SEMI-ANNUAL SCHOLARLY LEGAL JOURNAL
OF COMENIUS UNIVERSITY BRATISLAVA
FACULTY OF LAW

BRATISLAVA LAW REVIEW

Vol 6 No 1 (2022)

ISSN (print): 2585-7088
ISSN (online): 2644-6359
EV: 5519/17
DOI: 10.46282/blr.2022.6.1

CONTACT
Comenius University Bratislava
Faculty of Law
Šafárikovo nám. 6
811 00 Bratislava
Slovakia
blr@flaw.uniba.sk
IČO: 00 397 865

Published twice a year by Comenius University Bratislava, Faculty of Law
print and online:
https://blr.flaw.uniba.sk
https://doi.org/10.46282/blr

Volume 6 Issue 1 was published 30th June 2022

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Forthcoming issues:
2022, volume 6, issue 2
Deadline for submission of papers: 15th September 2022
Review procedure and editing process: September-November 2022
Foreseen date of publication: December 2022

2023, volume 7, issue 1
Deadline for submission of papers: 15th March 2023
Review procedure and editing process: March-June 2023
Foreseen date of publication: June 2023

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BRATISLAVA LAW REVIEW

PUBLISHED BY
THE FACULTY OF LAW,
COMENIUS UNIVERSITY
BRATISLAVA

ISSN (print): 2585-7088
ISSN (electronic): 2644-6359

BAVARIA'S SUPREME COURT – A UNIQUE FEATURE IN HISTORY AND TODAY / Manfred Dauster

Dr. Manfred Dauster
Presiding Judge at the Bavarian Supreme Court/Munich and Presiding Judge at the High Court of Appeal of Munich, as well as a member of the Institute for Economic Criminal Law, European and International Criminal Law at the University of Saarland, Saarbrücken, Hilblestraße 12, 80636 München, Germany
Manfred.Dauster@oblg.bayern.de
ORCID: 0000-0001-7582-1127

Abstract: *Courts shape the rule of law. Their history is part of the culture of a country. The way judicial institutions are treated characterises a country's attitude towards the status they accord to courts and judges. In its almost 400-year history, Bavaria's Supreme Court has experienced all facets - from being held in high esteem to being abolished twice. Its history is a lesson that points to the future in the development of European legal culture.*

Key words: *Bavaria's Supreme Court; Legal Culture; European Rule of Law; Legal History*

Suggested citation:
Dauster, M. (2022). Bavaria's Supreme Court – A Unique Feature in History and Today. *Bratislava Law Review*, 6(1), 9-30. https://doi.org/10.46282/blr.2022.6.1.246

Submitted : 19 June 2021
Accepted : 10 November 2021
Published : 30 June 2022

1. INTRODUCTION

If we look at the landscape of institutions in the countries of Europe, we see few, especially in the courts, which are so important for the European rule of law and which have a long tradition as evidence of the growth of a rule of law. Europe has experienced too many upheavals in the centuries of its history, which have had their effects on the judicial institutions in the European countries. The Supreme Court of Bavaria is an exception - not only in Bavaria and in Germany. Its very eventful, even painful history can be a lesson in how states deal with their judicial institutions. This handling is embedded in the constitutional and constitutional-political framework of the demand for a cultural state in the European countries, to which the legal culture belongs as one of its core elements. However, this legal culture can hardly be grasped in all its dimensions without institutional history.

2. COURT AND (LEGAL) CULTURE

Culture is not just about having opera houses and museums. Opera houses and museums are a given when it comes to culture, even if some political discussions about their funding suggest the opposite. Culture is a system of phenomena that includes the individual, society and the state and is characterized by a multitude of interdependencies between all these players. The absence of culture becomes a threat to the individual, society and the state, in particular if individual and social brutalization leads to the

abandonment of humanity, morals and law. This is still important to say in a country that has experienced the most horrific times of political, social, but also individual lack of culture. Hitler's passion for the Wagner Festival in Bayreuth does not make the Nazi State a "cultural state" (Kulturstaat). Thus, attending a festival did not make Hitler a supporter of the culture that had developed throughout German history. He never was, and neither were his cronies. This applies to him as a private person as well as the top representative of the state, and this statement has general validity for the entire Nazi regime. The lack of culture hurts. However, describing which individual, societal and anthropological aspects culture includes (of whom? of the individual?, of a certain society?, of a continent?) can and must be discussed in individual references. Not always and at all points such a discussion will lead to a consensus, but that is inherent to discussing culture.

It was the lack of culture under the Nazi regime that in 1946 prompted the Bavarian constitutional legislation to establish the Free State of Bavaria as a "cultural state" (Kulturstaat). The lack of culture was vividly in the minds of the members of parliament at the time, some of whom had experienced it themselves or even suffered from it; the consequences of Germany`s cultural collapse were omnipresent in the ruined landscapes of Bavaria's cities, they were a painful permanent reminder. Explicitly including culture in the constitution, defined it a legal concept, although this still awaits detailed explanation in the case law of the Bavarian Constitutional Court. However, it can be stated: where there is law, there is also culture. Injustice shapes and causes lack of culture. Therefore, the commitment to the Bavarian cultural state was also a commitment to the Bavarian legal culture as it had been developed and cultivated over centuries until January 30th, 1933, the day of the National Socialist's seizure of power. Legal culture also includes the institutions that are indispensable to the rule of law, first and foremost independent courts. In this respect, the cultural state certainly also reflects the history of institutions, especially in Bavaria, which, with its Supreme Court in all its historical manifestations, has shaped the Bavarian legal landscape for many centuries[1] of its more than 1000 years of sovereignty. Bavaria's cultural state also includes political discourse and the democratic customs that sustain it. In the course of the 20th and 21st centuries, Bavaria's Supreme Court has not always been (morally) well treated with respect to this discourse. This article sketches this by means of reconstructing the institutional history of this court, but also by offering an outlook at the value of this unique institution in Germany and in Europe of the regions.

3. FROM THE 17TH CENTURY *REVISORIUM* TO THE 19TH CENTURY MUNICH *OBERAPPELLATIONSGERICHT*

Germany's history is characterized by particularism in its public institutions. While in other European countries, such as France and England, the centralized nation state grew stronger at the turn of the Middle Ages to the modern era, the trend towards particular principalities intensified in Germany. This trend became even stronger with the religious division caused by the Reformation in 1517 and the formation of blocs between the then Protestant principalities and the states that remained Roman Catholic and were grouped around the Habsburgian Emperors, which remained Roman Catholic, with Bavaria developing to become a stronghold of Catholicism. When in 1806 the Holy Roman Empire ceased to exist, it was considered by some German law academics as a

[1] The Kingdom of Prussia, for example, the predominant power in the 19th century's Germany, always adhered to its higher courts and never decided to have a single supreme court.

"constitutional monster" consisting of several hundred of almost sovereign entities, a primarily ceremonial *Emperor* and the Imperial Parliament in Regensburg (*Reichstag*), acting somewhat like an international congress of talkative diplomats, who were more interested in their prerogatives and diplomatic rankings than in substance matter. At the turn of the 15th to the 16th century, a reform of the empire had aimed to counteract the fragmentation and powerlessness of the imperial institutions, which contemporaries were already aware of at the time. One remaining, though not very effective, result, was the Imperial Court (*Reichskammergericht*), established by Emperor Maximilian in 1495 (Schmid, 2003, pp. 117–144). The *Reichskammergericht* (Schroeder, 1978, p. 368 et seq.) was the central judicial authority in Germany that could administer justice throughout the Empire in either penal, civil and other matters. Since Emperor Maximilian, this was the Imperial Court initially seated in Frankfurt, then in Worms, then in Speyer and finally in Wetzlar near Frankfurt (Hausmann, 1995, pp. 9–36, 2003, pp. 145–160). Johann Wolfgang von Goethe, the greatest of German poets, spent a short time there as a young assessor. In the course of time, the *Reichskammergericht* was paralleled by another semi-judicial institution, the Imperial Court Council (*Reichshofrat*), based at the Imperial Court in Vienna and performing administrative as well as judicial tasks, especially in the field of cases linked to the position of the Emperor and his prerogatives and of feudal cases (Kasper-Marienberg, 2012, p. 12; Ortlieb, 2003, p. 221 et seq.); often conflicting with the jurisdiction of the *Reichskammergericht*. In the increasingly fragmented Holy Roman Empire, the situation remained like this until August 6th, 1806, when against the background of Napoleon's striving for power over Germany, Emperor Franz II laid down the German crown after he had declared himself Emperor of Austria in 1804.

However, the larger German states of the Empire, that is, first and foremost the Archduchy of Austria, the later Kingdom of Prussia and also the Electorate of Bavaria, were not much interested in being dragged before the barriers of the *Reichskammergericht* in legal disputes.[2] This contradicted their own understanding of the sovereignity of their territories, especially after the peace treaties of Münster and Osnabrück sealing the end of the Thirty Years War in 1648, which further strengthened the trend towards independence of the larger German territories. The means of separating the territorial court systems from the appeal supervision by the *Reichskammergericht* and its jurisdiction come with the "***privilegium de non appellando illimitatum***" (Eisenhardt, 1980; Kalkbrenner, 1975, p. 184), a privilege granted by the emperor to the most senior princes of German territories to complete the appeal processes within their territories and to avoid any supervision or interference by *Imperial Institutions*.[3] The Dukedom of Bavaria received this privilege from Emperor Ferdinand II on May 16th, 1620, and is to be seen in the context of the elevation of Duke Maximilian I to the Electoral Dignity in 1623 in gratitude for his support of the Habsburgians (Wolf, 2012, pp. 188 et seq., 289 et seq.) in their struggle against the Count Palatine of the Rhine, Prince Elector and short-lived Bohemian King Frederick in the early years of the Thirty Years War (Merzbacher, 1993, pp. 1–2; see facsimile print of the Imperial Privilege of 1620 in Delius, Seitz, and Hilliges, 1993, pp. 90–91; Kalkbrenner, 1975, p. 184;). The new Bavarian Elector created the "*Revisorium*" on April 17th, 1625, as the last judicial instance

[2] See complaint of the *Revisorium* to Prince Elector Max III Joseph of 1748 about law suits filed with the Reichskammergericht by Bavarian subjects, which urged the *Revisorium* to justify its activities (Sagstetter, 1997, pp. 28, 41 et seq.)

[3] However, in case of denial of justice by the territorial institutions (*"iustitia denegata vel protracta"*), legal remedy could be sought with the Reich institutions (see Sagstetter, 1997, pp. 28, 42).

DOI: 10.46282/blr.2022.6.1.246

in his electoral lands[4] replacing the appeals to the *Reichskammergericht* by *"beneficium revisionis"* (Merzbacher, 1993, pp. 1, 3)[5] in the Bavarian Electorate (Merzbacher, 1993, pp. 1–2).[6]

The Supreme Court of the Free State of Bavaria dates back to this *Revisorium* and therefore may claim almost 400 years of existence.[7]

The first two decades of the 19th century were dramatic times for Germany and especially for Bavaria. Napoleon elevated the Bavarian Prince Elector Maximilian Joseph to kingship. More importantly, the territory of Bavaria was enlarged and in the process of dismantling the former Holy Roman Empire all small sovereign and semi-sovereign territories within the enlarged Bavarian territory (and elsewhere in Germany) disappeared and were incorporated in the new Kingdom of Bavaria (Kalkbrenner, 1975, pp. 184, 188; he counts 83 such new territories acquired by Bavaria). Foremost all ecclesiastic entities (bishoprics, monasteries and abbeys) and all Free Imperial Cities lost their independence and became mediatized entities of the Kingdom of Bavaria or other German states). Each of these newly acquired territories brought its own legal order into the Kingdom, a contrast to any modern understanding of legal unity. Streamlining the public administration of the new kingdom (Doeberl, 1928, p. 466)[8] and abolishing traditional feudal rights and privileges were mandatory and became the prerequisite for integrating the newly acquired territories and their population into Bavaria (Kalkbrenner, 1975, pp. 184, 188; Merzbacher, 1993, pp. 1, 7). Some of the achievements of the Napoleonic

[4] In contrast to the *Reichskammergericht*, whose judges (and other personnel) were appointed by the Emperor on the proposal of the collegia of the *Reichstag*, the representations of the princes, nobles and the free cities in the old parliament, (*ius praesentationis et visitationis*), the Bavarian territorial collegia had not such a right of presentation, so that the *Revisorium* was a purely princely instance from the beginning (Merzbacher, 1993, pp. 1, 3).

[5] The *Revisorium* was the ultimate instance in civil proceedings, while final legal remedies in criminal proceedings remained within the jurisdiction of the Bavarian *Court Council*, a semi-judicial, last instance and political as well as administrative body immediate to the Elector (Heydenreuter, 1981; Merzbacher, 1993, pp. 1, 3; Neudegger, 1921, p. 119; for the Revisorium's jurisdiction, see Kalkbrenner, 1975, p. 184 et seq.)

[6] See facsimile prints of the Electoral Law Degree of April 17th, 1625 on the "Revisorium" establishment and a letter of the Elector of April 18th, 1625 to the Chief Chamberlain of Straubing explaining the jurisdiction of the said "Revisorium", in Delius, Seitz and Hilliges (1993, pp. 92–97 including reading the transcripts and explanations thereto on p. 98 and 99); Helmut Kalkbrenner also pointed to the enactment of the *Codex Maximilianeus* of 1616, a first attempt of codifying the law of the land in Bavaria after the *Lex Baiuvariorum* of the 8th century (1975, p. 184).

[7] For its institutional history in the 17th and 18th century see Kalkbrenner (1975, p. 184 et seq.), Friedrich Merzbacher also pointed to the fact that at the end of the 70s of the 18th century official court documents began to name the Revisiorium "Oberappellationsgericht" (1993, pp. 1, 3–7); in addition, the Revisorium experienced "revolutionary" developments through the Enlightenment of the 18th century and its ideas of natural law (Hugo Grotius and Samuel Pufendorf – as the most prominent representatives of the philosophy of natural law at the time, see more in Welzel [1962, pp. 123 et seq.; 130 et seq.]) when the Electorate reformed its legislation through the *Codex Iuris Bavaracii Iudiciarii* of 1753, a codification of the rules on civil proceedings (see also Code of Civil Procedure for the Kingdom of Bavaria of April 29th, 1869 [supplement to GBl. 1869, p. 123], in conjunction with the law concerning the introduction of the Code of Civil Procedure for the Kingdom of Bavaria of April 29th, 1869 [GBl. 1869, p. 1233])., through the *Codex Maximilianeus Bavaricus Civilis* of 1756, a codification of civil law, and through the *Codex Iuris Bavaricii Criminalis* of 1751, which all marked the Bavarian legal history for more than the next 100 years. The 1751 Criminal Code was replaced by the Common Criminal Code for the Kingdom of Bavaria of May 16th, 1813 (RBl. 1813, p. 665), which entered into force only for the Bavarian territories on the right bank of the Rhine river, whereas the French Code Pénal remained effective in the Palatinate. It was not until 1861 that the criminal law was standardized in the Bavarian territories on the left and the right banks of the Rhine, in particular by the Criminal Code for the Kingdom of Bavaria of November 10th, 1861 (Supplement I to GBl. 1862, p. 321) (Biebl and Helgerth, 2004, p. 49 et seq.).

[8] In this process, the *Revisorium* was dissolved by Electoral Edict of November 5th, 1802 and then (temporarily) replaced by three supreme justice authorities in "old" Bavaria, Swabia and Franconia located in Munich, Bamberg and Ulm (Kalkbrenner, 1975, pp. 184, 187).

reforms, such as equality before the law and independent courts (for Bavaria see Merzbacher, 1993, pp. 1, 7), had an impact on Germany and Bavaria in particular and could not be ignored (Rumschöttel, 1997, pp. 5, 9).[9] The necessary and complex reform process began in the first years of the 19th century under Bavaria's omnipotent First Minister, Maximilian Joseph Count of Montgelas (1759 – 1838) (Grau, 1997b, pp. 43–44). He issued the Organic Edict of August 24th, 1808 to restructure the judicial system and replaced the traditional *Revisiorium* as the last instance by a three-instance court structure with the Munich High Court of Appeal (*Oberappellationsgericht*) on top of the court system.[10] The *Oberappellationsgericht* in Munich[11] gained greater importance in Bavaria's constitutional history when after the revolution[12] of 1848/1849, the State Court for the Kingdom of Bavaria[13] (*Staatsgerichtshof*) was established within the *Oberappellationsgericht* in Munich (Grau, 1997c, pp. 49, 56). Here lay the beginnings of a constitutional court system in Bavaria. The *Staatsgerichtshof* was primarily responsible for prosecuting ministers of the state government for violations of the constitution and of the law,[14] even though this jurisdiction did not acquire any real factual significance (Grau, 1997c, pp. 49, 56; Rumschöttel, 1997, pp. 5, 22).[15]

4. FROM THE *OBERAPPELLATIONSGERICHT* TO THE (FIRST) *BAVARIAN SUPREME COURT*

After the final defeat of Napoleon I, the German Confederation was formed as an essential but partial result of the Congress of Vienna, which endeavoured to rebuild Europe and Germany. In terms of international law, the Confederation was a union of sovereign German States. In particular, the German Confederation Act of 1815 did not establish a national court system within Germany as a whole. This topic was left to the Confederation's Member States so that courts in the individual German States began and ended there. For the Kingdom of Bavaria, which was created in 1806, the Munich

[9] Today, Bavaria's State territory is located on the right bank of the Rhine River only. As a result of the Vienna Congress and the Treaty of Munich of April 30th, 1816 , in exchange of Salzburg, Inn- and Hausruckviertel, Bavaria received also territories on the left bank of the Rhine River, the Palatinate, where in 1810 under the French regime the Code d'Instruction Criminelle was enacted and remained in force even after the Palatinate became Bavarian (Biebl and Helgerth, 2004, p. 23) The criminal institutions in Palatinate kept their French touch until in 1832 the Palatinate institutions were merged into the existing bodies on the right bank of the River Rhine (Royal Ordinance of June 29th, 1832 [RBl. 1832, p. 438], see also Biebl and Helgerth (2004, p. 25 et seq.) and Kalkbrenner (1975, pp. 184, 188)).

[10] Facsimile print of Official Gazette of August 24th, 1808 in Delius, Seitz and Hilliges (1993, pp. 119, 121); see further Act Concerning the Bases of Legislation on the Organization of Courts, on Proceedings in Civil and Criminal Cases and on Criminal Law, of June 4th, 1848 (GBl. 1848, p. 137); and Biebl and Helgerth (2004, p. 29 et seq.).

[11] For its function to decide on complaints against State Ministers as of violations of the Constitution, which the King could submit (Title X § 6 of the 1818-Constitution) see Rumschöttel (1997, p. 5,19); with view on the Prosecutor's Office in the 19th century see Biebl (1992, p. 717 et seq.).

[12] Act on the Responsibility of Ministers of June 4th, 1848 (GBl. 1848, p. 69).

[13] Articles IX and X of the Act on the Responsibility of Ministers of June 4th, 1848 (GBl. 1848, p. 49). See further Merzbacher (1993, pp. 1, 8); facsimile print of the respective Official Gazette see Delius, Seitz and Hilliges (1993, p. 127/132).

[14] Act on the State Court and the Proceeding against State Ministers of March 30th, 1850 (GBl. 1850, p. 133); as well as see Rumschöttel (1997, pp. 5, 20 et seq.) and Grau (1997c, pp. 49, 55 et seq.).

[15] Prior to the establishment of the State Court, the *Landtag* and the *Reichsrat* dealt with the then Bavarian State Minister for the Interior, Eduard von Schenk, whose indictment before the *Staatsrat*, a semi-judicial institution (see Schlaich, 1965, pp. 460–522), almost came to pass (Grau, 1997d, pp. 57, 59–61; Weckerle, 1930) Eduard von Schenk prevented any indictment by resigning from office. His case was the only one seriously discussed in Bavaria under the terms of a ministerial impeachment.

DOI: 10.46282/blr.2022.6.1.246

Oberappellationsgericht crowned the inner-Bavarian court system.[16] However, the situation changed completely after the German War of 1866 when victorious Prussia defeated the troops of the German Confederation, ousted Austria from the German Confederation and created the Northern German Federation. The Empire of Austria went its own different ways and later became the so-called "Double Monarchy" of (the Empire of) Austria and of (the Kingdom of) Hungary. However, within Germany (minus Austria), the Northern German Federation was only the first step on the way to a unified nation. The Franco-German War of 1870/1871 created the possibility of a unified nation under the roof of one State in Germany under international and constitutional law and, in particular, under the predominance of the Kingdom of Prussia. The Constitution of the so-called Second Empire of April 16th, 1871,[17] created a state founded on an "eternal covenant of German Princes and Cities", but nevertheless contained some clear centralist elements by giving the Reich the right to legislate on essential questions of national unity.[18] Concessions were made to the southern German States, above all the Kingdom of Bavaria, especially with regard to the Bavarian Army, over which the King of Bavaria retained supreme command in peacetime. The German Empire very soon made use of its legislative rights in the field of justice as well. The North German Federation had already enacted the Criminal Code, which then the Reich legislator transposed into the Reich Act[19] with national effect.[20] The *Reichsjustizgesetze* (Imperial Judiciary Acts), which entered into force on October 1st, 1879, comprised of the national Civil Procedure Code,[21] the national Criminal Procedure Code[22] and the national Bankruptcy Code.[23] However, it was the Courts Constitution Act,[24] which regulated the administration of justice nationally. In criminal and civil cases, the Courts Constitution Act created a chain of courts that went from district courts via regional courts to the Higher Regional Court or from regional courts to the *Reichsgericht* as the Empire's Supreme Court,[25] which became operational on October 1st, 1879.[26] Conceptually, there was no longer any room in this new court system for the Supreme Court of one of the individual German States.[27]

Against the background of the special rights granted to Bavaria anyway in the due process of Germany's unification in the years 1870 and 1871 and with consideration for the pronounced sensibility about Bavarian statehood within the Reich and vis-à-vis the other individual German States, the Reich legislature by §§ 8 and 9 of the Introductory

[16] With view on the legal developments and reforms of the 19th century in Bavaria see Merzbacher (1993, pp. 1, 8 et seq.) and Kalkbrenner (1975, pp. 184, 188 et seq.). It is noteworthy to say that the first national constitution, adopted after the revolution and times of unrest of 1848/1849 and never entering into force established the national Supreme Court, the *Reichsgericht*, but again left it with the German States how to design their inner-court system.

[17] RGBl. 1871, p. 63.

[18] See Articles 3 and 4 of the Constitution.

[19] of May 15th, 1871 (RGBl. 1871 p. 127).

[20] Since only the *Reichsoberhandelsgericht* with limited competences was established in Leipzig in 1871 and it took another 8 years until the *Reichsgericht* was established, the Bavarian legislature made provisions through Article 63 of the Bavarian Introductory Act to the Criminal Code of December 26th, 1871 (GBl. 1871 Sp. 123) to ensure that the competences of the Oberappellationsgericht in Munich as the highest court in criminal matters were preserved (Merzbacher, 1993, pp. 1, 9 et seq.).

[21] of January 30th, 1877 (RGBl. 1877 p. 83).

[22] of February 1st, 1877 (RGBl. 1877 p. 253).

[23] of February 10th, 1877 (RGBl. 1877 p. 351).

[24] of January 27th, 1877 (RGBl. 1877 p. 41).

[25] Primarily having jurisdiction on final appeals in civil and criminal matters.

[26] § 1 of the Introductory Act to the Court Constitution Act (EGGVG) of January 27th, 1877 (RGBl. 1877 p. 77). For the *Reichsgericht*'s significance, see Müller (1997).

[27] See more details in Merzbacher (1993, pp. 1, 10 et seq.) with the discussions among Unitarists and Federalists as to whether the German States should be allowed to maintain their supreme courts.

Act to the Courts Constitution Act (EGGVG)[28] created the possibility for those federal states of the German Reich with more than one Higher Regional Court to concentrate the competences of the said higher regional courts on civil and penal matters within the State Supreme Court.[29] The Kingdom of Bavaria made use of this possibility. The government dissolved the Higher Appellate Court of Munich and created the *Supreme Court of the Kingdom of Bavaria* by the State Act on the Implementation of the Court Constitution Act of February 28th, 1879[30] and transferred the personnel of the *Oberappellationsgericht* to the new institution by Royal Ordinance of September 23rd, 1879.[31] Being the highest court in Bavaria, the *Bavarian Supreme Court* dealt with appeals in criminal and civil cases,[32] partly replacing the *Reichsgericht*, partly alongside the *Reichsgericht*. The quality of the jurisdiction was recognized. Some contemporaries even rated the decisions of the *Bavarian Supreme Court* higher in quality than those of the *Reichsgericht.*[33] However, after more than 50 years of acclaimed activity, times were to change dramatically for the *Bavarian Supreme Court* (and the entire court system in Germany).

5. THE FIRST ABOLITION UNDER NAZI-RULE

With the appointment of Adolf Hitler as Reich Chancellor on January 30th, 1933,[34] the construction of the Nazi state began (Merzbacher, 1993, pp. 1, 15). The Nazi-State-ideology was focused on the figure of the "Führer" and in doing so enshrined strong centralist tendencies, aiming at "Gleichschaltung" of all public institutions (Biebl and Helgerth, 2004, p. 185 et seq.) and concentration of power in the organs of the Reich

[28] of January 27th, 1877 (RGBl. 1877, p. 77).

[29] See the correspondence between Minister of Justice Johann Nepomuk von Fäustle and King Ludwig II on the matter of preserving a Bavarian Supreme Court in Delius, Seitz and Hilliges (1993, pp. 136–141); Merzbacher (1993, pp. 1, 10 et seq.); Kalkbrenner (1975, pp. 184, 187).

[30] In particular, article 42 of the law (GVBl. 1879, p. 273).

[31] GVBl. 1879 p. 1044 et seq.; or Kalkbrenner (1975, pp. 184, 190).

[32] It is noteworthy to mention that before the Civil Code came into force on January 1st, 1900 the legal landscape of Bavaria was characterized at least by eighty to ninety *Partikularrechte*. Civil Partikularrechte were inherited when Bavaria was enlarged at the beginning of the 19th century and acquainted many autonomous former independent territories with their "particular" legislation, which never were harmonized, amended or altered – often since centuries, and are still part of the Bavarian legal life but of minor importance (Eisenhardt, 2018, p. 311 et seq.; Fernandes Fortunato, 2009, p. 328 et seq.; Reiter, n.d., pp. 20–22). Such Partikularrechte had been and are being the matter of the so-called *clausula bavarica* in § 8 of the EGGVG (Merzbacher, 1993, pp. 1, 11 and RGBl. 1911 p. 60).

[33] With view on the further development of the Bavarian Supreme Court and its jurisdiction see Merzbacher (1993, pp. 1, 11 et seq.).

[34] The appointment by *Reichspräsident* Paul von Hindenburg "legalized" the coup d'état-movement of the NSDAP. 10 years earlier, on November 8th/9th, 1923, a coup attempt orchestrated by Hitler failed in Munich in front of the Feldherrnhalle on Odeonsplatz. Two judges of the Bavarian Supreme Court, Ernst Pöhner and Theodor von der Pfordten, also took part in this attempt (Demharter, 2000, pp. 1154, 1156; Herbst, 1993, pp. 37–38 et seq.).

DOI: 10.46282/blr.2022.6.1.246

executive.[35] This "Reichification"[36] very soon started to affect the judiciary.[37] The Bavarian "reserve rights or prerogatives" from the time when the so-called *Reichsjustizgesetze* (Kruis, 2004, p. 640 et seq.) had entered into force in 1879 and gave rise to the fear among the National Socialists that the *Bavarian Supreme Court* and the *Prosecutor General's Office* assigned to it would resist the fascist spirit of the times (Biebl and Helgerth, 2004, p. 186; Herbst, 1993, pp. 37, 53; Ladyga, 2012, p. 63) and that they would represent a stronghold of federalism and the rule of law that they did not want. The judiciary was to be transformed into a controlled and politicized judiciary (Ladyga, 2012, p. 63). On January 1st, 1935, the *Bavarian State Ministry of Justice* fell victim to the Second (Reich) Law on the Transfer of the Administration of Justice to the Reich of December 5th, 1934.[38] The Ministry was demoted to a simple department of the *Reich Ministry of Justice*. The *Bavarian Supreme Court* and the *Prosecutor General's Office* assigned to it followed[39] - together with all other state judicial authorities – on April 1st, 1935. The Third (Reich) Law

[35] § 2 of the Ordinance for the Protection of the People and the State of 28 February 1933 (RGBl. 1933 I, p. 83): Assumption of the powers of the supreme state authorities of Bavaria by the Reich government and appointment of General Ritter von Epp as Reich Commissioner (Herbst, 1993, pp. 37, 46).

[36] The fascist "reichification", however, looked back on tendencies that, after the revolution of 1918, became recognisable in the Weimar Republic. They also involved a streamlining of the judiciary, but could not politically assert themselves before January 31th, 1933 (Herbst, 1993, pp. 37, 52; Ladyga, 2012, p. 64 et seq.). The plan to abolish the Bavarian Supreme Court in the course of a so-called "(National Socialist) simplification of state institutions" combined the abolition with the relocation of a senate of the *Reichsgericht* from Leipzig to Munich (proposal of the Nazi *Prime Minister* Ludwig Siebert of September 5th, 1933) was not taken up by Hitler`s government. Siebert was offered the *Reichsregierung*, in the event of the relocation of a senate of the *Reichsgericht* to Munich, to dissolve the Bamberg Higher Regional Court in addition to the dissolution of the Bavarian Supreme Court (Herbst, 1993, pp. 37, 53; F. Hettler, 2004, pp. 33–34; Hirsch, 2006, p. 3255).

[37] Appointment of Hans Frank as Reich Commissioner for Justice on March 10th, 1933 and his appointment as Bavarian State Minister of Justice on March 16th, 1933 after the resignation of the last democratically elected state government under *Prime Minister* Heinrich Held on March 15th, 1933 , which also laid the foundation for the purge of Jewish judges and public prosecutors from the Bavarian judiciary that was then beginning (Herbst, 1993, pp. 37, 46, 47). By Act of June 27th, 1933 (GVBl. 1933, p. 185) the Bavarian Parliament (*Landtag*) dissolved the State Court as the first Bavarian justice institution. Impressive is the justification given for this by Hans Frank as Minister of Justice on behalf of the Ministry as a whole, which reveals the National Socialist programme: "The revolution of national uprising has brought with it a profound and as yet incomplete upheaval of the constitutional foundations. The provisions on the State Court are no longer in harmony with the development that has occurred. The right of the *Landtag* to impeach ministers has lost its original value in view of the right of the Reich Governor to appoint and dismiss ministers. Incidentally, it has never been put into practice. The same applies to the decreased importance of the *Landtag* when it comes to the impeachment of its deputies. The likelihood of a constitutional dispute, namely between the *Landtag* and the *State Government*, has also receded strongly into the background with the advent of the new constitutional situation. The constitutional complaint at last, a peculiarity of Bavarian law, has developed in recent years predominantly into an abused legal remedy, from which often only the so-called grousers drew benefit. In addition, however, it is not appropriate to continue to refer constitutional questions to a supreme court as long as the new constitutional development has not yet been completed. Only when this is the case it will be necessary to examine whether and in what new form there is room again for the jurisdiction of a Bavarian State Court." (quoted from Rumschöttel, 1997, pp. 5, 26; Grau, 1997a, pp. 69, 75–77).

[38] RGBl. 1934 I, p. 1214.

[39] See the correspondence between the then Bavarian Prime Minister Ludwig Siebert and the Bavarian State Minister of Justice Hans Frank: Merzbacher (1993, pp. 1, 15). The letter of thanks from the Reich Minister of Justice, Franz Gürtner, dated March 28th, 1935 (Deutsche Justiz 1935, p. 544) reveals the fascist ideology: ... "If I nevertheless had to decide to abolish this highest Bavarian court, it was because there can no longer be any room for a supreme state court in the new united Germany and its unified Reich judiciary created by the takeover of the state judicial administrations. And it is precisely in the name of this judiciary, in whose sphere the dream of centuries for German unity was first fulfilled, that I therefore extend my warmest thanks to the Bavarian Supreme Regional Court ... in the past and in the present. The Reich Government thanks them for their excellent, self-sacrificing work for the benefit of the German as well as the Bavarian people at all times - also during the severe shocks in the post-war years."

on the Transfer of the Administration of Justice to the Reich of January 24th, 1935[40] "reichified" the courts and public prosecutor's offices of the Member States of the Reich; they became Reich institutions (Biebl and Helgerth, 2004, p. 187; Rumschöttel, 1997, pp. 5, 26 et seq.). The *Bavarian Supreme Court* (and the *Prosecutor General's Office* assigned to it) ceased to exist on April 1st, 1935, 56 years after their foundation.[41] The law decree of the Reich Minister of Justice of March 19th, 1935[42] on changes in the judiciary in Bavaria transferred some of its competences to the *Reichsgericht* and others to the Munich Higher Regional Court (Biebl and Helgerth, 2004, p. 187). The last President of the *Bavarian Supreme Court*, Dr Gustav Müller, was dismissed with effect from April 1st, 1935; the remaining posts of the dissolved court were transferred to the Munich Higher Regional Court (Herbst, 1993, pp. 37, 53). As far as the unpublished "heritage" of the *Bavarian Supreme Court* is concerned, the files and records are largely lost. The files of the abolished *Bavarian Supreme Court* were almost completely lost during one of the Allied air raids in 1945 (Herbst, 1993, pp. 37, 43).

6. THE RE-ESTABLISHMENT OF THE BAVARIAN SUPREME COURT

Proclamation No. 1, promulgated by the Allied Commander-in-Chief Dwight D. Eisenhower in March 1945, closed the German courts.[43] The *Reichsgericht* in Leipzig ceased to exist on April 19th, 1945 (Fischer, 2010, pp. 1077, 1086).[44] By further Proclamation No. 1 of the Allied Control Council of August 8th, 1945, the Allies took over the supreme power of government in Germany.[45] In rebuilding the judiciary, the Allied Military Governments and the State or *Länder* Governments that the Military Governments soon appointed to office in all occupation zones followed the traditional court structure according to the (Reich) Courts Constitution Act. In the area of ordinary jurisdiction, a three-instance court structure was finally (re-)established, beginning with the district courts, continuing with the regional courts, and ending with the higher regional courts (Biebl and Helgerth, 2004, p. 191; Herbst, 1993, p. 59).[46]

The period immediately after 1945 was hence characterized by the disappearance of the (central) Reich legislature. The German Länder (in East and West), which came into being soon after the collapse and which were increasingly given political responsibility by the allied military governments, replaced the missing Reich legislator, also due to the consequences of the war and emergency situations. Without the

[40] RGBl. 1935 I, p. 68.
[41] Bavarian Law of February 23rd, 1879 (GVBl. 1879, p. 272) and the Bavarian Law on the Implementation of the (Reich) Court Constitution Act of April 10th, 1878 (JMBl. 1879, p. 99) – to be found in Biebl and Helgerth (2004, p. 486 et seq.); Tillich (1996, pp. 107, 109); Kalkbrenner (1975, pp. 184, 191).
[42] RGBl. 1935 I, p. 383.
[43] Para. III of the Proclamation – retrieved on March 13th, 2021 from Datei:Proklamation Nr. 1-Zweisprachige Bekanntmachung des Obersten Befehlshabers der alliierten Streitkräfte Dwight D. Eisenhower (deutschsprachiger Teil).jpg – Wikipedia
[44] Attempts to re-establish the *Reichsgericht* in Leipzig immediately after the collapse of Nazi Germany failed, among other reasons, as a result of the Allied decisions of the Potsdam Conference. This included the withdrawal of the US troops from Saxony and Central Germany. The territories came under Soviet military administration, which had no interest in re-establishing the *Reichsgericht*. Instead, the Soviets arrested those judges of the former *Reichsgericht* they could get hold of and imprisoned them in the Mühlberg concentration camp on the river Elbe, where most of them died (Fischer, 2010, pp. 1077, 1086).
[45] Amtsblatt des Alliierten Kontrollrats 1945, p. 4 – corrected p. 241.
[46] For the initial shortcomings see Merzbacher (1993, pp. 1, 17).

DOI: 10.46282/blr.2022.6.1.246

restrictions of the Weimar Reich Constitution,[47] which had become obsolete, the re-established and newly established Länder had access to regulatory matters that had been reserved for the Reich before May 8th, 1945. As a result, legal unity in Germany became increasingly fragmented. With the exception of the Supreme Court for the British Zone (Fischer, 2010, p. 1077,1086), it was not possible to establish an overarching court of appeal. Plans for this failed for various reasons.[48] Cooperation between the Allies dwindled with the Cold War. The French military government was very idiosyncratic in its occupation policy, especially with regard to the Saarland, a state located in the extreme southwest of Germany with rich coal deposits and a pronounced steel industry (Fischer, 2010, pp. 1077, 1086). The western state governments were nothing but satisfied with the state of affairs. With its three higher regional courts in Bamberg, Munich and Nuremberg, the Bavarian State Government found the problems resulting from the fragmentation of the law in Bavaria all the more pressing.

The preparatory work for the re-establishment of the *Supreme Court of Bavaria* began late in 1947. A draft law for the re-establishment of the *Supreme Court* was discussed in the Council of Ministers on September 12th, 1947[49] and submitted to the *Landtag*, the Bavarian Parliament, on September 19th, 1947, which passed it with marginal amendments only on October 31st, 1947 as Act no 124.[50] The *Bavarian Supreme Court* (including the General Public Prosecutor's Office assigned to it) was re-established on July 1st, 1948. Pursuant to § 4 of Act No. 124, its jurisdiction extended to appeals against

[47] Articles 6 to 11 of the Weimar Reich Constitution of August 11th, 1919 (RGBl. 1919 p. 1383) regulated the broad subjects of the exclusive, concurrent and frame work legislation of the Reich. With the exception of the exclusive legislative competence of the Reich under Article 6 of the Constitution, the Länder were only competent to legislate insofar as the Reich had not regulated the numerous legislative matters by Reich law (Article 12 paragraph 1 of the Reich Constitution). The Weimar Republic was thus far more centralised than the Federal Republic of Germany is today.

[48]See Merzbacher (1993, pp. 1, 15 et seq.) for the discussion in the *Länderrat*, an overarching institution within the American occupation zone consisting of representatives of the five Länder of the zone, Bavaria, Bremen, Hesse, Württemberg-Baden, Württemberg-Hohenzollern, and with the authority to ensure harmonized policies between the Länder Governments concerned.

[49] Protocol No. 33 of the Council of Ministers of September 12th, 1947, p. 4 et seq. The main reasons considered by the Bavarian State Government were the following: legal unity in Bavaria, the disappearance of the *Reichsgericht* and increasing regulations under Land law that required uniform interpretation. The Bavarian State Minister of Justice at the time (re-establishment of the Ministry of Justice with the announcement of 5 December 1945 [JMBl. 1945, p. 2]) Wilhelm Hoegner, incidentally an outspoken federalist, also saw the Bavarian Supreme Court as an important milestone for a stronger autonomy of the Free State of Bavaria within a re-established German State as a whole (Biebl and Helgerth, 2004, p. 192).On the contrary, the idea of establishing the Bavarian Constitutional Court within the Supreme Court, as it had been the case until 1933 (cf. § 70 para. 1 of the Bavarian Constitution of 14 August 1919 [GVBl. 1919, p. 531]), was initially discussed in the political discussion at the time (Grau, 1997a, p. 69 et seq., 1997e, p. 78 et seq.; Gummer, 1993, pp. 359, 361; Ruf, 2015, p. 374 et seq.), but not pursued further. The Bavarian Constitution of December 2nd, 1946 (GVBl. 1946, p. 333) had instituted the Bavarian Constitutional Court as an autonomous constitutional body (Herbst, 1993, pp. 59, 61). The incorporation of the Constitutional Court into the Supreme Court would have required an amendment to the Constitution that had come into force a year earlier. The Bavarian state government did not want to go down this path, since in Bavaria constitutional amendments are subject to a referendum. Similarly, hopes of establishing the nucleus of the Supreme Court for the US occupation zone in the Bavarian Supreme Court were dashed, similar to the Supreme Court for the British zone in Cologne, which functioned between March 1948 and September 1950 (Biebl and Helgerth, 2004, p. 194 et seq.; Kalkbrenner, 1975, pp. 184, 191 et seq.).

[50] Act N. 124 (GVBl. 1948, p. 83) – see for the history of the re-establishment Merzbacher (1993, pp. 1, 15–17). In the parliamentary deliberations in the session of the Bavarian Parliament of October 31st, 1947, Thomas Dehler, a member of the Bavarian State Parliament and later Federal Minister of Justice, referred to the necessity of re-establishing the Supreme Court as an act of reparation for Nazi injustice inflicted on Bavaria (Herbst, 1993, pp. 59–60).

verdicts of the (lower) jury courts[51] and to appeals in other criminal cases pursuant to § 5(1) of Act No. 124 only if the competent courts (Regional Court and Higher Regional Court) referred the matter to the *Supreme Court* for the purpose of clarifying fundamental questions or ensuring the uniformity of the case law.

This model of jurisdiction of the *Bavarian Supreme Court* did not last for long. After the founding of the Federal Republic of Germany on May 23rd, 1949, the Basic Law,[52] the new German Constitution, redistributed legislative jurisdiction between the Federal State and its Länder.[53] The law of judicial proceedings and of the court structure within Germany became the subject of concurring federal legislation.[54] The (Federal) Law for the Restoration of Legal Unity in the Area of the Constitution of the Courts, the Administration of Justice in Civil Matters, Criminal Proceedings and the Law on Costs of 12 September 1950[55] made it necessary to re-design the jurisdiction of the *Bavarian Supreme Court*, also with view to the *Federal Supreme Court of Justice* (Biebl and Helgerth, 2004, p. 206 et seq.; Herbst, 1993, pp. 59, 62 et seq.), established on October 1st, 1950 in Karlsruhe. The re-design was carried out almost immediately (Biebl and Helgerth, 2004, p. 208 et seq.). The competences of the Bavarian Supreme Court, also in relation to the Federal Supreme Court, have remained essentially unchanged since the beginnings of the Federal Republic of Germany and were based on a division of labour. The Bavarian Supreme Court decided appeals on legal points in criminal cases that began in the district courts, and in (administrative) fine cases as well as in civil cases if the subject matter of the dispute was based rather exceptionally in Bavarian state law, and in matters of non-contentious jurisdiction, while the Federal Supreme Court decided criminal appeals that began in the first instance in the regional courts. The bulk of civil law appeals were and are based in federal law. They also fall under the jurisdiction of the Federal Supreme Court of Justice. State protection offences (such as high treason and treason against the state, treason against the peace, acts endangering the democratic constitutional state and the rule of law, espionage or terrorism) traditionally were allocated at the highest German criminal court with the consequence that there were no legal remedies against the verdicts of the Federal Supreme Court of Justice. With the transfer of first-instance jurisdiction from the Federal Supreme Court of Justice to the Higher Regional Courts of the Länder, the Bavarian Supreme Court in criminal cases also experienced an extension of first-instance jurisdiction. This distribution of jurisdiction remained[56] until the Bavarian Supreme Regional Court was abolished for the second time.

[51] The background to the jury courts was that at that time legal remedies were considerably limited for reasons of scarcity of resources. In principle, there was only one legal remedy; a third instance was excluded (Strafgerichtsverfassungsgesetz 30 March 1946 [GVBl. 1946, p. 100]; Act No. 43 on Appeals in Contentious and Non-contentious Matters [Appeals Act] of 10 April 1946 [GVBl. 1946, p. 300]) (Biebl and Helgerth, 2004, p. 194).The jury courts were instituted by decree of the Bavarian State Ministry of Justice of July 14th, 1948 (GVBl. 1948, p. 243) (Biebl and Helgerth, 2004, p. 192 et seq.).

[52] BGBl. 1949, p. 1

[53] Articles 70 et seq.

[54] On the fragmentation of law after 8 May 1945 see Biebl and Helgerth (2004, p. 205 et seq.). In this context, see Article 186 paragraph 2 of the Bavarian Constitution and Lindner, Möstl and Wolff (2017, Art. 187 recitals 8 et seq., as well as Articles 123 et seq. of the Basic Law).

[55] BGBl. 1950, p. 455.

[56] On the unsuccessful attempts to abolish the Bavarian Supreme Court until 2006 see Biebl and Helgerth (2004, p. 216 et seq.).

