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Article 17 of Digital Single Market and the threat to Freedom of Expression

Abstract: The aim of this paper is to analyse the Digital Single Market Directive implemented by the European Union, and how it will impact the position of authors, rightholders, User Generated Content platforms and content creators.

Article 17 has been subject to much controversy, this contention is related to the shift in intermediary liability and online platforms for copyright protected content hosted on their platforms by their users. This paper will attempt to give an overview of the copyright protection pre-DSMD, the policy rationale for the new Directive, analyse how platforms deal with copyright infringement, and what mechanisms they might employ under the new directive to deal with copyright infringement. And will also discuss whether this new legislative instrument undermines the crucial fundamental freedoms available under The Charter in the European Union.

1. Introduction

In April 2019, after months of legislative process Digital Single Market Directive 2019/970[1] (~~"D~~SMD") was adopted. Article 17 of this Directive is one of the most controversial ones, and has been subject to criticism from platforms, internet users and human rights advocates, as it provides the foundation for content filtering and makes intermediaries liable for their users' content. Therefore, it is crucial to examine Article 17 and consider the objectives of the Directive and to analyse if the objectives are met.

There had been increased calls to amend copyright and safe harbour regime due to the escalation of illegal content, hate speech, terrorist propaganda, copyright infringements and fake news. Right holders and governments pushed for a regime to censor controversial content online, a straightforward reason behind this is that platforms benefit from sharing content, and they therefore have the means to regulate it in an effective and efficient manner.

[1] Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [DSMD]

If platforms are made liable for what the users are uploading then they will take appropriate steps to hinder the spread of illegal content online.[2]

Adding to this reasoning there was a widespread threat of platforms becoming too powerful, these platforms pose a legitimate threat of overtaking print and traditional media as they have become our main source of news, entertainment, help us stay connected with people, express ourselves and also share our opinions with others. Some also fear that these giant platforms might get too powerful and start acting like a hegemony and have the potential to ―grow so large and become so deeply entrenched in world economies that they could effectively make their own laws".[3] In Europe there was another aspect at play, anti-platform rhetoric was fuelled by nationalist sentiment against the ―invading" foreigners as in the digital war, Europe found itself outgunned by four invading digital giants, Google, Amazon, Facebook and Apple which govern most of the business world.[4] Therefore the Governments and rightholders pushed for more regulations.

In 2015 the EU Commission unveiled an ambitious plan to modernise the so-called ‗digital single market' through the Digital Single Market Strategy. In September 2018 members of the European Parliament voted in favour of the Copyright Directive.[5] However, Article 13 (now 17) which made filtering copyright protecting content mandatory was met with criticism from internet pioneers and users in Europe,[6] as content monitoring and filtering is prohibited under the E-Commerce Directive.[7] There is a legitimate concern about whether this would deprive the users of freedom of expression. (Poland has already challenged the copyright directive for the threat it poses to Freedom of Expression.)[8]

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[2] Niva Elkin-Koren, Yifat Nahmias, and Maayan Perel, ―IS IT TIME TO ABOLISH SAFE HARBOR? WHEN RHETORIC CLOUDS POLICY GOALS," *SSRN*, February 28,https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3344213. [hereinafter When Rhetoric Clouds Policy 2019]

[3] Farhad Manjoo, Why the World Is Drawing Battle Lines Against American Tech Giants, New York Times (June 1, 2016), https://www.nytimes.com/2016/06/02/technology/why-the-world-is-drawing-battle-lines-against-american-tech-giants.html

[4] 1 Steve Denning, The Fight For Europe's Future: Digital Innovation Or Resistance, Forbes (May 20, 2018) https://www.forbes.com/sites/stevedenning/2018/05/20/the-fight-for-europes-future-digital-innovation-or-resistance/#565f33e748c0

[5]Julia Reda, ―European Parliament Endorses Upload Filters and ‗Link Tax,'" Julia Reda, 2018, https://juliareda.eu/2018/09/ep-endorses-upload-filters/.

[6] Danny O'Brien, ―70+ Internet Luminaries Ring the Alarm on EU Copyright Filtering Proposal," Electronic Frontier Foundation, June 12, 2018, https://www.eff.org/deeplinks/2018/06/internet-luminaries-ring-alarm-eu-copyright-filtering-proposal.

[7]Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [E-Commerce Directive].

[8] Case-401/19 Poland v Parliament and Council

Under this new Directive, Member States will have to introduce a new regime regarding the internet intermediaries and safe harbours. This article will first discuss the current copyright landscape, the regulations under E-Commerce and Information Society Directive related to intermediaries, what „communication to the public means" and how the CJEU case law has evolved with it. It will also try to address what effects this might have on the economy and smaller start ups as they would be burdened with using technical methods and legal strategies to ensure compatibility. It will also discuss the methods tech giants like Youtube use and what problems are faced by content creators due to them. Furthermore, there will be an analysis whether the new Directive is compatible with the existing EU laws. Has the EU in an attempt to make a policy that holds large corporations liable for hosting copyright-protected material undermined the essence of copyright law? What other Fundamental Rights are affected by it? And if there is an option to mitigate the risk.

2. Copyright Law in European Union

With the Internet becoming commonplace in the late nineties, lawmakers were posed with new challenges regarding law and regulations on the internet. Especially in the field of Intellectual property. There was an incentive to focus on the role of intermediaries to solve legal issues like IP rights protection and user privacy. An important question was posed as to who exactly is liable for infringing material that gets uploaded or stored on the systems hosted by intermediaries.

Online intermediaries play an important role and in the earlier days policy makers were hesitant to regulate them and hold them liable for the content uploaded by users as they would harm the online industry.[9] To shield platforms against hindering progress in online businesses and creativity and to protect the freedom of expression, legislatures adopted a framework that exempted sites from holding the hosting sites from legal liability. This shaped the development of the internet in Europe. [10]

2.1 E-Commerce Directive and Safe Harbours

[9] Nedim Malovic, „Presumed Innocent: Should the Law on Online Copyright Enforcement and ISP Liability Change?," *SSRN*, March 26, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2941087. [Malovic]
[10] When Rhetoric Clouds Policy Goals, *supra* note 2

Over the years a number of directives at the EU level have worked on harmonizing the Intellectual Property Law, and also the remedies available to right holders against their rights being infringed over the internet. One of the most prominent Directive came in June 2000 and is called E-Commerce Directive. The aim of which was to benefit the internal market by creating a framework that would help electronic commerce and to promote legal certainty in the EU.The focus was especially on the liability issues, to improve the development of services across the EU and eliminate distortions of competition.[11]

What this directive tried to do was to create a balance between a competitive legal regime that promotes freedom of right to information. While defining ISP as ‗any informative society service that is to say any service normally provided for remuneration at a distance by electronic means and at the individual request of a recipient of services.' It also provided the scope of liability including the exceptions to it. ISPs can benefit from liability exceptions if they fall under the exemption categories mentioned in art 12-14 that is mere conduit caching and hosting, these are called the Safe Harbours.

Mere Conduit

Mere conduit is described in E-Commerce Directive (―ECD"),[12] as an information society service that ‗consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network'. This means as long as the intermediary does not interfere or modify transmission it will not be liable.[13] This was decided in the *McFadden* case, a German chain gave the general public a free and unsecure WiFi service to draw potential clients to its shop. In 2010 a musical work belonging to Sony was made available for download through their network, a clear infringement of copyright by McFadden's user. The question in front of the Court was who exactly is responsible for the infringement, and will they be able to rely on one of the protections available under the ECD.

The Courts decided that McFadden was not liable because a provider will not be liable for the information that is transmitted by a third party receiving the provider's service if the following the provider of the service did not initiate the illicit transmission; it must not

[11] Nedim Malovic, *supra* note 9
[12] E-Commerce Directive, *supra* note 7, art. 12
[13] E-Commerce Directive, *supra* note 7, art. 12(2)

have selected the recipient of the illicit transmission; and it must neither have selected nor modified the information contained in the illicit transmission.[14]

Caching

Article 13 of ECD concerns ―transmission[s] in a communication network of information provided by a recipient of the service" whereby the intermediary stores the information in an ―automatic, intermediate and temporary" manner ―for the sole purpose" of making the transmission to other recipients of the service more structured. This efficient use of server spaces and internet cables frees up space to other users. It grants immunity if there is no interference or modification by the intermediary. The purpose of this exception is to protect intermediaries in respect of materials that do not originate from them but are temporarily stored on their servers to ensure the availability of material and the stable functioning of the Internet.

Hosting

Article 14 of ECD is relevant where the service offered is the ―storage of information provided by a recipient of the service". An intermediary is exempt from liability they did not have ―actual knowledge of illegal activity or information". Similarly, the platform is protected from civil claims for damages as long they are not aware of facts and circumstances from which the illegal activity or information is apparent.[15] Article 14 sets a different threshold of knowledge for civil claims and other illegally shared content and to remain immune from liability the intermediary must act ―expeditiously to remove or to disable access to the information" as soon as they obtain knowledge or awareness of copyright protected content on their account, which is also referred to as notice and take down.

The platforms are not entitled to immunity and might be accountable for copyright infringements if they fail to meet the requirements. This is why notice and take down[16] procedures are now the industry standard for implementing online copyright and are now incorporated in the framework of most of the online intermediaries. Therefore, both the rightholders and intermediaries are held responsible for monitoring and enforcement of copyrights. These existing rules of liability regarding safe harbours do not encourage

[14] Case C-484/14 McFadden v Sony (2015)
[15] E-Commerce Directive, *supra* note 7, art. 12 14 (1)(a)
[16] Castets-Renard, Céline, Algorithmic Content Moderation on Social Media in EU Law: Illusion of Perfect Enforcement (February 9, 2020). University of Illinois Journal of Law, Technology & Policy (JLTP), Forthcoming. Available at SSRN: https://ssrn.com/abstract=3535107 or http://dx.doi.org/10.2139/ssrn.3535107

platforms like YouTube to turn a blind eye to the violation of copyright. In particular in some jurisdictions where platforms are excluded from accountability for unethical good faith removal of content. If so, they encourage intermediaries to act with extreme care and to act with caution.[17]

Article 15 of the ECD, prohibits Member States from imposing general monitoring obligations on information transmitted and stored. Although Member States cannot oblige intermediaries to actively seek facts and circumstances surrounding an illegal activity, it does allow them to oblige to inform relevant competent authorities of the alleged illegal activity undertaken. Where such activity is detected, intermediaries must take prompt action to remove the illegal content. Online intermediaries are protected under the safe harbour provision only if they meet the requirements.

As E-Commerce was a directive and not a regulation, there were differences in the applications and outcomes across the different Member States.[18] This disparity in enforcing digital copyright laws was undermining the fight against the online Intellectual Property Law infringements. The EU Commission recognized, and as an attempt to mitigate this by further harmonizing and modernizing the digital market unveiled what is now called the Digital Single Market Directive.

2.2 Communication to the Public

It is important to look at the safe harbours provided by the E-Commerce Directive as they lay out the exemption from copyright infringement, however, they don‘t provide laws regarding when liability should be applied and what is the scope. To understand the scope of copyright law it is imperative to focus on InfoSoc Directive[19] which attempts to harmonise the exclusive rights available to copyright holders, among which the „right to communication‘ and how it has evolved over the past few years plays an essential role in the intermediary liability.

[17]See Christina Angelopoulos, European Intermediary Liability in Copyright: A Tort Based Analysis, UNIVERSITY OF AMSTERDAM 141 (Apr. 22, 2016), https://perma.cc/ER2H73TX.

[18] European Commission, Memo 15/6262, Making EU copyright rules fit for the digital age – Questions & Answers,Brussels, 9 December 2015, available at http://europa.eu/rapid/press-release_MEMO-15-6262_en.htm.

[19] Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Official Journal L 178, 17/ 07/2000, 01-16. [Infosoc Directive]

In Article 17 of the DSMD the wording includes that platforms which are making a „communication to the public" will be liable for the content end users upload on their platform, and provides no definition for what communication to public means therefore it is important to see what this means and how it came about. Article 3[20] of the InfoSoc Directive provides authors/rightholders with the exclusive rights „authorise or prohibit any communication to the public of their works by wire or wireless means, including the making available to the public of their works, in such a way that members of the public may access them from a place and at a time individually chosen by them." Which, according to recital 23, should be understood in a broad sense, the aim of this directive was to provide a high level of protection for the authors so that their work does not get exploited.

The gradual change in what amounts to „communication to the public" can be seen by case law, first formulation of this term was in Berne Convention, InfoSoc directive derived the wording of Article 3(1) from WCT[21], however it did not define it. The concept combines two elements (i) an act of communication (ii) which is directed at the public.[22] CJEU also highlights additional criteria which are interdependent, and may be applied on a case by case basis.

In the case of *Svensson*[23] Courts held that „public" constituted an indeterminate or fairly large number of people and that the communication must be directed at a new public, which means the public right holder did not have in mind when it authorised communication to the public. In terms of „act of communication" case law has a general consensus that the mere making available of a copyright protected work, and not its actual transmission, to the public where they can access the work is sufficient. However there needs to be a deliberate intervention by the user without which third parties would not have been able to access the work. In *SGAE v. Rafael Hotels*[24] European Court of Justice confirmed that even though merely supplying physical facilities did not not suffice, the distribution of a TV signal does amount to communicating to the public.

In the 2017 case of *Filmspeler*[25] CJEU had to decide if selling multimedia players in which he has installed add-ons containing hyperlinks to websites on which copyright-

[20] Infosoc Directive, supra 19, art. 3(1).
[21] World Intellectual Property Organization, Guide to copyright and related rights treaties administered by WIPO and glossary of copyright and related rights terms (2003), BC-11bis.1
[22] Giancarlo Frosio, "It's All Linked: How Communication to the Public Affects Internet Architecture," *Computer Law & Security Review* 37 (July 2020): 105410, https://doi.org/10.1016/j.clsr.2020.105410.
[23] C-466/12 Nils Svensson et al v Retriever Sverige AB (2014)
[24] C-306/05 SGAE v Rafael Hoteles (2006)
[25] C-527/15 Stichting Brein v Jack Frederik Wullems, also trading under the name Filmspeler (2017)

protected works are made directly accessible, amounts to ‗communication of public.' The Courts held facilitating access to unlicensed content that would otherwise be difficult to locate would amount to communication to the public. In *GS Media*[26] case court added the profit making characteristic to communicating to the public, when hyperlinks are posted for profit making purposes it can be expected that the person who posted such a link carries out necessary checks to ensure that - is not illegally published on the website to which hyperlinks lead, therefore it amounts to communication to the public.

And in the *Pirate Bay*[27] CJEU not only clarified what accounts for an act of communication to the public but also who is responsible for it, it was held that the operators of The Pirate Bay by making their platform available and managing it, provide their users with access to copyright protected works. It also builds on the previous cases *GS Media* and *Filmspeler* that a profit making intent may be sufficient to trigger a rebuttable presumption that the operator had the knowledge of the kind of content that will be communicated through the platforms.[28]

These decisions contribute to the relentless expansion of the notion of communication to the public, which has led to a growing involvement of online intermediaries, platforms and other service providers in Internet content regulation and sanitization. And the change in the internet architecture, which contributed to the copyright DSMD, where we see a shift from platforms having secondary liability to primary liability (it has been argued that introducing a knowledge requirement within the primary liability, the CJEU has blurred the distinction between strict liability tort and constructive knowledge)[29] as providing a platform for users to upload infringing content now makes them liable.

3. The Value Gap

Generally intellectual property rights are understood as means to incentivise creation which in turn benefits society. As initially there is a high cost of creating and publishing expressive works, if no legal protection is provided then, that might demotivate people and

[26] C-160/15 GS Media BV v Sanoma Media Netherlands BV and Others (2016)
[27] C-610/15 Stichting Brein v Ziggo BV and XS4All Internet BV (2017)
[28] Eleonora Rosati, ―The CJEU Pirate Bay Judgment and Its Impact on the Liability of Online Platforms," July 21, 2017, https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=3006591
[29] *id.*

decrease the supply of creative works which will have an adverse impact on social welfare. To ensure that does not happen, exclusive copyright laws are put in place.[30]

The policy rationale for Article 17 comes from the value gap campaign, used by the music industry.[31] Value gap is the alleged imbalance between what the right holders get reimbursed for their content, and what the platforms that host this copyright protected content make in revenue. Before this Directive, there were no liabilIty exemptions, no monetising obligations, and due to the „notice and take down" regime right holders were unable to monetise the copyright protected content on platforms like Dailymotion, Youtube and Vimeo, where a majority of the content is uploaded by users, and often contains copyright protected. This created the rhetoric that there is a misuse of safe harbours which is diminishing the artists right to create, the artists are under remunerated. However this is at odd with the evidence as streaming platforms have actually increased profits for several years.[32]

In her article EU Copyright Grappling with Google Effects, Bridy explains how this rationale is flawed. She states that the music industry based their narrative on a comparison of Spotify and YouTube, how the revenues are distorted as they have different business models and face different legal issues.[33] YouTube allows for user generated content to be uploaded to the platform, Spotify on the other hand is a closed distribution programme which controls and decides the content it makes available to the users.[34] Spotify is an on demand digital music streaming service providing a variety of artists to listen to from all over the world, and while YouTube can be used to listen to music, it offers educational tutorials, family videos, lectures and parody songs.

The value gap argument is lacking in empirical evidence as the European Copyright Society in their opinion wrote, „we are disappointed to see that proposals are not grounded in any scientific (economic) evidence."[35] In the Global Music Report 2018: Annual State of Industry which is a publication of IFPI showed that 2017 was the third consecutive year in which the global music industry grew after 15 years of decline.[36]

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[30] When Rhetoric Clouds Policy Goals, *supra* note 2
[31] IFPI, „Rewarding creativity - fixing the value gap" http://www.ifpi.org/value_gap.php
[32] When Rhetoric Clouds Policy Goals, *supra* note 2
[33] Bridy, Annemarie, EU Copyright Reform: Grappling With the Google Effect (June 30, 2019). Vanderbilt Journal of Entertainment & Technology Law, Forthcoming. Available at SSRN: https://ssrn.com/abstract=3412249 or http://dx.doi.org/10.2139/ssrn.3412249 [A.Bridy}
[34] *id.*
[35] European Copyright Society, „General Opinion on the EU Copyright Reform Package," January 24, 2017, https://nexa.polito.it/nexacenterfiles/ecs-opinion-on-eu-copyright-reform-def.pdf.
[36] IFPI Global Report, *supra* note 31

In terms of the gap between the revenue generated by a platform like YouTube and the right holders income, there is an underlying assumption that all revenue generated should go to the rightholder, as they are the original creators. However, this overlooks the overall creativity that the platforms allows people to exercise, and the added value of that in the music industry. Before YouTube, aspiring artists dreamed of getting a record deal, without which they would not be able to share their talent, this gave the recording labels a leverage over the artists. However, the internet has changed the landscape of this, with platforms like YouTube, artists are able to create and share even with relatively low budgets. Not only that they are able to figure out the target audience.[37] YouTube has given a platform to many famous singers that launched their careers by uploading their videos.[38]

The music industry was able to convince the Commission there was a need to fix the value gap despite the false equivalence at the heart of the value gap campaign, the European Commission was persuaded that YouTube‘s entitlement to the protection of the E-Commerce Directive safe harbour had not been beneficial to ~~a~~ fair sharing of value" for use of recorded music on the platform. To address this problem and to redistribute the wealth from platform to rightholers Article 17 of the Digital Single Market Strategy was introduced.

4. The Digital Single Media Strategy

Significant part of the copyright framework dates back to 2001, when platforms like Facebook YouTube Instagram did not exist.[39] These platforms came a little later, and now are a livelihood for some people. They have launched careers helping people get famous or be discovered from social media to mainstream media, and to make money by becoming vloggers or bloggers. Therefore, the aim of the Digital Single Market is to modernise the copyright framework and to create an internal market for digital content and services. The aim is to facilitate research and education, improve dissemination of European cultures and positively impact cultural diversity.[40]

In 2015 a public consultation was held to carry out a comprehensive assessment of the role of online platforms and how to best address the issues regarding copyright infringement,

[37] A Bridy , *supra* note 33
[38] See https://www.teenvogue.com/story/best-artists-discovered-on-youtube
[39] Facebook was founded in 2004, YouTube in 2005 and Instagram in 2010
[40]European Union, ~~M~~odernisation of the EU Copyright Rules," European Commission, September 14, 2016, https://ec.europa.eu/digital-single-market/en/modernisation-eu-copyright-rules.

hate speech and terrorism related content.[41] There was a stark difference in the approaches raised by the people participating, in terms of liability under E-Commerce Directive, the users content uploaders and intermediaries considered it fit-for-purpose, and on the other hand the right holders and their association were not satisfied with the effectiveness of this regime and identified the loopholes in it.

Therefore, in the subsequent Communication, 'Online platforms and digital single market, opportunities and challenges for Europe',[42] the Commission officially sets forth their problem driven approach on supporting further development of online platforms in Europe. The Commission also highlighted the importance of having a robust regulatory framework, in which the platforms are able to provide access to information and content, but also take more responsibility for that content.

The focus of the new directive is on these three main objectives that there needs to be (i) more cross border access for citizens to copyright-protected content online (ii) creating right conditions for digital networks and services to flourish (iii) fair rules of the game for better functioning copyright marketplace, which stimulates creation of high quality content, and maximising growth potential of digital economy.[43]. The aim is to allow for wider online access to works by trying to reduce the differences between copyright national laws. The Commission emphasised the importance of online platforms and the powerful position they have, which they claimed could potentially impact other players in the marketplace. Stemming from this power is the need to guarantee that users (especially minors) are protected from hate speech and the harmful content online.[44]

With this new Directive, the Commission tries to reinforce the position of the rights holders. As one of its most important features is that it gives an opportunity to the content creators, authors and right holders to negotiate with Online Content Sharing Services Provider ("OCSSP") on how their work is shared and used on the platform, to get better remuneration for their content and be able to exercise better control on it. This new obligation concerns for most part platforms that financially profit from hosting copyright protected

[41] See European Commission, 'Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy' (24 September 2015), https://ec.europa.eu/growth/content/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud-0_en.

[42] See European Commission, 'Online platforms and the Digital Single Market — Opportunities and Challenges for Europe' (25 May 2016)

[43] *Id.*

[44] Montagnani, Maria Lillà, A New Liability Regime for Illegal Content in the Digital Single Market Strategy (June 3, 2019). Available at SSRN: https://ssrn.com/abstract=3398160 or http://dx.doi.org/10.2139/ssrn.3398160

content on their platform, often without the consent of the right holders. To set this right, the new directive assigns an active role on OCCSP to enforce and prevent copyright infringements. By introducing an obligation on OCCSP to obtain licenses or get authorisation from right holders to seek for the content they make available to the public on their platform.[45]

Where any unauthorised content is posted in the platform they will be held liable for it, as the ‗safe harbour' protection of Article 14 of E-Commerce[46] directive no longer applies.[47] Although the provision which made content monitoring mandatory was removed from the approved version of DSMD there is still an obligation on online platforms to prevent uploads of unauthorised content, which seems unlikely without implementing a filtering mechanism.

4.1 Scope of Article 17

After public outcry and much criticism of Article 17 of the new Directive, the updated version did not have the requirement to filter content that may be copyright protected. Article 2(6) of the Directive[48] read together with the Recital 61-63 defines ‗Online Content Sharing Service Providers' as a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.

Article 17 has an effect on platforms which allow their users to share the content with other users, this includes YouTube, Dailymotion and Vimeo as they host User Generated Content. The main purpose of these sites is to ‗store and give access to the public of copyright protected content' secondly, that content should be uploaded by ‗users'. Thirdly, it is important to note that the wording contains that online platforms play an active role in ‗profit making purposes' which excludes it from the liability limitation under Article 14 of the E-Commerce Directive. In doing so DSMD asserts the ruling in L'oreal v eBay.[49] Platforms that store or enable their users to upload copyrighted content for other reasons,

[45] DSMD, *supra* note 1, at art.17(1)
[46] E-Commerce directive, *supra* note 7 , art.14
[47] DSMD,supra note 1, at art.17(3)
[48] DSMD, *supra* 1, rectial 62
[49] C-324/09 L'Oréal SA v eBay International AG (2011).

such as non-profit uses or online marketplaces (which only offer retail and not access to copyrighted content) are excluded from the definition of OCSSP provided by DSMD.

There are some vague terms used in the directive that may cause uncertainty as to which platforms are included under the OCSSP, in the definition itself ‗large amount of copyright-protected content' as well as in recitals 62 reads that ―should target only services that play an important role." Leaving it up to the interpreters to decide what constitutes as large amounts and what is an important role.[50]

Article 17 also states that OCSSP is any service that performs an ―act of communication to the public" and is therefore liable for their content. Article 17 of the Directive explicitly asserts that when an online content-sharing service provider performs an act of ‗communication to the public' or an act of ‗making available to the public' under the conditions laid down in this Directive, the limitation of liability established in Article 14 does not apply. These safe-harbours no longer apply to platforms and they must license all copyright protected content being shared on its service to avoid liability for copyright infringement.

On platforms that uploads user generated content the damages for copyright infringements can be hefty, for example in 2007 YouTube, which was a relatively new platform, was sued by *Viacom*[51] for uploading copyright protected to content to the site for statutory damages over 1 billion. Internet giants like YouTube and Facebook can afford to pay a huge amount in damages but for small startups this will have a detrimental effect. In recent times there are a lot of new startups that are introduced on the social media landscape, they encourage creativity and diversity and bring people together from all over the globe. If they do not have safe harbour to fall upon they would go obsolete.

Best effort and Small Businesses

There is a mechanism provided in Article 17 which can provide platforms some reprieve if they comply with the conditions set out in the new directive which are that if a platform can demonstrate that they

(a) made best efforts to obtain an authorisation

[50] Karina Grisse, ―After the Storm—Examining the Final Version of Article 17 of the New Directive (EU) 2019/790," *Journal of Intellectual Property Law & Practice* 14, no. 11 (October 16, 2019): 887–99, https://doi.org/10.1093/jiplp/jpz122.

[51] Viacom International Inc. v. Youtube, Inc. No. 07 Civ.2103 (2010).

(b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the right holders have provided the service providers with the relevant and necessary information; and in any event and
(c) acted expeditiously, upon receiving a sufficiently substantiated notice from the right holders, to disable access to, or right holders, to take down infringing content and made best efforts to prevent its future upload.[52]

To decide whether an OCSSP has satisfied the _best efforts' requirement, Article 17 lists factors to be taken into account, including the type, audience, and the size of the service and the type of content the service hosts. [53] This means that OCSSP can avoid the liability of posting unlicensed content if they act expeditiously in taking it down and keeping it off the platform. The _effort to prevent future uploads' shifts the focus from the _notice and take down' regime to _notice and stay down.'[54] In order for the _staydown' element to work a platform would require a filter that can detect and refrain the content from being uploaded again.

Small or new businesses have been given some reprieve. For an OCSSP which has been active for less than three years and has an annual turnover of less than 10 million euros, is not subject to the same liability.[55] They only have to comply with the requirement of acting expeditiously upon receiving substantiated notification, to disable access to copyrighted material or to remove it from the website. They do not have to make sure that the content stays off of the website and is not uploaded again. However, where the average monthly visitors exceed more than five million they also need to demonstrate that they made efforts to prevent further uploads of notified work.

The question regarding this exception is if it's too narrow? Whether the three year period is enough for a platform to make a significant impact? And are the five million monthly visitors a number too low?

Pastiche Satire And Comedy

In order to tackle the challenges to freedom of speech that will occur due to automated enforcement of Article 17, it provides that preventive measures –shall not result in

[52] DSMD,*supra* note 1, at art.17 (4)
[53] DSMD, *supra* note 1, at art.17 (5)
[54] A Birdie, *supra* note 33
[55] DSMD, *supra* note 1, at art.17 (6)

the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright."[56]

There was a lot of controversy regarding the _death of meme culture' when Article 17 came about,[57] as websites would be forced to filter out copyright content. Memes and gifs (a very important part of social media) are user generated images of most copyright work. However that is not the case, they fall under the exceptions to copyright. People may use copyright protected works for quotation, review, criticism and for the use and purpose of pastiche, parody and caricature in the content they are generating. In practical terms this may not be very straightforward, as whatever technical measure is used to filter out copyright protected material to prevent it from being uploaded will not be able to decipher the context in which they were used.

4.2 Avoiding liability under Article 17 of Digital Single Market Strategy

There are two mechanisms by which online platforms may avoid copyright infringement liability, one is that they should seek to obtain a license from the right holders to cover their user's actions. If they fail to get an authorisation/license from the right holders they will be liable for their users sharing copyright protected content on their platform. And the other is to filter the content that is being uploaded to the platform, and make sure the copyright protected content is automatically deterred from the platforms.

4.2.1 Licensing

Licensing and getting authorisation for content has its obstacles, platforms that host user generated and uploaded content and everyday new content is uploaded by thousands of users, and the copyright protected material can range from songs, movie clips, books to video games. It would require the intermediaries/online platforms to anticipate everything that the users might upload and acquire licenses from numerous rightholders. For start-ups and small platforms it would be very expensive to obtain licenses to host content on their site. Recital 61 also states ~~r~~right holders should not be obliged to give an authorisation to conclude

[56] DSMD, *supra* note 1, at art.17(7)

[57] Bashar, A. I. (2018, December 24). Death of Meme Culture in EU. Retrieved from https://www.thedailystar.net/law-our-rights/law-watch/news/death-meme-culture-eu-1678282.

licensing agreements,"[58] however an online content sharing service provider that communicates to the public *must* obtain a license, this could lead to an imbalance between both the parties.

A platform seeking a license for User Generated Content is faced with a complicated licensing task, as the platforms are available in most parts of the world to an enormous participatory audience it's unforeseeable what content would get uploaded, ideally the license should encompass the whole spectrum. Umbrella Licensing is unavailable in most European Union Member states, even if a platform is able to find a collective society willing to enter licence for User Generated Content with umbrella effect put forward in Article 17 (2) of the Directive, it will still face a very fundamental problem of lack of harmonisation. The collective society landscape is significantly fragmented and a UGC deal available in one Member State might be limited to that region.[59]

Another option is a compulsory licensing scheme, which seems like an efficient method to regulate copyright protected works. These can be granted by the government or government bodies, who can oblige right holders to license their works to copyright protected works to platforms who want to use it. As these would be regulated by the government it would reduce the risk of monopoly prices and deadweight loss while increasing consumer surplus. However, this will lead to a higher administrative cost.[60]

4.2.2 Filtering

The CJEU in its previous judgements has made it clear that proactive monitoring and filtering are against EU law. In the final version of DSMD there is no reference to effective technologies to guarantee removal of copyright protected content. These references to technical measures that first appeared have been replaced with vague terms like „best efforts' and „relevant and necessary information'. These terms can be open to interpretation, and although there is no general monitoring obligation it does not prohibit OCCSP from voluntarily engaging in general monitoring to avoid liability under Article 17.

[58] DSMD, *supra* 1, recital 62
[59] Martin Senftleben, "Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market," *SSRN Electronic Journal*, 2019, https://doi.org/10.2139/ssrn.3367219.
[60] Giancarlo Frosio, "Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity," *SSRN Electronic Journal*, 2019, https://doi.org/10.2139/ssrn.3482523.

Another problem with filtering is that it would require content monitoring, which is prohibited in Article 15 of E-Commerce Directive. Article 17 has tried to find a caveat by using the term „specific works" that need to be monitored, however that is not possible without general monitoring. This would therefore lead to conflict between the two directives, as preventing future uploads of copyright protected work would lead to general monitoring of all content that is uploaded to that platform.

Manually filtering and blocking content to remove copyright protected works would place a logistical and financial burden on the platform and it is likely to adopt automated filtering and blocking tools. These automated filtering tools might undermine the freedom of expression, as algorithmic methods can not replace human judgement.[61]

At the moment, YouTube uses Content ID which is a digital fingerprinting system developed by Google that helps to identify and manage copyrighted content. It has spent almost $100 million on it, it is an ongoing cost. Platforms that are just starting out, or are smaller may not be able to afford the cost of the technology and human resources involved in content filtering. Google does not license ContentID for third party use.

ContentID provides the right holders with two major benefits over the previous notice and takedown method: it continuously monitors uploads for copyright protected works which makes things easier for the right holders as they no longer have to send notices in bulk, and it also enables them to authorise and monetise user infringement instead of blocking it. This has led to a new stream of revenue for right holders which was not available in notice and take down approach ContentID makes it easier to block claim filter monetise and track user infringements instead of only blocking it.[62]

The other option for content filtering is Audible Magic which is less expensive than Content ID and is used by Facebook, Tumblr and Vimeo. Their webpage now offers „solution" to complying with Article 17[63] However ACR technologies have their shortcomings, it can give false positives, and especially in hip hop music where they use a lot of looping to sample with, it can hinder creativity.[64]

6. Copyright Infringement and YouTube

[61] *id*
[62] Annemarie Bridy, "The Price of Closing the „Value Gap": How the Music Industry Hacked EU Copyright Reform," *SSRN*, July 1, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3412249.
[63] See Audible Website: https://www.audiblemagic.com/article-17/
[64] Toni Lester & Dessislava Pachamanova, The Dilemma of False Positives: Making Content ID Algorithms More Conducive to Fostering Innovative Fair Use in Music Creation, 24 UCLA ENT. L. REV. 51, 53 (2017).

Since the conversation is about how Article 17 is going to be implemented, especially filtering, it is important to look at how YouTube currently deals with the copyright infringements, and the problems it faces. It is one of the main targets of the new copyright law.

Under their Copyright Policy, YouTube is required to expeditiously remove the copyright protected content upon gaining knowledge and awareness, and they are also required to terminate access to repeat offenders.[65] The DMCA Safe Harbour protection applies to YouTube as long as it fulfils the prerequisites laid down by it. That is first, they will put in place a mechanism to terminate user accounts that consistently infringe copyright. Second, they must comply and not interfere with „normal technical measures," which are characterised as measures that copyright owners use to identify or protect copyrighted works.[66]

YouTube has two mechanisms in place to deal with copyright infringements. One is ContentID, which is a software designed by Google. Rightholders can issue claims of ownership against any videos uploaded by users on youtube that contain those movies, video games and songs. This can be done manually or automatically, in order to do this automatically the copyright holders can send their audios/videos to youtube to be stored in databases as "reference files". When a user uploads a video, it is scanned for material that matches the reference files. The copyright holder has an option to decide what they want to do with the content that matches, they could Block the whole video from being viewed, monetise the video by running ads against it; in some cases sharing revenue with the uploader or track the video's viewership statistics.[67]

As of May 2019 more than 500 hours of content is uploaded on YouTube every minute.[68] A lot of these videos are sources of income for the creators, for some it's their primary source of income.[69] YouTube claims only 1% of the claims are disputed, which are well over 4 million videos. And although many of these claims are legitimate, there are also instances where ContentID erroneously flags that is allowed under fair use. Undisputed claims do not mean they were rightfully claimed, the creator may choose not to dispute it. This gives the big corporations an advantage over the creators as youtube does not provide

[65] DMCA,supra note 26, 512(i)(1)(A)
[66] Id.
[67] See How Content ID works - YouTube Help
[68] "YouTube: Hours of Video Uploaded Every Minute 2019 | Statista," Statista (Statista, 2019), https://www.statista.com/statistics/259477/hours-of-video-uploaded-to-youtube-every-minute/.
[69] Hunter Merck, "Being A YouTuber Can Be A Real Job," The Odyssey Online (The Odyssey Online, June 14, 2016), https://www.theodysseyonline.com/why-being-youtuber-is-real-business-venture.

sufficient remedies for false claims. Furthermore, if the creator disputes the claims and it turns out to not be a false claim they get a copy strike.

Copyright strike is the more punitive method that YouTube employs to deal with copyright infringements. When the copyright holder files a legitimate formal request for YouTube to take down the infringing video from the user, the account gets copyright strike. And the content is taken down to comply with copyright law. This acts as a warning for the user. After 3 copyright strikes, the users account, along with any associated channels with it is subjected to termination.[70]

Although it does comply with the purpose of DMCA there is a lot of room for people to abuse copystrike,[71] since filing for it is fairly easy. There are no limitations on the number of copyright strikes and therefore can be used as a form of extortion. There is no one to mediate the situation, as YouTube does not act as the referee nor does it have a system in place to help prevent people from abusing the copyright system. This shows that being one of the biggest platforms creators are already facing too many copyright claims and discourages them from creating content. With Article 17 being implemented throughout Europe, YouTube believes this can spell new problems for YouTube, and might lead to blocking some content in Europe.[72]

7. Article 17 and the Fundamental Rights

The Charter of Fundamental Rights of the European Union[73]protects freedom of expression, that includes the freedom to receive and impart information, as well as protecting intellectual property rights. When these fundamental rights conflict with copyright law, policy makers and judges attempt to balance them. Although Article 17 will aid the rightholders to better protect their work, it does pose potential risk to Article 7 which is the right to respect of private life, Article 8 which is the right to protection of private data, Article 11 right to freedom of expression and information and Article 16 right to conduct business of the Charter.

[70] See Copyright strike basics - YouTube Help
[71] Tom Gerken, –YouTube's Copyright Claim System Abused by Extorters," BBC News, February 14, 2019, https://www.bbc.com/news/technology-47227937.
[72] See Updates on Article 17 (formerly Article 13) - YouTube Help
[73] Charter of Fundamental Rights of the European Union 2012 OJ (C 326) 391. [CFREU]

In the case of *Sabam v. Netlog*[74] CJEU recognised that content filtering requirements suppresses the expressive rights of the users. These content recognition technologies are not advanced enough to take into account context, that can lead to over blocking of content. They might filter out content which would be lawful under the exceptions like parody reviews or satire or existing consent. This would be a breach of article 52 (1) of the Charter Of Fundamental Rights which states that limitations on exercise of freedom of rights should only be made if they are necessary and genuinely meet objectives of general interest recognised by the Union on the need to protect the rights and freedoms of others.

Content Recognition Systems are based on algorithms and can detect similarities based on the databases provided, and would either flag the content or remove it. There is no human review to it, the system only flags the copyright matches with it‘s database and can not analyse if it falls within a limitation or an exception. This is evident by youtube copyright claims where lawful material was flagged by ContentID, professor Lessig uploaded a video of his lecture which was taken down,[75] a white noise video was hit by 5 copyright claims,[76] NASA‘s Mars Rover landing from missions official youtube channel,[77] and Beethoven‘s old recordings on youtube were flagged for copyright infringement.[78]

As discussed previously, there is no effective framework in place to deal with these false claims on YouTube, and for content creators this can cost them their livelihood. This impedes innovation and creativity. For right holders the issues regarding limitations of ContentID and Audible Magic are not a huge concern, as overclaiming is good for their revenue. It‘s a lucrative business.[79]

A problem that may arise due to filtering is that it may lead to preemptive blocking as this might be easier for OCCSPs to handle, this again poses the problem of fair use vs overly cautious platforms that might defeat the very purpose of copyright protection.[80] Article 17 (2) states that the license obtained by OCCSP _shall also cover acts carried out by users of the

[74] C-360/10 Sabam v. Netlog (2012)
[75] Michael B Farell, ―Online Lecture Prompts Legal Fight on Copyright - The Boston Globe,‖ BostonGlobe.com, 2013, Online lecture prompts legal fight on copyright.
[76] Chris Baraniuk, ―White Noise Video on YouTube Hit by Five Copyright Claims,‖ *BBC News*, January 5, 2018, https://www.bbc.com/news/technology-42580523.
[77] Bird Aine Parnell, ―Copyright Bot Boots NASA Rover Vid off YouTube,‖ Theregister.co.uk, 2012, https://www.theregister.co.uk/2012/08/07/nasa_dmca_takedown/.
[78] Ulrich Kaiser, ―Google: Sorry Professor, Old Beethoven Recordings on YouTube Are Copyrighted,‖ Ars Technica (Ars Technica, September 3, 2018),https://arstechnica.com/tech-policy/2018/09/how-contentid-knocked-down-decades-old-recordings-of-beethoven/.
[79] A Bridy, *supra* note 33
[80] Garstka Krzysztof, Guiding the Blind Bloodhounds: How to Mitigate the Risks art. 17 of Directive 2019/790 Poses to the Freedom of Expression (October 18, 2019). Forthcoming chapter in Intellectual Property and Human Rights (4th ed), Paul Torremans (ed), Wolters Kluwer Law & Business. Available at SSRN: https://ssrn.com/abstract=3471791

services falling within the scope of Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis or where their activity does not generate significant revenues. This can be interpreted as discouraging people from making too much revenue, if their content is good they will attract more people on the platform and on their content, which will generate more money for them, therefore they should avoid making good content.[81] This is the opposite of why Copyright laws were put in place, that was to encourage people to create more art, and be creative. No definition is given as to what „commercial basis" means or „significant revenues" mean, these gaps should therefore be filled by each Member State, which might lead to the problem that different definitions might be applied and the rules applicable will not be harmonised throughout Europe.[82]

Another concern regarding the filtering and monitoring obligations is that it can also impinge on the service users' right to protection of personal data.[83] In *Netlog* case the ECJ concluded that requiring installation of the contested filtering system would involve the identification, systematic analysis and processing of information connected with the profiles created on the social network by its users. The information connected with those profiles is protected personal data because, in principle, it allows those users to be identified.[84]

Any measure which is bound to influence the accessibility of the Internet is the responsibility of the State under Article 10 ECHR.19 Within the framework of this Article – and in accordance with Article 11 of the EU Charter – the website blocking cases must be examined by the court. They will have to look at the (1) manner of the site usage and (2) the effects of blocking on legitimate communication, but also (3) at the public interest in disabled information and (4) whether the alternatives to accessing such information were available. Under certain circumstances, it will further be pertinent to consider (5) the Article 10 implications for not only Internet users, but also the intermediaries concerned.[85]

7.1 Right To Conduct Business

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[81] *id.*

[82] Curto, Natalia, EU Directive on Copyright in the Digital Single Market and ISP Liability: What's Next at International Level? (August 7, 2019). Available at SSRN: https://ssrn.com/abstract=3434061 or http://dx.doi.org/10.2139/ssrn.3434061

[83] CFREU, *supra* note 73, art. 8

[84] Giancarlo Frosio, "To Filter or Not to Filter? That Is the Question in EU Copyright Reform," Ssrn.com, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3058680.

[85] Geiger, Christophe and Frosio, Giancarlo and Izyumenko, Elena, Intermediary Liability and Fundamental Rights (July 15, 2019). in: Giancarlo Frosio (ed.), The Oxford Handbook of Intermediary Liability Online (OUP, 2020), p. 138; Centre for International Intellectual Property Studies (CEIPI) Research Paper n°2019-06. Available at SSRN: https://ssrn.com/abstract=3411633 or http://dx.doi.org/10.2139/ssrn.3411633

The right to conduct business is recognised as a fundamental right.[86] When licensing obligation and filtering will apply to an OCSSP, they will be faced with the cost and burden of it. In an open letter to Members of the Parliament, a coalition of 240 Europe-based online businesses urged the Members to reject Article 17 (then 13).[87] They implored that the financial and operational burdens of implementing the filtering system was high, and that the restrictions and inaccuracy of available technology, and lack of protection for small and medium sized enterprises is a threat to online businesses. They wrote that DSMD ~~f~~failed to strike a fair balance between creators and other parts of society."[88]

In its previous judgement of *Netlog*, the Court decided that installing a monitoring filter would result in a serious infringement of freedom to conduct business, and that. The CJEU assumed that monitoring all the electronic communications made, directed to all future infringements of existing and yet to create works ~~w~~would result in a serious infringement of the freedom of the hosting service provider to conduct its business.'[89] Platform's freedom of business would be disproportionately affected since an obligation to adopt filtering technologies would require them to install a complicated, costly and permanent system at its own expense. Further it will be contrary to Article 3 of Enforcement Directive which states that ~~p~~procedures and remedies necessary to ensure the enforcement of the intellectual property rights (…) shall not be unnecessarily complicated or costly [and] shall be applied in such a manner as to avoid the creation of barriers to legitimate trade."[90]

Therefore it will be more burdensome for middle range online businesses, who do not have the capital that tech giants like YouTube and Facebook have, and they are neither within the exceptions granted to small businesses. As the new obligations imposed to online intermediaries increase barriers to innovation by making it more expensive for platforms to enter and compete in the market.

7.2 Mitigating the Risk of Article 17

[86] CFREU, supra note , art. 16
[87] Jos Poortvliet, ed., ~~2~~240 EU Businesses Sign Open Letter against Copyright Directive Art. 11 & 13 – Nextcloud," Nextcloud, March 19, 2019, https://nextcloud.com/blog/130-eu-businesses-sign-open-letter-against-copyright-directive-art-11-13/.
[88] *id*
[89] Sabam, *supra* 74
[90] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights

There are certain steps that could help mitigate the damage the new Directive might have. The Drafters were well aware of the risks the Directive could impose on freedom of expression. In Article 17.(7) they stated that regimes proposed in Article 17(4) shall not result in prevention of availability of work that do not copyright, even where the subject is covered by exceptions and limitations.

Overblocking is a threat to freedom of expression,[91] and this arises due to algorithms filtering out content which may not be subject to copyright protection, or which might be public domain. One way to tackle this problem is to set a mechanism where human beings can assess whether the content flagged by the filtering system falls under the exceptions, that is it review parody or a meme. The amount of human capital needed to deal with all flagged content would be too costly and perhaps disproportionate, this could be helped by categorizing which type of content would be flagged for human assessment.[92]

There are also provisions about appealing Article 17 (9) also states that Member States should put in place a complaint and redress mechanism to effectively and expeditiously deal with users in the event there is a dispute over disabling access or removal of work or subject matter that they uploaded. The provision also states that rightholders should justify their reasons for removal of work. Furthermore, appeals should be processed without undue delay and the decision subject to human review. Therefore, a system will be put in place by Member States that will deal with copyright infringements, and will balance the freedom of expression of the users and the rights of the artists.

Another important way to mitigate the risk is by educating people about what they can post, instead of focusing on what they can not post. This was also recognised by the DSMD in Article 17 (9) where it states that the OCSSP ~~s~~hall inform their users in their terms and conditions that they can use works and other subject matter under exceptions and limitations…" Garstka Krzysztof suggests websites proactively informing the users of what they can post by displaying the information on the site instead of just in the ~~"~~terms and conditions' which people do not read often.

In his Research paper, Giancarlo Frosio stresses that licensing, rather than filtering should guide copyright reform online. He suggests compulsory licensing schemes. Which can be granted by governments and obliges right holders to licence with the copyright protected asset to third parties willing to use. If by implementing a method due to which the costs of licensing could be lowered it would be helpful for businesses, especially start-ups.

[91] Garstka Krzysztof, *supra* 80
[92] *id*.

