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Bratislava Law Review is an international legal journal published by the Faculty of Law of Comenius University Bratislava, Slovakia (till the end of 2019 it was published by Wolters Kluwer in cooperation with the Faculty of Law of the Comenius University in Bratislava). It seeks to support legal discourse and research and promote critical legal thinking in a global extent. The journal offers a platform for fruitful scholarly discussions via various channels – be it lengthy scholarly papers, discussion papers, book reviews, annotations, or conference reports. Bratislava Law Review focuses on publishing papers not only from the area of legal theory and legal philosophy but also other topics with international aspects (international law, EU law, regulation of the global business). Comparative papers and papers devoted to interesting trends and issues in national law that reflect various global challenges and could inspire legal knowledge and its application in other countries are also welcomed.

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A NEW STRATEGIC APPROACH TOWARDS FINANCIAL REGULATION: A COMPARATIVE OVERVIEW OF THE ENGLISH AND ITALIAN LEGAL SYSTEM BETWEEN REGULATORY NEEDS AND TECHNOLOGY INNOVATIONS / Marco Boldini

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Abstract: *This paper analyses the dynamics and evolutionary strategies that are occurring in regulated markets in light of the impacts of new technological innovations in the financial sector and how different jurisdictions are seeking the right balance between fostering innovation and competition and ensuring customers protection. The main focus of the paper is to present regulatory sandboxes as one of the novel ways of regulating financial services, especially fintech. The article is characterized by a comparative approach based on my professional experience as a lawyer in UK and Italy, as well as my experience as an academic in the financial markets sector.*

Key words: *Financial regulation; FinTech; RegTech; Regulatory sandbox; Public Law; Comparative Law; UK; Italy; EU*

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1. INTRODUCTION

Since finance is a legal construct, there is always the need to regulate it. Otherwise, as the financial crisis showed, if private entities are left free to regulate themselves, no proper guarantees for investors would be provided.

Finance requires regulation, as any transaction carried out on financial markets needs to be ruled by respective agreements and thus law to ensure their effectiveness and enforceability.

Traditionally, the law-making approach to financial markets has debated around two main concepts: deregulation on one side and strict regulation on the other. The debate is the result of the intricacies naturally embedded in the financial world and the constant evolution of the products developed by the industry.

As the industry itself is very sensitive to innovation and development, it stands as the main promoter of economic transformations which generally have deep impacts on

theoretical concepts of laws (Amirante, 2008),[1] and for this reason, a careful adjustment of the legal system itself is required, especially taking for granted that, as Sabino Cassese (2009) recalled, juridical normativism and juspositivism should be considered inadequate to deal with the new millennium challenges because of the rapidity of economic and technological evolution, with its immediate impact on fundamental social structures.

In this regard, it is worth noticing that the transformation in the financial market sector is part of a wider global transformation of the law making process which is shifting – as affirmed by Carlo Amirante (2008)[2] - from a "pyramidal" vision into a "net" (Ost and Van de Kerchove, 2010)[3] or "horizontal" vision which involves different players of the social and economic texture due to the fact that – as also suggested by Paolo Grossi (2020)[4] – the complexity of modern society is hardly contained in codes composed by rigid norms. In front of those transformations, therefore, a "pyramidal" approach risks to be anachronistic, or at least not sufficient to grasp the dynamism of societies, as well as the pluralism of sources, actors, and relationships involved. Again, in the words of the author, the characteristics of the "net" approach are "the realization of a juridical unity while respecting its internal diversities; an intensely dialectical relationship between juridical unity and individual diversities; the valorisation of jurists in the production of law (since law is a matter for jurists and not for politicians) and, above all, of juridical science for its capacity to design principles that harmoniously unite and tend to be boundless" (Grossi, 2020), so that the regulatory activity should be inventive "in the etymological sense of find, discover by looking".

The debate on which regulatory approach is the most feasible went on for a long time. In the last years, after a hyper regulation due to the aim of mitigation risks for investors, some tentative to softer the regulatory approach have been introduced, as the involvement of market players through public consultations and the adoption of second and third level measures upon coordination with trade associations. The reason of such softer approach is that the law on financial markets shall take into consideration, together with the mitigating risks and protecting investors, the promotion of competitiveness and economic growth.

After decades in which hyper-regulation seemed to be, at least in Europe and North America, the most common approach to regulate finance – mainly due to the tentative to mitigate the risks arising from financial crisis and scandals (Mehrling, 2013)

[1] As masterfully highlighted by Amirante in one of his masterpieces *Dalla forma Stato alla forma mercato*, the legal aspect has become a fundamental moment of the economic process, arguing that economic issues are never merely technical, and to reduce them to mere technique is to devalue the role of parliamentary institutions.

[2] In his work, Amirante excellently analyses the effects of globalization on the institutions and the legal system of the State, by highlighting the new dimension of the state-market, that is, of the market form where the state and its original characters are put in a functional position and ultimately subordinated to the rules and the needs of the market itself.

[3] The two authors argue that from the pyramidal (regulatory) conception we are moving to a "deregulatory" conception, in the sense that regulation occurs through horizontal, "network" relationships.

[4] In one of his latest works, the author highlights how the post-modern society is abandoning the legal culture of the Age of Enlightenment, characterized by a rigid and hierarchical legal absolutism, in which the sovereign power proposed itself as the sole holder of the law, while society assumed a non-role of merely passive platform, while adopting more typical features of the Medieval legal dynamism, based on the juridical analysis of the historical development of society and its customs. In that sense, analyzing the principle of legality, the author writes: "The principle of legality was, in fact, supported by a single purpose: the creation by the State of a legislative right, expression of its will, neither read nor invented elsewhere. With a further and essential firm point: beyond this there was only the vast territory of juridic irrelevance, a complex socio-economic reality transformable into unifying law through an act of the will of the State [...] The principle of legality perfectly realized the most rigid juridical monism and perfectly realized the only possible itinerary to arrive at the creation of law".

– in the last years, especially with the aim of encouraging the adoption of new technologies in finance, innovative regulatory approaches become more popular, as pivotal regimes and regulatory sandboxes. In that sense as a matter of fact the UK, as I can testify from my own experience as a scholar and practitioner, has generally positioned itself as the main promoter of innovative and flexible institutes, also helped by the legal context of Common law, which historically rejected the myth of the rigidity of law, rather favouring a more flexible juridical system which ended up to be a perfect incubator of innovative solutions, very adaptable to the continue challenges posed by development of the economic texture.

The need for a more flexible regime is now more evident in the FinTech market (Alpa, 2019),[5] where there is a clear awareness that strict rules would be inefficient because they would discourage the adoption of new technologies and would slow the development of the sector (Carruthers, 2020). The main aim of RegTech is, indeed, to balance the fostering of digital innovation together with the protection of clients and the markets.

Regulatory sandboxes are also an example of new, lighter approaches to regulate FinTech, allowing firms to enter a regulated environment but benefitting from some exemptions to the ordinary rules.

The present work is divided into three parts. The first part offers an overview on the importance of the legal and juridical context with respect to the nature of the financial phenomenon and the markets in which it takes place, as well as the prevailing approaches in the interpretation of the phenomenon. The second part, instead, provides a focus on the solutions and regulatory interventions adopted in different jurisdictions for the regulation of the FinTech phenomenon, through the involvement at different levels of production and implementation of legislation by the many players involved in the sector, in order to adapt the regulatory system to the needs and opportunities offered by modern finance. Ultimately, in the third part, the tool of the regulatory sandbox is analysed, as well as its benefits for businesses and for the regulatory activity of the sector authorities, and the various models adopted and being adopted in the main jurisdictions.

2. FINANCIAL MARKETS AS A "LEGAL CONSTRUCTION"

As Katharina Pistor (2013) well explains, financial markets are a legal construction: each transaction on financial markets relies on contracts, from the sale and purchase of securities on stock exchanges to the subscription of derivate products to the granting of a financing. This means that all financial transactions need to be implemented according to the legal terms and conditions provided for in relevant agreements, which therefore need to be compliant with the applicable legal environment to ensure their proper enforcement. Indeed, law is decisive not only to set the terms of the agreements and to provide a perimeter in which parties may negotiate but also – especially – to ensure remedies in case of infringement, providing proper guarantees.

To ensure such intrinsically necessary support to financial markets, several approaches by legislators have been adopted, varying from different jurisdictions and ages. These approaches range from "doing nothing", which may be permissive or highly restrictive, depending on the context, to cautious permissiveness on a case-by-case basis

[5] As Guido Alpa masterfully pointed out, *"the science-driven technique has introduced a new revolution, precisely a digital revolution, and law has had to chase scientific discoveries and technical applications to economic relations in order to make the most appropriate choices that could not be entrusted to technicians and scientists"*.

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with reference to different sectors or players, to structured experimentalism such as regulatory sandboxes or piloting, and to the development of specific new regulatory frameworks, as happens mainly, in the European Union.

Because financial markets are legal constructs, a complete deregulation, which is sometimes desired due to the inadequacy of traditional legal instruments, may not be deemed to be an option at all (Krönke, 2021).[6] The absence of rules cannot exist, and thus deregulation may rather mean the absence of specific rules and the consequent application of the common civil rules or may lead to an implicit delegation of the law-making process to subjects different from legislators and regulators (Pistor, 2013), as trade associations of financial intermediaries. In that sense several initiatives, both in the UK as well as in several European countries, are taking place on the assumption that, for the moment, the best strategy to balance regulatory needs and technology innovations lays on a close and osmotic dialogue between legislators, regulators, and the different players and participants involved in the financial markets.

In certain sectors is nowadays widely common the adoption of a very sophisticated regulation and other approaches have been drastically overcome (i. e., the securities exchanges on regulated markets follow similar rules in different countries worldwide), while in others, such as those concerning the application of new technologies in finance (i. e., the so-called "FinTech"), the alternating of different approaches is still evident. Indeed, only in the last years in the European Union the adoption of common rules on main examples of Fintech (as the exchanges of crypto-assets or the crowdfunding)[7] has become popular, also to overcome the different approaches adopted in Member States which included specific regulations and testing initiatives, with the overall aim to, even with caution, support the development of technologies in finance and the consequent financial and economic growth.

3. FROM THE REGULATION OF FINANCIAL MARKETS TO "REGTECH"

In the past few years, following some financial scandals which highlighted the inadequacy of the existing rules, the approach appearing to be predominant was the hyper-regulation of financial markets (Mehrling, 2013).

For example, in the aftermath of the 2008 global financial crisis, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[8] enhanced the regulatory authority to oversee the US regulated markets, while in Europe, the review of the MIFID framework entered in the scope of the programme of the European Commission to provide investors with more guarantees protecting them from new risks. Together with MiFID II also other measures have been adopted in the European Union (i. e., the directive on the alternative investment funds,[9] the new prospectus regulation,[10] the benchmarks

[6] The author leans towards the possibility of regulating techno-finance by resorting to the instruments provided by current public law, especially administrative law. In this perspective, new regulatory tools, such as the sandbox, would be compatible with existing law.

[7] The European Commission proposed a Digital Finance Package composed of four highly relevant proposals for regulations. The first two are dedicated to crypto assets, the MiCA (Markets in Crypto-Assets regulation) and the Pilot (pilot regime for market infrastructures based on DLT). The third, the DORA Regulation, is dedicated to security in the financial sector, while the proposal on Artificial Intelligence was presented on 21 April 2021. In the crowdfunding sector the Regulation on European Crowdfunding Service Providers for Business entered into force in November 2021.

[8] The Dodd-Frank Act.

[9] The AIFMD, i. e. the Directive on Alternative Investment Fund Managers (2011).

[10] Regulation on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (2017).

regulation, the EMIR)[11] both to review and amend existing rules and to regulate sectors – as those of alternative funds, benchmarks and derivatives – not already ruled. The overall result was a highly regulated market.

However, within the perimeter outlined by the rules set by the public (legislators and regulators), private market players conduct their business: financial markets indeed are essential hybrid: *not state or market, private or public, but always and necessarily both* (Mehrling, 2013).

This is one of the reasons why, traditionally, also the private sector has been involved in the law-making process about financial markets. Within the hyperregulation following the financial crisis, several ways to match private and public needs have been enforced, trying to engage market players in the law-making process: the participation of such actors into the setting-up and refinement of the regulatory perimeter into which they make business, allows to overcome the traditional dualism between public and private.

A traditional way to involve financial entities into such policy-making process is the promotion, mainly through sectorial and ad hoc trade associations, of the so-called best practices or guidelines, often validated by national competent authorities. Such rules, being at their best simply "soft law", are not binding but a "comply or explain" principle may be relevant for those entities, which decide to disregard such guidelines.

An example of such practices is the "Corporate Governance Code" which has been issued by Borsa Italiana, the Italian Stock Exchange. The adoption of and compliance with the Corporate Governance Code is voluntary for Italian listed companies, but issuers who adopt it shall state in their Corporate Governance Reports which specific recommendations, laid down in principles and criteria, they have departed from and, for each one, explain how the company has not complied and relative reasons.

Other similar initiatives in Italy have been launched by Assogestioni, the trade association of Italian asset management companies, which in recent years adopted guidelines on the main aspects of financial regulation, such as the management of conflicts of interests – both from a governance and contractual perspective – the best execution of the clients` orders. In the provision of portfolio management, and inducements according to the AIFMD and MIFID II. Such guidelines have a very practical attitude to guide companies in the processes to adopt internally and have been validated by Consob,[12] the Italian Securities and Exchange Commission, supervisory authority of the Italian financial market, with the result that companies in compliance with them would be deemed to be compliant with the overall applicable legal framework.

Another example of initiatives sponsored by private entities and accepted as best practices in the markets, on a global basis, has been launched by the International Swaps and Derivatives Association ("ISDA"), a private organization that brought together the major issuers and brokers of derivative instruments. The association played a critical role in the rise of these markets, creating standard contracts, adapted in different jurisdictions around the world. Furthermore, ISDA not only promotes the adoption of best practices but also lobbies legislatures to adapt their legal frameworks (in particular bankruptcy laws) to their agreements and forces, to this extent, the same law-making process.

[11] Regulation on OTC derivatives, central counterparties and trade repositories (2012).

[12] Among other activities, CONSOB is responsible for: a) verifying the transparency and correctness of the conduct of operators in order to safeguard the confidence and competitiveness of the financial system, the protection of investors, and compliance with financial regulations; b) supervising in order to prevent and, where necessary, sanction any improper conduct; it exercises the powers granted by law so that investors are provided with the information necessary to make informed investment choices; c) working to guarantee maximum efficiency in trading, ensuring the quality of prices as well as the efficiency and certainty of the methods of execution of contracts concluded on regulated markets.

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The lobbying activity carried out by market associations is a common practice in the financial markets and in some cases it is formalised within specific processes to involve them, through public consultations, in the dialogue with National Competent Authorities who are required to adopt the so-called "second level" measures, i. e. the regulatory acts which implement primary laws through regulations and recommendations, both at the European level (e. g. by EFAMA, the asset management companies trade association) and at the national level.

The discussion on which of the mentioned approaches to regulate finance – from the deregulation to the hyperregulation and the "soft law" – is the most efficient has again been debated due to the need to regulate a new trend: the application of technology in finance.

FinTech ("financial technology") is a term used to describe the application of new technologies – such as blockchain, smart contracts and the distributed ledger technology (DLT) – to finance that seeks to improve and automate the delivery and use of financial services. FinTech is used to help companies and consumers better manage their financial operations and processes by using software and algorithms that are used on digital devices.

Notably, the use of technologies in finance leads to a dual result: on one hand, it allows the provision of the traditional services and products through new digital channels (i. e. the access to banking services through apps and website, the trading online) in a process known as "digital transformation", while on the other hand it allows the creation of new services and products, from those more similar to existing ones, (i. e. crowdfunding) to those more innovative, such as crypto-assets and relevant services.

Technology is therefore transforming financial markets around the world, generating new opportunities on one side and new risks (i. e., technology risk, cyber security, operational resilience) on the other. Regulators must develop new approaches to regulate FinTech ("RegTech") that balance the benefits of innovation and consequent financial growth with the need for financial stability and consumer protection.

To regulate FinTech, legislators around the world are testing very diverse approaches, which vary from a total un-regulation, with no changes in the existing regulatory framework to include such new activities, to FinTech specific regulations.

In particular, where legislators decide to provide for specific rules on FinTech, different methods may be adopted. As mentioned above, the application of technology in finance may lead both to the provision of traditional services through innovative means and to the development of new services and products. Those different trends require for different rules, *rectius* for different regulatory approaches. In fact, while in the first hypothesis a mere review of existing rules may be sufficient, in the second one, new specific rules may become necessary. Furthermore, it is not always simple to distinguish exactly between a new service at all and a new way to provide traditional services, and thus a mixed approach is often adopted.

For example, in the European Union, within the "Digital Financial Package" the European Commission declares to be intended to adopt several measures, both to review and amend the financial and banking regulation (e. g. the MIFID rules to include in the list of financial instruments those crypto-assets having similar features, as some security-tokens) (ii) adopt new rules, such as the proposal for a regulation on the market in crypto-assets (MICA), an innovative set of rules applying to certain categories of crypto-assets, their issuers and services provider, in part similar to the MIFID rules and in part to those of the Prospectus Regulation.

Furthermore, some measures have already been adopted at the European Union level, such as the Regulation on European crowdfunding service providers for business,

a very first example of how new phenomenon, such as the rising of capital through web portals, leads to the need of a new set of rules, specifically designed based on the features on the new service, even if in accordance with general principle and traditional guarantees for investors provided by the law.

4. A NEW APPROACH TO REGULATE FINTECH: THE REGULATORY SANDBOXES

Recently, a new approach to soften regulation on financial markets has been adopted around the world (Attrey et al., 2020; Corapi, 2019; Eberle, 2020; *FinTech: Regulatory Sandboxes and Innovation Hub (JC 2018 74)*, 2018; Krönke, 2021; Parenti, 2020; Quan, 2021; Zetzsche et al., 2017): the introduction of "regulatory sandboxes", i. e., specific regulatory frameworks under which firms are allowed to provide regulated services benefitting from temporary exemptions from the most stringent rules that would be applicable under the ordinary regime or, to use the words of Ringe and Ruof (2020), "*a safe playground in which to experiment, collect experiences and play without having to face the strict rules of the 'real world'*". As a result of the hyper-regulation of financial markets, in fact, most of the services concerning financial transactions are subject to strict rules, and firms to perform them need to be licensed by national competent authorities and subject to their surveillance. On the contrary, access to a regulatory sandbox would allow firms, under certain conditions, to provide regulated activities benefitting from a less restrictive regime.

FinTech regulatory sandboxes have recently been, introduced in several countries worldwide (Goo and Heo, 2020). In Europe the first country to implement them was the United Kingdom where, since it was launched, it has undergone numerous evolutions updating to different versions (Quan, 2021), the regulatory sandbox has operated on a cohort basis, allowing firms to apply during a specific window in the year until August 2021, when the regulatory sandbox became always open, allowing companies to submit applications throughout the entire year (Kalifa, 2021).

In the wake of the excellent results observed in the UK, the European Parliament, in a resolution of May 17, 2017, called for the introduction of the testing regime, recommending that competent authorities "allow and encourage controlled experimentation with new technologies for new and existing market participants" further specifying that "such a controlled environment for testing could take the form and space of regulatory testing ("sandbox") for Fintech services with potential societal benefits, which brings together a wide range of market participants and has already been successfully introduced in several Member States".[13]

Even if a common regulatory framework for the sandbox in Europe is still far from being realized, nevertheless the European Commission has also acknowledged equal dignity to the initiatives undertaken in some Member States, almost underlining their legal foundations by stating that "the competent national authorities are obliged to apply the relevant European Union rules on financial services, which nevertheless provide for a margin of discretion as regards the application of the principles of proportionality and flexibility enshrined therein. This can be particularly useful in the context of technological innovation (Commission et al., 2018). In Italy, in 2021, first windows to apply to the new FinTech regulatory sandbox have been opened too, and the next months will allow to understand if and to which extent the Italian market will effectively benefit from it.

[13] Resolution 2016/2243(INI) on Financial Technology: The Influence of Technology on the Future of the financial Sector (2017).

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The conditions for admission to a regulatory sandbox are different in each jurisdiction, but common elements exist (*International Guide to Regulatory Fintech Sandboxes*, 2021). Namely, to be part of the sandbox, firms generally need to prove that their business in the financial, banking, and insurance sectors has economic soundness and innovative features in respect to the existing market. Further specific requirements, such as the AuM under a certain threshold, target clients, and internal organizational structure, may apply too.

The main benefit of regulatory sandboxes is the fact that they permit firms to experiment innovative services and products in the market, with real clients. A pivotal period under the sandbox gives firms the opportunity to better understand the need of consumers preparing their business to enter it on an ordinary basis. Furthermore, while taking advantages of less strict rules, firms would always be under the continuous surveillance of competent authorities, thus avoiding the risk of non-compliance or incurring sanctions for the activities performed.

At the same time, also legislators and regulators may test the regulatory framework and dialogue with market players adopting a collaborative approach. In that view, sanctioning powers, which were previously seen as an "essential" element of the juridical experience in order to drive players' activity and to deter them from harmful behaviour towards investors and ultimately towards the stability and confidence in financial markets, have now been replaced by a friendly and reciprocal dialogue and assistance, aimed at analysing, defining and taking concrete initiatives on the fostering both competition and customers' guarantees in the financial markets. The dialogue helps to better understand the digital transformation taking place within the financial markets, from the regulator's/legislator's perspective, and to favour from a less stringent regime in order to test and launch activities, which would otherwise have been hampered by law, from the players' perspective.

Finally, regulatory sandboxes allow harmonization, even if with some exemptions from ordinary rules, and therefore provide for lower legal and compliance costs for firms. Indeed, sandboxes do not lead to a total reduction of such costs because to be allowed to a sandbox, companies shall prove the occurrence of certain requirements and thus several activities are required for the submission of the application.

Furthermore, in certain regimes, firms entering the sandboxes are allowed to require the competent authorities to be subject to specific rules benefitting from individual exemptions granted on a case-by-case basis. This, even if it is a concrete benefit for companies, leads to a non-overall harmonization, to certain risks for a fair competition between companies and – last but not least – to less guarantees for the protection of clients.

5. CONCLUSION

The need to regulate financial markets is strictly related to the nature of finance, which is a sort of legal construction requiring rules for the settlement and enforcement, through agreements, of each transaction.

This, together with the aim to provide guarantees for investors to protect them from the risks that emerged during the recent financial scandals, has led to a hyper-regulation of the market. If the provision of strict rules is certainly positive for the mitigation of risks and protection of clients, this could also hinder the development of new businesses and slow the overall economic growth.

The need for a balance between those different trends is traditionally a subject of debate about which is the most efficient approach to regulate finance. Furthermore,

the emerging application of technology in finance ("FinTech") has made this topic even more relevant because, despite the need to mitigate new significant risks arising from the use of digital instruments, at the same time there is the awareness that too many burdens for companies would discourage the development of this proficient market.

Thus, after decades of hyper-regulation, in the very last years, a new softer approach emerged including the involvement of private entities in the law-making process and the introduction of experimentations, such as the regulatory sandboxes.

FinTech regulatory sandboxes seem to be a very interesting approach allowing firms, especially start-ups and independent companies not belonging to a big banking group and thus not always able to bear high compliance costs, to develop their business benefiting from some exemptions from ordinary rules. At the same time, the ongoing surveillance by national competent authorities would guarantee proper protection of market stability and investors. Regulatory sandboxes could be very useful for entering the market by new entrepreneurs, as the UK experiences have already shown and, let us hope, that also the Italian new regime[14] will demonstrate.

That said, the experience, in particular that of the United Kingdom, well represented in the Kalifa Review, and Italy, still in the start-up phase, also returns to the interpreters some limits of the regulatory sandboxes. If some of these are inherent in the typical characteristics of the sandboxes, namely partial (and not total) harmonization, reduction (and not elimination) of compliance costs and related risks, others depend instead on the way in which they have been, or have not been, regulated in the various jurisdictions. Consider, for example, the lack of a harmonized regime at European level and therefore the impossibility to operate cross-border, a real paradox in the financial sector. And it is undoubtedly on these last aspects that it will be worthwhile to focus the attention of interpreters and operators, in order to identify solutions to improve a system certainly valid for the FinTech sector and all those markets characterized by a high degree of innovation, and which could represent a useful instrument for the regulatory framework to keep up with disruptive changes brought by new digital technologies.

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GENESIS OF LEGAL REGULATION WEB AND THE MODEL OF THE ELECTRONIC JURISDICTION OF THE METAVERSE / Oleksii Kostenko, Vladimir Furashev, Dmytro Zhuravlov & Oleksii Dniprov

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Abstract: *The study examines the transformation of scientific views and approaches to the problem of expediency and necessity of legal regulation of public relations, emerging from the evolution of the world system of public electronic resources in the transmission of information and Internet data from Web 1.0, Web 2.0 to Web 3.0. The stages of formation of the role and place of electronic jurisdiction in public relations are also investigated. Legal regulation of modern relations in virtual and augmented reality environments with the use of Web 3.0 technologies is not available today. At the same time, there are precedents for the application of certain provisions of analogue law to address legal uncertainties in the virtual environment, such as establishing ownership of virtual non-property assets, buying/selling of virtual non-property assets, liability for misappropriation of virtual non-property assets, etc. Obviously, the problem of legal regulation by the rules of analogue law in the virtual environment cannot be fully addressed. The solution to this problem is possible by creating a comprehensive e-jurisdiction and developing the Metaverse Grand Charter of Laws to regulate public relations in the meta-universe and to establish new branch of e-law. Given the urgency of the problem, the model of e-jurisdiction Grand Charter of Laws Metaverse is proposed. The model of complex electronic jurisdiction of Metaverse will allow to create basic conceptual apparatus, doctrinal and normative and legal concepts, to define objects and subjects of legal relations in Metaverse, to establish the basic forms of legal relations and mutual relations in Metaverse. This, in turn, will be the basis for reforming analogue legislation, partial interoperability in the digital environment and the development of new regulations in various areas of law and will stimulate the establishment of new e-jurisdiction. The study proposes the construction and basic elements of electronic jurisdiction, mechanisms for the separation of electronic offences and interaction with analogue jurisdictions. E-jurisdiction of the Metaverse Grand Charter of Laws will provide legal regulation of public relations both directly in Metaverse and in public relations related to the analogue and electronic world.*

Key words: *Metaverse; Cyberspace; Electronic Personalities; Avatars; Digital Humanoids; Electronic Jurisdiction; Web 3.0 Decentraland; Virtual Reality; Augmented Reality; AI; ASI; Cyber Laws; Laws Metaverse*

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1. INTRODUCTION

Historically, our civilization has passed three communication epochs – verbal, when information in the society was transmitted only orally; verbal and sign, where information was transmitted both verbally, and by means of special symbols, meaning letters, words, actions, and events; verbal and written, during which printed literature appeared. Today, humanity has entered the fourth epoch, an era dominated by electronic communication, where integrating information and communication technologies with previous forms of communication.