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7. THE SECOND DISSOLUTION ON JUNE 30TH, 2006

Elections to the Bavarian Parliament were held in the fall of 2003. The Christian Social Union (CSU), which has been in government since 1946 with only a brief interruption, under its party chairman and *Prime Minister* Edmund Stoiber, emerged from the elections with more than 60 per cent of the votes and a two-thirds majority of seats in parliament. In order to further promote technological progress, Edmund Stoiber, the old and new head of government, combined this policy of modernizing the economy and society with an unprecedented fiscal austerity programme in order to generate the necessary financial resources within Bavaria – called "the project administration 21" (F. Hettler, 2004, p. 33). Streamlining the state apparatus was a guiding principle of the programme of the new Stoiber cabinet IV. This excessive austerity policy also hit the *Bavarian Supreme Court*, like a bolt from the blue.[57] Without consultation with, for example, the then *State Minister of Justice* Beate Merk, the head of government announced in his government declaration on November 9th, 2003, to a largely speechless Bavarian Diet and a no less speechless public the abolition of the *Supreme Court of Bavaria* for reasons of state austerity and of simplifying the public institutions (F. Hettler, 2004, p. 33).[58] With a two-thirds majority in parliament, Edmund Stoiber did not have to be worried about any opposition to this from the government majority.[59] Moreover, the Bavarian *state government* did not care about uprising public protests,[60] which were also voiced outside Bavaria in favour of the court's continued existence. On October 25th, 2004, the Bavarian *Landtag* passed the Act on the Dissolution of the *Bavarian Supreme Court* and the *Public Prosecutor's Office* at this Court.[61]

The Repeal Act was challenged before the *Bavarian Constitutional Court*.[62] The chances of success of this constitutional complaint were low when realistically assessed.

[57] This lightning strike came all the more suddenly as all of Bavaria's prime ministers since 1946 have unanimously emphasised the importance of the Supreme Court for Bavaria's autonomy in Germany's federal system, praised the quality of its jurisprudence in the highest terms and - including Prime Minister Edmund Stoiber - rejected far from their minds any thought of abolishing this special Bavarian feature in Germany (see F. Hettler, 2004, p. 33 et seq.). On the occasion of the change in the office of the President of the Supreme Court on July 26th, 2000, only four years prior to the announced abolition, Prime Minister Stoiber stated: "Significantly, the 375-year history of the Bavarian Supreme Court was only interrupted during the time of the Nazi regime. In 1935, the Bavarian Supreme Court was abolished in the course of the politics of Gleichschaltung ("bringing into line"). This not only destroyed a symbol of Bavaria's statehood but also an important guarantor of an independent judiciary." (quoted by F. Hettler, 2004, p. 33).

[58] Insofar as Prime Minister Edmund Stoiber spoke of "simplifying the state" to justify the abolition of the over 375-year-old court, he unintentionally and without a corresponding awareness of history repeated the language used by the National Socialists in the "Reichification" of the federal judicial institutions and in the abolition of the Bavarian Supreme Court in 1935. In political discourse in Germany, one must always be careful with buzzwords! In addition: By dividing the jurisdiction of the dissolved Supreme Court among the three Higher Regional Courts, a regionalisation of case law was to occur, according to the state government. What the constitutional advantage of such an atomisation of uniform case law is supposed to be, still remains to be clarified.

[59] The Supreme Court found no real defenders in the parliamentary opposition. With a rather fatalistic attitude, the leader of the SPD parliamentary group in the state parliament at the time, Franz Maget, commented on the abolition. Only a few voices of opposition were raised, claiming that a tried and tested institution was being sacrificed for the sake of money only (see F. H. Hettler, 2004b, pp. 35, 37 et seq.).

[60] Since 1993, the Prime Minister himself had repeatedly - most recently in July 2000 - emphasised the necessity of uniform jurisdiction for Bavaria by the Supreme Court as well as the trend-setting significance of the Court's decisions for the whole of Germany, while at the same time condemning the elimination of the Court by the Nazi regime. According to the text of the government declaration of November 2003, the abolition was supposed to be about "pruning our legal state back to a lean rule- of-law state". As for the protesting voices see Hettler (2004a, p. 38 et seq.).

[61] Court Dissolution Act of 25 October 2004 (GVBl. 2004, p. 400).

[62] File no Vf. 3-VII-05 and Vf. 7-VIII-05.

It was therefore hardly surprising that on September 29th, 2005 the *Constitutional Court* confirmed the constitutionality of the repeal of the *Supreme Court*.[63] The *Constitutional Court* ruled that it is primarily a prerogative of the *State Government* to push ahead with political reforms and that it is up to the democratic legislator to decide what form a state administration and court organization should take below the mandatory constitutional requirements. There is no provision in the Bavarian Constitution that deals with the organization of the courts in Bavaria. Only the *Constitutional Court* is named in the constitution as a special body alongside the *State Government* and the *Landtag*, and is endowed with its own competences. Opponents of the abolition of the *Supreme Court* might have hoped that the *Constitutional Court* would address the "streamlining" and cost-saving effects of the Act of Abolition. Politically, this discussion had and has long been held, and in the end, it was also seen that it bordered on arbitrariness or ignorance on the part of the *State Government* to back this horse. The State Government was not ready to row back. In judicial restraint and very wisely, however, the *Constitutional Court* did not go down this path[64] - incidentally, a value of constitutional jurisprudence in Bavaria that cannot be appreciated highly enough. With the verdict of the *Constitutional Court* that the dissolution of the *Supreme Court* was not constitutionally objectionable, it was clear to the disappointment of even the supporters of the court: times pass, even if the loss hurts.

8. THE ESTABLISHMENT OF THE BAVARIAN SUPREME COURT IN 2018

As of July 1st, 2006, the Higher Regional Courts in Munich, Nuremberg and Bamberg exercised the functions previously performed by the *Supreme Court*. By means of the Dissolution Act of 2004, the *Land* legislation had concentrated certain functions at the aforementioned courts so that they functioned as a kind of a tripartite supreme court; the special courts for medical professionals, for architects and for engineers, for example, were located at the Munich Higher Regional Court. All legal appeals in administrative offence cases were concentrated at the Bamberg Higher Regional Court. Nevertheless, it was a time of interim. Coordination between the Higher Regional Courts in the revision cases in criminal matters was not facilitated, if only because of the geographical distances. A central collection of judicial findings was lacking. Their publication in internet databases did not completely replace a legal uniformity that the *Supreme Court* would have to produce. Bavaria had to cope with the situation created in 2004 and became effective in 2006.

Similarly to the announcement of its dissolution came the announcement by Minister President Markus Söder in early 2018 that the *State Government* intended to establish the Supreme Court within Bavaria. Whether there was a link to the upcoming parliamentary elections in Bavaria in October 2018 remains speculation. The establishment of a (supreme) court prima facie does not seem likely to mobilize masses of voters. In any case, there was no recognizable external impetus for this step, so the *Prime Minister*'s announcement came as a real surprise.

[63] VfGHE 58, p. 212 et seq.

[64] Unfortunately, the Constitutional Court did not discuss the issue whether the Supreme Court, in its centuries of existence, represented a part of Bavaria's legal culture and whether it was in keeping with the Bavarian Constitution's understanding of a cultural state to sacrifice such a proven institution on the altar of reform for the sake of "filthy lucre". In case of doubt, the Constitutional Court would have exercised restraint and left this sacrifice to the ultimate democratic responsibility of Parliament.

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The *Bavarian Supreme Court* was established on September 15th, 2018, on the basis of the Act of July 11th, 2018. The first sentence of Article 1 of this Act simply states: "There shall be a *Bavarian Supreme Court* with its seat in Munich." The official explanations of the said law do not say a single word about the *Bavarian Supreme Court*, abolished on June 30th, 2006. Had this been done, it might have become necessary to address the reasons for the 2006 dissolution and then to explain why in 2018 the reasons given in 2004 no longer applied. Markus Söder obviously wanted to avoid this discussion with one of his predecessors in the office of the prime minister. Such a discussion would have been anything but pleasant or fruitful and would have led nowhere. The *State Government*'s explanatory reasons for the proposed act of legislation also do not assume a "re-establishment" of the *Bavarian Supreme Court,*[65] but explicitly assume a new establishment. In the first reading of the government bill in the *Bavarian Landtag*, the then *State Minister of Justice*, Professor Dr Winfried Bausback, spoke of the "new Bavarian Supreme Court" as the "new flagship of the Bavarian judiciary", which "takes up a great tradition of the Bavarian Supreme Court". Nevertheless, the *State Government* did not fully return to the *status quo ante*. The *Office of the Public Prosecutor General* (at the *Supreme Court*) was, for example, not re-established. For reasons of economy or of money; moreover, the tasks of the Public Prosecutor vis-à-vis the *Supreme Court* were concentrated at and conducted by the Munich Office of the Public Prosecutor General (at the Munich High Regional Court) for the entire territory of Bavaria.

After 2006, federal legislators in particular did not hold their breath. Whereas in matters of non-contentious jurisdiction the Bavarian Supreme Court became the leading civil law institution recognized throughout Germany and exercising a predominant influence on this area of law, federal law brought about a change through the Act on Proceedings in Family Matters and in Matters of Non-Contentious Jurisdiction of December 17th, 2008 (FamFG), which entered into force on September 1st, 2009.[66] This Federal Act allocated respective final appeal jurisdiction to the *Federal Supreme Court of Justice.*[67] For the Supreme Court of Bavaria, the legal domain of non-contentious matters was thus definitely lost.[68]

8.1 The Current Jurisdiction in Civil Matters

In civil matters, the new *Supreme Court of Bavaria* has jurisdiction: 1. to decide on appeals, leap-frog appeals and appeals on points of law, as well as complaints and applications pursuant to § 7(2) sentence 2 of the Introductory Act to the Code of Civil Procedure (EGZPO)[69] in civil disputes, also insofar as the provisions of the Code of Civil Procedure (ZPO) do not apply to them, 2. to determine the competent court pursuant to

[65] Indeed, the choice of words for a re-establishment in 2018 would have been reminiscent of the circumstances surrounding the first re-establishment of the Supreme Court. Whereas in 1947/1948 it was a matter of a new beginning after a lost war, of rebuilding the rule of law destroyed by the Nazis and of redressing the injustice inflicted by the Nazis on Bavaria's more than 1,000 years of statehood, in 2004 it was a matter of a penny-pinching reform policy by the state government, which may be considered wrong but must not be compared with the Nazi methods of 1935.

[66] BGBl. 2008 I p. 2586, 2587.

[67] § 70 et seq. of the FamFG.

[68] § 133 of the Courts Constitution Act also allocates the final appeal jurisdiction on care and mandatory treatment matters with the Federal Supreme Court of Justice.

[69] Act concerning the introduction of the Code of Civil Procedure of January 30th, 1877, in the purified version published in the BGBl. III, systematic No. 310-2, which was last amended by article 1 of the Act of December 22nd, 2020 (BGBl. 2020 I p. 3328).

§ 36 ZPO, 3. to decide on applications pursuant to § 23(1) EGGVG[70] in civil matters, 4. to decide on arbitration matters pursuant to § 1062 of the ZPO, 5. to decide matters pursuant to § 6(1) sentence 1 of the Capital Investor Model Case Act,[71] 6. to hear and decide on cases pursuant to model determination proceedings pursuant to Book 6 of the ZPO, 7. to decide on appeals pursuant to § 99(3) sentence 2 of the Stock Corporation Act,[72] 8. to decide on appeals pursuant to § 27 of the Introductory Act to the Stock Corporation Act[73] in conjunction with § 99(3) sentence 2 of the Stock Corporation Act, 9. to decide on appeals pursuant to § 189(3) 1st sentence of the Act on the Supervision of Insurance Corporations[74] in conjunction with § 99(3) 2nd sentence and § 132(3) 1st sentence of the Stock Corporation Act, 10. to decide on appeals pursuant to § 260(3) 1st sentence of the Stock Corporation Act in conjunction with § 99(3) 2nd sentence of the Stock Corporation Act, 11. to decide on appeals pursuant to § 12(1) of the Act on the Settlement Proceeding under Company Law,[75] 12. to decide on appeals pursuant to § 51b 1st sentence of the Limited Liability Companies Act[76] in conjunction with § 132(3) sentence 1 and § 99(3) 2nd sentence of the Stock Corporation Act, 13. to decide on appeals pursuant to § 10(3) of the Transformation Act[77] and pursuant to § 10(1) 3rd sentence of the Transformation Act in conjunction with § 318(5) 3rd sentence of the Commercial Code,[78] each in conjunction with § 30(2) 2nd sentence, § 36(1) 1st sentence, § 44 1st sentence, §§ 60, 81(2), § 100 1st sentence and § 125 of the Transformation Act, 14. to decide on appeals pursuant to § 10(4) of the Transformation Act in conjunction with § 293c(1) 1st sentence and § 320(3) of the Stock Corporation Act, as well as pursuant to 293(1) 5th sentence and § 320(3) 3rd sentence of the Stock Corporation Act in conjunction with § 318(5) 3rd sentence of the Commercial Code, 15. to decide on appeals pursuant § 10(4) of the Transformation Act in conjunction with § 293c(2) and § 320(3) of the Stock Corporation Act as well as pursuant to § 293c(1) 5th sentence and § 320(3) 3rd sentence of the Stock Corporation Act in conjunction with § 318(5) 3rd sentence of the Commercial Code, 16. to decide on appeals according to § 10(4) of the Transformation Act in conjunction with § 327c(2) 3rd and 4th sentences and § 293c(2) of the Stock Corporation Act and according to § 327c(2) 4th sentence in conjunction with § 293c(1) 5th sentence of the Stock Corporation Act, as well as according to § 318(5) 3rd sentence of the Commercial Code, and finally 17. to decide on appeals pursuant to § 5(5) of the Introductory Act to the Stock Corporation Act in conjunction with § 12(1) of the Act on the Settlement Proceeding under Company Law. In addition to these matters, the

[70] Introductory Act to the Court Constitution Act of January 27th, 1877, in the amended version published in the BGBl. III, subdivision No. 300-1, as published, which was last amended by article 4 of the Act of December 12th, 2019 (BGB. 2019 I p. 2633).
[71] Capital Investor Model Case Act of October 19th, 2012 (BGBl. 2012 I p. 2182), as last amended by article 1 of the Act of October 16th, 2020 (BGBl. 2020 I p. 2186).
[72] of January 30th, 1937 (RGBl. 1937 I p. 107) in the version of September 6th, 1965 (BGBl. 1965 I p. 1089) as last amended by article 1 of the Act of December 12th, 2019 (BGBl. 2019 I p. 2637).
[73] Introductory Act to the Stock Corporation Act of September 6th, 1965 (BGBl. 1965 I p. 1185), as last amended by article 2 of the Act of December 12th, 2019 (BGBl. 2019 I p. 2637).
[74] Insurance Supervision Act of April 1st, 2015 (BGBl. 2015 I p. 434), as last amended by article 6 of the Act of December 9th, 2020 (BGBl. 2020 I p. 2773)".
[75] of June 12th, 2003 (BGBl. 2003 I p. 838) as last amended by article 16 of the Act of July 23rd, 2020 (BGBl. 2020 I p. 2586).
[76] Law on Limited Liability Companies as published in BGBl. Part III, systematic no 4123-1, as last amended by article 16 of the Act of December 22nd, 2020 (BGBl. 2020 I p. 3256).
[77] Transformation Act of October 28th, 1994 (BGBl. 1994 I p. 3210; 1995 I p. 428), as last amended by article 1 of the Act of December 19th, 2018 (BGBl. 2018 I p. 2694).
[78] Commercial Code in the adjusted version published in BGBl. III, subdivision number 4100-1, as last amended by article 14 of the Act of December 22nd, 2020 (BGBl. 2020 I p. 3256).

DOI: 10.46282/blr.2022.6.1.246

legislator has assigned public procurement cases to the *Supreme Court* pursuant to § 171(1) and (2) of the Act against Restraints of Competition and cartel cases pursuant to §§ 7(2), 63(4); 83; 85 and 86 of the Act against Restraints of Competition,[79] which are dealt with by special panels of the Court.

These predominantly corporate and competition law related matters require expertise in order to be dealt with (promptly, because it is frequently urgent), which is allocated to two civil divisions (Zivilsenate) of the *Supreme Court*. Those senates consist of one presiding and four co-judges each; one of the presiding judges is the Court President himself. More responsibilities are to be expected in the future because the court is a young institution. The Bavarian Police Authorities Act (Polizeiaufgabengesetz [PAG]), for example, currently in parliamentary consultation, provides that the decision of legal appeals against deprivations of liberty by the Police (article 99 of the government draft) will be concentrated at the Bavarian Supreme Court. The adoption of this law can be expected in the course of summer of 2021.

It is an undeniable constitutional fact. The most important matters of human coexistence in Germany form the subjects of federal (or European) legislation; the competence of the Länder in legislation is limited, roughly speaking, to religious matters and to the cultural sphere, to public education and public safety and order. In the future, it will be up to the skills of the Bavarian State Government in the German Bundesrat[80] and the attentiveness of the Bavarian Members of Parliament in the German Bundestag to provide new federal laws or laws to be amended with a "*clausula bavarica*", which will allow Bavarian state law to concentrate further matters of jurisdiction in the Supreme Court. The tenacity of the former state governments in the Kingdom of Bavaria in defending their Supreme Court against all centralist efforts at the Reich level may serve as a guideline for future legislators.

8.2 The Current Jurisdiction on Criminal Matters

In the area of criminal jurisdiction, the new *Supreme Court* has jurisdiction to decide on appeals on the point of law pursuant to the CPC, the Economic Offenses Act 1954[81], the Administrative Offences Act[82] (OWiG), the Act on International Mutual Legal Assistance in Criminal Matters[83] (IRG), or any other provision referring to the provisions of these laws with regard to the procedure, to decide on applications pursuant to § 23(1) EGGVG, insofar as they matter of the administration of criminal justice or law enforcement, to decide on appeals against decisions of the penitentiary execution chambers under §§ 50(5), 116, 138(3) of the Act on the Execution of Criminal Sanctions[84] (StVollzG) and against decisions of the juvenile chambers under § 92(2) of the Juvenile

[79] Act against Restraints of Competition in the version published on June 26th, 2013 (BGBl. 2013 I p. 1750, p. 3245), as last amended by article 8 of the Act of February 22nd, 2021 (BGBl. 2021 I p. 266).
[80] Article 50 of the Basic Law reads: The *Länder* shall participate through the *Bundesrat* in the legislation and administration of the Federation and in matters concerning the European Union. According to article 51 para. 1 of the Basic Law the *Bundesrat* consists of the *Länder Governments*.
[81] Economic Offences Act 1954 in the version promulgated on June 3rd, 1975 (BGBl. 1954 I p. 1313), as last amended by article 2 of the Act of December 21st, 2019 (BGBl. 2019 I p. 2911).
[82] Administrative Offences Act in the version published on February 19th, 1987 (BGBl. 1987 I p. 602), as last amended by article 3 of the Act of November 30th, 2020 (BGBl. 2020 I p. 2600).
[83] Law on International Mutual Assistance in Criminal Matters in the version promulgated on June 27th, 1994 (BGBl. 1994 I p. 1537), as last amended by article 1 of the Act of November 23rd, 2020 (BGBl. 2020 I p. 2474).
[84] Act on the Execution of Criminal Sanctions of March 16th, 1976 (BGBl. 1976 I pp. 581, 2088; BGBl. 1977 I p. 436), as last amended by Article 7 of the Act of December 9th, 2019 (BGBl. 2019 I p. 2146).

Court Act[85] (JGG). These appeals are handled by a total of seven criminal divisions (Strafsenate), each staffed by a presiding judge and two associate judges. The Supreme Court, which was dissolved in 2006, was concentrated in the State capital of Munich. The Court Establishment Act of 2018 has taken into account the government´s programme of strengthening Bavarian regions, which includes the relocation of central institutions of Bavaria therein. Accordingly, the Court Establishment Act has created external senates of the Supreme Court, namely two criminal senates in Nuremberg and two criminal senates in Bamberg. The criminal senates in Nuremberg additionally function as separate state courts for the medical professions,[86] architects and engineers;[87] in Munich, the 7th criminal senate performs the separate function of a disciplinary court for notaries[88] and of a senate for tax advisor and tax agent matters.[89] The special feature of these special courts in Nuremberg and Munich is that, in addition to the three professional judges, honorary or lay judges from the respective professions also participate in the hearings and decisions. The Nuremberg courts act as courts of last instance; in Munich, the disciplinary court for notaries is a first instance, the senate for tax advisor and tax agent a second instance court so that appeals are admissible and dealt with by the Federal Supreme Court of Justice.

With the Court Establishment Act of July 11th, 2018, as stated above, the legislature did not completely return to the "status quo ante" prior to June 30th, 2006. The "old" Supreme Court was assigned first-instance jurisdiction on security-related criminal cases. During the interim period, the Munich Higher Regional Court had jurisdiction to hear and decide such cases. With the Act of July 11th, 2018 the Bavarian legislature left it at that. Thus, unfortunately, it has not currently given the Supreme Court the opportunity to position itself in this increasingly important area of criminal law. The state government's explanatory memorandum to the Establishment Act is silent on the reasons why it has refrained from this option, leaving the observer to speculate. The opportunity, however, has not been lost; the Court Constitution Act still permits the transfer of this jurisdiction from the Munich Higher Regional Court to the Supreme Court. As an institution, the Supreme Court is young; it has to establish itself in the areas of competence so far assigned to it. In this respect, it remains to be hoped, perhaps even expected: "Time will tell!"

9. PROSPECTUS

The Supreme Court was established in Bavaria after parliamentarians in the Landtag endorsed its establishment almost unanimously, although the opposition side recalled with some satisfaction the statements of the government and the member of the government party in the Bavarian parliament at the time on the Court's dissolution in 2006. However, the Court's case law is tied to the legacy and already continues the sound jurisprudence to which Bavaria and Germany have accustomed to from the Bavarian

[85] Juvenile Courts Act in the version promulgated on December 11th, 1974 (BGBl. 1974 I p. 3427), which was last amended by article 1 of the Act of December 9th, 2019 (BGBl. 2019 I p. 2146).
[86] Bavarian Health Professionals Chamber Act in the version published on February 6th, 2002 (GVBl. 2002 p. 42, BayRS 2122-3-G), as last amended by § 3 of the Act of December 23rd, 2020 (GVBl. 2020 p. 678).
[87] Bavarian Construction Professionals Chamber Act of May 9th, 2007 (GVBl. p. 308, BayRS 2133-1-B), as last amended by § 2 of the Act of December 23rd, 2020 (GVBl. 2020 p. 678).
[88] Federal Code of Notaries in the corrected version published in BGBl. III, subdivision number 303-1, as last amended by article 12 of the Act of November 30th, 2019 (BGBl. 2019 I p. 1942).
[89] Federal Tax Consultancy Act in the version published on November 4th, 1975 (BGBl. 1975 I p. 2735), as last amended by Article 37 of the Act of December 21st, 2020 (BGBl. 2020 I p. 3096).

DOI: 10.46282/blr.2022.6.1.246

Supreme Court. In this respect, the signs are good. After the institution's troubled history, it is highly unlikely that a new state legislature will lay a hand on the court again. These are also good signs. The debates at the federal level on changing German court constitutional law in the sense of streamlining it have come to a standstill for some time. In view of many branches of the courts in Germany, which the Basic Law with the federal supreme courts as set forth by article 95(1) has prescribed in firm constitutional terms, and with view on the different procedural codes that are applied within those branches of the courts, simplifying the organization of the courts in Germany is a mammoth task that cannot be accomplished in a four-year legislative period in the German Bundestag. Unfortunately, very few politicians think beyond four their years term of parliament. The era of the great codifications that emerged at the end of the 19th century, which were also intensively discussed with the scholarly community, are hardly conceivable today. Despite the bitter taint, it can therefore be stated that Bavaria's Supreme Court is currently not under serious threat from federal politics either. The European Union is on the fringes. Community law regards it as a domaine réservé of the Member States of how they organize themselves. This applies in particular to the organization of domestic courts.

The look has a negative inflection. As the State Government has emphasized in its explanatory memorandum to the law and as it has also been taken up in parliament, the unique character of the Bavarian Supreme Court in Germany may have an effect not only on the landscape of courts. This may be linked to the expectation that in those areas of law, which have been transferred to the jurisdiction of the Supreme Court, the court will once again play a formative role in German jurisprudence alongside and in addition to the Federal Supreme Court of Justice. Insofar as it is within the power of the court, it will pursue the expectation. However, this is only one side of two medals. The State Government as well as the Bavarian Parliament, if they accomplish the cultural mandate from Article 3(1), 1st sentence of the Constitution, have to fulfil their task to make this possible for the court. As already stated above, culture includes legal culture and not only the cultivation of fine arts or the preservation of monuments. Not without reason did the constitutional legislator list the cultural state immediately after the legal state in its enumeration of state programmes and goals. The constitution is aware of their proximity and interdependence. The measures required in this regard certainly comprise the court's material and personnel resources; its competences must also be cultivated in accordance with the mandate and, wherever possible, expanded. The statements of the Bavarian Constitution on the cultural state are not exhausted in Art. 3(1), 1st sentence. According to Art. 140, for example, the Free State of Bavaria is also required to promote science and the arts. Science is not limited to the (state) universities, but can also take place in other institutions that are no less worthy of support. The scientific/scholarly mode of operation of a supreme court in its decision-making at least suggests the creation of a relationship that brings together the fields concerned. In this respect, there are clearly no limits to the political ingenuity of the responsible authorities and, of course, of the Court.

With the establishment of the Supreme Court, the state government has set its sights on strengthening Bavaria's autonomy within the federal structure of the Federal Republic of Germany. Courts accomplish federal landmarks only through their jurisprudence; they do not engage in the political struggle for state rights and federal prerogatives. Since the *Reichsjustizgesetze* of 1879, none of the German federal states, neither states of the Empire, nor the *Reichsländer* and or any other federal state of the Federal Republic of Germany has followed the example of setting up a supreme court, although the prerequisites are met by North Rhine-Westphalia, Baden-Württemberg, Rhineland-Palatinate and Lower Saxony. In future times the existence of a supreme court

in one *Bundesland* will not be sufficient to counteract the dwindling competences of the Länder. Crisis situations, such as the one triggered by the Covid 19 pandemic, show, however, that if the Länder act symphonically and not cacophonously, German federalism is quite capable of taming such catastrophes. A non-political body like the Supreme Court, nevertheless, is of little help in this regard. Politically speaking, however, the existence of a supreme court is a Bavarian trademark, after all other Bavarian prerogatives perished with the empire. As Wilhelm Hoegner, Bavaria's only SPD prime minister, once put it, the court is the last visible remnant of an autonomous Bavaria.

The law of the European Union creates room for maneuvering of individual regions of the member states. This is an expression of the principle of subsidiarity, which the treaties identify as one of the essential ways in which the Union functions. It would be presumptuous to expect all federally organized member states to follow the Bavarian flag. The Republic of Austria as a whole has fewer inhabitants than neighbouring Bavaria, and this can be broken down to the Austrian *Bundesländer*. Nevertheless, "a Europe of the regions" is an area in which a state institution can grow and where, within the network of national courts, such an institution as the Supreme Court can evolve to the best of the country but also to the best of the Union. Perhaps it was a failure of the former Supreme Court, which was abolished in 2006, not to have pursued this more actively. In the supranational setting, the Supreme Court's conceptuality is challenged, for one thing. On the other hand, when judicial ideas are expressed by the Court, politicians may be well advised not to grab a spoke in the wheel of the realization of such ideas.

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BRATISLAVA LAW REVIEW

PUBLISHED BY
THE FACULTY OF LAW,
COMENIUS UNIVERSITY
BRATISLAVA

ISSN (print): 2585-7088
ISSN (electronic): 2644-6359

VACCINE HESITANCY: THE FIGHT AGAINST MISINFORMATION IN THE DIGITAL SOCIETY / Valeria De Santis

Valeria De Santis, PhD.
Researcher of Public Law
Law Department
University of Naples 'Parthenope'
Via Generale Parisi n. 13,
80133 Napoli; Italy.
valeria.desantis@uniparthenope.it
ORCID: 0000-0003-2463-2507

Abstract: *The contestations arising from the introduction in various European countries of mandatory vaccination against Covid-19 for certain categories of workers are expressions of a profound malaise, not new and common to Western societies. Misinformation about vaccines is not a new phenomenon, but has been heightened due to the rise of social media, clearly evident during the Covid-19 emergency. These conflicts have a significant social impact and can hinder the struggle against the spread of the virus. This work analyses the origins and legal implications of this growing social mistrust in science, which jeopardises the stability of the constitutional order, founded on the principles of trust and solidarity.*

Key words: *vaccine hesitancy; mandatory vaccinations; constitutional legitimacy; personal freedom and self-determination; misinformation; algorithm society; fake news; populism; mistrust; constitutional law.*

Submitted : 04 March 2022
Accepted : 15 April 2022
Published : 30 June 2022

Suggested citation:
De Santis, V. (2022). Vaccine Hesitancy: The Fight against Misinformation in the Digital Society. *Bratislava Law Review*, 6(1), 31-50. https://doi.org/10.46282/blr.2022.6.1.280

1. THE PHENOMENON: WORK OBJECT

The disputes arising from the introduction of mandatory vaccination against Covid-19 for certain categories of citizens or workers in some European countries are expressions of a profound malaise, not new and common to these societies, which has a significant impact on countering the spread of the pandemic.

The phenomenon of vaccine hesitancy emerged well before the current pandemic crisis and is so alarming that in 2019 the WHO included vaccine hesitancy on its list of ten threats to global health.[1] Back in 2018, the European Commission and the Council were already expressing strong concern about the reduction in vaccination rates against some serious diseases such as measles and diphtheria.[2]

[1] WHO. *Ten threats to global health in 2019*. February 1, 2019. Available at: https://www.who.int/news-room/spotlight/ten-threats-to-global-health-in-2019 (accessed on 31.05.2022).
[2] Communication from the Commission, to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling online disinformation: a European Approach, Brussels, COM(2018) 236 final, 26 April 2018.

Despite the fact that vaccines in the EU are subject to a rigorous system of checks (before and after the authorisation),[3] the safety fears emerged among both common citizens and also among healthcare professionals.

While until the end of the XX sec. the percentage of European minors vaccinated against exanthematic diseases was above the threshold of 95% of the population (indicated by the WHO as necessary to achieve herd immunity), since the 2000s the social context has progressively changed. In various countries of the Union, in a part of the population, distrust has emerged against vaccination practices, which are beginning to be considered superfluous, if not harmful to health.[4] Moreover, due to some pseudo-scientific studies, which were retracted after publication and clearly denied by the scientific community, the idea has spread that there could be a correlation between the administration of some vaccines and the onset of very serious diseases, such as autism and encephalopathy (Kata, 2010). This worrying situation has prompted several states to change their policies by intensifying vaccination obligations for children in order to create a community of vaccinated adults.[5] In Italy, for example, the legislator intervened with law No. 119 of 2017, which - with a clear inversion of the pre-existing discipline - introduced the compulsory vaccination in paediatric age.

The phenomenon of vaccine hesitancy appeared even more clearly during the 2009-2010 AH1-N1 flu epidemic. In this circumstance, despite an emergency situation, albeit not of pandemic type, vaccine hesitancy constituted a concrete obstacle to the fight against the spread of the epidemic (Mesch and Schwirian, 2015). Today, at the global level, apart from the very low number of vaccinated individuals in developing countries, the main obstacle in the struggle against Covid-19 and the spread of variants is constituted by vaccine hesitancy (Cascini et al., 2021; Sallam, 2021). In fact, in Western societies there is a growing and unmotivated distrust of health institutions and scientists, who are seen as bearers of specialised and undemocratic knowledge.

This essay does not intend to present a sociological analysis of vaccine hesitancy; however, a constitutional analysis cannot even ignore this "fact" which can prove to be one of the obstacles to overcoming the pandemic. In the text, the main references will be made to European legislation and case law, while attention will be focused on Italy for some concrete examples of judicial practice and state policies on vaccination prevention and the fight against Covid-19.

Hereafter, this work will address: first, the main reasons for the vaccine hesitancy, then the causes that contribute to its spread and, finally, the response of the judges to this dangerous phenomenon. The purpose of this analysis is to delimit the phenomenon of vaccine hesitancy and identify what tools can be employed to deal with it in a legal system based on the constitutional principles of solidarity, tolerance and pluralism.

[3] According to Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, OJ L 311, 28 November 2001; and of Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, OJ L 136, 30 April 2004.

[4] European Centre for Disease Prevention and Control (ECDC). *ECDC launches the report "Countering online vaccine misinformation in the EU/EEA"*. June 29, 2021. Available at: https://www.ecdc.europa.eu/en/news-events/ecdc-launches-report-countering-online-vaccine-misinformation-eueea (accessed on 31.05.2022).

[5] For example, in 2015, the coverage for measles and rubella reached 85.3%.

2. ANTI-VAX PROTESTS AND INDIVIDUALISM: THE DISSOLUTION OF THE PRINCIPLE OF SOLIDARITY IN THE SOCIETY OF INDIVIDUALS

Vaccine hesitancy is an old and elusive phenomenon, which has its roots in different and complex reasons. It is worth remembering that the first protest movement against mandatory vaccination was born in 1866 with the creation of the Anti-vaccination League in the United Kingdom, following the introduction, with the Vaccination Act of 1853, of the first compulsory vaccination against smallpox for all children in the first three months of life, sanctioning the breach with the payment of a fine and even with arrest.[6]

The introduction of mandatory vaccination in the United Kingdom is by far the first ever form of limitation of civil liberties imposed by a state due to the need to protect public health. However, the protests against the vaccine obligation were so pressing that they led to the amendment of the Vaccination Act in 1898 with the mitigation of penalties in case of non-compliance and with the introduction of the conscientious objection clause (Panagopoulou, 2021; Salmon, 2006).

Leaving aside the historical evolution, it is interesting to highlight that the reasons put forward in the anti-immunisation propaganda from the end of the 19th century to the present day are in essence very similar. In fact, motivations have a spiritual, ethical, philosophical and religious nature; they often are also expressions of conspiracy theories and pseudoscientific beliefs, linked to alternative and natural medicine. Moreover, apart from the aforementioned reasons, there is often a deep-seated opposition to the obligation itself because obligation imposition is essentially considered an infringement of personal freedom and self-determination. Thus, in the analysis conducted in June 2021 by the European Centre for Disease Prevention and Control (ECDC), among the various reasons given against the vaccination obligation, a *constant* over time comes clearly to light, namely, the resistance with respect to the limitation of freedom imposed by the state.[7]

No-vax movements are mainly driven by a general aversion towards the imposition of limitations and obligations by the state, an opposition dictated by the self-referential claim of their own rights. In the present days, the phenomenon of vaccine hesitancy is thus rooted in an absolutist view of self-determination and in dangerous claims to a personalised health treatment.

In the post-industrial age, with the disappearance of large social aggregates and groups, individualism has taken over reflection on the subject of rights. In addition, the juridical studies have been influenced by this need to define and broaden the subjective profile of rights and particularly the right to health. In the "society of singularities" the aggregation around beliefs, needs and identities has become pre-eminent over any other factor of political compromise (Reckwitz, 2020; Martuccelli, 2002). Moreover, as will be seen below, the pervading use of social media amplifies this phenomenon of *singularisation* of contemporary societies.

The pandemic emergency requires balancing the protection of individual health and the interest of community health for the survival of the community itself. Thus, the global health emergency touches more than one sensitive nerve of Western societies, which are withdrawn into themselves, victims of individualism and distrust towards institutions. This is the reason why the limitations imposed in the fight against Covid-19

[6] Previously, the Vaccination Act of 1840 promoted free smallpox vaccination for all.

[7] European Centre for Disease Prevention and Control (ECDC). *Countering online vaccine misinformation in the EU/EEA*. Stockholm: ECDC, 2021. Available at: https://www.ecdc.europa.eu/en/publications-data/countering-online-vaccine-misinformation-eu-eea (accessed on 31.05.2022).

DOI: 10.46282/blr.2022.6.1.280

for the protection of individual and collective health must be interpreted starting from the constitutional concept of *individual* and *community*. In a pluralist democratic system, individual identity is never separated from the relational dimension i.e., from a context in which the individual's personality can only be unfolded in the intertwining of rights and duties (Pinelli, 2021; Massa Pinto, 2020).

It is "recognizing oneself in the face of the other" the duty of solidarity that projects the individual into the dimension of the social community. On the constitutional horizon, subjectivity is not a singularity, it is not, to paraphrase Lévinas, a "being for itself", but it is instead a "being" in a relational dimension (1985, p. 89).

As the Italian Constitutional Court states, the solidarity pact is a "bond of active belonging", which links the individual to the community and regulates the "mutual" relationship existing between rights and duties.[8] The free development of a human being is only meaningful in a relational and solidarity dimension. However, the hyper-individualism that is amplified by the increasingly fragmented and polarised digital public debate undermines this dimension of solidarity.

3. VACCINE HESITANCY IN THE ALGORITHM SOCIETY

Although the phenomenon of vaccine hesitancy has always been conditioned by poor information, today's digital information through the use of social media networks greatly exacerbates the spread of fake news and misinformation.

During the Covid-19 pandemic emergency, the Italian Regulatory Communications Authority (AGCOM) noted a very high increase in the impact of online disinformation sources, phishing sites and, in general, malicious domains related to Covid-19.[9] As never before, digital communication tools allow false news and bad information to spread and travel extremely fast and widely, encountering a multitude of unprepared recipients. In this way, both false information and online misinformation affect the levels of acceptance of vaccination treatment, increasing the phenomenon of vaccine hesitancy. Indeed, many studies have verified the correlation between exposure to online misinformation and the increase in vaccine hesitancy rates (Van der Linden, Roozenbeek and Compton 2020; Saling et al. 2021).

Misinformation and the dissemination of false information appear all the more serious in the face of a new phenomenon, which is the subject of numerous studies and findings that are still evolving. Thus, the publication of scientific evidence is not enough because there is a wealth of information, some of it contradictory, among which it can be difficult for many web users to find their way around and distinguish between false and reliable information.

Misinformation is not certainly a new phenomenon, but social media have a disruptive capacity for its amplification. In this sense, the Covid-19 pandemic has done nothing but confirm how much bad information can quickly and easily spread. The greatest difficulty in tackling misinformation by public institutions and health authorities depends largely on how the platforms work, on how information circulates on the web.

Actually, the information's dissemination through platforms is horizontal and decentralised, that is, it does not originate from a specific and responsible professional (journalist, editor), but is carried out by each user who, regardless of skills, can convey

[8] Italy, Constitutional Court, dec. No. 75 del 1992 (17 February 1992).

[9] Italy is the first country in Europe and the second in the world, after the USA, for the number of malicious domains linked to Covid-19, for more details see Italian Regulatory Communications Authority (2020). *Report on online disinformation. Special Issue on Coronavirus*, No. 3. Available at: https://www.agcom.it/osservatorio-sulla-disinformazione-online (accessed on 31.05.2022).

and create information (Pitruzzella, 2018; Frosini, 2016). While traditional channels of thought expression are structurally limited and, therefore, prerogative of a few, the web is an unlimited resource that allows anyone to produce information. It is simple by creating a website, a blog, or by using social media, to comment, post and chat to express one's own thoughts and produce information, thus creating or contributing to the spread of fake news online.

The lack of intermediation makes it difficult to identify responsibilities because the social media user unintentionally disseminates misinformation or false information. Usually, misinformation occurs without fraud and, indeed, in the belief of spreading useful information for all.

The production of this enormous mass of information and data is organised by a few platform operators (such as Google, Facebook, YouTube, Yahoo! ...), operating in an oligopoly framework. In this manner, information on the web which was born structurally open and decentralised, is filtered by a few companies whose algorithms profit from connecting producers and users of information. In information capitalism, the Over the Top (OTT) platforms profit precisely by extracting information, namely, from the selection of a huge amount of data spontaneously produced by the users of a hyper-connected world (Byrnes and Collins, 2017, p. 95; Cohen, 2019).

Users, by expressing their thoughts, contribute to creating information - or fake news - that providers and platforms, spread virally, by means of their extraction process, because the algorithms are exactly devised to connect users who have the same interests, ideas and inclinations.

More specifically, without consent to the use of these algorithms, the access to the OTT platforms is denied. In order to employ a particular online service, the user assigns to the platforms the right to collect, store and process his personal data (Simoncini, 2019, p. 80).

In fact, by the means of the expression of preferences and the exchange of content, the transfer of one's private "space" is monetised through profiling for advertising or to offer other paid services.

To increase the permanence online and favour the content circulation, the algorithms used by Twitter, Facebook or YouTube create "filter bubbles" or "echo chambers", that is, spaces in which those who show a certain idea or preference are put in contact with groups or people who have the same inclinations (Pariser, 2011; Susser, Roessler and Nissenbaum, 2019). In this way, misinformation and false information not only circulate very quickly but also are amplified, creating polarisation and fragmentation of the public debate on the net.

The user is a consumer, a citizen and a voter; he receives services that are only apparently free. In fact, the user himself is "for sale"; the product for providers is the user's time (Harris, 2021; Morozov, 2013). The aim of the algorithm is to ensure that the users stay on social networks as long as possible, and that they share and make viral certain contents in order to give greater visibility to advertisements linked to the content posted. If user profiling can be considered a useful tool, for example when it concerns obtaining suggestions relating to purchases, it obviously appears very risky when it ends up closing the user within a cultural information bubble. This perilous closure to the confrontation risks making the user remain trapped within those groups with which he shares orientations, passions, fears and, finally, disinformation.

DOI: 10.46282/blr.2022.6.1.280

4. FREEDOM OF EXPRESSION ONLINE AND FAKE NEWS: FACT CHECKING, CODE OF PRACTICE ON DISINFORMATION, DIGITAL SERVICE ACT

Considering what has been briefly outlined so far, it is clear that fighting against vaccine hesitancy requires an effort by the states to monitor disinformation on social media, invest in information and carry out massive information campaigns.[10]

After all, the recent experience gained during the AH1-N1 flu emergency in 2009-2010 has indeed shown how the vaccine hesitancy rate varies, since it depends a great deal on how much the states and the local government invest in communication and in the implementation of a reliable information campaign. The more institutions work to build trust and combat disinformation and fear, the more the vaccine hesitancy rate decreases.

As part of monitoring actions and in the absence of a general regulation framework, an interesting tool consists of checking the truthfulness of the news by means of reports from users to teams of information professionals. These are public platforms used by the providers themselves to verify the facts; they are tools open to users, which allow them to enter statements to verify their truthfulness. There are already several fact-checking organisations (i.e., in Italy, LaVoce.info, Pagella Politics, Factanews, Open). Moreover, at a supranational level, in 2019, "FactCheckEu", a project that brings together nineteen fact-checking organisations from thirteen different EU countries for collecting fact-checking articles of European interest was launched.

Although fact-checking is undoubtedly useful for uncovering and correcting distorted information, it is a tool that comes at a time when misinformation or false information has already reached a plurality of recipients. Unmasking fake news takes time and fact-checking does not necessarily reach those who have been victims of misinformation or false information. Therefore, fact-checking is subsequent to the spread of bad information, which could have already conditioned certain behaviours or influenced the choices of citizens. Actually, fact-checking may not be so useful for improving the condition of those who tend to remain closed within their own cultural bubble. There is also a problem of neutrality and, above all, of pluralism because the control is entrusted to professional associations of communication experts that are chosen and financed by providers and platform managers (Franchi, 2021; Monti, 2017). Therefore, the provider and platform managers have an evident interest in not being accused of spreading bad information.

The need to clamp down on online misinformation is a major concern and has been addressed in the EU with the Code of Practice on Disinformation adopted on November 26, 2018. Leaving aside the aspects relating to its uncertain nature, the Code is essentially a self-regulatory tool to which the main major network operators have adhered.

The Code identifies some common principles and objectives that can reduce the harmfulness of misinformation. According to the Joint Communication Com 236 of 2018, the object of regulation is to contrast false or misleading information created or disseminated for profit or to intentionally deceive the public and likely to cause public harm, i.e. threats to democratic political and policy-making processes, to public goods

[10] European Centre for Disease Prevention and Control (ECDC). *Countering online vaccine misinformation in the EU/EEA*. Stockholm: ECDC, 2021, p. 25. Available at: https://www.ecdc.europa.eu/en/publications-data/countering-online-vaccine-misinformation-eu-eea (accessed on 31.05.2022).

such as the protection of EU citizens' health, the environment or security.[11] Potentially harmful, but nonetheless legal content, protected by freedom of expression, should be handled differently than illegal content (such as hate speech, terroristic or child pornography), which can definitively be removed (Ó Fathaigh, Helberger and Appelman, 2021; Mchangama and Alkiviadou, 2021; Pollicino, 2020).