8. Conclusion

The policy aim behind the DSMD was to modernise the European Copyright law, to promote harmony and legal certainty. Member States have some time to implement it, and to make sure that it is doing so they are able to balance the provisions of Digital Single Market Strategy with the Fundamental Rights.

It is important to keep in mind that when the EU enforces new rules or changes, it is likely to have a significant impact on all platforms and concerned multinational corporations in the world. Europe has a population of approximately 500 million people, in order to not lose this audience the corporations and platforms will comply with EU regulations so it does not harm their business. Article 17 is going to make an impact on all platforms, currently most of these giant platforms are governed by US centric laws and are not subject to censorship.[93]

The aim of redistributing resources from large (mainly) US platforms to creators for the use of their work in the platform economy is undeniably well-intentioned. Nonetheless, the positive effect that Article 17 DSMD can have on EU rightsholders comes at a price, which is to be paid mainly by small and mid-sized EU platforms and artists blocking their legitimately used works due to over-blocking. This could diminish the rivalry between US tech companies in the European Union, leading to increased market concentration among EU platforms.

Although the policy rationale behind Article 17 was flawed,[94] the DSMD is a step in the right direction. The landscape of the internet has changed at an exponential speed over the past 20 years and the regulatory framework governing the internet in Europe was outdated, and left platforms unchecked which gave them too much power. Online platforms are in a profitable position, it makes sense to hold them accountable for the content that is allowed on their platforms. As platforms would like to retain their profit and their position in the market, they will make sure that they avoid liability.

This can also be an opportunity to address the shortcomings of the current available filtering systems and ACR technologies. As more platforms will be obliged to take measures

[93] When Rhetoric Clouds Policy, *supra* 2

[94] Bridy, Annemarie, The Price of Closing the 'Value Gap': How the Music Industry Hacked EU Copyright Reform (June 30, 2019,) *supra* note 31. And Elkin-Koren, Niva and Nahmias, Yifat and Perel (Filmar), Maayan, Is It Time to Abolish Safe Harbor? When Rhetoric Clouds Policy Goals (February 28, 2019) *supra* note 2.

to prevent copyright infringement on their platforms there will be more research and development in this area, which would lead to improved technology at a lesser cost, making it easier for small businesses to afford content filtering technologies.

The aim of the copyright law should not be to exclude or limit content as that undermines the very core concept that underpins the copyright law and discourages people from creating. Instead the focus should be on how to monetise that content,[95] so that the right holders get their due. This is especially important for content creators on platforms like YouTube. Copyright law is of utmost importance to preserve the integrity of artistic cultural and educational works, therefore it is important to have the legal framework updated that is better equipped to face the challenges of the ever changing landscape of digital and social media. At times Article 17 may limit some fundamental freedoms and there will also be times when the vice versa will be true, there will always be trade offs.

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[95]Giancarlo Frosio, *supra* 84

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A járványügyi helyzet egyes jogelméleti kérdései

Ormándi Kristóf[1]

Előszó

Jelen tanulmányban a fő kutatási témámtól eltérően egy, a nemrégiben kitört Covid-19 pandémia miatt aktualitását nyert témát, az egészségmegőrzés kérdését, valamint a járványügyi veszélyhelyzetek megjelenését a természetjogban, illetve a jogelmélet doktrínális részén, szeretném körüljárni. Ennek az esszének a fő fókuszát nem maga a koronavírus-járvány adja majd, mivel annek érdemi tárgyalása más tudományterületek feladata, így az csak érintőlegesen, hatásait, és szocio-politikai, illetve jogi következményeit tekintve. kerül tárgyalásra.

Esszém arra a fő kérdésre keresi a választ, hogy az antikvitástól a modern korig terjedő jogfilozófiai fejlődés során milyen jogintézmények, elméletek alakultak ki ezen veszélyhelyzetek (járványok) felismerésére, társadalmi-politikai szinten való kezelésére és megoldására.
Az első téma, amit a tanulmány bemutat, az őskortól a mai napig használt járványkezelési technikák, korlátozások, pl. a karantén megjelenése, jogintézményesítése az antik (görög, római) jogtól a mai modern jogrendszerekig. A másik témakör, amit vizsgálok, a releváns témakör szabályozása a természetjogban, illetve a nemzetközi, szupranacionális jogban is az ezekből a természetjogi tanításokból levont, „desztillált" alapelvek, az alapjogok vonatkozásában. A vis maior intézményének fejlődésére is reflektál a tanulmány, valamint hogy mennyiben alkalmazható ez a kifogás a Covid-19 pandémia jelen állása szerint.[2]
Szó fog esni továbbá a *de lege ferenda* szinten létező (benyújtott) javaslatokról, és az új direktívákról, mint például az EU részéről az ún. *Green Deal* törvénycsomag, vagy az ENSZ koronavírussal kapcsolatos új irányelvei; ezek jog(filozófia)i, szociológiai alapvetéseinek megvizsgálára is sor kerül.

Ezen célok elérése végett a szakirodalom és a már említett joganyag elemzését, illetve ahol indokolt, az összehasonlító módszert alkalmazom. A tanulmány alapvetően multidiszclipináris nézőpontból tekint az elemzett kérdéskörre, tekintve hogy maga a problémakör összetettségéből eredően nemcsak a társadalom- hanem a természettudományok területét is érinti. Érdemes megjegyezni, hogy e tanulmány műfaját tekintve *working paper* jellegű, így a probléma felvetésén és körüljárásán ebben a műben nem kívánok túlterjeszkedni. Ezt az is indokolja, hogy maga a probléma rendkívül összetett, és pusztán a jogi vetületei vizsgálatával szem előtt tévesztenénk más, létfontosságú aspektusait.

1. Történeti áttekintés

Mivel a járványok szinte már a Föld illetve az értelmes emberi élet keletkezésétől kezdve problémát jelentenek a társadalmak számára, ezért már az antik népek jogában is találunk utalásokat, illetve normákat, törvényi rendelkezéseket az ezen helyzetek (azon a társadalmi és technológiai szinten történő) kezelésére. A Bibliában a Leviták könyvében, - amely az ún. mózesi törvények részét képezi - pl. található egy olyan instrukció, hogyha mit tegyen a pap fertőzött személy azonosítása esetén:
„Az Úr ezt mondta Mózesnek és Áronnak: "Ha egy embernek a bõrén duzzadás, kiütés, vagy fénylõ

[1] A szerző a Szegedi Tudományegyetem Állam-és Jogtudományi Karának doktorandusza. (SZTE ÁJTK ÖJJI)
[2] "*Rebus sic stantibus.*"

folt keletkezik, bõrleprára lehet gyanakodni. Vezessék Áronhoz, a fõpaphoz, vagy valamelyik fiához, a paphoz. A pap vizsgálja meg a bõr betegségét. Ha a beteg részen a bõr elszíntelenedett, és a beteg bõr alatt üreg képzõdött, akkor lepra esete forog fenn. A vizsgálat után a pap nyilvánítsa az embert tisztátalannak. De ha a bõrön fehér folt van, a bõr látható beesése és a szõr elszíntelenedése nélkül, akkor a pap tartsa megfigyelés alatt a beteget,s a hetedik napon vizsgálja meg. Ha saját szemével meggyõzõdik, hogy a betegség nem múlt el, de a bõr alatt nem is terjedt tovább, akkor újabb hét napig tartsa megfigyelés alatt, a hetedik napon újra vizsgálja meg. Ha úgy látja, hogy a beteg rész elvesztette csillogását, és a bõr alatt nem terjedt tovább, a pap nyilvánítsa tisztának az illetõt: csak kiütésrõl van szó. Az mossa ki a ruháját és tisztává lesz. […]Ha a pap a vizsgálat során sem a bõr elszíntelenedését, sem a bõr besüppedését nem tapasztalja, hanem csak a halvány sebet, tartsa a beteget hét napig vesztegzár alatt, s akkor nyilvánítsa tisztátalannak, ha a betegség valóban elterjedt a bõr alatt, mert a lepra esete áll fenn. Ha a fénylõ folt megmarad, de nem terjed tovább, ez akkor csak betokosodott kelevény: a pap nyilvánítsa tisztának (az embert).”[3] Itt tehát már megjelenik a vesztegzár intézménye, illetve a további passzusokban a könyv úgy rendelkezik, hogy a beteggel érintkezésbe került ruhát, szőrt, textilt el kell égetni. Ez vitán felül bizonyítja, hogy már az archaikus időkben is, amikor még a betegség okát, mibenlétét nem sikerült megfejteni, akkor is tisztában voltak a terjedés kockázatával, és az óvintézkedések társadalomra gyakorolt hatásával, jelentőségével.

Az antik görög és római korban is bőven találhatunk hasonló rendelkezéseket, igaz, itt még egyes kiemelt betegségtípusokra (pl. pestis, lepra) vonatkozóan. (Ebben a korai fejlődési szakaszban még kazuisztikus jelleggel szabályoztak minden releváns dolgot, így nem alakultak ki a mai korra jellemző, mindent átfogó gumiszabályok.) Az antik görög világban jelent meg elsőként a köztisztaság[4] mint eszmény, aminek nem kis részben az volt az oka, hogy tartottak a betegségek terjedésétől. Ekkoriban a közvélekedés és az orvoslás az ún. *miazma*-elméletet vallotta, mi szerint, ha a környezetben elszaporodik a szemét és a „bűzlő kipárolgások”, akkor azok meg fogják az embereket betegíteni.[5] Ennek megakadályozására a poliszok számtalan tisztasági rendelkezést hoztak.[6] A római birodalom számtalan járványt vészelt át fennállása alatt, amelyeknek nem kis részben az is lehetett az oka, hogy a kor mércéjével mérve a világ legmagasabb színvonalú kereskedőhálózata az övék volt, jóllehet az áruforgalom mellett a kereskedők más nem kívánt dolgokat, így betegségeket is behurcolhattak Róma területére. A római légiók belső szabályzata már a kor mércéjén felül részletes szabályokat tartalmazott a betegek, hadirokkantak ápolására, illetve felállították a tábori orvosok intézményét. Itt már megjelent a triázs (betegek elkülönítésének intézménye) is.[7]

Az egyik legpusztítóbb járvány a birodalom kettészakadása után a „*Justinianus-i pestis*” volt, amely nevezett császár uralkodása alatt zajlott. A betegség nagyon gyorsan terjedt, és az orvosok képtelenek voltak hatékonyan felvenni ellene a harcot, ezért az ellátórendszer gyorsan túlterhelődött. Napi 5-10 ezer ember halt meg a betegség első három hónapjában, utána a negyedik hónapban a betegség terjedési üteme csökkent.[8] Justinianus császár a római jog általános elveit alkalmazta a járvány elleni védekezés során, illetve hozott egy új törvényt, amelyben új köztemetők

[3] Katolikus Biblia, *Leviták könyve, 13.* https://www.bibliacatolica.com.br/hu/katolikus-biblia/levitak-konyve/13/ U.m. 2020. jún. 15.
[4] A görög mitológiában a tisztaság istennője Hygieia volt, aki Aszklépiosznak, a gyógyítás istenének lánya. (Innen ered a higiénia kifejezés.) Maga ez a vallási-mitológiai keretbe való ágyazottság arról tanúskodik, hogy e társadalom számára nagy értékkel, motiváló erővel bírt az egészséges élet és a betegség kerülése.
[5] Gostin, Lawrence O. - Wiley, Lindsay F.: *Public Health Law: Power, Duty, Restraint*. University of California Press, Oakland, California. 12. o.
[6] Arnaoutoglou, Ilias: *Ancient Greek Laws: A Sourcebook*. Routledge, London, 1998. 76-78. o.
[7] Belfiglio, Valentine J: *Control of epidemics in the Roman army: 27 B.C. - A.D. 476*. International Journal of Community Medicine and Public Health, 4 (5), 2017. 1387-1391. o.
[8] Retief, Francois Pieter – Cilliers, Louise: *The epidemic of Justinian (AD 542): a prelude to the Middle Ages*. Acta Theologica 26 (2), 2006. 115-127. o.

felállításáról rendelkezett.[9]

Maga a *karantén* elnevezés, illetve ennek a fajta elkülönítésnek, illetve kijárási tilalomnak az elnevezése a középkori Itália területére nyúlik vissza, a nagy pestisjárvány idejére. Itt definiálták először és adtak nevet a vesztegzár intézményének, ami először *trentina* (harminc napos) majd *quarantena* (negyven napos) időszakig volt elrendelhető. Egy 1377-es rendelet szerint a pestisveszély miatt harminc napot kellett a nem helyi lakosoknak a közeli szigeteken vesztegzár alatt tölteni, mielőtt beléphettek volna Dubrovnik (Ragusa) városába, majd az 1400-as években a velencei Szenátus 40 napra emelte a kötelező várakozási időszakot, innen a karantén elnevezés. Ez hatékony óvintézkedésnek bizonyult a pestis kitöréseinek megelőzésére.[10] A velenceiek e célból ún. *lazaretto*kat (karantén-szigetecskéket) rendeztek be a városaik partjainál. Jóllehet, más betegségek esetén már korábbi idők óta használták az elkülönítést, pl. a leprásokat már az őskor óta a társadalom többi tagjától elkülönítve igyekeztek kezelni, illetve a szifilisz, sárga láz, stb. betegségek hordozóit is egyes kultúránként tartósan a társadalomból kirekesztett életre kárhoztatták.[11]

A 19. században illetve a 20. század elején a sárga láz és a kolera okozott járványszerű kitöréseket, melyek ellen az ún. *cordon sanitaire* intézményét (szabad mozgás korlátozása) hasznosították, illetve a megfertőződött települések lakóit kollektív karantén tűrésére kötelezték.[12] Ezen kívül azonban az orvostudomány akkori állásának megfelelően nem sokat tudtak tenni a járványok terjedésének megakadályozására. A 19. századra az angolszász világrészen már egészen pontos statisztikai kimutatások („*bills of mortality*") jelentek meg a különböző fertőző betegségben elhunytakról, és viszonylagos pontossággal tudták előrejelezni a különböző betegségek kockázatát.[13]
Mindezen fejlődés logikus végpontja és egyben kulminálódása az 1918-as spanyolnátha (H1N1-influenza) pandémia időszakára esett, ahol már a karanténok és járványügyi lezárások mellett az orvosok és a hatóságok számára kötelezővé tették a kesztyű-és maszkviselést, valamint ezen preventív szokások szélesebb körben is terjedni kezdtek.

A huszadik század nagy közegészségügyi vívmányai, melyek lehetővé tették az életszínvonal emelkedését és a népesség prosperálását - a teljesség igénye nélkül - a következőek voltak: oltások, biztonságosabb munkahelyek, családtervezés, ivóvíz klórozása, gépjárművek biztonságosabbá tétele, fertőző betegségek kontrollálása. (Az utóbbiban, mint a Covid-19 pandémia kapcsán kiderült, még az emberiség kihívás előtt áll.) A nagy egészségügyi kihívások azonban, amelyeket a 21. század társadalmainak kell megoldania: egy racionálisabb egészségügy kifejlesztése, a különféle rasszok és etnikai csoportok közti egészségügyi különbségek felszámolása, új fertőző betegségek kivédése, az idősek egészségének javítása, és a környezet megőrzése ill. tisztítása.[14]
A jelenkor legnagyobb egészségügyi kihívása értelemszerűen a Covid-járvány legyőzése, amely a szimpla biológiai valóságon túl a társadalmi valóságot is erősen érinti, és hatásai, illetve a belőle levont konzekvenciák hosszan velünk maradhatnak. Különösen eklatáns mellékhatásai a járványnak a Green New Deal és a hasonló zöld politikai stratégiák még inkább előtérbe kerülése, melyről az alábbiakban fog szó esni.

2. Általános elvek és trendek

[9] Lévén hogy a járvány következtében több mint 70.000 temetetlen halott maradt, amelyeket a közhigiénia érdekében el kellett temetőkben helyezni, megalkottak a Boszporusz partjainál (Galatea) egy új temetkezési övezetet. Uo. 120. o.
[10] Sehdev, Paul S. *The Origin of Quarantine*. Clinical Infectious Diseases. 35 (9): 2002. 1071–1072. o.
[11] Drews, Kelly: A Brief History of Quarantine. *The Virginia Tech Undergraduate Historical Review* 2. 2013.
[12] Taylor, James: *The age we live in: a history of the nineteenth century*, Oxford University, 1882 . 222.o.
[13] A "bills of mortality" intézménye először a pestisjárványban elhunytak regisztrálására jött létre a 17-18.sz-ban. Később ugyanebben a formátumban jelentettek meg a közhivatali szervek olyan statisztikákat, amelyek a születések és a halálozások számát, illetve okát tartalmazták (weekly returns of births and deaths). L.: Boyce, Niall. *Bills of Mortality: tracking disease in early modern London*. Lancet, London, UK. vol. 395,10231 ,2020. 1186-1187. o. ;
[14] Gostin-Wiley i.m. 26.o.

Bár a technikai és társadalmi fejlődés jelen színvonalán továbbra sem tekintendő semmi „kőbe vésettnek", és nem mindig áll az emberiség a jelenlegihez hasonló veszélyhelyzetekben a helyzet magaslatán, bizonyos általános konzekvenciák levonhatóak, illetve a történeti és szociológiai jogtudomány már levonta őket.

a) Trendek

A történeti fejlődés ívét figyelembe véve megállapítható, hogy *van egyfajta „fordított arányosság" a betegségekkel kapcsolatos kérdésekben a jogtudomány és az orvostudomány kompetenciáit tekintve*. Vagyis amíg az orvoslás kevésbé volt naprakész és az ismereteinek tárháza nem volt a maihoz hasonlóan szerteágazó, addig inkább a jogalkotók illetve a jogalkalmazók feladata volt, hogy a közegészséget, köztisztaságot fenntartsák, a fertőző betegségek terjedésének elkerülése végett a betegeket – akár karhatalmi eszközökkel – az egészséges honpolgároktól elkülönítsék, és akár a személyi szabadságot korlátozó rendeleteket meghozzák, betarttassák. Ez utóbbira egy kiváló példa a 19. századból *John Snow* esete, aki megakadályozta egy londoni kolerajárvány továbbterjedését azzal, hogy elrendelte, hogy az egyik kerületben egy fertőzött vízellátó csapot zárjanak le.[15] Ehhez meg kellett győznie a St. James apátság gondnokait,[16] hogy a csap fertőzött fogantyúját távolítsák el. A művelet sikeres volt, mivel a járvány egy héten belül megszűnt, a halottak száma csupán 616 főben maximalizálódott. Ebből és az ehhez hasonló esetekből levonató tanulság, hogy a járványokat gyakran nem az orvosi, hanem a társadalmi (jogi-normatív) közreműködés állíthatja meg. (Valójában az egyetlen ismert fertőző betegség amelyet orvosi úton – vakcinával - sikerült kiirtani, a fekete himlő volt.)[17]

A másik megfigyelhető trend amely leginkább mai világunkban, az ezt megelőző évtizedtől kezdődően van jelen, a (szociális) *média torzító hatása*, amely komolyabbnak vagy halálosabbnak állíthatja be a betegségeket, mint amik valójában, illetve a t*éves információk „vírusszerű" szaporodása*. Egy friss perui kutatás eredménye azt mutatta, hogy azok az információk, amelyeket az emberek az orvosi vagy más egészségügyi szakértőktől kaptak, általában inkább csökkentették a szorongást, ezzel szemben a Tv- és rádióból érkező információk már jelentősen félelemkeltőbbek voltak, legrosszabbul az internetes szociális médiák teljesítettek, mivel ezeket jelentősebben használják fiatalkorúak, és ők kevésbé disztingválnak, a „szenzációhajhász" információk megosztására hajlamosak.[18]

b) Természetjogi és jogelvi alapkérdések

Más részről fontos kérdés annak meghatározása, hogy ha *természetjogi szempont*ból próbáljuk meg szemügyre venni a közegészség és a járványok elleni védekezés toposzát, akkor az egészséghez való jog alapvető jognak tekintendő-e? A régi idők társadalom-, illetve jogfilozófusai, mint Hobbes, Hume, Kant, Pufendorf általában nem mentek bele ennek a konkrét kérdésnek a tárgyalásába, mivel az egészséget csak mint a boldog, kiteljesedett emberi életnek, mint célnak az egyik komponensének tekintették.[19] Azonban az „új természetjogi elmélet" (*New Natural Law Theory, NNLT*) képviselői[20] úgy vélik, léteznek egyes alapvető javak (*fundamental goods*), amelyek közé

[15] Uo. 14. p.
[16] *"Board of Guardians"*
[17] Flight, Colette: *Smallpox: Eradicating the Scourge*. BBC History, 2011. feb. 27. http://www.bbc.co.uk/history/british/empire_seapower/smallpox_01.shtml U.m. 2020. júl. 11.
[18] Mejia, Christian R. (et al.): The Media and their Informative Role in the Face of the Coronavirus Disease 2019 (COVID-19): Validation of Fear Perception and Magnitude of the Issue (MED-COVID-19). *Electronic Journal of General Medicine*, 2020, 17(6), em239.
[19] Taylor, Steven C.:Health Care Ethics. In *Internet Encyclopaedia of Philosophy*. https://www.iep.utm.edu/h-c-ethi/ U.m. 2020. jún. 30.
[20] Egy, a John Finnis, Germain Grisez, Joseph Boyle, és Robert P. George nevével fémjelzett kortárs, morális

sorolandó az egészség, illetve az egészséghez való jog is.[21] Az NNLT alapfeltevése, hogy az emberek cselekszenek. Az emberi cselekedet a test és az elme közti egység tiszta megnyilvánulásaként fogható fel. Szemben az olyan filozófusokkal, mint Hobbes, akik szerint a gondolat illetve cselekvés pusztán egy vágy megnyilvánulása, az NNLT-ben a cselekedet olyan *szabad akaratból született racionális gesztus*, ami nem redukálható egy érzelem megnyilvánulására. A cselekvésnek oka van, amelyet *alapvető jó*-nak tekinthetünk. Az alapvető javak az emberi cselekvés olyan alapokai, amelyeknél nincs szükség más referenciapontra vagy célra, mert a természetes értelmünk azt állítja, hogy ezek *önmagukban jók* az embernek. [22] *Az élet és az egészség megőrzése a legfőbb cél amire egy döntés alapulhat*. Germain *Grisez* azon az álláspontón van, hogy az egészség nem csupán a jó érzés és a betegségtől való mentesség, hanem a személy integráns egészként való működése, tehát minden idetartozik, ami támogatja a felnövést, a szaporodást, és a túlélést. Ellentéte az olyan testi vagy lelki működés, ami sérüléshez, betegséghez vezet, elveszi az utódnemzésre való képességet, vagy halált okoz.[23] A más alapvető javak többek közt a barátság, tudás, igazság, esztétikai élvezet, (munka-vagy sport-)teljesítmény. Az NNLT elmélete természetesen elismeri azt is, hogy amit az egyén alapvető jónak tart, az nem feltétlenül közjó (*common good*), vagy morális értelemben jó.[24]

Az *egészség védelme* mint alapérték, ha a jogi logika alapján bontjuk le, akkor *pozitív* és *negatív* jogokat foglal magába. A negatív jogokat könnyű meghatározni, mivel lényegi értelemben arról van szó, hogy mások kötelesek olyan magatartástól tartózkodni, amivel szándékosan megsértik az egészségünket.[25] A pozitív jogok meghatározása nem ilyen egyértelmű. Ha egy társadalmi közösség tagjaként definiáljuk önmagunkat, akkor világos, hogy vannak bizonyos kötelezettségek a közösség más tagjainak egészségmegóvása érdekében. Például valaki, aki találkozik olyan személlyel, akit elütött egy autó, akkor pozitív jogi kötelessége van neki segítséget nyújtani. Úgyszintén a szülőknek kötelességük a családjukat és a gyermekeiket a lehetőségekhez képest legjobb egészségügyi ellátásban részesíteni.[26] Viszont egy tágabb szociális közegben már nem teljesen egyértelmű, hogy pl. az Alaszkában élő munkásnak miért kötelessége (adói révén) hozzájárulni a floridai alkoholista egészségügyi ellátási költségeihez, mikor az utóbbi szándékosan rombolja az egészségét. Az NNLT szerint a politikai közösség közjóról alkotott meghatározása segít definiálni annak hatáskörét és korlátait.

A természetjog talaján jöttek létre a modern értelemben vett alkotmányos alapelvek, alapjogok is. Egy elismert modern természetjog-értelmező, *Maritain* szerint: „*Ugyanaz a természetes jog, ami lefekteti az alapvető kötelezettségeinket, és amely ereje által válik minden törvény kötelezővé, határozza meg számunkra az alapvető jogainkat*."[27] Az 1948-ban kiadott Emberi Jogok Egyetemes Nyilatkozatának 25. cikke úgy rendelkezik a kérdéskörről, hogy:
„*Minden személynek joga van saját maga és családja egészségének és jólétének biztosítására alkalmas életszínvonalhoz, nevezetesen élelemhez, ruházathoz, lakáshoz, orvosi gondozáshoz, valamint a szükséges szociális szolgáltatásokhoz, joga van a munkanélküliség, betegség, rokkantság, özvegység, öregség esetére szóló, valamint mindazon más esetekre szóló biztosításhoz,*

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természetjogi irányzat.

[21] Gregg, Samuel: *Health, Health Care, and Rights: A New Natural Law Theory Perspective*. Notre Dame Journal of Law, Ethics & Public Policy. 2(25). 2012. 463-479. o.

[22] Uo. 467. o.

[23] Grisez, Germain: Health Care as Part of a Christian's Vocation, in Luke Gormally (ed.): *Issues for a Catholic bioethic* 151-153.o., 1999.

[24]Ha valaki a tettével felróhatóan egy alapvető javat sért, akkor az a cselekedet morális szempotból korrupt. Például: ha egy orvos (illegálisan) embereken kísérletezik, az ő szempontjából a tudásra mint alapvető jóra törekszik, ugyanakkor a cselekménye az egészség és testi épség megsértésével jár, ezért nem tekinthető morális szempontból sem jónak, sem elfogadhatónak.

[25] Gregg i.m. 471. o.

[26] Uo. 472. o.

[27] Maritain, J,: *Natural law: Reflections on theory and practice*. (ed. W. Sweet.) South Bend, IN, St. Augustine's Press, 2001. 58. o.

amikor létfenntartási eszközeit akaratától független körülmények miatt elveszíti."[28] Ezt a Gazdasági, Szociális és Kulturális Jogok Nemzetközi Egyezségokmánya 20 évvel később úgy egészítette ki, hogy „*Az Egyezségokmányban részes államok elismerik mindenkinek a jogát arra, hogy a testi és lelki egészség elérhető legmagasabb szintjét élvezze."*[29] A Nyilatkozatot univerzális érvényű jogforrásnak szokás tekinteni, pedig az általa megfogalmazott elvek gyakran kívánalom jellegűek. Ez a követelmény sem tud a valóságban maradéktalanul megvalósulni, mivel a világ legtöbb államában még mindig nem elég demokratikusak és érettek a körülmények a fenntartható, modern szociális és egészségügyi szolgáltatások biztosítására.[30] A konkrét jogi illetve jogpolitikai vita, ami ezek kapcsán kibontakozik, az, hogy mekkora részt vállaljon az állam az egészségügyi feladatok ellátásában. A libertariánus (elsősorban jobboldali) nézet az, hogy az állam minél kevésbé avatkozzon bele ezekbe a folyamatokba, mivel az egészségügyi szolgáltatások is a más gazdasági jellegű javakkal, szolgáltatásokkal együtt a piaci törvényszerűségeknek vannak alárendelve. Ezzel szemben a baloldali nézőpont az, hogy a kormányzatnak nagyobb szerepet kellene vállalnia az egészségügy finanszírozásában, és mindenki számára hozzáférhetővé kell azt tennie.[31] (A modern természetjogi gondolkodás fősodra szerint az egészségügy feletti teljes állami kontroll torz helyzeteket eredményez, ezért ezt ellenjavallják.)[32]

Azt is érdemes megemlíteni, hogy bár az alapjogok, illetve a nemzetközi jog definitíve megadja ezeket az alapvető normákat, ettől függetlenül még az egyes államok felelőssége ezeket érvényesíteni, amiben vannak alapvető szintkülönbségek, a járványhelyzetekről, amelyek ezeket még jobban kiélezik, még nem is szólva. (Tehát nem lehet a fejlődő országok, mint Jamaica vagy Srí Lanka járványügyi készültségét, mind a tényleges orvosi ellátás, mind a jogszabályi háttér tekintetében egy lapon említeni a fejlett országokéval, mondjuk Írországgal.) Különösen igaz ez a koronavírus-járvány esetében, ahol példának okáért a svéd államot sok kritika érte a vírussal szemben tanúsított lazább attitűdje miatt, holott egyes elemzők szerint a svéd modell valójában működőképes.[33]

c) Vis maiornak tekinthető-e a pandémia?

Egy másik érdekes, bár az átfogó folyamatok értékelése szempontjából nem kardinális kitérő, hogy valóban vis maiornak tekinthető-e a jelenlegi járványhelyzet. A klasszikus római jog, amelyből ezt a jogintézményt eredeztetjük, úgy határozza meg ezt, mint „legyőzhetetlen erő; olyan baleset, amit nem lehet előre látni vagy megakadályozni az 'emberi gyöngeség' miatt"[34] Ha szigorúan vesszük, akkor *bár a vírus egy természetben előforduló molekula, a terjedését emberi, felróható mulasztás tette lehetővé* (tágabb értelemben a környezetkárosítás, szűkebb értelemben a vuhani piac alacsony higiéniai körülményei), ezért ez a római jog eredeti álláspontja szerint, illetve a jogelmélet szempontjából nem tekinthető vis maior helyzetnek. Viszont a *magyar jog* egy kúriai állásfoglalás, valamint a német AB azon állásfoglalása, amely szerint a járvány vis maiornak tekinthető, alapján az említett kategóriába sorolja. Ez vélhetően abból a jogpolitikai indokból származik, hogy a hibás tejlesítéseket vagy nem teljesítést a vírus által keltett vis maiornak tulajdonítsa, így mentesítvén a nem vagy hibásan teljesítő felet a nem szerződésszerű teljesítés joghatásai alól.[35] *Boóc* szerint ez a

[28] *Emberi Jogok Egyetemes Nyilatkozata*, 1948. 25. cikk 1.
[29] *1976. évi 9. törvényerejű rendelet az Egyesült Nemzetek Közgyűlése XXI. ülésszakán, 1966. december 16-án elfogadott Gazdasági, Szociális és Kulturális Jogok Nemzetközi Egyezségokmánya kihirdetéséről*, 12. cikk, 1.
[30] Eberl, Jason T., et al.: *Foundation for a Natural Right to Health Care*. Journal of Medicine and Philosophy, 0:1-21, 2011. 2 o.
[31] Uo. 16. o.
[32] Gregg i.m.
[33] CsillikPéter: *A svéd modell, ahogyan még nem láttuk – lehet, hogy nekik lesz igazuk?* Portfolio, 2020. június 17. https://www.portfolio.hu/gazdasag/20200617/a-sved-modell-ahogy-meg-nem-lattuk-lehet-hogy-megis-nekik-lesz-igazuk-436818 U.m. 2020. jún. 30.
[34] Berger, Adolf (ed.): *Encyclopedic dictionary of Roman law*, 1963. 43. kötet, 769. o.
[35] Göndöcz Péter: *A legtöbbet idézett jogi kifejezés az elmúlt hetekben: vis maior*. Deloitte, 2020. márc. 30.

kifogás azonban nem áll fenn az összes, a járványt megelőzően kötött szerződésre, amely így teljesíthetetlenné vált; az előreláthatóság kérdését is kell vizsgálni, illetve ha a felek kikötöttek valamely olyan vis maior klauzulát, amely alá ez szubszumálható, akkor ennek megfelelően kell a szerződést a továbbiakban teljesíteni.[36] Tehát a jogtudomány álláspontja, ha a gyakorlati szempontokat is figyelembe vesszük, nem egységes, de inkább afelé tendál, hogy a járvány egy *vis maior* helyzet.

3. Új környezeti-egészségügyi kihívások, és az azokra adott jogi válaszlehetőségek

A Covid-járványra adott jogi válaszlépések és lehetőségek jó része nem konkrétan erre a helyzetre lett kialakítva, azt csupán a szükség és a célszerűség követelményei miatt vették bele a jogalkotók a már korábban részben kialakított paradigmáikba. Ebben a részben a nemzetállamok jogának részletes vizsgálatát mellőzve, a szupranacionális és a nemzetközi szinten létrejött szabályozásokat kívánom közelebbről megvizsgálni, mivel ezek adják meg a jövő évtizedek olyan jogi és társadalmi keretrendszerét, amely a hasonló kihívások legyőzését tartja szem előtt. Közös jellemzője ezeknek a normáknak és állásfoglalásoknak, hogy általában a *soft law* kategóriájába tartoznak. Ezt az is magyarázza, hogy a helyzet elég újszerű, és szinte napról napra változik, ami nehezen teszi lehetővé a nemzetközi hatáskörrel rendelkező, bürokratikus szerveknek a hatékony szabályalkotást. Tovább nehezíti a feladatot, hogy egy ún. *tudományos vákuum* idejét éljük most, amikor a természettudományok is küzdenek egy korábban még nem látott probléma megoldásával, tehát minden egyes megoldási javaslat, illetve állásfoglalás pusztán egy kísérlet erejével ér fel.

Az első és legfontosabb ilyen dokumentum az Európai Közösség területére kiterjedő, *Európai Zöld Megállapodás* (European Green Deal, EGD).[37] Ennek célja, hogy a globális és azon belül az Európát érintő környezetvédelmi kihívásokra választ adjon. Célja továbbá az EU természeti tőkéjének megőrzése és a polgárok egészségének védelme.[38] Az átállásnak ugyanakkor méltányosnak és inkluzívnak kell lennie. A sokat hangoztatott fő ponton kívül, mely az EU tagállamainak 2050-re történő teljes klímasemlegességét hivatott megteremteni, a Zöld Megállapodás tartalmaz olyan rendlekezéseket is, melyek a biodiverzitást, a hátrányos helyzetűek felzárkóztatását, vagy épp az egészség védelmét segítik elő – például az egészségesebb élemiszerek előállítását célzó, „*A termelőtől a fogyasztóig*" nevű stratégia.[39] Az EGD-vel azonban az a probléma, hogy 2019 decemberében, amikor a közleményt publikálták, még nem jelentett világszerte kockázatot a koronavírus-járvány. Ezért több tagállam (mint Lengyelország, Csehország) azzal a kritikával illette az EDG-t, hogy ezen célkitűzések elérése egyszerűen kisebb prioritást jelent, mint a veszélyhelyzet leküzdése. Az EU által a járványkezelésre kiutalt ún. „helikopterpénzek" csökkenti az EGD megvalósulásának reális esélyeit.[40] Közben (2020 március 26-án) az Európai Parlament elfogadta az ún. „*Koronavírus-reagálási beruházási kezdeményezés*"-t, mely a meglevő uniós forrásokból támogatja az egyes tagállamok járvány elleni védekezését,

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https://www2.deloitte.com/hu/hu/pages/jog/articles/a-legtobbet-idezett-jogi-kifejezes-az-elmult-hetekben-vis-major.html. U.m. 2020. júl. 5.; Boóc Ádám: *Remarks on the effects of the coronavirus pandemic on the Hungarian contract law*. Társadalomtudományi Kutatóközpont, Jogtudományi Intézet. JTIBlog. 2020. ápr. 29. https://jog.tk.mta.hu/blog/2020/04/remarks-on-the-effects-of-the-coronavirus-pandemic-hu . U.m. 2020. júl. 5.

[36] Boóc i.m.

[37] *Communication from the Commission to the European Parliament, the European Council, The Council, the European Economic And Social Committee and the Committee Of The Regions*. *European Green Deal*. COM/2019/640 final. Brüsszel, 2019. dec. 11.

[38] Uo.

[39] Uo.; *A „termelőtől a fogyasztóig" stratégia*. COM(2020) 381 final, Brüsszel, 2020. máj. 20.

[40] Bartuszek Lilla Judit: *Korona vagy környezet? – A koronavírus hatása az Európai Zöld Megállapodásra*. Jurátus, 2020. 04. 23. https://juratus.elte.hu/korona-vagy-kornyezet-a-koronavirus-hatasa-az-europai-zold-megallapodasra/. U.m. 2020. júl. 05.

valamint az Európai Szociális Alap kibővítését. Ezek tehát jelentős forrásokat irányítottak át a környezetvédelem és más célok rovására a Covid-19 elleni védekezésre. Ugyanakkor egyes szakértői vélemények szerint van megoldás a két politikai célkitűzés egyidejű megvalósítására: például a vírus által sújtott iparágakat (pl autógyártás) segítő támogatásokat bizonyos környezetvédelmi feltételek teljesítésétől függővé tenni.[41]

Az *unió koronavírus elleni védekezéssel kapcsolatos új direktívái* rendkívül nagyszámúak, azonban közülük kevés rendelkezik a pandémia megoldásának elemi kérdéseiről. Ezek közül kiemelendő a *Covid-19-oltóanyagokra vonatkozó uniós stratégia*. E stratégia célkitűzései „*Az oltóanyagok minőségének, biztonságosságának és hatékonyságának biztosítása, annak biztosítása, hogy a tagállamok és lakosságuk időben hozzájussanak az oltóanyagokhoz, ugyanakkor az EU a globális szolidaritási erőfeszítések élén járjon, a megfizethető oltóanyaghoz való mielőbbi, méltányos hozzáférés biztosítása mindenki számára az EU-ban.*"[42] Az ezen célok elérésére tett erőfeszítések két pilléren nyugszanak, név szerint a Szükséghelyzeti Támogatási Eszköz, és az uniós szabályozási keret, melyet hozzá kell igazítani a jelenlegi szükséghelyzethez. A dokumentum úgy rendelkezik, „csak az EU és a tagállamok nagyon gyors és egységes fellépésével biztosítható a biztonságos és hatékony oltóanyagokkal való kielégítő és gyors ellátás".[43] Ennek érdekében az Unió együttműködik a WHO-val, és keretszerződések kerültek megkötésre a legtöbb oltóanyaggyártóval. Az említett Támogatási Eszköz keretében a költségvetési hatóságok mintegy 2,7 milliárd eurót bocsátottak rendelkezésre, illetve uniós gyűjtésből még 9,8 milliárd gyűlt össze az oltóanyag kifejlesztésére, melyet az Európai Unió az ESBA támogatási szerv keretein belül az oltóanyagra tud költeni. [44] A potenciális oltóanyag kiválasztása sok kritériumot igénylő, összetett folyamat, amelyben a főbb kritériumok (a teljesség igénye nélkül): az alkalmazott tudományos megközelítés és technológia biztonsága; a nagy tételben történő teljesítés gyorsasága; költséghatékonyság, kockázatmegosztás, felelősség, ellátási kapacitás.[45] Érdekesség, hogy az Unióban hatályos géntechnológia-ellenes irányelvek hatályát felfüggesztik az oltásra vonatkozóan, vagyis az tartalmazhat géntechnológiával kifejlesztett elemeket.[46] Ezen célkitűzések megvalósítására azonban, ahogy a kritikusok rámutattak, nincs garancia. Maga a dokumentum is úgy rendelkezik: „*Nincs garancia arra, hogy rövid időn belül rendelkezésre fog állni egy biztonságos és hatékony oltóanyag. A vizsgálatok és kezelések fejlesztése és alkalmazása ezért változatlanul fontos. A Covid19 elleni hatékony és biztonságos oltóanyagot azonban széles körben a jelenlegi világjárvány legvalószínűbb tartós megoldásának tekintik. A globális kereten belüli közös uniós fellépés nagymértékben növeli a Covid-19 elleni egyetemes beoltásnak, valamint a gazdasági és társadalmi élet rendes kerékvágásba való visszaállításának potenciálját szerte a világon."*[47] Az Európai Unió egyéb releváns stratégiái közül kiemelhető a Covid-dezinformáció elleni uniós stratégia[48] és a szükséghelyzeti támogatásról szóló rendelet[49] is. Ezek olyan alapvető elveket fektetnek le, amelyek elengedhetetlenül szükségesek a járvány elleni hatékony védekezéshez.

Hasonlóan figyelemre méltó az ENSZ által kibocsátott *United Nations Comprehensive Response to COVID-19* névre hallgató dokumentum, mely az ENSZ koronavírus elleni védekezéssel kapcsolatos célkitűzéseit írja le. Az ENSZ válaszreakciója három pillérre alapszik, az első az összefogott

[41] Uo.
[42] *A Covid19-oltóanyagokra vonatkozó uniós stratégia*. COM(2020) 245 final. Brüsszel, 2020. 06. 17.
[43] Uo. 1.
[44] Uo.
[45] Uo. 2.3.
[46] Uo. 3.4
[47] Uo. 5.
[48] Ez a gyűlöletbeszéd és a koronavírussal kapcsolatos dezinformációk elleni közös fellépésről szól. Ld: *A Covid19-cel kapcsolatos dezinformáció kezelése – lássuk a valós tényeket. JOIN(2020) 8 final. Brüsszel, 2020 .jún. 10.*
[49] *A Tanács (EU) 2020/521. rendelete az (EU) 2016/369 rendelet szerinti szükséghelyzeti támogatás működésbe léptetéséről, valamint az említett rendelet rendelkezéseinek a COVID-19-járványra tekintettel történő módosításáról.* 2020. ápr. 14.

egészségügyi válasz, amit a WHO koordinál, és célja a járvány kontrollálása, visszaszorítása, valamint a vakcina feltalálása. Másodsorban egy széles körű erőfeszítést kell tenni, hogy megvédjük az életeket és a világ polgárainak megélhetését, valamint a krízis által okozott humanitárius és emberi jogi károkat a lehetőségek szerint minél jobban enyhíteni kell. Harmadrészt az ENSZ azt a célt tűzte ki, hogy a világot a korábbinál jobbra, korszerűbbre és környezetbarátabbra kell újraépíteni („*build back better*").[50]

Az első pilléren belül az elsődleges célkitűzés a járvány kontroll alatt tartása. Amíg konrét gyógyszer vagy vakcina nem lesz elérhető a Covid ellen, addig a WHO iránymutatásai szerint az egyetlen hatékony reagálási lehetőség egy komplex megoldás, amely a tetsztelés, karantén, izolálás és betegápolás révén igyekszik megoldani a pandémia leszorítását. Hogy a betegség terjedését megállítsuk a karanténok feloldása utáni időkben, az országoknak hat kritériumot kell figyelembe venniük, amelyek:
„*1) a járvány terjedése kontroll alatt van; 2) az egészségügyi rendszerek képesek észlelni, tesztelni, izolálni és ellátni minden esetet és lenyomozni minden kontaktot; 3) a kitörés veszélyei minimalizáltak a sebezhető helyeken, pl. idősek otthonai, kórházak; 4) az iskolák, munkahelyek védőintézkedéseket vezettek be; 5) az új esetek behurcolása kezelhető; 6) a közösségek teljesen felkészültek és informáltak annak érdekében, hogy az „új normális" időszakában éljenek. Minden egyénnek felelőssége van azért, hogy életeket mentsen és megállítsa a vírus terjedését*."[51] Ezen célok elérése végett az ENSZ segíti a gyógyszerellátást, a logisztikai és technológiai feladatok ellátását, valamint a vakcina kifejlesztésében anyagi és technikai segítséget kíván nyújtani az *ACT-A* program keretében.[52]

A második pillér elérendő céljai közé tartozik az azonnali segítségnyújtás a világ legsebezhetőbb 63 országában, de idetartozik még a likviditási csomag nyújtása a fejlődő országoknak, vagy a globális tűzszünet „elrendelése"[53] is. Ezenkívül az ENSZ javaslatára eddig sebezhető csoportok (pl. nők) ellen való erőszak elleni újabb jogi szabályozásokat fogadtak el a világ több mint 140 országában. Illetve a dokumentum tanúsága szerint online kampányokat terveznek indítani a gyűlöletbeszéd és a járvánnyal kapcsolatos dezinformáció ellen.[54] A Covid latin-amerikai, afrikai és közel-keleti terjedésének mérséklése, illettve a károk reparációja érdekében a Globális Zöld Egyezség (Global Green New Deal) céljainak tető alá hozása 2030-ig létfontosságú eleme ennek a stratégiának.[55] A harmadik pillér az újraépítés kérdéseiről rendelkezik; a már említett zöld megújulás (green recovery) mellett kiemelt figyelmet kell fordítani az erőforrások mobilizálására.[56] A javaslat összességében egy jól összefoglalt, arányait tekintve szimmetrikus dokumentum. Azonban, mivel globális együttműködésről van szó, megkérdőjelezhető ennek valódi hatóereje, tekintve hogy a szegényebb országok nem feltétlen lesznek képesek, vagy már most is képtelenek a szükséges anyagi és normatív (államszervezetbeli, ill. bürokratikus változtatások, stb.) hozzájárulások teljesítésére. Mindenesetre az ENSZ az éves költségvetéséből legalább 1 milliárd dollár értékben tervez a stratégia megvalósítására költeni a következő kilenc hónapban, ami komoly összeg; ha ebből indulunk ki, akkor a koronavírus megfékezésére történő erőfeszítések valóban erélyesek lehetnek.[57]

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[50] United Nations: *United Nations Comprehensive Response to COVID-19: Saving Lives, Protecting Societies, Recovering Better.* 2020. június. 1-7.o.
[51] Uo..9.o.
[52] Uo. 10-11. o.
[53] Természetesen ez a kérelem nem jelent kikényszeríthető kötelezettséget a világ bármely államával szemben, de emberi és humanitiárius jogi következményei vannak.
[54] United Nations i.m. pp. 11-15
[55] Uo. 20-22. o.
[56] Uo. 27-28. o.
[57] Uo. 30. o.

Összegzés

Mivel a fertőző betegségek megléte egyidős nemhogy az emberiséggel, hanem a többsejtű intelligens élet kialakulásával, ezért törvényszerű, hogy ezek sok gondot okozhatnak a mindenkori társadalmak számára. A járványok elleni védekezés már az őskortól kezdve az egyik elsőrangú prioritás az ezekkel érintett kultúrák, társadalmak számára. Mint a *történeti részben* láthattuk, már az ószövetségi időkben is a képzett személyek, papok nagy figyelmet fordítottak a járványok megakadályozására, a betegség tüneteit mutató személyek egészségesektől való elkülönítésére. Ezek az intézkedések, amelyeket a természetes ész hívott életre (bár gyakran vallási színezetet nyertek), mind a mai napig fennmaradtak. Az orvostudomány és a természettudományok az 1500-as évekig folytatott viszonlyag lassú fejlődése miatt ezen intézmények nem sokat fejlődtek, majd a 19.sz-ra jelentek meg fejlesztett, nagyobb bürokratikus koordinációt igénylő formáik, mint a triázs vagy a cordon sanitiare. A huszadik század első felére már az emberiség viszonylag kellő tapasztalatot gyűjtött a fertőző betegségek hatásának csökkentésére, visszaszorítására, ám ez sem mindig elengedő, ahogyan azt a Covid-19 járvány esetében is láthatjuk.