This epoch has also gone through a path of transformation from archaic computers to meta-universal technology. Metaverse becomes not only an advancing era of communication, but it also becomes a new scientific and technical centre for the development of society, a battery and a designer of modern technologies, a generator of new suppleness, a tool for helping people to survive. It becomes an independent medium, functioning in parallel with the physical world and laws, which requires a certain rethinking in the current society (Shaoying et al., 2022).

The future Metaverse will become a large open scalable system. This system is being created simultaneously covering cyberspace, hardware terminals, different manufacturers and users, providing a wide range of application scenarios in virtual and augmented reality (AR/VR-environments), demonstrating the ultimate form of a super ecosystem. However, without proper legal regulation, the territory of «virtual freedom» can turn into a destructive tool. Only with the support of the law, it is possible to ensure legal regulation of social relations in the metaverse (Pengfei, 2022).

In the present, a handful of different meta-worlds are functioning: Horizon Worlds, Ceek city, Baidu Xi Rang, Metaverse Facebook, Decentraland (Ethereum), Emirates Metaverse, Expanded Virtual World, Qualcomm Nvidia Omniverse iz zasusvannymi technologies AI, AR / VR, holograms, XR-platforms, distribution registers, neural networks, quantum technologies and other technical solutions.

Obviously, the regulation of legal rights in Metaverse is considered a dividing line between electronic gaming software and application products. The legal regulation itself is fragmented and situational, applying existing analogous laws and regulatory acts such as codes, regulations, and standards.

Besides, there is a practice of conducting «experimental legal regimes», known worldwide as «regulatory sandboxes» or «legal incubators», in which the Government determines special legal regulation for a valid period in certain areas for the development of AR/VR environment.

The practice of using metaverses has already had several precedents for the application of certain provisions to resolve legal uncertainties in the virtual environment, such as establishing ownership of virtual intangible assets, buying/selling virtual intangible assets, liability for misappropriation of virtual assets with the signs of various types of discrimination and moral violence, the spread of ideologies of racism and fascism, etc. At the same time, there are more and more types of torts that have a nature exclusively in the Metaverse and should be regulated exclusively within the Metaverse.

Besides, a new perspective acquires the problem of legal regulation of the use of identity (personal) data, which will become the basis for the creation and functioning in the metaverses of virtual avatars or electronic humanoids.

Given the urgency of the problem, there is a need to create a single model of e-jurisdiction, based on which to develop the legislative framework for Metaverse.

Nowadays, this approach is unique, and the proposed Model of Integrated Electronic Jurisdiction Metaverse should become the basis not only for scientific discussions but also for the research in law in order to create initial model legislation that should provide legal regulation of public relations in Metaverse, as well as to launch the digital transformation of analogue legislation.

2. LEGAL REGULATION OF PUBLIC RELATIONS IN THE ELECTRONIC ENVIRONMENT AT THE STAGE OF TECHNOLOGY DEVELOPMENT WEB 1.0

The late 1990s and early 2000s saw the development of information and communication technologies related to the dissemination of information over the Internet. At that time, the environment of electronic resources was a static website designed for reading and viewing – Web 1.0. These information resources did not have interactive elements, multimedia, and did not have the features that allowed users to communicate online, share files, etc. The website creation tool was a number of HTML markup language tags that performed the design function. Besides, the speed of the Internet connection was not enough to transfer images and videos.

At the same time, many scientists saw in this technology the prospects not only for the application in broad fields of science and technology, but also for the formation of new social relations different from the existing ones. The scientists hoped that Web 1.0. and the Internet will allow the society to create new environment free from the state domination or not burdened by excessive legal requirements. This view was formed under the influence of the Declaration of the Independence of Cyberspace, authored by John Barlow and «Code and other laws of cyberspace» by the researcher Lawrence Lessig. In the Declaration, the author presented cyberspace as the space of such power that is necessary for the establishment of freedom. In fact, John Barlow (1996) has declared that cyberspace is a liberal virtual extraterritorial enclave that is not subject to any State jurisdiction and is designed for people free from any privileges and discrimination that completely denies State interference in cyberspace.

At the same time, L. Lessig (1999a) defined that cyberspace is inevitable, but unregulated, and society in the real world is governed by four main regulators: law, social norms, market relations and «architecture/code» (technological capabilities). No nation can live without it, but no nation can control behaviour in cyberspace. Cyberspace is a place where people are free from real control.

In our opinion, according to the technological capabilities of the time and the state of public relations, L. Lessig (1999b) considered the key regulator of cyberspace its architecture, technical components or capabilities, or «code». It is the code that determines the order of cyberspace use, just as public relations in real space are subject to public administration. L. Lessig argues that, in a fundamental sense, the code of cyberspace is its constitution. The code sets out the conditions under which people gain access to cyberspace and sets the rules that control their behaviour. The code forms its own sovereignty, which is an alternative to real physical life.

In his essay, L. Lessig (1998) highlighted for the first time the need for laws that would simultaneously ensure the regulation in cyberspace and minimize restrictions on human rights and freedoms. Analysing this book, Ana Viseu (2001) identifies that L. Lessig offers several ways to deal with the «gloomy» future: open source and development of legislation. According to L. Lessig, open source should act as a kind of constitutional review, ensuring that all citizens can «read» and influence the «created» surrounding environment. Legislative actions lie in the adaptation of the Constitution (US)

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to cyberspace to ensure that the values we experience today will be preserved in cyberspace.

Today, this approach can be called an attempt to «soft» or democratic regulation of cyberspace, which is mainly based on creating a legal basis for the use of certain technologies and provides almost no legal regulation of public relations.

At that time, the development of state legislation regulating cyberspace took place in two main areas: making changes and supplements to criminal codes and drafting legislation by developing a number of separate legislative acts.

The first direction was implemented by Canada, Estonia, Germany, Sweden, Finland, Austria, Italy, Latvia, the Netherlands, Spain, Poland, and Ukraine. For example, Ukraine has introduced a separate section «Criminal offenses in the use of electronic computers, systems and computer networks and telecommunications networks» in articles 361 – 363 and 363¹ of the Criminal Code.

The following countries are worth noting regarding the creation of separate legislation. Thus, in 2000, the Republic of India adopted the Information Technology Act, which provides legal regulation in the area of information and communication technologies and electronic signature technologies. This Law is interesting by the introduction of the special Cyber Appellate Tribunal to deal with offenses committed using modern cyber technologies. Besides, this Law introduces the classification of a number of crimes, including computer distribution of child pornography, electronic fraud and cyberterrorism, which provides for the use of State coercion in the form of fines or restraint of liberty (Articles 66, 66A-66E, 67, 67A-C, 71-79).

The US has passed provisions on controlling the assault of non-solicited pornography and marketing (15 U.S.C. §§ 7701-7713 (2003)), on fraud and related activity in connection with access devices (18 U.S.C. § 1029 (2015)), on fraud and related activity in connection with computers (18 U.S.C. § 1030 (2020)), on fraud and related activity in connection with electronic mail (18 U.S.C. § 1037 (2003)), on wire and electronic communications interception and interception of oral communications (18 U.S.C. §§ 2510-2523 (2022)), and on stored wire and electronic communications and transactional record access (18 U.S.C. §§ 2701-2713 (2018)).

During this period, other countries adopted laws: the Israeli Computer Law (1995), UK Computer Misuse Act (1990) and French Act Relating to Data Processing, Files and Freedoms (1978).

As one can see, society and the State reacted differently to the emergence of information and communication technologies Web 1.0. On the one hand, we have a position of formation of liberal approaches of «soft» regulation of cyberspace; on the other hand, the State, as the regulators of public relations, establish or authorize universally binding rules that, in a sense, restrict civil rights and freedoms, but these rules are ensured by the measures of the State influence, including State coercion.

3. DEVELOPMENT OF «ELECTRONIC» LEGISLATION OF THE PERIOD OF WEB 2.0 TECHNOLOGIES

Since 2004, the term «Web 2.0» has become widespread as one that characterizes the next stage in the development of information and communication technologies. In the future, it will often be used along with the term «scientific and technological revolution 4.0», as they describe the significant changes in society that occur as a result of its digitalization.

The term Web 2.0 means a comprehensive combination of technologies such as high-speed Internet protocols, fifth-generation mobile (5G), and the many standards of

wireless networks, interactive Web sites, resources, and platforms. The main difference between Web 2.0 and Web 1.0 is that content is created and produced by the users who are both consumers of content and are not owners of technical resources. At the same time, the emergence of Web 2.0 as an environment free from State domination and unencumbered by excessive law has been characterized by the emergence of the darknet network, cybercrime, malware, anonymous hackers, cryptocurrency, pirated content, destructive information, etc.

At the same time, «electronic» legislation was actively and proactively developed – national and international legislation in the sphere of information, criminal, civil, administrative law, intellectual property law and technical regulation of information and communication technologies through regulations, rules, certification, etc. For example, the regulation of the use of the IoT devices is carried out simultaneously with the introduction of technical and legal regulation (Kostenko, 2021b) and the governance of the use of AI is formed by many countries in accordance with the adopted AI Development Strategies (Zhang et al., 2021, 2022).

A significant number of international documents on the information society have been developed and adopted at the initiative and participation of non-governmental organizations. In solving infrastructure issues of Internet organization, the position of sovereign is has not always been and is the main priority. Effective regulators of the global information society have been the tools of soft international law, which, although not binding, are extremely responsive to new challenges and reflect the interests of all relevant actors. However, non-binding rules have a significant normative and convincing value. That is, technological innovations should be taken into account when developing the relevant regulations (Kyryliuk, 2015). For example, Ukraine for some time did not rush to develop modern legislation in the sphere of information technology and was rather slow in digitizing both public authorities and recodification of current legislation. However, the Parliament has recently developed and adopted a number of modern legal acts such as the Act on Protection of Information in Information and Communication Systems (1994), the Act on Electronic Trust Services (2017), the Act on The Main Principles of Ensuring Cyber Security of Ukraine (2017), the Act on Critical Infrastructure (2022), the Act on Virtual Assets (2022) and the Order of The Cabinet of Ministers on The Approval of The Concept of The Development of Artificial Intelligence in Ukraine (2020). In 2019, the Ministry of Digital Transformation of Ukraine was established, which is tasked with digitizing public authorities and mechanisms of public administration. The judicial system of Ukraine introduces such digital mechanisms as electronic judiciary and electronic registers.

Modern global legal regulation of cyberspace has significant achievements, but they are offset by two problems:

1. focus of the law to the formation of legal responsibility for cybercrime, as special types of crime committed with the use of digital tools in the national and cross-border information and communication environment (Riek and Böhme, 2018);
2. the absence of a single transnational law that would ensure public relations not only at the national but also at the transnational level (Razmetaeva, Ponomarova and Bylya-Sabadash, 2021), in which the postulate that jurisdiction should not be attached to a certain territory or borders is gradually gaining public importance, and technical possibilities for regulating cyberspace are limited both objectively and subjectively (Vartanian, 2000).

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Nowadays, academic debates revolve around the issue of the territoriality of cyberspace as a whole and its individual elements. As cyberspace now functions, its relation to the borders, national and international law is still sufficiently clear and proportionately dependent. There is a real possibility of separating cyber incidents in the jurisdictions of national and international law. That is, physical boundaries are still identical to regulatory boundaries, and law performs the vast majority of its functions within these borders, namely: economic, political, ideological, cultural and educational, regulatory, educational, protective and preventive ones, taking into account national characteristics.

N. Tsaugourias (2018) states in his study that the state extends its sovereignty to the physical level, i.e., to the infrastructure located on its territory. The state exercises sovereign authority in its territory. The state can also defend its control over cyberspace and cybercrime that takes place on its territory. Besides, the state is obliged to defend its sovereignty, including information one. That is, it not only entitled, but also obliged to control the security of information that passes through its infrastructure, which takes place or terminates s on its territory, or is transmitted through national technical hubs. This shows that under existing international law, the rules of territorial limitation may extend to cyberspace in its present form. The difference between the physical world and cyberspace is that the authority in the physical world is organized and operates in certain territories, while in cyberspace the authority is direct, not fragmented, or identical to the boundaries of cyberspace. People can transfer certain activities and actions to cyberspace, they can nominally/virtually populate cyberspace, but they can never remove themselves from the real world in real life. This means that cyberspace and its organization cannot be independent of the States and therefore cyberspace cannot be sovereign, because power in cyberspace is mediated by the States.

That is why many researchers such as P. Dombrowski, Ch. Demchak, L. Lessig, I. Shumsky and others are inclined to the projection of the Westphalian system on the «state structure» of cyberspace, because thanks to it the concept of sovereign State and its basic features, principles of equality in relations in the system of international law were formed; the institution of international guarantees, equality of States, the concept of sovereignty, the solution of international problems by peaceful means were introduced (Demchak and Dombrowski, 2014; Shumskiy, 2020). At the same time, A. Segura-Serrano (2006), analysing the current legislation, proposes the concept of the Common Heritage of Mankind (CHM), according to which the regulation of cyberspace should be carried out by international law. The concept of the CHM provides for the need to establish international Internet governance agencies, consensus-building on intellectual property and rights protection, privacy issues, the use of force and self-defence in cyberspace.

The future of e-justice in cyberspace is a separate issue. So far, there are many examples of successful solutions concerning local electronic court systems, such as in the Federal Republic of Brazil, the People's Republic of China, and others.

E. Keddell (2019), Y. Razmetaeva and S. Razmetaev (2021) correctly stress on certain risks of e-justice, which lies in the difficulties of synchronous integration of basic electronic tools into national justice systems, as well as possible bias of electronic justice algorithms. Moreover, this may be an intentional bias that was incorporated by the developers, or an unintentional bias that duplicates the prejudices developed in analogue justice.

An example of risky justice is the study of N. J. Gervassis (2004). He shares the L. Lessig's theory of cyberspace law based solely on cyberspace code and proposes the use of the CyberLaw protocol. CyberLaw is a re-designed network protocol in accordance with the rules of existing legal systems, which is transformed into an alternative form of

indirect «invisible» legislation. That is, part of the legal risks in cyberspace is blocked and corrected by the CyberLaw protocol at the stage of their establishment. It should be noted that the author himself acknowledges that this approach has great potential for abuse in the case of misapplication.

4. METAVERSE STRUCTURE BASED ON WEB 3.0 TECHNOLOGIES

Today we are observers, participants and users of the latest information technologies, which are already generically called Web 3.0. Web 3.0 technologies are information and communication decentralized electronic virtual eco-networks that operate on the basis of blockchain, electronic neural networks, machine learning, AI, IoT, semantic web, cryptocurrency, virtual and augmented reality, continuous availability. According to the research by E. Özkahveci, F. Cívek and G. Ulusoy (2022), the term «metauniverse» is now the most popular term, has many interpretations and is used to describe digitization processes in almost all spheres of human life.

Web 3.0 is the launching pad for the beginning of the scientific and technological revolution 5.0 and the next stage of human development – electronic humanoids and the metaverse. An unambiguous definition of the metaverse is not accepted.

The Metaverse or Decentraland characterizes an infinite number of virtual worlds, in which and between which physical and digital subjects and objects interact socially; the latter are endowed with certain properties: rights, duties and responsibilities. The key element of the Decentraland is the identification of physical and digital subjects and objects. Identification data is a pass to the Metaverse.

Taking into account the main features of post-industrial society and the trends of the transition period to it from industrial society, we can predict that the Metaworld will undergo the following three phases of development:

- the first phase – the shell of the Metaverse (basic level software and engineering), the actors and objects completely dependent on the developers and owners of the shell;
- the second phase – the shell of the Metaverse, the actors and objects belong to the developers and partly belong to the owners / users;
- the third phase – the Metaverse does not belong to specific developers, the management of actors and objects is carried out either by the owner (hardware bio identification) or autonomously (actors and objects are endowed with functionality and rights inherent in the owner).

Only individuals will be considered the actors of the Metaverse, and the category of objects will include legal entities, avatars, electronic personalities, AAI and ASI virtual digital works, digital humanoids, intangible electronic assets of all forms and types, etc. It is likely that in the third phase of the Metaverse the development of a number of objects such as avatars, electronic personalities, virtual digital works of the ASI class and digital humanoids will be transferred to the category of the actors, as at the legislative level they will be endowed with certain rights and responsibilities inherent only in the actors.

Currently, the Metaverse is undergoing the initial stage of its establishment and development (Özgökçeler, 2021). Its structure can be classified as interconnected technology information domains or electronic information corporations. Metacorporations compete in the fight for the user, finance, products and technology. The users of corporate meta-universes still can be anonymous or use aliases to register accounts and create impersonal avatars or e-personalities (Kostenko, 2022), and this reduces trust in the Metaverse as a whole and leaves grounds for abuse and wrongdoing.

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In our opinion, in the near future, the Metaverse will be more structured and will consist of the following elements: Personal Metaverse (PM), Collective Metaverse (CM), Corporate Metaverse (CorpM), Confederate Metaverse (CfM), State Metaworld (SM) and Megametaverse (MMV / WM).

Personal Metaverse (PM) means that each individual (actor of the Metaverse) can create his/her own electronic Metaverse (avatar, electronic humanoid, electronic personality) according to the personal imagination and be in it consciously and exclusively personally, for example, by analogy with the novel «Robinson Crusoe» by English writer Daniel Defoe.

Collective Metaverse (CM) is a voluntary electronic association of the actors and objects of the Metaverse, which operates by mutual agreement, but with mandatory compliance with generally accepted basic requirements or rules of MMV law.

Corporate Metaverse (CorpM) is a voluntary, industrial, scientific, commercial, religious or other electronic association of entities and objects of the Metaverse, which operates under corporate rules as long as they do not contradict generally accepted basic requirements or rules of MMV.

Confederate Metaverse (CfM) is a political union of the actors and objects of the Metaverse, each of which retains its independence, and all together respect the mutually agreed rules of law.

State Metaworld (SM) is an electronic State having the external and internal electronic characteristics of the State, as well as electronic substantive-spatial, informative-public, regulatory and institutional features.

Megametaverse or Whitemetaverse (MMV or WM) is a common decentralized electronic space, in which there are many personal, collective, corporate, confederate and State Metaverses that interact with each other under WM law.

It is advisable in the Metaverse to also enable Darkmetaverse (DarkMet) as required antagonistic element in the meta-universe, in which actors, objects and meta-universes with a self-governing system different from the one adopted in WM can be concentrated.

Since the Metaverse is considered to be an information and communication social ecosystem that creates, maintains, develops and ensures the functioning of public relations in electronic virtual form, it is appropriate to note that the electronic jurisdiction» of the Metaverse is a complex branch of law that regulates social relations that make up its subject matter – social relations in the metauniverse, as well as between the metauniverse and the physical world (Wyss, 2022). Each actor will have personal three-dimensional unique avatar, and the actors / objects will have unique property passports. Actors and objects can perform various activities – financial, scientific, creative, social, public ones, etc.

For example, the Republic of Barbados announced in 2021 that it will open its next embassy in the Metaverse, whose diplomatic complex is being built in Decentraland. The Barbados ambassador to the United Arab Emirates argued that «governments can act together when land is no longer physical land and restrictions are no longer part of the equation». He also noted that small countries do not have physical and financial capacity to support 197 diplomatic missions around the world, but the Metaverse ensures parity with such large countries as America or Germany. Other countries also have experience of virtual embassies – Sweden and Estonia have opened embassies in the Metaverse Second Life.

The United Arab Emirates has already become a leader in the Metaverse, building a modern digital economy, implementing policies and developing a regulatory framework in such areas as virtual assets, artificial intelligence and data protection.

Thus, the UAE State Regulatory Authority of the Virtual Asset Management Authority of Dubai (VARA) has opened a representation in the virtual world of The Sandbox, which will work with the private sector and relevant government agencies to establish legislative and oversight framework for digital assets. Besides, anti-money-laundering regulations and tracing of cross-border transactions will be formulated to ensure transparency and security for businesses and investors. Digital assets such as cryptocurrency, non-interchangeable tokens (NFT), etc. will be supported by a single legislative and regulatory framework.

In mid-April 2022, Emirates announced the creation of a brand in the sphere of metaverses (Emirates Metaverse), as well as collectible and useful indispensable tokens for its customers and employees.

In 2022, the world's first customer service centre developed by the UAE Ministry of Health and Prevention appeared in the Metaverse.

As the reality shows – social relations in the Metaverse are created, established and developed against the scepticism of individual scientists, experts and politicians.

5. PROBLEMS OF LEGAL REGULATION OF PUBLIC RELATIONS IN METAVERSE

The difference between the current cyberspace WEB 2.0 and the Metaverse of WEB 3.0 is that the vast majority of processes and procedures in modern cyberspace are governed by laws and regulations, including a certain range of public relations. However, in view of the above, it is the processes of modelling / predicting the transformation of existing and the establishment of new social relations in the Metaverse that need special attention, namely, to determine their direction and characteristics. This forms the basis for the establishment of mechanisms and means of their legal regulation. Besides, one has to decide on the following:

- what exactly will be considered «social relations in the Metaverse» and «relations in the Metaverse»;
- when, how and to what extent, electronic actors and objects are granted rights specific to an individual;
- what form of justice will be applied in the Metaverse.

Already, electronic personalities, avatars and electronic humanoids can qualitatively duplicate the appearance and behaviour of both the imaginary person and the real owner of the avatar or its user. Identical reproduction of a person, a real person is no longer considered the prerogative of medicine and requires reliable control over the use of human identification data of the «red» group (according to the author's classification) (Kostenko, 2021a) or hypersensitive personal data (according to the GDPR classification).[1] Virtual assets, smart contracts, NFT, virtual lands (Decentraland and The Sandbox meta-universes) are real electronic intangible assets of the Metaverse, with which very real, legally significant actions are being taken. The rules and norms of behaviour in the Metaverse are still being created by projection of the physical world and are of corporate nature. However, the trend of migration and transfer of the norms of public morality in the Metaverse by simulating cosmopolitan e-social relationships in the absence of clear attributes of the electronic state and the state structure of the Metaverse.

[1] EU Regulation on The Protection of Natural Persons with Regard to The Processing of Personal Data and on The Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) (2016).

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From virtual to real: it is no longer about imitating the real world, but about self-development based on the virtual world, which can not only shape a system of values independent of the real world, but also affect the real world (Pu et al., 2022).

The main problem of legal regulation of public relations in Metaverse is the lack of a single legal mechanism for regulating public relations arising in the Metaverse.

Establishing the mechanisms for the legal regulation of public relations in the Metaverse should solve many legislative problems related to differences in regulations of various jurisdictions. Most legal systems have existing archaic regulations, which are formulated without taking into account the possible emergence of social relations with the use of electronic technologies of the Metaverse. In some cases, these laws may regulate certain issues of information technology use, but their scope is often either narrow or ambiguous, creating a situation of legal uncertainty.

Modernizing national legislation to ensure legal compatibility across multiple jurisdictions is often replaced by temporary rules or regulations. At present, the legal institutions of national legal doctrines still have the levers to regulate general processes of digitalization of society. Individual cases of «electronic offenses» are considered by the judicial system through the projection of existing law, thus forming the basis for future e-justice in the Metaverse. Different cultural features and state priorities lead to significant differences in motivation and verdicts, and modern legislation, although progressive in nature, does not have full practical application or become fictious laws that are declarative in nature.

However, certain Metaverse technologies already exist and need to be regulated as they form new social relations, in which there are actors and objects, including those with the properties of actors.

So far, these properties are artificially created by the developers and are formed by them according to their imagination or the imagination of scientists or project customers.

E-justice, as well as generally accepted legislation, is absent in the Metaverse in general, or its role exploits certain provisions of local, national regulations and traditional "analogue" justice, very slowly transforming in accordance with the development of electronic public relations in the Metaverse.

6. METAVERSE E-JURISDICTION MODEL BASED ON WEB 3.0 METAVERSE TECHNOLOGIES

The establishment of law in the Metaverse objectively begins with the stage of projection of the laws of physical society on electronic social relations. But, given that the Metaverse is comprehensive, the projection of the laws of different countries will not have the desired effect. It is the advanced development of the relevant basic provisions of the global electronic legislation of the Metaverse that will provide an impetus for the modernization and improvement of national legislation in the area of optimizing and improving the efficiency of its use.

Legal regulation of public relations in the Metaverse requires the development of a comprehensive electronic jurisdiction grounded on the latest basic legislation – the Grand Charter of Laws Metaverse (GLM). In our opinion, GLM should include the following key parts:

- Constitution. The Great Charter
- General norms, composition of the laws of the Grand Charter
- WM Common law
- WM Judicial system WM

- WM e-Office Act
- Mode of cross-border interaction in WM
- Code of fundamental technical regulations
- Certificate of identity management
- Code of Non-property Electronic Assets
- Criminal Electronic Code
- Code of Cyber Defence
- Military regulation
- WM Grand Electronic Judicial Code
- Other regulations.

E-jurisdiction, e-justice is one of the key elements of e-public relations in the Metaverse. E-justice, at the initial stage, can be based on traditional "analogue" justice, which is transformed in accordance with the development of electronic social relations in the Metaverse.

The creation of mechanisms for the legal regulation of public relations in the Metaverse should solve many legislative problems related to differences in regulations of various jurisdictions governing the use of information and communication technologies, identification procedures, copyright, ownership of non-property assets, liability for damages, the list of crimes and coercive State measures for their commission.

Current «analogue era legislation» should be taken as a basis and begin to form the Grand Charter of Laws Metaverse.

The Constitution, the Charter, the common law, the judiciary should have the structures that maximize democratic and legitimate functioning of the WM.

The set of fundamental technical regulations are technical and legal documents that should fix the reference program codes, which will be used to determine the legal status and ownership of non-property electronic assets, such as NFT or content, at the legislative level.

The Code of Non-property Electronic Assets is intended to regulate relations with non-property assets and to establish electronic property rights and electronic intellectual property rights.

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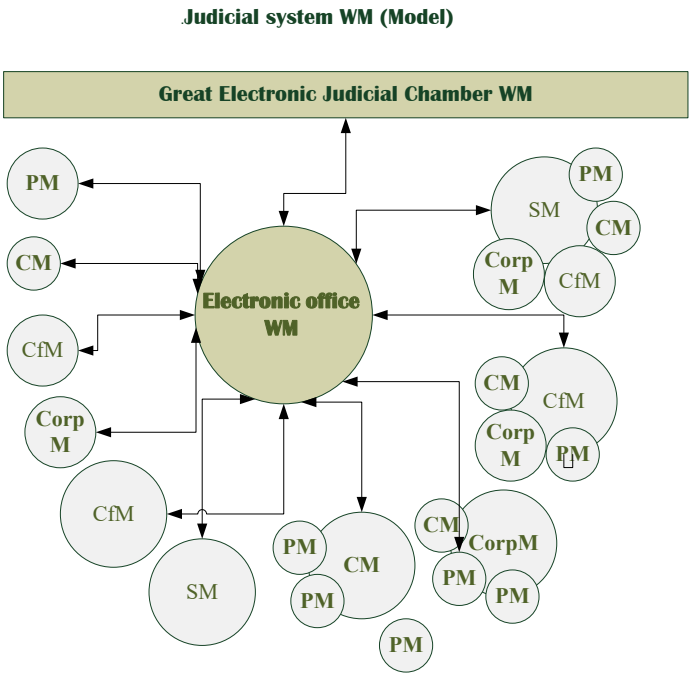

Fig.1 Judicial system WM (Model).