Albeit in a rather generic manner, the Code identifies some major objectives, namely, control, transparency, knowledge of the origin of the sponsored contents and accountability of users. Basically, the Code adopts a compromise solution, but following its adoption, Facebook introduced a fact-checking system and Google changed its algorithm to optimise the detection of fake news (Pagano, 2019; Monti, 2017).

The Code does have the merit of trying to delimit the concept of online misinformation in order to avoid the double danger of censoring and limiting the freedom of expression. Disinformation consists of the set of false and misleading content created and disseminated for economic or political reasons that may harm the democratic process or certain assets, including health. The harmful content can indeed be removed under certain conditions; it must be ascertained that the information is false and that those who deceive the public derive an economic profit disregarding any possible consequence on the democratic decision-making process, environment, safety and, finally, health.

In the absence of editorial responsibility and control by a public body (such as an independent authority), the Code aims to make responsible platforms, imposing a series of obligations on transparency and control of information.

Currently, the Covid-19 pandemic has revealed the need to strengthen the Code of Practice on Disinformation in order to promote a functioning digital public sphere based on the primacy of fundamental rights, freedom of expression and a more democratic public debate.[12] To this end, the EU Commission adopted the communication on 26 May 2021 to strengthen accountability and transparency in the fight against disinformation.[13]

The strengthening of the Code of Practice on Disinformation is part of an overall reform of the digital services market. The proposal of the European Parliament and of the Council for a regulation on a Single Market for Digital Services (Digital Service Act DSA) seeks to ensure the best conditions for the provisions of innovative digital services in the internal market. The DSA intends to protect the rights guaranteed by the Charter of fundamental rights of the EU,[14] introducing a set of procedures to combat illegal content online, such as hate speech, incitement to violence, defamation and illegal activities, such as the sale of counterfeit products.

Apart from illegal content, however, the DSA faces the problem of content that is not illegal but that are still harmful, such as incorrect information. Without defining content as legal but harmful, the Commission points out in Recital no. 63 that the

[11] Communication from the Commission to the European Parliament, the Council, The European economic and social Committee and the Committee of Regions, Tackling online disinformation: a European Approach, COM (2018) 236 final, 26 April, 2018.

[12] Council of the European Union. *Conclusions on strengthening resilience and countering hybrid threats, including disinformation in the context of the COVID-19 pandemic.* Doc. No. 14064/20, 15 December 2020, § 4. Available at: https://data.consilium.europa.eu/doc/document/ST-14064-2020-INIT/en/pdf (accessed on 31.05.2022).

[13] European Commission Guidance on Strengthening the Code of Practice on Disinformation, COM(2021) 262 final, 26 May 2021.

[14] Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM(2020) 825 final, 15 December 2020.

DOI: 10.46282/blr.2022.6.1.280

advertising systems used by large platforms can produce disinformation with a real and foreseeable negative impact on public health, public security, public debate, political participation and equality. In the context of the single market for digital services, the Commission, in Recital No. 68, shows the way to enhance self-regulatory and co-regulatory codes to address systemic risks to society and democracy, such as disinformation or manipulation and abuse. These are operations aimed at amplifying information, including disinformation, such as the use of bots or fake accounts to create false or misleading information, sometimes for profit, which are particularly harmful to vulnerable recipients of the service, such as minors.

In the same sense, the European Data Protection Board has also pointed out that strengthening the Code of Practice on Disinformation should increase transparency, avoiding both the risk of microtargeting of users, and the creation of algorithms that use their data to contribute to disinformation, polarisation and, finally, the ideological user manipulation.[15] Platforms adhering to the enhanced Code must therefore ensure transparency by identifying criteria for prioritising or down-positioning certain contents. Ultimately, OTTs must prioritise authoritative sources on topics of public and social interest. In this sense, for example, Facebook already foresees that when the user is about to join a no-vax group, a notice appears that invites to connect to the WHO page in order to be aware of the reasons related to the need to get immunised (Ceccherini and Rodriquez, 2020, pp. 77-78). In addition, platforms must also agree to tag content identified as false or deceptive as a result of fact-checking.

The EU Commission emphasises the need for platforms to intensify monitoring by enhancing the role of fact-checkers. In particular, independence and adequate remuneration of fact-checking companies and organisations can be implemented through multilateral agreements with major platforms. The consensual method introduced by the Code of Practice on Disinformation can therefore contribute to generate policies and actions to counteract disinformation and create algorithms and business systems that mitigate the scarce pluralism of information and the tendency to polarise the online public debate.

In the long term, of course, the use of artificial intelligence could improve fact-checking, introducing forms of control automation. In this sense, ECDC also points out that through automated keyword search techniques and algorithms, but also with more complex systems using artificial intelligence and machine learning, a public authority could monitor and identify those elements of online discussion that may affect the willingness to vaccinate.[16]

In terms of monitoring activity, the action carried out in Italy by AGCOM is also of great interest. With the *Online Disinformation Observatory*, AGCOM has dedicated a special in-depth study to the analysis of information and disinformation in the media during the health emergency, identifying the main risks and false information as well as threats to cyber security and Covid-19. However, these tools used in this particular emergency should become structural in order to achieve constant monitoring.

The regulation, even in the form of soft law, or self-regulation, as indicated by the DSA, is necessary but it must be implemented in the algorithm design phase. The protection of constitutional rights and assets requires an anticipation of the design phase

[15] European Data Protection Supervisor. *Opinion 3/2018 on online manipulation and personal data*. 19 March 2018. Available at: https://edps.europa.eu/sites/edp/files/publication/18-03-19_online_manipulation_en.pdf (accessed on 31.05.2022).

[16] European Centre for Disease Prevention and Control (ECDC). *Countering online vaccine misinformation in the EU/EEA*. Stockholm: ECDC, 2021, p. 5 and 25. Available at: https://www.ecdc.europa.eu/en/publications-data/countering-online-vaccine-misinformation-eu-eea (accessed on 31.05.2022).

of the algorithms, because any *ex post* corrective intervention comes when it is too late, when an infringement to the right has already been perpetrated (Simoncini, 2019, p. 89).

5. THE JURISPRUDENCE ON COMPULSORY VACCINATION IN THE FIGHT AGAINST COVID-19

The phenomenon of vaccine hesitancy described above has produced a series of disputes that have ended up before various national and supranational courts. Although there are not many judgments on mandatory vaccination against Covid-19, national and supranational courts have given an unequivocal answer by stating that given the effectiveness and safety of prophylactic treatment, there is no room for any form of vaccine hesitancy.

From the supranational point of view, according to Article 8(1) ECHR, mandatory vaccination constitutes an interference by public authorities with physical integrity, which has an impact on the protection of private and family life. However, in a "democratic society" the restriction of self-determination freedom may be necessary when the national legislator pursues the goal of protecting health and preventing harm to others.[17]

Therefore, the decision to introduce compulsory vaccination if aimed at reducing the risk of contagion and the social and economic impact derived from the spread of the disease cannot be considered an infringement of fundamental rights.

Also, the International Covenant on Social, Economic and Cultural Rights, adopted by the UN General Assembly in 1966, recognizes that the prevention, treatment and control of epidemic diseases constitute an *obligation* that states parties undertake to protect the right to health (art. 12 c)). For its part, the WHO in The Global Vaccine Action Plan of 2013 stated that immunization is, and should be recognized as a "core component" of the human right to health and an "individual, community and governmental responsibility".[18]

Regarding the vaccination obligation against Covid-19, the ECtHR has not ruled until now. However, the European judge, as a precautionary measure, with three decisions (taken between August and September 2021) rejected the request for interim measures against compulsory vaccination in France and Greece imposed by the national legislation (Vinceti, 2021).[19] The ECtHR ruled that the imposition of the obligation does not produce irreversible damages and rejects the request for the application of interim measures, because it considered that there is no *fumus* of violation of the Convention provisions, namely, of articles 2 and 8 of ECHR protecting the right to life, and the right to private and family life, respectively.

On the same line, the US Supreme Court has upheld the constitutional legitimacy of compulsory vaccination for certain categories of workers, recognising that vaccination policies do not violate any fundamental rights.[20] The Brazilian Supreme Federal Tribunal also confirmed the legitimacy of compulsory vaccination, sanctioned by specific

[17] ECtHR, Vavřička and others v. The Czech Republic, app. No. 47621/13, 8 April 2021, § 265 et seq.; ECtHR, Solomakhin v. Ukraine, app. No. 24429/03, 15 march 2012; ECtHR, Hristozov and others v. Bulgaria, app. No. 47039/11 and 358/12, 13 November 2012.

[18] WHO. *Global Vaccine Action Plan of 2013*. Available at: https://www.who.int/teams/immunization-vaccines-and-biologicals/strategies/global-vaccine-action-plan (accessed on 31.05.2022).

[19] ECtHR, Abgrall and 671 others v. France, app. No. 41950/21, 24 August 2021; ECtHR, Kakaletri and others v. Greece, app. No. 43375/21, 9 September 2021; ECtHR, Theofanopoulou and others v. Greece, app. No. 43910/21, 9 September 2021.

[20] USA, Supreme Court of the United States, Dr. A, et al. v. Kathy Hochul, Governor of New York, 595 U.S. (13 December 2021).

DOI: 10.46282/blr.2022.6.1.280

restrictions such as the exercise of certain activities or the ban on access to specific places (Canepa, 2021).[21]

Moreover, in France the Constitutional Council confirmed the legitimacy of the mandatory Covid-19 vaccination required by the legislator for certain categories and health personnel, military, caregivers and firefighters. The Constitutional Council stated that mandatory vaccination is legitimate because scientific findings show that treatment is effective in protecting the community and safe for individual health.[22] The introduction of the obligation is also justified in order to pursue the objective of constitutional value of protecting collective health. The French Constitutional Council notes that neither the right to work nor the freedom of enterprise is infringed by the legislator who introduces an adequate deadline for complying with the mandatory vaccination introduced to safeguard the community.

Similarly, in Italy, the judges of the first instance and the Council of State have confirmed the legitimacy of compulsory Covid-19 vaccine for health and social workers. Indeed, the vaccine has been proven to be safe and effective and the obligation is legitimate because it is imposed to respond to the twofold public interest of mitigating the impact on the national health service and curbing the spread of Covid-19, being the health and social personnel naturally exposed to a greater extent than other citizens.[23]

6. REFUSAL OF VACCINATION IN THE SOCIETY OF MISTRUST: THE JUDICIARY RESPONSE

According to what has been noted so far in the fight against Covid-19, both at national and supranational levels, the jurisprudence is convergent. When the legislator compresses the freedom of self-determination in order to pursue the objective of protecting health as an interest of the community, mandatory health treatment cannot be denied on the basis of religion, conscience issues or, in general, simply opposed in principle.

In this sense, most recently, on the matter of vaccination in paediatric age, the ECtHR in Vavřička and others v. The Czech Republic case reiterates that the vaccination imposed by state regulation constitutes interference by the public authorities on physical integrity and has an impact on private and family life. Recalling its own jurisprudence, the ECtHR underlines that physical integrity concerning the most intimate aspects of an individual's life falls within the notion of "private life", protected by Article 8 of the ECHR. Therefore, mandatory medical intervention, even if of minor importance constitutes an interference with respect to private life, which includes the physical and mental integrity of the person.[24] However, in a democratic society, according to Article 8(1) ECHR, restriction of the freedom of self-determination may nevertheless be necessary to protect the community health and the rights of others. Religious and conscientious reasons do not permit in any way the refusal of compulsory health treatment (Krasser, 2021; Nilsson, 2021; Camilleri, 2019): the ECtHR observes that no European country admits conscientious objection to compulsory vaccination.[25]

[21] Brazil, Supreme Federal Tribunal, ADI 6.586 and 6.587 (17 December 2020).
[22] France, Constitutional Council, Decision No. 2021-824 DC (5 August 2021).
[23] Italy, Council of State, III, sent. No. 7045 (20 October 2021).
[24] ECtHR, Solomakhin v. Ukraine, app. No. 24429/03, 15 march 2012, § 33; ECtHR, Salvetti v. Italy, app. No. 42197/98, 9 July 2002; ECtHR, Matter v. Slovakia, app. No. 31534/96, 5 July 1999.
[25] ECtHR, Vavřička and others v. The Czech Republic, app. No. 47621/13, 8 April 2021, § 276, § 330 et seq.; ECtHR, Hristozov and others v. Bulgaria, app. No. 47039/11 and 358/12, 13 November 2012; European Commission of Human Rights, Boffa and others v. San Marino, app. No. 26536/95, 15 January 1998.

With reference to its own jurisprudence on art. 9 ECHR, the ECtHR points out that not all opinions fall under the protection of thought and conscience freedom. The freedom of conscience protected by the ECHR does not at all imply the right to behave in the public sphere always according to one's own personal convictions and beliefs (Puppinck, 2017).[26]

Actually, in all the cases faced by ECtHR, religious or ethical motivations do not constitute the main reasons for the objections of movements opposed to compulsory vaccination. Even in the contestation of compulsory vaccination against Covid-19, the reference to conscientious objection assumes a merely instrumental function to question the validity of the vaccination, which is rather based on pseudo-scientific considerations.

As happens more and more frequently in the *mistrust society*, the reasons put forward against compulsory vaccination are based on convictions of meta-legal character. In this regard, in a case submitted to the Italian Constitutional Court in 1988 (ord. n. 134), the applicants challenged the law imposing compulsory vaccination, "clearly intended to protect the health", on the basis of "a generic and subjective belief of its inappropriateness" (Liberali, 2021; Tomasi, 2021). In the same sense, the ECtHR in the aforementioned Vavřička case points out that, in the various stages of the proceeding, the applicant contested the vaccination obligation for various reasons, at first, inherent in the protection of health and then, on philosophical and religious grounds.[27] The vagueness of the reasons invoked to challenge the legitimacy of mandatory vaccination confirms (as noted in §. 2) that, ultimately, those who oppose compulsory vaccination contest the contraction of personal freedom, of self-determination and of freedom of choice.

In modern Western "societies of suspicion" there is a sort of anti-scientific prejudice based on various ideological, cultural and religious motivations. What emerges in the jurisprudence is confirmed by a sociological analysis, which has measured the correlation between mistrust in institutions and the increase in the vaccination hesitation rate. In particular, during the health emergency due to AH1-N1 flu of 2009-2010, it was found that the more the distrust toward local and national institutions, the higher the vaccine hesitancy rate (Mesch and Schwirian, 2015).

Similarly, today, the analysis of the no-vaxer profile during the fight against Covid-19 shows that the rate of distrust in vaccination treatment is clearly higher among those groups most affected by the pandemic emergency. The greater the economic insecurity and the sense of distrust toward institutions, the lower the adherence to vaccination campaign (D'ambrosio and Menta, 2021). Those who have suffered severe economic consequences since the beginning of the pandemic are particularly vulnerable, they have felt abandoned by the state and, therefore, tend to be wary of vaccination.

From this point of view, in Western societies, the phenomena of political and scientific populism share similar dynamics, namely, a radical distrust of elites, experts, and technicians, who are considered expressions of a pervasive and exclusionary power (Kennedy, 2019; Ali and Pastore Celentano, 2017; Lasco, 2020). For this reason, if scientific populism and vaccine populism are converging phenomena, it is impossible to fight vaccine hesitancy without addressing the social, political and economic marginalisation that affects increasingly larger strata of the population in Western democracies.

The social evidence that clearly emerges from the national and supranational jurisprudence is a very clear indication that the distrust of vaccines, in the end, has little

[26] ECtHR, Pretty v. the United Kingdom, app. No. 2346/02, 29 April 2002, § 82-83.
[27] ECtHR, Vavřička and others v. Czech Republic, app. no. 47621/13, 8 April 2021, § 334.

to do with the vaccines themselves. Rather, the challenge posed by vaccine hesitancy is a symptom or a consequence of wider and deeper problems in our society that is increasingly catalysed by a digital public debate, which is polarised, individualistic, and distrustful.

7. VACCINE OBLIGATION AND DEMOCRACY

Facing the phenomenon of vaccine hesitancy, one wonders what might be the response of institutions. In particular, the question is whether and to what extent the introduction of compulsory vaccination could constitute an adequate response.

According to the converging views of the domestic and supranational courts, as shown (in par. 5. and 6. above), the vaccination imposed by the state is a severe limitation of the right to self-determination. Therefore, both the national constitutional courts and the ECtHR consider compulsory vaccination to be an *extrema ratio*, derogating from the principle of individual self-determination.[28]

The obligation to vaccinate affects the principles of inviolability and integrity, but is nonetheless legitimate if it is proportionate to the objective of the ensuring protection of the community health. Within these limits, compulsory vaccination does not violate the constitutional principle of safeguarding the integrity and dignity of the human person, nor the freedom of conscience.

In the same terms, the global network of jurists, the Lex-Atlas Covid-19 (LAC19), created to give legal responses to Covid-19, reaffirming that compulsory vaccination is not contrary to human rights, has indicated, in the Lac-19 Principles, that to be legitimate compulsory vaccination must be clearly prescribed by law, rather than by rules established by the executive and should preferably be preceded by public consultation. In accordance with ECtHR and national jurisprudence, LAC-19 underlines that compulsory treatment must also meet the principles of proportionality, must have a legitimate purpose, must be safe and effective and, finally, the fine for non-compliance with the mandate must be effective but not excessively onerous. (King, Motta Ferraz et al., 2021).

In the jurisprudence at every level, as well as in the recommendations of the LAC-19, the mandatory health treatment is therefore an extreme solution because it is objectively detrimental to personal integrity. Actually, in vaccination matters, democratic states must avoid the imposition of the obligation and ensure a high degree of adhesion, adopting instead measures aimed at combating disinformation, fake information and vaccine hesitancy. From this point of view, the awareness-raising campaigns carried out by the competent public authorities, with the aim of reaching and involving the widest possible segment of the population, have specific political and legal significance.

Namely, for the Italian Constitutional Court the institutional promotion of vaccination creates in individuals a natural trust in the advice of health authorities, leading them to a behaviour aimed at protecting the health of the whole community (Veronesi, 2021).[29] For this reason, for the recognition of the right to compensation for any damage

[28] Italy, Constitutional Court, sent. No. 5/2018 (24 January 2018); France, Constitutional Council, dec. QPC No. 458-2015 (20 March 2015); France, State Council, Association liberté information santé, No. 222741 (26 November 2001); France, Court of Cassation, No. 10-27.888 30 (11 July 2012); Constitutional Court of the Czech Republic, case No. Pl. ÚS 19/14 (27 January 2015); Hungary, Constitutional Court, dec. No. 39/2007 (20 June 2007); ECtHR, Vavřička and others v. The Czech Republic, app. No. 47621/13, 8 April 2021; ECtHR, Solomakhin v. Ukraine, app. No. 24429/03, 15 march 2012. In Spain and Germany, there are no compulsory vaccinations, but programmes encouraging the vaccination of minors and monitoring of the epidemiological situation that may always justify the introduction of mandatory vaccination.

[29] Italy, Constitutional Court, sent. No. 107/2012 (16 April 2012) and sent. No. 5/2018 (24 January 2018).

resulting from vaccination, it is completely irrelevant whether vaccination has only been recommended or is mandatory by law. In fact, in the presence of widespread and repeated communication campaigns in favour of vaccination, the choice of individuals to vaccinate, regardless of any specific reasons, is in itself objectively aimed to safeguard also the collective interest.

The vaccination information and recommendation campaign assume a specific legal and political importance as a promotional tool, which is consistent with the need to avoid, as far as possible, the imposition of compulsory vaccination. Moreover, the incidence of vaccine hesitation in contrast to the spread of the virus and variants, highlights the legal and political importance of information.

The central role of communication for the success of the vaccination campaign already emerged very clearly from the Italian Strategic Plan for anti-SARS-CoV-2/COVID-19 vaccination of 12 December 2020 in which it was envisaged to develop and disseminate adequate information for the different age groups, to constantly updating traditional media and web 2.0 in order to prevent non-punctual information/communication and, above all, to develop contents and operational strategies both online and offline to detect and respond to disinformation in real time. Despite these indications, apart from some initiatives carried out in the initial stage, when the campaign had just begun, it does not seem that institutional information, conducted at the national level, was particularly pervasive.

Information and recommendations, combined with flexible procedures to adapt to changing health needs, are an alternative to coercion and, according to the ECtHR, represent a more respectful solution both of the principle of self-determination and of the right to physical and moral integrity.[30] In the fight against Covid-19, also the Assembly of the Council of Europe in its resolution of 11 January 2021, No. 2361 exhorts to develop strategies to build trust in the vaccine through transparent communication. Democratic systems, founded on the primacy of person, that is, on the centrality of human dignity, should prefer non-compulsory solutions.

In light of constitutional indications, the mandatory vaccination constitutes an exceptional solution, justified by the objective of protecting the community. This is a derogatory limitation, adopted according to the needs arising from the epidemiological condition, anchored to the concrete situation and susceptible to different assessments on the basis of the epidemiological context and to the medical-scientific findings, always on a provisional basis.

Compulsory vaccination is an extreme solution because, as the Assembly of the Council of Europe recalls in the aforementioned resolution No. 2361 of 2021, it is a typical feature of non-democratic and oppressive systems. In democratic systems, the use of coercion is obviously banned; therefore, the failure to comply with the mandatory vaccination may lead to the prohibition on engaging in certain activities or may preclude access to certain places and services. In any event, the sanction for non-vaccination shall take the form of an administrative fine.

The imposition of the obligation does not always allow for the goal pursued by the legislator to be achieved. In fact, the provision of the penalty does not necessarily constitute a deterrent and its imposition is useless for the purpose of protecting individual and collective health. The sanction is not functional in achieving the ultimate objective, namely, to ensure widespread vaccination coverage. Even the Assembly of the Council of Europe in the Resolution No. 2361 of 2021 affirms that making mandatory vaccinations

[30] ECtHR, Vavřička and others v. The Czech Republic, app. No. 47621/13, 8 April 2021, § 239.

DOI: 10.46282/blr.2022.6.1.280

against Covid-19 is not recommended for the simple reason that the mandatory imposition may indeed prove to be counterproductive.

8. CONCLUSION

The present analysis offers some elements for reflection on vaccine hesitancy, a phenomenon that ends up involving the relationship between individuals, digital society and political institutions.

In a democratic society founded on the principles of freedom and solidarity, prophylactic coverage is a responsibility of states, which must undertake to make vaccination accessible, both in times of emergency and non-emergency. At the same time, vaccination is the responsibility of individuals who undergo this treatment for their own good and that of the community as a whole.

Vaccination treatment has a dual function: it is a sacrifice for the individual but is at the same time an advantage for the entire community. In this sense, the unjustified refusal of vaccination by a significant part of the population shows how in Western societies the ability of political systems to create a relationship of trust, based on compromise, which is necessary to achieve the common good, is in crisis.

In an increasingly polarised digital society, the aggregation around anti-scientific beliefs and individual needs makes compromise difficult. This social fragmentation complicates the political action needed both in emergency situations to counter the spread of the contagion, and also to plan an appropriate policy of prophylactic prevention.

This work therefore shows that behind the phenomenon of vaccine hesitancy hides the urgent need of placing at the centre of political action (national and European) the relationship between the individual and the community, which today mainly takes place through the regulation of the digital public sphere. In this sense, the data that emerged during the Covid-19 pandemic confirm indeed how pervasive and powerful online information is and how it can influence health, safety, consensus building and, ultimately, democracy.

The network, OTT platforms and artificial intelligence have become a part of the social structure; they are themselves a social infrastructure on which both individuals and authorities necessarily depend (Pollicino and De Gregorio, 2021, p. 13). For this reason, like with any social phenomenon that conveys and redefines the very notion of the public sphere, the network requires some democratisation interventions. The pandemic emergency has made clear the need to strengthen the tools to fight disinformation in order to promote a functioning digital public sphere based on the primacy of fundamental rights, freedom of information and democratic public debate. The only way to counter vaccine populism and rebuild a relationship of trust between individuals and institutions is investing in digital education and in the construction of a secure, egalitarian and democratic digital infrastructure.

On the contrary, although necessary in some emergency circumstances, imposition of mandatory vaccination represents a failure for a democratic state. Imposition of mandatory vaccination is a political and social failure, because it is a tangible indication of the inability of institutions to inspire confidence and counteract vaccination hesitancy.

Even from a political-constitutional point of view, the imposition of compulsory vaccination is in itself a failure for the system of a pluralist democracy, which is centred on the principles of tolerance and on the integration of the economic and social conflict into the dynamics of governance. The introduction of a general obligation to vaccinate is certainly constitutionally legitimate, but it may pose a risk to social cohesion. Like any

crisis, the Covid-19 pandemic has shaken society to its foundations, thus threatening to erode the sense of community, which the Constitution founds on the solidarity principles and shared duties.

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DOI: 10.46282/blr.2022.6.1.280

ARTICLES

BRATISLAVA LAW REVIEW

PUBLISHED BY
THE FACULTY OF LAW,
COMENIUS UNIVERSITY
BRATISLAVA

ISSN (print): 2585-7088
ISSN (electronic): 2644-6359

PUBLIC HOUSING IN LANDS AFFECTED BY NATURAL HAZARDS: A COMPARATIVE ANALYSIS BETWEEN ITALY, JAPAN, AND THE USA / Ivan Allegranti

Ivan Allegranti
Research Fellow and Ph.D. Candidate
University of Camerino,
School of Law
Via Andrea D'Accorso, 16
62032 Camerino; Italy
ivan.allegranti@unicam.it
ORCID: 0000-0003-0184-0194

Abstract: *In 2016-2017, an earthquake hit central Italy, in particular the Marche region. In 2011, Japan was devastated by the Fukushima nuclear disaster and in 2005 Hurricane Katrina struck the southwest coast of the United States. This work, starting from the analysis of public housing reconstruction process in Italy, will afterwards analyse the legislation adopted by the Japanese and the American governments in the same field. The aim of the work will be, on the one hand, to highlight the best practices adopted by the three governments in public housing buildings reconstruction process and, on the other hand, to understand which policies, used in Japan and in the U.S.A., can be "imported" in the Marche region, as far as public housing reconstruction process is concerned.*

Key words: *Civil Law; Natural Disasters; Public Housing; Comparative Law*

Suggested citation:
Allegranti, I. (2022). Public Housing in Lands Affected by Natural Hazards: A Comparative Analysis between Italy, Japan, and the USA. *Bratislava Law Review*, 6(1), 53-68.
https://doi.org/10.46282/blr.2022.6.1.287

Submitted : 6 May 2022
Accepted : 13 June 2022
Published : 30 June 2022

1. THE MARCHE REGION

1.1 A Country Full of Natural Hazards

In the last twenty years, Italy underwent three major seismic events: the earthquake of L'Aquila in 2009 (Special Office for the Reconstruction of L'Aquila, n.d.),[1] the earthquake of Emilia Romagna in 2012 (Regione Emilia-Romagna. Earthquake 2012, 2014)[2] and more recently the seismic events in Central Italy in 2016-17 (Special Commissioner for the 2016 Earthquake Reconstruction, n.d.).[3] After the 2016 earthquake,

[1] The 2009 L'Aquila earthquake occurred on April 8, 2009. The earthquake was 6.3 on the Richter Scale and caused the death of 309 people, over 1,600 injured, about 80,000 evacuees and over 10 billion euros of damage estimated.
[2] The Emilia Romagna earthquake struck the region on May 20, 2012, and on May 29, 2012. Both seismic events were on a scale of 5.9 and 5.8 on the Richter Scale. The crater affected 58 municipalities in provinces of Modena, Reggio Emilia, Bologna, Ferrara. Following the earthquake, 19,000 families left their homes, 16,000 people were assisted by Civil Protection, 14,000 homes were damaged, circa 13,000 production activities were damaged as well as 1,500 public buildings were damaged.
[3] The earthquakes of 2016 were in sequence and followed respectively two and three months after the previous one. The first was on 24 August 2016 at 03:36 in the morning, the second on 26 October 2016 at

in order to proceed with a reconstruction of destroyed houses, the c.d. 'reconstruction plan' was adopted, which regulates both private and public reconstruction process of the buildings affected by the natural disaster. In the meantime, however, those who have lost their homes have had the opportunity to choose whether to receive the Autonomous Accommodation Contribution (CAS),[4] live in an Emergency Housing Solutions (SAE)[5] or containers for residential and/or office use,[6] or stay in an accommodation facility that welcomes the earthquake victims until the end of the emergency.[7] The natural disasters affected not only the lives of the people involved, but also the shape of towns which needed to be rebuild (Bonis and Giovagnoli, 2019, p. 14). The housing problem has therefore permanently changed the concept of living in these areas, generating in people an utopia of return to their original home (Giovagnoli, 2018, p. 50). In 2020, the occurring pandemic highlighted even more the problems related to the housing solutions for the people affected by the previous earthquakes (Valle and Mariani, 2020, p. 97). However, the problems related to the destroyed properties remained, also for the part of the population that lived in buildings part of the public housing. For example, most of the restoration works of the destroyed properties had been suspended and part of the population has been forced to continue living in temporary housing solutions and to see their dreams of "returning home" recede.

1.2 Public Housing in the Marche Region

Public housing is a public service created to offer to those in need and unable to access the free market housing in which to live in (Perin, 2001, p. 976; Perulli, 2000, p. 1). Introduced already when Italy was a monarchy with Law on Public Housing (1903), public housing has taken more and more a social connotation (Solinas, 1985, p. 4). Currently, as specified by Article 2 of the Decree on Urgent provisions for the implementation of Community obligations and the execution of judgments of the Court of Justice of the European Communities, the granting of public housing is "an essential element of the public housing system consisting of all the housing services aimed at satisfying primary needs." In fact, allowing the poorest to access to housing services aims to fulfil the constitutionally guaranteed social function of private property (Perlingieri, 2011, p. 50). The housing is leased, for a minimum of eight years, to those who apply and whose economic and social characteristics are among those identified by regional legislation pursuant to Article 60, para 1 e) of the Decree on Conferral of functions and administrative tasks of the State on the regional and local authorities. The allocation of an accommodation is made by the municipality of the place where the house is located, in light of the Article 95 of the Decree of the president of the Republic on Implementation of the delegation pursuant to art. 1 of the law no. 382 of 22 July 1975.

21:18, the third on 30 October 2016 at 07:40 and the last on 18 January 2017 at 11:14. 299 people died as a result of the earthquake. This article will concentrate on public housing reconstruction process after this earthquake.

[4] Article 3 of the Ordinance of the Head of the Civil Protection Department on First urgent civil protection interventions following the exceptional seismic event that has hit the territory of the Lazio, Marche, Umbria and Abruzzo regions on 24 August 2016 (2016).

[5] Article 1 of the Ordinance of the Head of the Civil Protection Department on Further consequent urgent civil protection interventions following the exceptional seismic event that hit the territory of the Regions Lazio, Marche, Umbria and Abruzzo on 24 August 2016 (2016).

[6] Annex 1 of Explanatory note protocol n. 44398 03 September 2016 of the Civil Protection Department of the Council of Ministers.

[7] Article 1, para 2, a), b) and c), of Ordinance of the Head of the Civil Protection Department on First urgent civil protection interventions following the exceptional seismic event that has hit the territory of the Lazio, Marche, Umbria and Abruzzo regions on 24 August 2016 (2016) together with point 5 of Explanatory note protocol. n. 44398, 03 September 2016 the Civil Protection Department of the Council of Ministers.

While the national law has remained the same, the regional legislation on social housing in the Marche region has recently been reorganized by the Regional law on Amendments and additions to the regional law on Reorganization of the regional system of housing policies and the regional law on Amendments and additions to the regional law on Reorganization of the regional system of housing policies (2018), which incorporates the changes brought by Constitutional Act on Amendments to the Title V of Part Two of the Constitution (2001), which has changed the structure of competences between state, regions and municipalities. Although modified in some parts, to date the Regional law on Reorganization of the regional housing policy system (2005) remains the reference text for public housing in the Marche region.[8] The recent regional public housing building plan for the three-year period 2014-16, prior to the earthquake, had provided for the allocation of new resources for the housing programme.[9] In particular, the action of the three-year plan was aimed at the recovery and enhancement of the 159 unused Ente Regionale per l'Abitazione Pubblica (ERAP) properties, thus launching a unitary and also experimental program in the field of residential construction. In order to achieve the goals set out in the plan, three lines of action were planned. The first one was to implement the maintenance of the existing building and its energy efficiency (intervention line A). The second one aimed at increasing the supply of low-rent housing and facilitate access to first-home ownership (intervention line B). The third one was focused on recovering the existing properties and buy new estates (intervention line C). Then the earthquake came.

1.3 The 2016 Earthquake and the Reconstruction Process of Social Housing in the Marche Region

Following the earthquake events of 2016-2017, the Special Commissioner for Reconstruction (Commissario Straordinario per la Ricostruzione) adopted, in the field of public housing, both the Ordinance on Measures relating to the restoration of public buildings which may be used for residential purposes (2017) and the Ordinance on Second public works programme on the rebuilding of public buildings susceptible to housing use (2020).

The Ordinance on Measures relating to the restoration of public buildings which may be used for residential purposes stated that, in order to accelerate the reconstruction process of buildings part of the public housing programme, there had to be a coordination work between the Special Commissioner for Reconstruction and the Deputy Commissioners for Reconstruction (the presidents of the regions hit by the above mentioned earthquakes and part of a so called seismic crater), so that the latter would draw up a list of the public housing buildings estimated to be reconstructed. The abovementioned Ordinance needs to be read in coordination with the Interministerial Committee for Economic Planning (it. original: *Comitato Interministeriale per la Programmazione Economica* - CIPE) resolution,[10] with which 350 million euro were allocated, pursuant to point 2.1 of the resolution, for the renovation and redevelopment of buildings part of the Italian public housing programme. However, the breakdown of the funds was as follows: A) within the meaning of point 2.1, letter a), EUR 250 million were allocated for all the regions of Italy for a maximum of two renovation interventions per

[8] To have an overview on Marche public housing regional legislation see *Marche Regional Council. Laws*.
[9] The plan was approved by the Regional Council Resolution 07 July 2014 n. 804.
[10] Notice for the collection of expressions of interest to participate in the "Integrated social housing program" (2017), hereinafter referred to as "CIPE resolution".

DOI: 10.46282/blr.2022.6.1.287

region; B) pursuant to point 2.1, letter b) up to EUR 100 million for the reconstruction of social housing buildings in the four regions affected by the earthquakes of 2016-2017.[11]

However, this resolution raised three problems in its application. The first was that it allowed the regions affected by the earthquake, within the meaning of point 5.1., to request access to funds only 'once the emergency phase was over'. The problem raised by this phrase has had major consequences. In fact, the Marche region (as well as the others involved in the seismic events), were already in a state of emergency following the deliberations of the Council of Ministers that had declared emergency status. The last extension of the state of emergency had occurred following the entry into force of the Decree on Urgent provisions for economic growth in the South, with which the effects of the emergency state were extended, pursuant to article 16 para 2 until February 28, 2018.[12] In practice, the possibility of access to the funds allocated by the CIPE resolution was determined by an indeterminable factor, time, thus delaying the entire reconstruction process. The second problem was that under point 5.2., the same regions of the crater had to divide by themselves, through mutual agreements, the funds allocated, because the CIPE resolution did not give any indication on the funds allocated, thus highlighting the uncertainty about its applicability. Lastly, the resolution did not prohibit or allow the regions of the earthquake to request, but only for a maximum of two interventions, access to the fund of 250 million euro allocated for public housing ex point 2.1., letter a), thus creating doubts about the application of the resolution. In fact, the question was if the regions involved in the seismic events could not access or not the 250 million euros funds allocated at point 2.1., letter a) for all the regions of Italy or were allowed only to use the funds of 100 million euros allocated at point 2.1., letter b). In practice, it was very difficult for the regions involved to proceed with the reconstruction process of the properties part of their public housing programme.

Perhaps a new direction has been taken as reported in the recitals of the Ordinance on Second public works programme on the rebuilding of public buildings susceptible to housing use. In fact, the regions involved have both drawn up the definitive list of buildings referred to in Ordinance on Measures relating to the restoration of public buildings which may be used for residential purposes (Annex 1 of the Ordinance) and they have found an agreement to allocate the EUR 100 million as stated in Article 2.1. lett. a) and lett. b) of CIPE resolution. Ordinance on Second public works programme on the rebuilding of public buildings susceptible to housing use, moreover, has speeded up the time for the reconstruction of buildings part of the public housing buildings, shortening, for example, the time for the delivery of the final project that cannot exceed 150 days from the publication of the calls for tenders. This provision was finally confirmed financially by the decree of the Ministry of Infrastructure and Transport (2020). The aforementioned decree, in this regard, pointed out, for the purpose of reconstruction, that the interventions must receive the indications referred to in point 2.1. letter a) points 4), 6) 7) 8) and 9) of CIPE resolution. New buildings, therefore, must be destined for permanent renting with social rent; have building characteristics of high sustainability, with energy efficiency referred to in EU Directive on the energy performance of buildings (2010); pursue the safety of the structural components of buildings by means of seismic

[11] In any case, the works would have begun, in mind of the chrono-program referred to in point 3. 1 from 2019 and would be finished in 2023.

[12] The state of emergency was then further extended by one hundred and eighty days by Article 1 of the Resolution of the Council of Ministers on extension of the state of emergency as a result of the exceptional seismic events that hit the territory of the Lazio, Marche, Umbria and Abruzzo Regions on 24 August 2016, 26 and 30 October 2016, and 18 January 2017, as well as the exceptional meteorological phenomena that affected the territories of the same regions starting from the second decade of January 2017 as well as by Article 1, para 988 of the Act on Budget (2018) until 31 December 2019. Moreover, with the emergency caused by the COVID-19 epidemic, the emergency state lasted, in fact, until 31 March 2022.

adjustment or improvement; raise the standards of living quality as regards the overcoming of architectural barriers, technological innovation and self-sustainability and finally contribute to the improvement of the urban quality of the context of degraded neighbourhoods, through the recovery or implementation of secondary urbanization (crèches, nursery and primary schools, sports facilities, etc.). Public housing buildings affected in the areas of the crater recovery interventions were initiated with the recent Regional Decree of the Urban Planning and Landscape director (2021) of the head of the urban planning landscape and construction director that has decreed the identification start of social housing interventions in the damaged territories.

1.4 The Programmazione Sociale Regionale[13] and the New Strategies to Rebuild the Public Housing Buildings

In order to create strategies to rebuild the regional social context, every three years, the Region promotes the Programmazione Sociale Regionale (PST). The scope of this document is to analyse the critical points of many social aspects and to decide how to proceed in order to eliminate problems affecting the region. The PST 2020-2022 'Priorities and strategies for the development and innovation of the Marche welfare and for the strengthening of social services interventions'[14] was approved by the Marche region on 27 February 2020.[15] Divided into strategic objectives and sectoral development guidelines,[16] the PST 2020-2022 identifies as strategic objective n. 7 (OS7) the 'support to the phase of reprogramming of network of services in the areas affected by the earthquake." The first action (A1) identified by PST OS 7 is aimed at developing, among others, new services for public housing new forms. The respective direction of development, however, the n. 7, is related to housing policies related to housing deprivation.

The current PST must be read alongside with the Pact for Reconstruction[17] which, among its areas of intervention, provides for the "area 1 - services for social cohesion", actions aimed to "support to social and/or shared building initiatives through redevelopment and creation of spaces for collective use and related services". The importance given by the Pact for Reconstruction to public housing is not marginal, as the

[13] Regional Social Programming.

[14] Translated from Italian original: Indirizzi prioritari e strategie per lo sviluppo e l'innovazione del welfare marchigiano e per il rafforzamento degli interventi in materia di servizi sociali. Hereinafter referred to as "PST 2020-2022'.

[15] The PST is a social policy legal instrument introduced by the Marche region in Article 13 of the Regional law on tourist accommodation structures and regulations on tourist enterprises (2014). Approved on a three-year basis, the PST aims, on the one hand, to identify the objectives to be pursued, with programmatic actions, to eliminate social contrasts and, on the other, to ensure economic support to people in poverty (even extreme) thus combating social exclusion due to the absence or lack of income. The Marche's Regional Law fully transposes Act on framework law for the implementation of the integrated system of social interventions and services (2000). The latter, in line with Articles 2, 3 and 118 of the Italian constitution, creates the national legislative framework aimed at combating social exclusion due to inadequate income, social difficulties and conditions of non-autonomous status.

[16] The strategic objectives concern specific 'system actions' to be implemented over the three-year period and are provided for by a specific regulatory reference, detailed and described in the expected outputs. The development guidelines are actions aimed at implementing the evolution of sectoral actions and policies. Objectives and guidelines are connected: the achievement of an objective leads to changes in the guidelines and policies implemented to date to achieve the objectives.

[17] The regulatory references made by the PST in the matter are the Pact for Reconstruction' approved by the Marche regional council resolution on Pact for reconstruction (2018) and the Marche regional council Resolution on Programming 2014-2020 of the Internal Areas - Approval of the strategy proposal and the intervention proposals connected to it from the pilot internal area of the lower Apennines of Pesarese and Anconetano (2016).

DOI: 10.46282/blr.2022.6.1.287

reprogramming of the areas of the crater, in the perspective of social housing, contains other integrated actions, which are strengthening of educational, social care, health services and support and social mediation in favour of the populations affected by the earthquake. The macro-areas of focus, in fact, provide a reconstruction that aims to strengthen resilience and permanence of the population in the territories affected by the earthquake disaster, social cohesion with particular attention to both forms of social economy such as social agriculture, cultural activities, green caring and sport (Marche regional council, 2018, p. 19).

Returning to the PST, with regards to public housing, the main objective is to create a policy programme that aims to respond to the housing need, not only for the person living outside the crater, but with a strong economic discomfort, but also for those whose property is located in the areas of the crater.

1.5 The Results on the Reconstruction Process of Social Housing in the Marche Region

To date, however, the criticalities found – except for two examples of success already present in the territory of public housing, which are "Abitare Solidale Marche", founded by the Auser Marche and the Municipality of Osimo, and the Progetto Cives - is the lack of coordination between the various parties involved in the construction process: public administration and private initiatives. As noted, there is no 'regional social network of services with a strong public connotation' (Piano Sociale Regionale, 2020, p.104).

Speaking of the reconstruction process of public housing in the Marche region, in 2020, out of 174 necessary interventions of social housing, 86 interventions were not started. Of the 174 total, only in 9 cases the tender for the design has been started, in 29 cases the design has been started, the final project has never been approved; (of the remaining 145 buildings), in 4 cases the tender for the works has been started, while in 25 buildings the works have been started.[18] Only 21 buildings were completed (Special Commissioner on Reconstruction, 2021, p. 46).

Perhaps, in order to find solutions that can be adopted in the Marche region, it may also be useful to analyse the Japanese and the US experience.

2. JAPAN

2.1. The Japanese Public Housing Regulations between Ordinary and Emergency Regulations

In Japan, housing policies have changed since World War II. Indeed, faced with a large shortage of available housing units after the conflict, Japan has made home ownership more attractive to citizens by basing government actions on three pillars. The first was to create, following the promulgation of the Government Housing Loan Corporation (GHLC) Act of 1950, a facility on mortgages to purchase on the first house through long-term contracts with low fixed interest rates. The aim of this measure was to encourage the middle class to buy a house. The second was the adoption of the 1951 Public Housing Act, which authorized local government units (LGUs) to build social housing buildings and lease them at fixed rent prices for low-income people. The last pillar was the adoption of Japan Housing Corporation (JHC) Act of 1955 which promoted

[18] Analysing the whole crater, however, almost five years after the earthquake, out of 312 social housing interventions (for the four regions affected by the earthquake), 134 interventions have not been started. Of the 312, the project for the design of 42 has been launched, while of 63 the design process has been started, of 4 the final project has been approved (of the remaining 243 buildings), of 10 the tender for the works has been started while of 36 buildings the intense activities have been started. Only 23 buildings were completed (Special Commissioner on Reconstruction, 2021, p.12).

the construction of housing for more middle-class families in large urban centres (Hirayama, 2017, p. 15; Kobayashi, 2016, p. 19). The Public Housing Act has, pursuant to Article 1 of the Act, the objective of contributing to the stability of life and social well-being of disadvantaged people by providing sufficient housing for a healthy and adequate life for low-income persons, with a rent lower than the rents available on free market, through the cooperation between national and local governments. The local government builds, buys or rents housing and places it for low-income people. It is subsidized by the national government (Article 2). According to Article 7 of the Act, the national government subsidy amounts to half of the amount used for the construction of buildings and, in the case of disaster victims, to the destruction of social housing buildings, reimbursement is 2/3 (Article 8).