A tanulmány soron következő részében bizonyos *általános trendek*et ismertettem, valamint a természetjogi alapelveknek az egészségmegőrzésre és általában a járványokkal vagy a közegészséget veszélyeztető helyzetekkel szembeni fellépéssel kapcsolatos *konzekvenciák*nak szenteltem figyelmet. A természetjogi, jogbölcseleti értelemben vett alapvető javak közé tartozik az egészség mint alapvető érték védelme, és ez döntő mértékben befolyásolta a jog fejlődését. Ezt az is visszaigazolja, hogy sok, nagy hatású nemzetközi jogi dokumentumban visszaköszön ugyanez a terminológia. Azonban ezen elvek, jogpolitikai célok gyakorlati megvalósulása helyenként problémás, mivel csak az általános keretek vannak meghatározva, a gyakorlati megvalósulást az egyes államok kompetenciáira bízza anélkül, hogy valamely felső szerv felügyeletet gyakorolna felettük, és így e kompetenciák hiányossága miatt gyakran az elvek a gyakorlatba problémásan, vagy nem ültetődnek át.

A harmadik, utolsó részben ismertetni és összegezni szándékoztam a *különböző globális, illetve szupranacionális stratégiák*at, amelyeket a káros környezeti hatások mérséklésére, illetve a Covid-19 pandémia legyőzésére hoztak. Ezen a területen a már említett tudományos vákuum (amelyből valamelyest következik a jogi szabályozási „vákuum” is) miatt, illetve a felkészültség alacsony szintje és egyéb tényezők miatt nehéz definitív szabályokat alkotni, ezért a meglévő statégiák inkább „ökölszabályokat” és általános elvárásokat (soft law), avagy gumiszabályokat vezettek be. Fontos kiemelni, hogy a koronavírus-pandémia legyőzése nemcsak szociopolitikai illetve jogi, hanem természettudományos kérdés, ténykérdés is. Ezért önmagából a „papírjog” térfelén manifesztálódó vetületéből nem sok információt tudunk levonni a természeti, társadalmi valóságra vonatkozóan, ahol maga a betegség elleni harc folyik. E tanulmány megírásának időpontjában az új típusú koronavírus által okozott betegség még mindig terjedő szakaszban van, és sem orvosi, sem társadalmi megoldás nem született a járvány visszaszorítására, bár az oltóanyagok fejlesztése már előrehaladott stádiumban van. Így van okunk bízni benne, hogy a globális vészhelyzetet a kellő időben, hamarosan magunk mögött tudhatjuk, ám ebben a globális illetve lokális szabályozó szerveknek, illetve magának a társadalomnak is döntő felelőssége van.

Könyvismertető: Nagy Tamás – Egy arkangyal viszontagságai c. művéről

Ormándi Kristóf[1]

Mindjárt két éve lesz annak, hogy Dr. Nagy Tamás, a Szegedi Tudományegyetem Állam-és Jogtudományi Karának docense, a jog és irodalom tudományterületének ismert, nagy hatású művelője illetve kutatója végleg elhagyta ezt a világot. Mint egyik „kései" tanítványa, nekem volt szerencsém személyesen is ismerni őt, és a gondolatvilágába, személyes és szakmai érdeklődési köreibe betekintést nyerni. Ebből született a gondolat, hogy néhai mentorom előtt tiszteletet téve, de azért az objektivitás és a kritikus szemlélet mércéit megtartva írjak egy ismertetőt a halála előtti utolsó, *Egy arkangyal viszontagságai* című kötetéről.[2] A mű azt a gondolati szálat vezeti végig, hogy elválasztható-e, illetve érdemes-e elválasztani a szerző életpályáját a műveiben leírt történetektől és az általa megalkotott „*hipotetikus világoktól*", valamint hogy a jog és az irodalom szövegrétege között milyen rejtett összefüggések találhatók, és az adott korszak jogi nyelve mennyire befolyásolja (tudat alatt) az adott író stílusát, fogalmazási készségét. A kötet azoknak a tanulmányoknak, előadásoknak és egyéb kapcsolódó anyagoknak a gyűjteménye, melyek a szerző a Hajnóczy Péter Hagyatékgondozó Műhellyel való együttműködése során keletkeztek. Központi témája illetve toposza *Hajnóczy Péter munkásságának* elemzése. (Ez a kifejezés a legtalálóbb, hiszen ezt szó szerint és átvitt értelemben is fel lehet fogni, ahogy a későbbiekben láthatjuk.)

Nagy mindjárt az előszóban (illetve az első bevezető fejezetben)[3] definiálja a koncepciókat, amivel a műben végig dolgozni kíván. Ezek an intertextualitást, a jog és az irodalom szövegrétegei közötti kapcsolatot hivatottak feltárni. Ismeretes, hogy Stendhal és Heine munkáit a *Code Civil*, Kleistet és Hoffmann-t az *Allgemeines Landrecht*, Dosztojevszkijt az 1864-es évi orosz törvénykezés, Kafkát az 1852. évi osztrák büntetőtörvénykönyv – *Strafgesetz* – ihlette. Nem ritka, hogy a jogtörténet egyes kitüntetett státuszú szövegei bekerültek egy-egy mű vagy akár egy egész életmű szövegterébe. Példának okáért Stendhal - saját bevallása szerint - amikor a *Pármai kolostor*t írta, reggelente lapozgatta Napóleon törvénykönyveit, hogy annak alapján a stílus, amiben a regény írja, kellően száraz és tárgyilagos legyen.[4] A jog és az irodalom témakörei, szövegei között tehát kimutatható szignifikáns összefüggés, de ezt a szerző álláspontja szerint jellemzően egyik tudomány sem kezeli komolyan, csak afféle kuriózum, játék gyanánt. Az irodalomtudomány elhidegülése annak köszönhető, hogy a taine-i „*la race, le milieu et le moment*", vagyis a szerző élete, jelleme, lelki alkata szerinti értelmezés ma már elavultnak tűnik.[5] Kundera úgy fogalmazott, hogy a Kafka-regényeknek a szerző pályafutása felől való elemzése olcsó „kafkalógiává" silányítja azokat, vagyis nem egyebet állít, mint hogy az ilyen értelmezési kísérletek

[1] A szerző az SZTE ÁJTK ÖJJI doktorandusza.
[2] Nagy Tamás: *Egy arkangyal viszontagságai. Jog, irodalom, intertextualitás Hajnóczy Péter műveiben*. Gondolat, Bp., 2018 (Recta ratio)
[3] Uo. 11-31. o.
[4] Uo. 15-16.o.
[5] Vagyis ha bármiképpen jogi szaknyelvre akarnánk átkonvertálni, a „tényálláshoz kötöttség" megszűnt, mivel a szerző életét és a művei szövegterét már nem kötik mereven össze.

„kiherélik" magát az irodalmat. Ezzel szemben Nagy úgy gondolja, hogy „.. *az intertextuális nyomozások révén az irodalomtörténet nagy összefüggéseinek hálózatába beilleszthetőek a jogtörténet egyes epizódjai is, de azt is, hogy a dialógus kölcsönös […] haszna ott is jelentkezhet, ahol előzetesen nem várnánk*."[6] A jogi tematika (jog, jogászság, igazságszolgáltatási problémák ábrázolása) nem kell szükségképpen, hogy a tradicionális jogászi értelmezésre fusson ki. Ugyanígy az irodalom is „magáévá tette" és a maga módján ábrázolja az élet ezen területeit. Erre hozza fel a szerző példaként többek közt Kleist tárgyilagosan száraz stílusát, Dosztojevszik jogi szemléletmódját, vagy Kafka (és tőle átvetten Hajnóczy) A fűtő c. elbeszélését, mely az egyéni igazságérzetről szól.[7] A jogtudomány idegenkedését Nagy szerint az magyarázza, hogy az USA-ban a mainstream jogtudomány a jogi praxis alátámasztására, a jogi fogalomrendszer definiálására törekszik, itt a '60-as évek *interdiszclipináris fordulat*a révén megjelentek a law and […] elnevezésű tudományágak, de igazán csak a law and economics – jog és közgazdaságtan – vált elismertté. Az európai/kontinentális jogtudomány pedig a pandektisztika alapjaira épül, a római jog és a zárt jogi dogmatika alapjaira támaszkodik, amely nehezen vesz be a falai közé bármely nóvumot.[8] Pedig lehetne ez másképp is: a szerző *programbeszédét* alapul véve – azokon a megalapozott kutatásokon kívül is, amelyet *Robert Cover és Robert A. Ferguson* végeztek a jog és elbeszélt történet, valamint a jogi és irodalmi tevékenység és gondolkodásmód összefüggései tekintetében, léteznek egyéb megközelítések is, pl. *Ziolkowski*-é, aki a jog és az irodalom kölcsönös függését vizsgálja a történelmi korok kontextusában, illetve az *eljárás*ra fókuszál. Nagy álláspontja végső soron az, hogy minkét tudománnyal „*összhangba hozhatónak tűnnek azok a vizsgálódások, amelyek a szövegköziség (intertextualitás) ösvényén indulnak el, tehát elsődleges feladatuknak az egymásra ható jogi és irodalmi szövegek összefüggésrendszereinek és ezek specifikus formáinak a feltérképezését tekintik. E vizsgálódások nem titkolt célja, hogy a jogtudomány is képes legyen megfontolandó tanulsággal szolgálni az irodalmárok számára, s ezáltal (újra) kölcsönössé tenni az érdeklődést és a jelenleginél intenzívebbé tenni a párbeszédet a két terület képviselői közt. Ez olyan dialógus volna, melyet a jog és irodalom évezredes összefüggései valóban megérdemelnének*."[9]

A második fejezetben (Tűzoltó sem) a szerző Hajnóczy Péter életművére és irodalmi munkásságára fókuszál, illetve egy ízben azt veti össze több kortárs irodalmár, mint pl. Márai munkásságával. Az első tanulmány a fejezetben (Egy arkangyal viszontagságai a szocialimusban) adja a mű tulajdonképpeni gerincét. Mint azt előzetesen a szerző említi, az irodalomtudomány fősodra szemben áll bármiféle valóságreferens értelmezéssel, habár az utóbbi időkben a kisebbségi tudatosság és az új historizmus elméleteinek szellemében mégis relevánssá váltak azok a nézetek, hogy nem tagadhatjuk meg egy mű szerzőjének faji, nemi, vallási, stb. sajátosságait; valamint, hogy *az irodalom nem hermetikusan elzárt szövegréteg, hanem egyfajta „kulturális tett*."[10] Nagy Tamás is az utóbbi álláspontot részesíti előnyben az előzővel szemben, és a már említett kafkalógiára igyekszik találni ellenpéldákat – Hajnóczy személye és művei révén. A legtöbb kortárs kritikus Hajnóczy Péter korai műveiben a

[6] Nagy i.m. 18.
[7] Uo. 19-22.
[8] Uo. 23-28.
[9] Uo. 31-32.
[10] Uo. 37.

munkásrealizmust és az egzotikumot látta, lévén hogy kazánfűtőből lett író. Kései munkáira pedig az alkoholizmus árnyéka vetült, ezt vélték benne látni. Nagy szerint az életrajzi elemek nem elhanyagolhatók, ugyanakkor az „életrajzi paktumot" nem Hajnóczyval kellett volna megkötni, hiszen említett nem a saját személyét, hanem a darabokra hullott, „*szövegbe átmenthető és ott újraépíthető Én*"-t ábrázolta műveiben.[11] Hajnóczy életének egyes kiemelt tényei (árvaság, nevelőszülőknél való elhelyezés, nevének fel nem vállalása, fizikai munkás mivolta, alkoholizmusa, gyógyszerfüggősége) [12] hajlamosítják az elemzőket arra, hogy mindent ennek a fényében lássanak, holott az igazi személyiségét, melynek helyébe „a legenda" lépett, a szerző véleménye szerint soha nem fogjuk megismerni.[13] Hasonlóan a realista, szociografikus magyar írókhoz (tényírókhoz), mint pl. *Illyés Gyula, Nagy Lajos, Darvas József*, Hajnóczy prózája is valamelyest a realitások ismertetését tűzi ki célul, ám nem ragad meg a realitás talajánál, inkább annak groteszk átértelmezése.[14]

A tanulmány érdemi részét A fűtő c. elbeszélés jogi-irodalmi értelmezése tölti ki. Mint ismeretes, A fűtő nagyban épít Kleist és Kafka azonos című művére, illetve előbbi mű parafrázisának is tekinthető. A történet röviden: Kolhász Mihály, az 1970-es évek Magyarországán egy meg nem nevezett gyár munkása, kazánfűtő, felháborodik, mivel egy felsőbb utasítás folytán elveszti az őt megillető, fél liter tej „védőitalt", melyet a veszélyes munkakörülmények miatt kapott. Miután a vállalati hierarchia különböző szintjein keresztül vitt fellebbezése kudarcba fullad, otthagyja a gyárat, és egy ügyvéd segítségével próbálja meg igényét érvényesíteni, ám az sem vállalja az ügyet. Kolhász elméje látszólag megbomlik, tiltakozása egyre radikálisabb méreteket ölt: kiáltványt fogalmaz „az emberiség nevében", amelyben elítéli a gyár vezetését, majd előkészületeket tesz arra, hogy felgyújtsa önmagát. Miután belátja, hogy kísérlete nem hozza meg a kívánt eredményt, a megfelelő bocsánatkérések után visszamegy dolgozni a gyárba. A világ jobbá tétele iránti vágyat ezentúl hajnali sétáiban éli ki, amikor is „testével próbálja meg fölmelegíteni a levegőt"[15] Hajnóczy a történetet Kleist-től kölcsönzi, azonban amíg Kleist a történelmileg ismert Michael Kohlhaas-ról, Köln város előkelő polgáráról írt, aki lovainak eltulajdonítása miatt kezdett véres portyákba és rabló hadjáratokba, Hajnóczy hősének sorsa tragikomikus. Mindkettejüket az igazság keresése vezérli, a jhering-i értelemben vett *Rechtsgefühl*, illetve a *Fiat justitia, et pereat mundus* római maxima; azonban míg Kohlhaas eléri célját a bosszúban, és a *„bukott angyal" legendai státuszt* (minthogy bűneiért kerékbe törték), Hajnóczy Kolhásza ostobán téblábol a magyar szocializmus kisszerű és gyakran következmények nélküli világában, nem büntetik meg, de célját sem érheti el soha.[16] Kolhász cselekedete tehát végeredményben: *kis*

[11] Németh Marcell: *Hajnóczy Péter*. Kalligram Kiadó, Pozsony, 1999. 9-10.
[12] Hajnóczy eredetileg *Hasznos Ödön* néven látta meg a napvilágot 1942-ben, majd Hajnóczi Béla, Hajnóczy Béla Ödön neveken nevezte magát, míg végül *Hajnóczy Péter*re anyakönyvezték. *Hajnóczy József*nek, a magyar jakobinus mozgalom vértanúja leszármazottjának vallotta magát. Miután 1962-ben esti tagozaton elvégezte a gimnáziumot, alkalmi munkákból élt. Első elbeszélései A fűtő címmel 1975-ben jelentek meg. Ezután írásaiból élt meg, a Mozgó Világ című folyóirat munkatársa volt. Sajátos stílusa rövid életpályája ellenére jelentőssé teszi életművét. (Forrás: Wikipédia: *Hajnóczy Péter*. https://hu.wikipedia.org/wiki/Hajn%C3%B3czy_P%C3%A9ter. U.m. 2020. aug. 3.)
[13] Nagy i.m. 38-43.
[14] Uo. 47.
[15] Uo 54-55.
[16] Uo. 55-62.

hűhó semmiért.[17] Az elbeszélés olyan példabeszédnek tekinthető, amely az egyéni igazságkeresés kilátástalanságát mutatja be a szocialista jog-és államberendezkedés keretei közt. Megjelenik mindkét műben – a név apropóján – a Mihály arkangyalhoz való hasonlítás, amely Kohlhaas esetében heroikus jellegű, ő úgy jelenik meg, mint afféle bosszú angyala, Kolhász esetében azonban már a blaszfémia határát súrolóan igénytelen, közhelyes: az ő „trombitálásai"[18], amelyet a szerző ekként ír le, orrfújása avagy szellentése.[19] Nagy megjegyzi, hogy Hajnóczy alakjai a realista szerzők műveivel ellentétben (Kolhász kivételével) elnagyolt, tipikus karakterek. Megjelenik a „felfelé nyaló, lefelé taposó" káder, a zord szakszervezeti tag, és a nemtörődöm vezetők. Ez önmaga a fennálló rendszer iránti egyéni kritika ki nem mondott, de plasztikus megjelenítése.[20] Amely nem csak ennek az államberendezkedésnek sajátja: nem tudhatni, hogy itt, Kelet-Közép-Európában mikor ismétlődik meg a „kísérlet".[21]

A soron következő tanulmány Hajnóczy Péter életét és a szocialista joghoz fűződő felemás kapcsolatát hivatott bemutatni. Itt a szerző abból indul ki, hogy Hajnóczy delikvens jelleme illetve magatartása nem annyira saját, hanem az őt körülvevő társadalmi berendezkedés miatt alakult ki. Ennek fő apropóját a *zászlóletépéses ügy* miatti bírósági eljárásban látja. Itt Nagy ismerteti az ügy jegyzőkönyvét, melyet nem a büntetőjogilag releváns, hanem inkább groteszk-ironikus irodalmi megfontolások szerint értelmez, ami egyébként egy elfogadható olvasata a történteknek: a teljesség igénye nélkül, Hajnóczyt és bűntársát, *Vászolyi Erik*et bíróság elé citálták, mert részegen letéptek egy vörös zászlót. Jóllehet az ítélet meghozatalakor, mint tudva levő, még nem a tett-büntetőjog, hanem a szocialista típusú tettes-büntetőjog volt érvényben, és a bíróság maximális jóindulattal vette figyelembe az enyhítő körülményeket, mégis abszurd, egyben megmosolyogtató, hogy Vászolyit, mivel „*köztiszteletben álló gimnáziumi tanár*", és „*felesége orosz nő, […] így családi kapcsolata révén is inkább szimpátia, semmint ellenséges érzület állapítható meg részéről a Szovjetunióval szemben*" , egy sima figyelmeztetéssel elengedték. Míg Hajnóczyt, akinek az összes enyhítő körülményt figyelembe vette a bíróság, „*politikai éretlensége*" miatt, és mivel *„cselekményét éppen május 1. előtti időben, tehát a nemzetközi munkás összefogás előestéjén követte el"*, ezért 6 hét javító-nevelő munkára ítélték.[22] Nagy Umberto Eco gondolatait a *fiktív jegyzőkönyvekről* szabadon idézi, majd azon tűnődik, hogy „*a részleteiben idézett jegyzőkönyv és a szigorúan vett büntetőjogi fejtegetésektől 'megszabadított' ítélet szövegében lehetetlen nem meghallani a kész elbeszélést (például egy Örkény-novellát),vagy látni egy elbeszélés (például A fűtő vagy Hajnóczy egyéb történeteinek) nyersanyagát és szövegalkotó eljárásainak elemeit.*"[23] Ezeket a szövegeket a '60-as években nyilván nem azért írták, hogy valaki ironikus, vagy groteszk módon olvassa, most mégis ez történik az olvasóban. Ez felveti a kérdést, hogy ki hallja ebben a történetben az iróniát? Hallaná egy norvég, egy benini, egy

[17] Uo. 63.
[18] Mivel hogy Mihály, más hiedelmek szerint Gábriel *arkangyal* fújja a végítélet harsonáját.
[19] Uo. 64-75.
[20] Uo. 77-87.
[21] Uo. 87.
[22] Uo. 100-106.
[23] Uo. 107.

portugál is? Vagy egy 23. századi? Mi itt ebben a korban, Kelet-Európában nagy eséllyel meghalljuk, megértjük a történetet, és annak tanulságait is.[24]

A tágabb témát felölelő harmadik tanulmányban (Szövegutcákon: Séták a Fűtővel, Márai & Co.) a szerző valóság és fikció határvidékéről, a Hajnóczy illetve az említett írók életében megjelenő nehézségeknek a műveikbe való átviteléről értekezik. Kolhász Mihály alakja mintha a *Csalog Zsolt* szociográfiájában megszólaltatott, elnyomott, önmagukat és értékrendüket nem találó munkásokról lett volna mintázva. Külseje, személyisége, vonásai szinte jellegtelenek, csak az őt jellemző markáns gesztusok miatt lett különleges.[25] Hajnóczy maga a szocialista rendszerbe nehezen illeszkedő elemként számtalan eljárás terheltje volt, kezdve a legkisebbektől, mint pl. a 150 forint pénzbírság, amit a rendőrség szabott ki rá, mert átment a piroson, a már említett zászlós ügyön át, a legsúlyosabbakig, mint amikor a Szentgotthárdi Szociális Otthonról írt szociográfiáját ellehetetlenítendő, a Legfelsőbb Bíróság ítéletében szüntették meg az azt megjelentető folyóiratot. Ennek a nehézségéről, a meg nem jelentetésről írt *A nagy jógi légzés* c. posztumusz megtalált novellájában.[26] Hajnóczy műveit kora, illetve az 1990-es évekig bezárólag az utókor zöme is a „meztelen szociologikummal" azonosította. Azonban lehetséges, hogy – Nagy szavaival élve – ezek a művek is, mint Márai vagy Kafka elbeszélései – az okos szociográfiák kategóriájába tartoznak, vagyis itt a lemeztelenített valóság helyett, illetve mögött szimbólumok, rejtett utalások találhatóak. Ezt az is igazolni látszik, hogy gyakran bekerülnek *formulák, függő beszéd, (fiktív) jegyzőkönyvek* az irodalmi szövegbe.[27] A szerző feltételezése szerint tehát a Hajnóczy-szövegeknek van közük a megidézett jogi dokumentumokhoz. *Angyalosi Gergely* szavaival élve, „*A szövegköziség gondolatának felvetődése egy tágabb, filozófiai és ideológiai problémaszövevénybe ágyazódott bele."*[28] Ezt támasztják alá Hajnóczy kortársainak gondolatai is, akik szerint az írót *„…legelső írásaitól kezdve az identitás problémája foglalkoztatta. Az identitás azonban legkorábbi szövegeiben sem pusztán az önmeghatározás kérdéséhez volt köthető…"*[29] Műveiben így tehát az Én „átíródik a szövegbe." Ezt a jelenséget – Nagy Tamás álláspontja szerint – több szerzőnél is hasonlóképp megfigyelhetjük: E. T. A. Hoffmann a külső és belső világ közti ellentéttel vetette fel az elidegenedés kérdését, Kleist a híresen elhidegült, tárgyilagos mondatszerkesztésével, Kafka azzal, hogy költői képet fest az olvasónak a lehető legköltőietlenebb, az egyéni szabadságot tagadó, mesterséges világról.[30] Említettek munkásságát a szembeötlő analógiákon kívül az is összeköti Hajnóczy Péterével, ahogy a szerző megjegyzi, hogy: „*mindannyian mélyen benne jártak abban a 'sötétlő erdőben', amelyet jognak és igazságszolgáltatásnak nevezünk*."[31]

Ez a tény, bár nem sziklaszilárdsággal, de megalapozza az életműveknek jog és irodalom felőli megközelítés helyességét. A fent tárgyalt szövegutcák még sokáig járhatóak maradnak. A fejezet fennmaradó részét, mivel az többnyire a Csalog Zsolt- féle szociográfia részletesebb

[24] Uo. 111.
[25] Uo. 111- 117.
[26] Uo. 124-125.
[27] Uo. 120-136.
[28] Uo. 137.
[29] Németh i.m. 11-12.
[30] Nagy i.m. 138-146.
[31] Uo. 147.

kifejtése, s így nem releváns, csak röviden ismertetem. Nagy konzekvenciája az a Csalog által megszólaltatott, egyszerű, iskolázatlan munkásokról, hogy egyrészt a szociográfia a ’70es években élt alsóbb osztályok *kiszolgáltatottságát és életcéltalanságát jeleníti meg*; másrészt figyelemre méltó, hogy a munkások, a káderek és a vezetők, az egész társadalom szinte ugyanazt a *sablonos formanyelv*et beszéli, amelyben alig van kifejező érték. Ebből a valóságból merített Hajnóczy műveinek, de különösen A fűtőnek megírása közben.[32]

A második nagy fejezet, melynek címe Hálós ágyak balladája, Hajnóczy *Az elkülönítő* c. művének részletesebb elemzése. Itt a szerző kitér a nevezetes *Hajnóczy-dosszié* ismertetésére, melyben H. halála után a műveit megtalálták, illetve a hagyatékát gondozzák. E dosszié egy reklámszatyorban pihent éveken át, amikor is özvegye a Szegedi Tudományegyetem tulajdonába bocsátotta, ahol létrejött az erre kijelölt, Hajnóczy Péter Hagyatékgondozó Műhely. Az elkülönítő olyan szociográfia, amely 1975-ben jelent meg a Valóság c. folyóiratban, ám teljes terjedelmében sosem jelenhetett meg, hiszen Hajnóczy még 1980-ig dolgozott rajta, dokumentumregényként tervezte kiadni. A mű keletkezése nagy politikai, közéleti botrányt kavart, amely – mint ismeretes – a folyóirat megszüntetésével zárult. Nagy szerint Hajnóczy munkáját nemcsak szociográfiaként, hanem sajátos jogszociológiai munkaként is lehet olvasni.[33] A műben az elmebetegeket ápoló szociális otthonokban elhelyezett kezeltek *sorsáról* esik szó, bár ez alatt szerzője leginkább a jogi sorsot értette, amely szerinte tisztázatlan. Ezek a betegek valóban szörnyű, sőt megalázó körülményeknek voltak kitéve. A fűtő c. művével közös motívum a *jogorvoslat hiánya*, vagy keresztülvihetetlensége. Hajnóczy munkáit - Nagy megállapítása alapján - „*szenvedélyes jogkeresés fűtötte*”, bár joghoz való viszonya ambivalens volt, egyrészt az állami kényszerrel létrehozott és működtetett törvényjogot, másrészt az antik görög gyökerű, az esendő ember viszonyai iránt érzékeny természetjogot is tekintetbe vette, és értelemszerűen a második felé húzott.[34] Az elkülönítő lényegében *egy kezelt, Szépvölgyi Aliz* kálváriájáról szól, a szentgotthárdi otthonban töltött 4 évéről, és a szabadulásáról. De szó esik még az egyéb betegekről, így megpillanthatunk tragikus, egyéni sorsokat, mint a 12 éve nem vizsgált, amúgy nem elmebeteg öregemberé, az oroszul levelező, művelt Baráth Annáé, vagy a bántalmazott zsidóé. Hogy mi lett végzetük, azt a történelmi feledés jótékony homálya övezi, Hajnóczy elsődleges célja a dokumentarista ábrázoláson kívül Szépvölgyi megmentése volt, amely végül, nem konkrétan neki köszönhetően, de célt ért. Nagy úgy véli, hogy bár részben túlhaladt az ilyen típusú írásokon az idő, nem csalódunk akkor sem, hogyha Az elkülönítő teljes változatát dokumentumregényként vesszük kézbe. Mindenesetre reméli, hogy Az elkülönítő e kötet révén oda kerül, ahová való, vagyis *a helyére – bárhol is legyen az*.[35] A következő alfejezetben, mely egy beszélgetés *Jánossy Lajos*sal, Jánossy kiemeli, hogy részben Hajnóczynak is köszönhető, hogy a magyar társadalom elkezdett foglalkozni a mentális betegségek kérdésével, valamint hogy 2004-ben nemzetközi szinten betiltották a hálós ágyak alkalmazását a pszichiátriákon. A jog, a rendszer bosszúja, a per azonban elkerülhetetlen volt, bár a szociográfia ügyében érintetteket ez nem tántorította el.[36] A

[32] Uo. 150-163.
[33] Uo. 172.
[34] Uo. 175.
[35] Uo. 176-182.
[36] Uo. 183-194.

következő alfejezet (*A humánum nevében*) Szépvölgyi Aliz azonos című önéletrajzi regényével foglalkozik, amelyben megírta történetét a saját szemszögéből. Ez a rész kevés számunkra releváns konkrétumot tartalmaz, de Nagy idézi Szépvölgyi néhány versét, a közte és Hajnóczy között kelt levelezést, illetve összefoglalja életének főbb mérföldköveit, aminek utána levonja a következtetést, hogy Szépvölgyi és Hajnóczy művei illetve életútjai közt metaforikus kapcsolat, megfelelés található.[37]

A soron következő fejezet (Hajnóczy 2.0) az egyéb szövegkapcsolatokat vizsgálja. Ennek a résznek egyetlen, és talán az egész kötet legérdekesebb esszéje az *Alexandriai körök, avagy az értelmezés hatalma*. Itt a szerző a Hajnóczy műveiben a *Konsztantinosz Kavafisz* verseire tett utalásokkal foglalkozik, illetve ennek apropóján, hogy hogyan „mentődik át" egyik szöveg a másikba. Robert Cover szavaival élve, a jog jelentés-gyilkos, tehát csak egy jelentés, egy sztori maradhat.[38] Ezzel szemben az irodalom a végtelen értelmezési lehetőség, a szürreális meglátások tárháza. Hajnóczy *A latin betűk* c. „rémpercese"[39] vizsgálata közben, illetve annak első mondatát („*De hát hol is történt ez: Kis-Ázsiában, egy bejrúti kocsmában, vagy Antiokheiában?"*) jobban szemügyre véve Nagy arra a következtetésre jut – a többi szakértővel ellentétben – akik ezt Hajnóczy afféle meditálásának, Kelet felé tekintésének tudják be, hogy ezt Kavafisz versei szövegéből kölcsönözte. (pl: *egy kisázsiai községben; a beiruti kocsmákban*)[40] Ez arra a végkövetkeztetésre fut ki, hogy végső soron minden szöveg és szerző sorsa ugyanaz: *értelmezőkre szorulnak, kiszolgáltatottak, hasonlóan, mint az antiokheiaiak*.[41]

A kötet fennmaradó részében két, nem tudományos vagy didaktikus jellegű írás foglal helyet. Az első egy forgatókönyv, melyet Nagy Tamás írt egy, *A mi hatalmunk* címet viselő kisjátékfilmhez. Az egyik lábjegyzet tanúsága szerint a filmterv megvalósítása folyamatban van *Váncsa Gábor* filmrendező közreműködésével. (Azonban a rendelkezésre álló adatok szerint a film mégsem valósult meg – hogy a szerző korai halála okán, vagy esetleg más okból, azt nem tudni.) A *spoilerveszély* elkerülése végett tartózkodom a történet részletes ismertetésétől, de annyi elmondható, hogy Nagy itt is érzékletes portrét fest a különc íróról, szinte tapinthatóvá teszi személyiségének, fizikumának, szellemének vonásait.[42] A kötet végén foglal helyet Hajnóczy Péter *Hőközpont* c. posztumusz előkerült novellája, amely A fűtő egyik korai változatának tekinthető. Főhőse Kondor János kazánfűtő, aki szintén felháborodik a védőital, a fél liter tej elvesztése miatt, habár a végét nem tudjuk meg, mert befejezetlen maradt. Nem teljesen világos, hogy a szöveg hogy viszonyul a tanulmánykötetben fellelhető többi szöveghez, mi közöttük az összekötő kapocs,

[37] Uo. 195-206.
[38] Uo. 210-211.
[39] A történet rövid összefoglalása az, hogy a latin betűk összegyűlnek, A már éppen kezdi megszeretni Z-t, ám ekkor géppisztolyos katonák jelennek meg, akik tarkón lövik mind a 33 betűt, majd angolosan távoznak. A történet végére azonban a betűk föltámadnak, vérző testtel vánszorognak a tenger felé. A sztori mélyebb jelentése nem ismert, talán a diktatúráról szól, vagy azt fejezi ki, hogy *inter arma silent musae*.
[40] Uo. 201-217.
[41] Uo. 210-219.
[42] Uo. 223-240.

mindenesetre valóban becsületre méltó gesztus Nagy Tamás részéről, hogy publikálta kedvelt írójának művét annak halála után.[43]

A mű stiláris és szerkezeti felépítését vizsgálva megállapítható, hogy Nagy Tamás e kötetben a korábbi, elsősorban a jogi esszéinek visszafogott és szabályos stílusától elrugaszkodva, szabadjára engedi végtelen kreativitását és kaotikus nyelvi leleményét.[44] Ennek fonákja azonban, hogy ez a közérthetőségnek nemigen kedvez. A tanulmányok egyenként és összegészében is *jól felépítettek*, strukturáltak. Viszont mivel a szerző egyes gondolatokat szinte ugyanazokkal a szókapcsolatokkal újra és újra felidéz, a szöveg helyenként erősen repetitív érzést vált ki.[45] Pozitívum ugyanakkor, hogy a szövegben fellelhető, kedves *utalások és anakronizmusok* növelik az élvezhetőséget, és egyfajta „*bennfentes*" *hatást* fejtenek ki, tudniillik Nagy nemcsak az idézett szerző(k) műveinek értéksemleges kutatója volt, hanem a Hajnóczy-féle irodalmi univerzum ismerője, lelkes rajongója is. (Pl.: az *Amuri partizánok kottáját* használja egy ízben nyitó idézetnek; vagy az a mondat, amivel egy ízben Hajnóczy életpályáját jellemzi: „*egzisztenciális* ringelspiel, *teljes beszarás, joggal…*")[46] Helyenként találhatóak olyan utalások, közbevetések, nevek vagy adatok is, amelyek az értelmezhetőség szempontjából redundánsnak tűnnek. (Ilyen pl. *Kavafisz* nevének folyamatos említése, miközben a költő és gondolatvilága csak az utolsó fejezet első részében kerülnek felidézésre.) *Összegészében véve azonban eme szöveggyűjtemény beható ismeretekről, a szerző (értelmező) és az olvasó közti, sőt ad absurdum, a jog és az irodalom tudományterületei közti falak egyre erősebb lebontásának kísérletéről tesznek tanúbizonyságot.* Az eddig elmondottak fényében értelemszerű, hogy Nagy művét nem a laikusoknak szánta, így elolvasását a szűk szakmai közönségnek és Hajnóczy Péter kedvelőinek ajánlom.

Jelen soron írója gyakran elgondolkozik azon, hogy milyen lenne, ha Nagy Tamás még mindig köztünk élne, mit szólna egyes aktuális eseményekhez, a világ jelen állásához. Például mi lenne a véleménye a koronavírus-járványt követő felfordulásról, vagy a világ több pontján kitört forradalmakról – avagy „*végleg elteltek[-e] a purgatóriumi idők*"[47]?. Az *Egy arkangyal viszontagságai* című mű olvasása után világossá vált, hogy mi kapcsolja a szerzőt kedvelt íróihoz, irodalmi alakjaihoz, mint Hajnóczy vagy Szépvölgyi Aliz: az emberek segítése iránt érzett vágy, az egyszerű emberrel való lelki rokonság, a jog-és igazságérzet, a társadalom perifériájára jutottak küzdelme, (ön)megváltása.[48] Az az abszurd valóság, amelyet Kafka és Hajnóczy megénekeltek, és amelynek Nagy talán mindenkinél jobban értett, újra felütni látszik a fejét. Hogy mennyire aktuálisak most ezek a gondolatok, sajátos valóságértelmezések, ahhoz nem fér kétség.

[43] Uo. 240-248.
[44] Ld. pl.: „szövegutcák", „agyonpofozott életsorsok", „a szakszervezeti bizalmi *pilátusi* figurája", stb.
[45] Ld. pl. *Mintha Dániát ki lehetne szellőztetni* és *A humánum nevében* c. alfejezetek első 5 oldalát.
[46] Nagy i.m. 88., 190.
[47] Uo. 130.
[48] Egy személyes beszélgetésünk alkalmával N. T. azt mondta, hogy az a cselekedete, mikor egy kocsmában rosszul lett lányon segített, kihívta a mentőket, őt nagyobb elégedettséggel tölti el, mint bármilyen világi cím vagy rang.

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Translatable Untranslatability? Translating EU Law into Hungarian beyond Terminology

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Abstract

The European Union has elaborated a unique legal language so that the discrepancies among Member State legal systems may become less and less apparent under the auspices of unification. Though achieving multilingualism is one of the EU's major objectives, multilingual legislation first takes place in one of the EU working languages, and only following this step will it be translated into all official languages. The resulting target language legal texts are meant to trigger the same legal effects across the European Union. EU official languages, however, do not belong in the same linguistic family. All of the EU working languages (mostly English, and to a lesser extent, French and German) are part of the Indo-European linguistic family, behaving more or less in the same way during translation between them. If, however, the target language is found in a different linguistic family, such as the Hungarian language, which is part of the Finno-Ugric family, the encounter of these two legal languages mobilise certain legal language and legal language use differences and therefore determine the translational behaviour of the two legal languages. This study is an attempt at examining these differences when translating EU legal English into Hungarian and also a potential revelation of the problems that may arise during such translation, which, ultimately, may be felt in the legal effects produced by the resulting target language legal texts as well.

Keywords

legal translation, translatability, EU legal language, multilingualism, legal language translational behaviour, Hungarian legal language

Introduction

Law and language are mirror images of one another in many respects. In fact, they are so closely related that studying them in each other's relation has brought forth an interdisciplinary field which now has a long-standing tradition linking linguists and legal theorists. Admittedly, law may only become manifest through linguistic means. Reversing this statement, one might find that linguistic terms can determine the law itself. This is usually the case with legal discourse in one language. If, however, legal discourse is introduced into the translation process including two languages, the translator's role as an intermediary redoubles in significance, meaning that the translator's choices in translation will have an effect on determining the very meaning the law in the target language. This could lead to discrepancies and potential disputes concerning language versions, or it may help those at the receiving end of legislation with better understanding legal provisions if by translation they become more comprehensible and less obscure, thereby facilitating the recipients' access to justice.

This paper's focus is on the interrelation, intersection and the impact area of the following fields: translation studies, the law and language movement and the plain language movement set in the European Union's multilingual environment in which the Hungarian language with its distinct features has been ranked an official language since the country's accession to the EU in 2004. Using theoretical assumptions related to the above fields and revealing practical aspects of legal translation of EU legislation, mostly in English, into Hungarian through the analysis of parallel legal texts, translational strategies will become apparent that help grasp the meaning in the relation between law and language and the functioning of the Hungarian target language legal discourse. Legal terminology in translation is outside the scope of this paper as the focal points will be determined at a broader level: that of the sentence and the legal text. In turn, by understanding the linguistic mechanisms behind the translated legal text might facilitate rendering the law more comprehensible for non-professional recipients of the law.

1. EU multilingualism as a basis for studying the relation between the EU legal language and the Hungarian national legal language

The multilingual and multicultural aspects of the European Union are widely recognised as a determining factors when EU law is drafted. One of the characteristics of this drafting process is that EU law is initially formed in one of the 24 official languages, out of which English, French and German are traditionally given more scope as working languages of the drafting process. Of these working languages, English is overwhelming considered to rule the process.

Once a legal text is drafted in English, it is then translated into all other official languages with the consequence that all these language versions will be authentic in the European Union legal order. The resulting EU legal language has its own characteristics distinct from those typical of the Member States forming part of the Union. These features can most easily be revealed in the specialised legal terminology stripped of any national specificities. To a lesser extent but no less importantly, it can also be traced in the legislative style adopted by the EU legislative bodies. Consequently, one may argue that if the EU legislative language is so hermetically devoid of national attributes, Member States will longer regard EU law as compatible with their own legal systems. Fortunately, this is not the case. EU legal language is replete with traces of various national drafting styles and drafting traditions in terms of structure and terminology, which is aided by the fact that the drafters themselves are usually non-native speakers of English, whose production is then translated into one of the official languages.

EU law in a national legal order has different dimensions depending on the type of legislation created. If no transposition is needed for a Member State, which is always the case with regulations, the authentic target language versions cannot diverge from the structure of the original source text, therefore, one might not reveal much about the operations of the target language in translation. On the other hand, if the legal text is a directive, which requires transposition by the Member State to be part of the national law, one might be given the opportunity to more closely observe the working of the implementing national legislation that transposes the EU directive. The reason for such insight lies within the process of transposition itself. When implementing a directive into national law, the Member State is not bound by the structure and style of the source text. Unlike regulations, the target text implementing the EU directive is created inside the national legal order using its own legal discourse. Assuming that the target legal text is aimed at producing the same result as it is intended by the original source text, there is ample opportunity for studying the differences inherent between Member State law and the EU legal order when contrasting the two and observe the dynamic resulting from the translational link between them. This paper is thus aimed at revealing some of the major challenges facing the relationship of EU law with national legal systems, more precisely, EU law and the Hungarian legal order using the findings of other scientific fields: the law and language movement, translation studies and the plain language movement.

Law and language in the Hungarian legal discourse

This paper is aimed at highlighting the possible overlapping fields of the law and language movement in Hungary. In order to understand the mechanisms of the Hungarian legal discourse,

one must first look into the Hungarian research trends from their humble beginnings in the late 1960s. Similarly to mostly literature in English and German, the focus was first directed to the written legal language as professional language in Hungary, including legislative acts and court rulings. It was the linguist community and not lawyers that showed interest in such research, as lawyers were generally uninterested in the linguistic aspect of the Hungarian legal discourse. [VINNAI] Since the democratic transition of the country in 1989, shedding the yoke of the Communist rule, a gradual shift has been observed to take place in both the linguist and the legal profession in turning their attention to revealing potential interconnections between linguistics and jurisprudence. There has been research into the spoken legal language of courts and court procedures in Hungary since, and their relevance has been widely acknowledged.[1] Prior to such research, however, written legal discourse was placed in the centre of attention. In the 1980s, the legal professional language was studied with objective criteria, pointing out its main characteristics. Pioneering at the forefront of this research, Karcsay created a definition of what exactly a professional language is. He underscores the objective nature of professional language by stating that it is closely associated with social reality, a scientific field, profession or occupation. Therefore, it is not a mere cant, but it is directed at ensuring comprehension in an accurate and unambiguous manner. [KARCSAY] As Karcsay states, "the development level of any professional language is faithfully mirrored in the current state, political, economic, cultural and scientific level and differentiation and linguistic richness of a society."[2]

It can be clearly seen from the above definition of the professional language the reason why legal discourse has been a constant target for harsh criticism not only by representative of the plain language movement itself. Legal discourse is fraught with instances of incomprehension by the non-professional public. The underlying reason being that there is a compelling interest for all professionals to attribute the same sense to certain legal terms and expressions under all circumstances, which, after all, is what is primarily needed to ensure the principle of legal certainty. However, the expectations of non-professionals to present legal professional language in the most comprehensible way is also well-founded, since law regulates each citizen's life and an ever-growing part thereof as a system of norms that plays a vital role in the maintenance of the public order. On the other hand, as law engulfs an ever-greater portion of other professional fields, the complexities of such professional languages further deepen the laboriousness of an already complex legal language. Legal language, therefore, is part of the

[1] See research into the Hungarian legal discourse by Edina Vinnai and Miklós Szabó in Vinnai. *Jog és nyelv határán*. 157–211.
[2] Karcsay. *Jog és nyelv*. 329.

greater realm of professional languages as apart from everyday language; however, due to its role in society, it is in a special position compared to other professional languages.

Regarding the detrimental features of legal language briefly depicted above, Seregy underlines that "the objectionable phenomena of professional languages are, at the same time, the same objectionable phenomena of the mother tongue itself."[3] [SEREGY] As for legal language, this is exponentially true. Rendering the legal language of legislation plainer cannot be expected, since the spheres of life to be regulated are becoming more and more complex, leading to overregulation.

The translational behaviour of legal languages

Viewed in the context of Indo-European languages spoken by as many as 3 billion people worldwide, the Hungarian language possesses certain special features that can only be explained using a linguistic approach. In the course of general translation from an Indo-European language such as English, French or German into Hungarian as well as legal translation of such languages into the Hungarian language, the legal-linguist translator is faced with having to accept the following intuitive—albeit systematically common—practical observations:

a) "Hungarian resorts to using more verbs than Indo-European languages;
b) Hungarian dislikes passive voice structures;
c) When translating from Indo-European languages into Hungarian, it is not unwise to begin the translation in a backward direction at the end of the sentence;
d) Hungarian does not like lengthy adjunct chains before nouns;
e) Indo-European languages force Hungarian to use lengthy nominal structures;
f) Indo-European sentences place more emphasis at the beginning than Hungarian ones;
g) Translation strips Hungarian of her linguistic richness; therefore, measures should be taken to counter that effect." [KLAUDY 2003a]

Similar thoughts usually occur when one translates a legal text from English into Hungarian or when actually any two languages enter into a translational relation with each other, they tend to "behave" differently. There exists a coined phrase in Translation Studies when examining such relationships between languages in the context of the behavioural pattern of translators. Toury writes about the laws of translational behaviour [TOURY] placing emphasis on the actual

[3] Seregy. *Mi a szaknyelv?* 25.

behaviour of the translator. Viewed from a different angle, however, such translational behaviour can take on a new meaning, referring to the *translational behaviour of legal languages*. It can be stated that legal English shows different behavioural patterns when translated into legal Hungarian than into a related (Indo-European) language, such as French or German.

An example should suffice here to demonstrate the above statement. The same legal text can present readers with a different experience based on the end to which such a text is used. Reading it with a skimming technique, the linguistic form becomes irrelevant because the objective is to comprehend the information contained in the legal text. When scanning the text as a legal professional, the linguistic form suddenly takes more prevalence. However, if the objective is to translate the text, that same legal text reveals characteristics which have hitherto gone unnoticed. The legal text which behaved in a friendly way when read for general understanding may prove to be hostile in the attempt of translating it.

Based on the above, a question arises as to the reason why the legal translator's activities revive hidden characteristics of the legal text. When the law and language movement is seen through the lens of Translation Studies, both deal with texts and not linguistic systems. Every text is unique, complete and finite, in other words, a petrified manifestation of the linguistic system. Not until such a text is intended to be used for a specific goal will such a manifestation remain unchanged. Such a specific goal is legal translation. If one wishes to rewrite a legal text in another language, the source language system is revived and it starts to resist. Such resistance should be overcome by the translator.