The Criminal Electronic Code is designed to identify the types of offenses with the development and use of information and communication technologies and technologies of the Metaverse, as well as establishment of State and other coercive measures in the case of offenses. The Cyber Security Code is a technical and legal document that should establish reference programs, administrative, managerial, and technical measures to ensure cybersecurity at the legislative level, which will be mandatory for all the actors and objects of WM.

Military regulation is the set of statutes, instructions, and rules in the case of hostilities in the WM. The WM Grand Electronic Judicial Code will contain the rules and algorithms of e-jurisdiction, define its actors, objects, territoriality, specialization, etc. The Electronic Office WM will play an important role in GLM. In fact, this is the core of WM e-jurisdiction (Fig. 1). The Office will operate with the use of AAI and ASI and will perform the tasks of the Central Analytical Centre and the Separator of Electronic Reports of Electronic Incidents (Electronic Offenses). The WM e-Office will accept requests for e-incidents from all WMs and facilities, analyse the composition of offenses under WM legislation and the Grand Charter of Laws Metaverse itself, form a chain of «territorial accountability» and to draw up a list of participants in the proceedings. For example, if the electronic offence concerns the national «analogue» legislation, such an offense will be considered within national jurisdiction. In the case of an electronic offense CfM or SM between the jurisdictions of different metaverses, such an offense will be considered by

the WM Grand Electronic Court Chamber. At this stage in the formation of the WM and its Grand Charter of Laws Metaverse national legislation needs to be reconfigured or modernized to ensure legal compatibility and functioning of meta-universes emerging to make social relations and information technology activities more structured.

The rules and norms of behaviour in WM are still created according to the projection of the physical world and are corporate in nature. However, there is a trend of migration and transfer of norms of public morality in the Metaverse by simulating cosmopolitan e-social relations in the absence of clear attributes of the electronic State and the State structure of the Metaverse. The development of global electronic legislation of the Metaverse will give impetus to the modernization of national legislation.

The model of e-jurisdiction will outline the most important and problematic issues that arise in the evolution of mankind and the development of virtual reality technologies, as well as form the basis for e-law to regulate public relations in the Metaverse.

The main values and objects of the Metaverse to be protected in electronic jurisdiction should be:

1. Trust and reputation to be built by each subject and object of the Metaverse from the moment of its registration in the Metaverse using blockchain technology.
2. Integrity, reliability and validity of identification data, by means of which individuals and legal entities, other actors and objects are identified in the Metaverse:
   - biometric identification of individuals as particularly valuable and unique attribute or code of access to the Metaverse;
   - IoT identification data (Universal Identification Systems Object IDentifier (OID), Electronic Product Code (EPC), Universally Unique IDentifier (UUID) and International Mobile Identity Identifier (IMEI));
   - AI, AAI and ASI identification data (electronic certificates of quantum cryptographic systems that will protect the AI core from external attacks);
   - identification data of other types of objects.
3. Intellectual property rights and ownership of non-property electronic assets in the metauniverse.
4. Information security and cybersecurity.

The creation of the Grand Charter of Laws Metaverse requires the involvement of a large number of specialists in law and modern electronic technologies, as well as specialists who will conduct interdisciplinary research in many areas.

The Grand Charter of Laws Metaverse project is the project to be developed with the initiative and participation of non-governmental organizations, Metaverse corporations and research institutions, as well as leading Metaverse researchers.

7. CONCLUSION

The era of industrialization and industrial society is coming to an end. Mankind has clearly taken a course to build a new social system, which, at present, is most defined as a post-industrial society. It is already obvious that the «return» point has been passed. Humanity is currently in transition from an industrial to a post-industrial society. This path will be difficult, the resolution and settlement of very complex issues and contradictions, including the issues of national and international jurisdiction. One of the features of post-industrial society is maximizing cyberspace and using it effectively in conjunction with

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natural space in almost all areas of human life. That is, in fact, forming a post-industrial society, mankind forms cyber civilization (Metaverse).

Thus, humanity, rebuilding post-industrial society, forced to simultaneously address the issues of formation of the Metaverse and ensure the effectiveness of its use. Clearly, the development of the Metaverse will be gradual, consistent.

The early stage of development of Metaverse is a promising start for the study of social relations created in the virtual environment, the ability to focus on laws and rules, which will be relevant in the phased creation of a society of digital humanoids in the Metaverse. This is especially important given that these technologies, like many others, are multi-purpose in nature.

The main problem of legal regulation of social relations in the Metaverse is the lack of a unified legal mechanism for regulating even fundamental social relations that arise in the Metaverse.

The solution to this problem is possible by creating a comprehensive electronic jurisdiction and the Metaverse Grand Charter of Laws to regulate public relations in the Metaworld and the formation of a new branch of law.

Creating a comprehensive Metaverse e-jurisdiction requires:

- research in the field of information law on the direction of development of the basic conceptual apparatus, doctrinal and normative and legal concepts; recognition of structures of combined concepts and conceptual schemes, definition of objects and actors of legal relations in the Metaverse;
- study and recoding of current and projected norms of modern information, administrative, civil, criminal, labour law, property law, intellectual property, personal data protection and other branches and institutions of law, as well as the institutions of State security, information and cybersecurity.

The Metaverse Grand Charter of Laws project is the project to be developed with the initiative and participation of non-governmental organizations, meta-universe corporations and research institutions, as well as leading Metaverse researchers.

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JUSTIFIED DISCRIMINATION IN A LIBERAL SOCIETY /

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Abstract: *The act of discrimination is a decision that affects the rights of third parties. Undoubtedly, its exercise and materialisation are disastrous. However, would it be possible to discriminate against a person without facing legal consequences? This work opens a space to explain that there are situations in which discrimination is carried out and validated, in which it is justified its usefulness to preserve a titled property considered as a fundamental right or safeguarding public order as a fundamental structure of the teleology of the state.*

Key words: *Democracy; Fundamental Rights; Inequality; Discrimination; Autonomy; Justice; Legal Theory*

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1. INTRODUCTION

„*Learning to doubt is learning to think.*"
Octavio Paz

How many times has a child been reprimanded for playing with another, for the colour of his skin; the family's refusal to marry between people with different religions; the displeasure of some to see a homosexual couple, walking hand in hand; overselling a person with Arab features, at an international airport; almost automatic disapproval of an older person, asking for a job; refusal to work to a person with motor disability, without valuing his intellectual potential; the qualification of personal appearance prejudiced to enter a restaurant; and thus, there are so many situations that make discrimination subsist.

These (pre)social judgments cause an injury, a grievance and, logically, a victim(s). The perpetrator performs an action to demonstrate his displeasure or dissatisfaction, self-justifying the act in his right of freedom while at the same time making invisible the rights of others, to then produce and issue an apology of inculpability (Rousseau, 1992).

Discrimination is synonymous with aggression, in which a person is excluded from a social group, either because of his or her physical characteristics, because he or she has some kind of disease, religion, sexuality, or because he or she does not comply with the norm of the dominant ethics.[1] Undoubtedly, such acts affect society in a significant way, contract people and weaken their self-esteem, forming resistance and creating barriers in society.

Deconstructing discrimination is a daring way to know, observe and interpret the motives for imposing and applying an ignominious discourse (Garzón, 1998, p. 152). Misogyny, racism, segregation or confinement are examples that show the lack of understanding, tolerance, empathy and respect that merit the characteristics, preferences or actions of other people.

Prejudice becomes the primary element for the exercise of discrimination, which is exploited in an exercise of verticality, domination, subordination and manipulation that produces privileges and selfish satisfaction, which generates hatred, bitterness and resentment (see Galindo and Ríos, 2015).

In this order of ideas, this chapter starts from the hypothesis that there are spaces in which discrimination is inoculated as a fact. However, this can be exercised to create favourable conditions towards a group (positive discrimination), such as exclusive government calls for women or the hiring of people with a physical disability, as well as confined spaces in shopping centres for persons with disabilities.

Reflecting on justified discrimination, it is necessary to analyse its limitations in order not to misrepresent its public utility, since it may happen that this differentiated treatment, duly justified, is operationalised or erroneously invoked. For example, a job advertisement required a hostess, and presented a person with physical features that were not in line with the company's requirements; might it not be seen as discrimination? Let's think of another sample, an ex-defendant applies for a job as a vehicle operator in a securities company, and we assume that this person has already served his sentence and therefore, is readapted, not hiring him would be discrimination? Or is such refusal justified? The answers are not given, but must be constructed.

Judicial independence is enshrined and guaranteed in the Constitution as a principle for its hierarchy and must permeate in the creation, implementation and resolution of the various situations that arise, in the conflicts of individuals and in the activities of the State.

The methodology of this research is deductive and analytical, so to begin with a map will be presented on the nouns difference and inequality, with the objective of visualizing that discrimination is a social construct articulated and interrelated with the unjustified differential treatment derived from the unequal. The following section outlines the origins of discrimination, and how it has been part of history. This already allows us to explain how it has been socially established and how it has been used by governments to justify its existence and validity. This work will study the types of discrimination that exist, and thus observe the species, depending on the space and time context. Finally, an argument is made about possible discrimination, a space in which its exercise should not be objectionable.

[1] The Mexican Supreme Court of Justice has called these notions "suspect categories".

The aim is to expose when discrimination can be socially accepted and there are no legal effects, on the understanding that such action is validated and/or tolerated by certain circumstances and that it is limited to a closed space, creating exceptions in the area of discrimination. Such an act could be seen as an aporia in the legal system, but the rule should be regarded as relative, when applied, and as general, in its spatial scope.

2. DIFFERENCE AND INEQUALITY

In this section, two topics will be presented that have a primary objective, the distinction. The difference is the result of comparing similar things and noticing what are the similar and distinctive characteristics of those objects, things or goods. Inequality is realised from a knowledge or prejudice learned or constructed by a person(s) with the aim of disapproving something or someone who dislikes it, that does not seem correct, bothers or dislikes that being, acting, preference or make of another(s) individual(s) (cf. Perry, 2009).

With regard to inequality, when a confrontation takes place and one wonders if they are equal, in what way they are similar or different, one must take into account the reference system observed and discussed. For instance, to compare a pair of books precisely it is necessary to know what aspect is being compared and for what purpose, this is called a reference system. Physically, one is green cover and the other blue; one has a hundred pages and the other eighty; one is made with bond paper and the other with recycled paper; one has handwritten letter and the other of mold; one contains annotations and the other is in perfect condition; one book is recent and the other is from the last century. Another form of comparison could be functional or thematic: one book speaks of algebra and the other of politics; one was useful, the other was not understood. Thus, the reference system closely relates the intentions of the comparator and the objects of the comparison in order to have precision in the conclusions and/or specific intentions of the comparison.

Utilitarianism produces a link between the object and the subject, creating a benefit to the person from his subjective judgment. Subjectively, the person recognises the quality or function of the object to qualify if it is useful or convenient and in what way it is or can be. Thus, the difference can be in two ways, the physical comparison between two objects, which may be of the same genus, but different in the species. For example, you could note the differences between a dog's stomach and that of a bear, and compare the size, function, capacity, location, among several characteristics. But it is not productive to compare objects without a common genus, so they must be objects that can be compared or mentioned why they could be compared.

The constituent elements that contain the goods or properties allow for differentiation (Delfino, 1997, pp. 189–214). These judgments are made according to the characteristics of the objects and the knowledge of the person who makes the comparison. But they can also be realised from their usefulness. Differentiation is a fact that relates to the subject, its intentionality and the object, resulting in a decision or judgment. Subjectivity and utility will indicate how the thing will be observed, enjoyed or used by the person. For example, he who acquires a painting of Titian by taste or as an investment; he who travels by bus instead of driving his own vehicle to go to work; he who has more fun in a bar than in a museum.

So, it can be concluded that the differences are made from the comparison of the elements contained in an object, considering the gender in which they agree. From these elements, the differentiation is made between them. In another scenario, the difference is based on the function that the object must operate. There is no mandate for

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this decision, but on the contrary, in every comparison and selection of elements and functions, volitional subjectivism is reflected.

With regard to inequality, characteristics, preferences and uses are the distinctive elements that allow differences between people. These peculiarities or traits are basic to personality development. They are clothed with dignity, so they must be respected to live together in peace. So inequality can be seen as an incorrect distribution of freedoms, rights, resources or opportunities.

However, it is easier to qualify and subdue another person than to attend to the motive of subjective judgment toward another individual. Knowledge is created or assimilated to criticise for reasons such as race, sexuality, gender, creed, economic condition, among other ways to impose one thought on another. It recreates a truth constructed in conceptions or opinions of its own and/or of third parties, that try to distance, to prevent an act, to continue a conduct or to subjugate another subject.

Inequality is designed by a set of premises that originate in personal or social preference, or in certain socio-cultural, political and/or economic conditions. Someone does not like their neighbour to be an individual with indigenous traits, because they are not equal and considers that they should live outside their neighbourhood. In this matter, one has a prejudice towards people because of their personal characteristics (it does not qualify their behaviour or contribution to society), but it is not their pleasure to see them around and even has a discourse that justifies it. But where and why he issued that request to despise him and drive him out of his community. It should be noted that this person had prior knowledge, which was used as soon as he saw or knew of someone with certain characteristics. This prejudice becomes annoying when the circumstance confronted him with this visual situation so he demanded his eviction. His personal preferences activated his displeasure and activated a defence mechanism against the other individual. In this discussion, a distinction is created from the person who does not want to see, and another who does not share or please his thinking and attitude, and at the same time generates harm.[2]

The concepts that originate from discrimination can come from discourses and facts of inequality; which aim to establish privileges, impositions, benefits, subordinations, to impose a thought and action against the unequal, through the perpetuation of a certain status quo.

In the case of discrimination, it is validated and materialised by a narrative devoid of reflections and criticism. There is no inner judgment, and their sentences, actions, conditions and stipulations are obeyed as dogma, taking into account only those opinions that serve them to continue demonstrating their discourse and acting.

As a system of ideas, discrimination is an endogenous tendency. It does not need an external opinion or value, it is simply because it is and must be, without the possibility of making a comment or observation against; it is spurious, contains fallacies or is designed with prejudices, lies, manipulations or disqualifications about the features, acts and circumstances of inequality of people, to build a taste, benefit, privilege or reward for the unequal (see Altschuler, 2016).

Discrimination does not contain contrasts within, it requires opacity to continue operating and stationing people in darkness; to continue exercising their perversions and harms. This inequality is designed, manufactured and elaborated through prejudices or ideas without scientific deliberation or empathy. It originates from elaborate judgments about myths, subjective conclusions, manipulation of facts, false communication,

[2] The doctrine considers damage to be the violation of the interests of the person; injury to something in which it has a real interest.

permeable ignorance, among other components (Bickel, 1986, p. 38). These acts of control cause injury or grievance, causing the victim to suffer physical, psychological and/or financial loss.

This inequality (which is manifested in its discriminatory form) results in a bias in the exercise of rights and freedoms, which benefit the controlling person or ideological group, and, on the other hand, generates an affront to the(s) person(s) in his personal sphere, space, material and temporal.

3. ORIGINS AND FOUNDATIONS OF DISCRIMINATION

The proposed topic will be analysed from the theory of the spheres of justice of Michael Walzer (1984). The exploration of discrimination will unravel its nature, its components, its instrumentation, its objectives and the arguments for its validity.

Discovering the origin of discrimination will make it possible to know its nature and etiology. This anthropological discovery exposes the establishment and the instruments that were used to turn inequality into an imperative doctrine and condition of the possibility of discrimination. What is required for discrimination to be established as habitual conduct and for power to be exercised against the unequal?

The recognition and extraction of the foundations of inequality will reveal the foundations of judgments and actions to abuse, order and separate the various, through acts of exclusion and discriminatory segregation. For example, in Europe, pilgrims did not have the same rights as a citizen; slaves manumitted in Rome would never be senators. African-Americans in the United States of America were (and continue to be) frowned upon in multiple communities predominantly of European (white) descent; even those who are not of European descent are still prevented from buying and selling a property, and sometimes are not treated respectfully in shops and public services.

Discrimination as a product of subjectivity emanates from individual conceptions, in which it justifies why the other person should not and cannot be seen as peer and therefore does not deserve to be considered as an equal. Discrimination has been used as a tool to highlight differences between people.

These mechanisms become the materialisation of their conceptions, to highlight certain characteristics, behaviours or preferences of some that are supposedly subject to the will of others, so they cannot develop freely, nor exist with dignity. Contempt is one of the material instruments of discrimination, which originates from the characteristics or activities of another person or group (Delfino, 1997, p. 215). This action serves to make known that the subject is not a common element, is not pleasant, nor enjoys acceptance (or is of little value), and that explains and justifies the demerit or disqualification.

Discrimination provokes animosity and therefore requires or requests the cessation or prohibition of the action, the expulsion from the site and the appropriate punishment for altering and violating their welfare. It creates a sanction to the individual for not leading to what is imposed, because the pseudo-norm is on the one hand an act of empire and on the other, an exercise of a certain ideology. Dominant conditions will impose a resolution mechanism on that kind of mess.

Antipathy produces inequality. The discriminator expects or orders that people be of a certain aspect or that people act according to their ideas, demands and personal tastes (Kojéve, 2005, p. 36). In which the victims are at the mercy of the character and decision of the one who wants the imposition, to ensure their good, desire and tranquillity.

Discrimination is a product of irrationality. The rationalisation exercise produces knowledge and tools that design personality and behaviour. However, if a critical, intelligent and robust cognitive process is not developed, biased information and

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behaviour will be obtained. Irrational judgments also result in differential treatment of certain people, but without a solid explanation of their positions.

Ignorance is a source of discrimination. To express an opinion, make or question without proper information sometimes causes injuries. In Chile, it is said that communists eat babies. An illiterate comment that disqualifies the political adversary, which is made without any evidence (Constable and Valenzuela, 1991, p. 272). Discrimination and treatment for political preference continues to produce a deep division in Chilean society. Thus, ignorance can produce ill-conceived ideas and thus unequal treatment.

Discrimination as a lack of empathy. Placing yourself in the situation of the other person is essential to discover your thoughts and emotions and thus achieve social conformism. In cases of unequal treatment, the perpetrator is not interested in reflecting on the consequences of his acts, his selfishness does not allow him to think of the other. Your position does not allow you to place yourself in the role or emotions of others. Its goal is that its selfishness should prevail in its relations with the outside world.

Discrimination generates bias. Before a decision that deals with selection, distribution or another, if the person operates with an unequal-discriminatory epistemic system, he or she will prefer the subject who is closest to him or her. Your decision can be adjusted to set standards, or as an opportunity to show your judgment and power. Partiality does not recognise or grant the same rights, freedoms and opportunities, it is the benefit to another person in a private interest (see Trujillo, 2007).

Intolerance is implicit in discrimination. Respect for difference is at the heart of tolerance. This value allows coexistence between different people, regardless of their characteristics or behaviours. Tolerance is the essence of a republican regime, so that it exists and allows peaceful coexistence. Intolerance becomes discrimination, a lack of respect for diversity and pluralism (Williams and Waldron, 2008, p. 56).

Most discrimination is acquired empirically, through the senses and/or deductions, without a scientific method. Its conceptualisation is subjective and casuistic: its argumentation is a type of abstraction, which is made effective by its alliteration. Discrimination is validated as self-justification of what is right, what should be right, based on the biased trial.

There is no scientific support for discrimination. This means that it lacks the methodological structure to be able to produce a contribution to society, and improve the quality of life. Discrimination impedes the development of science and humanity, so the arguments or discourses in which it is fostered by inequality are a socio-political setback.

The type of discrimination is born and depends on a historical, economic, political and social context. This is understood to be a cultural product. It involves a space and time in which it takes place, for example: the persecution of the Girondins in the French Revolution, the final solution of the Nazi regime, apartheid in South Africa or segregation in the sixties in the United States. These discriminations were perpetrated through personal or social thought at a local or national level, in an environment in which a group tried to impose its position through harmful actions, in a given time and space (Nohlen, 2003, p. 191 and 196).

Discrimination is often accepted without consideration or reflection. The assimilation of their conceptions is made through the family, school, religion or social custom, which declare and justify why there should be inequality and the obligation to continue with this closed set of judgments, performing various behaviours that will cause the continuity of inequality (Dworkin, 2003, p. 419 et seq.).

Inequality as a social concept can be equated with the process of osmosis, that is, passing from a liquid to a solid membrane. In other words, the assimilation of

discriminatory knowledge happens from outside to inside the individual, as a means to be or belong to the main group or not to be discriminated against by them (see Caicedo Tapia and Porras Velasco, 2010). This adoption allows its continuity in time and space, through its reproduction and repetition to establish it as a custom. Its general observation provokes acceptance and validation in the community, which legitimises it by its acts in favour or disqualifying it for the outrages it excites.

Discrimination may be established as a social custom, as a product of the subjectivity of the individual or of the social psyche which invites and encourages its establishment or permanence through the observation of the repetition of these conventionalisms that erect a behaviour of the social group, some as unequal and others, as victims of their uses and abuses.

The family is another source that can preach and propagate discrimination, and make it adopted by its members. The family environment generates and fosters a form of behaviour inside and outside through the rules that are taught, invoked and protected from the same home. This communication of knowledge is taught by the holders of the family to the rest of their members, these thoughts are absorbed by the holders of the family to the rest of their members, who set out what values and practices they should exercise.

Another source of discrimination is through religious justification, which warns or makes an ordinance to parishioners to establish a set of beliefs that allow for the ends of inequality, abuse and injustice. Believers and worshippers of worship will not doubt the message by the authority that issues it, and will take their words literally and practice what is dictated by their spiritual leaders.

The ideological apparatuses of the State can also generate and spread discrimination, through certain messages that are communicated through propaganda, the media, norms and sentences that encourage the amalgamation between politics and society (see Althusser, 1974). For example, the caste system that existed in Mexico during the colonial period (Peninsular, Creole, Black, Mulatto, Zambo, Saltimbanqui, Salta pa´tras), determined the social position, and therefore specified their rights, freedoms, and even the places to attend, profession and to live (e.g., Castro, 1983).

It is necessary to remember that people who disobey discriminatory conceptions become enemies by not accepting or doing what they are supposed to do or invalidating because discrimination is part. As has already been said, the reproduction of hegemonic-oligarchic discourses instrumentalised from privilege.

This does not mean that any differential treatment is discriminatory, since, as long as such differentiation is objective, justified and rational, it cannot be characterised as discriminatory. If a football coach chooses certain players to play and not others because they do not have as much physical skill, the choice is not discriminatory, because there is a supporting threshold in the decision. Otherwise, the coach would standardise his decision not on physical dexterity in the religious inclination of the players.

Another key to its establishment is to favour a person or a group, so that the most capable, the most intelligent, the most beautiful predominates, etc. To benefit a person by his characteristics or abilities is a type of inequality, justified by that partial selection, with certain concepts of the right, the aesthetic, the useful, the valuable, etc. (cf. Dworkin, 1996).

Within discrimination, there is a situation of order-subordination, between the unequal and the subject who is the object of their claims and decisions. Which reveals an advantage for the one who exercises and a loss for the person who suffers the effects of their subjectivities. Partiality is one of the foundations for establishing a system of

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favouritism, in which a person or a group realises its taste and need, by means of imposition and coercion to protect a decision and to be able to grant a preference.

Although it is true, in the society, and less in the social complexity of the contemporaneity, not all have the same position, no less true is that this differentiated positioning does not justify either ontological, factual, social, politically and economically any arbitrary differential treatment. The objectives of discrimination are born from the individual conception by means of reflections, conceptions and assimilations at the subjective level, which will produce a prejudice that characterises the individual and his interaction with others.

One of the effects of discrimination is to constitute two social groups: the unequal and the unequal (victimizers and victims). In which the unequal will be those who make or cause an affectation or detriment by the exercise of their doctrine. The decisions and actions of the perpetrators take the form of economic, physical, mental, emotional or general damage or damage to their legal property or rights against the personality and property of the victims (Waller, 2013, p. 63 et seq.).

For example, consider the legality of the conduct of the operators of the Third Reich, with respect to their national legal system. The Nazis made the systematic extermination of a people a legal norm (García, 1991). The Nuremberg Laws of 1935, and any action taken to give effect to such a mandate, were protected by the Law of the Reich. Indeed, all their actions were backed up by-laws, decrees and regulations. The Nazis were aware that what they were doing or were not doing was criminal in nature; simply what they were doing was right, according to their legal system, and failure to do so would rather have made them liable for violating their law (Barrios, 2013). In this specific case, it can be elucidated how this relation and interaction between the two was legally institutionalised, translating discrimination as legal.

As mentioned, the discriminator wishes to repress, manipulate, deter or extinguish in order to gain advantages over what is not to his liking. In his environment, he tries to make his ideas prevail, under a means of domination and controlled circumstances. This for two reasons, the first, to have an ideal environment for your philosophy; and the second, to make permanent that ideal environment.

Controlling the way people live is another objective of discrimination. By stipulating how people should behave, an inventory is created of what can be done and what is prohibited, derived from what is permitted or directly, is prohibited.

The effect of disobedience to discrimination is the sanction that can be in various ways: corporal punishment, display, separation, censorship, limitation, marginalisation, even ostracism or confinement. Through punishment, the unequal system is reinforced; people know what they can do or how they should behave, the effect of the norm is to deter the behaviour.

The exhibition shows not only the offender, but will produce a marginalisation because it is contrary to unequal beliefs, and as a result, it will be separated from the rest because it did not respect the recognised norms. In an extreme way, the discriminated against can be expelled from the community so that they no longer see them, nor cohabit in the same space (Kerbo, 2004, p. 250 et seq.). The topic of expulsion on racial grounds, or how ghettos have been created to locate them, is well known.

An indirect objective of discrimination is to build subordination. There are two ways; the first is the unconditional submission of the unequal to their philosophy. The second is that which produces in the unequal as victims, having to obey the guidelines and conditions that this doctrine generates (Fallon, 2004, p. 7).

Discrimination as a trans-generational figure leads to the continuity of its principles, forms, actions and the circumstances that underpin it. Their continuation will

depend on their apparatus of persecution and punishment, education and other factors. What must be visualised is that an objective of inequality that seeks to impose itself permanently, to generate a single discourse, creating and establishing a single reason.

4. INTRODUCTION OF DISCRIMINATION AND ITS TAXONOMY

In the former section the concept of discrimination was presented, its origins, its foundations and a classification to see the different ways in which it can be exercised. In the next part of the study, it will be analysed which devices are used by the dominant person or group to impose their will through discrimination, that is, the instrumental sense of discrimination (Cornejo Certtucha, 1982, pp. 239–240).

Therefore, it must be borne in mind that obedience to inequality can be through coercion. For the imperative act to be considered not only legitimate, but also legal, this legal order is placed as just and valid, and as unjust and immoral, for the abused.

4.1 Forms and Types of Discrimination

Here will be the direct and indirect application of subjective, social or professional criteria that, based on inequality, have caused an imbalance in the relations, rights, freedoms and opportunities of some person(s).

In the act of discrimination, it is important to note that the difference can produce disadvantage, and vice versa, the disadvantage generates a discriminatory difference (Sørensen, 1996). Exemplifying: if someone possesses a certain personal characteristic by his skin tone, the unequal reacts, using his unconscious, which warns him and signals the behaviour he must execute.