Japan, however, has always been characterized by being a territory likely to be the victim of natural disasters. Therefore, over the years, it has equipped itself with several protocols to deal with the emergency period (Japanese Government Cabinet Office, 2021, pp.4-6). On a normative level, the Japanese state has equipped, following the disaster caused by typhoon Isewan, the Disaster Countermeasures Basic Act of 1961 that has laid the foundations for the current management of natural disasters.[19] The criteria of the protocols used for the management of natural disasters are those contained in the Basic Disaster Management Plan of 1963, subsequently amended in 1995. The plan clarifies the tasks assigned to government, public authorities and local government in disaster relief measures implementation of. For an easy reference to countermeasures, the plan also describes their sequence: preparation, emergency response, recovery and reconstruction according to the type of disaster (Japanese Government Cabinet Office, 2021, p.9).

2.2. The Fukushima disaster and the social housing reconstruction process

Recently, Japan was hit by the triple disaster of Fukushima on March 11, 2011 (Koshimura and Shuto, 2015, p. 3). The catastrophe was characterized first by an earthquake of magnitude 9 (Richter scale), then by a tsunami because the earthquake raised the level of the Pacific Ocean and finally by a nuclear disaster that destroyed the Fukushima nuclear power plants, with the consequent dispersion of nuclear waste in the surrounding environment. The legislation designed for this disaster consists mainly of the Basic Act on Reconstruction (2011) and the Basic Guidelines for Reconstruction in response to the Great East Japan Earthquake of 29 July 2011 (Koresawa, 2012, p. 111). To these laws, the guidelines on the outline of the System of Special Zone for Reconstruction (2011) have been added, which lowered the eligibility criteria to access the public housing for people who were homeless and/or impoverished by the disaster, and the Act on Special Measures for the Reconstruction and Revitalization of Fukushima (2012) governing the particular situation of Fukushima Prefecture, torn by the radiation of nuclear power plants. Both as an approach to reconstruction and as legislation, the disasters caused by the earthquake and tsunami have been regulated together, while the

[19] Just as curiosity for the reader, the Disaster Countermeasures Basic Act of 1961 introduced the 'Disaster Management Day' in the Japanese calendar and during the week from August 30 to September 5, there is the 'Disaster Management Week' in addition to a series of events such as the Disaster Management Fair, the Disaster Management Seminar and the Disaster Management Poster Contest, precisely to prepare the citizen for the event of a disaster.

DOI: 10.46282/blr.2022.6.1.287

nuclear disaster has been regulated on its own (Report of the Reconstruction Design Council, 2011).[20]

The reconstruction was based on 7 pillars that can be summarized as follows: 1) learning the lesson from the disaster; 2) rebuilding based on the community; 3) rebuilding looking at the future of the Tohoku region; 4) rebuilding with resilient communities in mind, but also in an energy efficient way; 5) reconstruction and economic revitalization go hand in hand, so that one pushes the other and *vice versa*; 6) concentrating specific resources to uplift the areas affected by the nuclear disaster; 7) rebuilding in a spirit of solidarity and mutual recognition (Report of the Reconstruction Design Counci, 2011).

In order to recover from the catastrophe, a time frame of 10 years has been suggested. At the government level, moreover, the entire emergency was managed on three levels with a bottom-up approach: municipality, prefecture and reconstruction cabinet led by the Prime Minister. The municipalities, already equipped with their own emergency plan directly on the ground, focused on interventions aimed at reconstruction and relocation and targeted interventions on the community; the prefectures coordinated the individual municipalities and these, in return, were coordinated by the central cabinet (Ranghieri and Ishiwatari, 2014, p. 15).

With regards to public housing, in point 5.1.4.v) of the Basic Guidelines for Reconstruction in response to the Great East Japan Earthquake, it was foreseen that, in a first phase, "certified" wooden houses would be built in flat areas away from tsunami risks and with an evacuation system in the event of a further disaster. For the densely populated areas, however, it was planned to adjust the reconstruction on the general plans planned for reconstruction.

The approach to public housing in Fukushima Prefecture was different. In this case, in fact, according to Article 25 (1) of the Act on Special Measures for the Reconstruction and Revitalization of Fukushima (2012), if it was not possible to offer temporary accommodation for evacuees who had been entitled to join the social housing programme, they were to be relocated to another prefecture in the country, so that they could be sheltered and protected from the radiation caused by the Fukushima nuclear disaster.

2.3. The City of Soma and the Results on the Japanese Social Housing Reconstruction Process

An example of public housing best practice may be the city of Soma in Fukushima Prefecture, where over 30% of all homes used for social housing programmes were damaged by the disaster. Financed entirely by the Government, in August 2012, a public housing building was completed and established for disaster victims (the first of the crater). The building consisted of 12 living units of two rooms each, based on the principle of mutual assistance, and it was also equipped with common spaces, as a dining room and a conversation area, with the aim of preventing the isolation of the elderly and trying to recreate a sense of local community. In order to cope with future situations in which the residents may require low-level nursing care, the facility has been designed so to eliminate architectural barriers, incorporating the principles of universal design i. e. equipped with handrails and toilets suitable for people in wheelchairs (Reconstruction Promotion Committe, 2013, p. 3). To date, analysing the report of the Japanese Government of 07 December 2020, it is possible to find that out of 29,654 public housing

[20] The Act consists of 24 Articles divided as follows: Title I, the General Provisions (Articles 1 to 5); Title II, Basic Measures (Articles 6 to 10); Title III, the Reconstruction Headquarters in response to the Great Earthquake in Eastern Japan (Articles 11 to 23); Title IV: Basic provisions on the establishment of the Agency for Reconstruction (Article 24) and finally a supplementary provision promulgating the law.

interventions needed to bring the affected areas back to the *status quo* before disasters, 100% of the same have been completed. To achieve this result, different construction techniques and architectural plans have been alternated. In fact, beyond large buildings, many apartments have been built in order to speed up not only the process of reconstruction of the building itself but also the purchase of land that, at times, is complicated. In the prefecture of Rikuzentakata only one-story apartments were built, creating a new problem: the isolation of the respective inhabitants (Kuroishi, 2018, p. 7). In fact, efficiency of the reconstruction process has been at the expense of population, especially the older ones, who have not been able to integrate in the new environment thus rebuilt.

3. UNITED STATES OF AMERICA

3.1. The American public housing regulations between ordinary and emergency regulations

In the United States, the Public Housing Programme was introduced by the United States Housing Act of 1937, which aimed to provide housing for people in need of housing after the Great Depression of 1929 (Wood, 1982). The beneficiaries, at the time of the Great Depression, were those who had lost their jobs or were unable to pay a rent according to free market rates. Initially, they were Euro-Americans and then, over the years, the demographics of the residents changed, as a prevalence of African Americans can be registered. These social housing estates, in addition to not being sufficient to meet the real needs of the population, have turned into real 'ghettos', marginalizing their inhabitants completely (Weesep and Priemus, 1999, p. 7). The structure of the program is crafted like this: there is a central authority, the Department of Housing and Urban Development (HUD) based in Washington, D.C., and several local agencies, Public Housing Agencies (PHAs), that manage on-site social housing programs. It will be the local agencies that will create suitable programs for the community living there, with wide discretion. The only limitation imposed on them is the respect for fundamental rights. Existing contracts between HUD and PHAs are called Annual Contributions Contracts (ACC). Under these agreements, the PHAs administer, in exchange for federal funding in the form of operational and capital contributions, their properties entrusted to them by the government according to federal rules and regulations (McCarty, 2014, p. 9).

3.2. Hurricane Katrina and the social housing reconstruction process

On August 25, 2005, Hurricane Katrina hit Florida, Mississippi, Alabama and Louisiana, devastating an area the size of Britain. The damage caused by the hurricane to the properties amounted to 300,000 condemned units, with an overall estimate of the disaster of $ 100 billion (Townsend, 2006, p. 7). The United States Government, however, at the time, was not unprepared for disasters. In fact, in 2002, following the terrorist attack on the Twin Towers in 2001, the Homeland Security Act was adopted, which regulated the entire emergency protocol to be applied in the event of a disaster. Later, in 2004, the National Response Plan was adopted, a general-use protocol that would govern the US response to natural disasters. The protocol's ratio is based on a bottom-up approach, whereby local authorities will provide an initial response to each hazard, including disasters of human and natural origin, and when their resources are insufficient, they may request assistance from neighbouring states. Only when accidents are of such magnitude that these resources are insufficient will the central state intervene, which will be able to make use of its internal emergency response capabilities or ask for assistance to neighbouring states, through mutual assistance agreements. In the latter case, it will

DOI: 10.46282/blr.2022.6.1.287

be a presidential disaster, as declared directly by the President of the United States of America. In 2006, the Post-Katrina Emergency Management Reform Act of 2006, amending the 2002 HSA and the 1988 Stafford Disaster Relief and Emergency Act, centralized the Federal Emergency Management Agency (FEMA) with national emergency management, also with regard to housing within the meaning of Section 683 of the Department of Homeland Security Appropriations Act.[21] The rule provided for coordination between FEMA and national sectoral organizations, in order to create and implement solutions that could help those who had lost a home, having an eye also to people with disabilities or whose economic condition was very disadvantaged (sect. 683 b, 5).[22] However, after the disaster, there was no synergy between individual government organizations, which effectively prevented an effective coordination between them (Townsend, 2006, p. 38). The Federal Emergency Management Agency (FEMA), in fact, acted without confronting other organizations such as the Departments of Veterans Affairs (VA), Housing and Urban Development (HUD) and Agriculture (USDA), which had offered housing for displaced persons, transferring many of them but not all, on cruise ships or in hotels., This lack of coordination and inadequacy in resolving the emergency have given rise to expropriations and discrimination to the disadvantage of evacuees (Finger, 2015, p. 603; Henrici et al., 2010). And for those who left, or had access to the house, the help received was not enough because, very often, rents were more expensive than market standards (Seicshnaydre, 2007). As for Public Housing, only $15 million was allocated under Article 1437g of the Public Housing Act (Lindsay and Nagel, 2019, p. 46; Pierre and Stephenson, 2008).

3.3 The National Housing Locator System

Almost three years after the disaster, the US National Disaster Housing Strategy was approved on January 16, 2009, in order to give a unified strategy to the real estate reconstruction. The NDHS has a "vision, supported by certain goals that will direct the nation to solve the disasters related to housing and the communities involved" (National Disaster Housing Strategy, 2009, p. 1). The plan offers an interesting idea: the National Housing Locator System. The National Housing Locator System is in fact a website, accessible to everyone, that can help individuals and families who would have access to public housing programmes to find, following a natural disaster on a local or national scale, on the whole territory of the United States housing leased at a regulated rent or for sale at a competitive price. The NHLS allows the HUD and its business partners, in particular other federal agencies and PHAs, to provide housing assistance by quickly locating rented housing and government-owned homes ready to be sold or rented during an emergency. Through lenders, approved by the Federal Housing Administration (FHA) of the HUD, the Department offers insured mortgages for disaster victims, to rebuild substantially damaged or destroyed homes, or to rehabilitate less damaged homes. FHA

[21] The Department of Homeland Security Appropriations Act, entered into force on October 4, 2006. The scope of this law is to "following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2007, for the Department of Homeland Security and for other purposes". This law, besides providing provisions in regards to the 2007 fiscal year of the Department of Homeland Security, amends at Title VIII "Emergency Communications", Subtitle D, the Stafford Disaster Relief and Emergency Act of 1988. The 2007 Act introduces to the Stafford Act, Section 683. The scope of this new article is to create a National synchronized communications system that can provide an effective and cost-efficient housing assistance to the people affected by the natural hazard who have lost their home and need a shelter.

[22] This provision has to be read together with Section 101 "Congressional Findings and Declarations" (42 U.S.C. 5121) of the Stafford Act.

can also provide home property opportunities through discounted sales programs. Access to HUD-assisted housing advisory agencies is also available.

In practice, however, even such an intervention has only increased the difficulties, which can be summarized as follows: the first was to create even more inequalities between those who could afford to leave and those who could not; the second concerns the fact that those who left could not return, because the reconstruction did not take place in fact, thus no longer creating a temporary, but permanent situation of detachment from their homeland. And if someone had returned, he would still not have been able to return to his home, as it was not available or even demolished or under reconstruction (Quigley and Godchaux, 2015). In so doing, as in fact, ten years after the disaster, the population has drastically decreased by 50% in the areas affected by the hurricane due to a slow and uncoordinated reconstruction (Sastry and Gregory, 2014).

4. LESSONS LEARNED AND FINAL REMARKS

The present paper has made possible to compare and to investigate the policies regarding public housing following a natural disaster in three distant countries: Italy, Japan and USA. Now, it could be questioned which foreign practice should be imported into Italy, more specifically in the Marche region, to mitigate the damage of a dramatic event such as a natural disaster with specific reference to the problem of public housing reconstruction. The question allows us to make some hypotheses.

From the Japanese experience, we could take into account the rigor and methodology that allowed, after only 10 years from the catastrophic event, the completion of public housing reconstruction process. This was made possible by a clear organization scheme and division of the functions between each Governative organization involved in the reconstruction process. However, above all, the success in this field was given by an upstream preparation on the possibility of a sudden disaster, allowing both the population as well as the government to be ready for the worst. What cannot be imported by the Japanese reconstruction process is the lack of attention provided to people in the public housing facilities rebuilding. In fact, the efficiency of the reconstruction process has been at the expense of the population, especially the older ones, who have not been able to integrate in the new environment thus rebuilt.

On the other hand, however, the American experience taught us the importance of effectiveness of the measures adopted. The case of Katrina has in fact highlighted numerous gaps on the social and Governmental side of the United States of America that have meant that, in a period of emergency, the weakest segment of the population has found itself almost helpless. Still a best practice that can be 'imported' from America is the National Housing Locator System. In fact, the possibility to provide, for those entitled to social housing, the access to a user-friendly website that allows access throughout the nation to public housing services, can be a great resource for evacuees.

This type of service, also if not adopted directly by the Marche region, has already been launched in Turin. It is called Io Abito Social (www.ioabitosocial.it). Created by the Fondazione Compagnia di San Paolo. This website is dedicated to the exploration and research of emergency and temporary housing solutions of Social Housing in the northern part of Italy (Lombardy, Piedmont and Veneto regions), allowing the poorest segment of the population to find a shelter in hard times. This type of intervention, already existing, could be strengthened and improved, extending it on a national scale, thanks to the interventions proposed by the Italian National Recovery and Resilience Plan.

Mission 1, Component 1, "Digitalization, Innovation and Security in the PA" of the PNRR provides, among other interventions, the creation of a national digital data platform (PDND) to enable the interoperability of data between each public administrations in the

DOI: 10.46282/blr.2022.6.1.287

country, thus benefiting both citizens and other public bodies (Piano Nazionale Ripresa e Resilienza, 2021, 90). The funds allocated to the establishment of the PDND amount to EUR 556 million and see both state bodies, including regions and individual citizens, as beneficiaries of this measure. On this point, the recent project "DigiPALM" approved by the Marche Regional Council on 14 December 2020, in order to encourage digitization in the municipalities of the region, could actively and concretely, implement even on a local basis, an initiative similar to IoAbitoSocial thanks to the funds allocated to this initiative that would allow to put into practice a synergy between population, municipalities, region and national digital system In particular, by applying this measure, it will be possible to rebuild the community using a participatory method, allowing, on the one hand, citizens to be 'active players' of the reconstruction process[23] (Bonetti, 2014, p. 129; Spanicciati, 2017, p. 721), while on the other hand, to remain in their own homeland (Allegranti, 2022, p. 7).

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[23] See Article 2, para 3 and Article 16, para 2 of Decree on Urgent interventions in favour of the populations hit by the 2016 seismic events (2016).

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BRATISLAVA LAW REVIEW

PUBLISHED BY
THE FACULTY OF LAW,
COMENIUS UNIVERSITY
BRATISLAVA

ISSN (print): 2585-7088
ISSN (electronic): 2644-6359

THE MODIFICATION OF THE DUTY OF LOYALTY AND THE DUTY OF CARE AND THE CONSEQUENCES OF THEIR BREACH BY MEMBERS OF ELECTIVE BODIES OF STOCK COMPANIES / Lucie Josková, Petr Tomášek

JUDr. Lucie Josková, Ph.D., LL.M.,
Assistant Professor
Department of Business Law,
Faculty of Law, Charles University
nám. Curieových 7
116 40 Staré Město, Czechia
joskova@prf.cuni.cz
ORCID: 0000-0003-1450-2864

JUDr. Petr Tomášek, Ph.D.,
Assistant Professor
Department of Business Law,
Faculty of Law, Charles University
nám. Curieových 7
116 40 Staré Město, Czechia
tomasekp@prf.cuni.cz
ORCID: 0000-0002-7871-0112

This contribution was prepared within the grant project of GAČR No. 18-04757S: "Fiduciary Duties (Primary duties of the administrators of matters of others)".

Abstract: *There are two leading duties that react to the agency problem in the corporate regulation – duty of loyalty and duty of care. The purpose of this paper is to answer the question whether, under what circumstances and on what grounds, it would be permissible to modify the two general duties either on the basis of an exception presumed by the law, or upon an agreement between a company and its director. With this purpose in mind, the authors analyse the respective legal regulation in three countries, namely Germany, Great Britain and the Czech Republic. While the modification of obligatory loyalty has been understood by the analysed legal systems within certain boundaries, they deal with the decreasing of the standard of care in a more positive way, whether through a direct modification of the standard of care or indirect modification through determining the role of an elective body member.*

Key words: *duty of loyalty; duty of care; modification; elective body; board; supervisory board; board member; stock company; limited liability company, commercial law*

Suggested citation:
Josková, L., Tomášek, P. (2022). The Modification of the Duty of Loyalty and the Duty of Care and the Consequences of Their Breach by Members of Elective Bodies of Stock Companies. *Bratislava Law Review*, 6(1), 69-84. https://doi.org/10.46282/blr.2022.6.1.282

Submitted : 16 March 2022
Accepted : 18 June 2022
Published : 30 June 2022

1. DUTY OF LOYALTY, DUTY OF CARE AND THEIR MODIFICATION

There is a basic principle in most legal systems that a member of an elective body (a director) of a business company[1] is obliged to act loyally (primarily perceived as

[1] This paper focuses on stock companies (as understood under Czech law), i.e. a limited liability company or a joint-stock company. The term *company* is sometimes used as a linguistically simplified designation of either one.

a fiduciary duty) and with due care. Such duties are a natural response to the fact that a director is employed to administer the matters of another person (a company); for that purpose, the director has wide ranging autonomy in terms of decision-making and representation powers (the so-called principal-agent problem or *agency problem;* see also Kershaw, 2012, p. 171 et seq.). The duty of loyalty and the duty of due care are presumed to ensure that any director is to proceed duly when governing the company interests and that no harm would be caused as a result of the director´s execution of office (under ordinary circumstances). Although these duties comprise just one of the possible instruments[2] to react to the *agency problem*, they form part of all corporate regulations within the European Union.[3]

Duty of loyalty and *duty of (due) care* mean that the member of an elective body is subject to requirements in two directions: the director is obliged (a) to protect the interests of the company[4] (duty of loyalty), and (b) to act with certain competence (duty of care). This is how two types of risk to which a company may be exposed, are prevented: the member of an elective body can be active and can have sufficient knowledge and experience, but he or she need not use the abilities in order to support the interests of the company; alternatively, the director may be loyal to the company´s interests, but in an absolutely incompetent way (Davies and Worthington, 2012, p. 517).

Although the distinction between the duty of loyalty and the duty of care may seem obvious, it is not always the case (Engert, 2016, p. 404 et seq.). But a general consensus applies at least to the meaning and substance of both duties.

The meaning of the loyalty duty is to ensure that a director prefers the interest of the company over his or her personal interest (or the interests of a third party). In that context, individual legal systems contain, in addition to the general loyalty duty, more detailed instruments in order to ensure that the company´s interests can be duly protected, such as regulation of conflicts of interest, which is considered by many authors as the core of the loyalty duty (Gold, 2014, p. 178),[5] prohibition of competition, prohibition to resign from office at improper time,[6] etc.

The duty of care imposed upon members of elective bodies means for them to proceed with the defined standard of conduct (care) which is used by the legislature to determine the desirable (expectable) mode of performing particular activities. Although the duty of due care has often been specified as various individual partial duties (see for example Fleischer, 2022, n. 19 ff.), its substance consists of a duty to preserve a certain quality of the way of acting or progressing in a course of action (standard of care).

The purpose of this paper is to answer the question whether, under what circumstances and on what grounds, it would be permissible to modify the two general

[2] For possible strategies to decrease agency costs see Armour, Hansmann and Kraakman (2009, p. 37 et seq.)
[3] This applies despite the fact that these are not always regulated as autonomous duties (see Gerner-Beuerle, Paech and Schuster, 2013, pp. 75–78, 118–125).
[4] We do not tackle the definition of what the interest of a company may be as the debate on this issue has been far from concluded.
[5] Also, a comparative study compiled for the purposes of the European Union dealing with the rights and liabilities of directors of stock corporations in individual EU countries states that "*The duty of loyalty, broadly understood, addresses conflicts of interest between the director and the company*." (Gerner-Beuerle et al., 2013, p. xi). For Czech law see, for example, Krtoušová Novotná (2019, p. 41).
[6] Such explicit prohibition was contained in the Czech Business Corporations Act ("ZOK") as applicable before 31 December 2020. It may be assumed that similar prohibition continues to result from the general duty of loyalty of a director. See the similar conclusion by Štenglová (2020, p. 196). For consequences of resignation from office at improper time see Supreme Court of the Czech Republic, No. 27 Cdo 3367/2018 (20 November 2019).

duties either on the basis of an exception presumed by the law, or upon an agreement between a company and its director.[7]

In order to find an answer to the above posed question, we have analysed the respective legal regulation in three countries; Germany, Great Britain and the Czech Republic (for the reasons for this choice see below). Furthermore, based on the findings, we have formulated general principles for modifying the duty of loyalty and the duty of care. For the sake of clarity, modification is understood as both the alteration of the content of the duty itself (loyalty duty, duty of care), and private law consequences of their violation.[8] Extremely significant consequences include liability to damages,[9] where *ex ante* or *ex post* exemption from liability to damages can be considered, and also changes of conditions in liability insurance regarding the performance of office (*D&O Insurance*).[10]

2. AN OUTLINE OF FOREIGN REGULATION

To provide a comprehensive overview of foreign regulation in a limited amount of space, one representative of both the continental and common law legal system have been chosen. The continental law is represented by Germany as regulation of the most populous European country, moreover with crucial impact on the regulation of further European countries (e.g. Austria and, due to the historical reasons, the Czech Republic as well). Great Britain stands for the common law system as a traditional representative of this legal family. Finally, the regulation of the Czech Republic is introduced as a state which belongs among continental jurisdiction, however, where common law principles are followed thoroughly and where different aspects of common law system are incorporated.[11]

2.1 Germany

German law imposes upon members of the board of directors and supervisory board of a joint-stock company and upon directors of a limited liability company a duty to act with due care (*Sorgfalt eines ordentlichen und gewissenhaften Geschäftsleiters*,[12] or *Sorgfalt eines ordentlichen Geschäftsmannes*).[13] The duty of loyalty is not explicitly regulated by legislation regarding those persons; however, both literature and case-law uniformly rely on the presumption that members of elective bodies of both joint-stock companies and limited liability companies owe also the duty of loyalty (*Treuepflicht*) (see, for example, Hüffer and Koch, 2022, n. 10–11; Fleischer, 2022, n. 147 ff.). Explicit

[7] This paper is based upon the text of co-author L. Josková entitled "Možnosti modifikace povinnosti postupovat s péčí řádného hospodáře" published in *Dvořák, J. a kol.* Soukromé právo 21. století. Praha: Wolters Kluwer ČR, 2017, pp. 63 – 75. The content of the original text has been substantially changed and its conclusions adapted after debates with P. Tomášek.

[8] Sanctions under Czech public law include, for example, disqualification (exclusion from the position). Czech law provides that a member of the governing body may be excluded from the performance of office if he or she has repeatedly or seriously violated duties during the last three years (section 63 (1) ZOK). In British law, see the Company Directors Disqualification Act 1986.

[9] Other penalties are also possible such as to render benefit acquired (for Czech law see section 53 (1) ZOK).

[10] Insurance is considered as one of the instruments to restrict liability (see, for example, Gerner-Beuerle et al., 2013, p. xiii).

[11] Since 2014, it has been possible to form joint stock company with both two-tier (traditional) system and one-tier system. At the same time, the business judgment rule was introduced [see Sec § 51 (2) ZOK].

[12] Provisions of section 93 (1) AktG for the members of the board of directors, and section 116 AktG for the members of the supervisory board.

[13] Section 43 (1) GmbHG for directors of a limited liability company.

DOI: 10.46282/blr.2022.6.1.282

statutory expressions of the loyalty duty are prohibition of competition and non-disclosure duty; in addition, some rules for conflicts of interest are also regulated.

Prohibition of competition applies to members of the board of directors of a joint-stock company (section 88 AktG), who must not, without the permission of the supervisory board, carry out certain activities and/or occupy a certain position. The supervisory board can issue permission only regarding certain activities unless harm has been caused to the interests of the company (for example, double mandates within the holding are permissible). Members of a supervisory board are not subject to the prohibition of competition; this approach has been justified by their looser relation with the company (and a more restricted loyalty duty) (Kumpan, 2014, p. 117; Habersack, 2019, n. 47; Spindler, 2022a, n. 81). On the other hand, it has been generally accepted that the prohibition of competition applies to the governing director of a limited liability company although the law does not explicitly stipulate so (Raiser and Veil, 2006, p. 517; currently e.g. Leuering and Rubner, 2020, p. 719).

Members of the board of directors and supervisory board of a joint-stock company are obliged to preserve the non-disclosure duty (section 93 (1), section 116 AktG). The same duty is owed by the governing director of a limited liability company, although the law does not explicitly impose the non-disclosure duty upon them (Oetker, 2021a, n. 19–21).

The Stock Act regulates the protection of a company against consequences of a conflict of interest in its section 112 AktG;[14] it governs the rules for representation of a company by the supervisory board where negotiations with the board of directors are at issue. The recent case law and literature suggest that those provisions apply not only to the existing members of the board of directors but also to its former members (Spindler, 2022b, n. 17). Even contracts concluded within common business transactions do not create an exception to such rule.[15] The Limited Liability Company Act is free from any similar provision; this is why the general rule of the Civil Code should apply in relevant cases (section 181 (1) alt. 1 BGB). However, in practice, governing directors of limited liability companies are frequently released from such restriction in the respective memorandum of association (Fleischer, 2003, p. 1052). The general regulation is complemented with rules regarding specific legal transactions. Thus, the Stock Act regulates the rules for providing loans to the members of the board of directors (section 89 (1) AktG); the same applies to providing security for a transaction (Fleischer, 2003, p. 1054). The provision of a loan to the governing director is regulated by the Limited Liability Company Act (section 43a GmbHG), although the main purpose in such cases is the protection of the registered capital (Oetker, 2021b, n. 1).

The doctrine treats in a different way possible modifications of the duty of loyalty and the duty of care, or the consequences of their breach, with respect to either form of the company.

The approach of the doctrine to permissibility of a modification of the duty of care for members of elective bodies of stock company appears to be uniform. German

[14] Section 112 AktG reads: "*Vorstandsmitgliedern gegenüber vertritt der Aufsichtsrat die Gesellschaft gerichtlich und außergerichtlich. § 78 Abs. 2 Satz 2 gilt entsprechend.*", i.e. the supervisory board represents the company against the board of directors in judicial proceedings and also externally.

[15] Literature in such cases recommends that a resolution of the supervisory board be adopted that would authorize company employees to enter into everyday transactions with the members of the board of directors Fleischer (2003, p. 1052).

stock law is based upon the principle *Satzungsstrenge*,[16] under which provisions of the Stock Act are considered to be peremptory. Therefore, a prevailing part of the specialist literature on this subject contends that the duty of care or the consequences of the breach thereof could not be modified, i.e. neither made stricter (Hopt and Roth, 2015, p. 126) nor softer (Hopt and Roth, 2015, p. 125; Hüffer and Koch, 2022, p. 613; Krieger and Sailer-Coecani, 2015, p. 1437). Should there be any deviations from statutory regulation of the duty of care or consequences of its violation stipulated in the by-laws or any agreement between the company and a member of its elective body, such provisions would be considered as non-existent *ab initio* (*Nichtigkeit*) (Hopt and Roth, 2015, p. 126). Although recently part of the German literature and practice requires that the modification of the duty of care (not the loyalty duty) should be permissible[17], particularly regarding the restriction of the scope of compensation for damage caused due to the breach of the duty of care (see Grunewald, 2013, p. 813 et seq.; Habersack, 2015, p. 1297 et seq.), any agreement in this respect is still missing[18] and no recent amendment of the Stock Act has introduced such a possibility.

As for the duty of loyalty for members of elective bodies of stock companies, the possibilities of its restriction or exclusion have received only marginal mention in the literature. Opinions regarding that issue tend to conclude that the duty of loyalty as a whole cannot be excluded again with respect to the principle *Satzungsstrenge*.[19] In another words, the duty of loyalty is considered to be peremptory and no modification is allowed.

As for the legal rules applicable to a company taking insurance in order to secure a director against risks resulting from his or her position there is a requirement of coinsurance in the amount of at least 10% of the damage, but not less than 1.5 multiple of the fixed annual remuneration of the board member.[20] However, it is not excluded that a board member also takes individual insurance to cover any potential duty of coinsurance, which has been used frequently in practice (Wagner, 2014, p. 235).

Regarding a limited liability company, part of the literature admits that certain modification of the duty of care, or the restriction of the duty to compensate the damage caused as a result of the breach of that duty, can occur.[21] However, these issues have been generally considered as controversial (e.g., Fleischer, 2016, n. 298). The basic argument of supporters of permissibility of modification of the duty of care is based upon

[16] Under section 23 (5) AktG, the by-laws of a joint-stock company can deviate from the statute only if such deviation is explicitly permitted in the statute. As a result, provisions of stock law are considered as peremptory. The principle *Satzungsstrenge* is based upon the decision of the Reich Court of Justice of 25 September 1901, file n. I 142/1; the decision became part of case law and was not questioned in the literature for a long time. However, it has been recently subject to criticism more and more frequently.

[17] The reason is relatively recent proceedings for damages instituted by members of elective bodies of joint-stock companies where the volume of damage was such that it significantly exceeded the insurance taken and compensation of such damage by the members would be for them liquidating. In this respect, there is a "model" case of Dr. Breuer, former board member of Deutsche Bank AG, who, along with the Bank, was sued for damages in the amount of 3.5 billion Euro, since he had expressed doubts regarding the creditworthiness (*Kreditwürdigkeit*) of Kirch empire (summary under Grunewald, 2013, p. 813).

[18] For a critical opinion see for example Fleischer (2005, pp. 914–915).

[19] See for example A. Hellgardt, whose opinion regarding the exclusion of the loyalty duty is quite tolerant (2010, p. 784).

[20] Section 93 (2) third clause, reads: "*Schließt die Gesellschaft eine Versicherung zur Absicherung eines Vorstandsmitglieds gegen Risiken aus dessen beruflicher Tätigkeit für die Gesellschaft ab, ist ein Selbstbehalt von mindestens 10 Prozent des Schadens bis mindestens zur Höhe des Eineinhalbfachen der festen jährlichen Vergütung des Vorstandsmitglieds vorzusehen.*"

[21] The cornerstone in that respect was laid by the decision of the Federal Court of Justice (BGH), which allowed for the shortening of the limitation period (decision of 16 September 2002, file n. II ZR 107/01).

DOI: 10.46282/blr.2022.6.1.282

the existence of wide powers of company members regarding their right to claim damages against the governing director.[22] This leads to a deduction that if limited liability company members may decide whether and to what extent they wish to enforce the claims of the company against its governing director having breached his or her duties, the same approach should apply to waiving such claims in advance (Paefgen, 2014, p. 1255). An example of potential modification of the duty of care, or consequences of the breach thereof, includes the right to restrict the liability of a governing director for certain types of conduct,[23] or to agree on a maximum scope of damages; another possibility is to make stricter the requirements giving rise to liability for the damage caused (Paefgen, 2014, p. 1254). Such restrictions are considered efficient even if they negatively affect the creditors (e.g. the performance regarding the claim for damages is required in order to satisfy the creditor) (Paefgen, 2014, p. 1255).[24]

Regarding the duty of loyalty of the governing director, it has to be said that the relevant literature makes minimal reference to the exclusion of the loyalty duty. However, at the same time, some authors admit that the duty of loyalty as a whole may be excluded (Hellgardt, 2010, p. 785 et seq.).

2.2 Great Britain

British regulation of business companies has traditionally been based upon the so-called monistic principle which means that a company has just one elective body – *board of directors*. The regulation of duties of its members was historically developed by case-law; a relatively complex statutory regulation was introduced by the Companies Act 2006.[25] Although this legislation does not contain explicit subdivision of duties of a member of the board of directors into the duty of care and duty of loyalty, such classification is presumed to be relevant today as it corresponds with the historical development of both duties (Davies and Worthington, 2016, p. 478).

Section 174 CA can be considered as a codification of the duty of care; a member of the board of directors is obliged to exercise reasonable care, skill and diligence to such an extent that would be expected of a person carrying out the functions of a director in relation to the company. The doctrine then infers that it would depend on the situation of a particular company and that it could not be expected in every single case that every member of any board of directors would be able to act as a professional member of the board (Davies and Worthington, 2016, pp. 480–481; Girvin, Frisby and Hudson, 2011, p. 336). In this context, some authors conclude that - with regards to the liability of non-executive directors who are not qualified or experienced in a discipline relevant to company administration – CA prescripts nothing relevant (Wild and Weinstein, 2016, p.

[22] Under section 46 n. 8, GmbHG, the annual meeting by its simple majority decides whether the claim against the governing director would be raised. In addition, the company may waive the claim or agree on its composition. This does not apply if the provision of section 43 (3) GmbHG has been violated, i.e. the provision prohibiting the payment of means in order to sustain the registered capital (s. 30 GmbHG), or the provision limiting the acquisition of one´s own shares (s. 33 GmbHG), and the amount is necessary to satisfy creditors (s. 9b GmbHG). Should the general meeting declare that no claim would be raised against the governing director regarding any damage already sustained, it means the waiver of any right to damages (s. 46 n. 5 GmbHG).

[23] Nevertheless, it is impossible to exclude the liability of a governing director for intentional breach of a duty, section 276 (3) BGB.

[24] Paefgen adds that although peremptory regulation of a director´s liability for the breach of a duty could be politically desirable it can be inferred neither from the systematics, nor the wording of the Limited Liability Company Act (2014, p. 1255).

[25] Hereinafter referred to as "CA".

198). In our opinion, such an approach opens the door to indirect modification of the duty of care, depending on the tasks a member of the board is entrusted with.

On the other hand, sections 171 through 173 and 175 through 177 can be considered as codification of the loyalty duty and relating good faith as basic fiduciary duties.[26] Those provisions stipulate that a director must act within his or her powers, must promote the success of the company, exercise independent judgment, avoid conflicts of interest (or notify the company of his or her interest in certain transactions), and must not accept benefits from third parties.

As for thoughts regarding possible modifications of the duty of loyalty, British law traditionally offers to company members a wide range for their autonomous regulation of internal issues of the company (see Davies and Worthington, 2016, p. 356), and the statutory regulation should be considered peremptory except for cases where the statute itself provides for certain deviation. Under section 173 (2) CA, the company´s constitution can stipulate under what circumstances the director is not obliged to exercise fully independent judgment (but his or her own judgment). Such special regulation can be used, for example, in subsidiary companies (see also Boyle, Birds et al., 2014, p. 610), which would be established for "servicing" purposes to fulfil objectives of their parent company or other companies within the same group. However, even in these circumstances, the director has a responsibility to their company as a whole. Thus, they must not force a subsidiary out of business just because it suits the parent company to do so, nor must the director be guided solely by the interests of the group as a whole (Loose, Griffiths and Impey, 2015, p. 241).

Another statutory exception applies to conflicts of interest. Under section 175 (1) CA, a director of a company must avoid a situation in which he or she has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company (on conflict rule). However, subsection (3) stipulates that such duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company relating to an unessential volume of company assets.[27] Furthermore, section 180 (4) b) CA provides that company members may, at the general meeting, adopt their own rules relating to conflicts of interest (Hannigan, 2016, p. 539), which makes the statutory regulation default than rather mandatory.

In addition, the no conflict rule is expanded by the no profit rule[28] which precludes a director of a company from benefiting personally from the position of a director. The no profit rule covers any inducement or incentive type of payment to a director or non-monetary type inducement as well.

As for a possible agreement between the company and its director to exclude private law consequences of the breach of the duty of care and the loyalty duty, section 232 CA prevents it ex ante as it stipulates that any provision is void that purports to exempt a director of a company from any liability for the breach of duty in relation to the company (Loose et al., 2015, p. 362 et seq.). However, subsequent approval (ratification) of conduct of a company director amounting to the breach of duty is possible (section 239 CA); it should be made by resolution of the members of the company adopted by qualified or simple majority depending on the respective form of the breach of duty (Loose et al., 2015, p. 355 et seq.).

[26] As for a fiduciary nature of such duties see also section 178 (2) CA. Cf. For a different opinion regarding section 171 CA see Hannigan (2016, p. 316).
[27] Section 191 CA stipulates that an asset is a substantial asset in relation to a company if its value— (a) exceeds 10% of the company's asset value and is more than £5,000, or (b) exceeds £100,000.
[28] See sec. 176 CA.

DOI: 10.46282/blr.2022.6.1.282

The limitation of the maximum extent to which a company director may be released from liability for a breach of their duties is rarely covered in literature. However, the doctrine infers that there can be such breaches that could not be subject to subsequent ratification, such as misappropriation of corporate property (Davies and Worthington, 2016, p. 574 et seq.).

It should be added that, despite the existence of section 232 CA, British regulation explicitly provides that a company can purchase, for a director of the company, insurance against the consequences of the breach of his or her duties (section 233 CA). Unlike in German regulation, no minimum co-insurance to be taken by a company director is required in Britain. Although such provision (in the case of taking insurance in the widest possible extent) can seem to remove all preventive effects regarding statutory duties of company directors, the issue can be seen also from another perspective, namely that insurance serves as a means to smoothly compensate the damage caused by a director and to protect the company and its creditors (Davies and Worthington, 2016, p. 579).

2.3 The Czech Republic

Czech legislation imposes the duty to act with loyalty[29] and due care upon the members of elective bodies of all companies (including limited liability companies and joint-stock companies). The loyalty duty and the duty of care are covered, by the general duty to act with due managerial care.[30] These duties are considered to be peremptory.[31] However, as is obvious from the text below, the regulation is in fact semi-peremptory as the tightening of the duties is allowed.

The possibility of making the duty of due managerial care (i. e. both duty of loyalty and duty of care) stricter is undoubted, as the law prohibits only mitigation of it.[32] Thus, a company and a member of its elective body can enter into an agreement that the member of the elective body must perform their role with due professional care.[33] The limit for this tightening is liability for a result as this is considered to be unacceptable (Čech and Šuk, 2016, p. 159).[34]

On the other hand, the duty to act with due managerial care (i. e. both duty of loyalty and duty of care) can be mitigated neither by agreement between a member of an elective body and the company nor in any constituting document of the company (there are exceptions mentioned below which limit partial loyalty duties) (Dědič and Lasák, 2021,

[29] It should be mentioned that a company director is obliged to act with necessary loyalty, which may give rise to consideration that such loyalty is lower as to its intensiveness compared to unlimited loyalty. P. Čech and P. Šuk argue that "*A member of a company body cannot be required, for example, to work 24 hours a day and seven days a week.*" (2016, p. 159).

[30] Section 159 (1) of the Czech Civil Code 2021 reads: "(1) *A person who accepts the office of a member of an elected body undertakes to discharge the office with the necessary loyalty as well as with the necessary knowledge and care. A person who is unable to act with due managerial care although he must have become aware thereof upon accepting or in the discharge of the office and fails to draw conclusions for himself is presumed to act with negligence.*"

[31] Supreme Court of the Czech Republic, No. 31 Cdo 4831/2017 (11 April 2018). In literature see e.g. Janů (2019, p. 229).

[32] As section 53 (2) ZOK explicitly excludes any limitation (or even exclusion) of liability it may be inferred that stricter rules may apply. Such conclusion corresponds with the purpose of the provision, namely to protect the company and its members and creditors.

[33] The standard of professional care is generally considered to be stricter than the standard of due managerial care.

[34] As for case-law, for example, see Supreme Court of the Czech Republic, No. 29 Cdo 2363/2011 (29 April 2013); Supreme Court of the Czech Republic, No. 29 Cdo 935/2012 (19 December 2013); Supreme Court of the Czech Republic, No. 29 Cdo 662/2013 (18 September 2014).

pp. 393–394). According to the law,[35] this is applicable to both the regulation of the duty itself and the consequences of its breach. The quoted provision undoubtedly applies to the *ex ante* modification of the duty to act with due managerial care and/or the liability for its breach.[36] However, it is disputed, whether an agreement between a company and a member of an elective body regarding limitation of damages, or – as the case may be – giving up of the compensation by the company after the causation of damages (*ex post)* is allowed. It should be noted that this part of the doctrine acknowledges both possibilities (similarly Dědič and Lasák, 2021, pp. 394–396).

As suggested in the introduction, the loyalty duty in Czech law is indicated in individual provisions of the Act. There is detailed regulation of the rules for conflicts of interest[37] and the prohibition of competition. The loyalty duty partly covers duties not explicitly regulated by the statute, such as non-disclosure (Lasák, 2022, p. 599). There are conditions regulated within the framework of individual partial duties, the fulfilment of which does not result in the infringement of statutory prohibition. For example, a member of an elective body who intends to enter into a contract with the company (e.g. to purchase one of the company´s immovables) has the right to conclude the contract with the company despite the existence of a conflict of interest, providing he or she informs all members of both the governing body and supervisory body of the intended purchase in advance of the conditions under which such contract is to be concluded. Nevertheless, it is emphasised by law that the notification of conflict of interests does not remove the duty of the member of the elective body to act in the interests of the company. As far as matters within the frame of common business transactions are concerned, the Act does not require any notification of a conflict of interest.[38] A possibility to deviate from the statutory regulation of the prohibition of competition is presumed by the Act itself as it explicitly permits that acts constituting the company can contain rules derogating from the statutory definition of the prohibition of competition.[39]

Specific regulation of liability insurance for the performance of office is absent in the Czech legal system. However, in practice, such insurance is commonly taken without being considered as a limitation of liability of a member of an elective company body.[40]

3. PRINCIPLES FOR THE MODIFICATION OF THE LOYALTY DUTY AND THE DUTY OF CARE

3.1 Duty of Loyalty

Across all three countries studied, there is a unifying presumption that duty of loyalty is an obligation intrinsically connected with the role of a member of an elective body and applies irrespective of whether the duty of loyalty is regulated by the law explicitly (the Czech Republic); through a set of duties (Great Britain) or – as the case may be – is not part of the written law at all (Germany).

[35] Section 53 (2) ZOK reads: "*Legal acts of a business corporation restricting the responsibility of a member of its bodies are disregarded.*"
[36] Section 53 (3) 4 ZOK provides for the settlement of damages arisen due to the breach of the duty to act with due managerial care, but it is quite controversial in the literature whether only an agreement on another equivalent manner of settlement is permissible, or a partial waiver of compensation of damage caused is also possible (e.g., Čech and Šuk, 2016, p. 176).
[37] See sections 54 through 57 ZOK.
[38] Section 57 ZOK.
[39] Sections 199, 441 (4), 451 (4) and section 459 (4) ZOK.
[40] In this sense, for example, see Csach (2015, p. 198). An exception is the view of R. Pelikán, who considers insurance as an impermissible limitation of the liability of an elective body member (2012, p. 116).

DOI: 10.46282/blr.2022.6.1.282

Further, it seems that the legislative core of the duty of loyalty is usually understood as the statutory regulation of the conflicts of interest (and their regulatory displays) and – in some cases – as the regulation of the prohibition of competition. At the same time, it is obvious that the analysed regulations also reflect that it could be necessary to partially derogate certain rules to enable the practical functioning of businesses (e.g. in case of group of companies). It is also obvious that in the German and Czech law the modification of the duty of loyalty is discussed rather reluctantly and only in connection with the regulation of conflict of interests and prohibition of competition, whereas British law stipulates multiple exemptions from the statutory regulation of the duty of loyalty. Moreover, any modification of the duty of loyalty or any statutory exemptions does not deprive a member of an elected body of his or her duty to act in the interests of the company (explicitly in the Czech regulation), or to – at least – bear these interests in mind.