The resistance of source language form is a relative concept, always depending on the current target language. It is easy to translate related languages into one another because they show less resistance to translation than languages that are not related to each other. These languages are paired up as 'friendly languages'. When languages from different linguistic families are translated into each other, such as Indo-European languages (English) into Finno-Ugric languages (Hungarian), they show rather hostile behaviour towards one another in translation, pushing translator to the height of creativity and the less experienced into utter despair. When translating legal texts, such creativity may not be permissible on account of unfriendly translational behaviour because the target legal text may trigger dissimilar legal consequences to what the source text originally intended to trigger. Therefore, one might ask: What must be done to counter such source language resistance effectively without prejudice to the intended legal consequences in the source text? In order to be able to answer this question, one should

take a look at the features and peculiarities of the contrasted legal languages: Legal English and legal Hungarian.

Transfer operations in legal translation into Hungarian

The term *transfer operations* was first introduced in Hungarian Translation Studies by Klaudy at the beginning of the 1990s. [KLAUDY 2003b] She had been relying on contemporary findings on the international scene. The revelations of Nida had contributed to the development of transfer operations although the term itself had never been used before as such. Current international literature has elaborated two terms regarding the more linguistically related translational operations taken in the strictest sense. If focus is placed on the process, then the terms 'transposition' or 'transformation' are employed. If, however, the result of the translation is stressed, the term 'shift' is usually applied, which in Hungarian would be translated as "translational procedures".

Nida distinguished two types of translation procedures: Technical procedures, referring to source language analysis, target language synthesis, controlling and editing the finished translation; and the other being organisational procedures, such as acquiring translatables or concluding a memorandum of agreement with the publisher. [NIDA 1964] What I would call transfer operation in legal translation, *legal transfer operation* in short, would most adequately be placed among the technical procedures, between source language analysis and target language synthesis.

Generally speaking, the translational procedures in the strictest sense are found in literature as "techniques", and apart from the typology established by Klaudy in the Hungarian Translation Studies, the realm of legal translation seen from this perspective has never been explored. Using the findings of Translation Studies can greatly contribute to the field of law and language as well as a deeper understanding of the mechanisms of legal discourse when attention is being paid to the translational behaviour of languages, and in this case, that of English and Hungarian when translating the former into the latter.

A definition of legal transfer operations

In the course of analysing the translational behaviour of legal languages, the legal translator must, half-consciously, half-unconsciously, resort to certain transfer operations to produce a target legal text that is suitable for triggering legal consequences. However, above all else, one must provide a definition of what exactly a legal transfer operation is.

Rethinking Klaudy's classification developed for non-professional texts, one may distinguish mandatory and optional legal transfer operations, automated and non-automated legal transfer operations, a classification based on the operation level, scope and underlying causes and according to the method of execution of transfer operations. [KLAUDY 2003b] Without alluding to such classification that would be analogous to legal texts, one must clarify the extent of legal transfer operations. Klaudy interprets transfer operations as "anything and everything the translator does to ensure that a target language text should result from the source language text."[4]

This broad definition should not be applied to the term legal transfer operations, since it would overemphasise linguistic issues to the detriment of legal ones. There exist two restrictive approaches to narrow down the scope of what may be regarded as transfer operation in a legal sense. One only considers operations to be transfer operations which the translator has to perform due to the lexical and grammatical disparities of the two languages. [CATFORD 1965] As for the other view, an even narrower approach should be applied. Under this approach, even operations justified by linguistic system disparities should be excluded from analysis, since they have to be performed mandatorily and translators do perform them automatically. Research must only be conducted in areas where transfer operations become necessary due to differences in stylistic traditions or the expectations of the target language reader. [SEGUINOT 1989] Drawing a parallel to the latter approach, it seems convenient to construe bifurcating stylistic traditions as divergent legal traditions and the expectations of the target language reader as the intended legal consequences of the target language legal text. As it was established above, there are sometimes irreconcilable disparities between the legal traditions embedded in the English and the Hungarian language, which even the neutralised EU legal English may not be deprived of. As for the intended legal consequences, if there are irreconcilable differences emerging during the encounter of the two languages, triggering the same legal consequences might prove even more difficult to achieve. Although differences may be manifested at a lexical and grammatical levels first, they have a direct effect on the textual level, since texts are made up of sentences based on words and expressions having lexical and grammatical structures.

Conclusion

The necessity of a comprehensive compendium of legal dynamic contrasts in English-Hungarian language pairs. The European Union has elaborated a unique legal language so that

[4] Klaudy, *Bevezetés a fordítás gyakorlatába*. 23.

the discrepancies among Member State legal systems may become less and less apparent under the auspices of unification. Though achieving multilingualism is one of the EU's major objectives, multilingual legislation first takes place in one of the EU working languages, and only following this step will it be translated into all official languages. The resulting target language legal texts are meant to trigger the same legal effects across the European Union. EU official languages, however, do not belong in the same linguistic family. All of the EU working languages (mostly English, and to a lesser extent, French and German) are part of the Indo-European linguistic family, behaving more or less in the same way during translation between them. If, however, the target language is found in a different linguistic family, such as the Hungarian language, which is part of the Finno-Ugric family, the encounter of these two legal languages mobilise certain legal language and legal language use differences and therefore determine the translational behaviour of the two legal languages. This study is an attempt at examining these differences when translating EU legal English into Hungarian and also a potential revelation of the problems that may arise during such translation, which, ultimately, may be felt in the legal effects produced by the resulting target language legal texts as well.

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Balog Dóra: International regulations in action: The DPRK's nuclear program and its challenges to the field of international law and international relations – Part I

Abstract

The following paper, in two continuous formats, discusses the nuclear activity of the Democratic People‟s Republic of Korea (DPRK) and the challenges it poses to international peace and security from an international law and international relations point of reference.

The first part is concerned with the international law perspective of the paper. After an introductory passage, the theoretical background of nuclear development is introduced, including concepts such as nuclear threat, nuclear states and non-nuclear states, the security dilemma, nuclear taboo. Furthermore, the reasons behind the urge of the DPRK to develop its very own nuclear arsenal, constantly improving that despite international condemnation, are explored. The second part elaborates on the consequences that nuclearization of the DPRK and its non-compliance with agreements have regarding international relations and the way diplomatic relations took shape as a result of recurring sanctions from the international community and the DPRK‟s repetitive violations of agreements and treaties. The chapter encompasses the events concerning the relationship between the DPRK and the parties on the international level, i.e. the United States, and due to its geographical location, on the regional level with the Republic of Korea, Japan, People‟s Republic of China and the Russian Federation. Conclusively, this part aims to suggest that despite threatening attitude, efforts are still made to normalize deteriorated diplomatic relations.

"None of us want to live in a world of permanent instability, where nuclear weapons have become the currency of international relations. Alternative solutions are within our reach."

- Kofi Annan, former Secretary-General of the United Nations[1]

1. Introduction

At the beginning of the nuclear age, as Siracusa puts it, "there were no rules, no non-proliferation norms, no concept of nuclear deterrence, and particularly, no taboo against nuclear war."[2] In relation to this, the public concept about nuclear weapons was mainly characterized by uncertainty, common anxiety and uneasiness. On the one hand, the only obvious fact was the presence of the nuclear arms race and the devastating capabilities of nuclear weapons that have already declared several millions of lives. On the other hand, the advancements made in the field of nuclear energy held the promise of important peaceful uses, such as the possibility of limitless energy to the globe provided by nuclear power.

With the spread of information about the capabilities of nuclear power, the demand for sharing the details has also emerged. However, the United States of America, the main holder of the most significant nuclear secrets, was not eager to share any of its knowledge due to the lack of an effective international control system. In the early phase in countering nuclear threat, international agreements and tied non-proliferation were created as a form of controlling the presence and spread of nuclear weapons. The bombs dropped at Hiroshima and Nagasaki shed light onto the darkness and danger that the atomic bomb meant for the world. Right after the incidents in Japan, the world feared that similar situations might happen, and the U.S. government also realized that it would be almost impossible to maintain an American monopoly on atomic bombs, so the only hope that civilization can hold onto would be the renunciation and the elimination of nuclear weapons that can be realized through international agreements.

States with emerging desires to become nuclear powers account for the majority of concerns that the international community has. The Democratic People's Republic of Korea (DPRK) is one of these states that has been undermining international attempts towards

[1] *Nuclear Non-Proliferation Treaty Faces Crisis of Compliance, Confidence, says Kofi Annan in address to University of Tokyo,* Tokyo, 18 May 2006.
[2] Siracusa, 2008, 27.

denuclearization and nuclear disarmament through noncompliance and covert development of its nuclear capacity.

The field of nonproliferation and nuclear disarmament has gradually broadened as the potential to exploit and misuse nuclear energy increased and the need for action has emerged. The basis of discussion in this thesis will be the intention to discover the nuclear aspect of interactions between the DPRK and the international community, while scrutinizing the historical context of nuclear development in the DPRK and taking into account efforts of the United Nations (UN) or neighboring countries against the nuclear threat.

The paper is divided into four greater sections and each of the aims to discuss the main questions posed in this paper. The first section provides the background of nuclear energy development and how the DPRK has managed to improve its nuclear arsenal to the point where it can threaten to use it against other states and the possible motives behind this strategy will be addressed as well. The second and third sections are dedicated to the aspects of international relations between the DPRK and the international community, more specifically the United States, the Republic of Korea (ROK), Japan, China and Russia and a review on how the relations between these countries were affected by the DPRK‟s nuclear activities in the diplomatic realm. One part of the fourth section is dedicated to the aspects of international law, describing how the field reacted to the gradual appearance of nuclear weapons as a threat to global peace and security, how the fight against this global danger has been attended to via establishing international institutions and signing treaties and multilateral agreements and how these affected the DPRK‟s nuclear development. The notion of Nuclear Weapon Free Zones (NWFZ) will be elaborated on within this section and the idea of a regional NWFZ involving the DPRK will be discussed as a potential solution for denuclearizing the state. The second half constitutes that core part of the thesis as it describes and discusses the sanctions adopted by the United Nations Security Council (UNSC) regarding the nuclear tests conducted by the DPRK starting in 2006 and their effectiveness in handling the problem. Sanctions regimes have been established in order to ensure that states violating international agreements give up their condemned behavior and change their attitude and it will be outlined whether the sanctions became stricter after each violation of the resolutions and how successful these economic and financial measures appeared to be.

In my point of view, the suitable research design to conduct is the method of documentary research, since facts, theories and possible conclusions can be drawn from already gathered information and the availability of written academic sources is high. Since the research will specifically consider international law as a basic frame of reference for the

issue, the usage of international agreements, declarations and nonproliferation acts and go through the institutions established for controlling the possession of nuclear weapons since these are also important features to consider. International sources to observe include the statues of institutions and the transcripts of treaties and agreements, as well as the resolutions adopted by the UN General Assembly (UNGA) and the UNSC. Regarding a better understanding of the nuclear phenomenon, the security dilemma and the strategy of the DPRK relevant books and articles on the issue will be included and considered.

From my perspective, the reasons behind the DPRK‟s actions and strategy are fascinating, concerning and distressing at the same time which serves as the basic interest for carrying out research on this topic. Furthermore, observing the international community‟s reaction and following how the field of international law has been and continues to be shaped through the sanctions, agreements and other attempts to tame the threatening DPRK is like seeing how history is being made since every step taken in the progress is a potential milestone for the future.

2. Background

The basis for the DPRK‟s nuclear arsenal originates from the creation of nuclear weapons, hence it is inevitable to discuss and cover the background of nuclear weapons as well. The basic difference between nuclear and conventional weapons is that the scale of a nuclear explosion "can be many thousands (or millions) of times more powerful than the largest conventional explosion."[3] Both explosions rely on the destructivity of the blast, although, the temperatures within a nuclear explosion are significantly higher than in a conventional explosion. Moreover, the so-called thermal energy is released during a nuclear explosion in the form of light and heat and [t]his energy is capable of causing severe skin burns and of starting fires at considerable distances."[4]

Siracusa offers views on the nuclear threat remaining essential with regard to the relations between states and threatening to become more important. According to him, the spread of these weapons would most likely bring about "two potentially calamitous effects: (1) terrorists will get their hands on nuclear weapons, (2) the proliferation of threats to use them, greatly complicating global security and in many respects harder to undo [more states join the nuclear club to enhance their prestige or overcome perceived insecurity]."[5] The table below presents the *de facto* and *de jure* nuclear weapon states in the world. At the beginning

[3] Siracusa, 2008, 5.
[4] ibid
[5] Siracusa, 2008, preface.

of the era of nuclear development the number of nuclear weapons and inventories increased dramatically and besides the most powerful states during the Cold War, other states began their own development and stockpiling of nuclear inventories. Besides constant improvement and stockpiling, the reduction of nuclear weapons also began due to international pressure growing against nuclearization.

Table 1. Nuclear-weapons states[6]

As Goodby puts it, there have been significant changes and constants in the nuclear arena during the past seventy years. On the one hand, the modifications include the appearance and disappearance of different technologies of nuclear weapons; the change in the main objective of the coercive diplomacy to the principle of deterrence only; and the fact the technology of the components "has now leveled off" and that the weapons used in deterrence are only "lower-yield weapons"[7]. On the other hand, the constants rather concern the political-psychological field of the situation. One is the progress that has been made with regard to "ending reliance on nuclear weapons for defense purposes [which relied on factors such as] national leadership attitudes and the state of the relationships between nuclear-armed

[6] N. Rózsa and Péczeli, 2013, 79.
[7] Goodby, 2015.

nations." Furthermore, public confidence has evolved endowing nuclear weapons with the ability "to preserve peace and to protect the safety of the homeland."[8]

Right after the end of World War II, the United States was the only state with nuclear capacity due to the absence of knowledge and raw materials on the Soviet side. Nonetheless, the USSR has managed to obtain enough information – with the contribution of a network of spies- to create its own fission-style bomb and to discover regional sources of uranium in Eastern Europe. These actions have led to the test of the very first Soviet nuclear bomb in 1949.[9] During the following decades, the Cold War superpowers launched a deadly race up on the nuclear ladder in the 1950s which lasted until the demise of the Soviet Union in December 1991. This era was characterized by superpowers and other states, such as the United Kingdom, France and China developing and stockpiling more and more nuclear warheads. Nevertheless, the peaceful end of the Cold War did not mean the end of nuclear threats to global security.

First and foremost, it is decisive to take into account historical events that contributed to the DPRK becoming a state in the 21st century with an obsession of continuously developing its nuclear arsenal and to shape a national attitude that poses a recurring threat and growing concern to international peace and stability. When trying to comprehend the history of the DPRK, at least two types of histories are available: the one that is made up of the information chunks coming from different documentations, "semi-ridiculous statistics and economic figures, the comments of the country"s leaders and diplomats […] and the testimonies of "[10] refugees and the prescribed and adjusted observations of visitors. Besides that, there is the official history that is released by the leadership of the country in order to present their own kind of history with their own perception of past events. The state has gradually and systematically isolated itself from the outside world and given up its responsibilities as a member of the international community (e.g. not being part of international or regional forums, the World Bank and the IMF). During the leadership of Kim Il-sung, the country had the support of the Soviet bloc, with Stalin financially aiding the country and the government policies of Kim Il-sung (which sometimes turned out to be rather disadvantageous for the people), however the North Koreans had been constantly encouraged

[8] ibid
[9] *Atomic Bomb History* (History.com) https://www.history.com/topics/world-war-ii/atomic-bomb-history (Accessed: 27 April 2020)
[10] French, 2014, xvii.

by state propaganda and had the responsibility to participate in the "arduous march", nonetheless it was all part of the state ideology that has been imposed on people.[11]

After the collapse of the communist regime and the dissolution of the Soviet Union, the DPRK has remained "the only unreformed Stalinist-style command economy [which] still publicly and vocally adheres to a Military First ideology of „putting the army before the working class"[12]. However, by today the tables have turned[13] and now the DPRK is facing economic stagnation while holding up "a rigid political system that is maintained despite famine and economic collapse".[14] Many leaders within the international community firmly believed that the DPRK would simply collapse inward because it would no longer be able to operate and manage the current political system without constant, mainly, financial assistance from outside allies. Although these implications failed to meet reality, because the DPRK managed to maintain the regime even after the collapse of the Soviet Union in 1989, the death of the Great Leader Kim Il-sung in 1994 and, later on, the death of his successor Kim Jong-il in 2011.

Scrutinizing the theoretical background behind the aspects of the DPRK's domestic and foreign policy concerning the attitude towards nuclear development and towards the proclaimed status believed to accompany the possession of nuclear technology is intertwined with the underlying notion of security dilemma and contributes greatly to understanding the possible reason behind the acts of the DPRK.

The concept of "security dilemma" is identified to reflect the logic of offensive realism. The basic notion of the concept is that the increase in the security of one state, causes the security of others to decrease. That makes it challenging for a state to strengthen its chances for survival while avoiding threatening the attempts of survival of other states. The concept was first introduced in 1950 by John Herz who, after analyzing the anarchic nature of the international system, implied that the security dilemma emerged because of a situation when "[states] are driven to acquire more and more power in order to escape the impact of the power of others [, which] in turn, renders the others more insecure and compels them to prepare for the worst."[15] Furthermore, in this situation no state can ever feel totally secure,

[11] Kim Il-sung created his own state ideology by fusing Soviet socialism with indigenous Korean traditions, thus the socialist attitude merged with the significance of history and customs. The success of establishing the kind of ideology lay behind the strong domestic need to rid the Korean society away from Japanese colonization and oppression.
[12] French, 2014, 2.
[13] Compared to the decades of 1960 and 1970 when the newly formed DPRK presented a more effective economic development and higher growth as opposed to its Southern counterpart.
[14] French, 2014, 4.
[15] Mearsheimer, 2001, 43.

power competition continues to accumulate, and the states enter a never-ending circle of security and power inequality. Within the international system, all states follow or aim to follow the same logic, i.e. to look for opportunities when they can take advantage of one another and their try to prevent other states from taking advantage of them. All in all, states pay attention to both offense and defense, or as Mearsheimer confirms "[t]hey think about conquest themselves, and they work to check aggressor states from gaining power at their expense [which] leads to a world of constant security competition."[16]

Nevertheless, there are other concerning factors that keep the great powers and members of the global community on alert, which are the "[f]ears that weak and failing states may incubate transnational terrorism [and] that poorly governed countries may be unable or disinclined to control stocks of nuclear, biological, or chemical weapons or prevent the onward spread or leakage of WMD-related technology."[17] This situation is made more complicated since 13 countries, out of the 17 possessing WMD programs, are considered to be "countries at risk of instability."[18] Today, one of the most frightening prospects is that a nuclear-armed state like Pakistan or the DPRK might lose control of its nuclear weapons through collapse or theft, risking that the weapons might get into the hands of actors without proper knowledge about the dangers and without a suitable level of responsibility towards global security.

According to Kenneth Waltz, nuclear weapons played a significant role in maintaining peace in the world after the world wars that have shaken the globe to its core. Their presence "make the cost of war seem frighteningly high and thus discourage states from starting any wars that might lead to the use of such weapons."[19] However, it is their presence that causes the so-called security dilemma. On the one hand, their development has contributed to maintaining peace between the great powers and prevented them from going into military adventures. On the other hand, their continuing spread among states has been causing widespread fear and uncertainty towards the future. Waltz also discusses some effects of the weapons on their possessors. He proclaims that "states coexist in a condition of anarchy"[20] and they apply the principle of self-help by which states must assist themselves by providing for their own security. That is why when the state of peace is discussed, the use of force, applied strategies and employed weapons need to be taken into consideration.

[16] Mearsheimer, 2001, 43.
[17] Howard and Forest, 2008, 50.
[18] ibid
[19] Waltz, 1981.
[20] Waltz, 1981.

Before the creation and development of nuclear weapons, these were addressed as any other weapons in the history of weapons and warfare, i.e. when a new kind of armament is introduced, it ultimately becomes widely acknowledged as legitimate. Nevertheless, with nuclear weaponry, it happened the other way around and they have turned out to be recognized "as abhorrent and unacceptable weapons of mass destruction, with a taboo on their use."[21]

In theory, nuclear taboo as a notion is extremely important because it poses a challenge to international norms which is believed to be created solely from the side and for the advantage of powerful nations. In a practical sense it is significant as it sheds light on restraints on the use of nuclear weapons.[22] By definition, nuclear taboo is identified as "a de facto prohibition against the first use of nuclear weapons [and it rather considers] normative belief about the behavior. [Moreover, it] is a particularly forceful kind of normative prohibition that is concerned with […] behavior that is defined" to pose a threat to individuals and communities within a society.[23] A taboo consists of two basic elements that need to be considered: its objective and phenomenological aspects.

The effectiveness of the concept is enhanced and supplemented by international law and agreements that by definition consider the freedom of action regarding nuclear weapons with great restrictions. Nonetheless, nuclear taboo is still only a de facto norm, without any legal mandatory nature.

2.1. Development of DPRK's nuclear technology

The story of the DPRK"s interests in developing nuclear weapons is long-standing and goes back to the 1950s, after the end of the Korean War and the establishment of the Democratic People"s Republic of Korea. In 1955, a delegation was invited to Moscow for a conference on nuclear energy and that event marked the beginning of the DPRK"s involvement in nuclear development. According to Ford, 1956 was a year when the DPRK signed an agreement with Moscow to involve North Korean scientists in a training on nuclear energy at the Dubna Nuclear Research Institute.[24] Following the establishment of the Yongbyon-based Nuclear Scientific Research Centre in the 1960s, the Soviet Union"s assistance continued, apart from financial contribution, in the form of actual training by Soviet scientists. In 1965, the DPRK received a nuclear facility from the Soviet Union in

[21] Tannenwald, 2005, 5.
[22] Tannenwald, 2005, 5.
[23] Optcit, 8.
[24] Ford, 2018.

which highly enriched uranium was burned and where North Korean scientists had the opportunity to do scientific research on nuclear development.

During the 1980s, the Soviet Union was the first in line to supply the DPRK with nuclear technology and with their help, the state could construct a five-megawatt Magnox reactor in Yongbyon.[25] The DPRK took the improvement to a new level and by 1986 the reactor "was capable of producing weapons-grade plutonium"[26] as well as, it "also had the enormous advantage of fuel cycle […] using indigenously mined natural uranium."[27] This time of the decade also brought about attempts to decrease foreign assistance for the DPRK"s development and it resulted in the DPRK becoming independent of foreign resources and capable of completing research and conducting tests by itself by the middle of the 1980s. [28] Due to central pressure, the DPRK decided to sign the *Treaty on the Non-proliferation of nuclear weapons* (NPT) in 1992 and permitted four rounds of inspections from the *International Atomic Energy Agency* (IAEA), however, it turned out to be a rather short cooperation as the IAEA detected anomalies during the on-site inspections and the DPRK failed to account for the ambiguity.

The presence of the military being at the core of the society in the DPRK has been around since the Korean War. Even though the scope of the military in the DPRK is hardly a match for countries, such as the United States, it "would [still] be a serious obstacle to any invasion from the South."[29] When observing the state"s missile program, the DPRK had gradually developed "the capacity to launch intermediate-range ballistic missiles capable of hitting mainland South Korea and much of Japan,"[30] however, further stages of development were yet to be achieved. After 2017, succeeding a series of improvements regarding its nuclear missile technology, the DPRK has successfully tested intermediate-range missiles and intercontinental ballistic missiles (ICBMs). [31]

Back in 2011, it first seemed that Kim Jong-un as the new leader with a wider education and more open-minded thinking would want to distance himself from his father and grandfather and would stand up as a more modern leader, however, everything has gone

[25] Ford, 2018, 11.
[26] Optcit, 187.
[27] Ford, 2018, 187.
[28] This entailed that the state was no longer exposed to other countries" support or potential refusal of providing help, i.e. the PRC had previously refused to give its nuclear technology to the DPRK (in 1964 and in the 1970s).
[29] Ford, 2018, 182.
[30] ibid
[31] By 2018, the progress has reached the stage where hitting the island of Guam and, potentially, anywhere within the mainland territory of the United States emerged among the possibilities of a DPRK strike. (Ford, 2018, 182)

against the assumptions. As author Kim writes, since Kim Jong-un stepping into office, the DPRK "has ratcheted up tensions by conducting missile and nuclear tests and threatening to launch what it has called a pre-emptive nuclear strike against the United States and South Korea."[32] Since the end of 2012, the DPRK has shown intentions regarding a possible military confrontation by launching long-range rockets and repeatedly conducting nuclear tests. These actions have increased the opposition of the global community and resulted in the imposition of several sanctions on the DPRK and the growing distance between the Hermit Kingdom and the rest of the world.

When discussing the armed forces of the DPRK, nuclear weapons must be covered with probably, an even greater concern than in any other country"s case. Already in the 1980s the DPRK"s nuclear weapons program was operating on a high capacity and at that time it has been predicted that the country had successfully produced plutonium that is enough for the development of at least one atomic bomb by the year 1992. Obviously, concerns and questions have been raised by the global community and member states of the United Nations made several attempts to put a halt to the nuclear development in the DPRK, with more or less success. When the current leader, Kim Jong-un rose to power with intensified ambitions, a new era began regarding nuclear armistice and ballistic missile technology. There have been a series of nuclear tests conducted by the DPRK, however, their test in July 2017 including an intercontinental ballistic missile (with an estimated range of 8,000 km) has eventually drawn the full attention of the global community and shed lights on the possible nuclear capacities of the DPRK.

There is no doubt that the DPRK has made several significant attempts towards bringing about an indigenous nuclear problem. This has also been proved by, for instance, the country"s continuous refusal to allow the required IAEA safeguards, not to mention the increase in the intention of the DPRK to delay the inspections and develop nuclear bombs in secrecy. According to Kim, the issue of the DPRK nuclear crisis has undergone three phases. The first phase can be concluded as the period from signing the NPT to accepting the IAEA safeguards, the second includes IAEA inspection that led to suspension of withdrawal announcement, and the third phase which was characterized by high-level dialogues and which ended with the Geneva Agreed Framework.[33] The program called Simultaneous Development of Economy and Nuclear Weapons was established with the aim to "quantitatively and qualitatively enhance nuclear force so it can be of strategic and tactical

[32] Kim, 2014, 1.
[33] Kim, 2014, 16.

use".[34] For the nuclear sources to be constructed, several requirements need to be fulfilled and specific circumstances have to be ensured, namely "nuclear fuel procurement, a mid- and long-range delivery system, and strong command, communication, and information capabilities".[35]

The DPRK serves as the outstanding manifestation of the security dilemma, since it is assumed that the DPRK tries "to establish itself as a de facto nuclear power state after two decades of turbulence."[36] If the DPRK's nuclear capability today is compared to that of in the 1990s, the state is now significantly more developed. Allegedly, Kim Jong-un is not only capitalizing on the development of nuclear capability as a means of legitimizing his power status, but he also states that this project is the instruction of his predecessor, Kim Jong-il. There has been a nuclear weapons development crisis going on for the past twenty years and the international community could not come up with a plausible solution to deter the threat that the DPRK is imposing on the world.

The attitude of the DPRK regarding the nuclear talks and agreements has varied between cooperative and uncooperative. The DPRK's "noncompliance was demonstrated in its refusal to participate in the talks, while its temporary cooperation was demonstrated in the form of its partial implementation of the agreements, concluding the agreements, freezing its nuclear weapons program and conducting nuclear tests."[37]

3. International aspects

Looking through the sanctions that became more severe after each violation, one might wonder how can the DPRK still survive, operate as a state and what resources can it use to provide minimum living standards for its population. Due to the unreliability of official records, if any, presented by the state, the trade volume, sources of income and the general economic situation of the country can mostly be estimated by outsiders. According to Grzelczyk, nowadays the DPRK still survives "by cultivating economic and political relationships with a number of countries, individuals, organizations, and companies,"[38] as well as maintaining relationships with other rogue states, underdeveloped and developing nations in the way of engaging in various forms of interdependence.

[34] Optcit, 1.
[35] Optcit, 2.
[36] ibid
[37] Kim, 2014, 5.
[38] Grzelczyk, 2018, 4.

The need for an international framework with the main mission of controlling atomic energy has emerged, and within that several efforts have been taken. For instance, the United States and Great Britain have concluded the Three Nation Agreed Declaration, agreeing that as wartime partners they would "share with all nations the scientific information associated with atomic energy for peaceful or civilian purposes.[39]" The holders of key details needed to be assured that there would be an appropriate system of safeguards for the sharing of information. Following that, the United Nations was called upon as a responsible body for establishing a commission that would come up with initiatives for a system of international control. With the United Nations entering the picture, more steps have been taken towards the establishment of the necessary institutions and a series of agreements regarding the non-proliferation of nuclear weapons.

The following section will be dedicated to the international relations aspect of the paper, describing the diplomatic difficulties that emerged due to the DPRK"s nuclear activities on the international and regional levels. Scrutinizing the evolution of international relations between the DPRK and the United States, ROK, Japan, China and Russia points to another segment that changed due to nuclear threats and it presents how specific countries made an attempt to maintain peaceful diplomatic relations despite the hostile attitude of the DPRK.

3.1. Clash between the DPRK and the international community

At the beginning of 1990s, it seemed that the DPRK would support its proposal of eliminating the nuclear threat from the Korean peninsula, however, this attitude has gradually changed and after agreeing to take a step further towards denuclearization, the state began conducting nuclear tests in 2006 and 2009 and has been acting in a way that assumes the DPRK"s goal, i.e. gradually increasing its nuclear capability. One aspect that is confusing for the outside world is the rhetoric that the DPRK projects, stating that their "actions were driven by U.S. hostility and [the DPRK]"s mistrust of the US"[40]. The DPRK has been consciously and effectively isolating itself from the rest of the world since Kim Il-sung took control over the country. The diplomatic relations regarding the DPRK and the United States have been closely observed due to the general belief that the Americans would be able to make the rogue state give up its ambitions to be a nuclear threat and as the representatives of prosperity they would show the way to become a stable and booming member of the international

[39] Siracusa, 2008, 28.
[40] Kim, 2014, 5.

community. The most recent and most important milestones in the series of encounters between the United States and the DPRK will be discussed in the following section.

3.1.1. Relations with the United States

The nuclear conflict with the DPRK has been considered to have a central role in American foreign policy for the last previous decades, due to the different attitudes from American presidents as well as the changing circumstances in the DPRK (leader change, famine, mass emigration, nuclear development, etc.).

The roots of diplomatic relations between the DPRK and the United States go back to the foundation of the state after the Korean War. From the DPRK"s perspective, the United States has been the straight representation of the kind of „enemy" that would intervene and occupy the state; hence the people are in great need of protection that the leadership and state ideology is willing to provide. During the bipolarism of the 20th century, the Korean peninsula has become a geographically significant spot in the East-Asian territory and for the United States it even became more important when the majority of the surrounding countries started to fall under Soviet influence, thus strengthening the communist ideology in the area and widening the Eastern bloc. After the Korean War, the main superpowers of the bipolar world took the share from the peninsula, with the Soviets influencing the DPRK and the United States enabling westernization in South Korea. Starting from the 1980s, the diplomatic relations between the DPRK and the United States could be described as one filled with roller coaster-like negotiations and policies. The United States, wishing to fulfil its role as an all-time Western superpower, expected the DPRK to react to the American demands concerning international aspects of the state. However, it appeared that the average attitude would not be working with the DPRK and when the United States applied a rather aggressive foreign policy towards the DPRK following the state"s withdrawal from the NPT, the DPRK did not back down but went on with developing its nuclear technology.

In the eyes of the American presidential administration, the DPRK was no more than one of the "several Communist satellites" that remained standing even after the collapse of the Soviet Union. It was obvious, however, that the disintegration of the Soviet power did not eliminate the state ideology or the government structure of the DPRK and that state remained closed towards technological advancements that the Western countries had to offer, given that the DPRK was willing to join the community of the states and take up the obligations with the membership. Prior to the turn of the century, tensions on both international and regional levels have escalated to a point where getting into a potential nuclear war with the DPRK seemed rather probable. The rogue state was approached from several directions in order to ease the

tension and besides avoiding the outburst of a war, try to take steps towards denuclearization. There have been several rounds of agreements and negotiations conducted between the DPRK and the U.S., however, the continuous resistance and negligence from the DPRK"s side to comply with the provisions of the bilateral agreements and the changing attitude of the American presidents towards the DPRK did not encourage the stabilization of international relations.

Following Clinton"s presidency, during which the rather unsuccessful Agreed Framework and lenient attitude towards the DPRK was deemed to be ineffective in pulling through the American will to make the DPRK give up its nuclear program and begin denuclearization, the political atmosphere drastically changed. Tragic events, for instance the terrorist attack of 9/11, and the political message coming from the DPRK during the previous decades regarding its intentions and neglect of obligations have resulted in the Bush administration referring to the state as "axis of evil"[41], a „rogue state", as well as „an outpost of tyranny" and the state has been declared as a clear and present danger to world peace. It was evident that the Bush administration did not wish to follow the steps of the Clinton administration and instead of conducting as many rounds of negotiations as deemed necessary, the presidency between 2001 and 2009 decided to follow a confrontational foreign policy towards the DPRK. Another change in foreign policy came around with the elections of Barack Obama who chose the silence policy method and lifted the terrorist state stigma as well with the firm belief that the regime would collapse from the inside. Nonetheless, taking into consideration the fact the DPRK-conducted nuclear tests have become more frequent during the Obama presidency, the reaction of the American leadership was rather calm and represented a policy of preferring negotiations and supporting the implementation of sanctions to hardline politics which could easily lead to the escalation of events resulting in an unwanted war.

Almost immediately after taking office in 2016, President Donald J. Trump was to face the issue of the DPRK and the continuous nuclear threat that the state posed to the world. When it was reported in August 2017 that the DPRK has successfully developed warheads for missiles capable of reaching the U.S. mainland, Trump reinstated the label on the DPRK and reacted in an interview that America would wage a "war of fire and fury, and frankly, [with a] power, the likes of which the world has never seen"[42] if the DPRK failed to cease nuclear

[41]George Bush State of the Union Address https://georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020129-11.html (Accessed: 28 April 2020)
[42] Tamkin, 2017.

testing. The DPRK‟s response was a series of threats against the U.S. territory of Guam and American allies, such as Japan and South Korea. During the following months, the tension increased between the two powers and Trump also mentioned that the United States would enlarge its nuclear arsenal which could lead to unimaginable destruction in case of an actual war[43]. Fortunately, and to the world‟s greatest surprise, by today it seems that the two leaders have found a common path. Unexceptionally, June 12, 2018 marks the date of the first and historic DPRK - United States Summit which was held in Singapore, where Trump and Kim have met and drawn up a joint statement. The statement includes four important points, referring to the establishment of a new relationship between the nations based on prosperity and peace; creating and maintaining peace on the Korean peninsula; the DPRK‟s responsibility for and commitment towards total denuclearization; and that both countries would recover remains of prisoners of wars back to their homeland[44]. Trump seems to have changed his strategy and instead of provoking Kim Jong-un, he believes that they have a lot in common and that he can reach out to the Hermit Kingdom and make it give up its nuclear arsenal as well as its secret developments and sites. Even though after the summit, the U.S. committed to suspend military exercises in South Korea, no tangible steps regarding denuclearization or sanctions relief have been reached, mainly because both sides had contrasting interpretations of the concept of denuclearization and their commitments, and especially, they had diverse expectations towards the other party. Another significant agreement between the two states was expected to be reached during the second U.S-DPRK Summit held in Hanoi, Vietnam 27-28 February 2019. Despite the great expectations on both sides, the summit ended early and without an applicable nuclear deal since the leaders had seemingly incompatible demands towards one another, i.e. the DPRK was willing to give up a certain part of its nuclear arsenal, however, Trump was not willing to lift the sanctions for that little in exchange.[45]

For the past couple of decades the demands that the two states upheld towards one another have not been altered, the core of the script is the same; the DPRK promising to give up its nuclear program, halt its development and putting verbal commitments on peaceful and total denuclearization on the table in exchange for lifting the sanctions that are becoming

[43] Griffiths, 2017.
[44] *Joint Statement of President Donald J. Trump of the United States of America and Chairman Kim Jong Un of the Democratic People's Republic of Korea at the Singapore Summit* (White House) https://www.whitehouse.gov/briefings-statements/joint-statement-president-donald-j-trump-united-states-america-chairman-kim-jong-un-democratic-peoples-republic-korea-singapore-summit/ (Accessed:28 April 2020)
[45] Oprysko, 2019.

tougher every year. On the contrary, the American side is willing to take steps in reducing the sanctions and is seemingly patient about the DPRK‟s decision, but the superpower is not going to give in for less than full compliance with previous agreements.

One thing is for sure, both sides appear to be optimistic about the future but even after several rounds of talks the leaders still do not seem to be on the same page regarding that future. The facts that a summit could be organized, and the states could begin talks again already show great progress, however, from a nuclear point of view it is questionable which approach towards denuclearization would be more flourishing and result in a breakthrough.

3.2. Regional aspect

Due to its geographical location, the DPRK has a rather determining and geopolitically important role in the Northeast Asian region. When Kim Jong-un declared the current strategy of the country in 2016, he did so in order to reaffirm the DPRK‟s commitment towards "simultaneously pushing forward the economic construction and the building of nuclear force and boost self-defensive nuclear force both in quality and quantity as long as the imperialists persist in their nuclear threat and arbitrary practice."[46] This announcement is a reassuring confirmation that defines how the DPRK sees itself on the regional and global stage. Grzelczyk, in her book titled *North Korea's New Diplomacy,* introduces a sequence of four phases on how the security policy of the DPRK has developed over time and how it has affected its status in the region. The four phases lead up to the current position of the country; first had to fight for political recognition and sovereignty when it became a part of the Soviet bloc (first phase), then focused on becoming more independent and began to get ideologically further from the People‟s Republic of China (PRC) and the United Soviet Socialist Republics (USSR) and emphasized the establishment of "security relationships" with similarly smaller states. The third phase contributing to the last phase, indulges taking advantage of the weapons that the state acquired from allies so that the DPRK could "provide and license weapons" which would eventually lead to the DPRK developing its own nuclear capacity and becoming a potential, yet not legally recognized nuclear-weapons state.[47]

The international relations between the DPRK and other countries in the Northeast Asian region, namely the Republic of Korea (ROK), the PRC, the Russian Federation and Japan will be discussed in the following sections, paying attention to the changes in these relations as a result of the DPRK‟s military-first and nuclear-development-first policy. As for

[46] Grzelczyk, 2018, 105.
[47] Optcit, 109-110.

the ROK and Japan, the possibility occurs whether they should consider going nuclear since the nuclear threat coming from the DPRK is getting more terrifying and more frequent and it will soon arrive to a point where the reassurance from the United States and its nuclear umbrella would provide the necessary sense of protection and security. Regarding the PRC and Russia, the states have a stronger tie with the DPRK due to ideologies and alliance that the greater powers transferred to the DPRK.

Table 2: Map of the DPRK[48]

3.2.1. Relationship with ROK

After the Korean War, both countries were quite occupied with restoring and re-stabilizing the country for the first time as independent states. Boosting the economy and enhancing development were major objectives of the government and later on turning towards each other also became an issue after decades filled with tension and ideological differences. On the one hand, traces of instability, distrust and high tensions characterized the relations

[48] Ford, 2018, xii.

between South Korea and the DPRK. On the other hand, during the presidency of South Korean General Roh Tae-woo between 1988 and 1993, the relations between North and South started to improve, "as new negotiations between the prime ministers of the DPRK and ROK began, raising hopes for reunification progress after only brief and intermittent talks and negotiations over the past decades[49]. In 1998, the first opposition candidate, Kim Dae-jung was elected as president and his time in office has become known for accumulated economic and political contact with the northern neighbor which also contributed to an increased extent of communication and trade between the two parties. The South Korean president and Kim Jong-il, there hereditary successor of the DPRK leadership after the death of Kim Il-sung in 1994, arranged a meeting in Pyongyang in 2000 (first Inter-Korean Summit after the announcement of the Sunshine Policy[50] in 1998), marking the very first meeting of the two countries" leaders since 1945 and making Kim Dae-jung the first president to visit the DPRK after the division. The meeting was concluded with a positive outcome, as "[d]iscussions on reconciliation and economic cooperation"[51] were mentioned and the event was seen as the first act towards a potential reunification. [52]

When it was discovered that the DPRK is capable and, more importantly, willing to, develop and test nuclear weapons, diplomatic relations and talks froze again. In 2010, the previously successful Sunshine Policy was abandoned by the following President Lee Myung-bak due to an accident in the Yellow Sea which was later assumed to have been caused by a DPRK torpedo (although, the state rejected those claims to be valid). The following months carried back and forth provocation between the two countries and tensions reached a peak point in 2013 when the DPRK launched a scientific and technological satellite. During the years, the DPRK was conducting talks with South Korea, while making continuous progress with its missile testing and with carrying out nuclear tests. After conducting the nuclear tests, the United Nations General Assembly agreed on posing sanctions on the DPRK with an intention of discouraging the state from further tests and progress in the development.

At the same time, the third nuclear test has caused debates to rise among South Koreans regarding the ownership of their own nuclear capability and whether the country

[49] Wilson, 2002.
[50] The Sunshine Policy, announced by former President Kim Dae-Jung, was the foreign policy of South Korea towards the DPRK with the intention of softening the northern attitude towards South Korea. It also included goals to narrow the economic gap and restore the lost connection between the states.
[51] Wilson, 2002.
[52] Prior to the meeting in Pyongyang, the countries have contributed to an accord in 1991, the Agreement on Reconciliation, Non-Aggression, Exchange and Cooperation. The agreement supposedly included non-aggressive actions, cultural and economic exchanges and on the establishment of a military hotline and commitment towards a peace regime.

should also „go nuclear". As Ahn and Cho writes, this issue has created a partition among the South Korean population with the supporting group arguing that it is inevitable for the country to develop its own nuclear capability to defend itself from the Northern threat, it would increase the leverage of South Korea as opposed to the DPRK and it would also heighten national prestige within the international community. Regarding this argumentation, it is believed that the DPRK is likely "to make provocations and thus assume the hegemony in North-South relations"[53] if South Korea does not build its own nuclear capacity. Advocates from high positions[54] supports the nuclearization of South Korea by arguing that "[n]uclear deterrence can be the only answer"[55]so South Korea can feel peaceful and less vulnerable in the neighborhood of the DPRK. Others, like Hwang Woo-yea, the current chairman of the Saenuri Party, argue that if the country does not want to fall for the threats coming from the North, it "must establish a response system against nuclear weapons in order to re-establish the military balance of power."[56] Moreover, the nuclear armory would not only serve as a defense, but it would also increase the power status of South Korea regionally and internationally as well, because it would allow the country to rise on the power ladder by bringing "nuclear warheads to the negotiating table [and it would] heighten the country"s national prestige and reinforce its sovereignty."[57] Additionally, the supporters of the South Korean nuclear capability have an increased concern regarding "the effectiveness of the American nuclear umbrella"[58] because the attitude of the American presidency under Barack Obama was siding with the idea of bringing a world without any nuclear weapons, thus increasing the weaknesses of the U.S. nuclear umbrella which stands as a boosting factor for the idea to establish the South Korean nuclear armament.

On the contrary, a more progressive group of South Koreans strongly believe that the development of a South Korean nuclear capacity could lead to a devastating nuclear war between the two Koreas and the South Korean nuclearization would create a counter-pressure on the DPRK and would urge the rogue state to increase its nuclear capacity and produce even more nuclear warheads. Moreover, as opposed to the idea of increasing power status in the region, this group sees the beginning of "a fierce arms race in Northeast Asia"[59], involving Japan and Taiwan who would also feel the urge to equip with the necessary nuclear weapons

[53] Ahn and Cho, 2014, 28.
[54] For instance, Chung Mong-jun, the former chairman of the ruling Saenuri Party.
[55] Ahn and Cho, 2014, 27.
[56] ibid
[57] Ahn and Cho, 2014, 28.
[58] ibid
[59] Ahn and Cho, 2014, 26.

to keep up with the other countries in the region. They support the idea of South Korea remaining nuclear-free because it maintains stability in the Asian region and close diplomatic relations with the United States, which would be easily destroyed once South Korea decides to go nuclear.

The tension has increased in 2016, when the ROK decided to allow the deployment of the Terminal High Altitude Area Defense (THAAD) system in the country.[60] This act rather undermined the progress towards denuclearization, shed light on core issues as well, "namely, the maneuvering among neighboring great powers and the test of wills between the two Koreas,"[61] and added further factors to the equation around the ROK dilemma to remain nuclear-free. Furthermore, the deployment contributed to destabilizing the fragile relations in the Northeast Asian region as it undermined the Chinese and Russian nuclear deterrence and expanded the cooperation between the ROK, the United States and Japan. The year 2017 brought a new president, Moon Jae-in and new promises, to return to the Sunshine Policy and to restore peaceful times. Seemingly, both the Winter Olympics and the reopening of the hotline were attempts towards a new phase in the reconciliation. In April 2018, Kim Jong-un met with the South Korean President for the Third Inter-Korean Summit, marking the first time since the Korean War that a DPRK leader stepped on South Korean territory. The summit ended with a joint declaration towards the final goal, i.e. total denuclearization of the Korean Peninsula. After several decades of negotiations, filled with tensions over nuclear tests and withdrawals from agreements, by 2018 both countries have reached a diplomatic breakthrough and established closer cooperation. The parties signed the Panmunjeom Declaration for Peace, Prosperity and Unification of the Korean Peninsula in April 2018. In the meantime, the DPRK and the United States also agreed to meet and discuss issues related to denuclearization, however, the summits resulted in no specific outcomes.

Consequently, since the partition of the two countries and the emerging nuclear threat from the DPRK reaching a peaceful unification has been among the top priorities for the two Koreas. Even though attempts have been made on both sides, so far, the outcomes of policies or agreements failed to meet the desired expectations.

[60] Although this foreign policy decision by former President Park Geun-hye has been highly criticized and it is believed that, among many other things, she agreed on the deployment and refused to engage in talks with the DPRK in order to ease the pressure and divert public attention from her wrongdoings. (Yu, 2017,72) Moreover, the deployment strengthened the DPRK‟s fear over being absorbed by the South, consequently the state doubled the speed in developing its nuclear arsenal. (Yu, 2017, 75)

[61] Yu, 2017, 63.

3.2.2. The Japan-DPRK relations

The relations between the states go back to the collapse of the USSR after which the DPRK was in need of money which provided motive for rapprochement. During that time, Japan had already been paying reparations for the ROK because of the period of occupation and colonization as a way of reconciliation. It seemed that the stage was set for the normalization of relations, however, talks were terminated several times due to threatening acts from the DPRK, for instance a (failed) satellite launch over Japan and catching a DPRK spy ship on Japanese territory. Nevertheless, in 2002 the Japan-DPRK Pyongyang Declaration was signed and in it the "leaders confirmed the shared recognition that establishing a fruitful political, economic and cultural relationship,"[62] and the DPRK promised to further maintain the moratorium on missile launching for the future. The fundamental policy of Japan towards the DPRK is the normalization of relations keeping in mind the abovementioned declaration, although the resolution of this issue is hindered by concerning cases like "abductions, nuclear and missile issues as well as settlement of the unfortunate past."[63] Abduction issues go back to the 1970s and 1980s, however the DPRK only admitted the wrongdoings in 2002 and failed to explain details on all of the abductees. From an international law point of view, the abductions are concerned to be severe violations of Japan‟s sovereignty and violate the safety of Japanese citizens as well.