On the other hand, social difference is a construct of a community, which has established a series of conceptions about the good, the just, the wrong, the normal, the accepted, the valuable, the due, the recognised, the bad, the harmful, the repudiable, the sanctioned, etc. The acts of the person are based on recognised standards that the majority approves (moral standards), which serve for the functional development on a personal and social level, which allow the performance of continuous tract conduct, and which are evaluated and strengthened in a reward or penalty system.

A religious community, for example, rejects homosexual people, because, to their sieve, they are perverse, because that is not natural, because their preferences, behaviours or ways of being are not acceptable, because they spoil the rest of society, because they are sick, among so many prejudices and ideas that drive the psyche and behaviour of the collective (Sojo, 2010, pp. 45–63). The person who adopts these preconceived ideas can accept them fully or with a certain degree of gradualness, or reject them, designing and constructing their own judgments, based on their own ideas and assessments.

The types of discrimination should be studied from the social, political and economic context. Each scenario is different, but there are certain patterns in its conception, diffusion and application. What is important to consider is that discrimination is created from subjective conceptions and that it tries to form people according to the plans of the unequal. In this way, discrimination is installed in the person and its rejection, adoption, continuity, disinterest or censorship depends on it.

Personal differentiation is the most common form of discrimination. This is generated from anthropology, the attire, the way of speaking, some physical or mental disability. In these cases, the subject distinguishes the difference from the others, generating and reproducing their inequality schemes.

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Many discriminations that are made are based on social conceptions, in which the individual validates his acting by communal impositions (Tilly, 1998, p. 22 et seq.). In this case, the difference is no longer based properly on the taste or preference of the person, but their judgments come from assimilated ideas, and therefore continues to reproduce and renew that belief. In the United States of America, several of its citizens think that Latinos only serve to provide services. In this case, immigrants consider that they are not able to lead a life and achieve the American dream; that they are not at their level and that their characteristics and beliefs do not allow them to achieve other goals.

As for discrimination as a factor of disadvantage, several possibilities can be noted. The first is the origin of the person (which can be racial, economic, among others), which leads to the judgment of acceptance by the community (Raz, 1988, pp. 23–99). The origin of where it comes from generates a label in certain groups, which qualify their acceptance according to it. Physical appearance is one of the main causes that excite and encourage discrimination. An attempt is made to impose a stereotype, standard or model of what is a pattern of beauty or of the aesthetic characteristics that people must possess, in order not to be disqualified by their image (in the Latin American case, the aesthetic standard is often the Eurocentric). By looking at the external elements, an image or symbol is formed in the person, which knows or identifies its physical peculiarities and for what purpose, housing in the mind its contents and functions of the object. But it not only assimilates identification, but also a personal judgment towards the object, an opinion based on subjectivity and/or in accordance with social materiality. The core of the identity of the object must be the basis for its identification, use and judgment.

On the other hand, all people have tastes, which come most often from the subjective selection of knowledge contained in the psyche (e.g. Dubet, 2015). They give guidelines to an act, to have or to do, as it is the dress, the sexual preference, among so many.

It is said that for tastes there are colours, and each human being has his preference, based on the purification of his knowledge, which provoke taste and attraction to various elements. In the case of personal tastes about the appearance of another person, it operates by prior knowledge either by personal taste or by an external conception, which directs its pleasures and thoughts.

The idea of superiority from one person to another can be given in several ways. One of the most obvious examples is that we observe that all individuals have certain morphological characteristics such as: skin colour, height, size, odour, among others, that allow identification and, in the background, the qualification of certain personal characteristics. In the first scenario, an identification and recognition is made. In the second moment, the attitude that will be taken towards the other individual takes place: an indifferent treatment, such as a pair or displeasure (which can generate an action against the other person).

The pre-judgment for physical differences becomes discrimination, when the same social treatment is not granted or recognised to those who are dissimilar in appearance or who they consider are not part of their standards, which gives them a differential treatment that attacks and violates their rights and freedoms.

Continuing with the subject of physical characteristics, one can see that discrimination occurs when there is a judgment that someone is more valuable than another because of their race or ancestry, that is, they are not peers and therefore their rights and freedoms should not be equal. Xenophobia is a social problem that results from the stigma of physical difference and leads to unequal treatment in society. Racial problems are as old as humanity, let us recover the African Americans in the USA, the Aryan supremacy, the indigenous of the ancient civilisations (Bolivia, Brazil, Chile, Peru,

Mexico, among others), the people was segregated by apartheid in South Africa, among many (Bix, 2009, p. 22).

It is observed that the image is what identifies us, but it is also the primary sample with which people are judged. This superficial judgment, which contains no depth, is only a perception based on emotional subjectivity. The attire of a person who comes from an original village, a punk, a trendy blonde, a dirty person, someone in an old suit, among so many images, instantly qualify the person by his image. This evaluation generates a reaction towards the other individual, which can be of indifference, taste or displeasure and with it, could generate an inequality in the treatment, for not complying with certain labels or not being in accordance with fashion consumption. One could also discriminate against a person because of the image he possesses by denying him a good or service. The unevenness that is exercised with these judgments creates a damage that the victim suffers in his sphere (Fiss, 2004, p. 59).

Gender, on the other hand, is a social product, recognizing the stereotyping of men and women, their roles in society, rights and freedoms. This construct is linked to a power relationship, in which women are unequal because of their sex and dominant beliefs (Izquierdo, 1999, pp. 25–49). Objectification has made women an object, at the service not only of men but also of society and the market. Differentiation has served to scorn and ignore their feelings and emotions, diminish their rights and freedoms, resulting in inequality by unravelling the gender issue. This has facticity in terms of jobs (secretaries, nurses, waitresses), careers (educators), jobs (it is believed that they cannot run a mechanical workshop), places (public and in good time), attire (label to look your own), to make it look good. This inequality is intrinsic in the acts that impose modes, forms, rules and behaviours of the roles that men and women must perform, if they want to be approved and seen well by the social conglomerate (Nino, 1989, pp. 199–236).

In another sense, sexuality is a private matter that concerns and belongs to every being. In this area, there are freedoms and rights that society has safeguarded and defined, in which preference must be respected, as well as the protection of the sexuality of minors and disabled persons. Sexual preference is a subjective decision, involving its exercise (optional), a decision, and a realisation involving the sexual rights of each person. The exercise of freedom of sexual preference is built on the basis of the personal, social and religious conceptions and beliefs of each subject, but which are determined in a space and time. This creates a parameter of admitted sexuality, in which the issue of right, normal and good are the measures to know if that person is acting in the right way, if there could be any tolerance, how to treat a disease or a crime to be punished. Discrimination comes in dealing with people who do not follow the social sexual canons; for example, homosexuals are not well seen by everyone, they cannot demonstrate their affection publicly, they go to exclusive places to entertain themselves without being qualified, clothing for their sexual preference, the application for a job if their homosexuality is recognised, etc.[3]

Mental condition can also generate differentiation, and lead to inequality and discrimination. For example, people with different capacities like Down, Asperger's, Tourette's, mental retardation, (among other mental or motor diseases) show at first sight a person with a disability, which sometimes produces a kind of injustice, for they do not enjoy the same physical or mental conditions as mental-physical-motor hegemonism. Without understanding, we are equal, but different.

[3] In Mexico, the right of same-sex marriage is recognised. But some of their rights as a husband or wife are not yet applied. For example, social security, adoption, health insurance, among others.

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These diseases already disturb them and cause them discomfort, but there are still people who do not offer their understanding and support, but who still discriminate against them. In the natural lottery they did not enjoy an excellent health, and therefore conditions must be created for them to participate in equity in society (Schneider et al., 2002).

Religious intolerance has generated hundreds of thousands of human misfortunes. To profess or worship any particular religion or creed is a personal decision. Militant religion or hatred directed at a particular person, race or population demonstrates their lack of spiritual pluralism. Disqualification, domination and imposition are the peculiarities of an intolerant religion, which on many occasions is in complicity with a State ideology.

Religion is used as an instrument of fanaticism, as a means for the State to instrumentalise exclusion, persecution, punishment or a campaign of hatred towards a religious group. For example, the Jews in the Nazi regime, the Cristeros in Mexico, the Christians in the Roman Empire, the Aztecs creed in the Spanish empire, the Muslims in the West, among other cases of discrimination for professing some faith (Tortosa Blasco, 2003, pp. 177–195). Do not forget that the Christian church in the Middle Ages censured any other way of understanding the world and that who dared, was punished, the way of prosecuting those who pointed out to be sorceresses, those who degrade those who do not follow the conventions, among others.

Belonging to a political group may also place a person in a situation of discrimination. People who are communists or extreme right-wing are intolerant of political pluralism, where their vision is one of political hegemony. They consider the ideology of the reason of State, and that their philosophy should be established, over others that are contrary or have an interest that does not empathise with them. This discrimination in the treatment of those who are not with me leads to disqualifying the thinking and interests of political pluralism, but, above all, exposes the lack of dialogue and empathy, considering antipodes or enemies to their adversaries.

The education received can also lead to discrimination. This in several ways: first, in some places, private education is a privilege, there are better teachers and peers with similar economic conditions unlike the public education system. Second, you can develop a bias for the school or university of origin. Thirdly, the opportunities presented to them by their place of training. And, finally, for the continuation of their studies in postgraduate, it is considered as variable, the school where they did their professional studies or to get a job. This difference between the types of education generates inequality and discrimination in treatment, opportunities and working conditions (Wesselingh, 1997).

The classism that is produced by belonging to a social stratum can produce discrimination (Cortés, 2016, pp. 23–60). The social treatment received by a person with financial resources in a restaurant or in a competence system, certain people enjoy an advantage because of the education they received and this causes a new case of discrimination (Sen, 2005, p. 16 et seq.). The social and economic conditions in which each person lives and in which he or she lives are sometimes decisive in terms of evidence and discrimination.

Age as a factor of discrimination where the years become a component in the market, in relationships or to define their activities (Gallego and Jiménez, 2010, p. 59). When an older person applies for a job in a factory, his or her application is rejected because of his or her abilities; a young person wishes to acquire a mortgage loan but does not consider it a subject to meet certain obligations; a mature woman trying to get a job in a government office and is rejected for the years she has and could contribute. In these cases, age is a determining factor for not obtaining what they requested or required.

In the first case, the physical condition of the elderly, their skills and abilities. In the second example, a person who does not enjoy a job stability and a certain profile, so it is more difficult for the person to find a real estate loan or to start a business. In the third case, for a woman with a certain age and no work experience it is very difficult to find work in the market, which requires young people and they will be paid less. So the jobs they come up with are minor, with little responsibility and minimal pay. This creates judgments of inequality and consequently discrimination, because those affected are not in accordance with the social, conventional or labour requirements, or worse, of commercial profitability.

Discrimination today is much discussed, since there are social entities and public entities that make laws to control and combat these acts; but, still, in times there are pockets in which part of the citizenry discriminates, which does not accept everyone equally and which bases its actions on unequal ideas (see Esquivel, 2015).

4.2 Validity Criteria for Justified Discrimination

Discrimination is instinctively rejected, recognised as harmful and a liability in liberal societies. However, it is this same freedom that on certain occasions allows its use to be justified, without a sanction; there is talk, therefore, of exceptions to discrimination, in which the application of criteria of segregation has no legal sanction and, moral, but an apology is sought for that decision, and it produces its validity from the protection of a protected asset.

Therefore, a classification can be created from various cases, which allow an analysis of why it is generated and why the justification is validated to be able to make a rational and objective differential treatment, seeking the primacy of certain principles.

4.2.1 Positive Discrimination

Positive discrimination was built on the basis of public policies, through so-called affirmative action, in the 1960s. It is essential to locate the context in which women could not be responsible for executive positions in the private sector or be appointed to relevant public functions. A stereotype emerged in which women's work was to preserve care for the home or to perform work in which men had no competence ('Affirmative Action in American Colleges After Fisher v. Texas', n.d.). Thus, society entrenched the custom of the roles, jobs and tasks that a woman had to perform, and on the other hand, a paradigm was consolidated that excluded them from public debate and decisions, without their presence or opinion.

This construction -positive discrimination- aims to seek justice and inclusion of women in the public space in which they request equal opportunities, inclusion in the public space, freedom of social action, equity in the treatment and full realisation of their rights (that are not only a legal representation). As an example, we can note the public calls for employment in the Mexican government, in which it was placed in the bases of the contest, which would only be for women.

This undoubtedly excluded men from the competence for these public positions, generating a series of legal remedies, which accused of discrimination and that there were not the same positions, just because they were of a sex other than the female.

On the matter in question, the High Chamber of the Court, in a different case, arrived at the following considerations when deciding the case SUP-JDC-1080/2013 and cumulated:

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> *"Affirmative actions in favour of women, for example, they aim to combat the discrimination and exclusion that they have historically faced, and they aim to accelerate their participation in a given area. - Also called temporary special measures, they seek to equalize opportunities and, therefore, grant special benefits or preferential treatment to women, who are destined to disappear as soon as the situation of inequality has been overcome. - They are affirmative action measures: or the issuance of one-off calls for public office and jobs open exclusively to women in response to a history of structural and systematic exclusion. A one-off call for women in competition competitions for posts related to the professional electoral service would be a proportionate response to the huge disparity between women and men holding posts in that service professional."*

Another example of positive discrimination can be found in the Mexican Federal Congress. At the present time, candidates and political representative delegations must be fifty per cent for women, so that there is equitable representation and they are no longer dispensed with electoral matters and political representation. Here, however, there would be room for reflection (IMCO Staff, 2018).

Although a quantitative parity had already been created in Congress, it did not mean that they had full freedom to exercise their functions, but that they were subject to the orders of the political party that nominated them and supported their candidacy. So their determinations are directed by the top political party, and, on the other hand, by the legislative agenda. It is a representation that in qualitative terms does not contribute to the gender of women, and that becomes an ornament for a beautiful photograph, but that has in the background an invisible chain and dark manipulation (Expansión Política, 2018).

4.2.2 Functional Discrimination

In a newspaper job section, staff were requested to work as hostess in a privileged restaurant. The restaurant required women of a certain height, good treatment, good looking and presence, but the message printed did not define or mention the physical characteristics that the candidates should possess, so a person with indigenous traits and an outfit of their locality was presented.

The human resources department decided that she did not have the image requirements required by the company's image. Thus, the victim decided to sue for this rejection, since she considered that it did comply with the bases of the advertisement, and that its racial and ethnic traits had been the pretext for not hiring her.

The case went to the Supreme Court of Justice where it found that there was a consensus that there had been discrimination on the basis of differential treatment, but it also gave the company the reason, since it had the freedom to choose its staff, and that knowledge and image considerations are paramount to the product they offer. In this way, an exception was designed in the criteria of recruitment of personnel, safeguarding the employer's right to freedom from hiring.[4]

[4] Direct amparo under review 4441/2018 of the Mexican judiciary.

4.2.3 Discrimination for Criminal Record

As discussed above, the image may be a requirement for employment. In which the aesthetic requirements are paramount for the development of the function that is planned, so the selection becomes fundamental for the proper development of that work. But one could examine a person's background as a criterion for agreeing to a job, in other words, one would be free to hire someone with a bad reputation or criminal record.

In Mexico, an advertisement was published in the employment section of a bank securities transport company requesting personnel. On that occasion, there was a man who had recently been released from prison for theft and drug trafficking. When applying to work, they asked him if he met the requirements that were of height, handling of weapons, consumption of drugs, among others that pointed out the advertisement of the newspaper. But the point that prevented the hiring was the appearance of his criminal record, because they did not provide confidence in the worker, so it was decided not to hire him.

The unsuccessful person established that he had been discriminated against, that he had already been released and that the issue of criminal records was not mentioned in the advertisement as a requirement for being hired and able to work in that company. The case was prosecuted, and was considered by the highest court in the country, which although the summons did not mention or specify any criminal record, no less true is that because of the activities carried out by the corporation, it required a suitable profile, and between them generate a relationship of trust to exercise its functions.

The discrimination on the basis of differential treatment that had occurred was justified by safeguarding the right of the company to recruit the appropriate personnel to carry out its tasks.[5]

4.2.4 Discrimination based on Mental or Physical Capacity

In previous cases, it was observed that job openings should be more specific so as not to create problems with recruitment. However, what would happen if the call established a mental condition to be able to own a job. In the hypothetical case of a construction site and there is an outside advertisement, which indicates that someone with experience in the handling of the crane is required to place iron beams, upload material and other acts related to heavy loads and a person with Down syndrome or advanced age is presented to apply for the use of crane handling. The first reaction was a mockery, he was not even asked about his skills, being discriminated against and not hired by the construction company (Suprema Corte de Justicia de la Nación, 2010).

The point to consider, is that the announcement did not contain as a requirement any reason of health, or mental or physical capacity; however, it should be reflected that people who want that employment enjoy a set of knowledge, skills and health to operate these teams. The safety of workers must be safeguarded by the same company, so the hiring of specialised personnel minimises risks, hence the justification for differentiated *treatment*.

4.2.5 Discrimination in Political Representation

There are sometimes certain requirements for positions and positions of political representation, which place those who could not fill them in a disadvantaged position, or

[5] Amparo in revision 272/2019 of the Mexican Judiciary.

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that because of its specialty requires personnel with a professional profile or certain requirements for its designation. These legal requirements could be considered discriminatory, but let's look at some examples. The Mexican Constitution states that to be a deputy or senator, one must be 21 and 25 years old, respectively. But really these citizens who already exercise political acts, cannot contend for the fact that they do not have the established age; indeed, age would be a criterion for thinking that the individual can already discern responsibly on public affairs.[6]

In other regulatory systems to apply for representative positions in Congress, it is required to know how to read and write (Brazil), or to have a higher secondary education (Chile), being the fundamental requirements to be a candidate. But are these constitutional conditions discriminatory, or are they the minimum level for carrying out their representative tasks? There are other conditions, for example, in Mexico, ministers of creed must give up their habits, at least six months before the election or have been commissioned to office in the government of the current election. In the case of the civil service, there are some additional requirements to be considered in office, such as having nationality (Taibo case) or to be Secretary of State (have a professional degree) (Muñiz Toledo, 2018).

4.2.6 Discrimination by Self Guardianship (Security)

Justified discrimination can also be made when it is for security reasons. In Mexico City, in public transport, cars or exclusive spaces for women are set aside so that they do not suffer from harassment, guaranteeing their safety and being able to travel comfortably, with this separation policy (Vela Barba, 2016).

In times of pandemic, a public service could be denied. For example, the rent of an apartment to a doctor, who is in contact with infectious diseases or attend in a restaurant to nurses who work with people infected with a virus of contact transmission (Lastiri, 2020).

4.2.7 Legal Discrimination

Sometimes the rules contain discriminatory criteria on the grounds that a superior asset is protected. In family matters, the Civil Code provides that in cases of guardianship, women shall have custody of minors, leaving the father of the minors defenceless, since a right is imposed by virtue of being the mother, and it is believed that they will take proper care of them. However, each case is a story, and not because it is regulated, all the elements of that issue should not be overlooked (Indigo Staff, 2019).

There are also specialised public policies for mothers who are householders, which provide them with certain support, such as education, health care for them and minors, entrepreneurship, housing, microcredit, working hours, among others. In which sexuality determines that only women will be able to obtain these benefits.

4.2.8 Competitive Discrimination

Context determines how people's lives and actions are taken. In which the evolution is the constant one so that the vulnerable groups obtain political triumphs or social demands for their rights. In the case of the women's sports competition, the difference between trans athletes and women has been noted. Because they consider that their physical conditions (volume and muscle mass) produce inequalities with

[6] Constitutional Articles 55 and 58 of the Mexican Federal Constitution.

women (biologically speaking) (BBC Mundo, 2016), which generates a competition that is not fair for these physical inequalities.

This topic is still being discussed, what can be observed is that the answer would be very casuistic, depending on the type of sport being consigned. It is not the same archery as athletics, routine with hoop and weightlifting, it is not the same synchronised swimming as boxing, among others (Vela, 2017).

4.2.9 Discrimination by Suspicious Appearance

In the criminal procedure system and in many public security systems, corporal review of persons who appear to be suspected by the police or who act in a manner that could lead to a crime is permitted.[7]

But this harassment is also due to the appearance of people. In the United States, reviews or arrests are greater for Latinos or African Americans, where their racial conditions are related to crimes, and therefore they are subject to greater supervision, which often becomes discrimination in their selection of personal reviews.

Another example where there is discrimination in screening is at airports. In which people with Arab traits are more guarded and personal searches are almost a future fact. Here the good that is protected is security, its criterion is the past acts in which there were terrorist attacks.

4.2.10 Discrimination on the Basis of a Public Record

Databases on various subjects are currently available. Through electronic means or public consultation ranging from credit histories, criminal records, record of sexual predators against minors, non-payment of alimony, professional malpractice, among others (CNDH México, 2016).

In these databases, various public data on individuals are displayed which can be used to obtain information about their activities. But these data could generate discrimination of the people contained in them, so it could be a factor (depending on the topic and object), to be able to discriminate against a subject who has committed illegal or illicit activities.

4.2.11 Diseases and Discrimination

At present, everyone is familiar with the issue of the pandemic by COVID 19. This virus has changed the way people develop their personal, professional, and social activities. This has resulted in the imposition of a system of social inactivity and confinement (compulsory or out of self-confidence), in which interaction with other individuals has been attempted to minimise, so as not to spread the spread of this disease.

For the same reason, a vaccine was invented to recover the previous life and be able to continue life as closely as the previous one, in terms of the uses and customs of the people. This immunisation in some states has become binding for subjects (such as Spain), and in other countries (such as Mexico), the issue of the freedom of individuals not to undergo this medical treatment against COVID has been discussed.

But there are certain states (such as Chile) in which a certificate called "Mobility Pass" has been issued, in which, to work, attend the cinema, go up to the subway, be at

[7] Art. 269 of the National Code of Criminal Procedure (Corporal Research).

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school, visit a museum, or any outside activity, it requires the subject to have it, under penalty of criminal or administrative punishment. For example, new discrimination is generated when a person without vaccines or those authorised, cannot enter the United States of America (Janssen / J & J. Pfizer-BioNTech. Modern. AstraZeneca. Sinovac. Sinopharm. Covishield. Covaxin) or Europe (Pfizer, Moderna, Johnson & Johnson, and AstraZeneca).

But should it be a sine qua non requirement for any activity (how to apply for a job, visit the family or attend a concert), to possess and present an immunisation card? Should people be forced to vaccinate (for the sake of others)? or should personal autonomy be respected and not excluded from social, personal, and professional activities?

4.2.12 A Possible Fraud to the Law

In this legal space, if a man requests a judicial change of his birth certificate, in which he is registered as a man to be now recognised as a woman, accompanies an expert in psychology in which her female personality is declared. The judge must consider or examine whether this person is making a voluntary change, there is no opposition, the law has no objections, and neither can the judge request further review of the case (López Bonilla, 2019).

Because it is an administrative procedure, an order is issued for the change of sex in the birth certificate, and with this, it is possible to exercise their rights as any citizen. Subsequently, it requests that the public policies that were created exclusively for women be recognised and granted, in areas such as entrepreneurship, single mothers, health for herself and her children, housing subsidy, educational scholarships, among others, or requiring work leave to care for their children.

On the electoral issue, there was a relevant case (Coppel, 2018). A group of men requested their registration by gender quota when claiming that they were women (they even dressed and made up for photos), and that not considering their personal decision would violate their sexual determination and discriminate against them, as they claimed to be women. This case was resolved on the assumption that they had not expressed this preference before the elections, nor had they made public or private statements about their sexual orientation, so they dismissed the matter and denied these postulations.[8]

5. EPILOGUE

This booklet presented a theme that, although it is repudiated at first instance, no less true is an act that is constantly carried out in various social areas. So the task was to show this clash of rights, in which the circumstance or an individual can operate an argumentative system that justifies discrimination, without having to face a punitive consequence. It is not a question of validating these decisions, but rather of stating that the relativity of a subject that can generate an exceptional space, and that is the same thing which allows to generate exit valves and that the juridical system can face its contradictions inside.

Justified discrimination in liberal society is a topic for discussing another form of protection of a protected good and on the other hand, observe the inexorable and unrestricted respect for the rights of every person, and that the clash of rights and

[8] SUP-JDC-304/2018 of the Mexican Judiciary.

casuistic circumstances produce spaces for the use of disqualification to certain individuals or groups (even affecting their rights), provided that the usefulness of that personal decision is useful for personal or social well-being.

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BERLE AND MEANS' CONTROL AND CONTEMPORARY PROBLEMS / Tibor Tajti

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Abstract: *The best way to judge the quality of a new company law is to test it against real-life problems. This article attempts to do that by placing the concept of control in the center of its observations, posing related questions, and offering food for thought for the drafters of company laws. The concept of control in the context of corporations with highly dispersed shareholders holding atomized stakes ('quasi-public corporations') was first dissected by Adolf A. Berle (lawyer) and Gardiner C. Means (economist) in their 1932 classic The Modern Corporation and Private Property. Their conceptualization and classification of control serves as the basis for the analysis herein, even though interest in control has lately been overshadowed by novel schools of thought based on agency theory and the like. With that in mind, the central thesis of this article is that control is the ultimate 'invisible hand' of company law because it is unparalleled in importance, omnipresent, and – due to its multifaceted nature – inherently difficult to grasp, especially insofar as its precise essence or its manifestation in real life circumstances is concerned. Secondly, using examples from recent cases from Central and Eastern Europe ('CEE'), this article aims to show that the crucially important concept of control is still not fully understood. Unfortunately, but perhaps unsurprisingly, empirical evidence readily proves that simple formulas for "taming" control do not exist. Instead, eternal vigilance, as well as regular re-evaluation of governance and oversight solutions, is needed not just by the boards and corporate officers in charge of oversight, but also by shareholders if control of corporate officers is at stake. Thirdly, the article demonstrates that control plays a similarly important role for small and mid-sized businesses ('SMEs') countering a burning set of problems that SMEs are doomed to face at some point in their existence: the issues corollary to the inter-generational transfer of the control and ownership of successfully operating companies. This topic is tackled through the prism of the milestone case of Galler v. Galler from Illinois, United States (US), which gave the green light to a peculiar but flexible set of solutions to these governance-related issues. I argue that the Galler formula, or at least parts of it, could be adapted elsewhere to serve similar ends. As the case studies offered in this article will demonstrate, these are living problems, especially insofar as they concern jurisdictions which are still yet to settle on wholly-adequate solutions, such as the post-socialist states of Central and Eastern Europe, China, and other fledgling legal systems across the globe.*

Key words: *Control; Separation of ownership and control; Corporate governance; Acquisition and abuse of control; Intra-generational transfer of wealth and control; Holding companies; Company Law*

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1. BERLE AND MEANS' CONTROL EXPLAINED

1.1 Why Should One Place Control at the Centre of One's Observations?

I must start by admitting that my decision to revisit the ever-recurrent topic of control is partially borne of personal experience. As my 20th anniversary as a university professor passes by, I have been reminiscing about my experience teaching various areas of comparative commercial law and regulation (with a substantial dose of private law as well), plus the 15 years I spent as a corporate counsel and board member of a former Yugoslav company that ultimately failed to survive the Balkan wars and the privatization wave of the 1990s. I realized that these two eras of my life have a strange common denominator: the concept of *control* as understood in the context of corporate law and the law of other enterprise forms, or, as is the case in Europe, as a fundamental element of company law.