In a general sense, we agree that it is inherent in every person's nature that they protect their interests against, and prioritise them over, the interests of others.[41] Therefore, the duty of loyalty imposed on a member of an elective body obliges them to prefer the interests of the company to his or her own interests (or interests of the allied person). Thus, the duty of loyalty creates the pillar of the relationship between a company and a member of its elective body (i.e. the relationship between two different persons).

However, contrary to the analysed jurisdictions, we do not think that conflict of interests and prohibition of competition are core elements of the duty of loyalty. We agree that the basis of obligatory loyalty is the general prohibition of self-enrichment to the detriment of the company or to use the powers entrusted for one´s personal benefit or for the benefit of an allied person.[42] This duty (prohibition to enrich yourself to the detriment of the company) cannot be modified by agreement between a company and a member of an elective body or given up by the company as this would be contrary to the substance of the relationship between the company and the member of an elective body.

This conclusion does not mean that the statutory regulation of conflicts of interest and the regulation of the prohibition of competition are not important rules connected with the duty of loyalty. On the contrary, they represent crucial devices to ensure that the duty of loyalty is fulfilled properly. However, they must follow the aim: to ensure that a member of an elective body does not enrich themselves at the expense of the company; not to prohibit every situation where interests of a company and a member of an elective body differ. Thus, if the analysed jurisdictions enable partial derogation of these rules, they reflect the functioning of businesses and do not alter the above-mentioned conclusion that the core duty of loyalty cannot be modified. Furthermore, the rules for conflicts of interest should solve situations when the interest of a company and interest of a member of an elected body are different. At the same time, they must prevent the situation when their strict observance would be to the detriment of the company. A typical example may be that it turns out to be exigent to admit, under set circumstances, that a contract should be concluded between the company and an elective body member. For example, if the member owns property that is needed by the company for its future expansion, the exclusion of such purchase with reference to its absolute prohibition would finally result in the detriment to the interests of the company. Similarly, it would make no sense if an elective body member would have to provide notification of every transaction with the company irrespective of its significance and risks for the company;

[41] For details regarding the existence of one´s own interest as a condition for legal personality see Pelikán (2012, p. 58 et seq.).
[42] For details regarding this issue see Engert (2016, p. 406 et seq.).

an example would be an elective body member of a company operating a chain of petrol stations who wishes to fill their car's fuel tank under regular business conditions.

We argue that the rules governing conflicts of interest should, rather than to provide for the general prohibition, mean primarily the regulation of procedures to resolve conflict satisfactorily, including providing exceptions to the general rules.

Conflicts of interest have been inevitably designated as a symptom of our times.[43] Thus, business practice has to deal not only with conflicts of interest between a company and its elective body member, but also between several companies with the participation of the same elective body member. Those situations are usually subject to the statutory regulation of prohibition of competition. An example of a justified exception to the prohibition of competition may be the possibility to hold a position on an elective body for several companies which are interconnected and where the interest of a particular company is subordinate to another interest (e.g. that of the holding).

To sum up, the above outline indicates that it may be desirable in some situations where the loyalty duty is to apply, that the restriction or exclusion of certain aspects of obligatory loyalty may be admitted; but only under the condition that the prohibition of self-enrichment to the detriment of the company is respected. The legal systems under consideration consider that such situations must be somehow resolved; as a result, they allow, within the defined scope, for certain mitigation of selected aspects of the duty of loyalty.[44] It is important that such intervention is practicable only to the extent and under conditions justified by another prevailing and legitimate interest. However, such considerations should be left only to a restrained legislature due to the significance of the loyalty duty and the actual imbalance between a company and an elective body member; the more so in the case of a company composed of several members where there is a potential threat of outvoting the minority.

On the other hand, the situation is perceived the other way around if the obligatory loyalty duty is made stricter. Should an agreement between a company and a member of its elective body replace the legal requirement to act in the necessary interest of the company in such a way that the elective body member would be obliged to act in the best interests of the company we would see no risk in such regulation as the statutory standard of acting would be higher and the protection of the company strengthened. Similar reasons lead us to have no objections against strengthening the rules on conflicts of interest and the prohibition of competition (whether applicable to substance or time). Nevertheless, it should always be thoroughly considered if such rules do not affect the company´s interest in undesirable ways (see above). Moreover, it should always be kept in mind that a company can act against its elective body members as a stronger party; as a result, the actual negotiating power of an elective body member should be considered and any excessive conditions prevented by means of the principles of private law.[45]

[43] As for conflicts of interest see Hopt (2004, pp. 1–52).

[44] See, for example, exceptions to the prohibition of competition in the German Stock Act (section 88 AktG), or the rules for transactions during conflicts of interest in British law (section 175 CA).

[45] Those would include, for example, an agreement under which a member of an elective body would bind him or herself not to accept the position of an elective body member in another company with the same objects of business.

DOI: 10.46282/blr.2022.6.1.282

3.2 Duty of Care

The members of the elective bodies are obliged to perform their duties with due care in all three jurisdictions under consideration. This duty is – unlike the duty of loyalty – was found to be explicitly regulated by law.

Whereas the possibility of modification of obligatory loyalty within the analysed legal systems is rather narrow, the changes to the duty of care seem to be more acceptable. It seems that raising the standard of care (e.g. to require due professional care) is generally allowed, unless a member of an elective body should be responsible for the outcome. Of the analysed jurisdictions, only the German regulation of stock companies explicitly forbids tightening of the duty of care referring to the principle of *Satzungsstrenge*. The decrease of the standard of care is demanded by the doctrine as it is believed to be required by the reality of business life (across all three jurisdictions). One possible way of decreasing the standard of care which has been suggested is restricting the duty to compensate for damage caused by the breach of the duty of care. There, analysed regulations distinguish between *ex ante* limitation (which is considered problematic) and *ex post* limitation (which could be allowed). Such an open approach is presumed to be based upon an idea that decreasing the standard of care or restricting the consequences of the breach of duty to act with such standard of care; can ensure that candidates would be more willing to take respective positions and be subject to reasonable risk in the course of their duties. Another important idea is that it is not legitimate to expect that all members of the board of directors would act with the same standard of care as they have different tasks to perform. On the other hand, opponents object that any limitation of the duty of care would have negative impact on the preventative nature of this duty.

Based on the findings, it can be stipulated as follows.

Companies by their nature have a primary role to protect their interests; they allow the modification of duty of care or legal consequences of its breach only if it proves to be advantageous for them.

Thus it can be presumed that a company permits the reduction of the standard of care (e. g. by limiting the consequence of its breach) only if it rationally evaluates, with sufficient evidence, that decreasing the standard of care, or limiting or excluding the consequences of the breach thereof, is more beneficial for the company than to adhere to the duty of care within the statutory regime (Hellgardt, 2010, p. 771).[46] This can be case if the reduction of the duty of care helps the company to secure a better candidate for the position of the member of an elective body. However, it is necessary to keep in mind that protecting the company´s own interests inevitably covers its implementation, i.e. ensuring the further existence of the company. This is possible only if interests of both the company members and its creditors are taken into account.[47] Not respecting the interests of creditors results in the company´s bankruptcy and further promotion of the company's interests becomes impossible (Pelikán, 2012, p. 59). In other words, contractual autonomy of parties must not be without limits when the standard of care is to be reduced. Thus, contractual autonomy should not only take into account the

[46] An example may be that a candidate makes the acceptance of the position conditional upon the limitation of the duty of care (such as by restricting the scope of compensation for damage in the case of the breach of that duty); and the authorized person would come to the conclusion that the risk potentially caused as a result of the reduction of the statutory standard would be counter-balanced by the benefits to be brought in by the candidate.

[47] See also section 172 CA.

interests of creditors but also the interests of minority company members[48] and other stakeholders (such as employees).

The tightening of the duty of care seems to be less problematic. This is obviously based on the logical fact that making the key duties of an elective board member stricter contributes to a higher degree of protection of the company's interests.

The need for a higher protection of interests can be applicable to companies engaging in highly specific activities, and such protection is required by statute. Examples in Czech law cover companies doing business or providing services on capital markets,[49] where the legislature imposes a higher standard of professional care instead of the standard of due managerial care. However, a risk-laden activity should not be avoided, because it attracts very high levels of care. This can lead to an extreme risk aversion and reduce the scope of individuals willing to join an elective body, which may potentially be to the detriment of the company. Despite this, we can assume that the benefit (i.e. an increased protection of the interests of the company) would prevail over the negatives. Therefore, making the duty to act with due care stricter, e.g. in the direction of professional care, is essentially possible. Nevertheless, it should not lead to the situation where the elective body member is liable for the result of his or her activities; if any business success goes for the good of the company, it should also bear the risk of failure and should not transfer it to the elective body members. Such tightening would be contradictory to the relationship between an elective body member and the company, as the member is responsible for the due performance of their activities and not for its results.

4. CONCLUSIONS

The duty of loyalty imposes on a member of an elective body the obligation to prefer corporate interests over their own (or the interests of the allied person). Its core role doesn´t lie in regulation of conflict of interests, but in the prohibition self-enrichment to the detriment of the company. Regulation of the conflict of interests is only a device achieve it. Thus, the duty of loyalty represents the pillar of the relationship between a company and a member of its elective body. Therefore, the possibility of modifying the duty of loyalty (or legal consequences of its violation) is very limited and only under condition that the prohibition self-enrichment at the detriment of the company is respected.

Thus, the restriction or exclusion of certain aspects of duty of loyalty may be admitted, but only within the scope defined by law, as legislature should ensure that the interests of the company are protected properly. On the other hand, the tightening of duty of loyalty is allowed, as in this way, the protection of the company is strengthened.

The duty of care requires a member of an elective body to act with certain competence. It can be assumed that – as the company primarily protects its own interests – the modification of the duty of care (or legal consequences of its breach) is only allowed in cases where it is more advantageous for the company than to let duty of care remain within the statutory regime. Thus, it is possible that also reducing the

[48] The interests of minority company members may be put at risk even where the company produces profit as a result of its functioning, namely when the company generates profits but has insufficient cash flow in order to pay dividends without taking a loan.

[49] Traders in securities (section 11a, the Business on Capital Market Act 2004, "ZPKT"), investment brokers (section 32 ZPKT), organizers of a regulated market (section 41 ZPKT), administrators of an investment fund (section 18, the Act on Investment Companies and Funds 2013, "ZISIF"), etc.

DOI: 10.46282/blr.2022.6.1.282

standard of care is attractive to the company as it can increase the willingness of candidates to take up membership of the elective body or to take risky business decision. However, the interests of the creditors and shareholders must be taken into account as well. The tightening of the duty of care seems to be less problematic as it helps to protect company better. Nevertheless, there are also visible hazards for the interest of the company which should be taken into consideration.

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DISCUSSION PAPERS AND COMMENTARIES

BRATISLAVA LAW REVIEW

PUBLISHED BY
THE FACULTY OF LAW,
COMENIUS UNIVERSITY
BRATISLAVA

ISSN (print): 2585-7088
ISSN (electronic): 2644-6359

THE DISTINCTIVE NATURE OF COVID-19 VACCINES: COMPENSATION FOR POTENTIAL DAMAGES UNDER THE LEGAL FRAMEWORK OF LITHUANIAN STATE IN THE CONTEXT OF GLOBAL EXAMPLES / Andra Mažrimaitė, Vilius Lapis

Andra Mažrimaitė
Junior Lawyer
Law firm Ellex Valiūnas
Jogailos str. 9,
LT-01116 Vilnius, Lithuania
andra.mazrimaite@ellex.legal
andramazrimaite@gmail.com
ORCID: 0000-0002-8653-2512

Vilius Lapis
Lawyer
NVO teisės institutas (NGO law institute)
Kazimiero Ladygos str. 1-121,
LT-08235 Vilnius, Lithuania
vilius@nvoteise.lt
viliuslapis@gmail.com
ORCID: 0000-0002-5936-8147

Abstract: *The article analyses legal mechanisms of compensation for damages caused by side effects of COVID-19 vaccines in Lithuania. In particular, draft amendments to the Law on the Rights of Patients and Compensation of the Damage to their Health registered by the Parliament of the Republic of Lithuania in 2021 are evaluated and arguments for the need for further improvement are provided herein. In order to comprehensively assess the nature of the side effects that may be a substantiated cause for damages, pharmaceutical analysis and evaluation of COVID-19 vaccines eligible in Lithuania are analysed. Analysis of the legal framework and proposals are construed mainly in light of the assessment of global examples. Following thorough evaluation of the question at hand, it is the opinion of the authors that the product liability mechanism is not appropriate in the context of the vaccination program applied in Lithuania and "a no-fault compensation model" shall be adopted instead, which would be funded by a separate (non) State institute/fund in Lithuania.*

Key words: *COVID-19 pandemic; Vaccines; Constitution; Vaccination; Side effects; Damage compensation, No-fault model; Lithuania; Civil Law*

Suggested citation:
Mažrimaitė, A., Lapis, V. (2022). The Distinctive Nature of COVID-19 Vaccines: Compensation for Potential Damages under the Legal Framework of Lithuanian State in the Context of Global Examples. *Bratislava Law Review*, 6(1), 87-106. https://doi.org/10.46282/blr.2022.6.1.285

Submitted : 19 April 2022
Accepted : 13 June 2022
Published : 30 June 2022

1. INTRODUCTION

Ordinarily, it takes scientists about 10 years to develop a vaccine. However, the pharmaceutical industry has proceeded towards the emergency approval of COVID-19 vaccines just in a matter of months (van Tassel et al., 2021a). Indeed, it is to be mentioned that the latter procedure was not done from the scratch – the research was performed using data on similar coronaviruses called SARS and MERS (Cassata, 2021).

Nowadays, vaccination is considered one of the public health's greatest achievements. However, a major ethical dilemma still lies in the balance between personal autonomy and choice versus protection of the entire population at risk (Amin et al., 2012).

In any case, the expedient procedure that was employed for the registration of COVID-19 vaccines triggered a certain level of doubts from people about the quality, side effects (adverse reaction) and effectiveness of COVID-19 vaccines. Consequently, policymakers and rule enforcers experienced challenges with regards to facilitating the global administration of COVID-19 vaccines and preventing concerns about compensation for damages caused by side effects of the vaccine (Congressional Research Service, 2021).

And what is known about the side effects (adverse reactions) of COVID-19 vaccines that are often referred to by people hesitant or refusing to have a vaccine? As of 1 March 2022, the European Centre for Disease Prevention and Control (ECDC) estimated a total of 876,708,597 doses of COVID-19 vaccines administered in EU/EEA countries, it constitutes at least one dose received by 85.5% (316,963,728) of the adult population over 18 years and full vaccination completed by 82.8% (European Centre for Disease Prevention and Control, n.d.). According to the European Medicines Agency (EMA) reports, up to 30 January 2022, 1,018,250 (0.7% of all administered doses) suspected adverse reactions after COVID-19 vaccination were reported to EudraVigilance.

The number of reported cases does not seem to be very high. One may claim that a vaccine is no different from any medicinal product, since every medicinal product may have adverse reactions, they are usually introduced to a patient using the medicinal product through a leaflet of such product, thus the patient is properly informed and can make a decision whether to administer the product or not. There is no special treatment of compensation of damages caused by side effects of a medicinal product, therefore no special mechanism is needed for evaluation of damages caused by side effects of the COVID-19 vaccine, one may add. However, it shall be noted that pandemic situation and requirements imposed on people to be vaccinated in order to be engaged in certain activities, social events, or simply performing one's work duties, are not the same as those for consuming other medicinal products.

Lithuanian Government adopted rules requiring a person to be vaccinated in order to be able to conduct certain professional activities (thus, the refusal of the vaccine can incur significant consequences upon that person) and since the number of reported cases is not that high maybe in Lithuania, could patients benefit from a more simplified procedure for compensation of damages in case of side effects (adverse reactions)?

In general, in the legal system of Lithuania, as long as a specific legal mechanism of compensation for damages caused by vaccines has not been adopted, general rules on product liability apply. That means currently, people of Lithuania who suffered adverse reactions can claim compensation for damages by commencing a product liability case or litigation against the state, healthcare professionals and/or the manufacturer of the vaccine before a court of Lithuania. This implies that the patient is faced with extremely difficult, time-consuming, and costly court proceedings, which would require to prove all circumstances of general civil liability. Unless amendments are adopted to the existing laws, a person may not benefit from an existing special simplified procedure under the Law on the Rights of Patients and Compensation of the Damage to their Health that applies for damages caused to a person's health in the event of provision of healthcare services.[1] This special compensation mechanism is called a "no-fault" procedure and under existing regulation, it explicitly excludes damages caused due to side effects (adverse reactions) of a medicinal product.

[1] Law on the Rights of Patients and Compensation of the Damage to their Health (1996). The Register of Legal Act, 102-2317.

Consequently, in today's reality, all potential vaccine recipients, and especially people in high-risk communities, face a dilemma: should they risk becoming infected or risk having a vaccine side-effect without sufficient access to compensation? This dilemma is exacerbated when it comes to compulsory vaccination or the voluntary consent of people to be vaccinated in the name of public health.

The purpose of the article is to analyse and evaluate legal mechanisms of compensation for damages caused by side effects of COVID-19 vaccines in Lithuania. Accordingly, the tasks are as follows: to evaluate the possible mandatory nature of vaccination in foreign and Lithuanian contexts; to define the current no-fault compensation model, to evaluate the possibilities of compensation for damages caused by vaccines in Lithuania; to provide analysis of the side effects that may be a substantiated cause for damages; to assess draft amendments to the Law on the Rights of Patients and Compensation of the Damage to their Health and present arguments for the need for further improvement. The object of the research is legal documents that establish indemnification mechanisms in Lithuania and pharmaceutical information related to COVID-19 vaccines.

The article is relevant since the vaccination process is still ongoing in Lithuania. People still do not have access to adequate redress for the possible side effects of vaccines. Such regulation is still not possible under the laws of the Republic of Lithuania, although vaccination has been going on for more than two years. The draft amendment to the law registered by the Parliament only a couple of months ago is still in the process of being adopted and it is not clear when it will enter into force (if it enters into force).

The following methods were applied when conducting the research: comparative analysis helped to understand different positions on vaccines and vaccination process; legal documents were used to analyse the provisions of current law in the context of patient compensation for damages and to assess the national regulations of other countries; systemic analysis was applied when evaluating the case-law of the European Court of Human Rights, the Constitutional Court of the Republic of Lithuania and the Supreme Court of Lithuania; empirical analysis of case-law was applied in order to better comprehend the concept of and the grounds of restricting the privacy under the case-law of the Lithuanian Constitutional Court and the ECHR; the linguistic method was applied in order to evaluate the relevant terms applicable to the research, to systematically interpret them.

2. PECULIARITY OF COVID-19 VACCINES: (NON)COMPULSORY VACCINATION AND COMPENSATION FOR DAMAGES

Contemporary forms of mandatory vaccination compel vaccination by direct or indirect threats of imposing restrictions in cases of non-compliance (Gravagna et al., 2020, p. 7866). Typically, mandatory vaccination policies permit a limited number of exceptions recognized by legitimate authorities (e.g., medical contraindications) (World Health Organization, 2021). Despite its name, mandatory vaccination is not truly compulsory, i.e., force or threat of criminal sanction are not used in cases of non-compliance. Still, mandatory vaccination policies limit individual choice in non-trivial ways by making vaccination a condition of, for example, attending school or working in particular industries or settings, like health care.

On 2020 December 27 vaccination against COVID-19 has started in Lithuania, like in the entire European Union. It should be noted that the pivotal clinical trials of all COVID-19 vaccines have not been completed. For example, Pfizer/BioNTech: Comirnaty is due to submit a report on the Comirnaty pivotal clinical trial to the European Medicines

DOI: 10.46282/blr.2022.6.1.285

Agency in December 2023. In the European Union, they are conditionally registered, i.e. in the absence of all the data normally required. As a result, their long-term effects, such as the risk of cancer, risk of autoimmune diseases, risk of birth defects, fertility, are unknown (European Medicines Agency, 2020).

Nonetheless, with almost a year and a half since vaccination began, different examples of practice in the context of compulsory vaccination appeared. Under these conditions, some countries have only tried to contain the virus and apply it for a short period of time, while others have only applied compulsory vaccination to workers in certain countries. Consequently, some of the countries already had existing or newly introduced mechanisms of compensation for damages caused by adverse effects of COVID-19 mandatory vaccination, others – not. These are analysed further below.

2.1 Examples of other countries

In high-income countries, few existing compensation mechanisms incorporate side effects of the COVID-19 vaccines, based on the declared health emergency states and the incentives of a wide vaccination campaign. In other cases, the existing no-fault compensation programs for routine immunization do not incorporate COVID-19 vaccination adverse events (D'Errico et al., 2021):

- Austria – COVID-19 vaccination is (or has been) fully mandatory. Austrian law provides a system of public law on the basis of which compensation is paid under the Vaccine Injury Act.[2] The state pays compensation if certain vaccines have caused damage to a person's health. Compensation is granted on an application for social insurance to the state under the Vaccine Injury Act. The claim is being processed administratively. Vaccinations from COVID-19 have been included in the Recommended Vaccination Regulation.
- Canada – In August 2021, the Canadian government announced it would require COVID-19 vaccination for federal public service employees and members of the military. As of June 2021, the Canadian government started a national vaccine damage compensation. The program is essentially designed for people who experienced severe reactions to an approved COVID-19 vaccine (Public Health Agency, 2021). Thus, it provides financial support only to those who have experienced a serious and/or permanent injury after receiving a Health Canada-authorized COVID-19 vaccine in Canada, on or after 8 December 2020. This support includes income replacement, payment for injuries, death benefits (including funeral expenses), and other eligible costs, such as uncovered medical expenses. The amount of financial support provided will be determined on a case-by-case basis, but compensation will be retroactive from the date of the injury or person's death.
- France – COVID-19 vaccination is not mandatory, but the French government has recommended COVID-19 vaccinations for certain categories of individuals. The existing compensation program includes compensation for injuries that are related only to compulsory vaccinations. There is officially no special procedure for compensation of damages resulting from recommended non-compulsory vaccinations. Therefore, any person who has suffered an injury and/or any damage as a result of the COVID-19 French

[2] Bundesgesetz vom 3. Juli 1973 über die Entschädigung für Impfschäden or Impfschadengesetz.

vaccination program is eligible for compensation pursuant to the general principles of French civil law, since this vaccine is non-compulsory.[3]

- Germany – COVID-19 vaccination is not mandatory in Germany, and the compensations are covered under existing legislation. German no-fault compensation program applies to everyone: to compulsory vaccination and to non-compulsory vaccinations, as long as the vaccination is publicly recommended by the Government of Germany. Therefore, a no-fault compensation program that also applies to COVID-19 vaccines as long as they are officially recommended by the Government as stated in Section 60 of the German Infection Protection Act.[4] The compensation size is officially a flat-rate scheme influenced by various factors, depending primarily on the individual degree of injury/damage.
- South Africa – COVID-19 vaccination is voluntary in South Africa. On 24 February 2021, it was announced that the government would set up a legal basis for a no-fault compensation model (Mboweni, 2021). The actual legal framework surrounding this compensation fund has not yet been released officially. However, the Health Minister of South Africa stated in January 2021 that any person who voluntarily chooses to get the vaccine will be required to sign an indemnity waiver, indemnifying the individual from any liability stemming from any potential risk and harm caused by the COVID-19 vaccine. In addition, the WHO created the vaccine injury compensation program, which is a no-fault compensation system that are available to 92 low and middle-income countries, including South Africa (World Health Organization, 2021).
- South Korea – Vaccination against COVID-19 is voluntary in South Korea. The South Korean Disease Control and Prevention Agency stated that in the future they will expand compensation coverage for those suffering from severe side effects injury and or damage after getting a COVID-19 vaccine (Lee and Kim, 2021). The compensation will provide up to 10 million KRW for the medical expenses caused by vaccines.

2.2 Peculiarity of Covid-19 vaccination in Lithuania

Paragraph 1 of Article 21 of the Constitution of the Republic of Lithuania (hereinafter – Constitution) establishes that the human person is inviolable.[5] The content of the inviolability of the person as a protected value consists of physical and mental inviolability.[6] This right to the integrity of the person is not absolute, i.e., it may be limited. However, this may be done only on the grounds and in accordance with the procedure established by law.[7]

Paragraph 1 of Article 2.25 of the Civil Code of the Republic of Lithuania repeats the above-mentioned constitutional provision, inter alia, establishing that a natural person

[3] République Française Decree 2020–1310 of 29 October 2020, Art. 53-1.
[4] Infektionsschutzgesetz. (Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen). Artikel 1 des Gesetzes vom 20 July 2000 (BGBl. I S. 1045); Zuletzt Geändert Durch Gesetz vom 27 July 2021 (BGBl. I S. 3274) m.W.v. 10 August 2021.
[5] Constitution of the Republic of Lithuania (1992). The Register of Legal Acts, 33-1014.
[6] Lithuania, Constitutional Court of the Republic of Lithuania, Case No. 36/2009-20/2010-4/2011-9/2011 (4 June 2012).
[7] Lithuania, Constitutional Court of the Republic of Lithuania, Case No. 12/99-27/99-29/99-1/2000-2/2000 (8 May 2000).

DOI: 10.46282/blr.2022.6.1.285

is inviolable.[8] The inviolability of a natural person is his or her right to decide on the intervention of his or her body and the right not to have any intervention against his or her body without his or her consent (Mikelėnas et al., 2002, p. 75).

The European Court of Human Rights (hereinafter – ECtHR), for its part, classifies the physical and psychological integrity of the individual as a concept of privacy within the meaning of Article 8 of Convention.[9] According to the ECtHR,[10] even the slightest interference with a person's physical integrity against that person's will must be regarded as a restriction on the respect for private life guaranteed by Article 8 of the Convention.[11]

The ECtHR has also emphasized in its case law that the physical integrity of the individual covers the most intimate aspects of a person's private life.[12] The slightest coercive medical intervention in the human body means the restriction/disregard of this right. The freedom to accept or refuse a particular medical procedure or to choose an alternative form of treatment is an indispensable part of the principles of free choice and personal autonomy.[13] The scope of free self-determination also includes the possibility of engaging in activities that may be perceived as physically or morally harmful or dangerous to that person.[14] Compulsory vaccination, as an involuntary medical procedure, is tantamount to restricting respect for private life, including the physical and psychological integrity of the person, guaranteed by 1st paragraph of Article 8 of the Convention.[15] But we also see the other side, on 8 April 2021 the ECtHR has ruled that the Czech Republic's compulsory vaccination regime for children is without prejudice to the right to privacy enshrined in Article 8 of the Convention.[16] It should be noted, that in each case it is necessary to assess individually and to answer the questions: was it "in accordance with the law"; pursued one or more of the legitimate aims set out therein; and was "necessary in a democratic society."

The constitutional principle of equality of persons for the law means the innate right of a person to be treated equally with others. Paragraph 1 of Article 29 of the Constitution[17] enshrines the formal equality of all persons, Paragraph 2 enshrines the principle of non-discrimination of persons and non-granting of privileges.[18] The Constitutional Court has more than once stated in its rulings that this principle must be observed both when passing laws and applying them. That principle obliges the same facts to be treated in the same way in law and prohibits, in principle, the same facts from being treated differently arbitrarily. Thus, the Constitutional Court has more than once held that the constitutional principle of the law on equality of all persons would be violated if a certain group of persons to whom a legal norm is granted was treated differently from other addressees of the same norm, although there are no huge differences of magnitude that such unequal treatment is objectively justified.

On January 13, 2022, the Law on the Prevention and Control of Communicable Diseases of the People No. I-1553 Draft law amending Articles 11 and 18 was

[8] Civil Code of the Republic of Lithuania (2000). The Register of Legal Acts, 74-2262.
[9] ECtHR, Storck v. Germany, app. no. 61603/00, 16 June 2005.
[10] Ibid.
[11] See European Convention on Human Rights.
[12] ECtHR, Y. F. v. Turkey, app. no. 24209/94, 22 July 2003; ECtHR, Solomakhin v. Ukraine, app. no. 24429/03, 15 March 2012.
[13] ECtHR, Jehovah's Witnesses of Moscow v. Russia, app. no. 302/02, 10 June 2010.
[14] ECtHR, Solomakhin v. Ukraine, app. no. 24429/03, 15 March 2012.
[15] ECtHR, Matter v. Slovakia, app. no. 31534/96, 5 June 1999; ECtHR, Pretty v. the United Kingdom, app. no. 2346/02, 29 April 2002; ECtHR, Salvetti v. Italy, app. no. 42197/98, 9 July 2002.
[16] ECtHR, Vavřička and Others v. the Czech Republic, app. no. 47621/13, 8 April 2021.
[17] Constitution of the Republic of Lithuania (1992). The Register of Legal Acts, 33-1014.
[18] Lithuania, Constitutional Court of the Republic of Lithuania, case no. 18/99 (2 April 2001).

registered.[19] That draft law sought to introduce compulsory COVID-19 vaccination in Lithuania for workers in certain areas, e.g., 1) personal health care services and activities; 2) social services and activities. The registration and submission of such a draft law already show that vaccination has been considered by the responsible institutions and to be made compulsory in Lithuania for certain, distinct groups of persons.

Apart from the mandatory nature of vaccines (as there is currently no such imperative regulation in Lithuania), we are faced with a situation where such actions are carried out as a result of universal immunization, not only for personal benefit but also for the protection of society, we are talking about moral benefits (Largent and Miller, 2021). It is often the case that a person performs such actions for the "general good", the state strongly encourages such actions, and we are under some pressure.

Interesting to note that under the Law on the Rights of Patients and Compensation for the Damage to Their Health[20] a newly adopted clause with regard to consent form and content with regard to vaccination against COVID-19 applies (Article 161). By this, it introduces specific requirements that apply for the consent of a patient to be vaccinated by, *inter alia*, COVID-19 vaccines. Meaning that each time a person arrives for a COVID-19 vaccine it is presumed that the person expresses its consent if certain information about the vaccine is provided by the healthcare specialist, or it is available in the premises of vaccination.

3. MECHANISM OF COMPENSATION FOR DAMAGES TO PERSON'S HEALTH IN LITHUANIA

The new wording of the Law on the Rights of Patients and Compensation of the Damage to their Health (1996), which entered into force on 1 January 2020, introduced significant changes in the process of compensation for damage to patients' health. A no-fault compensation model was introduced by the latter amendments, where patients' health damage is compensated without the need to prove illegal actions and the fault (guilt) of the person who committed it (the healthcare professional).

The following conditions for compensation for damages to the patient's health were established (Article 24(6):[21] 1) the damage caused to the patient's health and 2) it is not unavoidable damage. The notion of unavoidable damage is a new concept in the legislation and it requires to assess whether harm to the patient's health could have been avoided by providing healthcare in accordance with the quality requirements imposed on it.[22] Patient can commence proceedings for damage compensation by submitting a form to the Commission on the Determination of Injury to Patients (hereinafter – the Commission) Patient is no longer required to prove illegal actions or guilt and a causal link between the damage to health and the provision of personal health care. It is only

[19] Law on the Prevention and Control of Communicable Diseases in Humans (1996). The Register of Legal Acts, 104-2363.
[20] Law on the Rights of Patients and Compensation of the Damage to their Health, (1996). The Register of Legal Act, 102-2317.
[21] Ibid.
[22] Unavoidable harm - harm to the patient's health that is not related to the provision of personal health care services or is related to personal health care services but has arisen due to circumstances which the personal health care professional and/or personal health care institution could not foresee, control and/or prevent their way. The criteria for imminent damage shall be established by the Government of the Republic of Lithuania. Law of the Republic of Lithuania on Patients' Rights and Compensation for Damage to Health No. I - 1562 Law amending Articles 2, 7, 8, 13, 20 and Chapter V, supra note 49, Article 2 (91).

DOI: 10.46282/blr.2022.6.1.285

required to submit general information about how the damages occurred and prove damages (pecuniary and non-pecuniary) suffered by the patients. The rest is assessed by the Commission, with the assistance of experts as necessary.

It is agreeable that such model benefits patients as the compensation model is efficient and does not require costly and lengthy legal proceedings, making it easier for them to access a quick loss payment (Caplan and Reiss, 2020). It also contributes to greater legal certainty and predictability of the process.

However, Resolution of the Government of the Republic of Lithuania No. 3 of 8 January 2020 "On Approval of the Description of the Procedure for Compensation for Property and Non-Property Damage Caused by Damage to the Patient's Health" explicitly states[23] that damages suffered due to side effects of medicinal products falls under the notion of unavoidable damage, therefore, it is not compensated. Namely, the provision states that: unavoidable damage among other things exists when it is a disease or a health disorder caused by the pharmacological properties of medicinal products when used in accordance with the conditions specified in the summary of product characteristics, diagnostic and treatment descriptions, diagnostic and treatment methods and/or diagnostic and treatment protocols.

Therefore, considering such legal provisions side effects of a COVID-19 vaccine that are included in the summary of product characteristics are not covered by this model of compensation.

Lastly, who would respond if a person had a contraindication (hypersensitivity to the active substance or other excipient) and could not be vaccinated with any COVID-19 vaccine? In that case, in the absence of appropriate assessments from a doctor, would they be liable under the general no-fault harm model? The Supreme Court of Lithuania clarified that the fact that the patient selected the treatment, was purchased, and had access to the data on the medicine in the package leaflet, does not release the doctor from the obligation to provide the patient with all the necessary information.[24] A doctor who fails to comply with the obligation to provide information may be liable for the94 damage caused as a result of the patient's failure to comply with that obligation and his or her lack of understanding of the effects of the treatment, even if the doctor acted diligently during the medical procedure. The patient may claim damages because, without full information, they may not be able to know and avoid the risks of treatment by giving up a particular treatment, as well as not being aware of the contraindications for that medicine.

4. HOW DAMAGES CAUSED BY COVID-19 VACCINE CAN BE REIMBURSED UNDER THE CURRENT LEGISLATION?

The law refers only to the provision of health care services. However, the damage caused by vaccines cannot only be the same as that caused by a person, but is much more significant (Hickey, Shen and Ward, 2020).

Liability for poor quality vaccines, production and safety requirements may arise under Articles 6.292–6.300 of the Civil Code of the Republic of Lithuania[25] under the terms of the manufacturer's civil liability (also known as product liability). The institute of damage caused by a product or service of poor quality is considered a special tort in the

[23] Resolution of the Government of the Republic of Lithuania No. 3 of 8 January 2020 "On Approval of the Description of the Procedure for Compensation for Property and Non-Property Damage Caused by Damage to the Patient's Health". The Register of Legal Acts, 2020-00272.
[24] Lithuania, Supreme Court of Lithuania, case no. 3K-3-236/2010 (25 May 2010).
[25] Civil Code of the Republic of Lithuania (2000). The Register of Legal Acts, 74-2262.

civil liability system – the principle of no-fault liability applies. Therefore, a consumer seeking adequate legal compensation would have to prove damages, poor quality of the product or service and the causal link between them (Ulozas and Novikovienė, 2012, p. 602), and without proof of at least one such aspect, a person may not expect human redress of incurred damages/injuries.

From this, it is implied that in cases of product liability (that is a totally different legal concept from the one of the compensations for damages caused by side effects (adverse reaction)), the manufacturer is responsible. It is acknowledged that there is no harm when the vaccine is used in accordance with the conditions set out in the Summary of Product Characteristics for this vaccine and the disease or disorder is due to their pharmacological properties. The person evaluates all possible side effects before deciding to be vaccinated, as well as before deciding to take any medication, and agrees to have the vaccine injected into the body during the invasive procedure. Thus, according to the general principles of healthcare provision, vaccines (which are not usually mandatory) are self-consent, and adverse reactions to vaccines can only be claimed if adverse reactions not listed in the summary of product characteristics have occurred.

In this light, it is interesting to note certain provisions of the Advanced Purchase Agreements of certain vaccines, which define the conditions for the purchase of COVID-19 vaccines by the respective vaccine manufacturer and the European Commission (The European Commission and AstraZeneca AB, 2020; The European Commission and Janssen Pharmaceutica NV, 2020; The European Commission and Moderna, 2021; The European Commission and Pfizer Inc., 2021): "(...) the use of Vaccines (...) will happen under epidemic conditions requiring such use, and the administration of Vaccines will therefore be conducted under the sole responsibility of the Participating Member States". The Advanced Purchase Agreement of AstraZeneca (Vaxzevria) contains a provision statin": "Each Participating Member State shall indemnify and hold harmless AstraZeneca, its Affiliates, subcontractors, licensors, and sub-licensees, and officers, directors, employees and other agents and representatives of each from and against any and all damages and liabilities (.".)" (The European Commission and AstraZeneca AB, 2020).

Unfortunately, not all Advanced Purchase Agreement are publicly available, for example in case of Moderna vaccines, almost all clauses are marked as confidential and there is no way to access it. Therefore, specific provisions with regard to product liability are unknown (The European Commission and Moderna, 2021).

What does it mean, one may wonder? In general, it means that pharmaceutical companies remain responsible for product quality and safety requirements, they are subject to the manufacturer's civil liability, but they are not responsible for the (in) improper use of the vaccine and/or the side effects that could occur. Also, it is very likely that Governments, including Lithuania, will indemnify any product liability of the manufacturer following the provisions of Advanced Purchase Agreements.

Does that seem legally appropriate in the context of the peculiar vaccination regime that is applicable in Lithuania? The Government asks people to be vaccinated not only for their own safety, but also for other members of society, therefore the no-fault model of compensation that can be called "a "social contract" might be necessary – it assures those who have been vaccinated that the state will take care of them if there are serious side effects (Kod, 2021). It is reasonable to say that, if regulation were introduced requiring a person (such as a person working in a particular profession) to be vaccinated by state law, the possibility of a voluntary decision to be vaccinated would be substantially limited, in which case the state would have to compensate for any damage to their health (Ro et al., 2021). Compensation for damage to a patient's health caused by pandemic

DOI: 10.46282/blr.2022.6.1.285

vaccines could not and should not be a sign of civil liability (an adverse reaction to a pandemic vaccine that has caused serious consequences is not related to illegal actions or omissions of others that would damage the health of the person vaccinated with the pandemic vaccine). Sometimes it can cause much greater harm/injuries and long-lasting consequences than the careless or poor-quality actions of a healthcare professional.

However, what are the damages caused by side effects (adverse reactions) of COVID-19 vaccines? If the mechanism of compensation for damages caused by side effects is introduced, should it cover all damages of any side effect? What is known so far about the pharmacological properties of the vaccines in questions that might be helpful in deciding the scope of compensation mechanism?

5. EFFECTS OF VACCINES AND THE DAMAGE – THE PHARMACEUTICAL ANALYSIS

In very general terms, compensation of damages with regard to the medical preparations is a remedy in the form of a monetary award to be paid to a claimant as compensation for loss or injury. In most cases, the award is not warranted, because the side (or adverse) effects are in the pharmacology overview and description. When an individual is buying medical products, together with the products, one will get a written information pack, which contains all side and adverse effects. It is the user of the product that is essentially assuming the full risk.

According to the COVID-19 vaccines (which are considered medical preparations), the current situation and predicament are different. It is a well-known fact that the scientific evaluation procedure has not been finished. In other words, by standards, the vaccines are still in the research phase. For example, safety updates for the Comirnaty vaccine are still provided and updated monthly (European Medicines Agency, 2021). During this phase, the process of gathering data about effectiveness is still undergoing. The same applies to the research of the side effects that vaccines could provoke.

The notion of public health emergency required urgent efforts to develop and test the efficacy and safety of vaccines to combat the COVID-19 pandemic. The emergency use approval has been granted to COVID-19 vaccines before the completion of conventional phases of clinical trials. However, there is no comprehensive review of safety data reported from the vaccine trials, which is critical information to form the policies in order to improve uptake of COVID-19 vaccines and mitigate the risk aversion perceived due to the COVID-vaccine side effects.

In the present, it is very crucial to establish the safety of the COVID-19 vaccines when emergency approval is being granted to these vaccines without completion of all phases of clinical trials. Since vaccines are still being tested in clinical trials, so far there are no official results that reported the comprehensive profile of COVID-19 vaccines.

5.1 Fully Approved Vaccines

On December 21, 2020, European Medicines Agency (EMA) authorized the first COVID-19 vaccine – Comirnaty. On June 06, 2021, the EMA granted full approval to the Spikevax (previously Vaccine Moderna) COVID-19 vaccine. Currently, there are five approved COVID-19 vaccines in Europe – the latest, Nuvaxovid, was approved on December 20, 2022.

Specifically, vaccines Janssen, Vaxzevria and Nuvaxovid are not currently recommended for people below 18 years of age. Comirnaty vaccine is fully approved for

the prevention of COVID-19 in people 5 years of age and older, and Moderna is fully approved for people 6 years of age and older.

The COVID-19 vaccines create a so-called "grey-zone" because the side-effects are: 1. still unknown and unidentified because of the short time span; 2. known, but not yet registered officially and the process of side-effect approval hasn't been finished. For example, one of the Comirnaty vaccine's adverse effects is Myocarditis/Pericarditis. The European Medicines Agency assessed this complication in May-July 2021, halfway through the vaccination process. It was recommended to supplement the package leaflet with a warning about myocarditis/pericarditis occurring in young men 14 days after the second dose of the vaccine, indicating that its frequency is not yet known (Aušrotas, 2021).

5.2 Information on the Possible Side Effects of the Vaccines

The information provided to the public on the functioning of the medicinal product (in this case the vaccine) is significantly simplified. Comparing the package leaflets of all COVID-19 vaccines legally used in Lithuania, we can see that only the main possible side effects are presented.

Vaccine manufacturers in package leaflets that are available to the general public warn against general side effects, but there is little focus on more serious side effects. Generic side effects such as: injection site pain, swelling, general fatigue, headache, muscle pain, joint pain, fever, feeling unwell.

However, in the information provided to the health professionals (a summary of the characteristics of the medicinal product), which is publicly available, a slightly different picture is presented. In addition to all general data on the medicinal product, the proportion of clinical data, possible routes of administration, and general side effects, potentially serious and extremely serious side effects are also identified.

Adverse reactions observed during clinical studies are listed below according to the following frequency categories: Very common (≥ 1/10), Common (≥ 1/100 to < 1/10), Uncommon (≥ 1/1,000 to < 1/100), Rare (≥ 1/10,000 to < 1/1,000), Very rare (< 1/10,000), Not known (cannot be estimated from the available data) (Summary of product characteristics). Serious side effects include hypersensitivity and anaphylaxis, myocarditis and pericarditis, acute peripheral facial paralysis, paresthesia.

A number of anxiety-related reactions are described, including vasovagal reactions (syncope), hyperventilation or stress-related reactions (e.g., dizziness, heartbeat, increased heart rate, changes in blood pressure, paraesthesias, hyperaesthesia and sweating). Serious side effects – thrombocytopenia and clotting disorders – are reported.

Furthermore, in the general summary of characteristics of COVID-19 vaccines, clinical trials are taken into consideration. Conclusions are presented about collected data and results regarding the most common reactions in different groups of subjects and how these reactions are related to the number of doses.

Unfortunately, when studying it further, there are more unanswered questions like: why specific target audiences were selected for collecting data? There is a lack of focus groups within people with comorbidities, disabled people and elderly people. Also, it is missing information regarding the safety of vaccines for people with autoimmune or inflammatory disorders, and there is a question (in theory) if vaccine can affect their well-being as well as make their current diagnosis even worse. The document itself declares that there is a lack of information regarding these studies and that the risks and benefits should be considered.

DOI: 10.46282/blr.2022.6.1.285

Another big issue is when it comes to a question of whether it is safe to get the vaccine while having other vaccines or using specific (prescribed) long-term drugs, it is simply covered by the word "not recommended". Despite that, groups of people, that have weaker health are vaccinated in the first place and are not offered a proper compensation mechanism.

5.3 Analysis of Lithuania's Medical Situation in the Context of the Covid-19 Vaccines

From the start of vaccination on December 27, 2020, to December 31, 2021, a total of 4,131,021 vaccinations were performed in Lithuania (Table No. 1). For the second year running, the Commission has been receiving complaints about COVID-19 since the start of vaccination, i.e. from 27 December 2020 to 31 December 2021, a total of 6,808 initial reports were received (serious reactions to person's health – 407) on suspected adverse reactions (SAR) associated with the use of COVID-19 vaccines in Lithuania (Valstybinė vaistų kontrolės tarnyba prie Lietuvos Respublikos sveikatos apsaugos ministerijos, 2022) (Table No. 2).