When the DPRK conducted its first nuclear test, Japan reacted by banning all imports from the state and for the next period stalled the bilateral negotiations and talks. The heightened nuclear activity in the neighborhood of Japan reinsured the country to halt talks and after another nuclear test in 2009, the country banned exports to the DPRK.[64] The unfruitful negotiations and the empty promises from the DPRK increased the antipathy on the Japanese side and it appears that the relations will only be stabilized once the DPRK performs its commitments and fulfils denuclearization, putting an end to threatening its neighboring countries.

3.2.3 International relations with China

The common socialist alliance was preceded by assistance during the Korean War and that served as the foundation of a long-lasting relationship between the two states contributing to the PRC being undoubtedly the most significant trading partner of the DPRK.

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[62] *Japan-DPRK Pyongyang Declaration (Pyongyang, 2002)*

[63] *Japan-North Korea Relations – Overview* (Ministry of Foreign Affairs of Japan) https://www.mofa.go.jp/region/asia-paci/n_korea/relation.html (Accessed: 28 April 2020)

[64] Ford, 2018, pp. 223-224.

Similarly, to others in the region, the relatively normalized relations were badly affected by the 2006 nuclear weapons test and the PRC advocated the adoption of Resolution 1718 imposing sanctions of the DPRK. Even though the support of sanctions represented a „shift in tone"[65] and the country also expressed its disagreement with the violations of agreements, the intentions behind Chinese condemnation appeared laid-back and there was no guarantee that trade restrictions were implemented with the proper force. The PRC is one of the countries that advocate imposing sanctions, however, hinders the effectiveness of the sanctions regimes due to maintaining and even strengthening economic ties with the rogue state.

It is known that one of the top priorities for the PRC is to maintain stability on the Korean Peninsula and supporting the DPRK is beneficial for ensuring "a buffer between [the PRC] and the democratic South."[66] That is why the deployment of the THAAD system in the ROK has been criticized by the PRC as it was seen as a possibility to weaken the PRC"s regional influence and military capabilities. In hope of escaping an unwanted, yet potential burden on Chinese shoulders, the state has a strong political interest in sustaining the leadership of Kim Jong-un "in the hope of avoiding regime collapse and a refugee influx."[67] The most probable route for North Korean refugees lead through Chinese territory first, before moving onwards to other parts of Asia and they pose a significant issue on migration.

Prior to 2017, the PRC"s main role was that of a mediator and facilitator of peaceful events around the negotiating table. The Chinese foreign policy towards the Peninsula "have become more active, clear and balanced"[68], and have taken more practical steps towards denuclearization after the fourth nuclear missile test conducted by the DPRK, and at the same time began the transition from armistice to peace. Doing so the PRC wished to serve the expectations of the international community and encourage denuclearization, and at the same time aimed to fulfil the DPRK necessities for peace negotiations to resolve the differences.

Considering the alliance between the states, an important aspect emerged concerning commitments. The Treaty of Friendship, Co-operation and Mutual Assistance Between the People's Republic of China and the Democratic People's Republic of Korea, signed 11 July 1961 expresses the mutual respect between the parties regarding "sovereignty and territorial integrity, mutual non-aggression, non-interference in [...] internal affairs, [...] mutual

[65] Albert, June 2019.
[66] Albert, June 2019.
[67] ibid
[68] Yu, 2017, 78.

assistance and support,"[69] including the obligation to step up and defend the other, should that fall under armed attack by another state. Taking into account the provoking and aggressive behavior of the DPRK, the Chinese leadership has made several attempts to back out of this clause, especially if the DPRK initiated the conflict mainly because the PRC wishes to avoid being dragged into an armed conflict.

As an attempt to secure influence and participation, the Kim-Xi meetings were organized during 2018 and 2019 during which commitments were made to denuclearization and the DPRK leader agreed to open up for negotiations with the United States. Despite the diplomatic efforts and the maintenance of economic ties, there is no guarantee that the nuclear activities of the DPRK will not turn from an indirect to a direct threat to its Northern ally.

3.2.4. Relationship between Russia and the DPRK

Historically, the predecessor of Russia played an outstandingly important part in the foundation of the DPRK and granted all the support necessary for Kim Il-sung to establish its regime and secure its authority. A connection was built between the states due to the communist history, which was broken after the dissolution of the USSR and "resulted in the withdrawal of substantial economic subsidies to"[70] the DPRK and leaving the country in a rather vulnerable state.

Similarly, to the other countries, Russia has engaged in negotiations with the DPRK with the intention to make progress on denuclearization. The Kim-Putin Summit was held in April 2019 and presumably Kim Jon-un "needed to replace the narrative of weakness after failing to make a widely expected deal with the United States."[71] As one of the permanent members of the UNSC, Russia has an important role in adopting and imposing the sanctions, although in practice the state did not really enforce the restrictions, moreover it also violated the resolutions when reexported coal and did not prevent forced labor of North Koreans, hence kept open the door for the DPRK to generate income from foreign currency.

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[70] Snyder, April 2019.
[71] ibid

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List of Abbreviations

ABMT	*Anti-Ballistic Missile Treaty*
ANWFZ	*African Nuclear Weapon Free Zone*
CANWFZ	*Central Asia Nuclear Weapon Free Zone*
CD	*Conference on Disarmament*
CTBT	*Comprehensive Nuclear-Test-Ban Treaty*
CTBTO	*Comprehensive Nuclear-Test-Ban Treaty Organization*
DPRK	*Democratic People's Republic of Korea*
IAEA	*International Atomic Energy Agency*
ICBM	*Intercontinental Ballistic Missile*
ICJ	*International Court of Justice*
IMF	*International Monetary Fund*
IMS	*International Monitoring System*
NATO	*North Atlantic Treaty Organization*
NWFZ	*Nuclear Weapon-Free Zone*
NNWS	*Non-Nuclear Weapon State*
NPT	*Nuclear Non-Proliferation Treaty*
NWS	*Nuclear Weapon State*
KJNWFZ	*Korea-Japan Nuclear Weapon Free Zone*
LANWFZ	*Latin American Nuclear Weapon Free Zone*
OAU	*Organization of African Unity*
OEWG	*Open-ended Working Group*
OPANAL	*Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean*
PTBT	*Partial Nuclear-Test-Ban Treaty*

SALT	*Strategic Arms Limitation Talks*
SEANWFZ	*Southeast Asian Nuclear Weapon Free Zone*
SPNWFZ	*South Pacific Nuclear Weapon Free Zone*
SSOD	*Special Session on Disarmament*
THAAD	*Terminal High Altitude Area Defense*
TPNW	*Treaty on the Prohibition of Nuclear Weapons*
UN	*United Nations*
UNAEC	*United Nations Atomic Energy Commission*
UNDC	*United Nations Disarmament Commission*
UNDP	*United Nations Development Program*
UNIDIR	*United Nations Institute for Disarmament Research*
UNGA	*United Nations General Assembly*
UNODA	*United Nations Office for Disarmament Affairs*
UNSC	*United Nations Security Council*
USSR	*United Soviet Socialist Republics*
KEDO	*Korean Peninsula Energy Development Organization*
LWR	*Light-water Reactor*
PRC	*People's Republic of China*
ROK	*Republic of Korea*
WMD	*Weapons of Mass Destruction*

Balog Dóra: International regulations in action: The DPRK's nuclear program and its challenges to the field of international law and international relations – Part II

Abstract

The paper discusses the nuclear activity of the Democratic People‟s Republic of Korea (DPRK) and the challenges it poses to international peace and security. As a continuation to the previous extract in which the international relations perspectives were taken into consideration and explored, thereinafter the international law aspects will be introduced and scrutinized.

The first part is concerned with the international law perspective of the paper presenting the international attempts towards nonproliferation and disarmament with details on the institutions, multilateral agreements, the disarmament fora and the concept of Nuclear Weapon Free Zones established to stand up against nuclear threat and advocate for global denuclearization. Then, the sanctions regime set up by the United Nations Security Council to control and discourage nuclear activities by the DPRK will be introduced with a specific focus on each sanction imposed after each illegally conducted nuclear activity.

While the previous part of the paper aimed to suggest that despite threatening attitude, efforts are still made to normalize deteriorated diplomatic relations. This part supports the main argument of the study which entails that the current international law system is not suitable and well-structured enough for enforcing regulations and compliance to reach full denuclearization.

1. International law aspects

1.1. Regulations

In the second half of the 20th century, the rapid spread of nuclear weapons development established the stage for a counterreaction from those members of the international community who emphasized the potential dangers and promoted control over nuclear capabilities and the scope of this reaction was realized in the creation of an early framework within the field of international law that focused on nuclear proliferation and peaceful denuclearization. Even though the framework has changed over time, the main objectives remained the same if not became more direct and the community aimed at making the agreements more binding, through prioritizing international security and peace, but still considering national sovereignty.

The following section constructs the core part of the paper and it will be divided into two main parts presenting the significance and effects of nuclear institutions, treaties and agreements that have been created to tackle the possible threats posed by nuclear activity, to establish controlling schemes to limit these activities and to introduce peaceful disarmament measures. First, the institutions then the relevant international or regional treaties will be included and discussed.

1.1.1. Institutions

The following section will be dedicated to the most relevant international institutions that have been established in order to control and inspect the nuclear activities of states and to ensure that the treaties, previously signed and ratified, are being respected and obligations are followed. Furthermore, the relationship of the DPRK with these international institutions will be discussed within the subsections, respectively.

a. International Atomic Energy Agency

When it has become clear that nuclear weapons represent a new generation for weapons with the unpredictable destruction it might bring about and the fact that states can hardly defend themselves in a nuclear war: nuclear bombs cannot be eliminated without any harm done to the population or the environment. This caused the international community to stand up against nuclear weapons and their development, hence the creation of different agencies began in the 1940s. Primarily, these attempts were aimed at denuclearization and nonproliferation. The

establishment of the IAEA was among the first efforts to establish a system for nonproliferation.[1] The original idea came from the U.S. President Dwight D. Eisenhower‟s address delivered 8 December 1953 to the General Assembly of the UN. The initiative included the foundation of an institution that would promote nonproliferation and as a result the IAEA was established in 1957. The fundamental objective of the agency "is strongly linked to nuclear technology and its controversial applications, either as a weapon or as a practical and useful tool."[2] The IAEA was set up as a specialized agency within the United Nations family and it has been established to work with the Member States of the UN and other global partners in order to "promote safe, secure and peaceful nuclear technologies."[3] The Statue of the IAEA was approved on 23 October 1956 with 81 nations‟ unanimous signature and it came into force in 1957. Article 2 of the Statute defines the objectives, stating that

> "[t]he Agency shall seek to accelerate and enlarge the contribution of atomic energy to peace, health and prosperity throughout the world. It shall ensure, so far as it is able, that assistance provided by it or at its request or under its supervision or control is not used in such a way as to further any military purpose."[4]

Furthermore, the IAEA‟s major purpose has become to support the peaceful usage of nuclear energy and to ensure that this technology would not be exploited and used for military purposes. The approach towards this goal included research on nuclear technology, international cooperation and exchange of knowledge, as well as, through the establishment of a safeguards system (included in the Statue as well) which would entitle the Agency with certain "rights and responsibilities to the extent relevant to the project or arrangement."[5] Over the years, the safeguards have become even more central and crucial in the prevention of nonproliferation and they are aimed to check the Member States‟ compliance via embedding the IAEA safeguards in legally binding agreements between the States and the IAEA. This is to ensure with legal

[1] Some significant initiatives before the foundation of the IAEA are worth mentioning: the first resolution of the UNGA, A/RES/1(I) on the *Establishment of a Commission to deal with the Problems raised by the Discovery of Atomic Energy* which emphasized the need to control the use of atomic energy so that it can be utilized for "peaceful purposes"(paragraph 5) only and the Baruch Plan, introduced in 1946 by the U.S., which proposed the establishment of an international agency for controlling atomic weapons within the United Nations (the United Nations Atomic Energy Commission - UNAEC), however due to the Soviet Union‟s opposition, the initiative was declined. (Lázár, 2014, 17)

[2] *History of the IAEA* (IAEA.org) https://www.iaea.org/about/overview/history (Accessed: 27 April, 2020)

[3] ibid

[4] *Statute of the IAEA*, 1956, article 2.

[5] Optcit, article 12, part A (Agency safeguards)

measures that the States follow the obligations that they have previously committed to and provide a legal basis for proper implementation of safeguards. [6] Obviously, creating a legal framework for these safeguards is inevitable if the IAEA wishes to meet its own objectives and maintain the legality of the requirements towards States and demand full compliance from them. Primarily, these safeguards include the Statute of the IAEA as a basic document; the obligations of the States under the Treaty on the Non-Proliferation of Nuclear Weapons (discussed later) and treaties creating nuclear-weapon-free zones (discussed later); further instruments to the safeguards, i.e. agreements, protocols and subsidiary agreements; and the decisions made by IAEA Board of Governors. [7]

Within the system of safeguards, there can be different types of safeguards agreements distinguished, namely "comprehensive safeguards agreements with non-nuclear-weapon State parties to the NPT; voluntary offer safeguards agreements with the nuclear-weapon State parties to the NPT; and item-specific safeguards agreements with non-NPT States."[8] As it can be seen, the abovementioned agreements have been established with the purpose of engaging as many States as possible, whether they are considered to be nuclear-weapon States or not, or whether they are parties to the NPT or not, doing so in order to broaden the scope of engagement in nonproliferation and nuclear security. The so-called Additional Protocol has been also created as a complementary agreement to provide further tools and measures for verification. Primarily, it broadens the Agency‟s verification ability concerning peaceful utilization of nuclear materials and nuclear energy. The importance of verification and broadening the scope of Additional Protocols have increased during the end of the previous century because undeclared activities and utilization, from States like Iraq and the DPRK, emerged and highlighted possible weaknesses of the safeguard agreements that needed to be tackled.

Taking into account the legal framework set up by the IAEA is important, because during the period while the DPRK was engaged with the IAEA (mainly due to outside pressure), the state has failed to meet the requirements under the agreements and to maintain its commitment assigned in the safeguards agreements. Moreover, observing the interactions between the IAEA

[6] *Safeguards legal framework* (IAEA.org) https://www.iaea.org/topics/safeguards-legal-framework (Accessed: 27 April 2020)
[7] ibid
[8] ibid

and the DPRK historically, it is visible how the attitude of the international community gradually changed towards the rogue state.

Concerning the relationship of the IAEA and the DPRK, some key events and issues need to be mentioned. Regarding its nuclear program, the DPRK signed the first IAEA safeguards agreement in 1977 for two nuclear research facilities; became party to the NPT in 1985 and signed the NPT Safeguards Agreement with the IAEA in 1992.[9] This period displays a relative willingness from the DPRK to abide by the obligations, however, soon after things have gone awry. Shortly after the first IAEA inspections inconsistencies started to emerge between the DPRK"s previous declaration and the results of the inspection including „mismatch" between data on declared plutonium and nuclear waste, as well as, IAEA analysis which suggested the presence of undeclared plutonium in the state. In order to resolve the issue, the IAEA requested additional information and further on-site inspections on two sites allegedly connected to nuclear waste[10] however, the DPRK declined these demands and due to increasing outside pressure it announced its withdrawal from the NPT in 1993. This act marked the beginning of rather hostile relations between the DPRK and the international community. Sending it to the NPT States Parties, to the NPT depositary States and to the UN Security Council, the withdrawal statement with the reasons from the DPRK"s side argues that the IAEA has violated the state"s „sovereignty" and has interfered "in its internal affairs, attempting to stifle its socialism…"[11], moreover, serving American influence by requiring the state to open non-nuclear related military sites for inspection. The reasons for withdrawal were based on the NPT itself which allowed the Parties "the right to withdraw from the Treaty if [the state] decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country."[12] Due to negotiations with the United States, the DPRK decided to suspend its withdrawal from the NPT and as a result, the following years enabled the IAEA to conduct inspections with a limited scope and under strict rules set by the DPRK. Nonetheless, the limited inspections failed to provide the necessary assurance for the Agency on the appropriate use of nuclear technology in the DPRK. Because further inspection requests have been declined, the

[9] *Chronology of Key Events* (IAEA.org) https://www.iaea.org/newscenter/focus/dprk/chronology-of-key-events (Accessed: 27 April 2020)
[10] *Fact Sheet on DPRK Nuclear Safeguards* (IAEA.org) https://www.iaea.org/newscenter/focus/dprk/fact-sheet-on-dprk-nuclear-safeguards (Accessed: 27 April 2020)
[11] *Chronology of Key Events* (IAEA.org)
[12] *Treaty on the Non-Proliferation of Nuclear Weapons* (New York, 1968), article X, paragraph 2.

pressure from the IAEA continuously grew towards the DPRK and according to a resolution adopted by the IAEA Board of Governors in 1994 the DPRK maintained "to widen its non-compliance with its safeguards agreement"[13] and included the suspension of non-medical technical assistance to the state. The DPRK responded to the resolution by announcing its withdrawal from the IAEA on 13 June 1994 and considered itself to be in a position where it is no longer affected by obligations under the Safeguards Agreement, on the contrary to the viewpoint of the IAEA which still maintained the binding nature of the Agreement.

Taking everything into account, the Agency could never put together the whole picture on the DPRK's nuclear activity, it "has never been able to verify the completeness and correctness of the initial report"[14] of the state and it could not provide reassurance regarding the peacefulness of the DPRK's nuclear activity. Up until today, the IAEA has remained in a central position next to newly established agreements and organizations handling the situation with the DPRK as the Agency upholds its authority to continuously follow, monitor, store data and seek clarification on the nuclear activity of the DPRK in order to pursue the objectives of the IAEA and to increase its verification role in the DPRK to work towards the peaceful utilization of nuclear installations.

b. Comprehensive Nuclear-Test-Ban Treaty Organization

Another significant institution worth discussion is the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO) which has been set up with the purpose of implementing the provisions of the Comprehensive Nuclear-Test-Ban Treaty (CTBT). The organization was founded on 19 November 1996 and is made up of a plenary body with the Signatory States and the Provisional Technical Secretariat.[15] Since the treaty has not been enforced, the Vienna-based organization functions as a Preparatory Commission responsible for promoting the treaty and building up the verification regime which is supposed to become operational when the treaty enters into force. The verification regime was designed to detect all kinds of nuclear explosions and is based on three pillars: International Monitoring System (IMS), On-Site Inspections and the International Data Centre. The IMS includes 337 facilities designed to monitor and detect signs of nuclear explosions on the earth using seismic,

[13] *Fact Sheet on DPRK Nuclear Safeguards* (IAEA.org)
[14] ibid
[15] *Glossary: CTBTO Preparatory Commission* (CTBTO.org) https://www.ctbto.org/index.php?id=280&no_cache=1&letter=c#ctbto (Accessed: 27 April 2020)

hydroacoustic, infrasound and radionuclide technologies. The On-Site Inspections are built on data prepared by the IMS since inspections can be requested to areas where the traits of suspicious nuclear explosions are detected, however, inspectors would be authorized to collect evidence from the area only if the Member State to the CTBT approves the procedures and the CTBT has entered into force. Furthermore, the International Data Centre serves as a facility where data is processed and distributed in both raw and analyzed form. For instance, when the DPRK has conducted nuclear tests, the IMS detected and stored data on the activities and forwarded the details on the location, magnitude, time and depth of the tests to the Member States of the CTBT. [16]

c. Disarmament fora

Taking a look at the universal disarmament attempts, it is important to discuss the fora that constitute the so-called „disarmament machinery", the structure of which was established during the UNGA's first Special Session devoted to Disarmament (SSOD) in 1978[17]. According to the outcome of the sessions, the framework of the fora includes the United Nations Disarmament Commission (UNDC), the UNGA First Committee and the Conference on Disarmament (CD). Besides these, the previously discussed institutions (IAEA, CTBTO) and other platforms (UNODA) complete the relatively wide scope of disarmament issues.[18]

UNDC was set up in 1952 by the UNGA under the authority of the SC "with a mandate to prepare proposals for a treaty for the regulation, limitation and balanced reduction of all armed forces and all armament,"[19] although, it conducted substantial achievements only after 1978. It is when a successor Commission was set up as a subsidiary part of the GA with a universal membership, meaning the UN Member States were entitled to take part in the operations of the UNDC. Fundamentally, it is a deliberative body with the main task to set out recommendations, initiatives and directives regarding disarmament. Important to note that the recommendations and initiatives accepted by the UNDC form the basis of future resolutions and multilateral disarmament agreements and provide a reference framework for further debates on the issue.

[16] *Who We Are: CTBTO Preparatory Commission* (CTBTO.org) https://www.ctbto.org/specials/who-we-are/ (Accessed: 27 April 2020)
[17] *Special Sessions of the General Assembly devoted to Disarmament – UNODA* (UN) https://www.un.org/disarmament/topics/ssod/ (Accessed: 27 April 2020)
[18] Horváth. 2013. 39.
[19] *United Nations Disarmament Commission* (UN) https://www.un.org/disarmament/institutions/disarmament-commission/ (Accessed: 27 April 2020)

Decision-making is based on consensus which could also contribute to the fact that the UNDC lacks taking substantive positions, as the consensus-based process might foster the diversification of state"s interests.

The First Committee of the UNGA is primarily responsible for dealing "with disarmament, global challenges and threats to peace that affect the international community and [for seeking] out solutions to the challenges in the international security regime."[20] Given the basic structure of the Committee, UN Member States have the opportunity to be represented and participate in and discuss their disarmament policy attitude during the Committee sessions. Furthermore, the Committee has the authority to adopt resolutions that involve recommendations that will get to the UNGA for further discussion and potential adoption.

The Conference on Disarmament (CD), set up in 1979, is currently the only permanent multilateral negotiation forum dedicated to disarmament.[21] The number of members gradually increased and today the CD has 65 Member States - the DPRK being one of them. The CD is not a specialized agency nor an organ of the UN, however, it has a close connection with the organization and the operations of the CD intertwines with the work of the UNGA. It means that the CD proceeds the adopted agreements to the UNGA with the request to recommend those to the UN Member States for signature and ratification. The CD has a permanent agenda, known as the Decalogues and it contains all the issues that the Members address during the sessions, including nuclear weapons in all aspects, conventional weapons, reduction of military weapons and armed forces and several approaches towards disarmament.[22] In spite of the great significance that the CD had on the improvement of nonproliferation efforts, namely participating in drafting the Chemical Weapons Convention and the Comprehensive Test Ban Treaty, the clash of priorities and difference in state interests came to the surface and blocked the further substantial and effective work progress of the CD. Horváth (2013) gets to the conclusion that the CD has not been making progress for almost two decades now and it is because of the rule of consensus that affects decision-making differently. Originally, it was aimed to encourage the parties to reach agreement more effectively, nonetheless by today it appears that it has

[20] *Disarmament and International Security* (UN) https://www.un.org/en/ga/first/ (Accessed: 28 April 2020)
[21] Horváth, 2013, 45.
[22] *Conference on Disarmament* (NTI) https://www.nti.org/learn/treaties-and-regimes/conference-on-disarmament/ (Accessed: 28 April 2020)

become a tool for blocking decisions from going through, since it lacks political motive.[23] Reforms or a general revival of the CD could be crucial if the international community wants to avoid walking into a new nuclear arms race, considering that besides „old-fashioned" weapons, new technologies are emerging rapidly so instead of sitting around, the CD and other similar platforms must take "action to „alleviate tensions and take [the world] back from the nuclear brink."[24] Regarding the nuclear issue around the DPRK, during the annual session of the CD in 2017 the members discussed the missile launches of the DPRK and the sources of the conflicts in the region, moreover, the delegations repeatedly addressed and condemned the activities of the state. Based on reports, the DPRK delegates participate in the CD annual sessions, however, fail to contribute to the decision-making or the initiatives in any constructive way.

The idea to establish the UN Office for Disarmament Affairs[25] (UNODA) came with the Secretary-General's initiative for a reform at the end of the 1990s. Fundamentally, the Office was set up with the objective to create a system within which "the ultimate goal of general and complete disarmament"[26] can be achieved through collective effort. The UNODA has a wide range of activities and responsibilities, including giving assistance through collaborating with the other institutions of the UN, for instance the First Committee or the CD. Similarly, to other organizations the UNODA encourages peaceful dialogues and maintains positive diplomatic relations between states, furthermore, it promotes preventive and post-conflict disarmament measures.

When the UN took up the idea to establish a separate segment for disarmament issues within the portfolio of the organization, they did so by carrying the profound idea that served as the basis for establishing the United Nations itself several decades ago. With the development of atomic energy and nuclear weapons and more importantly the dangers that uncontrolled use of nuclear weapons could mean for the population of the world; the UN needed to react to this matter urgently. As Secretary-General António Guterres said in 2017, disarmament still plays a crucial role in the resolution and prevention of armed conflicts, including nuclear conflicts as

[23] Horváth, 2013, 50.
[24] *Make progress or risk redundancy, UN chief warns world disarmament body* (UN) https://news.un.org/en/story/2019/02/1033512 (Accessed: 27 April 2020)
[25] Received its current name in 2007.
[26] *About Us - United Nations Office for Disarmament Affairs* (UN) https://www.un.org/disarmament/about (Accessed: 27 April 2020)

well, and it is necessary to maintain disarmament in order to build confidence, strengthen stability and establish trust among states.[27]

1.1.2. Treaties and agreements

The aim of the next section is to examine and evaluate the treaties and declarations that have been drafted up, signed and ratified starting from the second half of the 20th century and up until today. The listing of the treaties will follow a chronological order and some other aspects of categorization will be based on the categorization made by N. Rózsa and Péczeli (2013), since their method follows a logical order that is feasible with the intentions of this paper.

	Name	Entry into force/Status[28]
FIRST GENERATION	PTBT	10 October 1963
	CTBT	Not yet in force
SECOND GENERATION	NPT	5 March 1970
THIRD GENERATION	NWFZs	Individual treaties and dates
FURTHER AGREEMENTS	Joint Declaration	19 February 1992
	Agreed Framework	Signed 21 October 1994
	Six-Party Talks	First round of talks began 27 August 2003
	TPNW	Not yet in force

Table 1: List of treaties and agreements in connection with the DPRK and nuclear nonproliferation

According to N. Rózsa and Péczeli (2013), there are three generations of agreements that can be distinguished when the issue of non-proliferation is being discussed. The treaties of the first generation, also referred to as declarative treaties, are characterized by not assigning any binding aspects neither to the nuclear weapons technologies, nor to the possessing states. When drafting these treaties, the essential objective was to build a deeper trust among the states having nuclear capacity and technology.

[27] *Secretary-General's Statements* (UN) https://www.un.org/disarmament/sgstatement/ Secretary-General"s Statements

[28] According to UNODA Treaties Database: http://disarmament.un.org/treaties/

a. Partial Test Ban Treaty

The bombings of Hiroshima and Nagasaki in 1945 has left the world in shock and shed the light on the unimaginable destruction that the recently developed nuclear bombs appeared to be capable of. The international community could not disregard the potential dangers that the nuclear weapons possessed[29], and multilateral treaties reflected the intention of the bipolar world to create a fragment within international law dealing with controlling nuclear activities and show a communal dedication towards nonproliferation and the elimination of the possible threat of nuclear weapons. The Partial Test Ban Treaty (PTBT) or officially the Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water, was one manifestation within the controlling mechanism drawn up with the idea of "the speediest possible achievement of an agreement on general and complete disarmament under strict international control […] which would put an end to the armaments race."[30] In spite of not being extensive, the objectives are clear, i.e. states signing the treaty commit "to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control."[31] The treaty was officially opened for signing 5 August 1963 and the United States, the United Kingdom and the Soviet Union have been assigned as the three bailees of PTBT. According to the transcript of the treaty, entry into force happens only "after its ratification by all the Original Parties."[32] The treaty represents one of the primary steps taken by members of the international community to ease the tension caused by nuclear weapons and the necessity to achieve this goal is clearly visible by the swift response from the parties because the treaty entered into force only a couple months later, 10 October 1963. Despite the fact that the treaty officially entered into force after the signature and ratification of the three assigned states, accession for other states was open as well. At the time of writing this paper, the PTBT has 125 state parties so far[33], although it is worth mentioning that among the nuclear weapons states, the DPRK is the only state that has not signed the treaty so far. According to N. Rózsa and Péczeli (2013), one of the major incompleteness of the treaty lays behind the lack of mentioning any

[29] Besides the events at Hiroshima and Nagasaki, it is important to mention that during these years the world got extremely close to an actual missile war between the United States and the Soviet Union with the Cuban Missile Crisis and it served as another factor urging the creation of a treaty to ease the tension.
[30] *Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water* (Moscow, 1963)
[31] Optcit, Article 1, paragraph 1.
[32] Optcit, article 3, paragraph 3.
[33] *Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water – Status of the Treaty* (UNODA) http://disarmament.un.org/treaties/t/test_ban (Accessed: 28 April 2020)

particular type of international verification mechanisms.[34] The possible explanation refers to the concern, the data collected during verification processes to check compliance with the treaty might be used to gather intelligence on the other party‟s technology and that would rather increase the tension between the superpowers of the time[35]. Even though the signature of the PTBT was a manifestation of the first real step towards a more complete test ban between superpowers, the treaty was still no more than a milestone in history and afterwards "[n]uclear weapon testing not only continued, albeit underground, but also increased greatly in number."[36]

b. Comprehensive Nuclear-Test-Ban Treaty

The Comprehensive Nuclear-Test-Ban Treaty[37] (CTBT) is a treaty which was created to "ban nuclear explosions by everyone, everywhere: on the Earth‟s surface, in the atmosphere, underwater and underground."[38] One of its main objectives includes making nuclear weapons development more difficult as well as preventing the radioactive damage spreading in the atmosphere, as well as to prohibit nuclear test bombings conducted with military purposes. First, countries, such as the United States, the Soviet Union and the United Kingdom made an attempt to halt nuclear test bombings by declaring a moratorium, although, due to differing state interests, the negotiations were cut off in 1980. In the 1990s, after the United States and the United Kingdom rejected an initiative from a group of developing countries, another moratorium on test bombings was declared, however, China was constantly delaying that until mid-1996. The CTBT was negotiated in Geneva between 1994 and 1996 and as a result 184 countries have signed it, among which 168 have also ratified it including France, the Russian Federation and the UK. Even though the CTBT was officially opened for signature 24 September 1996, the treaty has failed to enter into force up until today. For the CTBT to be complete and have the possibility to enter into force, 44 further countries with specific nuclear technology must sign

[34] N. Rózsa and Péczeli, 2013, 106.
[35] On the other hand, the successor of the PTBT will have a detailed Verification Regime as the representation of a possible advancement to agreements and treaties dealing with nonproliferation.
[36] *1963-77: Limits on nuclear testing* (CTBTO.org) https://www.ctbto.org/the-treaty/history-1945-1993/1963-77-limits-on-nuclear-testing/ (Accessed: 28 April 2020)
[37] The CTBT is intertwined with the previously discussed CTBTO.
[38] *Who We Are: CTBTO Preparatory Commission* (CTBTO.org) https://www.ctbto.org/specials/who-we-are/ (Accessed: 27 April 2020)

and ratify the treaty. While the DPRK[39], along with India and Pakistan have not signed the CTBT so far, the United States, Egypt, Iran, Israel and China have not ratified it yet.

In June 2018, some events caused a rather skeptical attitude from the international community and international relations experts, since Kim Jong-un earlier implemented a near-term moratorium on nuclear testing, ordered the closing of the Punggye-ri test site and the freezing of intercontinental ballistic missile tests. Furthermore, the intention from the DPRK to join international disarmament efforts in order to achieve a total ban on nuclear tests has also caused disbelief, because it is hardly believable that the DPRK would enter a period of voluntary denuclearization when in the past international efforts have failed to do so.

The agreements on nuclear arms control of the second generation expand their scope through vertical nonproliferation (concerning the number and quality of nuclear weapons) and horizontal nonproliferation (regarding the number of nuclear weapons states) and set an upper limit to these features. Although these agreements aim to build a deeper trust among states, to increase transparency and move towards producing less nuclear weapons, the treaties fail to address the situation of already existing nuclear weapons and their proliferation. Nonetheless, as opposed to the treaties of the previous generation, verification mechanisms and frequently scheduled inspections of party states are included in this group in order to put into force the regulations concerning nonproliferation.[40]

c. Treaty on the Non-Proliferation of Nuclear Weapons

Treaty on the Non-Proliferation of Nuclear Weapons (NPT) has become a landmark international treaty which was established with the main mission to prevent nuclear weapons and nuclear technology from spreading, to promote the cooperation regarding the peaceful usage of nuclear energy, as well as, to reach the "further goal of achieving nuclear disarmament and general and complete disarmament."[41] The NPT itself was negotiated during Johnson's presidency, alongside with the Strategic Arms Limitation Talks (SALT) with the Soviet leadership.

The presidency of Richard Nixon, between 1969 and 1974, was characterized by a series of negotiations. First, President Nixon alongside with his national security adviser and later

[39] The DPRK is one of the three countries that have broken the "de facto moratorium" with testing nuclear weapons.
[40] N. Rózsa and Péczeli, 2013, 117.
[41] *Treaty on the Non-Proliferation of Nuclear Weapons (NPT)* (UN) https://www.un.org/disarmament/wmd/nuclear/npt/ (Accessed: 28 April 2020)

secretary of state Henry Kissinger, succeeded in reaching a common ground in regard of the first limitations on "strategic offensive forces", as well as, the Anti-Ballistic Missile Treaty (ABMT) which controlled the testing and deployment of ballistic missiles on the American and Soviet sides as well. With these negotiations, it was believed that by hoping for a shared interest in the status quo, a more peaceful relationship could be obtained between the two superpowers during the period of détente. The next decades have witnessed proposals such as a strategic arms limitation framework during the Ford administration, nuclear arms control proposal and SALT II under Carter. Despite these agreements and negotiations, until 1986 the number of US and Soviet nuclear weapons was gradually increasing during the years of the Cold War. The nuclear negotiations were mainly shaped by the US-Soviet relationship; however, the preferred outcome of the agreements was mostly affected by third parties, e.g. when China successfully tested its first nuclear weapon, thus becoming the fifth nuclear weapon state in 1964.[42] The end of the Cold War ended with three major treaties between the U.S. and the Soviet Union, which all "resulted in substantially reduced levels of nuclear weapons."[43] Under pressure from the Soviet Union and in alleged exchange for two further reactors, the DPRK joined the NPT on 12 December 1985 and as a part of joining the treaty, the state seemingly accepted the obligations under the treaty.

Even though the DPRK provided the IAEA with an initial inventory of the state‟s nuclear installments and details on its nuclear activity, including the existence of the Yongbyon nuclear facility, the Agency rapidly realized the non-compliance between its own findings during the primary inspections and the DPRK‟s declarations. Notice from the Agency was not taken seriously and the DPRK remained secretive and refused to share further details on the development of its nuclear capabilities, including the actual amount of plutonium they had or they could produce or the progress they have made with their separation progress, or even the facts regarding the construction of nuclear facilities. As it was previously mentioned, the DPRK denied access to its nuclear facilities after the request from the IAEA to gather more information from the sites in an attempt to resolve the discrepancies and in March 1993 the DPRK has announced its withdrawal statement from the NPT, blaming the IAEA for violating sovereignty. According to the NPT, there is a period of three months until a State‟s withdrawal can be

[42] Goodby, 2015.
[43] ibid

complete, and as a result of frequent negotiations with the United States and increasing international pressure[44], the DPRK was finally persuaded to suspend its withdrawal on 11 June 1993, one day prior to the notice of withdrawal would take effect. During the following years, the United States and the DPRK conducted several rounds of negotiations that led to the signature of the Agreed Framework (discussed later). The US-DPRK agreement was used as an attempt to bring the DPRK back to compliance with its obligations, however not even the persistence of the American presidency was enough to prevent the DPRK from keeping up its non-compliance. Consequently, the DPRK announced to withdraw from the NPT on 10 January 2003 once again, due to back and forth verbal accusations between the rogue state and the United States for not abiding by the premises of the agreement, as well as repeated calls from the IAEA to cooperate and return to compliance with the safeguards agreement.

The notification on the withdrawal deepened the concern of the international community over the DPRK‟s commitment to nuclear activities and even former UN Secretary-General Kofi Annan expressed his regrets over the decision, highlighting "the importance of adhering to Treaties and their legal obligations in achieving international peace and security in accordance with international law [and that] the problems regarding DPRK‟s nuclear program must be resolved through peaceful dialogue"[45], nonetheless, this time the DPRK proceeded with the withdrawal process and left the NPT.

The fact, that the DPRK could withdraw from the NPT and could disregard the repeated demands from the IAEA to return to compliance with the obligations, question the adequacy of the system set up for nonproliferation to fulfil the fundamental ability of current international institutions to manage treaty implementation regarding nonproliferation and nuclear disarmament.[46]

The group of agreements and treaties, referred to as the third-generation nonproliferation treaties, combines the characteristics of the previous generations and adds cutting measures on already developed supplies of nuclear weapons. These measures can concern selected warheads and actual weapons, or a total nuclear disarmament. The verification system poses stricter rules

[44] The IAEA brought the dispute between the DPRK and the United States to the UNSC, which in response adopted UNSC Resolution 825 calling on the DPRK "to respect its non-proliferation obligations under the NPT, and to comply with the safeguard agreement of the IAEA [and it] also encouraged all UN Member States to facilitate a solution." Lee, 2010, 803.
[45] *Chronology of Key Events* (IAEA.org)
[46] Carrell-Billiard and Wing, 32.

and the obligations taken up by the parties are taken much more seriously than in the case of the previous agreements.

d. Nuclear Weapon Free Zones

The origins of the concept of Nuclear Weapons Free Zones goes back to the late 1950s when the Rapacki Plan was introduced to the UNGA as an idea to denuclearize Central Europe with the inclusion of Poland, the Federal Republic of Germany, German Democratic Republic and Czechoslovakia. The address was followed by a memorandum with details regarding the planned nuclear weapon free region, stating that states would be prohibited from producing, possessing or stationing nuclear weapons and this decision would have been respected by nuclear weapons states as well. Nonetheless, due to the lack of support and the belief that it is necessary to deploy nuclear weapons in the region[47], the plan has fallen through and all attempts to resuscitate it has failed too. However, it had a positive impact on the perception of the issue, and it included the main criteria of NWFZs. The following table presents the general and regional NWFZs that will be discussed in this section.

General NWFZs		
Antarctic Treaty	Antarctica	23 June 1961
Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies	Outer space	10 October 1967
Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor	Sea-bed	18 May 1972
Agreement Governing the Activities of States on the Moon and other Celestial Bodies	The Moon	11 July 1984
Regional NWFZs		
Treaty of Tlatelolco	Latin America and the Caribbean	25 April 1969
Treaty of Rarotonga	South Pacific	11 December 1986
Treaty of Bangkok	Southeast Asia	27 March 1997
Treaty of Pelindaba	Africa	15 July 2009
Treaty of Semipalatinsk	Central Asia	21 March 2009

[47] In order to balance out the military arsenal of states in the Warsaw Pact and to secure the balance of power between superpowers. (Lázár, 2014, 23)

Unilateral Declaration	Mongolia	4 December 1998

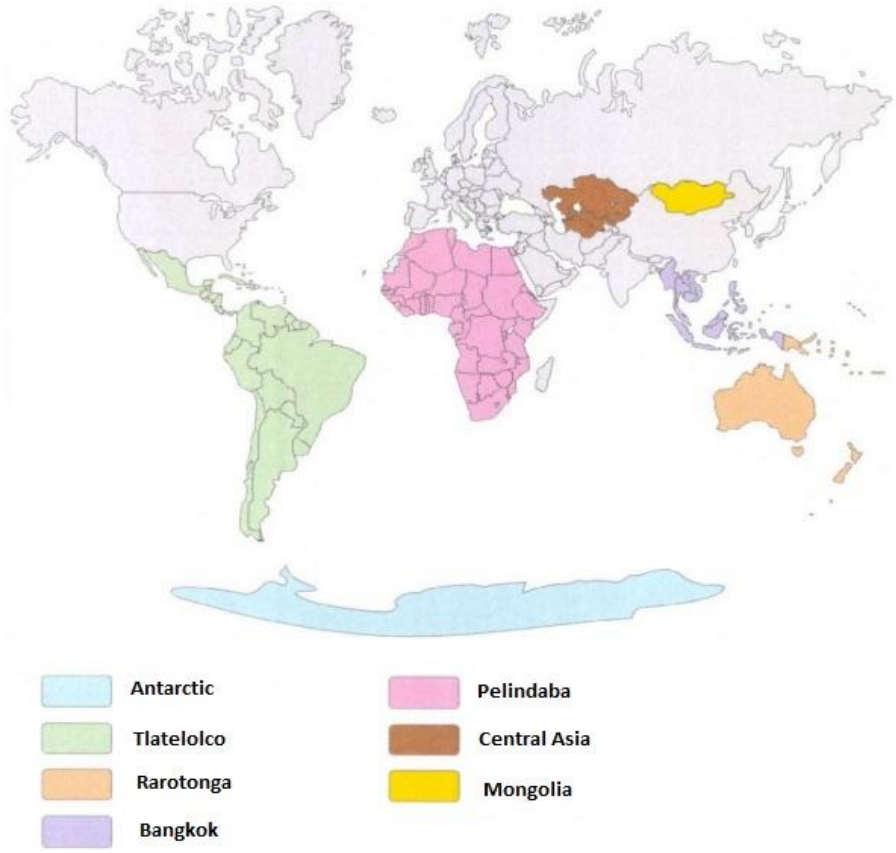
Table 2: General and regional NWFZs[48]

As Lee points it out, there has been a hint in Article VII of the NPT regarding the possibility of States coming together "to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories."[49] Prior to the extension of NWFZs to state territories, securing areas on earth that do not fall under the national sovereignty of any state, thus creating "general NWFZs"[50] took effect. This group of treaties includes the Antarctic Treaty[51], the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies[52], the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor[53] and the Agreement Governing the Activities of States on the Moon and other Celestial Bodies[54] securing the protection of the "global common areas".[55] Regarding the DPRK's involvement with these agreements, it had been accessed to the Antarctic Treaty 21 January 1987 (having an observer status now) and to the Outer Space Treaty 5 March 2009, however, the state did not proceed to join neither the Sea-bed Treaty, nor the Moon Treaty.

[48] Lee, 2010, 810-812.
[49] Lee, 2010, 809.
[50] ibid
[51] Entered into force 23 June 1961, it served as the first multilateral agreement with multiple states having interest on the territory and the parties have agreed that "Antarctica shall be used for peaceful purposes only, [... and] any nuclear explosions [...] and the disposal there of radioactive waste material shall be prohibited." *Antarctic Treaty* (1959) Articles I and V.
[52] Entering into force 10 October 1967, the Outer Space Treaty declares that States Parties refrain from placing "in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner." *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies* (1967) Article IV.
[53] The Treaty, entering into force 18 May 1972, prohibits States Parties to "emplant or emplace on the sea-bed and the ocean floor and in the subsoil [...] any nuclear weapons or any other types of weapons of mass destruction" in order to prevent a nuclear arms race in that region. (*Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies,* 1967, Article I.)
[54] The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies claims that "the moon shall be used [...] exclusively for peaceful purposes [and that] States Parties shall not place in orbit around or other trajectory to or around the moon objects carrying nuclear weapons or any other kind of weapons of mass destruction." (*Agreement governing the Activities of States on the Moon and Other Celestial Bodies,* 1979, Article 3)
[55] Lee, 2010, 809.

Lifting the core concept from the Rapacki Plan and bringing it forward, other states have opened up and created regional NWFZs all over the world. According to the UNGA"s definition, a NWFZ is

> "[a]ny zone, recognized as such by the General Assembly of the United Nations, which group of States, in the free exercise of their sovereignty, has established by virtue of a treaty or convention whereby: (a)The statute of total absence of nuclear weapons to which the zone shall be subject, including the procedure for the delimitation of the zone, is defined; (b) An international system of verification and control is established to guarantee compliance with the obligations deriving from that statute. "[56]



[56] *Establishment of a Commission to deal with the Problems raised by the Discovery of Atomic Energy,* General Assembly, A/RES/1(I). 1975.