I encountered the problematics of control during the former Yugoslavia's reorganization wave which began in the late-1980s, when a novel business form borrowed from the West – the 'holding company' – became the region's top business vehicle and was promoted as some sort of magical formula for a prosperous future. In my ensuing professorial years, control yet again came into the limelight in educational contexts, firstly due to the ascendance of the new hybrid discipline of *corporate governance*, and then somewhat later, through the supplementary (or rival) discipline of *corporate finance*. These disciplines clearly grew out of company law, but went much further by covering what one could aptly describe as the 'know-how' necessary for the proper implementation of company laws, together with a focus on best practices. Both also tackle corporate strategy issues. Corporate strategy, contrary to company law, takes not only a more practical but also a more holistic approach to corporate life. For example, the issuance and sale of shares (equity) is a method of raising capital by a company (and thus is a topic for corporate finance), but it may also lead to losing control of a company (and it thereby also relates to corporate governance).

The right approach to control thus requires a combination of the two perspectives. This basic tenet should not be forgotten when reading the ensuing elaboration: no meaningful control-related analysis is based solely on the text of a company laws nor – as is the case in the United States – upon the laws regulating various business vehicles.

Consequently, my second scholarly justification for choosing to deal with control is that if one fails to comprehend it, any proper understanding, or, for that matter, proper implementation of company laws, becomes impossible. Put pithily, control should not be overlooked as an invisible and impalpable institution of company law, but should instead be emphasized as a fundamental concept and understood as part of a holistic worldview that – as indicated above – also incorporates perspectives from both corporate governance and corporate finance. In the same vein, control is the ultimate "player" in company law for the large business forms listed on stock exchanges and for SMEs alike. Contrary to Cross and Prentice, who list limited liability and corporate governance rules as the mechanisms which *"[allocate] power in the company among the shareholders, the board of directors, and corporate officers,"* (Cross and Prentice, 2007, p. 13) the claim advanced herein is that control should be placed at the center of our theoretical understanding. While admittedly the concept of control *could* be considered a subspecies of the rules regulating corporate governance, doing so would only serve to make control less visible, if not invisible, which could go on to have negative practical repercussions.

The rise of corporate governance followed the collapse of Enron, the 8th largest public (listed) corporation in the United States (US), and the contemporaneous fall of a

number of other US corporations (e.g., WorldCom, Adelphia). The search for the origins of what the prestigious magazine *The Economist* called '*Enronitis*'[1] pointed to two main causes: accounting fraud and corporate sleaze. The regulatory response ensued in the form of the Sarbanes-Oxley Act 2002, which besides subjecting the accounting profession to a stricter regulatory regime and introducing numerous corporate governance rules targeting directors, further empowered the Securities and Exchange Commission (SEC) while strengthening criminal penalties for accountants and corporate officers. The Act has since been critiqued as a piece of hastily-passed legislation that amended and thereby undermined the schemes of several venerable statutes. Although initially an American affair, its spillover effects reached Europe and the rest of the developed world soon thereafter, frequently materializing in the legal sphere through the appearance of internal ethical, or codes on corporate governance,[2] which aimed to regulate the behaviour of directors. For a year or two thereafter, corporate governance became the dominant topic at conferences, among law journals' symposium issues, and in masters' theses. This, alongside a few recent cases from CEE, justify both this paper's focus on revisiting the topic of control and the idea that the problematics of control are deeply entrenched in the life of contemporary corporations.

1.2 On the Importance of Berle and Means' Monumental Work on 'Quasi-Public Corporations'

Enronitis was "culpable" for yet another important development for control. This was the re-publication of the enduring 1932 classic concerning the conceptualization of corporate control, i.e. *The Modern Corporation and Private Property* by Adolf A. Berle and Gardiner C. Means.[3] The book's relevance to the Enron scandal, corporate sleaze, and this piece's broader purpose is its ingenious analysis of what it calls 'management control', that is, control by the senior executive officers of the corporation (Berle and Means, 2004, p. 196). This form of control, one of five forms identified by Berle and Means, has resurfaced as a source of problems numerous times since the Great Depression.

Although a large part of the book has now become – to quote Weidenbaum and Jensen's introduction to the 2004 reprint – a period piece whose "*special value lies in its evocation of a historical period*," (2004, p. ix) this characterization applies primarily to the book's inclusion of abundant statistical data and case studies from 1920s US. However, the theory, fundamental concepts, and findings that form the core of the work arguably remain one of the best analyses not only of control itself, but also of another closely-related topic: the separation of ownership from control. Or, to use Weidenbaum and Jensen's formulation, "*many of the answers provided by this book have been superseded by more recent events, but the questions raised continue to be worthy of the attention of scholar and practitioner alike*" (2004, p. xviii).

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[1] The term was coined by journalists, see Enron a Year on: Investor Self-Protection (2002). *The Economist*. Available at: https://www.economist.com/leaders/2002/11/28/investor-self-protection (accessed on 10.12.2022).

[2] As put by Nina Cankar, "*the purpose of the codes [on corporate governance] has been to improve good corporate governance practice by increasing management's responsibility and promoting openness and transparency of business, thereby increasing investors' confidence in securities markets*." (2005, p. 288).

[3] Adolf A. Berle and Gardiner C. Means, The Modern Corporation and Private Property, with a new introduction by Murray Weidenbaum and Mark Jensen, Transaction Publishers, New Brunswick and London, 6th print, 2004. (hereinafter: Berle and Means, 2004). The book is the result of a commendable cooperation between a lawyer and an economist. The book is thus filled with statistical and quantitative data related to the contemporary US corporate sector, plus six tables and a chart in the appendix section.

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The book has yet another limitation: it is restricted to corporations, the largest form of business organizations in the US', both in 1932 and today. Moreover, as I have already hinted, they actually focused on a then new class of corporations, which they called '**quasi-public corporations:**' "*a corporation in which a large measure of separation of ownership and control has taken place through the multiplication of owners*" (2004, p. 5). In other words, it refers to a corporation in which the ownership of voting stock (shares) is widely diffused into the hands of hundreds if not thousands of shareholders, and while all shareholders are legally treated as the corporations' owners, actual control almost inevitably falls into the hands of either a group of minority shareholders, or of the company management (executive directors). Roe referred to this the feature of 'atomization,' or "*many shareholders owning only small stakes*" (1994, p. 6). The shareholders' powerlessness over decision-making and their consequent disinterest in the voting process makes the seizure of control by executive directors possible under certain circumstances. To illustrate, Berle and Means gave the example of the Rockefeller family's direct or indirect minority interest in several affiliates of the Standard Oil corporation. In the case of Standard Oil Indiana, a mere 14.5 per cent stake "*combined with the strategic position of its holders… proved sufficient for the control of the corporation*" (2004, p. 6).

Contemporary examples are easy to find as well. Sometimes, the old patterns described by Berle and Means resurface in an altered form, and sometimes even more-or-less unchanged. While Elon Musk holds a mere one-fifth of Tesla's single class of shares, he retains control through bylaws that impose supermajority voting (Masters, 2019, p. 26). Zuckerberg's control of Facebook rests on additional pillars: as well as being the Chief-Executive Officer (CEO) and chairman of the board, he uses a dual-voting class structure which affords him possession of 60% voting power. This is due to Facebook class B shares, 18% of which are held by Zuckerberg and a few insiders, which carry 10 votes per share (Kuchler, 2018). It is thus no wonder that in the aftermath of the Cambridge Analytica scandal (where about 87 million Facebook users' personal data was leaked) and the resulting fall of Facebook's stock value by about 10% (Kuchler, 2018), shareholders tried but failed to replace the dual class system with a 'one share – one vote' one.

Here, it is illuminating to quote from Zuckerberg's comment on the failed action of Facebook shareholders, which proves this piece's central point on the quintessential role of control in the corporate context; control is that 'invisible hand' that control-holders seek to maintain the efficiency of their control. As he put it: *"[Facebook] is 'really lucky' to be controlled by a single majority shareholder. … We are not at the whims of short-term shareholders. We can really design these products and decisions with what is going to be in the best interest of the community over time.*" (Kuchler, 2018).

1.3 Control: Definition and Forms of Appearance

In the introduction to the reprint edition, it is correctly claimed that Berle and Means only "*vaguely define[d] the concept of 'the control' of the corporation*" (2004, p. xii). Indeed, control is merely *described*, among others, by the example of control by corporate *management*, which in 'quasi-public corporations' with dispersed shareholders is typically placed in the hands of purported experts (Berle and Means, 2004, p. 66), who may not even be shareholders. As they ingeniously put it, one is virtually '*forced to recognize*' (2004, p. 66) that there is 'something' hard to grasp: something that unavoidably exists in corporate life and yet it differs from both ownership and management. This control – not in the sense of the *monitoring* of any particular body or officer in a company, though

including that power, too – refers extremely broadly to the possession of the powers necessary to make all important decisions for a company. This conceptualization of control is far more expansive than Weidenbaum and Jensen's, which is limited to the power to select the board of directors (2004, p. xii).

Berle and Means identified five types of control on the basis of their structural analysis of a sample group of contemporary American corporations. The *first* is complete, or near-complete ownership, which is normally the case in small-scale enterprises where ownership and control are in the same hands (2004, p. 67). The *second* group includes corporations with majority control, or control through ownership of a majority of the corporation's outstanding stock (shares). They also note that this form of control may translate into less control compared to the first group, as simple majority voting power is often not sufficient for making fundamental decisions affecting corporate life such as company dissolution or amendment of the corporate charter (2004, p. 67).

Contrasting with these relatively simple methods of control are Berle and Means' three remaining categories, which rest on more complex foundations. In their *third* type, control is maintained through various legal devices, yet without majority ownership. In this hybrid category of control, Berle and Means list pyramiding, the use of non-voting shares or shares with excessive voting rights, and the exploitation of preferred stock that affords excessively disproportionate rights to its holders. Many of these techniques were already in use by American corporations prior to the Great Depression, but only appeared in parts of Europe decades later (if at all). They also distinguished a *fourth* type, minority control, but it is their fifth category which plays a special role herein: management control (i.e., control by executive officers). This last category requires special attention, as do several extra-legal forms of control which Berle and Means mention only in passing.

1.4 Berle and Means' Disregarded Caveats concerning 'Management Control'

Berle and Means highlighted that 'management control' is probably the most subtle form of control, as it rests 'on no legal foundation' (2004, p. 82). Its existence is primarily linked to corporations with widely dispersed shareholders, in which there is no individual, or at most, only a small group of shareholders, that possess "*even a minority interest large enough to dominate the affairs of the company*" (2004, p. 78). Under such circumstances, shareholders who are aware of their position may therefore have no interest in voting, either. Or, as was the case in a number of US corporations in Berle and Means' times, such shareholders would "*sign a proxy transferring [their] voting power to certain individuals selected by the management of the corporation, the proxy committee*" (2004, p. 80). The end result is *de facto* control by the 'management,' which "*can thus become a self-perpetuating body even though its share in the ownership is negligible*" (2004, p. 82).

We know today that control may end up in the hands of executive directors and corporate officers through other means, too. Moreover, their position may be further strengthened by meaningful packages of shares or options awarded to them as rewards for their work or as incentives for meeting certain targets. Put simply, control by directors exists today in more varied forms and under more complicated sets of circumstances than in the era described by Berle and Means. They proved the existence of this form of control and hinted at some of the risks corollary to it, and thus the legacy they left to future generations ought to be acknowledged and reckoned with, at least, by introducing proper checks and balances to keep this type of control "tamed." It is a fact, however, that Berle and Means' insight is often neglected (if not intentionally disregarded) even today,

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precisely because it is not in the interest of control-holding directors, executive officers, and corporate office-holders to limit their own power.

A scandal concerning the Croatian national oil and gas company named INA,[4] which reached the media in August 2022 after going unnoticed for two years, is perfect proof of the sorts of problems that may result from the excessive concentration of control in the hands of executive directors. According to charges brought and relevant media reports (see, e.g., Bradarić, 2022), an executive director responsible for the sale of gas and empowered to sign contracts up to the value of €20m (though with the counter-signature of his deputy) fraudulently abused his position in a manner that caused damages exceeding €133m to INA. His method was simple: a small company (OMS-Ulaganje) was formed, including him and his pensioner father, as well as the President of the Croatian Chamber of Attorneys and two more individuals as the only shareholders. INA then sold gas to OMS-Ulaganje for a fixed price of €19,5 irrespective of any changes to gas prices on global markets. The small company then resold the gas at higher prices of up to €210. A bank clerk blew the whistle after noticing an attempted transfer of 500 million Kunas[5] to the executive director's pensioner father's bank account (see Bradarić, 2022). The Croatian Office for the Suppression of Corruption and Organized Crime (USKOK) subsequently initiated investigations concerning the whistleblower's allegation.[6]

What brings Berle and Means into the picture here is not only that a single executive officer found himself in the position to organize this fraudulent scheme, which in itself demonstrates the potentially excessive powers oft-possessed by executive directors, but – more pertinently – it shows that INA's entire governance and control system failed. According to the media, politics also played a role (see, e.g., Redakcijski tekst, 2022), but in this case politics can hardly be considered the sole culprit. According to the former CEO of INA, concern about the excessive power of executive directors was raised already in 2011-2012 and subsequently efforts were made – clearly unsuccessfully – to distribute the powers to conclude major contracts into "more hands." INA is one of Croatia's largest corporations, and as such has more layers of governance than most companies, including a Board of Executive Directors as well as a Board of Directors and a Supervisory Board. Moreover, as the Hungarian oil and gas company MOL holds a 49% stake in INA and consequently possesses significant governance rights, the top boards were of a mixed structure and were composed of both Croatian and Hungarian citizens. However, according to a public statement issued by MOL, they only learned about the scandal from the media in the summer of 2022 (e.g., HVG, 2022; V. B. 2022).

Under pressure from the incumbent Croatian government, the Hungarian president of the Board of Directors submitted his resignation a few days after the scandal broke out. This seems to have satisfied the Croatian side, but the harder task – i.e. finding the right legal 'checks and balances' for preventing future abuses by executive directors and establishing flexible but abuse-proof rules on contracting to this end – is yet to be achieved. It is a big question whether such a goal is achievable, especially considering that such multi-layered governance systems are inevitable in large firms with complex shareholder arrangements, and also considering the fact that these sorts of risks – which are in essence caused by 'the human factor' – seem similarly inevitable.

[4] For the history and corporate governance system of INA see INA. Available at: https://www.ina.hr/en/about-ina/profil-kompanije/povijest/ (accessed on 10.12.2022).
[5] The Kuna is the name of the Croatian national currency that will continue to be in use until 1st of January 2023, when the Euro will replace the Kuna. As of September 2022, the exchange rate is 7,51 Kunas for 1 Euro.
[6] For the English language pages of the Office see USKOK. Available at: https://uskok.hr/en (accessed on 10.12.2022).

The ultimate lesson from the recent INA case was superbly summarized by Kay: *"If we asked a visitor from another planet to guess who were the owners of a firm by observing behaviour rather than by reading text books in law or economics, there can be little doubt that he would point to the company's senior managers"* (Kay, 1996, p. 111). This description corresponds perfectly with the governance system of INA, and undoubtedly many more such large corporations in the region and beyond. Kay's comment above is ultimately what modern corporations must reckon with and what the law ought to provide checks and balances against.

1.5 Extra-Legal Control: Factual, Strategic, and Politically-Leveraged Control

Berle and Means further identified a sixth general form of corporate control, but failed to devote much attention to it. They spoke of this class as 'extra-legal in character (2004, p. 67), yet thereafter devoted little attention to this 'factual control' category. They nonetheless admit that "*[i]n the typical [US] large corporation […] control does not rest upon legal status [rather] […] control is more often factual, depending upon strategic position secured through a measure of ownership, a share in management or an external circumstance important to the conduct of the enterprise. Such control is less clearly defined than the legal forms, is more precarious, and more subject to accident and change*." (2004, p. 74).

The reason why it is important to highlight this form of control, in addition to this piece's focus on management control, is not just because these two are perhaps the most interlinked – and in practice, mutually complimentary – forms of control, but also because today – perhaps more so in CEE than in the high rule of law countries – this sixth form of control is dominant amongst large businesses. This is presumably due to the fact that throughout most the CEE, and more broadly throughout most of civil law Europe, non-voting shares or shares with excessive voting powers tend to be prohibited by law. The same could be said with regards to voting trusts, because notwithstanding the fact that an increasing number of European civil law systems have introduced versions of the trust, primarily to enrich inheritance law with more flexible legal tools (with some, such as Hungary's, being directly inspired by common law trusts),[7] few have gone as far as to expressly regulate voting trusts. There is also widespread distrust in the legal system throughout CEE, with the typical CEE businessman considering a day in court to be nothing but a waste of their time.

Last but not least, the presence of factual control is impossible not to see in case studies from CEE. The above-discussed Croatian INA saga could be taken as a paradigm case from that point of view. Particularly salient in that affair was the impact of politics on INA's business life, not just in 2022 but throughout the company's history. From both an academic and a practical point of view, an apolitical account of the governance structure of companies such as INA is impossible, and erroneous theoretical conclusions inevitably follow if politics is unduly disregarded. Particularly in cases concerning nationally important large businesses such as INA or MOL, political influence is simply the norm, not only in CEE countries but – as the Court of Justice of the European Union's judgments concerning so-called golden shares prove[8] – in Western Europe as well.

[7] On the spread of various forms of trusts in European civil law countries, see Tajti and Whitman (2016).
[8] See the cases: CJEU, judgement of 4 June 2002, Commission v. Portugal, C-367/98, ECLI:EU:C:2002:326; CJEU, judgement of 4 June 2002, Commission v. France, C-483/99, ECLI:EU:C:2002:327; CJEU, judgement of 4 June 2002, Commission v. Belgium, C-503/99, ECLI:EU:C:2002:328; CJEU, judgement of 23 October 2007, Commission v. Germany, C-112/05, ECLI:EU:C:2007:623.

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1.6 Abuse of Control

1.6.1 Simple Cases: the Northern Macedonian Smilenski Case

The fact that the concept of control is hard to pin down paradoxically makes it easy for crooks to exploit the concept's lack of clarity for malicious purposes, a phenomenon which is demonstrable with reference to numerous well-known cases. In most of these cases, a small group of individuals, often composed of friends and family members and typically with surprisingly little specialist legal knowledge, build-up a corporate façade through a byzantine system of interconnected companies while hiding their fraudulent activities behind the corporate veil.

In the small and economically weak country of Northern Macedonia, one of the successor countries of the former Yugoslavia, a series of events known as the *Smilenski* case saw a single businessman (aided by several family members) exercise full control over one such complex structure of interlinked affiliates that was built up during the transitory process of the early 1990s (Aleksandrovski, 2007, p. 141 *et seq*.). More than fifty interlinked companies (some incorporated in Austria, and some in Northern Macedonia) were controlled by Mr. Metodij Smilenski from a holding GmbH in Vienna (Austria). Exploiting the inexperience of local banks, his fraudulent scheme involved raising credit and then transferring the borrowed funds into untraceable accounts through his byzantine web of companies. The money ultimately 'disappeared'. As the only security given for these loans were the assets held by his shell companies, or the personal guarantees of Metodij, these shell companies were successively bankrupted in order to prevent the banks' collection of the debt, the guarantor disappearing from the reach of courts, too.

Empirical evidence clearly suggests that, unfortunately, this pattern of defrauding banks was frequently employed in the first transitory years in the entire region.

1.6.2 Abuse of Control: the Case of Holding Companies

Holding companies deserve special attention because in the former Yugoslavia, and some other post-socialist countries in CEE, they were seen as a model approach for the transformation of the large enterprises inherited from the socialist period into efficient business vehicles that could meet the demands of an efficient market economy. Generally considered a peculiar form of a group of companies, the holding company form seems to have become popular in Yugoslavia because there was an unspoken assumption that this form would keep economic control in the hands of the former central management, a class largely comprised of Communist-Party cadres.[9] The appeal of this particular form of ownership lay to a great extent in the fact that the overwhelming majority of Yugoslav businesses were not owned by the state, but operated under a *sui generis* form of 'societal ownership' ("*društvena svojina*"), which resembled – though differed in important ways from – cooperative ownership. The shorthand explanation is that the companies were owned by the workers they employed. Due to this *sui generis* form of corporate ownership, the state had much less direct influence over the process of economic transition from socialism to market economy than in Hungary and in other CEE countries with predominantly state-owned enterprise sectors. In other words, these Yugoslav oligarchs (not named as such initially) had freer hands in choosing and shaping the model for orchestrating their transition plans.

[9] For a more detailed description of the former idiosyncratic company ownership model prevalent in Yugoslavia and its effects on corporate governance, see Tajti (2005).

The scarce literature reveals neither the source of inspiration for the model nor the ultimate purpose of using the holding company form; relevant legislation and the few commentaries written thereon tended to present the model as virtually God-given. Most commentary only points out the law's relationship with other rules previously enshrined in the company act with little if any criticism or caveats attached. There are hardly any materials that specifically address the model's suitability for maintaining control over companies, nor are there any discussions on the role of control in secondary sources of law generally.

However, in line with the theory that this model was chosen to keep control in the hands of the experienced management of Yugoslavia's idiosyncratic socialist model, the subsequently formed holding companies employed former top executives in new, high-ranking executive positions. The tasks of those occupying these positions were limited to governance, the acquisition of stakes in new companies, and general investment, thereby excluding them from 'less comfortable' areas of activity such as manufacturing or marketing and sales.[10] However, in the absence of developed capital markets, making income from investing was normally nothing more than wishful thinking. Such holding companies would go on to possess shares in their affiliates, and sometimes subsidiary companies would also own shares in their holding company. Later, as it was realized that these Yugoslav 'holding companies' were actually just one form of the broader 'group of company' category, the designation disappeared from the legal parlance of some successor countries of the former Yugoslavia.

No quantitative data seem to exist, but several of these new holding companies collapsed soon after being created, with such companies typically facing serious governance problems even prior to the outbreak of the Balkan wars in 1991. The reasons for this included not only the burdens caused by a surplus workforce and the loss of markets, but also the teething problems corollary to the transition to capitalism, in particular, unfamiliarity with the nature of securities and other elements of the market economy, widespread distrust in an economic system that had been in constant crisis during socialism, and the lack of a litigation culture for bringing corporate disputes before the courts.

Needless to say, a misunderstanding of control's precise meaning and how it functions efficiently in the West ought to be added to this list. What I have learned from my experiences with Yugoslav holding companies is that control works where there is high respect for the law, or in modern terms, where there is a high rule of law index score, and the law is embedded in the people.[11] Where that is not the case, control by the center – the holding company – may evaporate overnight, a realization that experience thrust upon many in the transition era. In those days, the good fortune of the pearls of the national economy often depended more on political support and interference by politics than they did on good governance and management or respect for the rule of law. The brief history of holding companies in Yugoslavia is not a deeply researched subject, probably because the company form itself has largely fallen victim to oblivion. Nonetheless, history provides valuable insight into the causes of contemporary problems

[10] See, for example, section 410 of Company Act of the rump Yugoslavia from 1996, published in the Official Gazette No. 29/96.

[11] According to Krygier's description of 'social embeddedness and significance of the law' to mean that "*[t]he law must be, and must be widely expected and assumed to be, appropriate and to matter, to count, in the exercise of social power, both by those who exercise it (which should be far more than just officials) and by those on whom it is exercised*." (2001, p. 13).

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attendant to control, and may serve as an invaluable repository of utilizable empirical data.

An interesting and lesser-known point concerning holding companies that ought to be added is that holding companies were already creating problems in the US in Berle and Means' era. Berle and Means warned that "*holding companies can always be looked upon with a certain amount of suspicion; and why the investing public has always felt somewhat helpless in their presence [is because] [h]ere the control of the parent's directors over the subsidiaries' machinery is absolute; even the information disclosed may be so blind as to be unintelligible.*" (2004, p. 183).

I have already hinted that abuses of the holding company form were typically orchestrated by exploiting the pyramiding technique – i.e. multiple-layers of interlinked companies branching from a controlling holding company, much like the Smilenski case described above – combined with the use of non-voting shares, excessive voting power, and voting trusts (where existent). The ultimate aim of such structures is the maintenance of control over a group of companies by individuals or groups who do not hold the majority of the companies' shares (stock). Such practices were once a systemic problem in US public utility companies, ultimately leading to the passage of the Public Utility Company Act 1935[12] which attempted to tackle the problem. An article from 1946 described the complex, pyramid-like structures of public utility companies as follows:

"*The operating utilities […] at the base of these pyramids furnished all the revenues […] a large percentage of [which] were drained off […] by exorbitant service and construction fees charged against them by 'service companies' belonging to the parent holding company or to the individual interests who controlled the system. In such systems the companies in the super-structure were used for the purpose of retaining the insiders' control while the financial investment and risk were passed on to public investors by the floatation of myriad of holding-company securities carrying no effective power to control the management*." (Blair-Smith and Helfenstein, 1946, p. 150).

While the confines of this paper do not permit an in-depth exploration of the myriad forms that such complex holding structures may take, the questions concerning control that they raise are hardly irrelevant even today. Yet, if control and the malicious use thereof is to be observed 'in action,' then the US experience with public utility companies ought to be studied carefully.

1.7 Question to Be Asked: Should Control Be Made Visible in Company Acts?

Myriad dilemmas surround the subtle but essential concept of control. The simplest formal but hardly negligible question is: what weight is to be given to control in company law? Should it be made visible, and if so, how visible? Should control be subject to prescriptive drafting to "tame" it by carefully defining its meaning and uses wherever it comes up in company laws? Further, to tackle existing abuses of control, as illustrated also by the cases discussed herein, a parallel issue becomes: would mandatory or default rules better achieve the desired ends?[13]

The answer to most of these questions from across the Atlantic would be in the affirmative. The drafters of the General Corporation Law of Delaware, the leading authority on corporate law not only in the US but globally, found it important to define

[12] The Public Utility Holding Company Act 1935, 74-333 15 U.S.C.A. § 79 et seq.
[13] For a related discussion in the Slovakian context, see Patakyová and Gambličková (2020).

'control'[14] and to expressly regulate it in more articles. The same is done in the Model Business Corporations Act,[15] another model which provides the basis for corporate law throughout roughly half the States of the Union.

Continental European civil law systems generally do not expressly define control as conspicuously as these venerable US sources. The former Slovakian Commercial Code,[16] for example, had a distinct article on the 'Controlled and Controlling Party' and thus contained a definition of control, but this definition was extremely narrow and tailored only to the purposes of that article, thereby focusing only on voting rights. Other forms of control identified by Berle and Means – such as 'management control' – are not tackled directly in the Act, and therefore their scope and/or relevance in Slovakian law are anyone's guess. In the very few local publications on the subject, the topic of control tends to be merely hinted at during discussions concerning the separation of ownership and management.[17]

The former Hungarian Act IV of 2006 on Business Associations similarly mentioned control only in a few scattered provisions. This extremely-detailed technical statute was revoked by the new Civil Code of 2013, which deals with control as part of a relatively long article which only applies to groups of companies.[18] As opposed to the detailed and thus prescriptive Slovakian drafting, the Hungarian Civil Code is a minimalistic version of a European civilian company act that rests on the principle of 'disposivity'[19] (to wit, default regulation), meaning that the overwhelming number of company law provisions are not mandatory, but are merely models that may freely be departed from (Kisfaludi, 2013, para 3 at p. 87). The number of relevant provisions in Hungary's law have also been drastically reduced, arguably making the bypassing of legal principles surrounding control even easier.