Table No. 1.:

Vaccine	Vaccine doses	Number of suspected adverse reactions (SAR)	Percentage of SAR reports from the number of vaccinations	Number of SAR reports per 1000 vaccinations
Comirnaty	3 005 787	3 396	0,11	1,1
Spikevax	304 930	611	0,2	2,0
Vaxzevria	537 483	2 292	0,43	4,3
Jannsen	282 821	479	0,17	1,7
Total number of all vaccines	**4 131 021**	**6 808**	**0,16**	**1,6**

Table No. 2.:

Healthcare providers reports	Reports from patients	Reports submitted to EudraVigilance	Reports in total
816 (11,99 %)	5 574 (81,87 %)	418 (6,14 %)	6 808

Evaluating all the received reports of SAR in Lithuania in the period of 27/12/2020 – 31/12/2020, there was 0.16% of complaints from total number of vaccinations.

The majority of SAR complaints were regarding the Comirnaty vaccine. In the same period, 47.3% of vaccinated people were male and 52.7% female. According to the official data, most of the SAR were received from vaccinated women – it is almost 72% of total SAR reports.

The severe side effects of each vaccine have similar symptoms, and the number is certainly not small, even considering the total number of people vaccinated (Table No. 3).

Table No. 3.:

Severe Symptoms	Events Reported
Syncope	82
Tachycardia	32

Stroke (cerebrovascular insult)	22
Myocarditis and pericarditis	18
Acute peripheral facial paralysis	17
Convulsion	14
Myocardial infarction/heart attack	9

Between 27 December 2020 and 31 December 2021, 29 deaths were reported (Table No. 4).

Table No. 4.:

Vaccine	Number of deaths
Comirnaty	16
Vaxzevria	11
Spikevax	1
Covid-19 Vaccine Janssen	1
Total	**29**

In this case, it should be noted that in zero cases did the State Medicines Control Agency establish a direct causal link between vaccination with Covid-19 vaccines and the death of the patient.

Given that in Lithuania no mechanism of compensation for side effects caused by COVID-19 vaccines exist, such cases could not be reimbursed to the relatives of deceased people, as one of the essential features of the causal link would not be fulfilled.

Considering the non-exhaustive list of side effects that could be caused by the COVID-19 vaccine, it is reasonable to propose a certain nature of adverse reaction that shall be included in the compensation mechanism for patients. However, assessment of a particular side effect that could emerge newly shall be left open by the competent authority. Otherwise, patients could be deprived of effective remedies.

6. DAMAGE COMPENSATION FOR COVID-19 VACCINE – CALL FOR ACTIONS

During this period, when vaccination and revaccination of all individuals with booster doses are still being actively promoted, no changes in the legal framework have been adopted in Lithuania that would allow people to fully trust the COVID-19 vaccines and give the right to know that the side effects will be adequately compensated.

On January 13, 2022, draft amendments to the Law on the Rights of Patients and Compensation of the Damage to their Health No. I-1562 on Articles 24 and 25 were registered.[26] This was supplemented by the draft Article 24 (1), registered by the Seimas on January 20, 2022 (hereinafter – both pieces of the draft legislation are called "Draft Law"). The purpose of this Draft Law is to enable adequate compensation for the damages (pecuniary and non-pecuniary) caused by vaccines to the patient's health. The draft law provides that:

1. A patient or other person entitled to compensation in order to be compensated for the damage caused by an adverse reaction caused by vaccination during a state emergency and/or quarantine throughout the territory of the Republic of Lithuania in a

[26] Draft Law Amending Articles 24 and 25 of the Law on Patients' Rights and Compensation for Health Damage and Supplementing the Law with Article 24(1) (2022), XIVP-773(2).

Government Resolution on State Emergency and (or) quarantine the vaccine specified in the entire territory of the Republic of Lithuania, not later than within 3 years from the date on which it became aware or should have become aware of the damage caused by the vaccines, apply to the Commission in writing.

(...)

3. Compensation shall be paid if the Commission finds that the damage to the patient's health is caused by vaccines and the provisions of Article 6.292 of the Civil Code do not apply to compensation for damage caused by vaccines.

4. Compensation in the amount specified in the decision of the Commission shall be paid by the Ministry of Health from the state budget funds allocated to it within 30 days after the date of the decision of the Commission".

Indeed, one can agree that it is a good start needed for all patients suffered because of the side effects of COVID-19 vaccines. Of course, it is not yet adopted therefore, it is not a legal act in force. However, one could also raise a doubt whether such Draft Law is appropriate and sufficient?

It is foreseeable that the damage caused could be compensated only if it was caused by an adverse reaction that caused serious consequences. What would that cover in particular? Compensation for damage, considering the definition of a serious adverse reaction in paragraph 44 of Article 2 of the Law on Pharmacy of Lithuania,[27] would cover damage in cases where a person has suffered death, life-threatening, hospitalization or prolongation of the duration of his hospitalization, long-term/essential disability, incapacity for work or birth defect as a result of the reaction to the vaccine. Other reactions would be considered as minor adverse reactions and their damage would be uncompensated (e.g., mild fever, flushing at the site of the puncture).

Hospitalization, disability, and other signs should not be considered the only evidence of injury. Hospitalization is not appropriate to address some of the officially approved adverse reactions to pandemic vaccines. For example, inflammation of the heart wall (pericarditis) (Valstybinė vaistų kontrolės tarnyba prie Lietuvos Respublikos sveikatos apsaugos ministerijos, 2021) can take many forms, one of which is chronic pericarditis, which can affect people throughout their lives, but in a milder form and sometimes gets worse when they need medical help, but not necessarily in a hospital (Hoit, 2000). Pericardial effusion may also have consequences for cardiac function, although it may go unnoticed at first. Vaxzevria can also cause Guillain-Barré syndrome, which can cause significant damage to the human nervous system but does not require hospitalization (European Medicines Agency). Pandemic vaccines can also, in extremely rare cases, cause long-term side effects that have not been identified in the medical literature (British Institute of International and Comparative Law, 2021). For example, the feeling of "burning" in the chest and digestive problems that interfere with sports or work does not necessarily mean going to the hospital or being called a disability, but it is still a significant injury that has a significant impact on a person's life (van Tassel et al., 2021b).

In this light, it is reasonable to consider a separate commission, independent of the Ministry of Health, to be set up to assess the damage caused by the possible side effects of vaccines. This should not be combined with the damages (i.e. loss of life or injury) caused by the existence of a "no-fault" model and the actions taken by health professionals. In this case, it would be proposed to require the commission to examine claims for compensation and determine the extent of the harm suffered by a person who has suffered damage from a pandemic vaccine, without establishing *a priori* criteria (such as hospitalization) as proposed by the Government. The commission should be eligible

[27] Law on Pharmacy (2006). The Register of Legal Acts, 78-3056.

to assess the claim for compensation on the basis of the individual's medical history and the applicant's arguments about the damage suffered, rather than following "ticking the box" approach that is used in the current mechanism of the no-fault model, regardless of the specific cases and the consequences for the individual. It should be emphasized that such a commission should include particular experts such as: vaccinology, immunology, neurology, paediatrics, public health ethics, health law, and public health policy (Keelan and Wilson, 2011).

Also, compensation from the funds of personal health care institutions, i.e. an account administered by an institution authorized by the Government, in which the contributions of personal health care institutions to compensation for damage are accumulated, would be unjustified and unfair. This fund is intended to compensate patients who have suffered adverse effects through the fault of healthcare professionals. The damage caused by vaccines is not the same as that done by healthcare professionals, so it would be wrong to use the funding for completely different purposes.

In the opinion of the authors, compensation for damages caused by pandemic vaccines should not be linked to a "no-fault" compensation mechanism, but to a separate cluster of compensation for injuries financed by the state budget.

With regard to causal link, following the current approach of the State Medicine Control Agency that no damages were linked to the use of vaccines, one shall consider the mechanism of proving the damages and their link to the vaccine. It could be difficult to prove the damages and causal link if more time has passed since the vaccination and the reaction does not appear immediately and the symptoms or damage do not appear until later.

Proof of causation can be linked to a closed list of recognized adverse reactions the ones that are provided in the US and in the EMA. However, an alternative option leaves the test open, as in the recent Canadian COVID-19-specific NFCS, or the COVAX scheme, where the possibility of compensation for adverse events later proved not to be linked to the vaccine is preferred to the risk of excluding worthy claims. In the context of novel pandemic vaccines, the latter seems more appropriate as knowledge about these products evolves and consolidates (Rizzi et al., 2021). With this in mind, the authors would suggest creating a certain formula that would calculate the amount of harm done to a person. Such a formula should take into account the injury factor with an amplitude ranging (e.g. from 1 to 200) and should include the nature of the damage and the level of the disorder. In this context, the formula must be adapted individually in each case. A similar scoring system, which the authors consider to be quite appropriate for determining the damage caused by vaccines, is provided in the Resolution of the Government of the Republic of Lithuania No. 3 of 8 January 2020 "On Approval of the Description of the Procedure for Compensation for Property and Non-Property Damage Caused by Damage to the Patient's Health".[28]

7. CONCLUSIONS

The current legal framework in Lithuania stipulates that in the event of any possible side effects from the COVID-19 vaccine, a person may not benefit from a special simplified procedure for obtaining damages (the so-called "no-fault" procedure).

[28] Resolution of the Government of the Republic of Lithuania No. 3 of 8 January 2020 "On Approval of the Description of the Procedure for Compensation for Property and Non-Property Damage Caused by Damage to the Patient's Health". The Register of Legal Acts, 2020-00272.

DOI: 10.46282/blr.2022.6.1.285

Pharmaceutical companies remain responsible for the product quality and safety requirements, they are subject to the manufacturer's civil liability, but they are not responsible for the (in) improper use of the vaccine and/or the side effects that could occur.

From 27 December 2020 to 31 December 2021, a total of official 6,808 initial reports were received on suspected adverse reactions (SAR) associated with the use of COVID-19 vaccines in Lithuania.

COVID-19 vaccination has been taking place on a very large scale in Lithuania for almost a year and a half, and we still do not have a legal mechanism for compensation for health damage. In this context, it is stated that compensation for the damage caused by the side effects of vaccines should be based on a no-fault damage model funded by a separate State Institute / Fund.

It is proposed to accelerate the adoption of the draft Law on the Rights of Patients and Compensation for Damage to Their Health and to address the following key aspects:

- to require the commission to examine claims for compensation and determine the extent of the harm suffered by a person who has suffered damage from a pandemic vaccine, without establishing a priori criteria (such as hospitalization) as proposed by the Government; an independent commission, independent of the Ministry of Health, should be set up to analyse and assess these situations;
- compensation for damages caused by pandemic vaccines should not be linked to a "no-fault" compensation mechanism under the current legal framework, but to a separate cluster of compensation for injections financed by the state budget;
- it is proposed to establish a clear formula/mechanism according to which the harm caused to a patient by the side effects of COVID-19 vaccines should be determined with great precision in each case.

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DOI: 10.46282/blr.2022.6.1.285

BRATISLAVA LAW REVIEW

PUBLISHED BY
THE FACULTY OF LAW,
COMENIUS UNIVERSITY
BRATISLAVA

ISSN (print): 2585-7088
ISSN (electronic): 2644-6359

RECONSIDERING THE ABOLITION OF CAPITAL PUNISHMENT IN GHANA: THE NEED FOR LEGISLATIVE AND CONSTITUTIONAL AMENDMENTS / Prince Obiri-Korang

Prince Obiri-Korang
Postdoctoral Research Fellow
Research Centre for Private International Law in Emerging Countries; Faculty of Law, University of Johannesburg
Cnr Kingsway & University Roads, Auckland Park, Johannesburg, 2092
South Africa
pobiri-korang@uj.ac.za
ORCID: 0000-0002-9603-7793

Abstract: *The human rights argument for the abolishment of the death penalty has been firmly established in modern times in both practical terms and in the academic circles. Today, most countries have abolished the death penalty for various reasons, all of which are based on human rights. This paper is a contribution to the numerous studies calling for the abolition of the death penalty in various countries. Aside from discussing relevant international instruments (and other national instruments and judicial decisions) relevant to abolishing the death penalty, it focuses on issues concerning the death penalty in Ghana. The primary aim of this paper is to make a recommendation to both the executive and legislative arms of the Ghana government to abolish the death penalty.*

Key words: *Death penalty; ICCPR; ECHR; African Charter on Human and Peoples' Rights; Constitution of Ghana; Criminal and Other Offences Act of Ghana*

Suggested citation:
Obiri-Korang, P. (2022). Reconsidering the Abolition of Capital Punishment in Ghana: The Need for Legislative and Constitutional Amendments. *Bratislava Law Review*, 6(1), 107-124. https://doi.org/10.46282/blr.2022.6.1.284

Submitted : 17 April 2022
Accepted : 01 June 2022
Published : 30 June 2022

1. INTRODUCTION

On 5 March 2021, the High Court in Sekondi, Ghana, in *Republic v. Udeotuk Wills and Another* (2021), sentenced two accused persons to death by "hanging". In a matter that caught national attention, the accused persons were found guilty of the crimes of kidnapping and murder[1] of the "four Takoradi girls"[2] after two years of trial. This ruling gives the debate on whether or not to retain the death penalty in the statute books of Ghana a new lease of life.

In Ghana, although the courts continue to pass death sentences, as they are duty-bound, none of these sentences has actually been carried out since 1994 (Amnesty International, 2020). Here, those on "death row" have either had their death sentences

[1] Sections 90 and 47 of the Criminal and Other Offences Act No. 29 of Ghana.

[2] The case of the "four Takoradi girls" is a famous kidnapping and abduction case in Ghana, which occurred in 2018. All the kidnaping (and abduction) of the four girls took place in Takoradi at different times. This case led to a sustained citizen and media campaign that charged law enforcement officers to get to the root of the matter, as kidnapping was fast becoming rampant at the time. Later, police investigations led to the retrieval of the decomposed body parts of the victims from the home of at least one of the two suspects.

commuted to life imprisonment, or their executions delayed (Amnesty International, 2020). Currently, there seems to be no reason for one to believe that any of the death sentences, including the one relating to the "four Takoradi girls" passed in recent times, or to be passed in the near future, will be carried out. Regardless of this, legislative and constitutional provisions that prescribe the death penalty as the only punishment for certain offences continue to mandate both the state prosecutors and the courts to seek death penalty and hand out death sentences for stated offences, respectively.

This article seeks to add to existing literature calling for the abolishment of the death penalty around the world. Specifically, the article focuses on Ghana, with the aim of persuading the legislature of the country to consider the complete repeal of all statutory punishments that come in the form of the death penalty and commute it to life imprisonment (where this is justified). The article posits that there is no cogent argument in favour of retaining the death sentence in the statutory books of Ghana, especially when this type of punishment was only inherited from the "colonial masters" who have, themselves, abolished it.

The paper begins by first looking at the modern dynamics of the debate against the death penalty. In doing so, it considers international and regional public law instruments relevant to abolishing the death penalty around the world. To this end, it examines the extent to which these instruments abolish the death penalty – whether complete abolishment with no reservation as to the type (e. g. allowing the death penalty when it is not arbitrarily imposed) and the time (e. g. in time of war) when the offence occurs. The aim here is to compare the relevant provision of the various instruments to be discussed and to determine which of them is appropriate under contemporary human rights ideals on the abolishment of the death penalty. This will be used later as the basis for proposing legal reforms on the subject in Ghana. Thereafter, the paper will focus on the current situation in Ghana regarding the death penalty. Here, the article examines the law on capital punishment in Ghana, current practice in relation to the execution of such punishments in the country and finally the official position of the government of Ghana on the death penalty in relation to the Constitutional Review Commission. Further, the paper will provide reasons as to why Ghana needs to abolish the death penalty and provide various approaches that the country may adopt in abolishing the death penalty within its jurisdiction.

2. NEW DYNAMICS ON THE DEATH PENALTY

2.1 The Ideological Element

In modern times, the most important factor that has influenced the discussion on abolishing the death penalty has been a political movement aimed at changing the consideration of this issue from one that is mainly or solely decided as part of the national policy of the country to an issue of fundamental human right violation, including the risk of executing an innocent person (Zimring, 2003; Bae, 2007). Here, the rights that deserve protection do not only include persons' rights to life, but also their right to be free from repressive and excessive punishments (Zimring, 2003). This new movement gained strength as more countries continually emerged from colonial and totalitarian repression to adopt values that seek to protect their citizens from state power and the tyranny of the opinion of the masses. According to the new political movement, adopting the death penalty as punishment should be regarded neither as an issue to be judged with regard to local socio-political or cultural values, nor as a weapon of national criminal justice policy, meant to be enforced in accordance with the government's assessment of its value as a measure for crime control (Neumayer, 2008).

The human rights approach to abolishing the death penalty rejects the most prominent justification for the practice, namely retribution and the necessity to condemn and denounce crimes that "shock the sensibilities of citizens by their brutality" (Hood, 2008). In addition, it rejects the utilitarian justification that any punishment less severe than the death penalty cannot serve as a sufficient general deterrent to persons with the thought of committing crimes that attract the death penalty (Cohen-Cole et al., 2006). This is because existing evidence from the social sciences does not support the claim that the death penalty is necessary to deter persons from committing murder and that even if it did have some minimal effect, this could only be achieved by a very high rate of execution that is speedily and mandatorily enforced (Nagin and Pepper, 2012). Adopting the latter position, however, will invariably lead to the situation where a higher proportion of wrongfully convicted persons are executed (Lague, 2006). Further, it has been argued that it is exactly in situations where there are strong reactions to certain serious offences that using the death penalty as a means of crime control may be regarded as most dangerous (Zimring, 2003). Thus, the existence of pressure on both prosecutors and the police to bring persons suspected of committing crimes that provoke outrage may result in shortcuts and breaches of established procedural protections once a suspect is identified, making it less likely for a suspect to receive justice.

The challenges mentioned above seem to be endemic to the systematic usage of the death penalty and not merely a reflection of human faults or errors in the criminal justice administration of a particular country. For many of those concerned, even the smallest possibility of executing an innocent person is, in fact, an unacceptable breach of one's right to life (Bright, 2001). This position is rooted in the belief in the "inherent dignity" of all persons and the "inviolability" of the human being as it is impossible for any system (Barry, 2019) to reduce the risk of wrongful conviction with regard to offences that attract the death penalty to zero (Farrell, 2000; Moyes, 2002; Marshall, 2004; Zimring, 2003).

In addition, even though the possibility of error in sentencing is an important factor in the argument against the death penalty, those who are committed to this cause assert that even if a particular system could be made "fool-proof", it would still be reprehensible. Particularly, those in favour of the view that all persons have a right to life contend that matters concerning the death penalty should not be left to public opinion, not merely because such opinions may be uninformed or only partially informed but because of the appeal for the protection of the lives of all residents of a country, including those in captivity, from experiencing cruel and inhumane punishment regardless of their crime (Hood, 2008; Hood and Hoyle, 2008). Further, it has been asserted that the ends can never justify the means in the application of the death penalty. This is based on the argument that the control of serious offences is more properly achieved by tackling the factors that contribute to the commission of the crime instead of relying on an inhumane mode of punishment such as putting people to death, as a means of curbing such offences (Hood, 2008).

3. INTERNATIONAL FRAMEWORK

The ideals discussed above have today spread due to the development of international treaties, covenants and other legal institutions under the aegis of the United Nations (UN) and other relevant regional political institutions. In the long process that lasted since the initial adoption of the Universal Declaration of Human Rights (UDHR) in 1948 (the UDHR did not mention the death penalty in relation to the injunction set by article 3 that "every human being has an inherent right to life") until the adoption of the

DOI: 10.46282/blr.2022.6.1.284

International Covenant on Civil and Political Rights (ICCPR) in 1966 by the UN General Assembly, questions regarding the death penalty in relation to "the right to life" had been keenly debated. The result was a compromise position adopted by the ICCPR that allowed for "limited retention" of the death penalty. Article 6(1) of the ICCPR, the draft of which was agreed upon in 1957, provides that "every human being has the inherent right to life.[3] This shall be protected by law. No one shall be *arbitrarily deprived* of his life". Further, article 6(2) provides that "in countries that have not abolished the death penalty, sentence of death may be imposed only for the most *serious crimes* in accordance with the law in force at the time of the commission of the crime".[4]

Considering the circumstances that pertained in 1957, it is not surprising that the ICCPR could not provide a more precise definition for the crimes that should attract the death penalty by itself (the ICCPR). This is because some countries would have certainly preferred a very narrow and clear list of the offences for which it was permissible for them (or other countries) to impose the death penalty rather than relying on the concept of "most serious" crimes (Schabas, 2004). The concern here is legitimate as the term "most serious" is capable of being interpreted differently according to the culture, tradition and even political disposition of every country. As a matter of fact, the term "most serious crimes" as used in article 6(2) of the ICCPR may be described as nothing more than a standard set for the policy of moving towards abolishing of the death penalty through restriction. A useful interpretation of the term has, however, been provided by the Economic and Social Council of the UN (ECOSOC). In its publication, *Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty*, ECOSOC specified that the term "most serious crimes" should not go beyond those international crimes that lead to lethal and/or other extremely grave consequences.[5]

Similarly, the term "arbitrarily deprived" has been interpreted by the Human Rights Committee of the UN (HRC)[6] to mean that all the provisions of the ICCPR must be upheld in all capital trials, otherwise, the death penalty may not be imposed (Arbour, 2007). This includes the observance of internationally recognised requirements such as: promptly informing the defendant of the charge against her/him in detail; respect for the presumption of innocence; providing for interpretation and the translation of proceedings into the defendant's own language; right to counsel of the defendant's own choosing; providing enough time for defendant to prepare her/his defence; holding trial without undue delay; hearing by an impartial and independent court; and securing the right to review by a higher court.[7] This interpretation by the HRC was supported by the European

[3] Article 6(1) of the International Covenant on Civil and Political Rights of 1966.

[4] Article 6(2) of the International Covenant on Civil and Political Rights of 1966.

[5] Economic and Social Council of the UN's Safeguards guaranteeing protection of the rights of those facing the death penalty of 1984, available at: https://www.unodc.org/pdf/criminal_justice/Safeguards_Guaranteeing_Protection_of_the_Rights_of_those_Facing_the_Death_Penalty.pdf (accessed on 15.06.2022).

[6] The Human Rights Committee (HCR) is a body comprising of independent experts that is responsible for monitoring the implementation of the provisions in the ICCPR. This body should not be confused by the subsidiary body of the UN General Assembly known as the Human Rights Council. It is imperative to note that the findings of the HRC are not binding but in-principle only.

[7] HRC, *Carlton Reid v Jamaica* Communication No. 250/1987, U.N. Doc. CCPR/C/39/D/250/1987, 20 July 1990, para 11.5.

Court of Human Rights in *Öcalan v. Turkey*.[8] Although these safeguards provided by the various institutions are in themselves not binding, they have been endorsed by the UN General Assembly, demonstrating strong international support.

Further, the notion of "progressive restriction" employed under the ICCPR makes it quite clear that the level of "seriousness" that could justify retaining the death penalty for certain offences would need to be assessed and reassessed in a narrowing of definition till abolition is ultimately achieved (Miao, 2015). It was through Resolution 28/57 of 1971 and Resolution 32/61 of 1977 that this aspiration was reinforced by the General Assembly of the UN. Through these resolutions, the UN stated that its main object, "in accordance with article 3 of the Universal Declaration of Human Rights and Article 6 of the ICCPR", is to "progressively restrict the number of offenses for which capital punishment might be imposed, with a view to its eventual abolition" (UN Commission on Human Rights Resolution 28/57,1971 and Resolution 32/61, 1977).

In Europe, covenants banning the imposition of the death penalty as a means of punishment first appeared in 1982, when Protocol 6 to the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1953 was adopted by the Council of Europe. Under the protocol, article 1 abolished the use of the death penalty in peacetime.[9] However, article 2, which served as a clawback, allowed a country to include the death penalty as a means of punishment during wartime or when there is an imminent threat of war. Later in 1989, the UN General Assembly adopted the Second Optional Protocol to the ICCPR, which provided in article 1 that no one shall be executed (through the imposition of the death penalty) within the jurisdiction of any state that is a party to the protocol.[10] This implies that once the death penalty is abolished by a country, it should not be reinstated. Like article 2 of Protocol 6 of the ECHR, article 2 of the Second Optional Protocol to the ICCPR allows for a reservation that conserves the application of the death penalty during wartime. However, unlike the procedure allowed for the imposition of the death penalty in times of war in Protocol 6 of ECHR, the Second Optional Protocol of the ICCPR in article 2(1) only allows such reservations to be made at the time when the relevant country ratifies the protocol.[11] According to Schabas (2004), "only a handful [of such reservations] have been formulated".

In the Americas, the Organisation of American States' General Assembly adopted the American Convention on Human Rights to abolish the death penalty in 1990. Article 1 of the convention requires countries to restrain themselves from using the death penalty as a means of punishment, although it falls short of imposing an obligation of them to remove or repeal any such laws from their statute books (or, in some cases, their constitutions).[12] This provision makes it possible and prudent for *de facto* abolitionist countries in the region to also ratify the protocol. Additionally, article 4(3) of the

[8] ECtHR, *Öcalan v. Turkey*, app. no. 46221/99, 12 May 2005, para 169. Here the court stated that "In the Court's view, to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed… Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life is at stake, becomes unlawful under the Convention."

[9] Article 1 of the Protocol 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1953.

[10] Article 2 of the Protocol 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1953.

[11] Article 2(1) of the Second Optional Protocol of the International Covenant on Civil and Political Rights of 1966.

[12] Article 1 of the Protocol of the American Convention on Human Rights of 1990.

DOI: 10.46282/blr.2022.6.1.284

convention prevented countries that have already abolished the death penalty and subsequently ratified it (the American Convention on Human Rights) from reintroducing the death penalty.[13] This position remains true even in situations where the relevant country has not ratified the protocol.

Taking into account the limitations in all the above instruments to offences committed in time of peace, the adoption of the Protocol 13 to the ECHR is of particular importance. This is because it abolishes the use of the death penalty under "all circumstances".[14] Pursuant to the agenda by member states of the Council of Europe to resolve "to take the final step to abolish the death penalty in all circumstances, including acts committed in time of war or the imminent threat of war",[15] the Council of Europe adopted Protocol 13 in 2003 which abolished the use of the death penalty even in times of war.

The examples discussed above have served as a source of inspiration for institutional movements that seek to abolish the death penalty. In Africa, the African Commission on Human and People's Rights has urged all African Union member states "to envisage a moratorium on the death penalty".[16] Also, the Asian Human Rights Charter of 1999 declares, under article 3(7), that "all states must abolish the death penalty".[17] Further, the abolitionists' movement gained more momentum when political leaders across the world agreed through the UN not to use the death penalty as a mode of punishment by the international criminal tribunals that have been established to try cases of crimes against humanity and genocide in the then Yugoslavia and Rwanda in 1993 and 1994 respectively, and then later in Lebanon and Sierra Leone. Likewise, the Statute of the International Criminal Court of 1998, which was adopted by the Rome Conference, also did not prescribe the death penalty as punishment for any of the grave offences (these offences encompass genocide and other crimes against humanity) that were covered by the statute. The argument that can be made here is that if it has been agreed that the most serious of all criminal offences such as genocide and other crimes against humanity should not be punishable by the death penalty, why should other crimes (deemed to be lesser offences) attract such a punishment?

4. CONSIDERING THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

In Africa, articles 4 and 5 of the African Charter on Human and Peoples' Rights of 1986 (African Charter) preserve persons' right to life and their dignity respectively as fundamental values that cannot be derogated. Based on these provisions in the African Charter, it has been argued that the existence of the death penalty in the statutes of the majority of African nations infringes on these rights (Smit, 2004). A similar argument was made before and upheld by the Constitutional Court of Hungary when it was tasked to give an interpretation to a clause in the Constitution of Hungary (Magyarország Alaptörvénye) which provided, like the African Charter,[18] for an exception to persons' right to life (thus, a person may be sentenced to death) in cases where such deprivation is not

[13] Article 4(3) of the Protocol of the American Convention on Human Rights of 1990.

[14] Articles 1, 2 and 4 of the Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

[15] Preamble to Protocol 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

[16] Resolution Urging States to Envisage a Moratorium on Death Penalty of 1999 (ACHPR/Res.42(XXVI)99).

[17] Article 3(7) of the Asian Human Rights Charter of 1999.

[18] See the third sentence in article 4 of the African Charter on Human and Peoples' Rights of 1986.

arbitrary.[19] In spite of the constitutional exception, the court held that a person's right to life and dignity did not permit the death penalty, as recognising it would mean to deny the essence of these human rights. While the Hungarian court adopted an interpretation that invariably abolished the act/possibility of sentencing a person to death in their country, the African Commission on Human and Peoples' Rights (African Commission), the primary body tasked to propagate the principles of the African Charter and ensure their enforcement, has not been able to do same even though it has been presented with similar opportunities in the past.

In fact, many authors have generally mentioned the relative "inefficacy" of the African Commission in its mandate to enforce the provisions in the African Charter (Naldi, 2002; Odinkalu, 2002). When addressing the issue of the general abolishment of the death penalty in Africa, for example, the Commission did not view the death penalty as being inherently contrary to the African Charter (Smit, 2004). Also, the African Commission's Resolution Urging States to Envisage a Moratorium on the Death Penalty of 1999, which it adopted with the aim of abolishing the death penalty, only concerned itself with the imposition or implementation of the death penalty without ensuring that the necessary due process safeguards are enforced. This resolution urges African countries that choose to maintain death penalty to fully comply with their "obligations under the Charter". In fact, the closest the 1999 resolution on the death penalty comes to requiring that specific action be taken is the call for states to (a) "limit the imposition of the death penalty only to the most serious crimes"; (b) "consider establishing a moratorium on executions of the death penalty"; and (c) "reflect on the possibility of abolishing the death penalty".[20] Regardless of the fact that the resolution has taken a lenient approach in dealing with the death penalty, it was still not unanimously adopted by the AU member states and appears to have relatively little impact on the continent.

In spite of the above, the African Commission seems to have had a much more impact in cases where the challenge to a death penalty situation was on procedural grounds. For example, in the case concerning the death penalty imposed on the Nigerian activist Ken Saro-Wiwa, the African Commission held that the trial in Nigeria violated the due process provisions enshrined in article 7 of the African Charter. Hence, the death penalty was in contravention of article 4 of the Charter (thus, the death penalty was imposed arbitrarily).[21] Regardless of the significance of this ruling (which was given in 1998), it came too late as Mr. Saro-Wiwa had already been executed in 1995.

Irrespective of the lack of results in the Saro-Wiwa case, the Commission has been able to set a procedural benchmark that is very relevant to future cases concerning the death penalty. Thus, in cases brought before the African Commission after Saro-Wiwa, the Commission has successfully held that "expedited appeal procedures"[22] as well as "summary executions"[23] infringe on both articles 4 and 7 of the African Charter. However, upon the coming into force of the Protocol on the Establishment of an African Court on Human and Peoples' Rights of 2004, the impact of the Charter may now be stronger than before. This is because the Protocol specifically provides the African Court

[19] Hungary, Decision of the Constitutional Court, No 23/1990 (X 31) AB, 24 October 1990.

[20] Resolution Urging States to Envisage a Moratorium on Death Penalty of 1999 (ACHPR/Res.42(XXVI)99).

[21] ACHPR, *International Pen and Others (on behalf of Ken Saro-Wiwa) v. Nigeria,* AHRLR 212, Communications No. 137/94, 139/94, 154/96 and 161/97, 31 October 1998.

[22] ACHPR, *Constitutional Rights Project v. Nigeria,* AHRLR 248, Communication No. 143/95, 150/96, 15 November 1999.

[23] ACHPR, *Amnesty International and Others v. Sudan,* AHRLR 297, Communication No. 48/90, 50/91, 52/91, 89/93, 15 November 1999.

DOI: 10.46282/blr.2022.6.1.284

on Human and Peoples' Rights with interim measures that it may adopt when it is faced with cases of extreme gravity or urgency.[24]

5. THE DEATH PENALTY IN GHANA

As a member of the AU, Ghana seems to have chosen the option of retaining the death penalty in its statutory books. Here, the retention of the death penalty stems from the general support for the principle of *lex talionis* for atrocious crimes among the public. And although the public seems satisfied to see the death penalty in the statutory books (with the hope that this will serve as a deterrent for the commission of grievous crimes such as murder), there is generally no avidity on its part to see such sentences carried out.

In Ghana, while the death penalty is still recognised as a mode of punishment for certain offences today, in practice the country has not executed any of the persons sentenced to death by the courts for almost three decades (Amnesty International, 2020). Here, the last time a death sentence was actually carried out was in 1993, when 12 persons found guilty of murder were executed. Thus, today, the return to civilian rule under the Fourth Republic, ushered by the Constitution of 1992, seems to have led to an unofficial commutation of "death sentences" to "life imprisonments".[25] Aside the general practice of allowing persons on "death row" to rather remain in prison for life, the various presidents of the country have also officially commuted the death sentences of some inmates to life sentences. In fact, since the ushering of the Fourth Republic, Ghana has had the death sentence of over 300 inmates commuted to life sentences while some inmates have been granted a complete presidential pardon.[26] Thus, in Ghana, while there is no official moratorium on the death penalty, recent practices seem to suggest the country is an "abolitionist in practice" (Amnesty International, 2020).

Like the position in most countries around the world, article 1 of the Constitution of Ghana of 1992 protects the human dignity of all persons in the country. Further, article 3(1) of the Constitution protects persons' right to life, except that it allows a person's life to be taken "in the exercise of the execution of a sentence of a court in respect of criminal offence under the laws [of the country] of which he has been convicted".[27] This reservation, like that in the African Commission's Resolution Urging States to Envisage a Moratorium on the Death Penalty of 1999 (ACHPR/Res.42(XXVI)99), contradicts the inviolable nature of human dignity that the same law seeks to protect. Based on this reservation, aside from the imposition of the death penalty in article 3(3) of the Constitution itself for an offence against the safety of the state – high treason – the legislature has prescribed the death sentence as the punishment for murder and high treason in sections 46 and 180 of the Criminal and Other Offences Act of Ghana of 1960

[24] Article 27 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights.

[25] In Ghana, the last execution, which was in respect of 12 prisoners convicted of murder and armed robbery, was carried out on 17 July 1993.

[26] In 2013, then President of Ghana, John Dramani Mahama, commuted 33 death sentences to life imprisonment. Later in 2014, he further commuted 21 more death sentences to life sentences in commemoration of Ghana's Republic Day Anniversary. In 2015, President Mahama again commuted 14 death sentences life sentences. In April 2000, President John Agyekum Kufuor also commuted the death sentences of 100 prisoners into life sentences. In June 2003, he further granted amnesty to 179 prisoners that have been sentenced to death and have been awaiting execution for a period of 10 years.

[27] Article 3(1) of the Constitution of Ghana of 1992.

respectively. Thus, these sections of criminal act prescribe that persons found guilty of murder and high treason respectively are to be sentenced to death.[28]

In Ghana, like in other places in the world, the punishment – the death penalty – for the above two offences does not seem to have had any deterrent effect. Regarding the offence of high treason, for example, the death penalty has always been the prescribed punishment. However, history indicates that there have been, at least, five attempts to commit this offence, four of which have been successful, within the last twenty-seven years prior to the Fourth Republic (the current constitutional dispensation). All these occurred in an era where persons sentenced to death were actually executed. Comparing this to the next twenty-seven years when the death penalty seems to have been abolished in practice, there has been no attempt by any person or group of persons to commit high treason.[29] This is a clear indication of the fact that the death penalty itself has no special deterrent effect on a person's desire to commit high treason. This position has been endorsed by many research studies on the subject (Durlauf, Fu and Navarro, 2012; Cohen-Cole et al., 2006; Amnesty International, 2017).

Similarly, with regard to the use of the death penalty as punishment for murder in Ghana, there is no evidence to suggest that there is a rise in the murder rate in the country after successive governments of the Fourth Republic have refused to endorse the execution of persons sentenced to death. This position is true for countries that have abolished the death penalty as a mode of punishment for all offences in their jurisdiction (Amnesty International, 2017). This flaws any argument that seeks to support the retention of the death penalty as punishment for murder on the basis that it serves to deter individuals from committing murder.

Regardless of the above position, many Ghanaians continue to support the idea of retaining the death penalty in the statute books of the country. The debate about whether or not to abolish the use of the death penalty in the country and the contrasting opinions among the populace came to light during the vetting of four Appeal Court Judges by the legislature in respect of their nominations by the President to the Supreme Court of Ghana (the highest court in the country). During the vetting of these appointees, members of the Appointment Committee of the Parliament of Ghana sought their opinions on whether to repeal the death penalty from the statutory books of the country. Two of the appointees supported a repeal while the other two were against any such repeal. One of the judges made her case for retaining capital punishment by relying on a biblical quotation that "he who draws the sword must die by the sword".[30] To her, once a person is found guilty of murder under the traditional common law standard of proof for establishing guilt in criminal cases, there is no reason as to why the person should not be condemned to death.[31] According to the other judge who was also in support of the death penalty, it is false sentimentality to call for the abolishment of the death penalty merely because of the abstract possibility that innocent people might be executed. To him, not even the possibility of executing an innocent person (along with all the studies that have proven this to be real) (Moyes, 2002; Marshall, 2004; Gross et al., 2014) or the lack of

[28] See sections 46 and 180 of the Criminal and Other Offences Act Ghana of 1960.

[29] It should, however, be noted that currently Dr Frederick Mac-Palm and nine others are facing trial for treason (not high treason), as defined in article 19(17)(c) of the Constitution of Ghana of 1992, for conspiracy to overthrow the government of Ghana in 2018.

[30] Report on the Vetting of Supreme Court Nominees by Appointment Committee of Ghana on 27 May 2008 (www.modernghana.com).

[31] Justices Paul Baffoe-Bonnie and Rose Constance Owusu submitted that the death penalty should not be abolished while Justices Jones Dotse and Anin Yeboah were of the view that it should be abolished.

DOI: 10.46282/blr.2022.6.1.284

evidence to suggest that the death penalty does not serve a deterrent function any more than a life sentence was sufficient justification to call for the abolishment of the death penalty in Ghana. He also argued that it is only the death penalty that can ensure that convicted murderers do not come back to kill again. This argument seems problematic as it is clearly obvious that a life sentence can serve the same purpose. In fact, the call for the abolishment of the death penalty generally points to the substitution of the death penalty with the life sentence. On their part, the two judges who favoured the abolishment of the death penalty relied heavily on the argument that the death penalty does not either serve to have any extra deterrent effect than a life sentence and also that it risks the killing of an innocent person in situations where a person originally found guilty of murder is later determined not to be guilty.[32]

Aside from the above, the first serious attempt by Ghana to examine and further take a stand on whether to abolish the death penalty came with the establishment of the Constitutional Review Commission (Review Commission) in 2010. In the report presented to the President on 20 December 2010, the Review Commission suggested, after consultation with experts and the citizenry, that the death penalty should be abolished through an amendment of the Constitution of 1992. In this regard, the Review Commission suggested that the death penalty should be replaced with life sentence "without parole" (Constitution Review Commission of Ghana, 2011).[33] The Review Commission also based its argument for the abolishment of the death penalty on the traditional arguments that have been put across by most academics and interest organisations. These include the fact that death sentences are unconscionable, do not reduce the rate of crime, do not provide closure or sense of justice to victims' families and that the state may be "transforming itself into a killer" should it carry out such sentences. Therefore, the Review Commission proposed that the new Constitution contains a provision that prohibits the intentional killing of another by the state through the death sentence. The proposed provision by the Review Commission states that "no person should be deprived of his or her life intentionally" (Constitution Review Commission of Ghana, 2011).

Pursuant to the report by the Review Commission, the government of Ghana issued a White Paper accepting the recommendation to abolish the death penalty (and replacing same with a life sentence without the possibility of parole). According to the government, aside from the cogent reasons provided by the Review Commission in favour of abolishing the death penalty, it accepts the proposal because "the sanctity of life is a value so much ingrained in the Ghanaian social psyche that it cannot be gambled away with judicial uncertainties" (Constitution Review Commission, 2011). The decision by the government of Ghana to accept the proposal to abolish the death penalty had led to praise by the international community, including the UN which welcomed the government's response to the Commission's report (UN Human Rights Council, 2014). Following the UN's examination of the country under the UN Universal Periodic Review, Ghana looked to be heading toward the complete abolishment of the death penalty when the government agreed to hold a referendum to amend the entrenched provisions in the Constitution that mandate courts to pass the death sentence as punishments for certain offences in 2013. In view of this commitment, the government of Ghana established the

[32] Report on the Vetting of Supreme Court Nominees by Appointment Committee of Ghana on 27 May 2008 (www.modernghana.com).

[33] Since Articles 3(3) and 13(1), which concern the death penalty, are entrenched provisions in the Constitution of Ghana there will be the need for a national referendum in which a question will be put to the electorate on whether or not to maintain and/or amend these provisions.

Constitution Review Implementation Committee to help in the process of drafting and further implementation of the recommendation to abolish the death penalty. In accordance with its mandate, the Implementing Committee submitted a draft bill to the office of the Attorney-General and Minister of Justice for purposes of the amendment of the Constitution. The bill was supposed to be submitted to the Cabinet of Ghana, the legislature and the Council of States for further discussion (and approval) and then later put before the voting public to either approve or reject the bill through a national referendum.[34] However, for almost a decade now, after the bill was drafted and submitted to the appropriate authority, the process has stalled due to unspecified delays in the process.

Later in 2014, in a case brought before it against Ghana for the mandatory imposition of the death penalty upon the plaintiff for murder (Dexter Eddie Johnson v. Ghana, 2012 (Dexter Case)), the Human Rights Committee of the UN held that an "automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life contrary to Article 6(1) of the International Covenant on Civil and Political Rights" of which Ghana is a state party.[35] The Committee, therefore, called on Ghana to provide an alternative punishment, including the commutation of the death sentence to the life sentence. The UN Committee further required Ghana to adjust its legislation to fall in line with the said provisions of the ICCPR, as it is duty bound to avoid similar violations at a future time. This decision by the UN Committee, although not binding, serves to remind Ghana of its obligation under the ICCPR to ensure that the country does not arbitrarily deprive persons of their life. Regardless of the importance of this decision, it should be noted that it can only be relevant with respect to only section 46 of the Criminal and Other Offences Code of Ghana which prescribes the death penalty as punishment for murder. Regarding the offence of high treason, however, interpretation provided by the UN Human Rights Committee cannot have any influence on it. This is because, in the hierarchy of norms, the Constitution of Ghana, according to article 11, is at a higher rank than an international convention, which for all intents, constructions and purposes is of the same rank as an enactment by the legislature of Ghana.

6. THE WAY FORWARD FOR GHANA

In Ghana, it is clear that neither the state nor the people living in the country are interested in having persons sentenced to death executed so far as such persons serve a life sentence. As may be observed above, there have been instances where persons on death row but who are in fact serving life sentences, due to successive presidents' refusal to endorse such executions, are released from prison through presidential amnesty without any controversy. This is a clear indication that today, the death penalty, although still a legitimate mode of punishment in the country, serves no purpose and has no place in Ghana's criminal justice system. With no purpose to serve, it is imperative that Ghana abolishes the death penalty from its statutory books to add to its good human rights record under the current constitutional dispensation.

Further justification for abolishing the death penalty in Ghana may be based on the fact that Ghana is a state party to the ICCPR. As may be observed from above, the provision in article 6(1) of the ICCPR requires no person to be arbitrarily deprived of

[34] Article 290 of the Constitution of Ghana provides that a bill amending an entrenched provision must be submitted for referendum before it can be passed to Parliament.

[35] HRC, *Dexter Eddie Johnson v. Ghana*, Communication No. 2177/2012, CCPR/C/110/D/2177/2012, 6 May 2014.

DOI: 10.46282/blr.2022.6.1.284

his/her life. Currently, the "automatic and mandatory imposition of the death penalty [as punishment for murder in Ghana has been described to] constitutes an arbitrary deprivation of life contrary to Article 6(1) of the ICCPR" by the Dexter case. This led the Human Rights Committee of the UN to call on the country to provide an alternative punishment for persons convicted of murder. Going by the interpretation provided by the Committee as well as Ghana's international obligation under international law for being a state party to the ICCPR, it is imperative that the country takes appropriate steps to replace the death penalty with appropriate alternative punishment such as a life sentence. This position will only make legal what already exists – Ghana as a *de facto* abolitionist country – and removes any dent that continues the existence of the death penalty in the statute books Ghana brings upon the country.