Table 3: Nuclear Weapon Free Zones[57]

Today, there are five major regional NWFZs operating and besides those, Mongolia has declared itself as a single-State nuclear free zone and the Antarctic is considered to be a NWFZ as well. Some major contributors to the establishment of these zones have been the security policy environment in a given region, for that states might feel balanced out if they are surrounded by nuclear-weapons states; and the reoccurring efforts towards denuclearization.[58] Regarding the treaties, they include a specific protocol for the nuclear-weapon states that they have to respect given the legally binding nature of those protocols. These details oblige the nuclear-weapon states to respect the status of the zones and refrain from using nuclear weapons or threat states within the zones to use nuclear weapons against them. Nonetheless, in some cases nuclear-weapon states signed and ratified these protocols with additional conditions that reserved their right to use their nuclear arsenal in certain situations, for instance, when acting in self-defense or as a counterattack against a state that had previously attacked them. [59]

The Treaty of Tlatelolco, establishing the first, Latin American NWFZ (LANWFZ), was opened for signature in 1967 and entered into force 25 April 1969 and it includes all 33 states in the region of Latin America and the Caribbean[60]. With regards to the verification process, the compliance of the members of the LANWFZ is ensured through agreements with the IAEA and through the operation of the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (OPANAL).[61] The second zone to be created was the South Pacific Nuclear Weapon Free Zone (SPNWFZ) with the Treaty of Rarotonga. The treaty entered into force 11 December 1986 after the ratification of 13 states in the region. States became concerned with the possible consequences of nuclear weapons following the bombings over Hiroshima and Nagasaki and when they realized that their region would become subject to nuclear testing and would be exposed to hazardous impacts on the environment through nuclear waste.[62] With the

[57] N. Rózsa and Péczeli, 2013.
[58] N. Rózsa and Péczeli, 2013, 150-151.
[59] *Nuclear-Weapon-Free Zones (NWFZ) At a Glance* (Arms Control) https://www.armscontrol.org/factsheets/nwfz (Accessed: 28 April 2020)
[60] The states in the region became concerned about nuclear weapons following the events of the Cuban Missile Crisis of 1952.
[61] *Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (LANWFZ) (Tlatelolco Treaty*) (NTI) https://www.nti.org/learn/treaties-and-regimes/treaty-prohibition-nuclear-weapons-latin-america-and-caribbean-lanwfz-tlatelolco-treaty/ (Accessed: 28 April 2020)
[62] *South Pacific Nuclear-Free Zone (SPNFZ) Treaty of Rarotonga* (NTI) https://www.nti.org/learn/treaties-and-regimes/south-pacific-nuclear-free-zone-spnfz-treaty-rarotonga/ (Accessed: 28 April 2020)

Treaty of Bangkok, the regional NWFZs have expanded to the Southeast Asian part of the globe. The Southeast Asian Nuclear Weapon Free Zone (SEANWFZ) took effect 27 March 1997 involving Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.[63] Mainly due to the economic importance of the region on a global scale the nuclear weapon states have not signed the protocols because they wish to avoid the security assurances taking place against their influence.[64] The following zone in Central Asia (CANWFZ) includes the states of Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan. [65] The most recently established NWFZ on the African continent was set up with the Treaty of Pelindaba (creating the ANWFZ) through the cooperation of 40 African states.[66] Entering into force 15 July 2009, the established zone "covers the territory of the African continent, island States of the Organization of African Union (OAU) and all islands considered by the OAU in its resolutions to be part of Africa."[67] A quite outstanding case, that actually inspired the Central Asian regions to come together and form their own NWFZ[68], is connected to the unilateral declaration of Mongolia which "declared itself a single-State NWFZ [in 1992] and was recognized as having NWFZ status by the UN General Assembly in 1998. [Furthermore,] Mongolia may provide an example that other countries can build on to develop the NWFZ concept further and make them better able to address contemporary non-proliferation challenges."[69]

The valid question emerges why not establish a NWFZ on the Korean Peninsula to tackle the problems of non-proliferation and nuclear threat and one might wonder whether it would serve as a motivating gesture for creating a NWFZ in Northeast Asia or in the Pan-Pacific region. It might come as a surprise that the DPRK was the primary party to come up with the idea of a Korean NWFZ during inter-Korean talks in 1991. From South Korea"s side, then President Rho Tae-woo reaffirmed the state"s commitment towards the denuclearization attempts

[63] *Treaty on the Southeast Asia Nuclear Weapon-Free Zone* (Bangkok, 1995) 191 U.N.T.S.
[64] *Southeast Asian Nuclear-Weapon-Free-Zone (SEANWFZ) Treaty (Bangkok Treaty)* (NTI) https://www.nti.org/learn/treaties-and-regimes/southeast-asian-nuclear-weapon-free-zone-seanwfz-treaty-bangkok-treaty/ (Accessed: 28 April 2020)
[65] *Treaty on a Nuclear-Weapon-Free Zone in Central Asia* (Semipalatisnk, 2006) 2970 U.N.T.S.
[66] *African Nuclear Weapon Free Zone Treaty (Treaty of Pelindaba) - Status of the Treaty* (UNODA) http://disarmament.un.org/treaties/t/pelindaba (Accessed: 28 April 2020)
[67] Lee, 2010, 811.
[68] *Central Asia Nuclear-Weapon-Free-Zone (CANWFZ)* (NTI) https://www.nti.org/learn/treaties-and-regimes/central-asia-nuclear-weapon-free-zone-canwz/ (Accessed: 28 April 2020)
[69] Lee, 2010, 812.

and this mutual agreement has eventually led to the Joint Declaration of the Denuclearization of the Korean Peninsula signed in 1992. Considering the potential Korean NWFZ, the Joint Declaration could be taken as the primary step towards the establishment of the zone, however, it turned out that the two states had different ideas on the process of denuclearization: "South Korea regarded it as limited nuclear deterrence under the NPT, while [the DPRK] saw it as general and comprehensive nuclear disarmament through an NWFZ."[70] Further steps towards denuclearization have been taken from the DPRK through the Agreed Framework, conducted with the United States in 1994 and via signing the Joint Statement in 2005.

From a geographical perspective, the zone would cover the area of the Korean Peninsula, including "all land holdings with the adjacent islands, internal waters and territorial seas."[71] As it was mentioned regarding the previous NWFZs, the nuclear-weapons states would be obliged to sign the specific protocol regarding their confirmation of the establishment of the NWFZ and with regards to their nuclear activities in the region and it is questionable whether they would contribute to the Korean NWFZ, given that they might want to hold on to their maritime influence through potential U.S. military bases on smaller islands that might fall under the territory of the newly established zone. As Lee points out, relatively strong regulation would follow including the abolishment of "already-made and stationed" nuclear arms, of using nuclear facilities for non-peaceful purposes; it would line up a series of activities that would be banned under the treaty and the inclusion of a verification system involving IAEA safeguards agreement and full inspections that would ensure that peaceful use of nuclear energy.

Another approach towards a potential NWFZ in the region is addressed by the concept of a Korea-Japan NWFZ (KJNWFZ) suggesting that the two Koreas and Japan would engage in establishing a zone within which it would be possible to reinforce nonproliferation obligations and emanate the denuclearization attempts to the territory of the DPRK as well. This engagement would be beneficial for the countries in the region, as well as the international community as the treaty would legally bind the DPRK to abide by the nonproliferation regulations, to comply with verification and inspections and outside participants would be legally prohibited from providing assistance to the DPRK nuclear weapons development. Moreover, South Korea and Japan would receive negative security assurance from the nuclear weapon states restricting those from any

[70] Optcit, 813.
[71] ibid

nuclear attack against the states within the region. Furthermore, apart from the DPRK, South Korea and Japan have been claiming themselves to be non-nuclear-weapons states and the treaty setting up the KJNWFZ would reinforce this notion. Eliminating the risks of a potential nuclear war in Northeast Asia is crucial for maintaining regional and international security and peace and setting up a NWFZ there "could prove valuable in de-escalating regional tensions and reversing the growing trust deficit,"[72] and could set the ground for an environment where states would have the opportunity to focus on national security policy-making without considering nuclear weapons as the primary tools to develop for securing national security.

There have been further multilateral agreements established with states and the DPRK as an extension to the already existing system aiming to promote proper utilization of nuclear energy, nonproliferation and, most importantly, peaceful denuclearization. The following agreements concern not only the DPRK, but other third parties, i.e. states that are also affected by the nuclear activity of the DPRK or even the International Court of Justice (ICJ) whose advisory opinion served as a basis for further discussions on the issue.

e. Joint Declaration on the Denuclearization of the Korean Peninsula

Following the evolution of nonproliferation issues based on the previous chapters, we arrive at the next cornerstone which was realized through the inter-Korean peace talks that had been going on during the 1990s with a major focus on denuclearization. Finally, the two states agreed to sign the treaty 20 January 1992 (entered into force 19 February 1992) in which they declared that neither state would "test, manufacture, produce, receive, possess, store, deploy or use nuclear weapons, [furthermore, they would] use nuclear energy solely for peaceful purposes [and they would] not possess nuclear reprocessing and uranium enrichment facilities."[73] The necessary verification measures would be carried out by the authorized institution and each state would be entitled to conduct inspections on a chosen territory of the other state. For the purpose of implementation the South-North Joint Nuclear Control Commission was set up, however, the Commission could not reach an agreement on a verified inspection regime and its operation has been halted in 1993.[74] Soon after the entry into force of the Joint Declaration, the DPRK

[72] Thakur, 2017.
[73] Joint Declaration on The Denuclearization of The Korean Peninsula (1992)
[74] *Joint Declaration of South and North Korea on the Denuclearization of the Korean Peninsula* (NTI) https://www.nti.org/learn/treaties-and-regimes/joint-declaration-south-and-north-korea-denuclearization-korean-peninsula/ (Accessed: 28 April 2020)

announced to withdraw from the NPT and since then the focus has been on the DPRK returning to the NPT and less emphasis placed on the Joint Declaration. With 1994, the stage was set for a DPRK and American cooperation under the Agreed Framework (discussed in the following section) which also assured the provisions of the Joint Declaration. The agreement included the DPRK‟s commitment towards denuclearization and fulfilling the obligations under the Joint Declaration were knitted to economic sanctions later imposed by the United States on the DPRK. Almost a decade later, the DPRK still avoided IAEA inspections and the operation of the Control Commission broke off as well.

All in all, the Joint Declaration included the core principles of what a potential NWFZ would entail and the agreement is of great importance because "it held the promise of preventing nuclear proliferation in both North and South Korea, while simultaneously preventing further stationing of nuclear weapons anywhere on the Peninsula."[75] It was high time that the essential idea behind the treaty was addressed due to the escalating tension between the DPRK and the world, however, the details of the agreement were not enforced enough, hence the continuous dispute between the DPRK and the IAEA and the DPRK‟s resistance to follow the provisions gradually undermined the potential effectiveness of the declaration. Today, the Joint Declaration is mentioned in every UNSC Resolution that imposes sanctions on the DPRK calling on the state to return to and abide by the terms of the agreement.

f. Agreed Framework

Even after the conduction of the Joint Declaration, the DPRK still refused to comply with IAEA inspections which resulted in further tension between the IAEA and the DPRK[76] and after the very first announcement from the DPRK to withdraw from the NPT in March 1993, the United States stood up and began discussions with the DPRK and eventually persuaded the state to "„suspend the effectuation‟ of their withdrawal"[77]. The disagreement between the DPRK and the IAEA continued and reached its peak generating a major crisis which started to be defused when former United States President Jimmy Carter intervened and visited Kim Il-sung in Pyongyang for further discussions which subsequently brought about the Agreed Framework

[75] Hayes and Hamel-Green, 2011. 113.
[76] As discussed earlier, the tensions were slightly eased when the DPRK agreed to sign and ratify the Safeguards Agreement in January 1992, however, due to serious discrepancies between the DPRK initial report and IAEA inspection results, the newly established relations have gone awry swiftly and the DPRK ended up announcing its withdrawal from the NPT and the Safeguards Agreement in 1993.
[77] Carrell-Billiard and Wing, 29.

between the two states, signed on 21 October 1994 in Geneva "to negotiate an overall resolution of the nuclear issue on the Korean Peninsula."[78] The time when the agreement was in force and held the potential to achieve further stages towards the nonproliferation of the DPRK and the possibility of a peaceful denuclearization was between 1994 and 2002. The framework assigned certain responsibilities for each party and even though at some point the two participating states got into major disagreements, they could still make significant achievements.

According to the first item mentioned in the agreement, the two states would "cooperate to replace the DPRK's graphite-moderated reactors and related facilities with light-water reactor (LWR) power plants."[79] This subsequently meant that the United States was expected to provide the necessary material for the construction of the LWRs and alternative energy resources in the form of heavy oil. In exchange for which the DPRK was obliged to shut down its graphite-moderated and all other reactors and halt other construction projects and "eventually dismantle these reactors and related facilities,"[80] and the IAEA would be entitled to verify the activity freeze. The agreement not only included exact deadlines dated from the signature of the Agreed Framework until when the obligations were to be carried out, but it also referred to the "full normalization of political and economic relations [as well as working] together for peace and security on a nuclear-free Korean Peninsula [, and] work together to strengthen the international nuclear non-proliferation regime."[81] The normalization of international relations included returning to full compliance with treaties, i.e. the NPT, IAEA Safeguards Agreement, implementing the elements of the Joint Declaration and encouraging future engagement with the Republic of Korea in the form of peaceful dialogues. [82]

Regarding the progress, the foundation of the Korean Peninsula Energy Development Organization (KEDO) involving the United States, South Korea and Japan, is significant because it is connected to the Agreed Framework in a way that it was designed to be the funding of the construction of the LWRs, agreed upon in the agreement and it entailed the financial contribution

[78] Agreed Framework between North Korea and the United States (21 October 1994)
[79] Agreed Framework between North Korea and the United States (21 October 1994) provision 1, paragraph 1.
[80] Agreed Framework between North Korea and the United States (21 October 1994) provision.1. paragraph 3.
[81] Agreed Framework between North Korea and the United States (21 October 1994) provisions. 2, 3, 4.
[82] Furthermore, the original agreement has been substituted by four additional agreements and several protocols since its adoption. Lee, 2010, 804.

from several countries as well as was assigned to deliver "interim energy until the completion of the first reactor."[83]

Right after concluding the Framework, both sides kicked off by following the provisions with the belief that this agreement would resolve the nuclear crisis peacefully. During the following years, the DPRK was playing by the rules, i.e. with unloading fuel rods, and sometimes engaged in a give-and-take exchange, i.e. when it announced "that it would not export missiles in return for 3 billion US dollars of financial support for three years."[84] The next years brought about events that can be viewed as diplomatically successful, up until a point where the American foreign policy towards the DPRK has changed to "a „comprehensive and integrated approach,"" which were articulated at a Summit in 1999 in an agreement to lift economic sanctions and provide more food support in return for the DPRK to put an end to missile launches.[85] The cooperation between the two states was going smoothly during the Clinton administration, however, the American approach has substantially changed when George W. Bush became President in January 2001 and declared the DPRK as a part of an "axis of evil"[86] and this declaration was followed by a drastic redesign in the U.S. foreign policy towards the DPRK excluding maintaining peaceful diplomatic relations with a state that poses a great threat to international and regional peace and security.

It gave the final blow to the relations in 2002 when American intelligence gathered evidence on the DPRK secretly developing its uranium enrichment capability and with that it became clear that from the DPRK"s point of view the original idea that they had followed all along was whether the leadership could barter its completed nuclear deterrent for a peace agreement and security guarantees, as well as the lifting of economic sanctions and an economic development package delivered to the doorstep of the country while the leadership could still covertly continue the development of its nuclear capacities, and not necessarily to engage in peaceful crisis resolution. In late 2002, the DPRK indirectly confirmed the assumptions regarding its nuclear program, however, later on the confirmation has been denied. Nevertheless, the terms of the bilateral agreement have been violated and the United States promptly took measures and cut fuel supplies from the DPRK, which was followed by further political and

[83] Lee, 2010, 804.
[84] ibid
[85] Lee, 2010, 804.
[86] George Bush State of the Union Address https://georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020129-11.html (Accessed: 28 April 2020)

economic sanctions. As a reaction to that, the DPRK has announced that due to the U.S. violating its obligations by cutting the supplies, the state would "resume operations at nuclear facilities, [...they] removed passive verification measures and told the inspectors to leave."[87] The clash between the U.S. and the DPRK resulted in the DPRK leaving the NPT, this time without suspending its withdrawal and it was assumed that the state began reprocessing fuel rods. Both, the primary confrontational approach from the Bush administration and the often secretive behavior from the DPRK, contributed to the collapse of the Agreed Framework and got the world one step closer to a second nuclear crisis, although this was regarded as far more dangerous as "neither party could find a suitable exit from this diplomatic quagmire."[88]

g. Six-Party Talks

The year 2003 brought the possibility to renew talks with an effort to ease the tension between the parties. Both countries agreed that new negotiations should be conducted "in a more peaceful and systematic manner"[89] in resolving the previously triggered crisis. The framework for this negotiation was realized as the Six Party Talks, inviting China, the United States, Russia, Japan and the two Koreas to a hexagonal table in Beijing 2003.

Kicking off in August 2003, the talks continued in 2004 without any significant progress, mainly because the U.S and the DPRK still maintained "mutually irreconcilable positions"[90] and harshly criticized each other. Although, it seems that a solution to the conflicts was halted by the lack of cooperation between the parties, involving the other countries has appeared to be useful as they could somewhat ease the tension and resolve standoffs from one talk to the other. After three rounds of talks, the countries finally reached a milestone and on 19 September 2005 adopted the Joint Statement on the nuclear crisis which had a similar structure to the Agreed Framework and kept the initial objective, i.e. to denuclearize the Korean Peninsula in a peaceful manner. Furthermore, the declaration involved South Korea claiming not to possess any nuclear weapons on its territory and that it would revise the Joint Declaration signed in 1992. From the United States‟ side, it agreed to refrain from deploying nuclear weapons on the Korean Peninsula, from attacking the DPRK with any kind of weapons. Additionally, the participating

[87] Carrell-Billiard and Wing, 30.
[88] Lee, 2010, 805.
[89] Lee, 2010, 805.
[90] Lee, 2010, 805.

countries agreed in the declaration to be providers of energy assistance to the DPRK, and in particular, that South Korea would provide an LWR to the DPRK.

The success could not be celebrated by the international community for too long, because even though the agreement has been declared progressive and effective, during 2006 the third nuclear crisis came about; once when the DPRK fired several missiles towards the East Sea of Korea in July 2006[91] and when the state conducted its very first claimed nuclear test in October 2006[92], thus revealing that the DPRK indeed possessed a nuclear weapons program. Despite the events around the nuclear tests, the Six-Party Talks continued to make an attempt and relieve the tension and with the release of the two Actions for the Implementation of the Joint Statement in 2007 under which the DPRK has agreed to close the Yongbyon facility, to invite the IAEA inspectors back in the country and allow the necessary inspections and verifications, and to follow the requirements of the Joint Statement, as well as to begin bilateral talks with the U.S. and Japan in order to reach a normalized level of diplomatic relations. In exchange for these commitments, the rest of the states agreed to provide emergency support to the DPRK in a form of heavy fuel oil. The continuation of the Action plan was adopted on 3 October 2007 and it included "more concrete measures", i.e. the DPRK agreed to disable existing nuclear facilities and report fully on its nuclear programs. Nonetheless, the talks eventually broke down in December 2008 and resulted in the DPRK refusing free access to its nuclear facilities, conducting a second nuclear test in mid-2009 and finally leaving the talks in 2009[93]. This period has shown that the outcomes of efforts were altering between on and off and resulted in a chess-like progress between the parties and this contributed to the difficulties in resolving the nuclear issue with the DPRK even after years of negotiations and resolutions.

Both, the Six-Party Talks and the Actions for the Implementation of the Joint Statement have presented that there was a collective attempt to improve the nonproliferation and disarmament regimes to stand up against nuclearization and misuse of nuclear weapons and to

[91] After the firing, the U.S. and Japan informed the UNSC about the incident and demanded that the issue is addressed. The UNSC responded by adopting Resolution 1695 on 15 July 2005 urging the DPRK "to suspend all activities related to its ballistic missile programs and to return to the Six-Party Talks and the NPT." (Lee, 2010, 806.)

[92] Japan and the U.S. notified the UNSC once again, drawing attention to the seriousness of the actions of the DPRK and calling for effective action. As a response to the test, the UNSC adopted Resolution 1718 on 14 October 2006, the first among several resolutions demanding the DPRK to put an end to its nuclear weapons program and imposing economic and, later on, financial sanctions on the state with the cooperation of the UN Member States. (Lee, 2010, 806.)

[93] Ford, 2018, 13.

create an environment where the majority of the international community can set up a control system with the ability to react to violations and impose sanctions when deemed necessary to secure the protection of international security and peace. Taking the previous attempts into account the development of the mechanism is visible, however, the fact that more than one instances of nuclear threat from the DPRK occurred and the nuclear dispute is still a critical part of contemporary politics points to the agreement framework lacking enforcement and the fundamental binding feature without which effectiveness can be hardly achieved.

h. Treaty on the Prohibition of Nuclear Weapons

International efforts to tackle the problems with proliferation remained in focus and with time the focal points of approaching the issue have changed as well in order to discover and shed a light on new scopes of the effects of nuclear weapons. The Treaty on the Prohibition of Nuclear Weapons (TPNW)[94] serves as a great instance for a treaty that was drawn up by the Humanitarian Initiative with a focus on the humanitarian aspects of proliferation, i.e. the humanitarian consequences of a possible nuclear war and the impacts on the population, health and the environment. The movement growing out of the Initiative gained support and hopes arose towards a more solid progress regarding nuclear disarmament. Despite the high number of states endorsing the Initiative at the NPT Review Conference in 2015, they failed to agree on a final version mainly due to disagreement over the potential outcome and the desire "to shift efforts to advance the disarmament agenda to an open-ended working group (OEWG) on nuclear disarmament within the UN General Assembly."[95] The OEWG meetings in 2016 resulted in initiatives for moving the nuclear agenda forward and the idea of a possible ban treaty turned out to be a successful proposal which was voted and forwarded as a recommendation to the UNGA for organizing a convention the following year to prohibit nuclear weapons. Obviously, states that rely on their nuclear programs did not support these initiatives, in fact the United States, France, the United Kingdom, China, Russia, Israel, India, Pakistan and the DPRK did not even attend the sessions and rejected the final report as well. Without these countries‟ support and with boycotts "by all nuclear weapons possessing states, most NATO countries, and many

[94] also called Nuclear Weapon Ban Treaty
[95] *Treaty on the Prohibition of Nuclear Weapons (TPNW)* (NTI) https://www.nti.org/learn/treaties-and-regimes/treaty-on-the-prohibition-of-nuclear-weapons/ (Accessed: 28 April 2020)

military allies of nuclear weapons states"[96] and after two rounds of negotiations regarding the nuclear weapons ban, the TPNW was adopted on 7 July 2017. The legitimacy of the treaty became a subject of debate among UN Member States as advocates of the TPNW said that it represents "an important step in delegitimizing nuclear weapons and reinforcing the norms against their use"[97] while the opposing states assumed that it is a "political grandstanding" which could weaken the NPT.

Currently the treaty has 81 signatory states, among which 36 have already ratified it. According to the treaty, it will enter into force 90 days after ratification, acceptance, approval or accession has been deposited by 50 states. As opposed to previous multilateral agreements, the TPNW lacks a verification regime and instead the treaty maintains compliance with the safeguards agreements with the IAEA.

The Treaty contains the strict prohibition of developing, testing, producing, manufacturing, acquiring, possessing or stockpiling nuclear weapons or other nuclear explosive devices, furthermore, to transfer, to use or threaten to use these explosives under no circumstances. [98] Article 4 of the TPNW calls on the State Parties to remove their nuclear weapons and get rid of their nuclear weapons program as soon as possible in order to ensure reaching the stage of total elimination of nuclear weapons.[99] The TPNW has been labelled with outstanding significance among multilateral treaties regarding nuclear disarmament because it is the first one to be adopted since 1968 when the NPT was adopted. However, it cannot be denied that without the participation and influence of nuclear weapons states the TPNW cannot be taken seriously and there is hardly any chance that it would contribute to the creation of customary international law and have a long-standing effect on nuclear disarmament.

With regards to the DPRK, joining and ratifying the TPNW would be the solid basis for the road towards denuclearization. The possibility of the DPRK signing and ratifying the treaty has occurred during the U.S.-DPRK Singapore Summit in 2018 and it became an agenda point for the Inter-Korean Summits as well. From the international community's perspective, the TPNW represents the most effective way to get the Korean Peninsula closer to a full denuclearization and put an end to an era of nuclear threats and uncertainty.

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[96] ibid
[97] ibid
[98] *Treaty on the Prohibition of Nuclear Weapons* (New York, 2017) Article 1.
[99] Opt.cit. Article 4.

1.2. Sanctions

The following section will discuss the sanctions adopted by the UNSC throughout the years as a response to the DPRK nuclear tests. Prior to scrutinizing the sanctions, however, it is important to mention that the issue of illegal nuclear testing and possible consequences have already preoccupied the attention of the United Nations, hence in the 1990s, the International Court of Justice had been asked to provide advisory opinion on the issue of legality regarding the use of nuclear weapons and whether the use of nuclear weapons would be a breach of obligations under international law. The ICJ presented its opinion in 1996 and did so while touching upon not only legal or illegal, but environmental aspects of the use of nuclear weapons as well. The ICJ highlights Article 2, paragraph 4 of the Charter which states that

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[100]

The right to collective self-defense is acknowledged, however, the means of weapons are not specified in the Charter, as well as, no specific weapons are prohibited under the Charter either. Nonetheless, considering the principle of proportionality under the law of self-defense the use of force is required "to meet the requirements of the law applicable in armed conflict, including, in particular, the principles and rules of humanitarian law."[101] This might assume that the states are left to decide what weapons they consider eligible for self-defense, however, "[a] weapon that is already unlawful *per se*, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose."[102] Referring to the rule of proportionality again, the Court states that the use of force, even if it involves nuclear weapons, "must [...] also meet the requirements of the law applicable in armed conflict"[103] so it can be considered legal. The very nature of nuclear weapons, *inter alia*, the high probability of devastation in case of nuclear exchanges and the potential risks accompanying the use of nuclear weapons as a form of self-defense, is considered to be important factors that states should take into account when they

[100] *Charter of the United Nations* (San Francisco, 1945) Article 2, paragraph 4.
[101] *Overview of the case: Legality of the Threat or Use of Nuclear Weapons* (ICJ-CIJ) https://www.icj-cij.org/en/case/95 (Accessed: 28 April 2020)
[102] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Report 1996, 244.
[103] ibid, 245.

consider using nuclear weapons as a response to threats. Moreover, in the advisory opinion the Court emphasizes the authority of the Security Council regarding the use of force and states that if a Member State decides to live up to its right to individual or collective self-defense the measures taken "shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council."[104]

Later on in the text, the Court has also managed to examine customary international law in order to "determine whether a prohibition of the threat or use of nuclear weapons as such flowed from that source of law"[105] and discussed the legality of the use of nuclear weapons under international humanitarian law and emphasized the importance of protecting civilians from any form of attack, the prohibition of developing weapons that might fail to distinguish a civilian from military targets and the avoidance of "unnecessary suffering."[106] On a conclusive tone, the Court declared the issue regarding the applicability of nuclear weapons to be rather controversial and noted that the use of nuclear weapons, in their pure existence, can hardly be "reconcilable"[107] with the rules applied in armed conflict. The Court drew a conclusion in which they stated the following:

> "[i]n view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[108]

It has been proven that at the time of the advisory opinion, the system of international law was far from ready to adjust new and applicable requirements for the threat or the use of nuclear weapons in a time when the circumstances of war conflicts have changed a lot. The aforementioned advisory opinion complements the legality and the authority of the Security Council to establish a sanctions regime and adopt resolutions in order to change the undesirable behavior of rogue states, in this case, the nuclear tests of the DPRK.

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[104] *Charter of the United Nations* (San Francisco, 1945) Article 51.
[105] *Overview of the case: Legality of the Threat or Use of Nuclear Weapons* (ICJ-CIJ) https://www.icj-cij.org/en/case/95 (Accessed: 28 April 2020)
[106] ibid
[107] ibid
[108] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Report 1996, 266.

Regarding nonproliferation and total disarmament, there is an ongoing opposition within the United Nations. More specifically, between the members of the General Assembly and the Permanent Members of the UN Security Council (P5)[109]. In July 2018, "over 120 countries in the United Nations voted to adopt the first-ever global treaty to ban nuclear weapons,"[110] however, the nuclear-armed nations refused to take part in the negotiations. During the past 20 years, the NPT has been negotiated and the treaty has proceeded to become "the first multilateral legally-binding instrument for nuclear disarmament."[111] The representatives of the P5 argued that the initiative fails to recognize the realities of the international security environment and that the ultimate prohibition is not compatible with the policy of nuclear deterrence which has contributed to maintaining peace in Europe and North Asia for the past decades. They argued that instead of providing the necessary security against threats like the DPRK-possessed nuclear program, the treaty would create more divisions and would fail to address other security challenges.

Recently, the current UN Secretary General António Guterres expressed his agreement with the adoption of the ban treaty as he believed that it represented "an important step and contribution towards the common aspirations of a world without nuclear weapons."[112] He also hoped for the outcomes of the treaty to be promoting an inclusive dialogue and enhancing the renewal of an international cooperation towards nuclear disarmament. The treaty itself poses prohibition towards activities related to nuclear weapons, i.e. developing, testing, producing, manufacturing, acquiring, possessing or stockpiling nuclear weapons or devices, as well as, using or threatening to use any of these weapons. In connection with the nuclear ban treaty, the UN has decided to hold a High Level Conference (Summit) on Nuclear Disarmament with the purpose of enhancing progress toward the achievement of a nuclear weapons convention[113] as well as achieving the proposed ideas that would enhance the reduction of nuclear risk, would put an end

[109] Usually referred to as the P5, consisting of China, France, Russia, the United Kingdom and the United States, although, often Germany is often referred to as the sixth world power.
[110] *UN adopts global treaty banning nuclear weapons; India skips talks* (Economictimes.indiatimes.com) https://economictimes.indiatimes.com/news/defence/un-adopts-global-treaty-banning-nuclear-weapons-india-skips-talks/articleshow/59502052.cms (Accessed:28 April 2020)
[111] ibid
[112] *UN adopts global treaty banning nuclear weapons; India skips talks* (Economictimes.indiatimes.com) https://economictimes.indiatimes.com/news/defence/un-adopts-global-treaty-banning-nuclear-weapons-india-skips-talks/articleshow/59502052.cms (Accessed:28 April 2020)
[113] The idea initially arose in 2013 and the Summit was supposed to take place in 2018, however, UNGA decided to postpone the conference to a later date.

to the modernization of nuclear weapons, and would address the renewal and establishment of Nuclear-Weapon-Free Zones in the Middle East and in North-East Asia.[114]

According to the backbone structure of the United Nations, the UNSC is authorized with the power to take action or any kind of measure with the purpose of maintaining or restoring international peace and security. Establishing sanctions regimes and imposing different forms of sanctions, ranging "from comprehensive economic and trade sanctions to more targeted measures such as arms embargoes, travel bans, and financial or commodity restrictions,"[115] have served a large scale of goals, such as "to support peaceful transitions, deter non-constitutional changes, constrain terrorism, protect human rights and promote non-proliferation.[116]

The following section will list and scrutinize the economic and financial sanctions that have been agreed upon by the UNSC unanimously, in order to make an attempt to tame the nuclear activity of the DPRK after each illegal test that have been conducted through the years. The next table contains the sanctions imposed by the UNSC resolutions with regards to the DPRK"s nuclear activity, however, it does not include the general provisions and the details concerning the monitoring mechanisms established by the provisions.

Resolution number	**Date of adoption**	**Date of DPRK tests**	**Sanctions**
Resolution 1718	14 October, 2006	9 October, 2006	-Member States to prevent direct, indirect supply, sale or transfer of certain goods -did not apply to financial transactions
Resolution 1874	12 June, 2009	25 May, 2009	-scope of sanctions expanded to financial transactions, technical training -expansion of arms embargo -Member States are called to inspect vessels, refrain from new commitments regarding financial and credit institutions -prohibit financial support from Member States

[114] *'2018 UN High-level Conference on Nuclear Disarmament'* (Unfoldzero.org) http://www.unfoldzero.org/2018-un-high-level-conference-on-nuclear-disarmament/ (Accessed: 28 April 2020)
[115] *Information on Sanctions* (UN) https://www.un.org/securitycouncil/sanctions/information (Accessed: 28 April 2020)
[116] ibid

Resolution 2087	22 January, 2013	12 December, 2012	-sanctions list including individuals and entities subject to travel ban or asset freeze
Resolution 2094	7 March, 2013	12 February, 2013	-expanded list of prohibited goods, materials, items, technology, luxury goods -if DPRK-vessels deny inspection, entry to ports can be denied from Member States
Resolution 2270	2 March, 2016	6 January 2016	-ban on technical training, advice, service or assistance from Member States -ban on all arms and related material -mandatory inspection and asset freeze -expansion of sanctions list -limit placed on banking activities
Resolution 2321	30 November 2016	9 September 2016	-Member States are obliged to suspend scientific and technical collaboration -affects diplomatic relations: reduction in the number of staff, restriction on travels of DPRK government officials -ban on DPRK‟s export of minerals, iron, iron ore and coal -restriction on the amount of coal exports from the DPRK
Resolution 2356	2 June 2017	-	Further 14 individuals and 4 entities added to the travel ban list
Resolution 2371	5 August 2017	3 July and 28 July 2017	-the DPRK not to deploy chemical weapons -ban on export of several materials: coal, iron, iron ore, lead and lead ore -additional names and entities, materials and goods on the list -prohibition of joint ventures by the DPRK and other states

Resolution 2375	11 September 2017	2 September 2017	- Member States are prohibited from engaging in ship-to-ship transfers with DPRK vessels -ban oil and petroleum imports -restriction on the amount of crude oil that can be imported -ban on textile exports and overseas laborers are not provided with work -further entities, individuals on the list
Resolution 2397	22 December 2017	28 November 2017	- restriction on crude oil import, refined petroleum products -ban on export of food, agricultural products, machinery, electrical equipment -ban on import of earth and stone, wood, vessels -ban on seafood trade -further expansion of the sanction list -Member States are to seize and impound vessels caught smuggling

Table 4: UNSC Resolution adopted between 2006 and 2017

It is believed and confirmed that the leadership in the DPRK considers possessing and developing nuclear weapons as the sole "means to guarantee the survival of the country and [the] regime."[117] Presenting reasons, such as the examples of war games that the US government holds with its allies, to justify turning to nuclear strategy and, ultimately, considering nuclear weapons as effective means to "keep domestic and international enemies at bay."[118] Until today the response from the international community came in the form of serious condemnation, mostly in the form of economic and financial sanctions. Since 2006, when the DPRK conducted its first detected illegal underground nuclear activity, the SC has adopted nine sanctions so far, forming a new after each nuclear or missile activity of the DPRK. With the sanctions, and by increasing the severity of those, the UNSC aimed to highlight the disagreement of the international community

[117] Albert, July 2019.
[118] ibid

towards the utilization of nuclear energy and to stand up against the means that the DPRK was using its nuclear capacity for. Within the jurisdiction of the resolutions of the UNSC, the member states of the UN are entitled "to interdict and inspect [the DPRK] cargo within their territory and subsequently seize and dispose of illicit shipments."[119]

The resolutions in general contain general provisions in which the Security Council expresses its concerns regarding the most recent activities of the DPRK and points to the importance that Member States collaborate and cooperatively reject providing (direct or indirect) financial help for the further development of DPRK's nuclear or missile capability. The legal basis for the economic and financial sanctions imposed on the DPRK is served by Chapter VII (concerning *Action with respect to threats to the peace, breaches of the peace, and acts of aggression*), Article 41 of the Charter of the United Nations which entitles the Security Council to "decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures."[120] Due to the clarity of the threat that the illegal nuclear and missile tests meant for international peace and security, the SC has decided to impose numerous different sanctions touching upon the "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations,"[121]given that the DPRK failed to respond to the concerns and react to the consequences. After the adoption of Resolution 1718, the Security Council Sanctions Committee (1718 Committee) was established, within the framework of the monitoring mechanism, in order to monitor and review the sanctions and to monitor the potential future violations of those sanctions and make reports about the progress to the SC. In order to assist the work of the 1718 Committee, a Panel of Experts[122] was established with Resolution 1874 in 2009 and since then its mandate has been extended annually. Based on the scope of its work, the 1718 Committee deals with taking appropriate actions reacting to alleged violations against the sanctions; collecting information from Member States regarding how those implemented the measures in their countries; considering and deciding on exemptions from the measures; expanding the travel

[119] UN Security Council Resolutions on North Korea (Arms Control Association) https://www.armscontrol.org/factsheets/UN-Security-Council-Resolutions-on-North-Korea (Accessed: 28 April 2020)
[120] *Charter of the United Nations*, (San Francisco, 1945) Chapter VII, Article 41.
[121] ibid
[122] Consists of seven experts with the duties to assist the 1718 Committee, gather and analyze data, make recommendations and provide interim reports to the UNSC. (SC Resolution 1874 (2009))

ban list by designating individuals and entities; examining reports from Member States and the Panel of Experts; preparing reports to the UNSC every 90 days and conducting outreach activities.[123]

Resolution 1718, the first resolution in a series of attempts to regulate and sanction the rogue state, was adopted on 14 October 2006 after the nuclear test conducted on 9 October 2006 claimed by the DPRK. The SC, on behalf of the international community, acknowledged "that the test claimed by the DPRK has generated tension in the region and beyond, and […] that there is a clear threat to international peace and security."[124] The SC clearly pointed out that the DPRK does not have the authority to call itself a nuclear weapon state even though the leadership of the state took it as far as amending the constitution of the country where they described the state as being "an invincible politico-ideological power, a nuclear state and an unchallengeable military power, and opened a broad avenue for the building of a powerful socialist country."[125] In Resolution 1718, the withdrawal from the NPT, the inactivity in the Six-Party Talks and the evident neglect of the obligations under the Joint Statement are mentioned and the SC puts a great emphasis on highlighting the importance of participation in these ongoing negotiations and initiatives. The demand of the SC towards the DPRK to take responsibility for the consequences and avoid committing the same deeds against international peace and security was reaffirmed in every transcript issued on this matter and this commitment from the SC was intertwined with infinite support towards nonviolent dialogue and the belief that maintaining peaceful diplomatic relations will enable restoring peace and security on a global level.

In accordance with the Charter of the United Nations, Member States were called upon to "prevent the direct or indirect supply, sale or transfer to the DPRK […] of any battle tanks, armored combat vehicles, large caliber artillery systems,"[126] etc. certain goods and materials, and specific luxury goods. With Resolution 1718, at first, sanctions did not apply to financial or other assets because the essential objective was to prevent further improvement of nuclear technology and not to punish the population by cutting financial resources. Nonetheless, it appeared that the sanctions have failed to reach the expected outcome as the DPRK continued to conduct illegal nuclear and missile tests throughout the following years and did so disregarding the

[123] *1718 Sanctions Committee, 'Work and mandate of the Committee'* (UN) https://www.un.org/securitycouncil/sanctions/1718#background%20info (Accessed: 28 April 2020)
[124] UN SC Resolution 1718, 2006.
[125] Preamble of the Constitution of the DPRK (1972)
[126] UN SC Resolution 1718, 2006, paragraph 8.

condemnation of the international community. As the illegal activities of the DPRK did not seem to be affected by the sanctions, the SC in further resolutions (1874 passed in 2009, 2087 and 2094 both adopted in 2013, 2270 and 2320 both passed in 2016, 2371, 2375 and 2397 passing in 2017) has drawn up a system of economic and financial sanctions while expanding or modifying the scope of it after each violation, as well as creating a sanction list of specific individuals and entities who became subject to either travel ban or asset freeze[127].

As it was mentioned before, Member States were called on to act[128] according to Article 41 and with the expansion of the sanctions it also included inspection of all kinds of cargo going to and coming from the DPRK, the prohibition of "international financial and credit institutions […] to enter new commitments, expect for humanitarian and developmental purposes,"[129] and refraining from financially supporting the DPRK. Resolution 2087 (adopted on 22 January 2013), was the first decision to include the sanctions list of individuals and entities falling under the strict obligation of specified measures. With the adoption of Resolution 2087, a so-called Implementation Assistance Notice was issued for situations where DPRK-flagged vessels refused the on-board inspection from Member States. Resolution 2094, adopted on 7 March, 2013 has a different tone because the DPRK has continuously violated the previous resolutions and the SC expressed its concern over the DPRK "abusing the privileges and immunities accorded under the Vienna Convention"[130] by neglecting the regulations and acting against the determined sanctions.

Since the date of the first UNSC resolution, several rounds of further restrictive measures and decisions have been made from targeting areas of the DPRK's export system, affecting its import possibilities and gradually limiting its access to the international financial system. Despite the sanctions becoming harsher, it is done so with the deep belief that stricter measures would eventually bring the leadership of the rogue state to realize that stepping on the road to denuclearization and cooperating with the international community is a more plausible solution for the survival of the DPRK and better server the benefit of the people as well.

[127] The sanction list was added as an appendix to the resolutions and the new names were enclosed to the newly adopted resolutions.
[128] Even though the Member States have been repeatedly asked to cooperate and fulfill the obligations assigned by the resolutions, it is obvious that the DPRK continuously generates revenue through illegal means of trade, smuggling, etc. Furthermore, it is also widely known that the sanctions fail to fulfil their effectiveness because of certain states and companies that refuse to enforce or act according to these sanctions.
[129] Security Council Resolution 1874, 2009, paragraph 19.
[130] Security Council Resolution 2094, 2013.

2. Conclusion

Taking a closer look at cases, like this one with the DPRK, it can be concluded that even though multilateral efforts have been taken to prevent states like the DPRK from obtaining its own nuclear weapon program, it was only partially successful. After the collapse of the Agreed Framework in 2002, the short period of nuclear freeze in the DPRK, the state eventually returned to plutonium production, announced the development of its enrichment program and by today it had conducted several nuclear weapons and missile tests. It might be said that the issue was given enough attention, from the harsher economic and financial sanctions from the UNSC, but the contrary might be proven by the still existing threat from the DPRK and the absence of will to halt the tests and return to the NPT or the Safeguards agreement. Global disarmament is still a long way to be achieved in order to establish a system that is eligible for the majority and it is "equitable and nondiscriminatory"[131], but still necessary compliance, effective verification and proper enforcement under an ideal agreement can be approached if previous cases are observed and lessons are deducted from experiences, such as the one with the DPRK.

Regarding the possible potential solutions for the issue we can take into consideration those treaties that already exist but due to the absence of cooperation from the necessary number of participants to ratify them, they fail to enter into force and become effective. Theoretically, if the DPRK agrees to join the CTBT then the denuclearization of the Korean Peninsula would finally begin and the possibility of a nuclear war between the two Koreas would fade even more. On the contrary, the lack of a proper definition of denuclearization leaves some doors open for the DPRK. Nonetheless, the accession to the CTBT would also provide the DPRK with some drawbacks since "the provocative nuclear testing program would be ended, including limiting the DPRK, closing off numerous opportunities for the country to qualitatively improve nuclear weapons."[132] Provided the fact that the state has been deprived of the option to get hold of foreign technology transfers, advances for the country and opportunities for further technological development would also be either limited or eliminated. According to Herzog, verification measures lie at the heart of nuclear arms control. That is why the controversial aftermath of the demolition of test sites in the DPRK are so significant, given that no expert observers were present, and no scientific reports have been submitted.

[131] Carrell-Billiard and Wing, 32.
[132] Herzog, 2018.

A similar scenario can be drafted up in the case of the ratification of the TPNW. If both Koreas joined the TPNW, each state would be obliged to give up some of their current systems. For instance, South Korea would need to leave the American „nuclear umbrella" meaning that it would still be able to rely on American deterrence, but not nuclear deterrence. [133] While the DPRK would be obliged to draw up and implement a plan for the total elimination of its nuclear deterrence and would be expected to allow the proper verification and authorization by the IAEA. Altogether, these could lead to the elimination of nuclear threat on the Korean Peninsula and it would potentially lead to the normalization of the situation in the Northeast Asian region, as well for states to reconcile and put an end to regional hostility.

Another possibility is the establishment of a KJNWFZ which would create a legally binding framework for denuclearization with which the DPRK would be obliged to comply with. Regrettably, it is not likely that the DPRK would willingly join the KJNWFZ if it threatens its national sovereignty, which would likely happen since the nuclear program constitutes the important aspect of how the state positions itself in the global arena. Apart from that, the treaty establishing the zone would need to be tailored to the specificity of the region.

Personally, I think a revived agreed framework would not be well-functioning because if we consider the current administration in the United States, it does not seem to have the competence to conduct such an agreement that would be beneficial for the international community and acceptable for the DPRK, since after two rounds of talks the U.S and the DPRK failed to agree even on genuine commitments and establish solid grounds for further negotiations. I also believe that a collective approach, quite like the Six-Party Talks could be initiated, but only with cautious preparations in order to avoid overwhelming pressure which could trigger a counter-resistance in the form of a military or a nuclear attack if the leadership feels endangered. After all, the requirements seem to remain incompatible between the parties and this knot cannot be untied until a common ground is established, or until the parties are willing to compromise on certain aspects of their authority.

Drawing an inference, it seems that currently the circumstances are not appropriate enough for the creation of an effective sanctions regime that would be able to carry out its original purpose. This can be attributed with the malfunctioning of the UNSC in a sense that the

[133] *Koreas Summit shows the power of diplomacy* (ICAN)
https://www.icanw.org/koreas_summit_shows_the_power_of_diplomacy (Accessed: 28 April 2020)

power balance is uneven and misfitting for the relations in the 21st century. What is more, it is undeniable that the nuclear-weapons states and their potential disagreement with certain provisions of the agreements that would restrict their interests affects the outcome and efficacy of any attempt towards denuclearization, disarmament initiatives or sanctions.

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List of Abbreviations

ABMT	*Anti-Ballistic Missile Treaty*
ANWFZ	*African Nuclear Weapon Free Zone*
CANWFZ	*Central Asia Nuclear Weapon Free Zone*
CD	*Conference on Disarmament*
CTBT	*Comprehensive Nuclear-Test-Ban Treaty*
CTBTO	*Comprehensive Nuclear-Test-Ban Treaty Organization*
DPRK	*Democratic People's Republic of Korea*
IAEA	*International Atomic Energy Agency*
ICBM	*Intercontinental Ballistic Missile*
ICJ	*International Court of Justice*
IMF	*International Monetary Fund*
IMS	*International Monitoring System*
NATO	*North Atlantic Treaty Organization*
NWFZ	*Nuclear Weapon-Free Zone*
NNWS	*Non-Nuclear Weapon State*
NPT	*Nuclear Non-Proliferation Treaty*
NWS	*Nuclear Weapon State*
KJNWFZ	*Korea-Japan Nuclear Weapon Free Zone*
LANWFZ	*Latin American Nuclear Weapon Free Zone*
OAU	*Organization of African Unity*
OEWG	*Open-ended Working Group*

OPANAL	*Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean*
PTBT	*Partial Nuclear-Test-Ban Treaty*
SALT	*Strategic Arms Limitation Talks*
SEANWFZ	*Southeast Asian Nuclear Weapon Free Zone*
SPNWFZ	*South Pacific Nuclear Weapon Free Zone*
SSOD	*Special Session on Disarmament*
THAAD	*Terminal High Altitude Area Defense*
TPNW	*Treaty on the Prohibition of Nuclear Weapons*
UN	*United Nations*
UNAEC	*United Nations Atomic Energy Commission*
UNDC	*United Nations Disarmament Commission*
UNDP	*United Nations Development Program*
UNIDIR	*United Nations Institute for Disarmament Research*
UNGA	*United Nations General Assembly*
UNODA	*United Nations Office for Disarmament Affairs*
UNSC	*United Nations Security Council*
USSR	*United Soviet Socialist Republics*
KEDO	*Korean Peninsula Energy Development Organization*
LWR	*Light-water Reactor*
PRC	*People's Republic of China*
ROK	*Republic of Korea*
WMD	*Weapons of Mass Destruction*

Új vallási mozgalmak a jog és a technológia tükrében

Ormándi Kristóf[1]

Bevezetés

Ezt a *working paper*t a korábbi, *Kalózok vagy szentek?* c. esszém egyfajta folytatásának, kiegészítésének szánom.[2] Bár a kettő célja nem egyezik meg teljesen, közel azonos a célkitűzés illetve a kutatási téma, amelyet a két írás körüljár. Korábbi írásomban az adatmegosztásra kiemelt hangsúlyt helyező új vallási mozgalmak, így különösen a *kopimizmus* helyzetéről, bejegyzett vallássá válásáról, jogi problémáiról írtam; jelen esszében célom más, újabb szempontok szerint elemezni e vallási közösség működését, valamint más *új vallási mozgalmak*ét (*new religious movement, NRM*) és összehasonlítani ezeket. Majd ezen összehasonlítás alapján kategorizálni, ideáltípusok szerint csoportosítani ezeket a mozgalmakat. A fő szempont a joghoz (mint társadalmi jelenséghez), illetve a tudomány és technológia jelenlegi állásához fűződő álláspontjuk.