These seemingly formalistic queries, which detractors may consider purely academic, do play an important role in warning and educating those who use the law

[14] See §203(c)(4) of Delaware General Corporation Law defines control as follows: „ [...] *"**Control**," including the terms "**controlling**," "**controlled by**" and "**under common control with**," means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting stock, by contract or otherwise. A person who is the owner of 20% or more of the outstanding voting stock of any corporation, partnership, unincorporated association or other entity shall be presumed to have control of such entity, in the absence of proof by a preponderance of the evidence to the contrary; Notwithstanding the foregoing, a presumption of control shall not apply where such person holds voting stock, in good faith and not for the purpose of circumventing this section, as an agent, bank, broker, nominee, custodian or trustee for 1 or more owners who do not individually or as a group have control of such entity*. [...]." [Emphasis added.] 8 Del. C. § 100, et. seq., as amended from time to time.

[15] See §8.60(2) of the Model Business Corporations Act providing a differing yet also express definition reading as follows: *"(2) "**Control**" (including the term "**controlled by**") means (i) having the power, directly or indirectly, to elect or remove a majority of the members of the board of directors or other governing body of an entity, whether through ownership of voting shares or interests, by contract, or otherwise, or (ii) being subject to a majority of the risk of loss from the entity's activities or entitled to receive a majority of the entity's residual returns."* [Emphasis added.] See American Bar Association. Committee on Corporate Laws. Model Business Corporation Act: Official Text with Official Comment and Statutory Cross-References.

[16] Act No. 513/1991 Coll., section 66a. For the related commentary see Ďurica (2016, p. 299-305).

[17] For a rare English language analysis of Slovakian law, see Patakyová, Grambličková, and Duračinská (2022).

[18] A Polgári Törvénykönyvről szóló 2013. évi V. törvény [Civil Code] §§3:49-3:62. These sections took over the earlier solutions and did not add much on control. Thus, the group of companies must be registered in the company register but the group does not qualify as a juridical person. It is only those companies that qualify as controlling members which must prepare consolidated yearly financial reports.

[19] A caveat needs to be added here. Namely, reliance on default rules in the context of company laws is characteristic of other regional legal systems as well, for example in Slovakia. See, e.g., Patakyová and Grambličková (2020). What makes the Hungarian system different is the reduction of the "quantity" of provisions and in the length thereof.

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about the role of control as well as the pitfalls and potential consequences of neglecting thorough consideration of the issue. This applies *mutatis mutandis* to legal education; students are generally inexperienced in that they normally come to universities without much exposure to real life corporate challenges. Unlike practicing businessmen, they will not be able to intuitively perceive and grasp the roles that corporate governance and control play in the life of enterprises, and thus the formal transfer of theoretical knowledge on the topic ought to be considered an important pursuit in its own right.

2. INTER-GENERATIONAL TRANSFER OF WEALTH AND CONTROL IN FAMILY-OWNED FIRMS

2.1 On the Geography and Gravity of the Corollary Problems

Numerous questions, risks, and conflicts arise over the intergenerational transfer of control over successful companies. Such issues typically arise between the small business founder(s), their spouse(s), and/or their heirs when the former's retirement, death, or incapacity comes knocking at the door. This problem is presumably encountered in all legal systems, though it is perhaps more serious in less developed economies where SMEs constitute the dominant business form.

CEE is unique in this respect because in most countries of the Eastern Block, the establishment of private businesses was not possible under socialism. The exceptions were in the westernmost countries (e.g., Hungary) from the 1980s onwards, and in the former Yugoslavia, which took a less radical economic path, especially following Stalin's death in the early 1950s. In Yugoslavia, small workshops employing a small workforce were never prohibited in the post-WWII period.

Yet the true U-turn as far as CEE policy on SMEs was concerned occurred after the fall of the Berlin Wall and during the transitory 1990s, when thousands of SMEs were founded in the region. Thousands failed soon after, with most of them ending up abandoned in lieu of being led out of the market through insolvency proceedings. A considerable number of SMEs nonetheless survived, grew, and eventually became genuine success stories (e.g., the Hungarian Graphisoft).[20] While only a small number of the most outstanding ventures became hot topics in the media, and fewer still became topics of interest for legal scholars, the actual number of outstanding success stories is far from negligible.

The systemic problem for which CEE's local laws possessed no tailor-made solutions was the myriad questions that surfaced upon the retirement, death, or incapacitation of the founders of such successful enterprises. It was not just the lack of written law that caused concern, but also the lack of awareness about the dimensions of these problems and the non-existence of any societal 'know-how' necessary for dealing with them. These problems included, perhaps most importantly, questions surrounding the transfer of control.

Although quantitative figures and empirical analyses on these and related issues tend to be lacking in CEE – though this varies from country to country – some figures and pertinent publications can nonetheless be found. I was in the position to gather data primarily from post-1990 Hungary, but this data may also provide insight on the situation in neighbouring countries (perhaps with the exception of Austria). For example, the number of abandoned and liquidated companies remained high throughout the pre-COVID-19 period in Hungary.[21] One may presume that a significant number of these firms

[20] See at Graphisoft. Available at: https://graphisoft.com/hu (accessed on 10.12.2022).
[21] For a related discussion and some relevant statistical data, see Tajti (2019).

failed due to the problems inherent in the inter-generational transfer of wealth and control.

In fact, this peculiar set of problems remains one of the main contemporary challenges in the region and justifies a quest for answers from more economically advanced jurisdictions. This quest ought to include the US, a country that is often excluded as it is thought to be too divergent a system. The ensuing elaboration of the lessons that emerge from the milestone US *Galler v. Galler* case – with its balanced formula that simultaneously ensures that control is kept within the family and that the closest members of the family are financially provided for following the death of the founder-manager brothers – should also prove insightful for European civil law systems.

2.2 Why was the Galler v. Galler Case Momentous?

The case was of special importance for at least three reasons: *firstly*, it legitimized shareholders' agreements, and *secondly*, it led to the recognition that SMEs are a distinct business form which requires somewhat different rules from those applicable to large corporations. *Thirdly*, and most importantly for our purposes, its unique formula ensures that close family members are financially provided for through the future earnings of the family company upon the death of the company's founders (two brothers), while simultaneously guaranteeing the continued operation of the company under family control. Although some of points the brothers agreed upon were contested and not fully endorsed by the Supreme Court of Illinois, the pattern was eventually given a green light by it.

It is the position of this paper that this formula – notwithstanding its common law origin and the major differences between US and European company laws – may be of use to other countries including those in CEE because SMEs across many jurisdictions are burdened by very similar if not identical issues. Thus, when reading the ensuing description of the *Galler* formula, the right question is whether the law of one's home jurisdiction has sufficiently flexible arrangements in place that are tailored to addressing these common issues faced by SMEs.

2.3 Why the Galler Formula may be of Use in CEE and Other Less Developed Legal Systems

Having been directly exposed to developments in Hungary and Serbia, and indirectly exposed to developments in similarly placed jurisdictions thanks to my colleagues, students, and acquaintances from neighbouring countries, what I saw and heard was that hundreds of successfully launched SMEs typically failed due to one of two issues. Either the firm would fail once the first large deposit of money was made in the firm's accounts, or after a major problem surfaced, irreconcilable conflicts would arise between family members and/or the founders, and the business consequently ground to a complete halt. Under such circumstances, old friends or family members quickly became fierce enemies over disputes concerning the share in the profits they were entitled to, or alternatively, over who should be blamed for mistakes and ought thus suffer the liability corollary thereto.

Although obviously psychology, Fukuyama's trust (i.e. "*the improbable power of culture in the making of economic society*" – 1995, p. 1), and many other factors also play a role in such impasses, these problems are essentially corporate governance and corporate finance problems that the founders of these SMEs either lacked awareness of, or negligently – if not willingly – disregarded. Many of the failed enterprises, in other

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words, did not even reach a stage where questions concerning the inter-generational transfer of wealth arise.

2.4 The Facts of the Galler Case

The facts of *Galler* are especially educative, as they display how the problems burdening US closed corporations resemble those facing European SMEs. The Galler Drug Company was founded in 1919 by two brothers, Benjamin and Isadore Galler, who were equal partners. Shortly thereafter, in 1924, the business was incorporated under the Illinois Business Corporation Act and each of the brothers received half of the 220 shares of stock issued. For the sake of completeness, it should be added that in 1945, each brother sold 6 shares to an employee as a reward for his work, but this additional owner was not party to the dispute that arose after one of the brothers died in 1955, and his small shareholding did not affect the dispute's outcome either.

While good relations persisted between the two brothers, they concluded agreements – that is, shareholders' agreements – "*for the financial protection of their immediate families and to assure their families, after the death of either brother, equal control of the corporation*."[22] They took this step on the advice of their accountant; it is my view that analogous advice could have saved thousands of SMEs from disappearance in CEE and elsewhere. This not only provides a workable formula for the consensual transfer of wealth and control between generations that is necessary for continuing the successful operation of businesses, but also imposes a formula which disincentivizes conflicts between heirs.

Notwithstanding the existence of these shareholders' agreements, as it is usual in case of family-owned firms and generally in inheritance proceedings, one of the sides sought to have these agreements[23] quashed after Benjamin (one of the brothers) died without honouring them. Emma Galler, the widow of Benjamin, then sued for accounting and specific performance of the agreement, and the first instance court granted this relief. However, the Appellate court reversed this decision and denied Emma Galler an order for specific performance. In fact, the second instance court found the agreement void on public policy grounds because of "*the undue duration, stated purpose and substantial disregard of the provision of the Corporation Act […].*"[24] Put pithily, the agreement was highly unusual even though it was a solution fit for the purposes for which it was created.

The case became a milestone precedent because Illinois' Supreme Court did not find the obviously out-of-the-ordinary agreements unenforceable. Or, as they put it, it was not a '*corrupt scheme*' but was rather an '*[agreement] between stockholders dealing on equal terms*'[25] that would not lead to any public detriment. Two further aspects of the agreement in *Galler* were of crucial importance. On one hand, it was a "*straight contractual voting control agreement which did not divorce voting rights from ownership of stock in a close corporation [and it was not a voting trust either].*"[26] On the other hand, although its

[22] United States, Illinois, Galler v. Galler, 32 Ill.2d 16, 203 N.E.2d 577 (1964), p. 579.
[23] The agreement was executed by signing six copies of the terms and conditions, and the signed copies were left with the accountant for safe keeping.
[24] United States, Illinois, Galler v. Galler, 32 Ill.2d 16, 203 N.E.2d 577 (1964), p. 581.
[25] *Ibid*., p. 577, para 1.
[26] *Ibid*., p. 577. Voting trusts came up as a defense which the defendants attempted to plea, asking the court to apply these rules to the Galler agreement because the duration of voting trusts was limited to 10 years under a 1947 Illinois statute. *Ibid*., para 4-5, at p. 586. As the court did not consider the Galler agreement to be a voting trust and as for straight voting agreements – in use since 1870 – the defendants' defence was rejected in this regard.

duration was atypical for those times, it was not excessive because it was foreseen to continue only "*so long as one of the two majority stockholders lived*."[27]

It must also be added that at the time that the shareholders' agreements concerned in *Galler* were made, these peculiar contracts – which are simultaneously creatures of contract and company law – were novel even by the US standards. Thus, even more so in CEE, where shareholders' agreements were essentially unknown prior to the fall of the Berlin Wall. Consequently, few in CEE understood how shareholders' agreements could be used to prevent the myriad conflicts likely to arise consequent to events surrounding the inter-generational transfer of wealth and control. As shareholders' agreements typically remain confidential, years (if not decades) passed before their existence became publicly known in the region, a pattern which suggests a gradual proliferation of such arrangements in CEE. Nonetheless, it seems that shareholders' agreements have not yet been widely utilized in CEE for the specific purpose of preventing common problems associated with the inter-generational transfer of wealth and control.[28] This fact in particular justifies the re-examination of the *Galler* precedent contained herein.

2.5 The Elements of the Galler Arrangement: A Balanced Formula for Financially Supporting Close Family Members and Keeping Control in the Hands of the Family

As noted previously, it is important to stress that the brothers party to the shareholder deal concerned in *Galler* made the said agreement with two interlinked goals in mind. On one hand, they wanted to use the future profits of the company to provide financial support for their close family members after they died. Insofar as financial support was concerned, the agreement foresaw three possible sources of support for the wife (or children) of whichever brother died first; the first was a salary continuation agreement which provided that a sum double the salary previously paid to the deceased brother for work done in their capacity as a corporate officer was to be paid monthly to their widow over a five-year period, or to their widow's children if their widow was to remarry within that five-year period.[29] The *second* was the duty of the corporation to declare certain annual dividends, the figures of which were also specified in the agreements.[30] *Thirdly,* the corporation was granted authority to purchase "*so much of the stock of Galler Drug Company held by the estate [formed upon death of any of them] as is necessary to provide sufficient funds to pay the federal estate tax, the Illinois inheritance tax and other administrative expenses of the estate.*"[31]

The brothers also designed their agreement to ensure that their two families would retain control of the business. The tools used to that end were technical but ingenious, demonstrating their comprehension of both the importance and characteristics of control. The first set of technical rules concerned the composition of the future board of directors. It was provided that the bylaws of the corporation shall be amended to provide for a board of four directors with a prerequisite quorum of three; clearly a measure designed to maintain the balance between the brothers' two families. Additionally, to stymie abuse of the technical rules respecting the convocation of the

[27] *Ibid*., p. 577.
[28] For the history and various uses of shareholders' agreements in Hungary in the post-1990 period, see Tajti (2018).
[29] United States, Illinois, Galler v. Galler, 32 Ill.2d 16, 203 N.E.2d 577 (1964), p. 581.
[30] *Ibid*., p. 580, para 6.
[31] *Ibid*., p. 581, para 11-12.

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board, they provided that "*no directors' meeting shall be held without giving ten days notice to all directors*."[32]

A related feature of the agreement is that it tied the hands of the heir-directors in regards to the selection of the board; the agreement simply mandated that only listed family members (Isadore, Benjamin and their wives) were to be voted for by future board members.[33] Moreover, it provided that if one brother were to die, that deceased brother's wife was to have the power to nominate a descendant to replace her deceased husband on the board.[34] The certificates evidencing the shares of the two brothers had to be printed upon a legend which subjected the transfer of shares to the terms of the already-concluded shareholders' agreements, thereby warning third-parties of the shareholders' peculiar arrangements.[35]

Obviously, some of these solutions may seem foreign – if not repugnant – to the legal systems of certain jurisdictions. Still, the *Galler* formula might be instructive elsewhere, at least for the purposes of shedding light on the sorts of problems SMEs may face during the inter-generational transfer of wealth or control as well as on potential solutions thereto.

3. EPILOGUE

Berle and Means prophesized that "*[i]t is conceivable […] that the problems of 'control' [discussed in their seminal book] may become academic within another generation.*" This particular prediction has – uncharacteristically – proved to be mistaken: control has survived, has remained equally tricky to identify in practice partly because of the novel forms it may take, and yet it has continued to generate problems similar to those tackled by Berle and Means. The daunting task awaiting drafters of contemporary laws regulating various business vehicles will therefore to a significant extent revolve around the question of what should be done with the perplexing, partially theoretical, and partially practical concept of control? As the above elaboration concerning issues connected to the inter-generational transfer of control over SMEs vividly demonstrates, control is undoubtedly a topic with concrete practical implications which are hardly of *de minimis* importance. Taking cognizance of and devoting more attention to control, the *invisible hand* of the domain, is a good start.

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[32] *Ibid*., p. 580, para 2.
[33] *Ibid*., p. 580, para 3.
[34] *Ibid*., p. 580, para 4,5.
[35] *Ibid*., p. 581, para 9.

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DISCUSSION PAPERS

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THE CONCEPT OF FORCE MAJEURE IN COMMERCIAL CONTRACTS AND ITS INTERPRETATION DURING PANDEMIC IN NORTH MACEDONIA / Nikola Dacev

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Abstract: *A pandemic, defined as an epidemic spread over larger regions, is of course not unknown in the world. There are several pandemics in history that have left a great impact on humanity. However, so far there has not been a pandemic of such proportions and consequences as the Covid-19 pandemic.. It literally paralysed life and led to unprecedented health, economic and political consequences on a global scale. As has been the case in every area, Covid-19 has also had a serious impact on legal systems. Many countries were not ready with appropriate legislation to deal with the pandemic in terms of implementing appropriate measures to help their citizens. Because of that, a large number of trade agreements were not realised or their realisation was made difficult. What was a serious problem in trade agreements that could not be realised and what is the subject of primary analysis in this paper is the concept of force majeure (vis major), its regulation and the question of whether the pandemic can be considered as a force majeure event. Uncertainty in the interpretation of outdated provisions or lack of appropriate provisions regulating force majeure in pandemic conditions has led to many citizens not being able to exercise their rights derived from contracts and thereby creating dysfunctionality in legal systems. In this paper, it is essential to review the force majeure clause, its concept, development and representation in different legal systems, by making a brief comparison between French law and English law and determining key regulations on an international level. At the same time, the main focus of research will be on the regulations in North Macedonia and the manner of regulating this concept of force majeure. It is also equally important to find the answer to the question of the role of legal systems, whether law as such will continue to exist in the same form and with the same content or whether we already are in the phase of creating the so-called pandemic law, i.e., whether the pandemic initiates a rearrangement of the concept of force majeure in trade agreements in North Macedonia, as well as everywhere in the world.*

Key words: *Pandemic law; Force majeure; Trade agreements; Law of obligations; UNIDROIT; North Macedonian law*

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1. INTRODUCTION

The impact of Covid-19 was so significant that even after more than 2 years, we cannot say with certainty when and if we will return to the normal way of life, that is, the life before the pandemic. Most of the countries around the world struggled fighting the virus. Taking into account the urgency of the situation, a large number of so-called restrictive measures translated into new laws to combat the Covid-19 virus were adopted, and in some countries a large number of decrees with legal force were passed in conditions of emergency, as was the case in the Republic of North Macedonia. The content and the need for some of those acts was controversial, to say the least, especially those directly violating basic human rights guaranteed by the Constitution. The usefulness of those measures is debatable, whether and to what extent they prevented the spread of the virus. But the more important question right now is: if we get past this pandemic situation, what will happen if a pandemic of similar proportions happens again? Many countries did not have adequate legislation, so they interpreted existing laws, passed new laws or decrees with legal force in fast-tracked legislation and any law passed in urgent procedure cannot have the same quality as a law passed in a regular procedure, especially due to the difference in time intervals. Now legislators, taking into consideration the acquired experience, have more time to prepare laws in case of a pandemic.

In particular, this paper has as its research subject matter the trade agreements that remained unimplemented due to the pandemic. Specifically, a comprehensive analysis will be made of the concept of force majeure, its meaning, development, manners of regulation in different legal systems, in order to get to the point of trade agreements that cannot be realised and the pandemic. This begs the question whether the pandemic is considered a force majeure and consequently whether the contracts can be considered rescindable? A large number of, for example, tourist companies did not want to return the invested money of citizens for tourist trips that were cancelled due to the pandemic, with the explanation that the pandemic does not constitute an event of force majeure and that there is no regulation on this matter. Some of the companies claimed that they would fail financially if they returned all the funds to the clients. Should the state governments have stepped in and helped the companies by covering part of the losses or not? This is precisely why I believe that adequate special pandemic law or set of laws to regulate trade agreements in the event of a pandemic would be of great benefit in the future.

Many questions remain unanswered, such as why countries reacted relatively weakly and belatedly to the Covid-19 pandemic – despite the fact that the likelihood of this type of contagion was widely recognised by public health experts, and furthermore in early 2020, countries except for China were, in fact, forewarned of the imminent threat before the virus began to spread globally (Rojas, 2000, pp. 61-68). Another crucial issue is the necessity to restrict civil liberties and rights to a degree never-before-seen in the world. Gatherings have been banned or restricted, travel restrictions and curfews have also been imposed, companies have been forced to close, and, for some, those closures may have proved permanent. Perhaps these measures were necessary to limit the transmission of the disease and thus reduce the final death toll. But most of these decisions were made without the required objective evidence of their value and approval by parliaments or even local representative governing bodies (Zuckerman, 2020, pp. 79-84). The fact is that all these restrictions affected the business relations of business entities. The effect of the pandemic on the contractual relations between the parties was enormous. Therefore, the focus of this paper is one crucial aspect related to the pandemic and commercial contracts, or more precisely the subject of analysis will be the

pandemic as a force majeure for non-fulfilment of trade agreements that were concluded during the pandemic, and how to regulate such agreements in the future if a new pandemic occurs.

2. CONCEPT OF FORCE MAJEURE (VIS MAJOR, CASUS FORTUITUS)

"Force majeure", "vis major" and "casus fortuitus" clauses, or in a word force majeure clauses, are common in commercial contracts and essentially release the contracting parties from responsibility or liability when an extraordinary event or circumstance beyond their control occurs. It means that in such cases the contracting parties are not able to avoid damage. These circumstances include cases such as war, strike, riot, crime, pestilence, or an event described by the legal term of "act of God" (hurricane, flood, earthquake, fire, volcanic eruption, etc.) which prevents one or both parties from fulfilling their contractual obligations towards the other contracting parties.

The concept of force majeure or vis major originates from French civil law and is an accepted standard in many jurisdictions that build their legal systems from the Napoleonic Code. In common law systems such as those of the United States and the United Kingdom, force majeure clauses are acceptable, but they must be more explicit about the events that would trigger the clause. There are two main criteria that determine whether something is force majeure: 1) no human activity or action can prevent the event, 2) no natural or legal person by any action can prevent or avoid the side effects of the event. The key thing about force majeure events is that they are unpredictable and impossible to prevent.

The word force majeure appears in article 1148 of the Civil Code of France which provides: "There is no place for any damage when, as a result of force majeure or cas fortuit, the debtor has been prevented from transferring or doing what he undertook or doing what he was forbidden." To be able to successfully invoke force majeure, the debtor (obligor) must prove that the fulfilment of the obligation is impossible, not just difficult. In this respect, force majeure corresponds to English law. However, where French law differs is in the rule that the technical performance of an obligation precludes the parties from invoking force majeure. If the contract is technically enforceable, the possibility for the parties to invoke force majeure will not be available, even though the economic basis of the contract may have disappeared. In this respect, the force majeure concept in French law is narrower than in English law, which exempts the promisor in such circumstances. French law only considers physical or legal impossibility. Although there is no general doctrine of force majeure in English law, parties often use the words force majeure in their contracts, forcing the English courts to attribute some meaning to them. It is rare for the words force majeure to appear in a contract regulated otherwise, and most often they are part of a list of exceptions, and the words should be interpreted on a case-by-case basis with due regard to what precedes or follows them, and with due regard to the nature and general terms of the contract (Lebeaupin v Richard Crispin & Co, 1920). It is worth mentioning that in English law a distinction is made between the frustration clause and the force majeure clause. The former means that the contract is to be immediately and automatically ended, irrespective of the wishes of the parties, whereas enforcing force majeure clauses in contrast involves no danger of becoming involved in making a new contract for the parties or imposing an outcome irrespective of their wishes (McKendrick, 2013).

Regarding international trade agreements, we will highlight article 7.1.7 of the Principles of International Trade Agreements of the UNIDROIT International Institute for the Unification of Private Law, which provides a form of force majeure similar, but not

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identical, to the concepts of the term in common law and civil law: "release from the performance of an obligation is granted if the party proves that the non-performance is due to an obstacle beyond its control and that it cannot be expected that the party was able to take into account the obstacle at the time of the conclusion of the contract or that was able to avoid it or overcome the obstacle or its consequences." [1]

3. FORCE MAJEURE CLAUSES IN COMMERCIAL CONTRACTS

In contractual relations, the rule applies that the parties must respect the contract and fulfil their contractual obligations. However, there are cases in which the contracting parties are prevented from performing their contractual obligations due to events beyond their control, such as in the case of force majeure events. Commercial contracts often include a force majeure clause that sets the conditions for determining the existence of a force majeure event or circumstance that prevents or hinders the performance of a party's contractual obligations. Contractual behaviour is very much concerned with risk taking in the sense that the parties to a contract will have expectations as to the outcome of the contracting process, some of which may not be fulfilled. Non-fulfilment of expectations may arise due to some event beyond the parties' control, therefore, those who are risk-averse should make arrangements through the use of force majeure clauses (Oughton and Davis, 2000, pp. 245-247). Force majeure clauses vary from contract to contract, so it is important to check the specifics of a given clause. In the absence of a force majeure provision in the contract, the law applicable to the contract will be relevant, and the contracting parties are therefore advised to seek appropriate legal assistance. The concept of force majeure is not universally recognised, and different legal systems provide different solutions when an obstacle or event prevents the performance of commercial contracts. Force majeure clauses generally share some basic characteristics. An authentic example is the International Chamber of Commerce Model Force Majeure Clause 2020 which is a balanced model that can be a useful reference for drafting future contracts and offers users a choice of short or long form. [2] The long form of the International Chamber of Commerce force majeure clause may be included in the contract or incorporated by the words "The force majeure clause (long form) is incorporated into the contract". The parties may also use the clause as a basis for drafting a clause tailored to the specific needs of the contracting parties. The short form of the force majeure clause of the International Chamber of Commerce is a reduced version of the long form, limited to some essential provisions. It is intended for users who wish to incorporate in their contract a balanced and well-drafted standard clause that covers the most important issues that may arise in this context. Users must be aware that the short form, by its nature, is limited in scope and does not necessarily cover all issues that may be relevant in a particular business context. When this is the case, the parties should draft a specific clause based on the long form of force majeure clause of the International Chamber of Commerce. The basic test for many force majeure clauses requires the party invoking the clause to prove that - the impediment is beyond the party's control; - the obstacle could not be reasonably foreseen at the conclusion of the contract; and - the party could not avoid or overcome the effects of the impediment. If a party to a commercial contract successfully invokes a force majeure clause after timely notice of the force majeure event, that party is usually released from its duty to perform its

[1] The Principles of International Trade Agreements of the UNIDROIT International Institute for the Unification of Private Law, 2010.
[2] The International Chamber of Commerce Model Force Majeure Clause 2020.

impaired contractual obligations and from liability for damages for breach of contract, during the period when the event of force majeure prevents the execution of the contract. The other party to the contract may also be allowed to terminate the performance of the contract after receiving timely notice of the force majeure event from the party invoking the clause. The International Chamber of Commerce's 2020 Model Force Majeure Clause provides that plague and epidemic are examples of presumptive impediments that trigger the use of the clause; with respect to such presumed impediment, the party invoking the clause need only prove that such impediment could not have been avoided or overcome. The 2003 International Chamber of Commerce Model Force Majeure Clause also took a similar approach.[3]

Force majeure clauses come in many shapes and sizes, ranging from simple clauses that provide for the termination of the contract in the event that performance is prevented by circumstances covered by the term force majeure, to clauses of enormous complexity that contain, among other things, a list of events as an obstacle to breach of contract, notice provisions that need to be sent to the promisor that contain the consequences in details of the force majeure event. To have a clearer picture of the mentioned clauses, we will take just one example of a force majeure clause, clause 17 of the refined sugar association agreement which provides the following: "If EEC legislation, government intervention, frost, war, strikes, riot, political unrest or, labour disturbances, civil commotion, fire, weather, act of God or any cause of force majeure (whether similar to the aforementioned or not) beyond the seller's control prevents directly or indirectly within the delivery period specified in the contract: the full or partial supply or delivery of the sugar in accordance with the contract or the means of transport declared or to be declared for the loading of the sugar, and the seller or his agent are unable to provide other means of transport of an equal nature in order to enable delivery within the period of the contract, the seller will immediately notify the buyer through a means of communication of such fact and the quantity concerned, and the term of delivery will be extended for 45 days. If the seller is prevented from responding immediately due to circumstances beyond his control, he is obliged to notify the buyer as soon as possible. If delivery is still prevented by the end of the extended period, the contract will be void for such quantity without payment of penalty or other claim." From this example of a force majeure clause, we can see the manner of its regulation, as well as the effects of its use. The clause can not only protect the promisor who was prevented from performing the contractual obligations due to certain events; sometimes such a clause may extend protection to the promisor whose performance is merely impeded or delayed (The Refined Sugar Association, 2021, pp. 9-14).