It should be noted that, while it may be easy for Ghana to abolish the use of the death penalty as the punishment for murder, as this position was only adopted through a legislation by the legislature, it will be much more difficult for the country to do same with regard to the sentence for high treason. As may be observed from above, the offence of high treason is not merely a statutory offence (which may be repealed by a legislative act) but also a constitutional one. This means abolishing the death penalty will require a national referendum which aside being an onerous task may also lead to an unfavourable result. To achieve this, the government may need to get back on board with the initial constitutional review process that it started in 2010. Thus, Ghana will need to reactivate the Constitution Review Implementation Committee that was established in 2013 in order to kickstart the constitutional review process and further ensure that the process ends as intended.

Another option that may be employed to abolish the constitutional death penalty is the approach adopted by the Hungarian Constitutional Court in which the court, despite the Constitution of Hungary allowing a person's right to life to be deprived in situations where such deprivation is not arbitrary,[36] held that a person's right to life and dignity did not permit the death penalty under any circumstance. However, this approach may only serve to abolish the death penalty with regard to murder and not that concerning the offence of high treason. This is because, unlike the punishment for murder, which is prescribed by an ordinary legislation,[37] the punishment for high treason is sanctioned by the same constitution that seeks to protect persons' right to life and dignity.[38] This makes it impossible for the courts, as the interpreters of the Constitution, to infer that the right to life and human dignity somehow invalidates another provision in the same Constitution.

While adopting a position that abolishes the death penalty as proposed by the Constitutional Review Commission is appropriate, this article suggests that Ghana takes into consideration the current position adopted by the Council of Europe. Unlike most international instruments, in Europe, pursuant to the agenda by member states of the Council of Europe to resolve "to take the final step to abolish the death penalty in all circumstances, including acts committed in time of war or [indicating an] imminent threat of war", the Council of Europe adopted Protocol 13 to ECHR which today abolishes the use of the death penalty both in times of war and during peace time.[39] Thus, since it has been established by the numerous research and academic works as well as the

[36] Hungary, Decision of the Constitutional Court, No 23/1990 (X 31) AB, 24 October 1990.

[37] S. 46 of the Criminal and Other Offences Act No. 29 of Ghana of 1960.

[38] Article 3(3) of the Constitution of Ghana of 1992.

[39] Article 1 of the Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances.

Constitutional Review Commission of Ghana itself that the death penalty does not by itself provide extra deterrent effect compared to life sentence for offences such as murder and treason, it is suggested that Ghana adopt an approach that is in line with the current position in member states of the Council of Europe. By this approach, Ghana will effectively abolish the death penalty not only during times of peace but also in times of war. Adopting this approach will require Ghana not to only repeal the relevant constitutional provisions that tacitly endorse the death penalty (article 13(1) of the Constitution of Ghana of 1992) and those that explicitly provide that the death penalty be imposed on persons found guilty of certain offences (article 3(3) of the Constitution of Ghana of 1992), but also ensure that there is an express provision in the Constitution that prohibits the use of the death penalty at all times. In Africa, examples of this can be observed in Namibia and Mozambique where article 6 of the Constitution of Namibia[40] and article 7(2) of the Constitution of Mozambique[41] expressly prohibit the death penalty.

7. CONCLUSION

The human rights argument for the abolishment of the death penalty has in modern times been firmly established in both practical terms and in academic circles. Today, most countries have abolished the death penalty for various reasons, all of which are based on human rights. For example, in discarding the last remnant of the death penalty in its country in 1995, Spain stated that "the death penalty has no place in the general penal system of advanced, civilised societies… What more degrading or afflictive punishment can be imagined than to deprive a person of his life…" (Dieter, 2007; Hood, 2008). Similarly, the death penalty was abolished in Switzerland because, according to the country, the punishment constituted "a flagrant violation of the right to life and dignity" (Dieter, 2007; Hood, 2008). In Africa, one may take a cue from the words of Justice Chaskalson of the Constitutional Court of South Africa in *Makwanyane and Mchunu v. The State*.[42] In the historic opinion banning capital punishment under the new South African Constitution, he stated that "the rights to life and dignity are the most important of all human rights… and this must be demonstrated by the state in everything that it does, including the way it punishes criminals". Today, the fight against the death penalty is no longer regarded to be an internal matter among countries. Many countries, including Canada,[43] Germany[44] and South Africa[45] have indicated this by refusing to extradite

[40] Article 6 of the Constitution of Namibia of 1990.

[41] Article 7(2) of the Constitution of Mozambique of 2004.

[42] South Africa, *Makwanyane and Mchunu v. The State,* Case No. CCT/3/94, 6 June 1995.

[43] The death penalty being categorised as a grave impairment of human dignity has been acknowledged by the Canadian Supreme Court in *Kindler v. Canada,* [1991] 2 SCR 779, 26 September 1991. In a case that was concerned with the extradition of two fugitives facing murder charges from Canada to the United State, the Canadian court required that the United States provide assurances that it will not seek the death sentence before the court may grant the extradition.

[44] In the case of Jens Soering, the European Court, which was considering an extradition appeal for a German national to the United States, held that extraditing the defendant to the United States would be in breach of Art. 3 of the European Convention on Human Rights which forbids inhuman and degrading treatment. However, Soering was eventually extradited to the United States after the state of Virginia agreed not to seek the death penalty. The ruling by the European Court on extradition was primarily based on the death row phenomenon; see more details in ECtHR, *Soering v. United Kingdom*, app. no. 14038/88, 7 July 1989.

[45] South Africa, *Mohamed and Another v. President of the RSA and Others,* Case No. CCT17/01, 28 May 2001.

DOI: 10.46282/blr.2022.6.1.284

persons to countries such as the United States unless it provides assurance that the death penalty will not be sought against the persons.

As observed from this article, Ghana remains a *de facto* death penalty abolitionist country which is commendable today considering the country's past on the execution of prisoners who have been sentenced to death. However, the country needs to take a further step in abolishing the use of the death penalty as a mode of punishment for certain offences in the country. This will be in line with the current practice in a country where all persons sentenced to death are in fact serving a life sentence and thereby boosting the country's reputation on matters of human rights in the international community. There is no better time for one to call for the abolishment of the death penalty in Ghana than today, where the sitting president, Nana Addo Dankwa Akufo-Addo, is regarded to be a human rights lawyer and activist. He may start this by first having the attorney general bring to parliament a bill to repeal the relevant provisions in both the Criminal and Other Offences Act of Ghana of 1960 and the Criminal and Other Offences (Procedure) of Ghana of 1960 that are in relation with the imposition of the death penalty as punishment for murder. He may thereafter need to focus on how to ensure that the works of the Constitution Review Implementation Committee of Ghana are put back on track, this time with the needed support to ensure that the recommendations of the Constitution Review Commission are implemented, to ensure that the death penalty is replaced with a life sentence without parole. In addition to repealing all death penalty provisions in its constitution, it is suggested that Ghana includes a positive provision in the constitution that outrightly abolishes the use of the death penalty under all circumstances. This will help boost Ghana's position as a beacon of human freedom and rights in Africa and in the world.

If the executive, for some reason, delays this process or refuses to do this, the change can also be brought about by a legislator through a private member bill. Thus, aside from the executive branch of the government of Ghana leading the fight to abolish the death penalty, a member of parliament may also be able to do this by introducing a bill in parliament that seeks to repeal relevant laws on the death penalty in the country.

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DOI: 10.46282/blr.2022.6.1.284

BRATISLAVA LAW REVIEW

PUBLISHED BY
THE FACULTY OF LAW,
COMENIUS UNIVERSITY
BRATISLAVA

ISSN (print): 2585-7088
ISSN (electronic): 2644-6359

A CRITICAL LEGAL PERSPECTIVE ON THE RECENT CZECH TRANSGENDER CASE (Pl. ÚS 2/20) / Nikolas Sabján

Mgr. Nikolas Sabján, PhD., LL.M
Assistant Professor
Comenius University Bratislava
Faculty of Law
Department of Theory of Law
and Philosophy of Law
Šafárikovo námestie č. 6
810 00 Bratislava, Slovakia
nikolas.sabjan@flaw.uniba.sk
ORCID: 0000-0001-7017-0468

The article presents an output of the research project VEGA No. 1-0350-21 „Trans-Identity of minors. Ethical and Legal Aspects related to Informed Consent."

Abstract: *The purpose of this short commentary is to present a critical legal analysis of the recent Czech Constitutional Court's judgment on trans rights. The paper puts forward an external legal perspective characteristic for critical jurisprudence and it aims to show the presence of antagonistic interests and the extra-legal (ideological) factors that permeates and influences the judicial decision-making. It outlines some of the theoretical assumptions of critical jurisprudence which are, subsequently, applied to the Court's judgment. More specifically, it follows the theoretical project of agonistic jurisprudence and attempts to show how it could be utilised in the context of judicial decision-making.*

Key words: *Transgender rights; PL. ÚS 2/20; Ideological critique of law; Critical legal theory*

Suggested citation:
Sabján, N. (2022). A Critical Legal Perspective on the Recent Czech Transgender Case (Pl. ÚS 2/20). *Bratislava Law Review*, 6(1), 125-136. https://doi.org/10.46282/blr.2022.6.1.288

Submitted : 19 May 2022
Accepted : 20 June 2022
Published : 30 June 2022

1. INTRODUCTION

Transgender rights, and more generally, issues surrounding trans people have become the object of fierce debate in recent years. Heated, though interesting and complex debates are underway in Anglophone countries (mainly in the UK and US; see e.g., Pape, 2022; Sharpe, 2020; Asteriti and Bull, 2020), in continental Europe (see e.g., Continental Europe Enters the Gender Wars, 2021; Europa-Kolleg Hamburg, Institute for European Integration, 2019), as well as in jurisdictions beyond the West (Jain and DasGupta, 2021).

Similarly, Central Europe (the context from which the author is writing) is also "catching up" and the topic is becoming part of public and academic discourse (see for instance Batka, 2021; Meteňkanyč, 2021). On the one hand, this development is welcomed. Simultaneously, however, it is unfortunate that the debates are oftentimes rather uneducated (particularly in the context of public/political discourse), full of prejudices and stereotypes. In some cases, there is an outright dismissal of the legitimate concerns of trans people as these are perceived as "subversive", "unconventional" or "unnatural". In particular, the topic itself has triggered a strong reaction from conservative groups and political subjects. For instance, the call for the protection of gender, gender identity or gender expression under human rights norms is decried by the usage of

derogatory terms such as "gender ideology" (UN Human Rights Council, 2021a). The "gender ideology" narrative is sometimes even framed as a global conspiracy with the aim to destroy political and social orders (UN Human Rights Council, 2021a). More generally, the debate concerning trans rights is part of what is sometimes referred to as "culture wars" (Barša, Hesová and Slačálek, 2021).

Against this background, the recent trans case decided by the Czech Constitutional Court (PL ÚS 2/20) can be perceived as emboldening the above-mentioned conservative forces and amplifying the emerging "gender wars" in the Czech Republic.[1] Arguably, the most controversial part of it concerned the Court's reasoning with respect to Section 29 of the Civil Code, which imposes mandatory sterilization for gender reassignment and which was ignored and thereby implicitly upheld as constitutional (I will come back to this later). Thus, it is hardly surprising that the judgment was characterized by Zuzana Vikarska and Sarah Ouředníčková as "*evasive, insensitive, ignorant and political*" (2022).[2] Their analysis, together with the dissenting opinion of judge Šimáčková provides, in my view, compelling arguments against the Court's conclusions. However, these analyses could be described as *internal legal perspectives*. These are valuable and I do concur with them. But my aim in this paper is to present, in the tradition of critical legal theory, an *external legal perspective* that is needed to complement the internal perspectives.[3] Thus, my aim is to situate the Court's decision in a more broad (critical) theoretical perspective to show how the Court's reasoning is influenced by ideological presuppositions, which remain hidden or are obscured by the supposedly rational, logical and *apolitical* character of its reasoning.

Taking into account the aforementioned, the paper is structured as follows: first, I will lay out and explain what I consider to be the core theoretical assumptions of critical legal tradition. This includes, in my view the political nature of the social world, hermeneutics of suspicion and the emancipatory ideal. More generally, my theoretical inspiration comes from Rafał Mańko's project of agonistic jurisprudence (2021, pp. 175-194) which, to my mind, represents an effective and theoretically sound framework for critically analysing judicial decision-making. The present paper adopts the essential attributes of this theoretical and intellectual project.

Subsequently, the second part will focus more closely on the Court's judgment by applying the critical-legal theoretical framework. First, I will briefly describe the facts of the case. Secondly, the emphasis will be put on the main legal arguments of the Court's decision. Even though I am primarily concerned in this paper with the *external* legal perspectives, it should be pointed out that reference will be made, naturally, to *internal* perspectives too. Or, to put it differently, every critical legal analysis should consist of a combination of internal and external perspectives, stressing how they are dialectically interconnected. Finally, I will conclude with a few comments regarding the topics discussed.

[1] There is also an ongoing debate in Slovak Republic about a new technical guidance published by the Ministry of Health, which no longer prescribes sterilization in cases of gender reassignment. However, there has been a backlash from conservative members of the parliament.

[2] Though there are other reasons for it as I explain below.

[3] Internal legal perspectives are characteristic for traditional, positivist legal approaches where law is separated from social, political, economic, or ideological aspects and the main emphasis is put upon strictly legal arguments from within. External perspectives are more concerned with these extra-legal factors and their aim is to situate the process of legal argumentation, reasoning and decision-making in the broader socio-political and ideological context. I would like to primarily focus on this latter, external perspective. For a more detailed discussion see: Douzinas and Gearey (2005, pp. 16-17).

2. THEORETICAL BACKGROUND

As mentioned above, I will try to briefly outline the core theoretical assumptions of critical legal theory, albeit it is not possible to give a fully detailed account of all the theoretical assumptions due to limited space.[4]

2.1 The Political Nature of the Social World

Many of the recently published work on critical legal theory emphasizes the political[5] nature of the social world, i.e. the inherently antagonistic nature of the social. These antagonisms are in some sense universal and ineradicable. Critical legal theorists (e.g., Rafal Mańko) invoke the work of Chantal Mouffe and her notion of agonistic democracy (Mouffe, 2013), emphasizing the conflictual nature of the whole democratic project (Mańko, 2021, p. 178). This aspect represents also the dividing line between Marxist and post-Marxist theories – the former, at least in their orthodox versions, assume the possibility of eradicating social antagonisms whereas the latter disagrees with this conclusion. However, it should be clarified that conflict (in the post-Marxist sense) does not have a pejorative connotation. For Mouffe, conflicts form an important and productive part of democratic politics and she is critical towards the possibility of rationally reaching consensus. In other words, she does not have much patience with the liberal understanding of politics as a means to rationally resolve conflicts by the activity of experts, tinkering with technicalities where ideological and value-driven questions are apparently absent. At the same time, Mouffe is clear about the need to maintain the institutional and rules-based order – these are the "background requirements" to prevent the destruction of democratic system. To put it more precisely: "*conflict, in order to be accepted as legitimate, needs to take a form that does not destroy the political association*" (Mańko, 2021, p. 178).

Now, we cannot identify a closed list of antagonism(s). These are, rather, relative to the specific socio-economic and historical context in which they occur and play out. In spite of this, it is possible to identify, quite schematically, two different categories: economic and socio-cultural antagonisms. The former includes, for instance, conflicts between employers/employees, consumers/traders, tenants/landlords and so on. The latter category is more relevant for our analysis: these include antagonisms in the context of reproductive rights, discrimination based on race, ethnicity, sex or *gender*. The conflicts are taking place, by and large, between liberals/socialists and conservatives (or more generally, between traditionalists and progressives).[6]

Critical legal theorists aim to extend this theoretical framework to the legal sphere as well (i.e. to the so-called *juridical*) (Mańko, 2021, pp. 179-181). As Mańko explains: "*in my theoretical project the judge, as decision-maker, will be portrayed as someone arbitrating between conflicting (antagonistic) interests – in every single case that is adjudicated – on the assumption that political conflicts do not come to an end when legislation is enacted, but they continue in the courtroom*" (2021, p. 176). He then proceeds by stating that judgments, "*cloaked in legal form* (…) *decide on individual instances of ongoing collective conflicts, opposing* [for instance] *moral progressives to traditionalists,*

[4] Nevertheless, many of the theoretical and methodological issues have been covered elsewhere. See for instance: Hunt (1987, pp. 5-19); Mańko (2018, pp. 24-37); Mańko and Łakomy (2018, pp. 469-486).
[5] The concept of political is understood here as a "*space of power, conflict and antagonism*." Mańko (2021, p. 177).
[6] Although there are disagreements within the liberal/left ideological "camp" when it comes to trans rights (see for example: Zanghellini, 2020, pp. 1-14).

DOI: 10.46282/blr.2022.6.1.288

minorities to majorities and so forth" (2021, p. 176). It is important to note that these antagonisms decided in the courtroom are not *only* the result of rational and logical methods, relying merely on law but are permeated by ideological considerations. The ideological aspects of judicial decision-making are also an essential assumption of critical jurisprudence to which we now turn.

2.2 Hermeneutics of Suspicion/Ideological Critique of Law

The most succinct definition of the hermeneutics of suspicion in the legal field[7] is put forward by Duncan Kennedy, who points out that "*contemporary elite jurists pursue, vis-à-vis one another, a 'hermeneutic of suspicion', meaning that they work to uncover hidden ideological motives behind the 'wrong' legal arguments of their opponents, while affirming their own right answer allegedly innocent of ideology*" (2015, p. 91). More broadly, it is a practice, which aims to uncover hidden interests and meanings in the legal field. Even though there is much to be said about this form of hermeneutics, we shall stick to this short description by Kennedy and flesh out two further issues implicitly connected to this practice: first, the ideological critique of law; and secondly, the well-known argument of critical legal scholars concerning the indeterminacy of law. These are structurally interconnected.

Starting with the relation of ideology and law – much ink has been spilled over this issue and it is not possible to rehearse these debates in more detail here. I shall make only a few comments regarding this complex issue. First, we should distinguish between, on the one hand, *legal ideology* (or synonymously, ideology of law) which is understood here as a mechanism which contributes to the legitimacy of the legal system and more broadly, to the existing socio-economic order. It achieves this mainly by the processes of legitimization, naturalization, and universalization.[8] In other words, legal ideology maintains and reproduces, on the *structural* level, the existing order.

By contrast, *ideology in law* refers to specific ideologies penetrating and influencing legal actors and law as such (e.g., judicial decision-making, legislation, doctrine and so forth). Here we can return to Kennedy's claim above. Essentially, Kennedy argues that judicial decision-making is an ideological struggle and he distinguishes between "activist judges", "difference-splitting judges", "bipolar judges" or simply "centrists" (Mańko, 2021, p. 182). The ideological struggle applies, presumably, to lawyers, academics and other legal actors alike (Kennedy, 2007). Simply put, Kennedy is pointing to the ideologically motivated legal practice (and theory too) since, as he puts it, "*judges who claim they are ideology free are either acting in bad faith, or simply in denial in the psychoanalytical sense*" (Mańko, 2021, p. 184). Although Kennedy is working in a different legal context (common law system) and mostly focusing on appellate courts, his view is, I believe, correct. This description is especially accurate when it comes to, for instance, human rights/constitutional law (our case) or public international law.

One further aspect shall be mentioned with regards to the concept of ideology. It is not uncommon to invoke it as a phenomenon in connection to issues of truth/falsity or reality/fiction. This is how Marx and Engels' work is sometimes interpreted through their notion of false consciousness.[9] Now, there are more refined interpretations of Marx's and Engels' work which show that they did not use the concept of ideology only with this meaning. However, we shall skip this debate for it is not directly relevant for our purposes.

[7] For a different view see Leiter (2004, pp. 74-105).
[8] For a more in-depth analysis of these terms, see Marks (2001, p. 112) or Eagleton (2007, chapter 1).
[9] Marx never actually used this term. It was Engels, who used it in his correspondence with Franz Mehring. See: Marx-Engels Correspondence (1893).

What is more important is that in our usage ideology does not deal with questions of truth or falsity, i.e. it is not concerned with epistemic questions. Rather, ideology is understood as functional "*with regard to some relation of social domination ('power', 'exploitation') in an inherently non-transparent way: the very logic of legitimizing the relation of domination must remain concealed if it is to be effective*" (Žižek, 2012, p. 8). Thus, according to Žižek, ideology critique starts with the assumption that "*it is easily possible to lie in the guise of truth*" (2012, p. 8). In other words, ideology critique discerns how the content of certain statement or text (e.g. a legal text) even if factually correct, might legitimize a relation of domination.

Let us now turn to the second issue that is the indeterminacy of law. We turn again to Kennedy who presents what may be called a relative indeterminacy of law and puts forward a leftist phenomenological theory of interpretation (2008, pp. 154-173). Kennedy's theory can be summed up in the following way: legal materials do not determine *per se* the result of an interpretation, though they constrain the legal actor. In his view, legal actors interpreting texts are driven by as strategic (ideological) aims. However, achieving a preferred (ideological) result is "*a function of time, strategy, skill and the 'intrinsic' or 'objective' or 'real' attributes of the rule one is trying to change*" (2008, p. 160). Accordingly, it is in my view acceptable to characterise his theory as a relative indeterminacy of law – far from being an "anything goes" ethos, Kennedy recognizes the limiting nature of legal texts. However, the acceptable and dominant interpretation of a legal problem is determined also by other factors (as mentioned above). In addition, a crucial limiting factor in legal interpretation is the prevalent, i.e., *hegemonic* ideology. As Mańko points out, citing another Polish legal scholar Lakomy: "*if certain legal interpretations are more prevalent and treated as 'objective' by a give legal community, this is because of a shared cognitive structure of the members of a give interpretive community*" (2021, p. 183). In other words, this hegemonic ideology plays a crucial role in maintaining a specific solution to a legal problem and this is then perceived as the "correct" interpretation of law. A consensus emerges in the legal community and this interpretation is treated almost as if it was "natural" until a *counter-hegemonic* ideology emerges and questions the existing hegemonic view (including the existing "solution" to a specific legal problem).

Now, I want to add to the analysis that it is paramount to avoid an "universalising" approach which tries to present a one-size-fits-all conclusion. Nevertheless, I want to insist upon this feature of a struggle between hegemonic/counter-hegemonic ideologies permeating the legal domain and playing an essential role in the context of legal interpretation. But the point is that this struggle is different in each legal field. For instance, since human rights norms are much more abstractly formulated and normally actors in this field are more "progressive" (or one shall say less conservative) than in other fields, so it is more prone to reinterpretation and change. Nevertheless, taking the example of rights further, I think Kennedy correctly argues that rights are neither progressive or regressive *per se*; it is simply a medium through which individuals/group express their subjective preferences (2002, pp. 178-229). Additionally, the interpretation of these rights is heavily influenced by the existing hegemonic/counter-hegemonic ideological forces.

2.3 Emancipation

The last theoretical assumption that I would like to briefly mention is the emancipatory ideal of critical jurisprudence. The basic idea comes from Max Horkheimer (and other theorists from the Frankfurt school) who argued that the main distinguishing

DOI: 10.46282/blr.2022.6.1.288

criterion between traditional and critical theory is emancipation (Horkheimer, 1972, pp. 188-244). Critical theories aim to extend the freedom of individual as much as possible and simultaneously eradicate all forms of domination in social relations (Bohman, 2016).

This emancipatory goal is present also in the work of critical legal theorists whereby the importance of connecting theory to practice is underlined. Legal theories and philosophical work should not be produced for its own sake, but the objective is to directly address and affect the "outside world". Thus, it is not incorrect to describe the work of critical legal theorists as "engaged" and concerned with practical ends. This involves, for instance, analyses of how this or that decision of a court, legislation or legal interpretation affects different individuals and groups, whether it further entrenches relations of domination or sustains and helps to reproduce exploitative relations and so forth.

2.4 Critical Analysis of Judicial Decision-Making

Rafal Mańko concludes his latest article with specific suggestions for critical case-law analysis. It goes something like this: first, we need to identify the social antagonism(s) present in a specific case. Secondly, legal materials that the court could apply shall be identified. Thirdly, all the interpretative possibilities of a given legal material should be laid out. Fourthly, the decision itself is analysed with the aim to determine which of the antagonistic interests it favours. Fifthly, the emphasis should be put upon the ideological presuppositions of the chosen interpretation by the court. Ultimately, the analysis should indicate alternative (strictly) legal interpretations that will lead to results more in line with the emancipatory goal, thus in favour of, for example, minorities (Mańko, 2021, pp. 187-189).

3. CZECH CONSTITUTIONAL COURT ON TRANS RIGHTS

3.1 Facts of the Case

The facts of the case are relatively straightforward. The complainant (T.H.) is a non-binary person who was born as a man. T. H. does not identify as a man, nor a woman but if they had to choose, they would prefer to be considered as a woman. The complainant have undertaken hormonal therapy and certain aesthetic changes but have not undergone any surgical operations since they do not deem that necessary and which is quite common among trans people.

T. H. submitted a request to the Czech administrative authorities whereby they wanted to change the birth number from male to either a neutral or a female form. However, the authorities refused this request since T. H. had not fulfilled the conditions enshrined in Section 29 of the Civil Code, i.e., sterilization.

They initiated proceedings against this decision with the aim to question the constitutionality of three norms related to the process of gender reassignment: first, Section 29 of the Civil Code, which stipulates that gender reassignment occurs "*through surgery with the simultaneous disabling of the reproductive functions and the transformation of sexual organs*"; secondly, Section 21(1) of the 2012 Act on Specific Health Services concerning surgical intervention; thirdly, Section 13(3) of the 2000 Act on Registration of Population and Birth Certificate Numbers which prescribes the method of determining birth numbers which contains information about the sex and age of a person.

3.2 Decision of the Court

The Court upheld (implicitly) the constitutionality of the first two norms – implicitly because the Court did not carry out the constitutional review as it concluded that T. H. did not aim to undergo, in line with Section 29 of the Civil Code, sterilization. Consequently, the first two norms were, in the opinion of the Court, irrelevant. As stated by the Court: "*the complainant did not fulfil the condition for a change of his birth number before submitting the request, irrespective of Section 29 of the Civil code*" (Vikarská and Ouředníčková, 2022).[10] Concomitantly, the Court stated that T.H. "*identifies as a neutral person without an assigned sex.*" Thus, according to the Court, the mandatory sterilization for gender reassignment stipulated in the aforementioned Section 29 is not decisive since "*in the Czech legal order, gender reassignment means a transformation from a man to woman or from a woman to man*" but T. H. identifies as a non-binary person. And, as the Court stated, rather oddly, "*in the Czech Republic, people are divided into women and men.*" Based on this, the Court refused to rule on the constitutionality of Section 29 of Civil Code and therefore, it did not address the core issue of sterilization in the context of gender reassignment.

With respect to the issue of birth numbers, the Court stated the following: it accepts the possibility of self-identification with a different gender. However, this is irrelevant for birth numbers – their purpose is to register sex assigned at birth. In this regard, the Court opines that only the information about biological sex registered by the state is "useful"; by contrast, gender identity "*does not have any objective, meaningful use for the state and remains outside the state's reach or record, because there is no reason for this record*" (Vikarská and Ouředníčková, 2022). The Court continues in its reasoning, which seems to suggest that biological sex is "real" and gender identity is merely a "fiction". In relation to right of self-determination as part of right to privacy, the Court concluded that everyone has the right to "*perceive themselves however they wish*" but this should not be confused with the "*right for reality to be different than it is, i.e. with the right to some kind of a fiction*" (Vikarská and Ouředníčková, 2022).

I shall mention two further comments made by the Court and then move to the next part, which will critically scrutinize the Court's conclusions. First, the Court, without giving any explanation whatsoever, ignored the case-law of the European Court of Human rights[11] as it has "*considerable doubts about the transferability of some of the conclusions of the ECtHR to the environment of the Czech legal system*." This was strongly criticized by the dissenting judges. Secondly, the Court concluded the judgment in its very last paragraph by stating that questions regarding persons as biological species, their lives and relationships should be dealt with and resolved in the Czech parliament. Otherwise, the "*judicialization of these issues may lead to the politicization of the Constitutional Court and thus to the weakening of its position as an impartial and independent judicial body protecting the constitutional order*" (Vikarská and Ouředníčková, 2022).

3.3 Critical Notes

After this brief outline of the facts of the case and the decision of the Court, I shall turn to the final part of this paper. Generally speaking, my purpose is to undertake an

[10] I am relying in my text on the translation found in the cited text.
[11] See the references to the ECtHR case in the dissenting opinion of Kateřina Šimáčkova. For a further analysis of case-law on this issue see Arnauld, von der Decken and Susi (2020, pp. 193-207); Bassetti (2020); or Horvat (2021).

DOI: 10.46282/blr.2022.6.1.288

ideological critique of this decision in the light of the above-mentioned theoretical framework.

The first step should involve the identification of conflict(s)/social antagonism(s) of the case at hand. By and large, the antagonism here is between two competing ideologies – traditionalism and progressivism or more precisely, left/liberal interpretation on the one hand (the complainant) and the interpretation of the Court in line with conservative ideology.[12] The antagonistic interests in this context can be subsumed under the group of socio-cultural antagonisms (see above) which involve, more broadly, two contradictory interests – the interests of trans people as a minority group and the majority (which was clearly favoured by the Court in this case). At the same time, a more specific antagonism would be that of gender non-conforming (those who reject the male/female binary)[13] persons against the cisnormative (privileged) group trying to maintain the existing order of things and prefers the existing gender norms. The latter group was favoured by the Court. This can be demonstrated by the reasoning of the Court where the implicit message is that T. H. as a non-binary person does not fit within the male/female binary and "*in the Czech legal order, gender reassignment means a transformation from a man to woman or from a woman to man.*"[14] As I explained above, this is the reason why the Court refused to consider the constitutionality of Section 29 of the Civil Code, which requires mandatory sterilization in the case of gender reassignment.[15]

Secondly, the determination concerning the legal materials that a court could find appropriate to decide the case is necessary. Even though in the case at hand the Court refused to deal with the constitutionality of two norms (concerning sterilization and surgical intervention) - and the decision in this respect was hardly convincing - these should have been applied. In fact, the majority of judges supported this view – sterilization as a condition enshrined in Section 29 of the Civil Code was the core issue and should have been considered. That is also why the decision was characterised by legal scholars as *evasive*.[16]

Had the Court applied these norms, the third step would have focused on the different possible interpretations of these relevant legal materials. Here, we shall reaffirm the hermeneutics of suspicion which directs us to the conclusion that "*no legal norm, be it a constitutional principle, a legislative rule or a precedent, may be simply 'applied' to a given set of facts without its interpretation*" (Mańko, 2021, p. 188). That would disregard the "*true stakes behind a given interpretation*" (Mańko, 2021, p. 188). Here, even the decision *not to* apply the earlier mentioned legal material is, of course, an interpretative act. And an ideological one, for that matter. If it had applied these norms (especially Section 29 of Civil Code), it would have been much more difficult for the Court to disregard conflicting, progressive interpretations (mandatory sterilization as a violation of right to privacy, as accepted by the ECtHR and other international quasi-judicial organs, such as the Human Rights Committee, or even in contravention of prohibition to be subjected to torture or to cruel, inhuman or degrading treatment or punishment).

[12] That is why it was welcomed by some conservative groups in Czech Republic, e.g. the Aliance pro rodinu (Alliance for family). Its statement can be found here: https://alipro.cz/2022/04/03/tz-rozhodnuti-ustavniho-soudu-chrani-deti-i-materstvi-a-otcovstvi-ktere-nelze-libovolne-menit/.

[13] Analyses of these terms can be found in Haefele-Thomas (2019, chapter 1); or Duffy (2021).

[14] Or as the Court stated "*in the Czech Republic, people are divided into women and men.*"

[15] Of course, this argument is rather dubious, if not simply wrong, since T. H. also claimed that if they had to choose, they would prefer to be considered as a woman (e. g. in the context of birth number change). The Court ignored this fact as it was pointed out by Šimáčková in her dissenting opinion and this interpretation was also criticized by Vikarská and Ouředníčková (2022).

[16] See above.

Now, with respect to the third question (the birth number issue), it is also possible to imagine other interpretations which would be more in favour of the complainant (i.e. recognition of a third gender category). Such interpretation was reached by the Federal Constitutional Court in Germany (UN Human Rights Council, 2018, p. 18) or in other jurisdictions (Jain and DasGupta, 2021). The context, to be fair, was different. But the point is that alternative interpretations are conceivable.

Under the fourth step, Mańko proposes to order the results of an interpretation "*on an axis extended from the maximization of interests of group A to the interests of group B*" (2021, p. 188). (Un)surprisingly, the Court's interpretation maximizes the interests of the majority (and it is in line with the traditional/conservative ideologies). I do concur with Mańko that "*there can be no 'neutral' position on the axis, no 'perfect compromise' but that always the position between two poles benefits more to one or to the other side*" (2021, p. 188). Usually, the liberal counterargument invokes the methods of balancing or proportionality tests. I find this argument problematic and unconvincing because it merely shifts the issue onto a different level as balancing or proportionality tests are even more open to outside, ideological/political forces (see e.g., Koskenniemi, 2010, pp. 47-58). Thus, we cannot avoid these outside influences. Moreover, we cannot identify a "perfect compromise" in cases like the one, which is being discussed simply because there is always one side whose interests and values are upheld or supported.

The fifth step includes the analysis of Court's interpretation from the perspective of different ideologies. I already hinted at this before – the two antagonistic interests framed according to two clashing ideological positions. I would add to this that it was clearly the hegemonic ideology (the traditionalist/conservative) which guided the Court's interpretation. First, the Court conveniently evaded the problem of sterilization required in for gender reassignment, thus supporting its ideological presuppositions (i.e. *status quo*). Secondly, without elaborating on this further, the Court dismissed the existing case-law of the European Court of Human Rights. As we can see here, an emerging counter-hegemonic ideology is present on the supranational, but also international level (again, conveniently ignored by the Court) (UN Human Rights Council, 2021b). Third, it is symptomatic that the Court invoked a sort of "*ultima ratio*" argument that if it had dealt with these questions, it would have led to *politicization* of the judiciary. In my view, it is precisely the function of constitutional courts to decide these pressing questions and provide protection to the minority groups against the possible "tyranny of majority". But what's more important is the assumption of this last argument: it is that non-decision in these cases is somehow *apolitical* or non-ideological whereas the opposite would constitute a politicization. This conclusion is fundamentally flawed as non-decision in this case is in itself an *ideological* position, meaning that it maintains and reproduces the existing injustices and relations of domination (trans people subjected to inhumane practices, perpetuating symbolic and material harms, etc.) and the conclusion is consistent with the hegemonic (conservative) ideology. In other words, there was no *apolitical* or *non-ideological* position in the context of this case.

In the sixth step, an alternative legal interpretation more favourable to the opposing antagonistic interests backed by strictly legal arguments (linguistic, systemic, teleological and so forth) should be presented. As we referred to these above, it is not required to rehearse them again.

4. CONCLUSION

I have tried to show, in line with the theoretical assumptions of critical jurisprudence, the antagonistic interests present in the context of the recent trans case

DOI: 10.46282/blr.2022.6.1.288

decided by the Czech Constitutional Court, as well as the influence of ideologies (either hegemonic or counter-hegemonic) which guided the Court. Critical legal approaches, as opposed to traditional theories, bring out to the fore these conflicts and ideological presuppositions and it was precisely this aspect that guided our analysis of the Constitutional Court's decision.

The fundamental assumption of this approach is that *things could have been different*. Although legal materials, together with other factors such as the hegemonic ideology, constrains the interpretations and decisions of courts, we can always find equally acceptable and sound interpretations (though these are also influenced by ideologies) which are more inclined towards the emancipatory goals of critical jurisprudence.

However, we should not succumb to the commonly held view that critical legal theory is nothing more but a nihilistic attitude where "anything goes". Additionally, as Karl Klare correctly argues, the fact "*that the legal and moral/ideological cannot be disentangled does not imply that there are no different between them or that these differences are unimportant*" (2015, p. 11). The law does constrain and there are good/convincing and bad/unconvincing legal arguments (though these are not static and change over time). However, we should recognize the extra-legal factors being at work in the legal field.

In addition, the fact that hegemonic and contra-hegemonic ideologies are always present in the legal field (e.g. in the context of judicial decision-making as argued earlier) does not mean that everything is ideological, and thus, any decision is qualitatively the same. As we tried to show above, it should be always determined which interests are maximized by a decision and which group is favoured/disadvantaged by it. Furthermore, the analysis should focus on how a certain interpretation/decision perpetuates relations of domination and social stratification. The purpose of this paper was precisely to focus on these aspects.

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REVIEWS

BRATISLAVA LAW REVIEW

PUBLISHED BY
THE FACULTY OF LAW,
COMENIUS UNIVERSITY
BRATISLAVA

ISSN (print): 2585-7088
ISSN (electronic): 2644-6359

MOKRÁ, LUCIA: INTERNAL DIMENSION OF HUMAN RIGHTS IN THE EUROPEAN UNION. C. H. BECK, 2021 / Sára Kiššová

Mgr. Sára Kiššová
Comenius University Bratislava
Faculty of Law
Institute of European Law
Šafárikovo námestie č.6
810 000, Bratislava, Slovakia
sara.kissova@flaw.uniba.sk
ORCID: 0000-0003-2834-8853

Submitted : 25 May 2022
Published : 30 June 2022

Suggested citation:
Kiššová, S. (2022). Mokrá, Lucia: Internal Dimension of Human Rights in the European Union. C. H. Beck, 2021. *Bratislava Law Review*, 6(1), 139-142. https://doi.org/10.46282/blr.2022.6.1.289

The topic of human rights is currently much-discussed, whether in the context of constantly evolving technologies, the recent imposition of lockdowns during the Covid-19 pandemic, or some NGOs that draw attention to certain countries of the world, which still have a problem with respecting the human rights standards. The legal theory recognizes national and transnational protection of human rights. From the point of view of EU law, we can divide the protection of human rights into three pillars: the protection of human rights by Union law, the protection of human rights by international law, and the national protection of human rights.

Personally, as a PhD. Student, I have focused on the institutional and constitutional law of the EU in my previous research, but I am also very interested in the very issue of human rights protection. So far, however, I have dealt mainly with the European Convention on Human Rights and Fundamental Freedoms and the decisions of the European Court of Human Rights, and I have not paid so much scientific attention to the EU Charter of Human Rights (EU Charter). However, the monograph Internal Dimension of Human Rights Law in the European Union by Associate Professor Lucia Mokrá has caught my eye, especially for the outline and comprehensiveness of the book, which is at the same time relatively brief given the number of pages.

Associate Professor Lucia Mokrá (currently the Dean of the Faculty of Social and Economic Sciences of Comenius University Bratislava and also a member of the Institute of European Law, Faculty of Law, Comenius University Bratislava) focuses in her scientific work, among other things, on the rule of law in the EU and human rights, which is also reflected in the book Internal Dimension of Human Rights in the European Union, which I will briefly address in the following lines.

The Author divides the book into three main chapters, focusing on the historical development of human rights in the EU, the general definition of human rights in the EU, and, finally, the EU Charter of Fundamental Rights itself.

In the first chapter, the Author describes the historical development of human rights in the EU thus, the reader briefly learns about the progressive integration of the EU, from the purely economic nature of the European Union to the change in the decision-making of (then) European Court of Justice, which, in 1969, addressed the issue of human rights for the first time, thus moving away from a restrained position on human rights issues and thus moving EU integration forward (Mokrá, 2021, p. 1). The EU has thus slowly become a watchdog that pays attention to the protection of human rights not only within the Union, but also externally.

In the second chapter, the Author deals with human rights in the European Union. This chapter offers theoretical insight into other sources of human rights in the EU than the EU Charter. Therefore, emphasis is placed on the provisions of primary law, the decision-making activity of the Court of Justice of the EU (CJEU), and one of the fundamental principles of the EU - the principle of human rights.

Therefore, the first subchapter deals in detail with the human rights contained in the primary law of the EU, i.e., treaty provisions, more precisely with the interpretation of Article 2 TEU and Article 6(3) TEU and related theoretical knowledge.

As the second source of human rights in the EU, the Author analyses and thus points to the decision-making activity of the CJEU, which deals with the spectrum of rights from property protection (Hauer 44/79) through freedom of religion (Prais 130/75) to freedom of information (Protection of Unborn Children, C-159/90), etc. (Mokrá, 2021, p.13). This subchapter also addresses the issue of the European Court of Justice's reluctance to deal with human rights proceedings, which has been significantly altered by the case-law of the principle of the primacy of EU law over national law.

The last subchapter of this section deals with the principle of human rights, as one of the main values of the EU, contained in Art. 2 TEU, and its importance and position in the EU legal order and EU activities.

The second chapter also includes a subchapter dealing with other international human rights instruments in relation to the EU, namely the European Convention on Human Rights (ECHR). The Convention has a special place in the EU legal system, which has evolved over the years, as before the EU set up its own internal human rights system, the Convention served (and still serves) as an interpretative tool for the CJEU (Mokrá, 2021, p. 21). Over time, the EU has also committed to access to ECHR. I would like to highlight this subchapter mainly for its excellent summarization of the issue of EU accession to the ECHR, where the Author provides factual arguments as to why accession has not taken place to this day and points out the legislative problems associated with it.

The end of the second chapter is devoted to the equally important spectrum of human rights that the EU protects and guarantees, those that stem from EU citizenship. The Author characterizes EU citizenship as a so-called "Cornerstone of Human Rights Protection". In this section, I would like to highlight the work with the numerous case-law through which the Author points out the development of human rights linked to EU citizenship, whether in connection with the sphere of free movement of persons or active and passive suffrage.

The book's third chapter is purely focused on the EU Charter of Human Rights. In this section, the reader will learn about the importance of the EU Charter of Human Rights and its place in EU law. The Author deals more extensively with the important issue of the political and legal status of the EU Charter and the issue of its applicability, which she analyses in detail through Art. 51 to Art. 54 EU Charter. At the same time, she interestingly describes the reluctant application of the EU Charter by the CJEU, which did not refer to the provisions of the EU Charter in its decisions until 2006 and essentially waited for the

EU Charter to be incorporated into the Lisbon Treaty and declared as EU primary law (Mokrá, 2021, p. 66-67).

The end of the last chapter is devoted to the separate parts of the EU Charter, within which the Author has individual rights. In interpreting each of the rights, the Author uses several case laws and professional literature, so the reader gets an elemental insight and knowledge of each of the rights contained in the Charter.

In conclusion, the book Internal Dimension of Human Rights in the European Union deals with human rights issues in the European Union factually and educationally, emphasizing the EU Charter of Fundamental Rights. The text of the book is easy to read, and the Author clearly and factually comments on the topic with reference to numerous case laws and other thematically relevant professional literature. From my point of view, I found it beneficial that the Author pointed out the various case law within the subject matter and did not resort to repeating well-known case laws, which enriched me in the process of reading.

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Mokrá, L. (2021). *International Dimension of Human Rights in the European Union*. Praha: C.H. Beck, p. 194. ISBN 9788074008306

DOI: 10.46282/blr.2022.6.1.289

BRATISLAVA LAW REVIEW

PUBLISHED BY
THE FACULTY OF LAW,
COMENIUS UNIVERSITY
BRATISLAVA

ISSN (print): 2585-7088
ISSN (electronic): 2644-6359

KASINEC, RUDOLF - ŠURKALA, JÁN: LEGAL ASPECTS OF CENSORSHIP IN CZECHO-SLOVAK FILM IN THE ERA OF NORMALIZATION. COMENIUS UNIVERSITY IN BRATISLAVA, FACULTY OF LAW, 2021 / Marián Šuška

Mgr. Marián Šuška
Comenius University Bratislava
Faculty of Law
Department of Theory of Law
and Philosophy of Law
Šafárikovo námestie č. 6
810 00 Bratislava, Slovakia
marian.suska@flaw.uniba.sk
ORCID: 0000-0001-7767-7296

Submitted : 12 June 2022
Published : 30 June 2022

Suggested citation:
Šuška, M. (2022). Kasinec, Rudolf - Šurkala, Ján: Legal Aspects of Censorship in Czecho-Slovak Film in the Era of Normalization. Comenius University in Bratislava, Faculty of Law, 2021. *Bratislava Law Review*, 6(1), 143-148. https://doi.org/10.46282/blr.2022.6.1.293

Person X: *"...don't worry, we know him very well. We're keeping an eye on him!*
You, I advise you wisely – do not try to have any contact with him..."
Person Y: *"...huh... Intéressant."*
Person X: *"Intéressant, you jerk! It's dangerous, remember it!"*

(Dialogue from the Slovak film *The Shop on main street*,
winner of Academy Awards of 1965)[1]

The above-mentioned dialogue represents the hidden essence of a theme of the reviewed book - it is an interview that at first glance does not really indicate anything directly, but indicates many things indirectly. The experienced authors on this legal topic – Rudolf Kasinec and Ján Šurkala – decided to analyse the very actual legal and social problem – the individual's right to freedom of expression and its conflict with censorship.[2]

This aim is realised in a category of films that were sanctioned by a totalitarian socialist regime of Czecho-Slovakia, predominantly in the era of so-called *"normalization"*.