Ez az írás „elődjéhez" hasonlóan leginkább összehasonlító módszerrel, a nemzetközi jog, polgári jog, jogelmélet, szociológia specifikus kérdései felől közelíti meg a témát. A téma orientációja már eleve meghatározza a kutatás interdiszclipináris jellegét. Korábban a Kopimista Misszós Egyház rítusaira, tevékenységére, jogi szempontrendszer alapján való értékelésére összpontosítottam. Azonban ahhoz, hogy átfogóbb ismereteket legyen képes eme esszé közvetíteni, érdemes szemügyre venni a többi, akár teljesen eltérő indíttatású mozgalmat (valamint ezek hozzáállását említett kérdésekhez) is, amelyek az európai (és így a hazai) közélet, vallási élet részét képezik.

Az internet, az adatközlési technológiák és a modernitással együtt járó pozitívumok, illetve negatívumok rohamos terjedése társadalmunk egyetlen szegletét sem kíméli. A vallás társadalmi jelensége az e világon kívül eső okokat és jelenségeket keresi, fogadja be a hit által, ezért épp ezt a társadalmi alrendszert érinthetik legkevésbé érzékenyen a változások; azonban – mint azt *Yinger* és más szociológusok megállapították - a szabályok ezen a téren sincsenek kőbe vésve. A régi, fejlődésre és adaptálódásra képtelen vallási formák fokozatosan zsákutcába szorulnak, és a helyükre új, a mai környezethez adaptálódó, fejlődésben és mozgásban levő formák, szervezetek, rendszerek, szertartások kerülnek. [3] Ezt mutatja a kopimista vallás – pár évre visszatekintő – története is: a barátok közt tréfából megalapított vallási mozgalom mára már komoly és Internet-szerte ismert, követett, több országban bejegyzett egyházzá vált.

Azonban nem kell egy egyháznak a technológia és haladás osztatlan elfogadását hirdetni: sok vallás sikere épp a konzervatív személyek megszólításában van, ezek jellemzően negatívan viszonyulnak a modernizációhoz. Illetve vannak olyan NRM-ek is, amelyek a modernizáció bizonyos elemeit elfogadják, vagy akár „szükséges rossznak" tekintik, más elemeihez, illetve más technológiákhoz pedig elutasító módon állnak. Mindezen álláspontok illusztrálása és példákkal való alátámasztása lesz esszém egyik fő célkitűzése.

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[1] A szerző a Szegedi Tudományegyetem Állam-és Jogtudományi Karának doktorandusza. (SZTE ÁJTK ÖJJI)

[2] Ormándi Kristóf: Kalózok vagy szentek?: Az adatmegosztás és a vallási mozgalmak egyes jogi kérdéseiről. *Comparative Law Working Papers,* Volume 4. No. 1. 2020. http://www2.oji.u-szeged.hu/web2/images/stories/kopimizmus_ormandi.pdf (U.m. 2021. 01. 13.)

[3] Ld. pl Yinger, J. Milton: *Religion, Society and the Individual*. Macmillan, NY, 1968. 33.

1. A Kopimista Missziós Egyház helyzete, álláspontjai és validitása

A *kopimista vallás* létrejöttét, intézményrendszerét és elért eredményeit már korábbi írásomban tárgyaltam;[4] most e vallással kapcsolatos szakirodalom és az új perspektívák alapján törekszem meghatározni kialakult helyzetét, és hogy a technika, különösen az adatmegosztás iránti kivételes fogékonysága, illetve ezen „esszencia" megragadása és vallási köntösbe öltöztetése hogyan befolyásolta a szervezet tagságának, kritikusainak, ellenlábasainak életét. Ez a jellemzés főleg a jogilag releváns tényeket veszi szempontul, de egyes valláskutatók szakmai, illetve szubjektív álláspontjainak bemutatása is az elemzés részét képezi. A kopimizmus mint vallási jelenség (az alapítók álláspontja szerint) már 2010 óta, több mint egy évtizede létezik, azonban csak a tízes évek első felében vált ismertté.[5] Tagjainak száma a bejegyzett egyházzá válás után rohamosan nőtt, rövidesen elérte a 8500 főt. Manapság már több mint egy tucat országban vannak káptalanjai (chapter), és egyre nő a vallás teológiai szövegeinek száma. [6] De miért vált a „kalózok vallása", ez a kezdetben társadalmi csínyből kinőtt új vallási mozgalom ilyen elterjedtté és széles körben elfogadottá? Vajon pusztán viccnek és politikai állásfogalásnak tekinthető? Értelmezhetjük ezt valóban autentikus hitrendszerként, amely ideológiai intergritással és következetességgel bír, amely általában a „legitim vallások" sajátja?

Bár a tények alapján mindkét verzió alátámasztható, Sinnreich egy harmadik álláspontot képvisel, mégpedig, hogy a kopimizmus egy olyan hitrendszer alapjait fekteti le, amely különleges módon alkalmas a „*hálózati kor*" társadalmi berendezkedését kiszolgálni, és az információ episztemológiai minőségét átérezni, kinyilatkoztatni. Felületes újszerűségét leszámítva e vallás olyan keresztény és pogány tanításokat visszhangoz, amelyek stratégiailag megerősítik doktrinális hátterét, miközben gyengítik a szerzői jogok dominanciáját azzal, hogy egy velük merőlegesen szembe menő vallási álláspontot képviselnek.[7] [8] Bár a kopimista tanokkal tudományosan foglalkozók egyfajta exegézis vagy etnológiai kutatás módján próbálták meg a vallást és annak szent szövegeit értelmezni, egy komplexebb megközelítés, vagyis a vallás, a jog és és értékrendek közti diskurzuselemzés gazdagabb eredménnyel járhat. A kopimizmus követőitől nem idegen az abszurd és cinikus világlátás, emiatt bizonyos összefüggés vonható e NRM és a Cussack által úgynevezett fiktív vallások (invented religions között)[9], amelyre példák a „pasztafarianizmus" vagy a „jediizmus". Ezek valójában a szervezett vallás teljes elutasítását teszik meg célul. Ez a tény viszont önmagában nem képes a kopimizmus eredetiségét megcáfolni, hiszen számos bevett vallás alapítói is fiatalok és excentrikusak voltak Egy vallás rituáléi és hagyományai a nem hívők számára abszurdnak és nevetségesnek hathatnak. A fiktív vallásokkal szemben a kopimizmus több mint retorikai kísérlet, ún. *reductio ad absurdum*, ami a vallás képtelenségét igyekszik támadni.

A kopimista ideológia gyökerei a kommerciális érdekeket kiszolgáló szerzői joggal szembe helyezkedő, digitális információcserét éltető álláspontok, amelyek a *Kalózpárt* kialakulásában is fontos szerepet játszottak. A kopimista egyház egyik alapító tagja, *Engström* nyilatkozata szerint „*létezik kalóz ideológia, ennek a vallási megnyilvánulása a*

[4] Ormándi i.m.
[5] A svéd kormány erre szakosodott szerve (*Kammarkollegiet*, Pénzügyi és Adminisztrációs Ügynökség) a bejegyzett egyházak sorába 2012-ben felvette a Kopimista Missziós Egyházat.
[6] Sinnreich, Aram: Sharing in spirit: Kopimism and the digital Eucharist, *Information, Communication & Society*, 19:4, 504-517.
[7] Uo. 507.
[8] A kopimizmus és a szerzői jogok közti versengés tekintetében lásd pl. Ormándi i.m. 1-3.
[9] Cusack, C. M : *Invented religions: Imagination, fiction and faith*. Ashgate, Burlington, VT, 2010.

kopimizmus."[10] Azonban a kopimizmus nem a kalóz ideológia egyházi ruhába öltöztetett változata, hanem az információnak az emberi életben betöltött szerepének spirituális értelmezése; erkölcsi elveit az információ létrehozása és terjesztése körüli etikai megfontolások határozzák meg.[11] A vallásalapító *Isak Gerson*, aki kereszténykén és kopimistaként is azonosítja magát, „*itt valami szentről kell beszélnünk, hogy leírjuk [az információ fontosságát], ez olyan nagy dolog.*"[12] A kopimizmus legalapvetőbb elve, hogy az infomáció szent. A „Kopimista evangélium" (*A Kopimist Gospel*) című szent szöveg szerint: „*Számunkra ismeretlen és még felderítésre váró okok következtében, a riboszómák megjelentek, amik másolódni tudtak.Ez volt az Élet kezdete. Ezáltal a Másolást látjuk az Isteni Szellem első manifesztációjának.*"[13] Más kopimisták is megerősítették ezt a hitet, hogy a „kopimi az élet alapvető értelme". Az információ szakrális tisztelete az ún. *kopyacting*-ben nyilvánul meg: az információ értékét úgy imádják, hogy lemásolják.[14] Egy másik alapvető kopimista nézet, hogy az információ minden ember veleszületett joga. A kopimisták úgy gondolják, hogy (informatikai) forráskódot eltitkolni a rabszolgatartással egyenlő súlyú bűn, és hogy a szellemi tulajdonjogot védő törvények förtelmes megsértései az intellektuális szuverenitásnak és szabadságnak.

Van egy további alapelv, amely megcáfolni látszik a kopimistákat egyszerű kalóznak definiáló véleményeket. A *copymixing* (keverve másolás) e vallás meggyőződése szerint egy szent formája a másolásnak, mivel kiterjeszti és javítja az ismert információk körét. Tehát pl. a hithű kopimistának a *Csillagok háborúja* film torrent oldalon történő egyszerű megosztása kevesebb örömet okoz, mint ugyanennek a mixelt változata. A kopimisták számára fontos a személyi szabadság (privacy) védelme: a liturgiákról tilos felvételt készíteni, az adatokat a hívek kötelesek védett formában továbbítani. A személyes adatok megosztása nem tartozik a kopimi körébe, mivel a szakrális információk azok, amelyek közérdekűek, vélhetően sokak érdeklődési körébe tartoznak. A kopimista vallás úgy tartja, az állam és annak törvényei alsóbbrendűek a vallás előírásaihoz képest. Különösen aktív szerepet vállalnak a (nem ritkán átpolitizált) szerzői jogi törvények tagadásában. A Kopimista Egyház weboldala szerint „*az információs technológiát nem köthetik gúzsba a törvények.*"[15] A kopimista *op*ok (papok) aktivista szerepet játszanak az információszabadság kikövetelésében, és instruálják a híveket arra, hogy miként védjék meg a személyes és információs szabadságaikat.

2. Történeti-jogelméleti áttekintés

Mint azt az előző tanulmány is ismertette, a másolás mint szent tevékenység nem újkeletű dolog, az ókori és kora középkori kereszténységben is szakrális jelentőséggel bírt. A Karoling-korszakban több ezer kódexet másoltak át kézzel hithű szerzetesek; illetve a kódexek maguk is gyakran konkrét intézkedéseket tartalmaztak annak érdekében, hogy az információ minél pontosabban másolódjon át egyik „fizikai tárolóról" a másikra. Nem téves tehát az a megállapítás, hogy a kopimisták az ó-és középkori kereszténység egyes aspektusait, álláspontjait alkalmazzák modern világunkban.

[10] Idézi Sinnreich, 2016.
[11] Sinnreich i.m.
[12] Idézi Sinnreich, 2016.
[13] Engström, Christian: *A Kopimist Gospel. Book 1: The Creation*. [e-book], 2. https://christianengstrom.files.wordpress.com/2013/01/a-kopimist-gospel-book-1.pdf
[14] Sinnreich i.m.
[15] Kopimistsamtfundet: *Welcome to the missionary church of kopimism*. https://kopimistsamfundet.se/english/ (U.m. 2020. 01. 13.)

A másik fő kérdéskör azonban a vallási entitások és a technológia (illetve a jog és társadalmi berendezkedés) viszonya. Az ebben a témában keletkezett releváns szakirodalom álláspontja afelé hajlik, hogy az NRM-ek általában – kevés kivétellel - fogékonyak a technológiai újításokra és előszeretettel alkalmazzák azokat hitük megélésében, önmaguk és tanaik népszerűsítése gyanánt, illetőleg a hittérítésben.[16] A *Weber* és *Durkheim* munkái által felállított „*egyház*" és „*szekta*" ideáltípusok alapján az a prekoncepciónk támadhat, hogy az egyházak azaz a (jelen esetben) még kicsi és feltörekvő vallási mozgalmak általában elfogadóak és pozitívek a társadalmi renddel szemben, míg a szekták alapvetően kirekesztő mentalitással bírnak, a társadalom értékrendjét tagadók.[17] Ez alapfeltevésként megállja a helyét, viszont gyakran jelentkeznek kivételek, amely többek között az elmúlt évszázad trendjeinek hatására gyökeresen átalakult világunk miatt van így. Általánosságban elmondható, hogy minden egyes népszerű álláspont vagy mentalitás képviselői megtalálhatják a saját igényeikre szabott vallást: az ultrakonzervatívoktól a hippiken át a jövő zenéje iránt áhítozó újítókig számtalan vallás és meggyőződés kínálja fel lelki „portékáit".

3. Más vallási mozgalmak gyakorlata és hozzáállása

Bár az „új vallási mozgalom" kifejezés alapján az az előítéletünk támadhat, hogy ezen mozgalmak a régi, megrögzött egyházakkal, vallási formákkal való szakítás jegyében „magukévá teszik" a modernitást annak eszköztárával együtt, vannak olyan új vallások – jellemzően egy régebbi vallási tradíció továbbvivői vagy abból kivált „szekta" entitások – amelyek kifejezetten elítélik a modern világlátást. Ilyen például a Krisna-tudatú Hívek Egyháza (ISKCON) vallás, amelynek hangadói egészen a '90-es évek közepéig elítélték a modern tudományba és a haladásba vetett hitet, helyette azt hangoztatták, hogy az indiai istenek szó szerint, nem metaforikus értelemben ezen a világon léteznek.[18]

Megjegyzés: ez a working paper jelenleg még nem teljes. A hiányzó adatok és információk feltöltése, kiegészítése folyamatban, a kész verzió megjelenéséig az Olvasók szíves türelmét és megértését kérem. A szerző.

[16] Herzfeld, Noreen: Introduction: Religion and the New Technologies in Herzfeld, Noreen (ed.): *Religion and the New Technologies*. MDPI, 2017. 1-4. ; Hexham, Irving – Poewe, Karla: Modernity and the New Mythology in *Understanding Cults and New Religions*. Eerdman's Publishing Company, Michigan, 1986. 46-60.
[17] Ld. pl. Török Péter: *És (a)mikor destruktívak? Az új vallási mozgalmak szociológiája és hazai helyzete.* Interdiszclipináris szakkönyvtár 5. Semmelweis Egyetem, Budapest, 2011. 86-93.
[18] Chryssides, George – Wilkins,Margaret Z.: *A Reader in New Religious Movements*. Continuum, London, 2006. 254-259.

Counter-Terrorism Legislation as a Proxy for "Improper Influence" in the Judiciary by the Executive and Legislature

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Abstract

In this article, counter-terrorism law provides a suitable proxy for the dyadic influence of the executive and the legislature on the judiciary. Counter-terrorism law of a democratic nation is often a product of both the executive and the legislative branches of government. Yet this law has substantial bearing on the independence of the judiciary. The present paper employs it as a substituted measure (proxy variable) of the executive and the legislative influence on the judiciary.

1. Introduction

There are several ways that both the executive and the legislature can influence the judiciary, either directly, or indirectly. However, there are other subtle ways that judicial independence can be threatened by the dyadic influence of the executive and the legislature. Over the last two decades, states have adopted increasingly robust counter-terrorism laws and policies. Frequent terrorist attacks experienced over that period reaffirmed the continued importance of strengthening the administration of justice, particularly in western democracies where such attacks became prevalent. The enhancement of the administration of justice therefore means the maintenance of legal rights within a political community by means of the physical force of the state. The strengthening of legal rights and the use of physical force by the state to combat and prevent terrorist acts and activities has been perceived as a step in the right direction and a measure to ensuring national security preservation. UN Security Council Resolution 1373 and subsequent related resolutions require states to implement laws and measures to improve their ability to prevent terrorist acts. Various western states have therefore recently adopted what is commonly referred to as "counter-terrorism laws." While counter-terrorism laws existed in many countries even prior to the September 11, 2001 (9/11) attacks on the US soil, such laws were not as "aggressive" as the new ones. Besides, the immediate response by the international community in the fight against terrorism serve as a catalyst for states to develop new measures and strengthen existing laws. These measures include criminalizing the financing of terrorism; freezing the funds of individuals involved in acts of terrorism; denying financial support to terrorist groups;

cooperating with other governments to share information; and investigating, detecting, arresting, and prosecuting individuals and entities involved in terrorist acts.[1]

In trying to understand how counter-terrorism law has affected the administration of criminal justice, and the independence of the judiciary, particularly in western democracies, the present paper addresses the relationship between the criminal justice system and terror suspects. The assumption being made here is that, terror suspects are "innocent till proven guilty." Indeed, Article 11 of the United Nations Universal Declaration of Human Rights, affirms that "Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defense."[2] Terror suspects are, therefore, not terror criminals, or guilty, unless and until the court of justice renders a "guilty" verdict. Terrorists who have been proven guilty deserve proportionate punishment through the full force of the law. However, terror suspects under the custody of the state and are yet to be arraigned before the court of justice, deserve certain rights. They deserve the due process right and the right to fair trial within the ambit of the criminal justice system. But the due process and fair trial can only be realized if they rely on procedures that respect human dignity and equal treatment for all criminal suspects.

Although counter-terrorism laws existed in many western nations prior to the 2001 attacks, the magnitude of the 9/11 attacks impelled the immediate response by the international community to develop new measures aimed at strengthening existing laws. Even though diversity emerge in the organizational structure, as well as the administrative model of the judicial systems in western liberal democracies, the world of modern constitutional state is characterized by significant convergence, rather than divergence, particularly in the direction of judicial independence, transparency, accountability, and efficiency. Increasingly, therefore, there is homogeneity that define and characterizes similarities in trends and, indeed, the traditional differentiating characteristics of legal families are fading. This makes comparison on regional level very necessary.[3]

Yet tensions between these two areas of law and policy have emerged in recent years, resulting in challenges for governments and humanitarian actors. Although western democracies have laid a strong foundation for judicial independence, the independence of the judiciary still faces practical challenges in these democracies, particularly when it comes to the administration of criminal justice for terrorist suspects. Despite the western countries creating essential aspects of ensuring judicial independence such as, institutional structures, constitutional infrastructure, legislative provisions and constitutional safeguards, adjudicative arrangements and jurisprudence, and maintaining ethical traditions and a code of judicial conduct, there still exists improper influence,

[1] BURNISKE, Jessica; MODIRZADEH, K. Naz; LEWIS, A. Dustin. *Counter-terrorism laws and regulations: what aid agencies need to know*. Humanitarian Practice Network. No.79. November, 2014, p.3.

[2] https://www.humanrights.com/what-are-human-rights/universal-declaration-of-human-rights/articles-11-20.html. Retrieved on December 17, 2020.

[3] FLECK, Zoltan. (2014). A Comparative Analysis of Judicial Power, Organizational Issues in Judicature and the Administration of Courts. In "*Fair Trial and Judicial Independence: Hungarian Perspectives*." (2014). BADO, Attila. (Ed). Switzerland: Springer International Publishing.

particularly on the administration of criminal justice by the state. Indeed, these essential aspects serve to insulate judges from the external pressure and the improper influence on the judiciary by the two other branches of the government (executive and legislature). Yet, even though these aspects are necessary and underpin the legitimacy of the institutional independence of the judicial branch, judicial systems are not fully free from political influence. This paper argues that the political control of the judiciary is well subsumed in the state's power to preserve national security. The contemporary national security legislations in the name of counter-terrorism law, allocate more powers to the state the "new" powers often

As John Salmond observes, the administration of justice implies, "the maintenance of rights within a political community by means of the physical force of the state."[4] While Salmond is right that the maintenance of rights (law and order) in society requires the use of physical force by the state, the physical force must also be guided or tamed by a body of laws that limits the hard-power of the state. This suggests that all state agencies and state actors must also adhere to, and respect the rule of law. But Salmond warns that although, the law is, without doubt, a remedy for greater evils, it also brings with it evils of its own. In the present paper, it is argued that although the counter-terrorism law is necessary remedy the evils commissioned by terrorists, the same law also brings with it other evils such as infringing on liberty and decreasing the likelihood of achieving a fair process in judicial trial. Counter-terrorism law essentially creates two different institutional cultures within the criminal justice system for terror suspects. On the one hand, there is the culture that does not necessarily believe in the ideals of fundamental justice and, hence espouse the use of disproportionate force, and longer pretrial detention for terror suspects. This culture is headed by the executive branch of government. On the other hand, there is the culture that observes the hygiene of the rule of law, due process, fair trial, and ideals of fundamental justice. This culture is headed by the judicial branch. When these two different institutional cultures live together within the criminal justice system, conflicts based on "intense constitutional dissension" increase.

2. Counter-terrorism Legislation as Proxy for the Executive and Legislative Dyadic Action

In the present study, a proxy scheme is herein adopted to account for the "improper influence" on the judiciary by the executive and legislative actions. It must be borne in mind that the executive and the legislature are key political players whose actions can potentially impact on the judicial performance. More pivotal, the executive and the legislature are two important political organs whose consensus is necessary for legislation and policymaking. The assumption is made here that the quality of relationship between the executive and the legislature in democracies is more likely to improve in periods of high-level national security threats. This implies that in times of high-level terrorist threats, both the executive and the legislature are more likely to build consensus or form a joint action in shaping their policy preferences on terrorism intervention measures. This commonly adopted policy preferences by both the executive and the legislature, is assigned the name "dyadic action," in the present study. It entails a joint action between the two political organs in decision making on matters important to the national security preservation. In this case, the focus is particularly on new national security legislation on terrorism prevention. It is this

[4] SALMOND, W. John. (1902). *Jurisprudence OR The Theory of the Law*. Temple Bar: London, Stevens and Haynes Bell Yard, p.14.

legislation that is implicated in bringing into play "improper influence" upon the competency of the judicial branch, through the executive and legislative dyadic action. The new national security legislation on terrorism prevention is referred herein as "counter-terrorism legislation" or interchangeably as "counter-terrorism laws". They refer to laws passed by the legislature with a view to combating terrorism and protecting the national security. In the subsequent paragraph, we explicate how counter-terrorism legislation (dyadic action) serves as a suitable proxy for the improper influence on the judicial power by both the executive and the legislature.

Since counter-terrorism legislation is a policy action adopted by the dyadic action between the executive and the legislature, it can be deduced that there is a positive correlation between counter-terrorism legislation and the dyadic action. The implication being that the dyadic action by the executive and the legislature is subsumed in the counter-terrorism legislation. In other words, counter-terrorism legislation is a suitable proxy for, or a suitable substitute of, the executive and legislative joint action (dyadic action). This national security law deserves considerable attention. Firstly, to a great extent, it materially deviates from the ordinary criminal law. It is designed to sanction administrative detention. This kind of detention allows for arrest and detention of individuals by the State without trial. Secondly, it permits prolonged pre-trial custody, which undermines the right to *habeas corpus,* and the right of arrestees to contact their family. Thirdly, it denies many suspects the right to be represented by a lawyer during the arrest, investigation, and atrial. Fourthly, it presumes that the existing criminal procedure code is ill-suited to handle the specific challenges presented by terrorism, and that the ordinary criminal law's reliance on suspect's rights and the strict evidentiary rules are not effective enough to remove the threat of dangerous terrorists. Sixthly, while criminal prosecutions are normally designed primarily to punish past crimes (criminal proceedings have a retrospective focus), counter-terrorism law is aims to prevent future action. It is remarkable to add that administrative detention does not require proof of individual guilt. It attributes to all members of a certain group the actions of a few. Such action by the State goes against the International Covenant on Civil and Political Rights, which protect individuals' freedom from infringement by governments.[5] Thus, the improper influence on the judicial power by the executive and legislative dyadic action unfolds against the backdrop of counter-terrorism legislation. Consequently, we elucidate how counter-terrorism legislation adversely impacts the judicial power- competency.

3. Counter-terrorism Laws and Improper Influence on the Judicial Power

Counter-terrorism laws have become part of an effective scheme by the executive and the legislature to unlawfully invade and "chip off" the "judicial power." It is respectfully submitted in the present study that counter-terrorism laws pose potential threat to judicial power and judicial independence. It is therefore necessary to illustrate with robustness, how counter-terrorism laws potentially weaken the judicial power and hence pose significant threat to judicial independence in democracies. Our delving into the relationship between counter-terrorism laws and the judicial power is premised upon the presumed "improper influence" exerted upon the judiciary by the joint action (dyadic action) between the execute and the legislature. Justice Miller, in his work on the Constitution defined the concept of judicial power as "the power of courts of justice to decide and

[5] https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx. Retrieved on September 12, 2020.

pronounce a judgement and carry it into effect between persons and parties who bring a case before it for decisions."[6]

It is important to examine criminal justice system in the age of terrorism. The focus here, therefore, is on the relationship between counter-terrorism legislation and the impartial judicial decision-making within the criminal justice system. The bountiful literatures on judicial systems systematically examine how different rules, institutional structures, and incentives determine the concept of judicial independence. Scholars, for instance, have shown that only genuine and credible judicial reforms are likely to safeguard judicial independence and create guarantee of fair trial.[7] These credible reforms and incentives include fair selection of judges, automatic case allocation schemes, autonomous budget for the judiciary, and judicial security of tenure. While many western democracies have fulfilled most, if not all, of these crucial aspects for legitimizing judicial independence, it is often perceived that these essential aspects produce desired balanced judicial outcomes in western democracies. However, the relational outcomes between judicial reforms and judicial independence often circle back. This is likely to happen, especially when the executive is desirous of curtailing judicial independence.

There are a number of reasons, however, which are likely to force the state to become desirous of the curtailment of judicial independence. One of them is politics, and especially when the government wants to respond to national security threats in heavy-handed ways that violate the rights of individuals. For instance, in the United Kingdom (UK), courts only have the authority to review the validity of delegated legislation, but not primary legislation. Indeed, parliamentary sovereignty places an important limit on the power of the UK courts. Although the Human Rights Act 1998 is said to have imposed some limits on parliament, this could be more theoretical than practical. The UK judiciary is still incapable of legally invalidating primary legislation under the constitutional doctrine of parliamentary sovereignty. This provides parliament with ultimate legal control. This induces the government to look for ways of single-handed decisions and thus weakening the judicial autonomy. In some cases, the government is desirous of judicial loyalty in order to make the judiciary defer and rule in favor of crucial government policies that the ruling party seeks to implement. Judicial loyalty to the executive is likely to happen when the executive succeeds in weakening the judicial self-governing bodies.[8] There are mixed accounts, however, of how far the government has succeeded in securing judicial loyalty, particularly in western democracies. One of the government's failures in coercing judicial loyalty in western democracies is due to the strict adherence to the principle of the separation of powers.

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[6] THOM, Pembroke Alfred. (1912). *The Judicial Power and the Power of Congress in Its Relation to the United States Courts: Argument of Alfred P. Thom in Opposition to Senate Bills 4365 and 4366, Prohibiting the Granting, by Any Court, of Injunction in Certain Cases*. U.S. Government Printing Office, p.5.

[7] FLECK, Zoltan; BADO, Attila; SZARVAS, Kata. (2014). Fair Trial and Judicial Independence in Comparative Perspectives. In "*Fair Trial and Judicial Independence: Hungarian Perspectives*." (2014). BADO, Attila. (Ed). Switzerland: Springer International Publishing.

[8] BADO, Attila. Political, merit-based and nepotic elements in the selection of Hungarian judges. A possible way of creating judicial loyalty in East Central Europe. *International Journals of the Legal Profession*. Routledge, Taylor and Francis Group. 2016.

The concept of separation of powers has been entrenched in the constitutional documents. It would have been good to observe and specify improper influence of the executive and legislature in the judiciary. However, the prospect of making such direct observation, where the executive and the legislature directly exert their undue influence in the judiciary is sometimes practically impossible, especially in constitutional democracies. Proxy variables in research, is a variable that is not easily captured in a date series, yet it impacts the dependent variable in a significant way. Research on the improper influence in the judicial branch by the executive and judiciary have long focused on….Yet little attention has been paid to proxy alternatives. In the present paper, undue influence in the judiciary by the executive and legislature is proxied as "counter-terrorism legislation."

Using counter-terrorism law as a substitute for specifying the improper influence in the judiciary by the executive and legislature can be said to be valid insofar as it captures the dyadic action by the two political organs that exerts pressure on the judiciary to endorse government security policy that negates the letter and the spirit of the fundamental law (constitution). Counter-terrorism law has been argued to chip off the constitutionally protected rights of individuals.[9] For instance, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA-PATRIOT) Act 2001, which was immediately created as a counter-terrorism law after the 9/11 provides more power to security agencies to conduct warrantless searches, and if necessary, warrantless intrusions without obtaining probable cause search warrant from the court of justice. This action by the executive in the name of national security law, goes against the Fourth Amendment protection, which provides individuals constitutional protection from unreasonable searches and seizures by the government.[10] The only time a warrantless search and seizure could be allowed without probable cause is where their reasonable procurement is impracticable. But it is interesting to remark that the U.S. Supreme Court in, *Olmstead v. United States*, upheld the unwarranted use of wiretaps to intercept the conversations of the defendant and others in a criminal investigation.[11] However, it must be understood that the Court was only categorical on telephone wire taps, but refused to extend that exception to "persons, houses, papers, and effects, as expressed in the Fourth Amendment language.[12] This implies that the government can remotely intercept or wiretap private conversations without obtaining a warrant. The Supreme Court seemed to have relied upon the concept of "tangible property" when pronouncing itself in *Olmstead*.

In 1967, however, the Supreme Court broadened its interpretation in *Olmstead* when deciding in *Katz v. United States,* to include searches of people as well as places.[13] But it asserted that first, the court must decide whether the individual had a subjective expectation of privacy. If the answer is yes, the court must then determine whether society objectively recognizes that individual's expectation of privacy. The Court pronounced that the government's eavesdropping activities violated the privacy upon which petitioner justifiably relied while using the telephone booth. This

[9] EVANS, C. Jennifer. Hijacking Civil Liberties: The USA PATRIOT Act of 2001. *Loyola University Chicago Law Journal*. Volume 33, Issue 4, 2002.
[10] https://constitution.congress.gov/constitution/amendment-4/. Retrieved on November 28, 2020.
[11] Olmstead, 277 U.S. at 438.
[12]U.S. CONST. amend. IV.
[13] Katz v. United States, 389 U.S. 347 (1967).

is a classic example where we see the Supreme Court seems to be affirming the Fourth Amendment constitutional foundation in favor of civil liberty protection, by asserting that the word "privacy" entails the privacy of people in their homes as well as any other place outside their homes that they might find themselves in. This broadened interpretation seems to protect privacy to almost everything. *Katz* seems to strengthen public trust and confidence in the judiciary as the guardian of the constitution and the protector of rights.

Counter-terrorism law is basically a body of laws adopted by the state to deter and punish terrorist acts and activities, and to prevent terrorist groups from being able to threaten state security, disrupt law and order, and cause harm to innocent civilians. Although counter-terrorism law is a notable national security legislation in many western constitutional democracies, it considerably weakens and regresses criminal justice reforms. There have been complaints that counter-terrorism laws have introduced different rules of criminal procedure. The legal principles under counter-terrorism laws also seem to be applied on a discriminatory basis. This has been said to interfere with the due process, and fair trial in criminal law. For instance, the USA-PATRIOT Act 2001, was immediately created as a counter-terrorism law after the 9/11, with increased power of government agencies to combat violent terror machinations plotted against the U.S. by Islamic extremists.[14] At the same time, special military tribunals were established by the U.S. president through an executive order to try non-US citizen terror suspects.[15] Detailed discussion on how counter-terrorism laws tend to affect the criminal procedure law is tendered in the sections below.

Counter-terrorism law is used in the present paper as a suitable proxy for describing the improper interference of the executive and legislature in the administration of criminal justice, particularly in western democracies that have experienced high numbers terrorist attacks. Myriad episodes of terrorist attacks in western democracies in the recent period have led to governments taking responsive measures and actions that often offend their constitutions. The Execute and Legislative branches, are political organs capable of imposing deprivation of liberty during high-level national security threats. In times of war, or during periods of high-level terrorist attacks, for example, the two political organs are capable of building a dyadic consensus with a view to imposing a state of emergency that considerably limits civil liberties. This deprivation of liberty may have far-reaching repercussions for the administration of justice. Let me illuminate this point further. When the dyadic consensus between the executive and the legislature is aimed at restricting liberty on national security grounds, it often comes in the form of a new legislation, which to a considerable extent, also offends the constitution. The two political organs may agree to come up with a new national security legislation, for example, counter-terrorism law, which legally calls for conformity. They would then make astute rational argument and persuasion (informational influence) that the new law is necessary for national security preservation. This kind of argument and persuasion amounts to social pressure. It is a form of social pressure that calls for conformity and is capable of directing other forms of influence, such as demands, threats or personal attacks on the judges and the judiciary as a whole. This is just but one instance, of how the two political

[14] FRIAS, S. Ana. *Counter-terrorism and human rights in the case law of the European Court of Human Rights.* Council of Europe Publishing, November 2012.
[15] GROSS, Emanuel. Trying Terrorists - Justification for Differing Trial Rules: The Balance Between Security Considerations and Human Rights.

organs (the executive and the judiciary) might influence the administration of justice – directly or indirectly imposing social pressure on judges.

As one scholar, Jerome Alan Cohen, observes, judicial independence requires that a legal system protects its judges from governmental or social pressures that could force a judge to deviate from his or her interpretation and application of the law.[16] As already stated, both the executive and the legislature are capable of imposing social pressure on the judiciary. According to the American Psychological Association Dictionary of Psychology, social pressure, entails the exertion of influence on a person or group by another person or group.[17] Social pressure must therefore be seen as a potential external and improper influence on the judiciary from the two political organs. It is capable of influencing the judiciary to support the government in achieving its national security policy objectives. It is important, however, to exactly understand how this social pressure comes about, and how it exerts far-reaching repercussions on the administration of justice.

In the present-day permutation of terrorist attacks, considerable pressure is bound to mount on the government to preserve national security and to maintain law and order. This impels the government to act swiftly in order to renew its strength and security, by revitalizing its security apparatus. In the case of terrorist threats, the government would undertake additional efforts to create counter-terrorism law with a view to preventing terrorists from acquiring space to commission terrorist attacks. This security apparatus not only serves to defend the territorial integrity of a country, but also enables the state to enforce the law. But the structure of this security apparatus must be based on adopted legislation so as to validate its fundamental objective of ensuring safety. Many of western democracies have been able to create new national security laws, commonly referred to counter-terrorism law. The counter-terrorism law comes as a package with provisions derived from the dyadic consensus of both the executive and the legislature. But the enforcement of this law often creates fundamental challenges. These challenges come in the form of human rights violations and impediment in the administration of justice, contrary to the fundamental law. But just how does counter-terrorism-law falls afoul of the constitution – the basic or the fundamental law of the state?

Counter-terrorism laws are often passed in the legislature with far less debate on their infringement on liberty and their potential conflict with the constitution. The proponent of counter-terrorism laws often believe that speed is essential in the battle to prevent terrorist attacks. This has led to new security laws being passed despite the fact that they potentially undermine liberty and the due process rights guaranteed by the constitution. These compromising maneuvers often pose significant threats to the independence of the judiciary. Moreover, the enforcement of counter-terrorism law often potentially undermines the rule of law and weakens fair trial. From a criminal justice perspective, full constitutional protections should always be applied to detained suspected terrorists. Criminal justice proponents also argue that treatment of detained suspected terrorists and the investigative methods used to build cases against them should comport with the traditional due process protections for all suspects of crimes. The counter-terrorism law also provides the law

[16] COHEN, Alan Jerome. The Chinese Communist and Judicial Independence. *Harvard Legal Review*, (1969).
[17] https://dictionary.apa.org/social-pressure. Retrieved on 12, October, 2020.

enforcement agencies the discretion for arbitrary arrests, indefinite or prolonged detentions, harsh interrogations, and in some cases torture of suspected terrorists, some of which could be innocent persons.

The enforcement of counter-terrorism laws is complicated and is known to offend the constitutionally guaranteed human rights in a number of ways. For instance, the fight against terrorism by the state has witnessed several attempts by state security agencies to unduly extend pre-trial detention of terror suspects without the judicial authority ordered by court of justice. In the corpus of the European Court of Human Rights (ECtHR) case law, unlawfully prolonged pre-trial detention sharply conflicts with international law and best practice. Undue extension of remand custody is condemned by the ECtHR as it runs afoul of Article 5 of the European Convention on Human Rights.[18] Indeed, prolonged pre-trial detention removes the right to liberty from suspects, some of which, are innocent because they have not been tried before a competent court and proven guilty. Terror suspects who have not been convicted of any penal crime, on the basis of evidence that has not been examined, are likely to suffer serious detriments. This not only amounts to denying them liberty, but also affects their health, family, and livelihood. It is only the court of justice, but not state security agencies, which should have the competent authority to determine the pre-trial custody of terror suspects. Indeed, in the constitutional democracy of western nations, the right of access to justice should be expeditious and not illusory.

Moreover, the enforcement of counter-terrorism laws often run in the constitutional democracy of western nations afoul of *habeas corpus* rights. It means that terrorist suspects can be detained for a longer period of time without being produced before court. This potentially creates impediment to *habeas corpus* proceedings. A well-established rule in criminal law is that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law. However, terrorist suspects under the counter-terrorism law, are often treated as if they are already guilty even before being arraigned before a competent court. Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that, everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.[19] The decision by the investigating security agencies to decide to unilaterally detain suspects for longer periods and deny them the right to be heard in court within the time period provided for in the constitution is improper and runs afoul of the human rights law. It is only the court, and not the executive-led security agents that should determine how long a suspect should be in custody pending full investigations before being arraigned in court. This implies that there are some state actions that are *ultra vires* and the state is capable of acting beyond its legal powers to detain suspects for a longer periods than what the human rights law permits. All criminal procedures, whether involving terror or non-terror suspects must be in line with the human rights. Article 6(1) of the European Convention asserts this guarantee by assuring that in the determination of individuals civil rights and obligations or of any criminal charge against them,

[18] https://rm.coe.int/pre-trial-detention-assessment-tool/168075ae06. Retrieved on October 14, 2020.
[19] https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf. Retrieved on November 17, 2020.

everybody is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[20]

In some cases, due to the harsh interrogations, indefinite detentions, and torture of suspected terrorists, and as far as the rules of evidence in a trial are concerned, it becomes questionable how the investigating agencies collect and tender admissible evidence. This suggests that judges may not be able to decide each case in accordance with the facts, the rule of law, and by reference to the manipulated evidence before the court. Because of this lack of transparency, the evidence procured and adduced could be of great concern. The primary concern would be on the issue of fairness and impartiality in the administration of justice. Indeed, it would be a travesty of justice if sound conclusions are drawn from an improperly procured material evidence. Yet, the rules of evidence often profoundly affect the course and outcome of trial in courts of justice.

In the present paper, counter-terrorism law is used as a proxy variable and is therefore substituted for the executive and legislative influence (improper interference) on the judiciary. It is precisely for the reason that it might be difficult to directly observe the executive and legislative influence on the judiciary because of the rebuke that they might get if they openly and directly try to interfere with independence of the judiciary. But it should not be surprising that the dyadic influence of the executive and the legislature on the judiciary can be exerted through other mechanisms. In the absence of an observable direct influence of the executive and the legislature on the judiciary, a suitable proxy variable (counter-terrorism law) can be used to capture that aspect of direct influence. As one scholar, Kazuhiro Ohtani, correctly observes, using the proxy variable is better than omitting the unobservable variable in terms of the effects.[21] In this case, using counter-terrorism law as a proxy (substitute) for the executive and legislative influence on the judiciary is better than omitting the unobservable direct influence of the executive and the legislature on the judiciary. This is to say that there are other ways or mechanisms under which the two political organs can use to exert their influence on the judicial system.

4. The Executive and Legislature Influence on the Judiciary

During periods of high-level terrorist threats, the two political organs (executive and legislature) are, highly likely to build consensus on how to counter such threats, and maintain social order of shared norms and values. One of the consensus is that the "means justify the ends." This implies that there must be some form of interventions in curbing terrorist threats. Such interventions usually involve new security legislations, commonly known as "counter-terrorism law." Whenever counter-terrorism law is adopted, it becomes a popular sentiment by the executive and the legislature. It is assumed to carry the values and preferences of the citizens since the citizens' will, are represented by elected leaders. When the executive and the legislature make counter-terrorism law become the popular will of citizens, judges are often expected to be responsive to the values and preferences of the citizens. Although judicial systems are supposed to maintain boundaries with the other non-judicial systems that exist within their environment, they can hardly escape the

[20] Ibid, p.6.
[21] OHTANI, Kazuhiro. A Note on the Use of a Proxy Variable in Testing Hypotheses. *Economics Letters* 17 (1985) 107-110.

trust and confidence that citizens put and have upon them. There is almost always strong social pressure on the judiciary to pronounce harsh punishment on terrorists.

5. Conclusion

The social pressure potentially on the judiciary effectively makes counter-terrorism law a suitable proxy for the external and improper influence on the judiciary by the two political organs. In some cases, the pressure would be on the judge to surrender independence, and the rule of law, and instead defer to the popular will of citizens. The independence of the judiciary cannot hold when there is improper interference in, pressure on, and threats against, the judiciary system. In deciding on terrorism related cases, judges are often confronted with more complex situations that require them to develop a cautious approach in adjudicating over such cases. Besides, the ICCPR states that trying civilians under a military court may raise problems regarding the "equitable, impartial, and independent administration of justice concerned." This is why the ICCPR goes on to say that "Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials." It implies that trying civilians under military courts should be the exception and not the norm, especially when those being tried are charged with crimes that can be handled by civilian judges. In most democratic nations, civilians are tried before civilian courts where their cases are heard by civilian judges even where they are charged with terrorist acts. The Right to a Fair Trial is protected by the ICCPR under Article 14. The violations of the rights to Liberty and Security and prohibition of torture and inhuman or degrading treatment or punishment directly impact the right to a fair trial.

Is the Judiciary under Pressure? Judicial Independence in an Age of Terrorism

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Abstract

Over the past several decades, terrorist threats in western liberal democracies have grown substantially. But the level of threat went higher after the September 11, 2001 (9/11) terrorist attacks on the U.S. soil. The present paper examines the effect of terrorist threats on the judicial independence before the 9/11 and after the 9/11. Judicial independence is analyzed by modeling a constitutional ideological issue space analytical framework and drawing on relevant case law data involving litigations on terrorism-related human rights violations through court proceedings. The present paper argues that there is a variation in courts' decisions on terrorism-related human rights violations before the 9/11 and after the 9/11. The level of terrorism threat is likely to help us understand this variation and to enable us to assess whether the level of terrorism threat could provide reliable theoretical explanation that can effectively be applied to different judicial systems across democracies. Employing small-N design and using case law data from four different western democracies (U.S., UK, Germany and France), results indicate that there are variations in court decisions involving similar cases on terrorism-related human rights violations adjudicated before the 9/11 and after the 9/11.

1. Introduction

Are there threats to judicial independence arising from terrorist threats? The present paper examines judicial independence during periods of national security threats. In particular, it pays considerable attention to the influence of terrorist threats on the independence of the judiciary in western democracies. Although western liberal democracies are known to have a strong judicial independence, the changing world of a complex global terrorism poses a considerable challenge to the courts and the rule of law. Responses to high-level national security threats by governments often tend to take a big ideological distance from ordinary freedom, respect for human rights and the rule of law that the constitution guarantees. Indeed, threats to judicial independence are very likely to arise whenever there is a broader assaults on the rule of law and the institutions that are designed to protect it. The essence of this article is not to challenge a centerpiece of judicial independence orthodoxy that accounts for the tenure of judges, the budget autonomy of the judiciary, and the merit selection of judges as stronger predictors of judicial independence. Rather the analysis herein is to explicate the relationship between judicial independence and terrorist threats by modeling a constitutional ideological issue space. This is a directional and proximity model that provides a generic analytical framework for understanding the behavior of the courts during periods of national security threats. This model is useful in expanding the literature in this area of study and, thus deepening our appreciation of threats to judicial independence.

The concept of judicial independence as articulated in this article is conceptualized in two different phases. The first phase examines judicial independence during periods of low-level terrorist threats, while the second phase explores the judicial independence during periods of high-level terrorist threats. The low-level and high-level refer to terrorist threat levels with low-level suggesting that terrorist attack is possible but not likely and the high-level denoting terrorist attack is highly likely. These two contextual differences have important implications for understanding judicial decision-making during periods of national security threats. The primary aim of the present paper is to provide a fresh perspective in understanding how terrorist threats can potentially trigger actions that lead to undermining the independence of the judiciary by both the executive branch and the legislative branch. The analysis of the constitutional ideological space model produces a strong argument that the judicial protection of rights and fundamental freedoms tends to weaken during periods of high-level national security threats on account of the diminished judicial power. More succinctly, the efficacy of judicial protection of liberty in western liberal democracies is conditioned by a measure of national security threat.

Just as Marx Weber stresses nature and timing of social revolution as an important historical cause, the September 11, 2001 (hereinafter 9/11) terrorist attacks on the U.S. soil became an important historical cause of national security revolution in many western democracies. This marked the beginning of the global war against terrorism. Soon after the 9/11, western liberal democracies realized that all was not well in terms of national security preservation. Immediate drastic measures needed to be undertaken in order to preclude any future catastrophe designed by the 'evil' and criminal acts of Islamist extremist terrorists. Both the executive arm and the legislative arm of government made concerted effort to craft new security legislations aimed at preventing terrorism. By so doing, the third arm of the government – judiciary was only left with the role of interpreting

the new counterterrorism laws and policies. It should be borne in mind, however, that even before the 9/11, western democracies had been experiencing terrorist attacks and had some legal framework of prosecuting criminal offenses related to terrorism. However, the impact of the 9/11 terrorist attacks led to new legislations being enacted with tougher measures aimed at not only preventing terrorism, but also pre-empting its formation.