4. REGULATION OF THE CONCEPT OF FORCE MAJEURE IN THE REPUBLIC OF NORTH MACEDONIA

As in most legal systems, force majeure is recognised and regulated in a large number of laws in the Republic of North Macedonia. Here, we will refer to a part of them, more precisely the laws that refer directly or indirectly to commercial contracts. It is understood that the basic law in which force majeure is covered is the Law on Obligatory Relations, although in the provisions where force majeure is defined, the term force majeure is not used, but the impossibility of fulfilling the obligation of one party in a bilateral agreement for which neither party is responsible. According to the Law on

[3] The International Chamber of Commerce, Model Force Majeure Clause 2020.

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Obligatory Relations of North Macedonia, in such a case, the obligation of the other party is extinguished, and if the latter has fulfilled some of its obligation, it can request a return according to the rules for the return of what was acquired without a ground.[4] The event must be unforeseeable and must occur after the conclusion of the contract and before the arrival of the obligation. Law on Obligatory Relations also gives the parties the opportunity to terminate the contract due to the impossibility of fully fulfilling the contractual obligations when the partial fulfilment does not correspond to their goal, otherwise the contract remains in force, and the other party has the right to request a proportional reduction of its obligation.[5] The term force majeure is used in other provisions of the Law on Obligatory Relations, such as in the provisions on the failure of objects due to force majeure, from which it follows that the contract is terminated and the remaining obligations of the contracting parties are extinguished.[6]

It is worth noting that the Law on Obligatory Relations makes a distinction between contracting parties who behaved within the framework of what was agreed and those who did not do so when recognizing the force majeure event as a reason for the impossibility of fulfilling the contract. That is, in case of failure to act according to the contract and damage or destruction of the object due to force majeure, the party that did not act according to the contract is not released from its obligations, that is, it is responsible for the damage caused.[7]

From the other laws that regulate or may have an effect on commercial contracts, force majeure is also covered in the Law on Contractual Pledge, where it is established as a reason for termination of the right of pledge, in case of destruction of an object due to it, unless the pledged object is insured.[8]

In the Law on Bills of Exchange, on the other hand, force majeure is recognised in the provision that is considered dishonest if in the consumer contract in the case of force majeure the consumer is able to terminate the contract only by prior payment of damages.[9] Furthermore, the Law on Bills of Exchange regulates the extension of deadlines and notifications in case of impossibility to submit the bill of exchange for payment due to a force majeure event. At the same time, the Law on Bills of Exchange also lists the cases that are not considered as force majeure i.e., the obstacles that are purely personal for the holder of the bill of exchange or for the one to whom he entrusted the bill of exchange to submit it for acceptance or payment.[10]

What was very relevant at the height of the pandemic, that is, when there were serious restrictions and bans on cross-border travel in most countries, was the issue of cancellation of tourist travel contracts, and the possibility of travellers being compensated. Some of the tourist companies did not return the invested funds to the clients under the pretext that in that case they would go bankrupt and gave them a voucher that they can use the following year but without returning their money.

The Law on Tourist Activity of the Republic of North Macedonia regulates this issue in such a way that when the travel agency cancels the tourist package – arrangement, the user of the services has the right to get a refund of the entire amount

[4] Law on Obligatory Relations, "Official Gazette of the Republic of Macedonia" no. 18/2001, 78/2001, 4/2002, 59/2002, 5/2003, 84/2008, 81/2009, 161/2009, 123/2013, 215/2021, Article 126, paragraph 1.
[5] *Ibid.* Article 126, paragraph 2.
[6] *Ibid.* Article 601.
[7] *Ibid.* Article 889, paragraph 5.
[8] Law on Contractual Pledge, "Official Gazette of the Republic of Macedonia" no. (5/2003, 4/2005, 87/2007, 51/2011, 74/2012, 115/2014, 98/2015, 215/2015, 61/2016, Article 41.
[9] Law on Bills of Exchange, Official Gazette of the Republic of Macedonia no. 3/2002, 67/2010, 145/2015, Article 63.
[10] *Ibid.*, Article 64.

that he paid under the contract, within a period that cannot be longer than 15 days from the day of cancellation of the contract, except when the cancellation is the result of force majeure, which means that the refund deadlines can be extended in case of cancellation of the trip due to force majeure. The Law on Tourist Activity here unequivocally refers to the Law on Obligatory Relations when determining the meaning of the concept of force majeure.[11]

But this is exactly where we come to the essential question of whether the Covid-19 pandemic can be classified as a force majeure event. That is the reason we emphasise the regulations that govern the concept of force majeure in different legal systems in this paper and that they might be the answer to this question. But there are other aspects that are of great importance in addition to the existing legislation. Whether the execution of the contract is difficult or impossible due to the pandemic, whether the goals of the parties can still be achieved or not. Here, it can be seen that the type of contract can also be decisive. In terms of what kind of event it is, predictable or not? If trade agreements were concluded before the pandemic, then it can be considered as an unforeseeable event and enter into the category of force majeure. But for the trade agreements that are being concluded after the pandemic, it may not be considered as an unenforceable event because the pandemic is certain and ongoing.

In the case of trip cancellations, all the above-mentioned questions are crucial in terms of the possibility of late performance of the contract i.e., realisation of the trip, but I believe that in case of cancellation of the contract, the obligation of the travel agencies to return the funds is indisputable and based on the principle of acquiring without ground.

5. THE ROLE OF THE CONCEPT OF FORCE MAJEURE DURING A PANDEMIC

Due to the impossibility of predicting the development of the Covid-19 pandemic, it seems that the future is becoming increasingly uncertain. Entrepreneurs want to continue with their business ventures, but many are not sure if they will be able to meet their existing obligations and wonder what will happen if they really cannot meet their obligations. As various levels of government in a number of states brought recommendations for closures, travel restrictions, and social distancing, parties want to know what they can do to protect themselves if they cannot honour their agreements. In that regard, the question logically arises of whether the parties can rely on the force majeure provisions in their contracts if the effects of Covid-19 threaten their adherence to these contracts.

To constitute force majeure, the words used in the clause in question must explicitly cover an event such as Covid-19, using the words "pandemic", "epidemic" or "emergency case within the public health". In the absence of such specific wording, courts may not recognise Covid-19 as a force majeure event. That is why the text contained in the force majeure clause is of great importance. Many contracts that have been drafted since the pandemic hit contain this terminology, but the first step in any analysis is, of course, reviewing the text that needs to be interpreted from the contract itself. Depending on the context, Covid-19 could probably be included in the scope of broader phrases such as "act of God" or "plague" or "circumstances beyond reasonable control of the parties". The court is also obliged to determine, in the event of a dispute due to a non-fulfilment of

[11] Law on Tourist Activity, Official Gazette of the Republic of Macedonia no. 62/2004, 89/2008, 12/2009, 17/2011, 47/2011, 53/2011, 123/2012, 164/2013, 27/2014, 116/2015, 192/2015, 53/2016, 31/ 2020, Article 21.

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the contract connected to a force majeure event, the Covid-19 pandemic, whether the pandemic is the real reason for the non-fulfilment of the contract.

When analysing whether the pandemic can be considered as an event leading to the inability to perform an activity due to force majeure, it is necessary to make a distinction between business entities, the way they work, and the conditions in which they work, while also taking into account the trade agreements they have concluded with their business partners. So, for example, from the subjects that were affected by the restrictive measures, we can highlight the restaurants that can provide services through a delivery system, although they are prevented from using their premises for guests, however, it cannot be considered that they are completely prevented from work and earn a significant income. Coffee shops, on the other hand, that do not have a coffee delivery system cannot perform their activity and meet the condition for the Covid-19 pandemic to be considered an event of force majeure.

Force majeure clauses are a means of allocating risk in a contract. These clauses excuse the failure to fulfil a contractual obligation upon the occurrence of certain, unforeseeable event or circumstance that is beyond the control of the parties. The essential question to which the court must give an answer is whether that event is really beyond the control of the parties concerned and whether the event, which is considered force majeure and is the reason for the non-fulfilment of the contract was foreseeable. Courts sometimes inquire into the foreseeability of an event, even if it is expressly stated in the force majeure clause. In the case of Covid-19, this issue could arise for contracting parties who entered into contracts after it became likely that the pandemic would start. Therefore, the date the contract entered into force or was signed will be of great importance. The Covid-19 pandemic, as a specific event, was probably not predictable, at least up to a certain period of time. Contracting parties that have taken steps to enter into a contract despite the existence of evidence that a pandemic will occur may not be able to rely on a force majeure provision to be released from their obligations to perform the contract.

Whether an event qualifies under a force majeure clause depends on the facts of the case, the wording of the clause, and the obligations of the contracting parties. In addition, Covid-19 (or the event to be relied upon) must have a real and direct impact on the affected party's ability to fulfil its contractual obligation. The indirect impacts of Covid-19, such as price fluctuations, are less likely to prevent contract execution. To determine whether Covid-19 is covered by the force majeure clause, the court must first assess the steps taken by the contracting parties to mitigate damages. Parties wishing to rely on Covid-19 as a force majeure in the contract must keep in mind their obligations and try to avoid or mitigate the foreseeable impacts of the pandemic. Some contracts specify the required level of action taken to mitigate the force majeure event and to mitigate the effects of the force majeure event on the other party to be taken by the affected party. When there is no provision in the contract to take action to mitigate damage by the contracting parties, courts will be more reluctant to recognise Covid-19 as a force majeure where the consequences for the affected party can be avoided. Even in the case of damage that has already occurred, the affected party is still required to take steps to mitigate the consequences of the damage. Even when there is no formal requirement to provide evidence, the affected parties must document how Covid-19 has affected their ability to meet their contractual obligations, as well as their efforts to avoid and mitigate its impact.

Force majeure clauses, similarly to any other change regarding the (non)performance of the contract, often require notification to the party as a condition to trigger the application of the clause. A party must know whether notice or any supporting

documentation are required under the contract, and if so, carefully consider the timing or other formal requirements. The party must provide the required notice according to the contract and according to the prescribed method, but this requirement may be more difficult to achieve given the current restrictive measures, and therefore, an appropriate assessment should be made. However, depending on the nature of the contract, it may be impossible to notify the other contracting party in time, of course, given the rapid changes that occur almost daily in these pandemic conditions. However, it is always in the best interest of the contracting parties to take all necessary steps to perform the contractual obligations and to promptly inform the other party if they are unable to do so.

In short, as far as the situation in North Macedonia is concerned, the Government of North Macedonia made decisions that indirectly had an impact on trade agreements, such as the changes in Article 266-a, paragraphs (1), (2) and (6) of the Law on Obligatory Relations which referred to rates of penal interest.[12] The adoption of this decree was aimed at facilitating the working and payment conditions of the real economic sector, as well as of citizens in the country in conditions of a seriously disturbed economic situation and liquidity of legal entities, and as a result of the Covid-19 pandemic.

Although in North Macedonia no adopted measure defined the pandemic as an event of force majeure, I believe that by declaring the state of emergency, the conditions for the occurrence of "force majeure" have been met, but only for those sectors and economic entities that were directly affected by the pandemic as we stated above in the example.

6. METHOD OF REGULATING FORCE MAJEURE WITHIN THE FRAMEWORK OF PANDEMIC LAW (IN THE POST-COVID ERA)

Although we are aware of the serious consequences caused by the pandemic, we still cannot know with certainty and in full what the damage will be, nor how long it will take for the world to return to the state it was in before the pandemic. Especially now with the rapid inflation of the prices everywhere and the war in Ukraine, it is even more difficult to predict the future. It is a legitimate question to ask whether we will ever return to the lives we had before the pandemic. But even more worrying is the question of what would happen if we had another pandemic on a similar scale. The fact is that there is no country that was prepared for such a pandemic. That is why a number of countries are already preparing legislation in case of a pandemic like the one we have right now. In the Republic of North Macedonia, there are still no announcements about the creation of a law during a pandemic, but some of the previous decrees can be used in that direction. It is understood that the main goal of the law should be greater protection of citizens' health. But what was the focus of this research, trade agreements and their (non)realisation is also a key issue that should be regulated in the pandemic law, all in order to help the contracting parties in the realisation of their rights and obligations from the contracts. The concept of force majeure in conditions of a pandemic, in most countries in the world and in North Macedonia, is recognised and regulated in several

[12] Decision to amend and supplement the decision on preventive recommendations, temporary measures, ordered measures, dedicated protocols, plans and algorithms for action to protect the health of the population from the infectious disease covid-19 caused by the sars-cov-2 virus, the cases and the time period of their application on 23.03.2020, ("Official Gazette of the Republic of North Macedonia" no. 263/20, 269/20, 275/20, 287/20, 292/20, 298/20, 304/20, 306/20, 317/20, 13/21, 45/21, 53/21, 55/21, 58/21, 64/21, 65/21, 75/21, 87/21, 94/21, 100/21, 106/ 21, 109/21, 113/21, 116/21, 119/21, 126/21, 133/21, 139/21, 141/21, 146/21, 153/21, 162/21, 176/21, 187/21, 193/21, 199/21, 204/21 and 220/21).

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laws, but the complexity of the pandemic, especially on such a scale as Covid-19, undoubtedly needs additional regulation. Can every pandemic be considered a force majeure, should the contracting parties have a clause in the contract that will refer to the pandemic as a force majeure event, how in that case will the contractual obligations between the parties be regulated, etc. are only part of the issues that should be covered in the pandemic law. Particular attention should be paid to human freedoms and rights and the degree of their restriction during a pandemic, among other things, because they are also correlated with the realisation of trade agreements. The greater the restriction of human rights and freedoms, such as restrictions on movement, the more difficult the implementation of trade agreements.

There is no single way to regulate force majeure in pandemic conditions. It is necessary to take into account the existing legislation that regulates the concept of force majeure, the business customs of the contracting parties when concluding contracts, court practice, to observe the legal opportunity offered by the Law on Obligatory Relations expressed in the freedom of contracting and to enable the parties with contractual clauses for force majeure to regulate this issue in their contracts, but at the same time to direct them through appropriate general norming of the clauses in which direction to regulate their relationship if the contract cannot be fulfilled due to a force majeure event such as pandemic. It is very important to prevent abuse of the concept of force majeure as an argument for non-fulfilment of contractual obligations.

7. CONCLUSIONS

In this paper, the concept of force majeure, its notion in different legal systems, the manner of its regulation, and the effect it has on trade agreements, were briefly elaborated. A general conclusion that emerges is that the event must be unforeseeable, beyond the control of the contracting parties, making it impossible for the contracting parties to perform their contractual obligations while releasing them from responsibility or obligation from the moment when an extraordinary event or circumstance occurs. Force majeure is gaining even more relevance in customer contracts and defaults amid a global pandemic. Case law generally points to the fact that force majeure is often cited as an argument in the client's defence when there is a claim for damages due to breach of contract. Although reliance on the clause, of course, does not necessarily absolve a party of a possible lawsuit, taking appropriate steps to mitigate damage to both parties can be an additional tool, in addition to the necessary one provided by law. Of course, it is smart from a business perspective to approach these issues head on. If we are talking about conscientious and honest contracting parties, then it can be concluded that they would be interested in fulfilling the contractual obligations because it is better for both business and the economy. As with any anticipated or potential breach of contract, once the client knows its risk, it is wise to approach the other party to see if partial performance or revised contractual terms will avoid a complete breach or default. It goes without saying that it is the duty of lawyers to help their clients make the best business decisions in these uncertain times. The court should continue to be the last instance for resolving business disputes. With this in mind, I want to point out that despite the need for additional regulation of force majeure in pandemic conditions, the dispositive nature of the provisions governing trade agreements must be maintained for the contracting parties to continue to maintain a high degree of freedom in negotiating business works.

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ITALIAN LEGISLATIVE PROPOSAL OF CRIMINALISING BULLYING: GENERAL CRITICAL CONSIDERATIONS / Enrico Lanza

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Abstract: *The aim of this study is to understand if criminalising bullying is a solution to counter and prevent the phenomenon. The Italian legislative proposal of criminalisation offers hints to discuss about a general problem while underlining that the penal solution is not the answer to solve a complex social problem as bullying (and cyberbullying) is. The creation of a specific crime determines a simplification of the question because it concentrates the attention on the dyad bully-victim, without considering the essential role of the group. Taking into account the role of the group and the relationship between the bully and the group implies a systemic approach.*

Key words: *Bullying; Cyberbullying; Penal law; Criminalisation; Complexity; Systemic approach; Italy*

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1. INTRODUCTION

Nowadays bullying, especially in its cyber version, is considered a social problem of great pervasiveness, requiring effort by means of contrast and prevention strategies. In particular, it is frequent that public opinion, overwhelmed by the drama of some news episodes,[1] complains about the use of penal sanctions, not only as a repression instrument (according to retributive theory), but also – and above all – as a prevention one: the punishment would fulfil the deterrent function (Albertson, 2014; Tefertiller, 2011).

From this point of view, the relevance of promoting a cultural operation on minors has been underlined, who are the subjects normally involved in bullying episodes (in this

[1] Many researchers have put in evidence the risk of suicide for children and adolescents involved in bullying episodes (either as bullies and as victims). See, for example, Hinduja and Patchin (2010); these authors underline that "*it is unlikely that experience with cyberbullying by itself leads to youth suicide. Rather, it tends to exacerbate instability and hopelessness in the minds of adolescents already struggling with stressful life circumstances. Future research should identify and specifically assess the contributive nature of these stress-inducing experiences*" (2010, p. 217). From this point of view, it is interesting the study of Dilmaç (2009). In this study, the researcher tries to understand what factors motivate young people to cyberbully and explores the relationship between psychological needs and cyberbullying: to discover the possibility of predicting cyberbullying behaviours from specific psychological needs. According to the results of this study, aggression and succorance positively predicted cyberbullying, whereas intraception negatively predicted it; endurance and affiliation negatively predicted cyber victimisation; only the "change need" positively predicted cyber victimisation. For the differences between bullying and cyberbullying, see the research made by Lester, Cross and Shaw (2012).

article, in fact, bullying and cyberbullying are considered phenomenon exclusively concerning minors). According to this opinion, young people must be made aware that some behaviours integrate a fact characterised by a meaningful social disvalue. The widespread lack of awareness of the serious consequences that certain behaviours can have is the most worrying aspect today. Therefore, it is considered important to define general rules and, also, to provide for some criminal sanctions for specific particularly damaging behaviours.[2] In other words, to counteract bullying, it is considered necessary to create a specific penal provision.

Actually, Italian judges have applied to some cases of bullying the provision of art. 612-bis of the Criminal Code on stalking,[3] which, however, is considered unsuitable to firmly contrast the spread of what seems to be becoming a real negative behavioural model, characterised by a strong spirit of prevarication and aggression. Therefore, a specific crime should be created both for contrasting and preventing purposes: to realise retribution and deterrence as ends of punishment.

Based on this conviction, a bill has been presented in Italy aimed at the criminalisation of bullying behaviours. The project is still being examined in the Senate, most likely set aside due to the emergencies that the country is going through in this period: Covid-19 pandemic, the economic crisis, government instability, the recent (re)election of the President of the Republic and Ukrainian war.

However, it is necessary to analyse this proposal of law to understand whether the path taken by the Italian legislator can be considered adequate.

In this article, the proposal of the Italian legislator on the criminalisation of bullying will be explained and the reasons against the adoption of this solution (and, generally, against the criminal solution) will be underlined (Lanza, 2021).

2. ITALIAN LEGISLATOR PROPOSAL OF CRIMINALISING BULLYING

The issue of bullying was the subject, already in the XVII legislature (2013-2018), of a prolonged debate between the Senate of the Republic and the Chamber of Deputies, which ended with the approval of Law no. 71/2017 concerning exclusively cyberbullying.[4] The deemed persistence of the relevance of the problem has led, even in the following legislature (the XVIII), to continue the debate and to identify additional tools in order to prevent and counter the phenomenon.

In January 2019, the bill of parliamentary initiative no. 1524, on 1) the subject of preventing and combatting the phenomenon of bullying and 2) the implementation of re-education measures for minors, was presented; the new provisions should modify the Criminal Code, Law no. 71/2017, and the Royal Decree-Law no. 1404/1934.[5]

[2] These considerations have been expressed by the President of the Juvenile Court of Naples, Maria de Luzenberger Milnernsheim, during the hearing at the Justice Commission, which took place on 24th July 2019, concerning the Italian proposal of criminalisation analysed below.

[3] The Italian Supreme Court applied Article 612-bis of the Criminal Code to some episodes of bullying in sentences no. 28623 of 27th April 2017 (concerning four minors who, in the school environment, had committed physical assaults, harassment and acts of insult to another minor), n. 26595 of 28th February 2018 (concerning personal injuries and beatings that were caused by two minors to a school friend and which lasted throughout the school year, causing the victim to leave school), n. 33863 of 4th April 2017 (concerning the persecutory acts, carried out for two years, against two minors by a group of children). In the latter decision, the reference to bullying is explicit, in the first two it is implicit, in the sense that the term "bullying" never appears.

[4] Law no. 71/2017 is entitled "Provisions for the protection of minors by means of the prevention and contrast of the phenomenon of cyberbullying".

[5] Royal Decree-Law 1404/1934 created in Italy, in 1934, the juvenile court.

The aims of the proposal are:

- the prevention and the fight against bullying through criminal measures (with the amendment of art. 612-bis of the Italian Criminal Code);
- changes in the discipline of coercive measures of a noncriminal nature applicable by the juvenile court;
- the introduction of tools to assess and analyse the phenomenon in the school environment.

This proposal is in continuity with Law No. 71/2017, as some socio-educational measures are contemplated, while including bullying (and not only cyberbullying, as in Law no. 71/2017); furthermore, it expands the intervention methods, providing for the use of tools of criminal repression and a reform of coercive measures of a noncriminal nature applicable by the juvenile court to young people who engage in irregular or aggressive conduct.

Art. 1 of the proposal provides the amendment of Art. 612-bis of the Criminal Code,[6] in order to extend the crime of persecutory acts (i.e. stalking, which constitutes the "natural" reference model for typing any form of prevaricatory action) to include the conduct of repeated threats and harassment that places the victim in a condition of marginalisation: essentially, to include bullying episodes. In other words, no new crime has been proposed, but the one disciplined by art. 612-bis of the Italian Criminal Code has been integrated. The configuration of a specific criminal offense could have created greater problems than it could solve. Due to the extremely varied range of behaviours that rise to forms of bullying and cyberbullying, indeed, the normative formula could have been too general, in an attempt to include everything, discounting a lack of certainty, or excessively descriptive, like a catalogue, inclusive of heterogeneous behaviours, expressive of diverse coefficients of offensiveness. It must be noted that Italian legislation ignores a (juridical) definition of bullying (which is also lacking in this proposal). Such a definition should include elements that, from a sociological and psychological standpoint, have to be considered essential for the identification of the phenomenon: the intentionality of the abusive conduct of the bully, its recurrence over time, and the asymmetry in the relationship between the bully and the victim (Olweus, 1978; Farrington, 1993; Baldry, 2001; Menesini, 2009). It can therefore be said that bullying is characterised by a series of intentional behaviours, repeated over time, aimed at damaging the victim, facilitated by the support, even tacit, of the peer group or, at least, by its silence, originated in a pre-existing relationship between the parties; relationship that is characterised by

[6] According to art. 612-bis of Italian Criminal Code on stalking:
"*Unless the fact constitutes a more serious crime, anyone who, with repeated conduct, threatens or harasses someone in such a way as to cause a persistent and serious state of anxiety or fear or to provoke a well-founded fear for his/her own safety or that of a relative or a person linked to him/her by an emotional relationship or to force him/her to alter his/her life habits, is punished with imprisonment from one year to six years and six months.*"
The penalty is increased if the offense is committed by the spouse, even separated or divorced, or by a person who is or has been linked by an emotional relationship to the injured person or if the offense is committed through IT or telematic tools.
The penalty is increased up to half if the offense is committed against a minor, a pregnant woman or a person with disabilities as referred to in article 3 of Law no. 104/1992, or with weapons or by a misrepresented person.
The crime is punished upon complaint by the injured person. The deadline for filing a lawsuit is six months. The remission of the complaint can only be procedural. The complaint is in any case irrevocable if the fact was committed through repeated threats in the manner referred to in article 612, second paragraph. However, one proceeds *ex officio* if the offense is committed against a minor or a person with disabilities as referred to in article 3 of Law no. 104/1992, as well as when the fact is connected with another crime for which one must proceed *ex officio*.

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asymmetry (unbalanced power) for physical or psychological reasons. Cyberbullying then requires that these behaviours are carried out with IT and telematic tools (Lanza, 2021).

The condition of marginalisation, indicated in the proposal, is not defined in the criminal code, but the concept is recalled in the jurisprudence of the Council of State on mobbing, where reference is made to "damage from (occupational) marginalisation". According to this body, the unitary persecutory strategy is necessary to mob someone; this strategy is not substantiated in single acts expressive of the ordinary dynamics of the employment relationship (such as normal interpersonal conflicts in the workplace, caused by antipathy, mistrust, scarce professional esteem, which are not characterised by the will to marginalise the worker), but in a unitary design with the purpose of marginalizing the employee or placing him in a position of weakness. However, the concept of "marginalisation", remains quite generic, susceptible to extensive applications and exegetical doubts: therefore its perimeter must be defined taking into account the other constitutive elements of the crime of persecutory acts.

Cyberbullying is specifically punished thanks to the presence, in the second paragraph of art. 612-bis, of an aggravating circumstance (introduced by the Legislative Decree no. 93/2013, converted into Law no. 119/2013) relating to the commission of stalking with the use of technology; moreover, in this way, from a systematic point of view, cyberbullying becomes an aggravated form of bullying.