[1] KADÁR, J. KLOS, E. The Shop on Main Street. Czechoslovak Film Institute, 1965. Winner of the "Academy Award for Best Foreign Language Film" for the year of 1965. A year later, Ida Kamińska was nominated for the "Best Actress in a Leading Role".

[2] For more details about authors' bibliographies in this topic see for example a bibliography of the reviewed book in its end – p. 162 et seq.

In Czecho-Slovakia, there was even invented a term *"safe deposit films"* or *"locked films"* (in Slovak/Czech *"trezorové filmy"*) for this special category of films. The comprehensive legal-scientific elaboration of film censorship in the former Communist bloc still misses and thus the submitted text is an important pioneer on that topic. The book itself consists of three main chapters: each chapter is analysing a different aspect of the problem.

The first chapter deals with the matter of the right to freedom of expression and the problem of censorship. A reader shall learn about the eternal problem of state power, which tends to expand and intensity of which points out to the level of (non-) democracy. No less important is the fact that the right to freedom of expression can get into conflict with rules of other normative systems of a society, e. g. morality, religion and so on.

In the beginning, the first chapter aims at the most crucial international and national legal guarantees of the right to freedom of expression that has been applied in today's Slovak Republic. We must appreciate that authors do not only mechanically copy individual legal text and sections of the law, but on the contrary, they always add important information, which can be used to get a close understanding of it. Within the framework of national constitutional guarantees, the book for example refers to the first Communist Czecho-Slovak *Constitution of 9th May 1948*, which in section 22 directly governs rights and obligations concerning a film medium. Socialist regimes were aware of the power of film as an important mass transmitter of ideas, what was the reason for ensuring strong control over the whole film industry in a state.[3]

However, the reviewed text does not only analyse the Communist understanding of the right to freedom of expression, but also points to the interference of this right within today's democratic Slovak Republic and – what is in our opinion particularly important – briefly analysing this right from a view of the European Court of Human Rights.

The following part of the first chapter focuses on the notion of censorship. Authors present and define this concept and then they analyse its theoretical and historical aspects. We must welcome that authors do not demonize censorship (because, particularly in a current democratic society, term censorship is connected with mainly negative associations). On the contrary, they objectively analyse censorship as a phenomenon that has its place (of course, only within certain, predetermined legal limits) in a modern-day democratic society.

A film is a type of medium with widespread impact. Authors explain the reasons for the intensified existence of film censorship in totalitarian socialist states and they shortly analyse the default model of censorship for former socialist countries - the censorship model of the Soviet Union. The text comprehensively analyses the interpretation of film censorship in socialist regimes, which is well supplemented with statements by major politicians of those states. As an example, we can point out on a speech of J. Stalin: *"Film in the hands of the Soviet government is a great invaluable force. It has exceptional qualities of psychological influence over the people, it helps working class and its party to educate workers in the spirit of socialism, to organize the people to fight for socialism, to increase their cultural and political militancy."* (Kasinec and Šurkala, 2021, pp. 35-36). Albeit in second chapter of the book, there is a similar speech by G.

[3] Constitution of the Czechoslovak Republic No. 150/1948 Coll. § 22 (1) The right to produce, distribute, publicly exhibit, as well as to import and export motion pictures shall be reserved to the State. (2) Broadcasting and television shall be the exclusive right of the State. (3) The exercise of these rights shall be regulated and exceptions prescribed by Acts.

Husák.[4] That all only points out that leaders of socialist countries recognized the power of film and its impact on society.

This part is followed by a text directly oriented on the development of censorship in socialist Czecho-Slovakia. Book first examines an earlier, cumbersome bureaucratic censorship model from the turn of the 1940s and 1950s, which consisted of a party, union and state level. It was replaced in 1953 by more efficient model based on the state office *"The Main Administration of Press Supervision"*.[5] Reading this part of the text, today's reader who lives *"in the comfort of Western democracy"* shall sometimes be shocked on information mentioned by authors, such as the fact that the aforementioned office also checked advertisements in newspapers and magazines, or about the mysterious inconspicuous letter *"M"* followed with a series of number at the beginning or at the end of a film. The censorship procedure itself and the legal aspects associated with it are described in considerable detail.

The last part of the first chapter briefly deals with the actual problem of modern-day censorship. It is pointed out that many well-known films are criticized for various reasons. As examples we can mention well known *Gone with the Wind* (1939, allegedly for portraying the Confederacy in glorious, romantic view), *Dumbo* (1941, alleged caricature of black people in the form of crows), *Indiana Jones and the Temple of Doom* (1984, alleged caricature of Hindi society) or *Avatar* (2009, allegedly for showing "white man saviour complex"). Authors reflect these delicate problems in a very careful way, and they think about their consequences.

The second chapter of the book is fully focused on a central topic – analysis of film and state in Communist Czecho-Slovakia. It mainly concerns a short period of the 1960s, usually associated with the iconic political figure – Slovak Alexander Dubček,[6] who became the most important political figure in Czecho-Slovakia in 1968. At that time, the Czecho-Slovak film industry brought an extraordinary movement called The Czech-Slovak New Wave.[7]

This era is represented by removing the strong totalitarian character of the regime that also caused changes in censorship. It meant the possibility of relative freedom in the creation of (but not only) film works. During this period, authors in Czecho-Slovakia created high-quality motion pictures awarded by the world most prestigious awards, including two winners of Academy Awards in the category *"The Academy Award for Best International Feature Film"*.[8] It is worth noting that since then, even after the fall of the regime in 1989, this success has been neither overcome nor at least repeated. Dubček's *"socialism with a human face"* lasted shortly - the Soviet occupation took place in August 1968, followed by reprisals and *"normalization"* of the Czecho-Slovak society. The normalization era meant the definitive setting of society and film censorship, until the Gentle revolution in 1989.

[4] Gustav Husák (1913-1991) was a Slovak Communist politician. He served as the First Secretary of the Communist Party of Czechoslovakia from 1969 to 1987 and then as the president of Czechoslovak socialist Republic from 1975 to 1989.

[5] In Slovak "*Hlavná správa tlačového dozoru*".

[6] Alexander Dubček (1921-1992) was a Slovak politician. He served as the First Secretary of the Presidium of the Central Committee of the Communist Party of Czechoslovakia (KSČ) from January 1968 to April 1969. After fall of Communism in November of 1989 (Gentle revolution) he served shortly as the Chairman of the federal Czecho-Slovak parliament.

[7] Sometimes wrongly named as only "Czech New Wave" chauvinistically omitted the Slovak factor, even though Slovak factor had a crucial role, as we point it out further in the review.

[8] These are above-mentioned films The Shop on Main Street (1965) and Closely Watched Trains (1968).

DOI: 10.46282/blr.2022.6.1.293

Text reflects these events in association with film censorship. Authors do an analysis of a term *"prohibited film"*. Except of studying their characters, they also point out different names given to the category of prohibited films in socialist states. This fact is linked with dissimilar understanding and level of censorship in a particular state, despite being in the same Eastern socialist bloc (see a comparison of *"trezorový film"* in Czecho-Slovakia meaning a safe deposit film versus "doboz" in Hungarian meaning *"only"* a box).

In particular, we would like to pay attention to a chapter, which divides safe deposit films into several categories, according to an imposed sanction. Authors distinguish four categories of sanctions: (1) life imprisonment, 2) imprisonment for a certain period, 3) prohibition of activity and 4) death penalty. It is a truly original construction of film sanctions, which is invented by authors. It has its relevant legal basis, which in very smart way illustrate a destiny of a particular prohibited film.

Authors research further the above-mentioned structure of sanctions, and they supplement it with real examples. Particularly interesting is a mentioned case of an amateur actor, who described how he had been looking forward to the premiere of that film, where he had starred. However, since all cinemas cancelled it, that man could not have watched film until 2009 (i.e., 44 years) (Kasinec and Šurkala, 2021, pp. 78-79).

Third and final part of the text is designed as a selection of the most important Czecho-Slovak safe deposit films. These are divided into 2 categories – Czech films (10 works) and Slovak films (9 works). In each subchapter on a particular film, the reader is at first briefly acquainted with a plot of a film. Subsequently, authors are analysing reasons for banning the film (as censorship reasons had not been explicitly specified usually). They propose the most potential censorship reasons for every film. We must appreciate that authors' intention is to motivate a reader to watch a film for making their own opinions about the reasons, which led censorship to put a particular film into an imaginary safe deposit.

Second edition of the text increased number of analysed safe deposit films. Among them, we can eventually find an analysis of two extraordinary Slovak safe deposit films, namely: *The Miraculous Virgin* and *The Man Who Lies*.

Here, we must especially notice a subchapter about *The Miraculous Virgin*. We consider this text as one of the best-written parts of the reviewed book. Plot of the film is about central character – Anabella – the personification of creative scientific and artistic freedom (ergo, the right to freedom of expression). Anabella, an attractive muse, is immediately surrounded by numerous artists as well as university academics. However, only few of them shall understand that the right to freedom of expression (personified by Anabella) cannot be usurped as a private possession. Author is brilliantly analysing the topic together with the manner how he links it with the reality of today's world. In our opinion, this text could be a basis for a separate article.

Generally, in addition to everything that has been written here, we can evaluate the 2nd edition of the book as a valuable update of the previous text in all its aspects. From the formal point of view, there is an important improvement in the structure of the text itself. Now, it is represented by a clear 3-part structure. For illustration, first chapter of the 1st edition included 24 subchapters, in which text was a little bit confusingly organized. In addition, the format of the book – now A5 standard – is quite more appropriate.

If we should suggest recommendations for authors, there could be found several of them. First of them, it should be useful to translate the book into – at least – English language, as this topic is very actual. It brings new impulses, and it represents certain guidelines or comparative material for states, which have not had experience with

(socialist) totalitarian censorship. Moreover, the topic does not present only theories, but presents real models, which were applied and existed in the past.

Another recommendation could be seen in further research of the topic. It can be done in several ways. One of them could be continuous research with extension to the modern-day problem of film censorship.[9] Also, research could continue in historical framework. This idea could be enlarged with comparative study of film censorship among systems in several former socialist states and their mutual understanding and realization (e. g. Czecho-Slovakia v. Yugoslavia, Poland, Hungary, etc.).

At the end of the review, we can definitely recommend the book, as it is a very interesting text, the merit of which - the problem of safe deposit films resulting from the conflict between the individual's right to freedom of expression and state censorship is highly actual in today's society. *"Indeed, if a situation arises and individuals' opinions, along with their rights, are being removed, art must come to the scene as a feast for the soul, which can hide the ideas of freedom of expression and create strong opposition in society and encourage them to activity."* (Kasinec and Šurkala, 2021, p. 160).

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[9] Of course, the reviewed book includes short text about it (cf. p. 49 et seq.).

DOI: 10.46282/blr.2022.6.1.293

REPORTS

BRATISLAVA LAW REVIEW

PUBLISHED BY
THE FACULTY OF LAW,
COMENIUS UNIVERSITY
BRATISLAVA

ISSN (print): 2585-7088
ISSN (electronic): 2644-6359

RIGHTS *IN REM* BETWEEN TRADITION, REFORM AND TRANSFORMATION (BELÁ, 3 – 5 SEPTEMBER 2021) / Igor Hron

Mgr. Igor Hron;
Comenius University Bratislava
Faculty of Law, Department of Legal History and Comparative Law;
Šafárikovo nám. 6;
818 00 Bratislava, Slovakia.
igor.hron@flaw.uniba.sk
ORCID: 0000-0002-7091-5850

This report was prepared as part of the research project no. APVV-18-0199 titled "New Challenges in the field of Rights *in Rem* in Slovakia"

Submitted : 12 June 2022
Published : 30 June 2022

Suggested citation:
Hron, I. (2022). Rights *in Rem* between Tradition, Reform and Transformation (Belá, 3 – 5 September 2021). *Bratislava Law Review*, 6(1), 151-154. https://doi.org/10.46282/blr.2022.6.1.294

Despite the still prevailing and uncertain pandemic restrictions on the verge of 2021, Comenius University in Bratislava, Faculty of Law, was able to host the second edition of the conference organised as part of the research project APVV-18-0199 "New Challenges in the field of Rights *in Rem* in Slovakia" ("*Nové výzvy v oblasti vecných práv na Slovensku*"). The conference was held on 3 to 5 September 2021 at Chateau Belá for the second time, as well.

The conference was opened with a speech by Mgr. Olexij M. Meteňkanyč, PhD., focusing on the institute of legal personality, which represents without any doubt a cornerstone of any legal order. The contribution was concerned with addressing the question whether it is possible to confer legal personality on the various non-human phenomena, as recent trends prove that at least some jurisdictions have granted legal personality, or at least particular rights, to rivers, lakes, national parks, ecosystems, or even artificial intelligence. These cases were analysed with regard to the reasons for granting such rights and the possible future development in the area of legal theory.

This presentation was followed up by Assoc. Prof. Mgr. Matej Mlkvý, PhD., LL.M., focusing on the issues connected with the acquisition of ownership to war booty and its historical development commencing in Roman law, up to the present day. In his presentation, he has shown that the acquisition of ownership through the law of prize has its stable presence and influence also nowadays. The specific impact of this mode of acquisition was illustrated with example of the 2021 events in Afghanistan concerning a war booty seized by the Taliban. A specific emphasis was given to the work of Hugo Grotius who managed to develop the pertinent issue in his work *De iure belli ac pacis.*

Apart from the *ius commune* aspects, the presentation also addressed the views formed in the Czech doctrine, primarily by authorities such as A. Randa or J. Sedláček.

Mgr. Marián Šuška pointed out several issues with respect to disputes over cultural objects and their nature in terms of classification as to the so-called concept of hard cases. The discussion was open by introducing the contributions to the legal philosophy of R. M. Dworkin and H. L. A. Hart with regard to hard cases and their defining elements. Afterwards, these elements were applied with the intention to analyse, whether and why the disputes over cultural objects constitute such a category of cases. To illustrate this connection, a case of restitutions in the decisions of the Constitutional Court of the Czech Republic was provided.

Mgr. Adam Köszeghy followed with the introduction into the topic of international trade. Namely, the contribution analysed the provisions regarding the acquisition of ownership established by the Code of International Trade (Act. No. 101/1963). The said domestic law exclusively regulated property relations in international trade and, as compared to the Civil Code and the Economic Code, differed in terms of substance as well as structure. The provisions at hand were then contrasted with the General Conditions for the Delivery of Goods adopted by the Council for Mutual Economic Assistance, together with the mutual relationship between both sources of law.

Prof. Mgr. Miroslav Lysý, PhD. devoted the presentation to the topic of *dominium duplex* in law valid on the territory of the Slovak Republic. The property relationships connected with land between tenants/peasants and their lords were dealt with to a varying extent by customary and statutory law. The essential elements of such a relationship were always the *dominium directum* assigned by the landlords, who were the owners of the substance of the land and the *dominium utile* enjoyed by the tenants/peasants. The regulation, changing over the centuries, has governed a diversity of rights and obligations to various types of land. As was shown, many feudal institutes with respect to land ownership survived the revolution of 1848/1849.

Mgr. Vladimír Sedliak shed a light onto the questions associated with material publicity of the Land Register, as it has an irreplaceable function in acquiring ownership in Slovak private law. More specifically, he introduced the audience to legal practice and jurisprudence both in the Slovak Republic and the Czech Republic. Special attention was given to numerous decisions of the Constitutional Court of the Czech Republic criticising the insufficient legal regulation of material publicity, which would benefit from its strengthening. The vital part of the presentation was a comparison between the conditions before and after the adoption of the new civil code in the Czech Republic.

Assoc. Prof. JUDr. Zuzana Mlkvá Illýová, PhD. introduced the audience into the matters of ownership acquisition from a non-owner. More specifically, a model situation where a natural person acquired a piece of land on the basis of inheritance proceedings, which a public notary mistakenly included, as it was never previously owned by the deceased. The presentation familiarised the attendees with legal aspects raised in the argumentation on behalf of the applicants and its potential pitfalls, among others, unjust enrichment, invalidity of contracts, and civil liability.

JUDr. Ing. Karin Raková, PhD. provided a presentation on the exclusion of minors from inheritance. While in most cases disinheriting affects an adult child, the practice allows for the exclusion of minors, if one of the grounds for exclusion has been met and whether an appropriate behaviour can be expected of him due to his mental maturity. However, the threshold for this behaviour is not always met in practice.

JUDr. Zuzana Klincová, PhD. dealt with the legal consequences connected with the acquisition of ownership to the jointly rented flat by spouses during the marriage. The key part of the presentation was devoted to an analysis of the decision of the Supreme

Court of the Slovak Republic of 29 October 2019, Case No. 1 Cdo 37/2019. After examining the facts of the case, various legal aspects were emphasised. Finally, a concern was raised as to the sufficiency of the reasoning not only of the Supreme Court decision at hand, but also of the arguments substantiated by the Supreme Court of the Czech Republic which were largely taken over into the domestic case law.

Mgr. Sára Kiššová pushed the debate forward to a broader European context by discussing the approach and actions of the European Union towards Poland. Special attention was given to the K 3/21 and P 7/20 rulings of the Constitutional Tribunal. Therefore, it is no surprise that the current developments in the Constitutional Tribunal and the Supreme Court of Poland in relation to the issue of rule of law were highlighted. In addition to these aspects, the potential range of options available to the Union was analysed – ranging from infringement procedures to sanctions regimes. Above all, the whole situation may seem like tilting at windmills.

Mgr. Igor Hron followed by analysing the protection of intellectual property in light of Article 1 of the Protocol No. 1 to the European Convention on Human Rights and the relevant case law established by the European Court of Human Rights. Although the intellectual property is not a novel issue in the jurisprudence of the Court, it has not developed a broad body of decisions yet. The questions that were raised during the presentation touched on the concept of possessions and its link to the objects of intellectual property and the possibility of protecting moral rights under Article 1 of the Protocol No. 1 to the Convention, together with a future outlook on the possible development.

Mgr. Martin Magdolen continued the discussion with a remark associated with the absence of a remedy in the payment order proceedings under Act No. 307/2016 Coll. The current regulation of this procedure is not without pitfalls or shortcomings. Following the issuance of a payment order on the basis of an application filed as part of a payment order procedure, the defendant is required to substantiate his defence. The defendant is also required to submit a number of facts, which are directly imposed on him by the said law. However, the problem arises in cases, where the court evaluates the defence as substantially reasoned or meeting all the requirements – even in cases where it does not meet these standards. Thus, the discussion was primarily devoted to analysing several decisions of the Supreme Court of the Slovak Republic, which approved the procedure of the court of first instance, if it found the incorrectness of the assessment of the defence in the payment order proceedings.

Assoc. Prof. JUDr. Ing. Ondrej Blažo, PhD. closed the conference with a presentation concerning the issue of expropriation in the context of the ongoing COVID-19 pandemic. Especially, whether the measures restricting business activity adopted across the globe could amount to the concept of regulatory expropriation. It was shown that the issue at hand possesses complex facets ranging from the stabilisation and umbrella clauses to ever-extending body of international investment arbitration decisions. As has been demonstrated, the protection offered under the European Convention on Human Rights also plays an important role with regard to the protection of investments, by delimiting that such measures must not impose individual and excessive burden.

As was highlighted several times during the conference, the area of rights *in rem* still generates a broad discussion, which is connected not only with historical foundations of private law, but also the currently applicable law and even more importantly the possible future development. All these aspects were covered during the conference, although, as the conclusions of the formal and informal discussions proved, the researched areas provide still a lot of room for further evolution.

DOI: 10.46282/blr.2022.6.1.294

BRATISLAVA LAW REVIEW

PUBLISHED BY
THE FACULTY OF LAW,
COMENIUS UNIVERSITY
BRATISLAVA

ISSN (print): 2585-7088
ISSN (electronic): 2644-6359

ENSURING THE OPERATION OF THE CONSTITUTIONAL BODIES OF THE SLOVAK REPUBLIC DURING CRISIS SITUATIONS: CURRENT POSSIBILITIES, LIMITS AND POSSIBLE SOLUTIONS (BRATISLAVA, 20 APRIL 2022) / Daniel Takács, František Pažitný

Mgr. Daniel Takács
Comenius University Bratislava
Faculty of Law, Department of Constitutional Law;
Šafárikovo nám. 6;
818 00 Bratislava, Slovakia
daniel.takacs@flaw.uniba.sk
ORCID: 0000-0002-8405-3059

Mgr. František Pažitný
Slovak Academy of Sciences
Institute of State and Law
Klemensova 19
813 64 Bratislava, Slovakia
frantisek.pazitny@flaw.uniba.sk
ORCID: 0000-0001-6976-551X

This report was prepared as part of the research project VEGA No. 1/0824/21 titled "Ensuring the operation of the constitutional bodies of the Slovak Republic during crisis situations: current possibilities, limits and possible solutions".

Submitted : 13 June 2022
Published : 30 June 2022

Suggested citation:
Takács, D., Pažitný, F. (2022). Ensuring the Operation of the Constitutional Bodies of the Slovak Republic during Crisis Situations: Current Possibilities, Limits and Possible Solutions (Bratislava, 20 April 2022). *Bratislava Law Review*, 6(1), 155-158. https://doi.org/10.46282/blr.2022.6.1.295

On the 20th of April 2022, Comenius University in Bratislava, Faculty of Law, Department of Constitutional Law and Constitutional Committee of the National Council of the Slovak Republic organized an international scientific conference named „Ensuring the operation of the constitutional bodies of the Slovak Republic during crisis situations: current possibilities, limits and possible solutions". It was organised in the National Council building. This event was supported by French Institute in Bratislava.

One of the aims of the conference was to propose solutions to the problems that come with the current legislation in the form of the Constitutional Act on State Security.

The second but no less important goal was to gain valuable knowledge about foreign regulation in the field of state security through contributions presented by foreign guests.

The first part began with the introductory word of Assoc. Prof. JUDr. Marián Giba, PhD. and the Chairman of the Constitutional Law Committee of the National Council JUDr. Milan Vetrák PhD. The first presentation has Prof. Ján Svák from the Faculty of Law of Comenius University. In his contribution, he analysed the legitimacy for determining the occurrence of a crisis situation. Two important foreign guests spoke after him. The first foreign guest who presented his contribution was Prof. Douglas McKechnie from United States Air Force Academy in Colorado Springs, USA. He focused mainly on aspects of the independence of the Constitutional Court in a crisis situation. The second foreign guest was Prof. Basile Ridard from Université de Poitiers, France. In his contribution, he examined the effects of the pandemic on the functioning of parliaments in Europe.

The second part began with a presentation of the Constitutional Court judge JUDr. Róbert Šorl, PhD. He focused on law-making in Slovakia during a pandemic. His contribution was interesting mainly because it offered a view of a judge of the Constitutional Court of the Slovak Republic on regulations adopted by the Public Health Office of the Slovak Republic during a pandemic. The second speaker was JUDr. Petra Príbelská, PhD, judge of the Supreme Administrative Court of the Slovak Republic. In her contribution, she analysed the possibilities of using the powers of the Supreme Administrative Court of the Slovak Republic, for example judicial review of regulations issued by the Public Health Office of the Slovak Republic. The third speaker in this part was a foreign guest, Prof. Karel Klíma from the Metropolitan University in Prague. In contribution, he focused on examining the activities of the European Union institutions and bodies in crisis situations. The last speaker of the second part was Prof. Gabriela Dobrovičová from the Faculty of Law of Pavel Jozef Šafárik University in Košice. In her interesting contribution, she sought an answer to the question: "Who should make important decisions in the coronavirus crisis?"

The third part of the conference was devoted to the national constitutional anchoring of crisis situations and the subsequent procedures following their duration. The section was opened by Assoc. Prof. Mgr. Marek Káčer, PhD. from the Faculty of Law of the University of Trnava who dealt with the issue of extending the state of emergency in the pandemic year 2020. The specific situation that occurred in 2020 in connection with the extension of the election period was very critical mainly due to the circumstances that accompanied this process. The second speaker was Assoc. Prof. JUDr. Kamil Baraník, PhD., LL.M. from the Faculty of Law of the Matej Bel University in Banská Bystrica who dealt with the constitutional process in crisis situations.

The fourth part of the conference focused on individual aspects related to the duration of crisis situations. Participants from the home Faculty of Law, Comenius University in Bratislava spoke within this section. The introductory lecture was given by Assoc. Prof. JUDr. Marek Domin, PhD., who presented a paper focused on the responsible relationship between the executive and the legislature in times of crisis. Another speaker was Assoc. Prof. JUDr. Jozef Valuch, PhD., whose contribution was focused on a very interesting and at the same time important topic of disruption of the operation of not only the constitutional bodies of the state by cyber operations from the point of view of international law. Then, the word was given to JUDr. Stanislav Gaňa. PhD. and his contribution focused on the possibilities of exercising public power by means of long-distance communication during a pandemic. The fourth section was closed by Mgr. Vincent Bujňák, PhD., who focused on a specific law on the Rules of Procedure of the Parliamentary Council.

The final section was attended by doctoral students from the Department of Constitutional Law, Faculty of Law, Comenius University in Bratislava, and the Institute of State and Law of the Slovak Academy of Sciences, whose contributions focused on specific areas related to their research. The section was opened by Mgr. Daniel Takács, who dealt with the issue of extending the term of the National Council of the Slovak Republic during the crisis situation. He pointed out the absence of such a possibility in the constitutional regulation of war and the state of war. The following contributor was Mgr. František Pažitný, who focused on other aspects of the constitutional responsibility of constitutional bodies during the war and the state of war. Another contribution was presented by Mgr. Samuel Cibík, who focused on the budgetary responsibility of constitutional bodies in crisis situations. The last section was closed by Mgr. Mária Bezáková, who provided a general overview of the issue of the impact of crisis situations on the development of the principles of a democratic state and rule of law.

As part of the closing speech, the conference was closed by Assoc. Prof. JUDr. Marián Giba, PhD. who especially emphasized the conviction that the conclusions resulting from this conference should be reflected in the legislative activities of the National Council of the Slovak Republic and especially the parliamentary constitutional law committee in cooperation with which this conference took place.

DOI: 10.46282/blr.2022.6.1.295

BRATISLAVA LAW REVIEW

PUBLISHED BY
THE FACULTY OF LAW,
COMENIUS UNIVERSITY
BRATISLAVA

ISSN (print): 2585-7088
ISSN (electronic): 2644-6359

COMENIUS UNIVERSITY BRATISLAVA REPRESENTED AT THE HELGA PEDERSEN MOOT COURT COMPETITION 2021-2022 (STRASBOURG, FRANCE) / Sandra Sakolciová, Igor Hron, Adam Máčaj

Mgr. Sandra Sakolciová, PhD.
Comenius University Bratislava,
Faculty of Law, Department of
International Law and International
Relations; Šafárikovo nám. 6;
818 00 Bratislava, Slovakia.
sandra.sakolciova@flaw.uniba.sk
ORCID: 0000-0003-1693-7976

Mgr. Igor Hron
Comenius University Bratislava,
Faculty of Law, Department of Legal
History and Comparative Law;
Šafárikovo nám. 6;
818 00 Bratislava, Slovakia.
igor.hron@flaw.uniba.sk
ORCID: 0000-0002-7091-5850

Mgr. Adam Máčaj
Comenius University Bratislava,
Faculty of Law, Institute of European
Law; Šafárikovo nám. 6;
818 00 Bratislava, Slovakia.
adam.macaj@flaw.uniba.sk
ORCID: 0000-0002-3086-8025

Submitted : 02 June 2022
Published : 30 June 2022

Suggested citation:
Sakolciová, S., Hron, I., Máčaj, A. (2022). Comenius University Bratislava Represented at the Helga Pedersen Moot Court Competition 2021-2022 (Strasbourg, France). *Bratislava Law Review*, 6(1), 159-162. https://doi.org/10.46282/blr.2022.6.1.291

The 2021-2022 year of international moot court competition before the European Court of Human Rights had brought several milestones to the history of first moot court dedicated to educating law students about issues surrounding human rights in Europe and implementation of the European Convention on Human Rights. To conclude its first decade, the former European Human Rights Moot Court Competition has been rebranded as the Helga Pedersen Moot Court Competition (HPMCC), named after first female judge of the European Court of Human Rights. It has also been the first year of the competition to organize in-person oral finals since the outbreak of COVID-19 in 2020. Finally, this year

of the HPMCC allowed students representing Comenius University in Bratislava, Faculty of Law, to set new records for upcoming teams to beat.

The first stage of the competition this year consisted of written rounds, where teams of two to four law students from member states of the Council of Europe drafted memorials on behalf of the family of applicants, as well as the respondent state. The fictional case dealt with the responsibility of states for omissions in fighting climate change and preventing harm resulting from environmental hazards exacerbated by deteriorating climate. In the case, flash floods destroyed home of the applicants, and several of them were wounded, as well as suffered from mental health problems in the aftermath. The applicant's memorial argued that due to state's lackluster approach to climate change and obsolete environmental law that failed to address it and mitigate impact of emissions, human rights of the applicants were violated by the natural disaster the state failed to address. As a result, students had to argue that the harm the applicants suffered violated their right to life and prohibition of ill-treatment, as well as right to private life, protection of home and right to property under European Convention on Human Rights. On the other hand, students also had to prepare a memorial responding to the allegations from the point of view of the government, addressing the issues while arguing that state policies to protect environment and fight climate change have adequately safeguarded rights of the applicants against interference caused by natural forces, thereby fulfilling positive obligations of the state.

After submitting the written memorials, the competition is followed by a regional oral round, which has been a mandatory part of the moot court for each team for the last three years. The regional oral rounds took place remotely, due to the ongoing COVID-19 pandemic, and were organized by universities and European Law Students Associations in Ukraine, Greece and Poland. Between 10 and 12 March, a team from Comenius University in Bratislava, Faculty of Law participated in the virtual regional rounds, representing both applicants and the respondent state in two oral pleadings before judges with expertise in international human rights.

Upon receiving the results from both the written memorials and pleadings in the regional rounds, top eighteen teams qualified for the final oral round, which took place between 9 and 13 May in Strasbourg, France, accompanied by nineteenth team invited by the ELSA International from Ukraine. The team from Comenius University qualified for the finals this year for the second time in the history of the competition, as the only team from Slovakia, and from seventh place, the highest placement of any Slovak team in the history of the moot court. During both rounds, the teams were judged vastly by the professionals practicing at the European Court of Human Rights.

Written and oral parts of the competition require students to present different kinds of skills and are designed to prepare them for their future careers as human rights lawyers. Whereas the quality of the written memorials is reflected by the time and energy students put into researching and formulating arguments on paper, the oral part of the competition tests especially the ability to address any immediate issues and questions that arise in the courtroom. Throughout the whole competition, the participating students learn not only how to approach a complex case study involving difficult legal problems, but also how to undertake responsibility as they work in teams and often under time pressure.

The oral pleadings are usually the "fun" part, because they are more interactive. The simulated proceeding in both regional and final round is traditionally opened by the presiding judge who asks both teams to introduce their members and to present arguments. The thirty-five minutes of pleading by the Applicant is followed by the Respondent who has the same amount of time to address the counter-party's claims.

Afterwards, five minutes are granted to each party for a rebuttal. During the presentations, members of the bench can ask any additional questions they might have. Answering questions posed by judges is considered one of the most difficult tasks of the speakers. Once the time allocated for the rebuttals is up, the bench usually gives both teams short feedback on their performance for further improvement.

The final oral round taking place in Strasbourg was composed of preliminary rounds, where every team pleaded in a similar way to the regional rounds twice, representing both parties to the dispute. On the first pleading day, 10 May, the team from Comenius University in Bratislava, Faculty of Law represented the respondent state against the team from the University of Antwerp. During the next pleading day, the team argued on behalf of the applicants, while the respondent state was represented by the students of Durham University.

Compared to the regional rounds, the stakes in the preliminary rounds, as well as the follow-up quarter-finals, semi-finals and the final round, were raised, as the students were judged also by the professionals practicing at the European Court of Human Rights, among others by the Slovak case processing lawyer, Ms. Zuzana Kovalova, who also co-authored the case.

University of Oxford and University of Passau, having advanced through the preliminary rounds, quarter- and semi-finals, competed against each other in the grand final, on 13 May, which took place in the hearing room of the Grand Chamber of the European Court of Human Rights, with all remaining teams watching the face-off from the gallery.

The prize for the overall best team was well-deserved by the team from the University of Oxford, while several Best Orator prizes, as well as the Best Respondent Written Submission was given to the team of the University of Passau. The overall Best Applicant Written Submission was awarded to the Saint-Louis University, Brussels.

Apart from the exhausting competition schedule, the organisers prepared also a valuable academic programme for the participating teams. Worth mentioning are the opening keynote speeches of active judges of the European Court of Human Rights. The first, presented by Mr. Latif Huseynov, an Azerbaijan judge, devoted to the issues of global challenges the Court is currently facing. Among others, he underscored the controversial issues connected with the question of the Court's jurisdiction. Following his remarks, Ms. Anja Seibert-Fohr, a German judge, addressed the question of upholding the rule of law through interregional human rights dialogue, focusing principally on the issue of cross-referencing among international human rights bodies, contributing to universal human rights protection from a comparative perspective.

The participating teams were also provided with a social programme, commencing with the opening ceremony hosted by Mr. Manuel Montobbio, Permanent Representative of Spain to the Council of Europe, upholding the tradition that the opening ceremony is hosted by the state of the previous edition's winners.

The Comenius University in Bratislava, Faculty of Law team also had the honour to meet with the Slovak judge at the European Court of Human Rights, Ms. Alena Polackova. Madam judge showed the team one of the Strasbourg sightseeing gems, Parc de l'Orangerie, and provided them with an interesting insight into the work of judges and decision-making process at the Court. Moreover, an informal meeting with Registry lawyers from Slovakia took place at the premises of the Court. During this pleasant meeting, Ms. Trnkova and Ms. Bosanska discussed their role at the Court and motivated the aspiring lawyers to follow their career dreams. The first-hand experience with professionals from the Court was concluded by a dinner with colleagues from the Czech Republic.

DOI: 10.46282/blr.2022.6.1.291

The extraordinary opportunity to meet inspirational professionals went beyond the Court itself. The students and coaches were very pleased when they were contacted by the Permanent Representation of the Slovak Republic to the Council of Europe during their stay in Strasbourg. At the competition's closing ceremony, Ms. Oksana Tomova, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of the Slovak Republic to the Council of Europe and Mr. Radoslav Kusenda, Deputy Permanent Representative of the Slovak Republic to the Council of Europe, acknowledged the team's efforts and success and discussed many interesting topics. The students gained a precious insight into the role of state representatives in an international organisation, including the challenges that they face. The coaches from the Comenius University in Bratislava, Faculty of Law thanked the Permanent Representation for their invitation to meet and support the participants of the upcoming moot court editions.

The overall experience shows that competitions such as this one enables young people to develop not only their career paths, but also their personalities. Meeting peers and professionals from around the world and watching them all work towards strengthening human rights, democracy and rule of law is simply invaluable. Hard work is certain, but the benefits even more so! The Comenius University in Bratislava therefore encourages students to take part, discover their potential and help building a just world.

ANNOUNCEMENTS

The Upcoming Celebrations of the 100th Anniversary of the Faculty of Law of Comenius University Bratislava[1]

In 2021, the Faculty of Law of Comenius University celebrated its 100th anniversary. It was October 24, 1921, when the historically first semester opened in the building of the Faculty of Law, then located on Kapitulská Street. The celebrations of the 100th anniversary should take place a year ago, but measures in connection with Covid-19 made it impossible for us. However, it is never too late to celebrate such a beautiful anniversary of the Faculty of Law. Therefore the coming September 2022 will be a month full of celebrations, which will be outlined in the following lines.

We will celebrate with everyone - with the academy, students, families, and friends. During the month, everyone will find an opportunity to celebrate.

We will start formally with an opening ceremony in the form of a formal meeting of the Scientific Council. Immediately after the meeting, there will be a ceremonial opening of the permanent exhibition "100 Years of the Faculty", which will introduce the visitor to the history of the Faculty of Law of Comenius University and individual departments and institutes, together with their members. The first week will end with a gala evening with a rich program, which will be attended by, among others, our talented students with a dance performance.

The second week of the celebrations will be opened by the world-famous international scientific conference Bratislava Legal Forum, which will take place from 12-13 September 2022, with the main theme "Rule of Law and Academia in the Turbulences of 100 years". After the presentations, colleagues will meet with their families in the middle of the second week of the celebrations at the "Legal Family Day" event, which will be full of action programs from tourism to Devín to barbecue and boating activities in the shipyard.

The third week of the celebrations is linked to the beautiful moment of the opening of the 101st winter semester at the Faculty of Law. The start of the new semester will create an opportunity for students to join the celebrations of the 100th anniversary of the faculty. Furthermore, bachelor's and master's degree students can participate in the so-called Corporate Social Responsibility (CSR) program. CSR will include various activities of our students towards the public, such as student legal counselling for single parents or a legal clinic for communities, where selected secondary schools will be invited to a tour of the faculty with a final lecture on an interesting law topic. During the week, we will also try other volunteer activities such as a blood donation event, in which we aim to collect at least 100 litres of blood or a collection of clothes for various cooperating organizations.

In addition, the Faculty of Law will celebrate with its partners, who will offer our students a program in the form of discussions, workshops, and various internship offers. Students will thus have the opportunity to establish contact with faculty partners such as the Public Procurement Office, the Antimonopoly Office, the Supreme Court of the Slovak

[1] Author: Sára Kiššová, Institute of European Law, Faculty of Law, Comenius University Bratislava, e-mail: sara.kissova@flaw.uniba.sk

Republic, the Slovak Bar Association, the Nuclear Regulatory Authority, the National Safety Authority or the Representation of the European Commission.

We will celebrate the end of the third week of the celebrations with the Law Olympiad, where students will be able to compete not only against each other but also against their teachers in activities of various kinds - chess, film, sports.

Against the background of the third week of celebrations, the Diplomatic Academy will also be celebrating its 30th birthday with a symposium to which several important diplomatic names will be invited and announced to the public in the near future.

The celebrations will come to an end in the fourth week, and this week will be devoted to various discussions and lectures. Guests from different fields of activity will be invited, and this week will aim to open various interesting topics, introduce (not only to students) the functioning of various institutions, or present current issues from the world of law.

The celebrations will culminate in a joint concert by Cigánski diabli and Martina Šindlerová at the Refinery Gallery, dedicated mainly to our students, who will be able to have fun with good music and dance after two years.

BRATISLAVA LEGAL FORUM 2022

Comenius University Bratislava, Faculty of Law organizes on 12 and 13 September 2022 (Monday and Tuesday) under the auspices of the Alumni Club of Comenius University in Bratislava, Faculty of Law the eighth year of the international academic conference **"Bratislava Legal Forum 2022"**. The conference will be held in a hybrid form - in the premises of the Faculty of Law, Comenius University in Bratislava and at the same time in an audio-visual online form via the Microsoft TEAMS application.

This year's conference will be more significant because it will be organized as a part of the celebrations of the 100th anniversary of the founding of the Faculty of Law, Comenius University in Bratislava.

The primary topic of the plenary session is "Rule of Law and Academia in the Turbulences of 100 years".

The main aim of the conference is to create a space and platform for discussion between all legal professions on the one hand and academics on the other. The conference is, in accordance with the aforementioned aim, divided into a plenary session and parallel discussions conducted in topic-based sections in which attention will be paid to the issues and problems of the rule of law and its interaction with academia over a turbulent 100 years.

Within the plenary session and selected sections, the conference language is Slovak, Czech, and English.

Participants can register to the conference via online registration system available on the website: https://conferences.flaw.uniba.sk/.

The amount of the conference fee is 96, - EUR (including VAT) for personal participation and 72, - EUR (including VAT) for online participation.

The publication output from the conference is a reviewed collection of papers with an ISBN No. assigned to. It will be produced in an electronic form and will be permanently accessible on the website of the conference and on the website of the Faculty of Law, Comenius University in Bratislava. The reviewed collection of papers will be incorporated into the library database systems as well.

More information about the conference can be found on the conference website: https://bpf.flaw.uniba.sk/.

Contact e-mail to the conference organising committee: bpf@flaw.uniba.sk.

We are looking forward to your participation!

LIST OF SECTIONS AND THEIR TOPICS:

No.	Sections & Topics	Language
1)	**Section of the main theme of the conference** *"Rule of Law and Academia in the Turbulences of 100 years"*	SK/CZ/EN
2)	**Theory of Law and Philosophy of Law Section** *The problem of freedom (academic, civil, metaphysical)*	SK/CZ/EN
3)	**Roman Law, Canon Law and Ecclesiastical Law Section** *Roman and canon studies and justitia in the changes of thousands of years*	SK/CZ
4)	**Legal History and Comparative Law Section** *Terminology of the Private Law in the Slovak History*	SK/CZ
5)	**International Law and International Relations Section** *Rule of law protection at supranational and international level and its impact on national legal order*	SK/CZ/EN
6)	**Constitutional Law Section** *30 years of the Constitution of the Slovak Republic – experiences and perspectives in good and bad weather*	SK/CZ/EN
7)	**Administrative Law Section** *The owner of the land as a subject of administrative and legal relations*	SK/CZ/EN
8)	**Administrative Law Section** *Administrative punishment and administrative sanctions in Europe*	EN
9)	**Environmental and Climate Law Section** *Improving the effectiveness of the fight against illegal activities in the field of environmental protection*	SK/CZ/EN
10)	**Financial Law Section** *Changes of Financial Law, its science and teaching over time*	SK/CZ/EN
11)	**Commercial Law and Economic Law Section** *Recodification of company law – sources of inspiration and expected solutions to the challenges of the third millennium*	SK/CZ/EN
12)	**Labour Law and Social Security Law Section** *Raison d´être of the labour law and social security law in Slovakia – 100 years of evolution and prospects for the future*	SK/CZ/EN
13)	**Civil Law Section** *Current application problems in the field of family law and related proceedings under the Civil Non-dispute Code*	SK/CZ/EN
14)	**Criminal Law, Criminology and Criminalistics Section** *The efficiency of pre-trial proceedings – current status and challenges for the future*	SK/CZ/EN
15)	**European Law Section** *Rule of Law: Precious Gem? Apple of Discord?*	EN
16)	**Information Technology Law and Intellectual Property Law Section** *Legal challenges of automated world*	EN
17)	**Clinical Legal Education Section** *Accessibility of legal services: Responsibility of a state, legal profession of academia?*	SK/CZ/EN

Interdisciplinary Aspects of the Status of Transgender People in Society

The Comenius University Bratislava, Faculty of Law host an international conference in September 2022 related to the situation of Trans-Gender People in Slovakia entitled:

„Interdisciplinary Aspects of the Status of Transgender People in Society"

This conference is a part of the research project of the Scientific Grant Agency of Ministry of Education Nr. 1/0350/21: *„Trans-Identity of minors. Ethical and Legal Aspects related to Informed Consent."*

The aim of the conference is to create a space for a substantive and scientific discussion on the status of transgender people in society with the potential to identify shortcomings in the current legislation not only in the Slovak Republic, but also in other legal systems of Central European countries. Speakers are mainly members of the Faculty of Law in Bratislava, Faculty of Medicine in Vienna, and Faculty of Law in Linz, as well as experts from the field of Psychology and Psychiatry.

Date: September 22nd at 9:00 AM in the premises of Comenius University Bratislava, Faculty of Law, Šafárikovo námestie č. 6. Conference languages: Slovak, Czech and English.

In case of additional queries, please do not hesitate to contact the conference organizing team at the following email addresses: olexij.metenkanyc@flaw.uniba.sk and/or tamara.cipkova@flaw.uniba.sk

We look forward to seeing colleagues who are engaged with the issues outlined above, and both the scientific community and the wider public are warmly welcomed.