The implications of implementing the new counterterrorism laws and policies have, however, been broad and have received myriad criticisms including violations of rights and fundamental freedoms protected by the constitution. Some of these violations include detention without trial, the right of *habeas corpus*, torture and ill-treatment, notions of guilt by association, extraordinary rendition, and undue constitutional avoidance in some cases. These violations not only affect the rule of law, but also serve as impediments to fair trial. This phenomenon has the potency of triggering interbranch tensions, particularly between the executive and the legislative arms on the one side, and the judicial arm on the other side. Apparently, the actual conflict that pit the executive/legislature against the judiciary derives from motivational struggles and contradictory imperatives. While the state is motivated to make security preservation as its top priority, the judiciary must struggle to make constitutional protection of rights and fundamental freedoms as its cardinal priority. It is therefore imperative to examine whether terrorism-related human rights litigations founded on very different contextual meanings, low-level threats (i.e. before the 9/11), and high-level-threats (i.e. after the 9/11) are influenced (moderated) by the level of national security threat.

The primary aim is to able to understand whether high-level terrorist threats after the 9/11 put judicial actors (judges) in situations that pressurize them to act in certain directions perceived to be contrary to the legal and constitutional norms. It is only by examining terrorism-related human rights adjudications (case laws) that we are able to understand and determine the motives behind the courts' decisions. The idea here is to be able to understand the real context forming the court's decision. We are also able to tell if the judge's decision is sincere and guided by the law or driven by other external influence. The external influence as used in this article denotes the counterterrorism laws and policies produced by the concerted effort of both the executive and the legislature. The new counterterrorism laws and policies are thus being imputed as the primary external influence acting negatively on the independence of the judiciary. Independent courts have no option, but to administer the law impartially, promote human rights, and ensure that individuals are able to live securely under the rule of the law.

The present article provides a comparative framework for assessing the effect of terrorism threats on the independence of the judiciary in western liberal democracies with specific attention to the U.S., UK, Germany and France. In particular, the role of courts in responding to terrorism-related human rights challenges posed by the global war on terror is adequately explicated. It is well argued herein that the more appropriate way to examine the independence of the courts is by observing whether or not they hesitate to check the legal and constitutional limits on executive action, especially in the context of terrorism-related human rights litigations. It is important to understand whether or not the judicial process is likely to be characterized by undue constitutional avoidance and great judicial deference to the executive and legislative security policies. When

Judges perceive security matters as properly within the ambit of the executive determination, but become reluctant to address the rights violations occasioned by executive actions, then the judiciary would appear weaker in its role of checks and balances. This is because courts have inherent constitutional responsibility to protect not only the rule of law, but also procedural fairness against government powers.

The rest of this article is organized as follows. Section two terrorist threats in western liberal democracies, section three ideological issue space model, section four state power in security preservation, section five judicial power in liberty protection, section six US, section seven UK, section eight France, section nine Germany, and section ten is the conclusion.

2. Terrorist Threats in Western Liberal Democracies

Terrorist threats have evolved over the years to become a complex global threat. The assumption being made here is that terrorist attacks after the 9/11 have been of proportional magnitude and, hence lend a significant impact on the independence of judicial systems in liberal democracies. This proposition is a plausible depiction, but requires robust probing for validation. It is this change in the magnitude of terrorist threats and how it affects the autonomy of judiciary in respect of adjudications of terrorism-related human rights cases that this article endeavors to investigate. Considering observations before 9/11 and after 9/11 provides a possible cross-temporal dimension to account for the fact that pressure on the judiciary tends to build under the influence of security legislative and policy transformation processes and in this case, new counterterrorism legislations. It shall be illustrated later on in this article that different contexts affect judicial outcomes in different judicial systems.

Western liberal democracies now face immense difficulties in modern times, particularly in protecting their citizens from terrorist violence. Terrorist threats can lead to rapid changes in national security policy that are often guided by politics and rhetoric at the expense of the rule of law. The scale of the danger posed by global terrorism cannot be underestimated. In Western Europe, German like the US, UK and France has a history of terrorism and national security jurisprudence. All these countries are constitutional democracies and have for a long time encountered terrorist movements. It can be said that for a long time, they have been endowed with a wealth of constitutional experience in balancing security and liberty. For instance, the Germany Constitutional Court has often used proportionality and balancing analyses to resolve national security and human rights related disputes.[1] However, the terrorist attacks on the 9/11 traumatized not only, the American people, but also the rest of European democracies. Just a few years later, Britain also suffered lethal terrorist attacks on July 7, 2005. In France, the Terrorism Situation and Trend Report (TE-SAT), which Europol produces each year since 2006, the European Union (EU) member states experienced 151 deaths and more than 360 injuries in 2015 only. This includes the November 2015 terrorist attacks in Paris, France.

However, how the executive and the legislative branches respond to such threats have important implications for the independence of the judiciary. The interference with the judicial role has been

[1] MILLER, A. Russell. Balancing Security and Liberty in Germany. *Journal of National Security Law and Policy.* Vol. 4, 2012.

more dramatic in effect, particularly during periods of high-level terrorist threats. For instance, there have been cases whereby the state resorts to 'special' or military courts as trial fora for terrorist-related offences, instead of allowing such cases to be tried in the ordinary open courts. Moreover, there have been instances where the state adopts unlawful measures that seek to curtail judicial engagement in the administration of justice. The effect of such unlawful measures have resulted in undermining the rule of law and the interference of fair trial. In the adjudication of terrorism-related human rights litigation, the principle of fair trial would be materially compromised if the state arbitrarily subjects terrorist suspects to torture and ill-treatment in extracting evidence, longer detentions without trial, *habeas corpus* denial, and extraordinary rendition. These are serious impediments to the administration of justice. Such moves by the state is a manifestation of undermining the cardinal principle of judicial independence. Thus, the judiciary should never be denied its role of judicial oversight to authoritatively examine the legality of any action of a person or authority in accordance with the provisions of the constitution or any law of a country.

Measuring judicial independence could be very challenging. Legal scholarship on this topic opines that measuring the degree of judicial independence in a specific jurisdiction or legal system is not easy as there is no uniform methodology and that, assessment requires more than quantitative and qualitative data. But even once data are collected, the validation of those data still lacks an exact methodology.[2] Indeed, while it might be easy to identify case laws where a court clearly did not act according to the law, it would not be very easy to determine the reasons motivating the judge to decide a particular way in a single case. Even though assessing the legal safeguards provided for in a given country is relatively simple, detecting the actual motivation of an individual judge would be much more complicated. It is thus impossible to have data on judicial independence without possible deficiencies. The implication therefore is that it is difficult to establish a precise and reliable score on judicial independence.[3]

Despite the deficiencies and considering the fact that it might not be easy to accurately assemble an effective method of measuring judicial independence, there are nonetheless widely used methods to establish an approximate picture of what an independent judiciary entails. One of the less disputable methods involve checking whether a given legal framework complies with the principle of judicial independence and provides for the necessary safeguards. This method ensures that there are standards that are to be followed, as set out, for example, in the Council of Europe Recommendation (2010)12 'Judges: independence, efficiency and responsibilities.' In this article, a different angle is employed as one alternative way for determining judicial independence.

The model presented in the section below provides a universally applicable analytical framework of how an independent judiciary should work in liberal democracies. It is a theoretical functioning of institutional arrangements found in a majority of democracies in the administration of justice. The idea behind functionalism is to look at the way practical problems of solving conflicts of interest are undertaken in different legal systems. Societal problems such as terrorist threats are to

[2] WINTER, Lorena Bachmaier. *Judicial independence in the Member States of the Council of Europe and the EU: evaluation and action.* (2019).
[3] Ibid 2.

be experienced in many democracies today. But these democracies have some legal framework which helps to resolve such problems. Although legal concepts, legal rules, legal systems, and legal procedures may sometimes be different, the legal solutions to such problems may, however, be similar. In examining the responses of the U.S., UK, Germany, and France to the problem of terrorist threats, the model provides a functional process based on functional equivalents of relevant institutions that are charged with providing solutions to practical problems and in this case, balancing between security preservation and liberty protection.

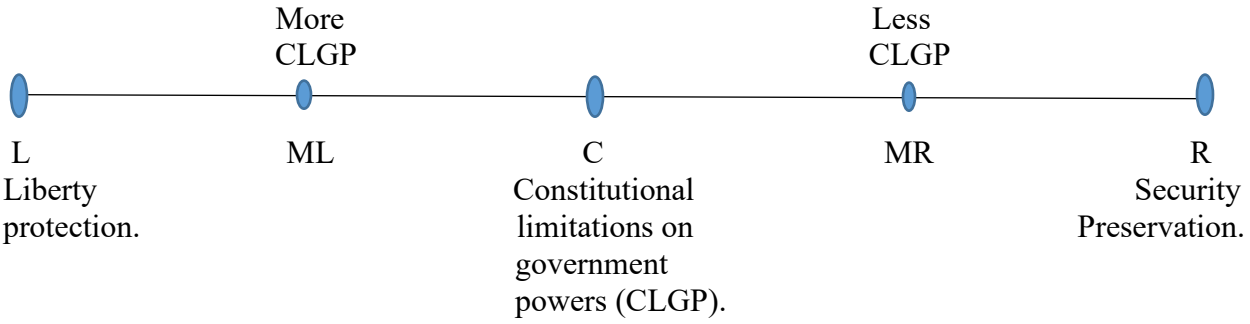
3. Ideological Issue Space Model - Analytical Framework

To advance research on the relationship between terrorist threats and threat to judicial independence, that is, the influence of terrorism on judicial independence, this article directly models the ideological issue space for analytical framework. It takes the form of "Security and Liberty Ideological Framework" (hereinafter SLIF). This is done using a one-dimensional (unidimensional) continuum, which ideologies are placed, ranging from "very liberal" on the extreme left to "reactionary" or "very conservative" on the extreme right. This framework not only provides most analyses of security and liberty ideologies, but also characterizes the standard ideological constitutional provisions. This framework bears the concept of conventional ideological spectrum.

The concept of constitutional ideology as used in this article refers to a system of ideas and ideals, which form the values and principles of a liberal democracy. Essentially, it carries the norms of western liberal democracies. These norms draw on constitution ideologies, which are either codified or uncodified. In this case, the constitutional ideologies captured include, the separation of powers into different branches of government, the independence of the judiciary, judges as protectors of rights, a system of checks and balances, the rule of law, and the equal protection of liberties. The terms liberty, rule of law, liberal democracy, low-level national security threat, high-level national security threat, and judicial independence are all ideological labels. These constitutional ideologies may also be referred to as 'ideal types', meaning constitutional elements common to western democracies (U.S., U.K, German, and France) under study. Ideal types are not meant to refer to perfect, or moral ideals of democracies, but rather to stress common characteristics of those democracies.

The ideological space model below determines the power function of the executive vis-à-vis the judiciary in a constitutional democracy during the low-level and high-level national security threats. From this model, we are able to examine the behavior of the judiciary and to determine its independence in two-time periods (low-level and high-level) of national security threats. The unidirectional model is fashionably (deliberately) labelled as briefly described: from extreme left to extreme right on the continuum have points L, ML, C, MR and R. Point L on the extreme left denotes liberty protection, point ML denotes middle left, point C denotes constitutional ideologies, point MR denotes middle right, and point R denotes security protection. Then the constitutional limitations on government powers (CLGP) is fixed at C in the middle of the continuum and is assumed to strike the balance between the executive power and the judicial authority, thus satisfying the checks and balances principle.

Firstly, it is assumed that the CLGP position on the unidirectional continuum is fixed (enshrined) in the constitution (C) and should not change even during times of national security threats. Secondly, it is assumed that the government is very likely to violate the CLGP position at point C and try to shift it to point MR during national security threats. Thirdly, it is also assumed that whereas the government will prefer position MR as opposed to position C during times of national security threats, the liberty proponents would still prefer either point C or point ML during security threats. Moving the CLGP to the right, shrinks the enjoyment of liberty. As the distance between L and CLGP moves further to the right, then the judiciary becomes under pressure to pull back the CLGP back to point C in order to satisfy the principle of checks and balances.



Individuals tend to enjoy more liberty when the CLGP position moves more from the center to the left side. This implies that individuals feel that the government's interference in their lives is very limited and the courts have a constitutional obligation to protect those rights. However, when the CLGP position shifts more to the right, it implies that the government is assuming (clawing back) more powers and defying its constitutional limits on powers. When this happens, individuals lose more liberty and turn to the courts for protection. At this point, the courts are more likely to feel the pressure to pull back (restore) the CLGP to the center and, thus satisfying the principle of checks and balances. When the courts are able to pull back the CLGP to the center, the rule of law is thus restored.

Based on this analytical framework and applying it to terrorism-related human rights violations adjudications, judicial independence can then be determined on the basis of the ability of the courts to restore the CLGP from any space on the right of C to C- the center. Liberty protection by the judiciary could be a good measure of judicial independence. This is because it is emphatically the province and duty of an independent judiciary (autonomous courts) to interpret what the law is and not to unduly defer to the executive policy if that policy runs afoul of the constitutional provisions. Indeed, courts in liberal democracies are imputed a special responsibility for ensuring that individuals do not suffer unjust treatment at the hands of the government. In this article, it is illustrated that as the level of terrorist threat changes from low to high, the enjoyment of liberty

and its protection inversely changes from high to low. It then becomes the onus of the judiciary to restore that change to its original position.

In determining judicial independence again it is important to pay considerable attention to how both legal rules and legal principles are being applied by the courts. In other words, it is necessary to consider reasons for judicial decisions because they are the ones that play an important role in legal justification. For instance, in cases where judges defer to national security preservation over the liberty protection even if the legal rules supporting liberty protection make reasonable sense to the context of the case, there must be a reasonable justification as to why the court is unable to apply the legal rules. In the absence of that justification, then it would be reasonable to conclude that there must be some external influence acting on the case.

As a basic tenet of the Madisonian democracy, the concentration of power by the government poses a great threat not only to the decisional autonomy of judges, but also to individual autonomy and freedom. The government should adhere to the constitutional principles (ideologies), and ought not to have the totality of power in liberal democracies. Liberty can only be protected by the judiciary when it is capable of pulling back the CLGP from any space to the right back to point C. This model provides an illustrious argument that terrorist threats present greater risk to judicial independence, especially when threat level is high (i.e. substantial, severe, and critical) in democracies. Conversely, a period of low-level terrorist threats is likely associated with lower risk to judicial independence in democracies. The model is therefore capable of providing a plausible account of the relationship between judicial independence and national security threats in democracies that have been harmed by terrorist attacks in recent period.

4. State Power in National Security Preservation

The state usually has the most interest in securing order in society. The state therefore must executively ensure and realize order in society. In so doing, it must centralize and monopolize force. According to the social order theory, in any democratic society, the social order is imperative and, indeed societies must be held strongly together by collective morality. But because of the complexity of modern society, collective morality might become weaker and, thus giving way to social disorder or pathologies. This social disorder may be caused by some social facts. As Emile Durkheim correctly observed, social facts emanating from non-shared moral beliefs are likely to shape individual behavior in society. Those who join terrorism to inflict harm on innocent people, for example, must be subscribing to other social facts that are morally unpopular. When the social order is not well balanced in society (i.e. lack of equilibrium) it calls upon state authorities to restore normalcy or equilibrium. This is exactly the case with the terrorist attacks that increasingly cause harm to innocent lives and property. Such attacks cause disorder through the use of illegal force to an otherwise orderly society.

The executive is more likely to expand its powers when its legitimate use of force is being threatened, when its constitutional obligation of protecting lives and property is being challenged, when its legitimate power is being contested by illegitimate power, and when its ability to provide security is being defeated through unlawful means. Since it is only the government that can exercise legitimate force or coercion in a democracy, there is no other person or entity with such

right to take the government's constitutional responsibility of exercising force. In such cases, the state must act to preserve itself and to protect its citizens by dehumanizing those individuals that are inclined to social disorder. Threats to national security can be effectively mitigated if all the branches of government (executive, legislature, and judiciary) exercise their constitutionally mandated functions. This requires optimal practice of functions within the separation of powers doctrine. This has been the case for several years, especially in liberal democracies. However, the current landscape of terrorist threats have probably challenged the traditional optimal functions of governmental powers. The traditional security apparatus appear weak to guarantee security and protection in democratic societies. This phenomenon calls for extra-ordinary measures in extra-ordinary times.

In a bid to justify state power, proponents of state-centered theories advance the argument that state has a pre-legal right, or non-positive right of natural law, and therefore it is supposed to act for its own preservation.[4] This view is purely classical. According to Klaus Stern, the state always has an unwritten, supra-positive right of necessity, which positive law cannot limit.[5] This school of thought further argues that norms cannot bind state in exceptional situations in which instead, the state, by necessity, has its own right to self-preservation. It asserts that legal norms cannot take away the right of the state due to the very abnormality of exceptional situations. In other words, the state is perceived as a pre-legal institution, whose power is originally unlimited, and only tamed by the law. This perceived right of the state is not merely alongside the constitution, but clearly against it, since the constitution cannot apply in an abnormal, emergency situation.[6] However, a moderated version views the power of state as subject to positive law. The moderated state-centered version is that although the state has the right to employ all the necessary measures to fight against intrusion and destruction of public order by state enemies, those measures should derive from the provisions of positive law.

The constitution-centered theorists, however, advance the idea that there needs to be protection of constitutional interests by the state. This school of thought articulates a prohibition on excessiveness of governmental powers. Furthermore, it demands compliance with positive law by the state. In other words, the constitution-centered theory advances the supremacy of the constitution, while the state-centered theory advances the supremacy of the sovereign (executive). How then should the liberal democratic state reconcile these opposing lines of thought? The foregoing theories pose dilemma to state authorities in liberal democracies. This is compounded by the fact that the encroachment of government on individual's rights and fundamental freedoms often fail to achieve presumptive validity. How then should governments approach this more complex problem in the face of a high-level national security threats? To be able to answer to these questions, it is important to invite more discussions on the best possible ways that state authorities

[4] KOJA Fredrich traced this view back to the Hegelian idea of the state as preeminent institution. See KOJA Fredrich: *Der Staatsnotstand als Rechtsbegriff*, Salzburg, Pustet 1979, 12.
[5] See JAKAB Andras: *European Constitutional Language*. Cambridge University Press. Cambridge CB2 8BS, United Kingdom, 2016, 315.
[6] See Kruger (n.86) 31 'Emergency law, by its very concept, implies recose to natural law as against positive law').

should act during exceptional circumstances (i.e. extraordinary times) such as during periods of war and terrorist attacks.

Immediately after the 9/11, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA-PATRIOT) Act was passed in the US with little debate or amendment to the legislation. This new counterterrorism legislation enabled the then US Attorney General to effectively cancel *habeas corpus* with a decree that stated the government would henceforth consider detaining aliens for a longer period without trial. However, a New Jersey Judge denounced the government's refusal of *habeas corpus* and the names of the detainees were never released by the state authority. Instead, the Attorney General responded by issuing an emergency regulation trumping the State court's decision. It can be clearly seen here that terrorist threats enables the state to gain justifiable and defensible executive powers. This phenomenon clearly illustrates the motivational struggle between the executive and the judiciary in security preservation and liberty protection, respectively. The bid by the court to try and pull the CLGP from the right side space position back to the C position as per the analytical model was clearly frustrated by the executive. This is yet a clear illustration of how the independence of the courts can be interfered with by the executive power. In this case, it can be said that the court acted fearlessly and according to the law, thus stamping its independence.

5. Judicial Power in Liberty Protection

The table below illustrates the pressure on the judiciary before the 9/11 and after the 9/11. In examining all the four liberal democracies, it can be argued that although all these democracies were experiencing terrorist threats even before the 9/11, the level of terrorist threats were low, legal frameworks against terrorism existed albeit not very strict, terrorism-related human rights violations existed although at a low level, and protection of rights and fundamental freedoms were enshrined in the constitution. However, the level of pressure on the courts in adjudicating terrorism-related human rights violations was not as great as compared with the pressure the courts are experiencing after the 9/11. The table below captures the theoretical conceptualization in the above model. The argument being made is that terrorism-related human rights adjudications after the 9/11 have put considerable pressure on the courts to pull back the CLGP back from the right side space to the C position. When the courts are not deferential to the constitutional liberty protection when it is clear that state authorities are liable for the rights violations, then it can be argued that the courts have weaker judicial power.

Table 1.1 illustrating comparisons of the four democracies before and after the September 11, 2001.

The four western liberal democracies before September 11, 2001 terrorist attacks on the U.S. soil.									
Country.	Experiencing terrorism threats?	Level of terrorism threats.	Counter-terrorism law and policy?	Tougher counter-terrorism law and policy?	Terrorism-related human rights violations?	Level of terrorism-related human rights violations.	Protection of human rights enshrined in the constitution?	Liberal democracy?	Greater pressure in adjudicating terrorism-related human rights violations?
USA	yes	low	yes	no	yes	low	yes	yes	no
UK	yes	low	yes	no	yes	low	yes	yes	no
Germany	yes	low	yes	no	yes	low	yes	yes	no
France	yes	low	yes	no	yes	low	yes	yes	no
The four western liberal democracies after the September 11, 2001 terrorist attacks on the U.S. soil.									
USA	yes	high	yes	yes	yes	high	yes	yes	yes
UK	yes	high	yes	yes	yes	high	yes	yes	yes
Germany	yes	high	yes	yes	yes	high	yes	yes	yes
France	yes	high	yes	yes	yes	high	yes	yes	yes

Source: author.

Scholarship observes that courts are likely to be deferential to the government when both the executive and the legislature are united. However, when government is fragmented, the courts are able to fight overbearing security laws and policies.[7] This argument suggests that courts adjudicate and produce outcomes depending on the dyadic consensus of both the executive and the legislature. This also implies that the courts are not able to freely stamp their own authority, but instead relies on the strength and weakness of the other two branches of government. When this happens, particularly when the proportionality of rights violation by the state is high, then it can be deduced that the courts adjudicated under some external influence.

It is important to mention, however, that in almost all liberal democracies, judges would be more careful to give the executive encouragement to continue the infringement on liberty for fear of being entrapped and acquiesced to the legitimacy of executive atrocities. Legal scholarship acknowledges that in choosing between protecting society and protecting individuals, judges may

[7] LARUE F. Patrick. Judicial Responses to Counterterrorism Law after September 11. *Democracy and Security.* Vol. 13. No.1, pp 71-95, 2017.

reflect on how to construe the law and whether they should give effect to the will of government or choose another course.[8] For instance, within the EU Member States, there is the risk that the principle of 'mutual recognition' based on mutual trust can be uncritically or blindly applied without assessing the personal and substantive circumstances of individual cases. This principle now requires that the executing Court (authority) must undertake necessary check and assessment before complying with the European arrest warrant (EAW). This means that even among the EU Member States judges, there is lack of mutual trust per se in how each Member State handles human rights cases. This principle (mutual recognition) is already severely weakened in Case C-216/18 PPU Minister for Justice and Equality v. LM. Judges must now consider judicial independence as a precondition for mutual trust. Breach of the right to a fair trial in one Member State could be a ground for putting on hold the principle of mutual recognition and for refusing to execute a European arrest warrant.

6. United States

In the United States, cases that have arisen post-9/11 are worth of attention. The arbitrary detention of 'enemy combatants' at the Guantanamo Bay in Cuba and the lawfulness of trial by the Military Commission were of great concern. This also interfered with habeas corpus. The designation of terrorist suspects in question as 'enemy combatants' and the lawfulness of their detention in military camps was of great legal and constitutional concern, particularly because some of the detainees were US nationals. In *Hamdi v. Rumsfeld,* for example, a court of appeals determined that Hamdi (Petitioner) a US citizen designated an "enemy combatant" could be indefinitely confined and had no right to challenge his designation in federal court. However, the U.S. Constitution grants citizens held in the United States as an enemy combatant the right to a meaningful opportunity to challenge the factual basis for his detention before an impartial decision maker.[9]

The petitioner was an American citizen captured and designated an "enemy combatant" by the United States Government. He was then placed into an indefinite confinement at Guantanamo Bay. He filed a federal writ of habeas corpus and the Fourth Circuit Court of Appeals found his detention legally authorized and determined that the petitioner was not entitled to further opportunities to challenge his "enemy combatant" designation. He later appealed the Court of Appeals ruling and the Supreme Court granted certiorari. The issue before the Supreme Court was whether the Constitution grant an American citizen held in the United States as an enemy combatant the due process right to challenge the factual basis for his detention before an impartial decision maker. The Court emphatically held that the Constitution grants citizens held in the United States as an enemy combatant the right to a meaningful opportunity to challenge the factual basis for his detention before an impartial decision maker. Even in times of war, the country must retain its values and the privileges of citizenship.

[8] GRAVER Hans Petter. (2015). Judges against Justice: On Judges When the Rule of Law is Under Attack. Heidelberg: Springer.

[9] US Supreme Court, Yaser Esam Hamdi and Esam Fouad Hamdi as next friend of Yaser Esam Hamdi, Petitioners v. Donald H. Rumsfeld, Secretary of Defense, et al., 542 US 507 (2004) decided June 28 2004.

On 12 June 2008 the Supreme Court of the United States decided that persons detained by the United States in Guantanamo Bay have the constitutional privilege of habeas corpus. The recognition that all detainees are entitled to this basic right, irrespective of their nationality, their designation as 'enemy combatants' or their offshore location, has been hailed as a victory for the rule of law. Jubilation is somewhat tempered by the fact that it took six years to decide that detainees are entitled to a protection that would normally guarantee judicial access within hours, days or maybe weeks. *Boumediene v. Bush*, 553 U.S. 723 (2008), was a writ of habeas corpus submission made in a civilian court of the United States on behalf of Lakhdar Boumediene, a naturalized citizen of Bosnia and Herzegovina, held in military detention by the United States at the Guantanamo Bay detention camps in Cuba. Guantanamo Bay is not formally part of the United States, and under the terms of the 1903 lease between the United States and Cuba, Cuba retained ultimate sovereignty over the territory, while the United States exercises complete jurisdiction and control. The case was consolidated with habeas petition Al Odah v. United States. It challenged the legality of Boumediene's detention at the United States Naval Station military base in Guantanamo Bay, Cuba as well as the constitutionality of the Military Commissions Act of 2006. Oral arguments on the combined cases were heard by the Supreme Court on December 5, 2007.

In the US case, we see a situation whereby habeas corpus constitutionally applies, theoretically guaranteeing access to a court within hours or days of arrest and detention. But one must question why it took the US courts several years to determine the question, yet habeas corpus writ constitutes an emergency remedy. Was there a meaningful judicial response to this sort of emergency remedy?

In *Boumediene*, we see that there is a far more deferential approach to the government by the US Appeals court, which is an inferior court to the US Supreme Court. One wonders why the US Appeals court would defer to the government's anti-liberty national security policy. However, it takes the courage of the superior court of the land – the US Supreme Court to rule against government's violation of the right to liberty. In this matter the lawfulness of detention was successfully challenged. The *habeas* proceedings and the outcome indicated a lack of justification for prolonged detentions by the executive. The result also indicates the importance of the judicial review function by the Superior court.

In another case involving 'extraordinary rendition', there was an incident of kidnapping and secret transfer of terror suspects without any process of law to some offshore states (detention by proxy) that have poor records of human rights protection. Such countries still allow torture, arbitrary detention and other serious human rights violation. This was the experience of Khalid el-Masri, whose case provides great insight into the practice of extraordinary rendition. El-Masri is a German citizen who was arrested by Macedonian border officials in December 2003, apparently because he has the same name as the alleged mentor of the al-Qaeda Hamburg cell and on suspicion that his passport was a forgery. After three weeks he was handed over to the US Central Intelligence Agency (CIA) and flown to Baghdad and then to 'the salt pit', a covert CIA interrogation center in Afghanistan. He was held for 14 months, allegedly mistreated and prevented from communicating with anyone outside the detention facility, including his family and the German

government. After some time, it then became apparent to his captors that his passport was genuine and that he had nothing to do with the other el-Masri. He was eventually set free in May 2004.

When a lawsuit was brought before a US court, the government invoked the so-called 'state secrets' privilege, arguing that the 'entire aim of the case is to establish state secrets'. The case was dismissed in its entirety by the US District Court, and upheld by the US Court of Appeals. In October 2007, the Supreme Court decided, without giving reasons, to refuse to review the case. This matter was never settled on by courts. It was simply the end of the line for justice in US courts for el-Masri. Despite the government's misconduct, it mounted a defense that such proceedings might per se damage its national security. But clearly, this was a travesty of justice for el-Masri. We see again US lower courts (US District Court and Court of Appeals) deferring to the government policy (security preservation) in lieu of liberty protection. The lawsuit did not, however, get to be heard by the US Supreme Court.

7. United Kingdom

In 2004, there was another terrorism-related human rights litigation in the UK. The case is framed as *A and others v Secretary of State for the Home Department.*[10] This case is also known as the Belmarsh 9 case. It involved nine appellants, six of which were detained in December 2001, and the three others were detained between February and April 2002. The case concerned the prolonged detention of non-UK nationals in Her Majesty's Prison Belmarsh, on the basis of their suspected involvement in international terrorism, pursuant to the 2001 Anti-Terrorism, Crime and Security Act. In order to allow such a measure, the United Kingdom had derogated from its obligations in respect of the right to liberty under Article 5 of the European Convention on Human Rights (ECHR). Since they were charged under the UK's Anti-terrorism, Crime and Security Act 2001, part 4 of the Act provided for their indefinite detention without trial and deportation. However, the power was only applied to non-British nationals. Under section 25 of this Act, they had the right to appeal to the Special Immigration Appeals Commission (SIAC) against their detention. But the SIAC, which is also a court in the UK, ruled against them and in favor of the government policy. Consequently, all the nine appellants took their appeals to the House of Lords to challenge the decision of the Special Immigration Appeals Commission to eject them from the country (UK) on the basis that there was evidence that they threatened national security.

The House of the Lords held that the indefinite detention of foreign prisoners in Belmarsh without trial under section 23 of the Anti-terrorism, Crime and Security Act 2001 was incompatible with the European Convention on Human Rights. As a consequence, the House of Lords made a declaration of incompatibility under section 4 of the Human Rights Act 1998, and granted the appeals.

In this particular case, the right of *habeas corpus* was not, as such, in dispute. The argument in this case was the lawfulness of the derogation and of the indefinite detention of non-nationals as opposed to national, thus applying double standards and discriminating against non-nationals on the equality of justice. When the matter went before the House of Lords, which was then the Supreme Court of appeal in the United Kingdom, the court found that the United Kingdom's

[10] [2004] UK House of Lords 56.

derogation from the European Convention on Human Rights to enable it to detain people on national security grounds, potentially indefinitely, was not valid. Although the majority deferred to the government's assessment of the existence of an 'emergency' justifying derogation, they however, found that the detention of non-nationals could not be justified as strictly required by that emergency. The majority judgment notes that 'If derogation is not strictly required in the case of one group (nationals), it cannot be strictly required in the case of the other group (non-nationals) that presents the same threat.' The House of Lords thus found a violation of the rights to liberty and to non-discrimination, provided for in law in the United Kingdom via Articles 5 and 14 of the ECHR.[11]

In *Belmarsh*, we see yet another pattern whereby the Special Immigration Appeals Commission, which is a court inferior to the House of Lords, deferring to government's anti-liberty national security policy. However, it takes the courage of the superior court of the land – the House of Lords to rule against government's violation of the right to liberty. It is important to note that while the House of Lords grappled with the difficult issue of balancing between security and liberty, it did its best to strike an acceptable balance in a democratic society facing the challenge of international terrorism.

Moreover, the issue of admissibility of torture evidence also played out in the United Kingdom, in the case of *A and Others v. Secretary of State for the Home Department (No. 2)*.[12] The case concerned the admissibility of torture evidence, before the UK Special Immigration Appeals Commission. This matter involved evidence that may have been obtained through torture by foreign states. The UK government advanced the argument that evidence obtained through torture at the hand of a UK official is inadmissible, whereas evidence obtained through torture at the hand of foreign officials, for whom the United Kingdom is not responsible, is admissible. This argument was strangely accepted by the court of Appeal. In its judgment of 8 December 2005, however, the House of Lords rejected this rationale, asserting that torture is torture no matter who does it, and that such evidence can never be admitted in legal proceedings. Here we see again the important role of the Superior court overruling decision of the lower court by reaffirming fundamental principles. If torture evidence were to be allowed, then definitely there would be no guarantee of fair trial.

8. France

In France, there has been an expansion of the executive branch in the war against terrorism and a consequent repression of liberty in recent years. This is in light of the terror attacks committed in France by its own citizens, and growing engagement of its young people with international Islamic extremist. Moreover, counterterrorism measures have taken the pre-emptive approach as opposed to the ordinary criminal approach. The pre-emptive criminal justice approach means that even the mere predictability of the dangerousness through interpretation of signs of behavior, belief, social habits becomes a reason for arrest by the police. By enforcing the law to punish mere suspicions

[11] DUFFY Helen. Human rights litigation and the 'war on terror. *International Review of the Red Cross*. Volume 90 Number 871 September 2008.
[12] UK House of Lords, A v. Secretary of State for the Home Department (SSHD) (No. 2) [2005] UKHL 71, Judgment of 9 December 2005.

prior to the commission of a crime, it means that the fight against terrorism challenges the foundations of the criminal law. It thus replaces the idea of prevention, with the less certain notion of pre-emption. The current matrix of terrorist attacks in France has made national security become an issue of 'political management' and this has contributed to diminishing power of the judicial system in protecting civil liberty. The other issue is that even mere association of wrongdoers in relation with a terrorist enterprise has become a terrorism-related offence in France. It perceives a terrorist act as the mere participation in a group in view of the preparation of an act of terrorism.

After the 9/11, France legislated even tougher counterterrorism laws. For instance, in 2004, there was for the first time in the legislation history of France, a participation (conspiracy) legislation that was set to prosecute as a felony, any form of association with groups or organizations perceived to be of terrorists. That kind of offense was made to attract a punishment of up to 10 years, and the leaders of the group, could get up to 20 years imprisonment. Two years later, in 2006, the punishment of the mere participation in a group with a criminal aim (such as attack on persons or the destruction of property with explosives) was raised to 20 years and 30 years for leaders. In July 2016, this harshening process reached its final peak with the punishment set at 30 years for participation and life imprisonment for directing the terrorist group. Moreover, the 2016 legislations brought about other radical procedural changes such as the prolongation of pre-trial detention.[13] This meant that those suspected of membership of an outlawed terrorist organization could now be held for up to three years prior to trial, compared to only two years for those suspected of commissioning terrorism. The idea was to prolong the investigation action in conspiracy.

9. Germany

Against the background of the global campaign against terrorism threat, counterterrorism legislation in Germany has ignited considerable debate over the relationship between public security and human rights. The latest developments in Germany's counterterrorism legislation serve to explicate whether and to what extent Germany authority provides its citizens with adequate legal protection regarding human rights.

Terrorism in Germany, just like in the United Kingdom, has brought great harm to the Germany nation. In 2017, for example, there were terrorist incidents in Germany: On July 28, a United Arab Emirates-born Palestinian refugee who had been denied asylum allegedly killed one and injured five others with a machete while shouting *Allahu akhbar* in a Hamburg grocery store. He was reportedly radicalized shortly before the attack. Even though the suspect was known to the police and assessed as mentally unstable rather than a security risk, his commission caused great harm and raised questions on how state authority should respond to foreigners suspected of terrorist activities. This incident sparked widespread calls for stronger enforcement of deportation laws and discussion of the difficulty of identifying threats. Shortly after the incident, on November 27, the Mayor of Altena in North-Rhine Westphalia was seriously injured in a knife attack. His attacker

[13] French counter-terrorism: Administrative and Penal Avenues. Report for the official visit of the UN Special Rapporteur on Counter-Terrorism and Human Rights May 2018.

said the mayor's refugee-friendly policies were the motive for the attack.[14] Following these two incidents, the German authority responded by enacting new counterterrorism legislations which were perceived to be far-reaching.

In 2017, for instance, Germany justifiably significantly increased the number of its terrorism-related investigations, arrests, and prosecutions, and to a lesser extent, increased prosecutorial and law enforcement resources to handle the increased caseload. Law enforcement targeted a range of terrorist groups including violent Islamist extremists (approximately 90 percent of cases, and the greatest threat according to German officials), the Kurdistan Workers Party (PKK), the Turkish Revolutionary People's Liberation Party/Front (DHKP-C), and domestic left wing and right wing actors. At the same time, the government enhanced monitoring of *Gefaehrder* (i.e., dangerous persons who had not been accused of crimes but had come to the attention of law enforcement), began deportations of foreign terror suspects, and actively investigated returning foreign terrorist fighters. Terrorism has become a major issue for all political parties in Germany and counterterrorism measures seems to be a top priority among political leaders. Germany is a member of the Global Coalition to Defeat ISIS and therefore continues its counterterrorism cooperation with the international community.[15]

In line with its constitutional mandate to provide security and safety, the Germany government enhanced its existing counterterrorism laws with several pieces of legislation, including: expanded use of mobile license plate reading systems to assist police and border security personnel; legalization of electronic ankle bracelet monitors; implementation of European Union (EU) Directive 2016/681 concerning Passenger Name Record (PNR) data; implementation of EU regulations to strengthen EU-wide law enforcement data sharing and align data protections with Europol regulation 2016/794; authorization of online search and source telecommunication surveillance; and enhanced prosecution tools for hate crimes and online propaganda posted by terrorist organizations. The Germany government's response to terrorism threats following the incidents of attack was reminiscent of 'scotched earth.' Probably the term "enemy penology" coined by Guenther Jakobs brings to bear the response of Germany authority to terrorism threats.

Due to increasing and unpredictable terrorism threats, Guenther Jakobs' terminology of "enemy penology" is gaining political credence in the war against terrorism in Germany. Jakobs introduced the concept of "enemy criminal law" (*Feindstrafrecht*), or enemy penology, into the legal debate, due to a concern with the increasingly anticipatory nature of criminalization in German legislation in the last decades of the 20th century. Against the backdrop of a series of terror attacks in the West and the ensuing debates on how to deal with the dangers and threats of the new millennium, Jakobs's theory gained new momentum in Germany's public discourse and beyond.[16] This concept has become a device for political intervention. Indeed, the notion of the enemy penology is

[14] See United States Department of State, Country Reports on Terrorism 2017 - Germany, 19 September 2018, available at: https://www.refworld.org/docid/5bcf1fa54.html. Accessed 15 December, 2019.
[15] id
[16] KRASMANN Susanne. *Criminological Theory, Critical Criminology*. Online Publication. Date: Jan 2018DOI: 10.1093/acrefore/9780190264079.013.36. https://oxfordre.com/criminology/criminology/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-365. Accessed on 2019. 10. 27.

"attractive" and indispensable for dealing with certain extreme crimes and notorious offenders, not only to prevent future crime and avert harm from society but also, to preserve the established ordinary criminal law. This concept advances the idea that the enemy should be isolated and excluded from the normal system in society. Enemy criminal law therefore may be a peculiar legal concept that has found its way in counterterrorism law.

The German authority has adopted a multi-agency approach to investigating terrorism threats. It is now the case that counterterrorism investigations must be conducted by both federal and state-level law enforcement agencies and coordinated through the Joint Counter-Terrorism Center, which is composed of 40 internal law enforcement and security agencies. According to a recent report by the Ministry of Justice, the report indicates that there were 1,119 active terrorism investigations during January to November 2017, a sharp increase from 238 in 2016. Some cases were offshoots of refugee processing (for example, asylum seekers claiming to be threatened by violent Islamist extremists). Law enforcement agencies significantly expanded use of the *Gefaehrder* (perpetrators) designation, used to monitor "extremists," and completed the first deportations of known terrorists. Thirty-six *Gefaehrder* were deported in 2017, the majority to Algeria, Bosnia and Herzegovina, and Tunisia.[17] It is also important to note that in August 2017, the Germany Constitutional Court upheld a law permitting expedited deportations of persons on the *Gefaehrder* list. This is important because it highlights an incident where the judiciary supports government's policy on the fight against terrorism.

It should, however, be noted that there is some similarities between Germany and France in their responses to terrorism threats. While it is apparent that the French Government created and introduced 'enemy penology,' a similar phenomenon is replicated in Germany's criminal justice system. For example, the two high profile 2017 cases highlight increased sentences for terrorism convictions. Four defendants associated with the 2012 Bonn Rail Station Bombing Plot were convicted on charges that included founding and/or membership in a terrorist organization, conspiracy to commit murder, and weapons violations. The main defendant received a life sentence with no possibility of parole, which is rare in Germany. The accomplices received between nine years and nine months and 12 years, which are atypically long sentences in Germany. This clearly illustrates the point that the state is more inclined to codify or introduce 'enemy penology' as opposed to using the ordinary penal code while fighting terrorist suspects. This also raises the issue of discrimination between criminals because both terrorist acts and other ordinary criminal acts are jointly treated as criminal offences by law because terrorism is nothing but a crime.

The other point to bring forth about Germany's authorities resolve to fight terrorism is the high suspicion regarding religious affiliation. It is interesting to note, for example, that the Germany Anti-Terror Act 2006, amended 2017 provides several requirements of personal details (data) that must be obtained from terrorist suspects. It is worrying that the "Anti-Terrorism File Act of December 22, 2006 (Federal Law Gazette I p. 3409), which was last amended by Article 10 of the Law of August 14, 2017 (Federal Law Gazette I p. 3202)" requires terrorist suspects to disclose their religious affiliation, among other requirements. For, example, § 3(hh), which mainly addresses types of data to be stored in police file asks for information on religious affiliation and

[17] https://www.refworld.org/docid/5bcf1fa54.html. Retrieved on 2019. 11. 2.

justifies this on the basis of the necessity to know an individual's religious affiliation for the purposes of clarity in combating international terrorism. This requirement increases the possibility of profiling and discrimination of foreigners based on their religious creed.

The other interesting aspect of the Germany's counterterrorism law is its security measures on surveillance laws. These laws have come under greater scrutiny. It is a constitutional obligation that the German government has to protect and respect personal privacy, which is why the country has had some of the most restrictive surveillance laws in the world. Any other deviation from this obviously falls afoul of the German constitution. However, the increased terror threat in recent years has seen the German government tighten measures on the streets and online. In June 2017, for example, the German government added an unprecedented spate of new public surveillance laws to Germany's Criminal Code. This saw a major increase in the number security cameras installed across cities and sanctioned federal police to wear body cams while on patrol. At the same time, the Germany authority mandated the BfV to be responsible for monitoring "anti-constitutional" and extremist activity by intercepting data sent through telecommunications networks, such as emails, telephones and text messages. It does this either by requesting the data from the telecom providers, or through what is known as the "Trojan Law," which allows malware to be installed on computers and smartphones. Intercepted data is allowed to be stored for up to six months.[18] This development attest to government's violation of privacy rights and runs afoul to the German constitution.

In each state of Germany with the exception of Bavaria, the law allows for detention of suspects without charge for a maximum of 14 days. However, in 2017 the southern state of Bavaria caused a huge legal drama when its regional government sought to keep suspected terrorists indefinitely detained without charge. The state's ruling party, the Christian Social Union, was actually accused by a number of opposition lawmakers and the press of seeking to undermine the rule of law. The Bavarian regional government ultimately introduced laws allowing suspects to be held without charge for up to three months at a time. However, every three months, a judge must decide whether the suspect can be released or not. In theory, a suspect could remain imprisoned for years. Terrorist attacks in the Bavarian cities of Würzburg and Ansbach; a mass shooting in Munich; and the truck attack at the Christmas market in Berlin completely ramped up security measures against terrorism in the state of Bavaria. In response to these violent incidents, the state of Bavaria passed a new law expanding the powers of the police. "The most efficient defense against dangers is to not let them emerge at all," said Bavarian Interior Minister Joachim Herrmann. "We're an open society, but in order to protect that society we need a strong state. Civil liberties will not be threatened by the authorities through laws or surveillance, but rather by extremists and chaos."[19] At the same time, electronic ankle bracelets, heightened surveillance, aggressive action against potential threats were some of the new measures taken by the Bavaria's parliament to counter extremism. The main aim was to stop imminent threats.

[18] https://www.dw.com/en/preventing-terrorism-what-powers-do-german-security-forces-have/a-40546608. Retrieved on 2019. 11. 12.
[19] https://www.dw.com/en/bavaria-ramps-up-security-measures-against-terrorist-threats/a-39829936. Retrieved on 2019. 11. 14.

Criticisms were raised following the introduction of the new counterterrorism laws. One of the criticism came from Markus Löffelmann, a judge at the Munich District Court. "We have to remember that we're dealing with a situation in which the person concerned has not committed a criminal offense," warned the judge.[20] But he was not the only one who criticized the changes introduced by the new legislation. Criticism also came from both the judges' union and the police force. The opposition in the state parliament also voiced their concern and said the law goes too far. Katharina Schulze of the Green Party, for example, said that the possibility of arresting people who haven't been convicted or suspected of a crime is a massive infringement on their rights. The Social Democrat (SPD) politician Franz Schindler who was a strong proponent of revising the security laws also voiced a concern that the freedom of citizens would be disproportionately limited in the name of security by the new measures. For this reason, the SPD abstained during the vote in parliament. Schindler was especially critical of how the vaguely defined term "imminent threat" empowered the police while possibly infringing upon constitutional rights.

It can be deduced from the discussions in this section that while some of the newly introduced counterterrorism laws are consistent with the constitutional principles that guarantee the protection of fundamental rights and freedom, others pose significant challenges to the constitution, rule of law and, of course judicial independence. The balance between national security and human rights in Germany's war against terror has increasingly tilted in favor of security.

10. Conclusion

High-level terrorism threats produce challenges that weaken the principle of judicial independence in liberal democracies. This is because the pressure on the government to preserve national security and to maintain law and order, not only affects the executive branch of government, but is a shared pressure that also affects both the legislative and the judicial arms of government. It is a pressure that often translates into the legislature and the judiciary feeling the need to support the government achieve its national security policy. This pressure creates an environment that does not make judges feel fully free to decide terrorist-related cases exclusively according to the law. This means that during trial of terrorist suspects, impartiality might not be guaranteed because of the pressure on the judiciary to support the executive achieve its national security policy objectives.

Among western liberal democracies, the level of implementation of judicial independence varies greatly between different countries due to different political and judicial systems. Because of the diversity of legal systems, constitutional positions and approaches to the separation of powers could also be different. It is also fair to assume that there could be some possible divergence in the level of protection of judicial independence between EU Member States and non-EU Council of Europe Member States. Each country would behave differently when faced with imminent terrorist threats. It is very likely that during high-level terrorism threats, the executive actions would pay little regard to the rule of law and this in turn would hamper the right to a fair trial of terrorist suspects. Since the likely breach of the rule of law and the right to a fair trial is possible, particularly

[20] https://www.dw.com/en/bavaria-ramps-up-security-measures-against-terrorist-threats/a-39829936. Accessed on 2019. 11. 10.

during periods of high-level terrorism threats, this would imply that an efficient delivery of justice by judges would not be possible.