may provide that this paragraph also applies to non-essential executory contracts (Article 7(4) of the Directive). The authors of this paper believe that the vagueness of the definition of essential executory contracts may again trigger disputes over whether a certain contract is essential for day-to-day business operations or not. It seems that a debtor would have to persuade a court that a concrete contract falls under this definition. However, the Directive establishes that certain types of contracts, such as contracts for essential supplies such as gas, electricity, water, telecommunications, and card payment services should be regarded as essential for day-to-day business (Preamble 41 of the Directive). The authors of this paper also believe that such contracts are strictly related to those which are crucial for the regular operation of the business. In other words, if a contract may have economic benefit to the debtor but is not necessary for the continuation of the business, it seems that such contract does not fall under this definition.

The regulation of the protection of essential executory contracts is related to the need to preserve the contractual relationships of the company being restructured with the contractors with whom the performance of the concluded contracts is necessary to ensure the continuity of the company's activities. Assessing said regulation in the light of contract law, it appears to restrict the principle of freedom of contract and the right to terminate a contract. In this case, the other party to the contract may suffer some inconvenience because the debtor's default is tolerated. These rules apply only to those contracts that are directly related to and necessary for the economic and commercial activity of the company. It is considered that this circumstance must be substantiated by the debtor via proof that the termination of a particular contract would mean (for the most part) the impossibility of further economic commercial activity. In such a case, the nature of the debtor's activities and whether they really require the continuation of a specific contract should also be assessed.

The authors of this paper believe that although the Directive's aim of ensuring continuity in the performance of essential executory contracts in restructuring proceedings is economically reasonable, it may cause some difficulties. First, it may engender additional disputes between a debtor and creditors as to whether a certain contract is essential or not for day-to-day business. Second, a debtor may be willing to abuse their contractual rights and justify the non-performance of contractual obligations.

The Directive also establishes the protection of the debtor against so-called "ipso facto" clauses, which allow termination of a contract when certain circumstances appear (for instance, when a debtor becomes insolvent). The Directive acknowledges that such clauses could also be triggered when a debtor applies for preventive restructuring measures (Recital 40 of the Directive). Pursuant to Article 7(5) of the Directive, Member States shall ensure that creditors are not allowed to withhold performance or terminate, accelerate, or in any other way modify executory contracts to the detriment of the debtor by virtue of a contractual clause providing for such measures, solely by reason of (a) a request for the opening of preventive restructuring proceedings; (b) a request for a stay of individual enforcement actions; (c) the opening of preventive restructuring proceedings; or (d) the granting of a stay of individual enforcement actions as such. Thus, the Directive not only protects the performance of essential executory contracts, but also restricts the modification of such contracts in cases where this is justified solely by the debtor's application for restructuring proceedings.

Conclusions

1. A stay of individual enforcement actions is a provisional solution which should facilitate the negotiation of a restructuring plan and provide a debtor "breathing room" to continue business activities. A stay of individual enforcement actions is economically beneficial to a debtor, but it may be detrimental to creditors as they temporarily lose access to individual enforcement actions against the debtor.
2. The Directive lays down grounds for the imposition and non-imposition of a stay of individual enforcement actions. A stay should not be imposed if a debtor fails to fulfil major obligations to employees or tax or social security agencies, or has committed a financial crime. Thus, only good faith debtors should be granted a stay of individual enforcement actions in restructuring proceedings.
3. In the view of the Directive, the aim of a stay of individual enforcement actions in restructuring proceedings is to support the negotiation of a restructuring plan. This regulation should assist a debtor in finding a common agreement with creditors, and avoid the deprivation of assets during such negotiations. It seems that an important condition of a stay is that the negotiation of a restructuring plan is legitimate, and an agreement with creditors is possible. This requirement should allow for the separation of frivolous attempts to negotiate a restructuring plan from real efforts to conclude it.
4. The Directive lacks any guidance on how a stay of individual enforcement actions should be compatible with the procedural guarantees of the right to a fair trial. The Directive allows for the suspension of enforcement proceedings only when they would jeopardize restructuring proceedings. However, such an exception is particularly vague and gives rise to riddles concerning whether the enforcement of a particular claim would jeopardize restructuring proceedings or not. If a dispute arises, the court should not only consider the interests of the debtor, but also whether the application of this instrument is compatible with the right to a reasonable length of enforcement proceedings.
5. In the Directive, a stay of individual enforcement actions has two significant consequences: the suspension of the duty to commence insolvency proceedings, and the protection of essential executory contracts. The authors of this article found that the regulation of the protection of essential executory contracts may cause further problems, as it may trigger additional disputes between a debtor and creditors as to whether a certain contract is essential or not for day-to-day business. Further, a debtor may be willing to abuse contractual rights and may seek to justify the non-performance of contractual obligations.

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