In the third paragraph of art. 612-bis, a new aggravating circumstance, which involves an increase of the penalty up to half, is contemplated. This circumstance is related to the fact committed by more than one person, and is aimed at sanctioning that group dimension which is a typical trait of bullying and an instrument of particular pressure. In the original version of the proposal, in this paragraph the additional aggravating circumstance of having committed the fact with discriminatory purposes was also stated.

Finally, in a new paragraph, once the definitive sentence has been issued, the mandatory confiscation of any IT tools used to commit the crime is provided (measure that concerns the crime of persecutory acts in general).

The admissibility of a party's complaint is maintained (and the remission of the complaint is only procedural). As in the general ruling of the last paragraph of art. 612-bis, public prosecutor proceeds *ex officio* if the offense is committed against a minor or a person with disabilities, or if the fact is connected with another crime for which it is necessary to proceed *ex officio*. In the context of bullying, which usually has children as protagonists, the autonomous intervention of the judicial authority will therefore be ordinary.

In this proposal, the legislator has not defined the phenomenon of bullying closer to its social dimension,[7] leaving the interpreter with the task of adapting the precept to reality.

In addition, the proposed amendment of art. 612-bis does not completely solve the problem of the punishment of bullying behaviours that are not among the constituent elements of stalking.

The other articles contained in the proposal are not particularly significant for the aims of this work.

[7] It should be remembered that the majority of international literature considers three elements as constitutive of bullying: the intentionality of the abusive conduct (the intent to inflict harm, in a direct or indirect form); the reiteration of this conduct; the asymmetry (the imbalance of power) in the relationship between bully and victim (both belonging to the peer group) (Olweus, 1978; Farrington, 1993).

3. WHY CRIMINALISING BULLYING IS NOT AN ADEQUATE SOLUTION

May the choice of criminalising bullying be considered appropriate?

Also during the hearings at the Justice Commission of the Italian Chamber of Deputies (to discuss about the bill examined in this article), the representatives of the National Bullying and Doping Observatory highlighted the boomerang effect risk that the criminalisation of bullying behaviours could trigger; moreover, if the perpetrators are under 14 years old, therefore not punishable according to Italian legislation.[8] The speakers had wondered whether, in these cases, if the conduct is carried out in the school environment, the headmaster and the teachers aware of the incident should be held responsible, pursuant to the second paragraph of art. 40 of the Italian Criminal Code:[9] with the risk of encouraging conspiratorial attitudes on the part of the school, to avoid self-denunciation, or the excess of reporting even for incidents without criminal relevance.

To stem these dangers, the speakers suggested the adoption of a method borrowed from the experience of organizational models in companies implemented in Italy with Legislative Decree no. 231/2001. In other words, it would be necessary to "proceduralise" the management of the phenomenon, through the adoption of an event management system, a sort of "school code of ethics", exactly as it happens for the compliance programs provided for in Legislative Decree no. 231/2001. Attention should be focused on training, considered as an indispensable preventive moment, and methods to manage the "crisis" that occurs when an episode of bullying is perpetrated. In this way, it will be possible, on the one hand, to improve the preparation of teachers, but also of parents and pupils, influencing the current family educational model, and, on the other hand, to inhibit that boomerang effect mentioned before. In particular, this could be done through the creation of a specific defence, which would be invoked whenever schools demonstrate that they have observed to their ethics code and have implemented all the steps of the procedure typified therein, thus avoiding the applicability of the guarantee position pursuant to art. 40 of the Italian Penal Code, exactly as it happens in the corporate context pursuant to art. 6 of Legislative Decree no. 231/2001.[10] This proposal can be considered as an expressive of a systemic approach.[11]

In defining repression policies (which should always be accompanied by serious prevention activities), it is necessary to take into account that episodes of traditional bullying above all (but this consideration is partly valid also for the cyberbullying) arise not in a context of strangers, but within the relational network of the protagonists, for the recovery of which – both victims and perpetrators – an intervention that involves that context appears necessary: and with this meaning the educational institutions and the peer group appear fundamental (Christensen, 2009).

Moreover, it is very often emphasised that bullying behaviours constitute "normal" episodes of adolescence. If this is true, if bullying is a socially accepted

[8] According to art. 97 of Italian Criminal Code, the person who committed the crime before the age of fourteen is not punishable. If he/she is socially dangerous, he/she may be subjected to security measures.

[9] In art. 40, second paragraph, of Italian Criminal Code it is provided the so called "equivalence clause": not preventing an event that you have a legal obligation to prevent is tantamount to causing it.

[10] According to this art. 6, the management body is not punishable if it has adopted and effectively implemented, before the commission of the offense, organizational and management models suitable for preventing crimes of the kind that occurred.

[11] See the report of the hearing, at the Justice Commission of the Chamber of Deputies, of lawyers Giorgia Venerandi and Antonella Follieri, representatives of the National Bullying and Doping Observatory, of 27th August 2019.

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phenomenon by young people, an individualising approach (focused on the victim or on the offender) cannot be adopted to affirm the responsibility of those who hold such behaviours, or, at least, the idea of responsibility cannot be expressed in such terms. A systemic approach would be needed, which concerns the context, the institutions – above all the school – rather than the victim-offender dyad (Aleo, 2020).

Bullying occurs when the various educational agencies, from family to school, are unable to contain the drive of aggression present in some children and, above all, to transform it into a constructive drive. From this point of view, it is a social problem rather than an individual one, and this must be the perspective to study and contrast it; otherwise the risk is to focus only on the individual, who inevitably has responsibilities, but forgetting that it is the whole system that has allowed a person to trample the rules of the community. However, the presence of bullies and victims is not enough to have bullying, but there must also be a group that observes, participates, does not intervene, and allows rights to be mortified (Rossetti, 2018).

The penal-centric approach contradicts this essential social dimension; however, it expresses a simplification of the problem.

If the merely penal solution appears strongly reductive, it cannot be overlooked that bullying appears as one of the new manifestations of juvenile deviance, characterised by aggression against the physical or moral person of the other: if traditionally the juvenile deviance has been expressed with the aggression to the patrimony of others, today the way of aggression to the other person, especially if different or weaker, appears to be prevalent. Furthermore, these behaviours concern not only the marginal segments of the population but also children of the middle bourgeoisie; they have no basis in social exclusion but in the generational divide; they do not belong only to males, but also to girls;[12] and when goods, rather than people, are attacked, they are mainly the goods of the community and not of individuals (Moro, 2019, p. 594).

Bullying is the indicator of a discomfort that does not have a primarily economic-social matrix, as it is in the traditional reading of juvenile deviance, but derives from a general malaise, which receives nourishment from intergenerational communication difficulties.

The spread of the phenomenon of bullying, combined with its pervasiveness, feeds its interpretation as a social problem, a source of danger, and therefore to be subjected to control, stimulating the idea of repression and punishment as the only possible answers. Instead, the preventive approach (which requires a careful family, environment, and social context) and the promotion of social well-being (through empowerment, prosocial behaviours, and so-called life skills) are fundamental (Civita, 2006).

Bullying, in fact, is a systemic, group, and contextual notion, whose definition is possible only in these terms: precisely, of group and context. In other words:

1) bullying seems to have a primarily psychosociological matrix;
2) it is a social notion, in the sense that
    a) the bully, in order to fully fulfil his role, needs a group;
    b) concerns behaviours held in groups,[13] by those who look at the image of themselves, in the relationship with the environment (primarily the group, but not only);

[12] See Barlett and Coyne (2014); it's a research concerning the sex differences in bullying and cyberbullying.
[13] About the behaviour of bystanders in cyberbullying see Van Cleemput, Vandebosch, and Pabian (2014). The aim of this study is to further investigate the personal and context-related determinants of different possible

c) it concerns conduct determined by frustrations and insecurities, in the relationship with the social environment;

3) the approach can only be sociological (i.e., systemic-contextual); therefore, bullying must be the subject of systemic analysis (of systems theory).

The group, in fact, plays a very important role inside the adolescents' behavioural dynamics, for their growth and for the construction of their identity, because it facilitates emancipation from adults and stimulates forms of positive aggregation.[14] Although this type of aggregation is generally a growth factor for the adolescent, in some cases it can become a risk factor for individual development. It is then explained how it can sometimes lead to the cancellation of the inhibitions present in young's and to the fulfilment by them, together with other peers, of criminal conduct that the individual would not engage in (Calvanese and Bianchetti, 2005, p. 1417).

The choice to create a specific crime to repress bullying seems to constitute a solution, first of all, useless, for the existence (and the sufficiency) of multiple other types of crime that can be used to sanction the bully conducts,[15] and, above all, contradictory with the characteristics that institutional intervention must have towards the protagonists of this phenomenon: children to be educated, not to be punished. A specific incriminating norm would be a way of simplifying (by forcefully bringing it back into binary, interindividual logic) a complex problem: not complicated, but complex; which requires a multifactorial, systemic approach (Aleo, 2020).

Criminalising bullying means circumscribing within a "closed system" a phenomenon that has inextricable relationships with the surrounding environment. It means adopting, as has been said, a simple (simplistic) approach to a complex problem.

In fact, in bullying, personal and social factors are intertwined (factors of social interrelationships of the individual with the peer group and, more generally, with the context), and for this reason understanding the phenomenon and, above all, the role and meaning of each variable is very hard (Smorti and Ciucci, 2000, p. 34).

It is clear that the criminal dimension can (must be) left to operate with reference to single facts (episodes that integrate specific criminal forms), but the phenomenon

reactive behaviours of bystanders of cyberbullying: "joining in," "helping the victim," or "doing nothing". The Authors underline that, differently from traditional bullying, the role of bystanders in cyberbullying is still insufficiently studied.

[14] In the literature, you can see the essay by Fansten, J. (1991). *La fracture du myocarde*. Paris: Editions Gallimard. Italian translation: (1994). *Segreti da ragazzi*, Milan: Einaudi scuola; the story about a group of schoolmates, who collaborate to help their friend Martin, left alone for the sudden death of his mother, to survive, hiding from everyone what had happened, to save him from being placed in a dreaded public welfare facility.

[15] In Italian Criminal Code the crimes that a bully can realise with his/her behaviour are, for example: substitution of person (art. 494), instigation to suicide (art. 580), beatings (art. 581), personal injury (art. 582 and art. 583), defamation (art. 595), production, dissemination, transfer and possession of child pornographic material (art. 600-ter and art. 600-quater), kidnapping (art. 605), sexual violence, including group sexual violence (art. 609-bis and art. 609-octies), private violence (art. 610), threat (art. 612), stalking (art. 612-bis), illicit dissemination of sexually explicit images or videos (art. 612-ter), torture (art. 613-bis), illegal interference in private life (art. 615-bis), unauthorised access to an IT or telematic system (art. 615-ter), violation, theft and suppression of correspondence (art. 616), dissemination of fraudulent filming and recordings (art. 617-septies), theft (art. 624), robbery (art. 628), extortion (art. 629), damage (art. 635), damage to information, data and computer programs (art. 635-bis), damage to IT or telematic systems (art. 635-quater), harassment or disturbance to people (art. 660). The code also provides for some aggravating circumstances that may be relevant to bullying: art. 61 n. 11 ter (concerning the commission of a crime against a minor within or next to education or training institutions) and art. 604 ter (concerning the commission of crimes with the purpose of discrimination). In the special legislation, it's important the offense of art. 167 of the privacy code (concerning the unlawful processing of personal data).

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must be treated as a whole, regardless of the criminal measure, to prefer systemic criteria: only in this way we can hope for the effectiveness of the intervention.

If bullying is not viewed as a systemic-relational phenomenon, if it is believed that even a single behavior can constitute it, then bullying becomes only a particular motivation for acting, a prevaricatory intent that expresses the criminal measure of the individual perpetrator, but that does not require special institutional attention: differently from the attention that is guaranteed in the ordinary way to minors involved in criminal offenses.

However, the problem persists because bullying has no particular relevance outside of the systemic dimension.

In this context, the educational (and not punitive) task today appears even more burdensome than in the past due to the way in which social life – a necessary step for responsible maturation – takes place and develops. If it is true, in fact, that today's children are not fully aware of the meaning and consequences of their actions, as highlighted by the President of the Naples Juvenile Court, it seems quite unlikely that the acquisition of this awareness will pass through the criminalisation of their conduct. The creation of the crime would have only symbolic meaning: as mentioned before, it would express a cultural operation towards minors, who must be made aware of the fact that some behaviours integrate a crime characterised by a serious social disvalue.

If, nowadays, adolescents are only apparently socialised because the many experiences they live do not correspond to an adequate maturation process, the idea of criminalising bullying appears dissonant: since the actions of these boys who behave like bullies seem to be dictated more by their empathic incapacity than by a delinquent will. And, on the other hand, as already mentioned, there are many criminal norms that punish individual conducts in which the bully's action can consist.

Instead, what is argued in the doctrine seems acceptable: "There are no bullies, there are teenagers who behave as bullies. To claim that a teenager is a bully is to make him/her believe that he/she has no alternative of behaviour. Therefore, attributing a negative identity to the adolescent puts him/her in a condition that makes him/her believe actually bad and dishonest. Conversely, communicating to a teenager that he/she has behaved like a bully allows him/her to put himself/herself in the third person with respect to the action, with the consequence of better understanding that what is wrong is not his/her person but that particular attitude" (Balloni, Bisi and Sette, 2019, pp. 282-283).

And in this moment institutional intervention becomes fundamental, precisely, from a criminological point of view, to avoid that labelling process that can be the prerequisite for a deviant career. Since these are minors and students in the development phase, their possible errors and transgressions should be accepted and understood in a supportive perspective, recalling the educational and caring responsibility of adults and the whole community, before attributing to children and young people negative stable statuses (Arcari and Provantini, 2019, p. 42).

It is clear that bullying constitutes an individual and social problem that affects the serenity of child growth, which sometimes marks them irreversibly and requires commitment and perseverance in law enforcement. The question is whether the chrism of the penalty is useful in achieving the protection of the young person, both victim and offender.

Compared to the latter, the consolidated idea, even at an international level, is that criminal intervention, more than merely punitive, must be educational: an opportunity for maturation, for the development of a personality still in formation.

Compared to the victim, whose role is often also linked to his/her condition of fragility, it is more significant to invest in improving self-esteem, in strengthening the character, rather than hoping for the effect induced by the bully's punishment.

The fact is that bullying is a phenomenon that belongs entirely to the world of children and that must therefore be addressed with an educational intervention on children, not with the ablative and simplifying solution of the penalty: that, even when it is carried out in the name of recovery, it already symbolically expresses a break between the offender and society.

Young people often only need a guide who knows how to stimulate their sense of personal responsibility (of an idea of responsibility understood as a path), who has confidence in their possibility of change (Aleo and Di Nuovo, 2011).

In one of I. McEwan's stories, taken from *The Daydreamer*, Barry Tamerlane is a boy with normal appearance, who manages to override others due, on the one hand, to his ability to immediately transform his desires into actions and, on the other hand, to the fear that everyone had of him, for the reputation he enjoyed. Peter, the protagonist, at one point in the story realises that Barry's power depended on the role played by the group: "*we are the ones who dreamed of him as the bully of the school*", he says; "*he is not stronger than any of us; all his strength and power, we dreamed of it; we have made him what he is*" (McEwan, 1994). And so he manages to free himself from the yoke of the bully, assuming, however, in his turn the clothes of the bully. Peter starts ridiculing Barry for his characteristics of normality (the plumpness, the braces on the teeth, the help given to his mother in washing the dishes at the end of the birthday party, the old stuffed bear in the bedroom), and he is helped by the group who, relieved by the defeat suffered by the one who had frightened them for so long, carries out his function of reinforcement of the bullying action.

In McEwan's uplifting story, Peter realises what he has done, feels no satisfaction with his bullying, and can only try to apologise to his partner by starting a friendship.

At the base of the abusive behaviours of bullies, there usually seems to be learning and revenge: 1) learning, in one's own environment (primarily family), of aggressive behavioural methods; 2) revenge against wrongs, oppression, and the frustrations suffered. To stop the phenomenon, children need to learn more and be protected from the injustices they suffer.

4. CONCLUSION

The culture of creating criminal offenses to solve a (social) problem – of identifying a person responsible for the fact – expresses not only a simplifying logic but, above all, an approach that we can define, paraphrasing Jonas, de-empowering with respect to those who have the task (the responsibility) of defining and implementing social rules: that community which, as Jonas argues, must bear the weight of the legacy to be left to the new generations (Jonas, 1979). Responsibility must be identified in the choices of value and in the definition of priorities. In this context, the individual is only the weak link in the chain, which pays for the inability of pursuing ethically sustainable models.

For this reason the words of Simone Weil on the penal function, on the pedagogical role that punishment must play, and on the contradiction between an ideal of justice to be pursued (in a society in which it is necessary to elaborate a declaration of duties towards the human beings) and the way in which justice is administered (not only in its real, historical moment, but already at the definitional, normative, level of creation of the cases) are still valid: expressive of an ideal in which, through the suffering of

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punishment, the offender recovers the sense of justice and thus regains his/her place in the human community (Weil, 1949).

Today, of course, reintegration should rather be understood in the Braithwaite meaning: a moment of a process of empowerment that helps the offender to regain a socially shared action, without the need for an amendment through the suffering of the soul (Braithwaite, 1989).

Furthermore, Weil herself, treating public action as an essential tool for the realisation of the collective good, underlines the importance of education, which consists in giving rise to motives. The indication of what is advantageous, what is mandatory, and what is good, belongs to teaching. Wanting to lead human creatures towards goodness by indicating only the direction, without having made sure of the presence of the necessary motives, is equivalent – she says – to wanting to start a car without petrol, pressing the accelerator.

Children, therefore, must be educated in the complex meaning that this term presupposes: directed towards a goal first of all, but not only, by example, but certainly not with fear and hope generated by threats and promises. However, the educational task towards the most difficult subjects is a difficult objective to pursue, which cannot be delegated to the "simple" solution of punishment, devoid of those connotations of justice that make it an instrument of reintegration into the social fabric of the person who made a mistake.

Excluding the usefulness of criminalisation does not want to represent a viaticum towards the de-responsibility of the minors, quite the opposite. Starting from the conviction that it is necessary for everyone, from a very young age, to fully understand the meaning of their actions (and the consequences that may derive from them), it is essential to intervene when an episode of prevarication occurs. The problem is the choice of the way to intervene, with the main – inalienable – goal of the maturation in each of the senses of responsibility towards oneself and towards the community of which one is a part. A "complex" approach is needed, which looks at the dynamics of reality, which tries to understand and condition them, but which appears to be the only truly capable of helping society grow.

It is a question of looking at the act committed by the young man/woman as if it were a mistake. From a scholastic point of view, the error is overestimated since it is considered a lack, while the error is information, useful for the teacher and later for the pupil. It allows us to understand the causes and to intervene on these (which can be very different: psychological, family, sociological), in order to treat, according to good Hippocratic medicine, not so much the symptoms but the causes, while the punishment considers only the symptoms (Morin, 2014).

We must never forget that the violence of young people is a cry, a request for help, since they live in a disoriented society. And we must also remember that we, adults, have built this society. We are therefore responsible for it. It is up to us to propose new models, new structures (Morineau, 1998).

When the discipline of criminal proceedings against juvenile defendants was renewed in Italy in 1988, many had feared that the innovative, atypical solutions contemplated therein could favour the impunity of the youngest and, consequently, the increase in juvenile delinquency. Instead, these tools, in the judicial reality, have proven their effectiveness, have been wisely implemented by the judges, and have made it possible to face the "problem" of juvenile delinquency effectively, with de-formalised solutions. And the quality of the results led to the export of the most important remedies (processual probation and the declaration of irrelevance of the fact above all), with some – moreover, questionable – adaptations to the adult system. This experience should

constitute the spur to experiment new paths today, to adopt alternative methodologies to the traditional ones, to prefer a systemic, multifactorial and contextual approach, to the formal and simple logic, which, as we have said, is not able to intercept the complex dynamics that characterise our time.

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KAZIMIERZ KOLAŃCZYK (1915-1982) AND A NEW APPROACH TO THE TEACHING OF ROMAN LAW IN POST-WAR POLAND / Grzegorz Nancka

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Abstract: *An entirely new approach to the teaching of Roman law was long-awaited in post-war Poland. There were not many studies for learning the subject, and in the case of the available ones, their weaknesses were highlighted. A breakthrough in the area of the Roman law academic textbook came with the publication of "Roman Law" by Kazimierz Kolańczyk. It is considered one of the best Roman law textbooks, if not the best, in the 20th century in Poland. The work was significantly different from the other hitherto available textbooks, primarily because the author developed his own concept for that type of study. As it turned out, the work by K. Kolańczyk opened a completely new phase in the Polish didactics of Roman law. It is therefore useful to take a closer look at its assumptions and K. Kolańczyk's approach to the teaching of Roman law, and also to evaluate the permanence of the changes in teaching caused by that study.*

Key words: *Roman Law; Kazimierz Kolańczyk; Teaching; Textbook*

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1. INTRODUCTION

Kazimierz Kolańczyk (1915-1982) was a professor of Roman law at the Adam Mickiewicz University in Poznan.[1] He was remembered primarily as the author of one of the best, if not the best, Roman law textbooks in the 20th century in Poland. The textbook *Prawo rzymskie (Roman Law)*, which was originally published in 1973, has already had six editions to this day (Kolańczyk, 1973; Kolańczyk, 2021; Dajczak, 2021).[2] It was published three times during the author's lifetime. The first edition was an important event for the Polish Romanist community. According to the pre-release information, the work "stands out by virtue of its vivid presentation of the real meaning and the practical, economic and social function of particular legal institutes" (Nancka, 2021, p. 159). The print circulation of that edition was 5,000 copies and they sold out relatively fast. As a result, soon it was decided that another edition of the work would appear. The second extended and

[1] Kazimierz Kolańczyk, professor of legal sciences, Polish Romanist, and legal historian, scientifically linked with the Adam Mickiewicz University in Poznan, where he was the head of Roman law. He was also connected with the Nicolaus Copernicus University in Torun (Dajczak, 2010; Lesiński, 1983; Rozwadowski, 1983).
[2] The latest (sixth) edition was edited by Wojciech Dajczak.

improved edition came out in 1976, and its 10,000 copies vanished from the bookshops as quickly as in the case of the debut edition. The success of that edition meant that the third edition (also 10,000 copies) appeared already in 1978. In essence, it did not differ from the second edition – except for the removal of obvious printing errors. This means that within five years 25,000 copies of the study in total reached readers (Nancka, 2021, p. 159). The work, which at the time of its publication was a major novelty in the publishing market, was very well received by readers, both academics and students (Modrzejewski, 1974; Rebro, 1975; Wiliński, 1974; Wycisk, 1975). However, probably nobody expected at that time that the textbook would still be gladly used fifty years later. The unquestionable success of this work prompts the question as to its immense popularity at the time when it was published and its permanence. Moreover, it will be interesting to see what approach to didactics was adopted in the textbook and why the work by K. Kolańczyk is still considered one of the best Roman law textbooks in postwar Poland.

2. STARTING POINT FOR A DISCUSSION ON A NEW TEXTBOOK

A Roman law textbook corresponding to the realities of the time was long-awaited in the publishing market in postwar Poland (Dajczak, 2020, p. 209). While an increasing number of studies appeared abroad, for instance, by Max Kaser (1960), Fritz Schulz (1951), or by Antonio Guarino (1957), a new approach was keenly anticipated in Poland. Shortly after the Second World War, in 1948, a textbook by Borys Łapicki came out (1948), but it was not well received by readers (Kodrębski, 1995, p. 240). Students also had a textbook by Rafał Taubenschlag with its pre-war traditions at their disposal. The last edition of that work edited by Henryk Kupiszewski appeared in 1969 only after the author's death. That textbook was viewed as too short and unclear due to the insufficient explanation of Latin terms (Kolańczyk, 1965, p. 235). Moreover, since 1962, a textbook by Wacław Osuchowski, which was a significant achievement of Polish postwar Romanist studies, was available to readers (1962). That work, however, was too lengthy and written in a mechanical and at times somewhat tedious manner (Kolańczyk, 1965, p. 239). The author did not attempt to evaluate the particular institutes and failed to point out which were principal, and which were peripheral (Kolańczyk, 1965, p. 253). Besides, the textbook had an overdeveloped scientific apparatus (Kolańczyk, 1965, pp. 236-237). Kazimierz Kolańczyk was aware of those problems and saw the need for the preparation of an entirely new didactic resource. He published a review article in "The Journal of Law and History" on the 1962 work by W. Osuchowski, in which he addressed the most important problems related to the didactics of Roman law and outlined a concept of a new textbook for the study of the subject (Kolańczyk, 1965).

K. Kolańczyk treated the work by W. Osuchowski as a starting point for further discussion on what a modern Roman law textbook should be like. K. Kolańczyk (1965, p. 235) believed that the textbook should be of an appropriate length and be written in a manner that is accessible to students. He held the view that a definition of the didactic role of a university subject was a crucial issue that determined the adoption of an appropriate model of conducting classes and, consequently, the content of the textbook. He believed that in the case of Roman law, it consisted primarily in "the historical and dialectical introduction of the student to the issues of law and civil procedure in general, opening his eyes to those issues and shaping the civilist imagination" (1965, p. 239; Bardach, 1965, p. 331). Roman law is a highly abstract and dogmatic academic subject, therefore, the level of its difficulty is significant (Kupiszewski, 1981; Sondel, 1976). This meant that in the context of the development of a new textbook, it was necessary to

search for new methodological approaches and draw on existing patterns (Kolańczyk, 1965, p. 248).

The adoption of appropriate systematization was a fundamental issue connected with the creation of the textbook (Kuryłowicz, 2018). The Poznan professor took the view that it was essential to determine the position of civil procedure. Two options were the most popular. It was possible to apply the *personae-res-actiones* arrangement known from *Institutiones* by Gaius, or rely on the pandectic systematization (Kolańczyk, 1970; Czech-Jezierska, 2017). The textbook arrangement according to the Gaius systematization meant that the procedure should be placed at the end, whereas the pandectic systematization implied that this section was included in the general part of the textbook. The latter model was adopted by R. Taubenschlag, even though only since the 1955 edition. W. Osuchowski took a similar approach, and the Roman civil procedure precedes the whole system of Roman private law in his textbook. Kazimierz Kolańczyk was evidently in favor of the systematization in which the part concerning procedure would precede the lecture on substantive law. He believed that "Roman procedural law, however, is an indispensable key to understanding substantive law and therefore its presentation cannot be too concise" (Kolańczyk, 1965, p. 244). However, a different approach was also possible, which was shown in a textbook by Stanisław Wróblewski (Kolańczyk, 1971; Wróblewski, 1916). In *Zarys rzymskiego prawa prywatnego* (*An Outline of Roman Private Law*), the Cracow Romanist adopted an original approach whereby a discussion on the particular institutes of procedural law was linked to the institutes of substantive law, with a general outline of the historical development included in the chapter on the history of sources (Kolańczyk, 1965, p. 244). In addition, K. Kolańczyk pointed out that in S. Wróblewski's view, "the separation of the procedural law as a distinct part leads either to the obliteration of its historical function or to a repetition of things once said" (Wróblewski, 1916; Kolańczyk, 1965, p. 244).

It was equally important to determine whether the textbook should be based solely on pure Roman law, as was the case with a majority of works published at the time, or whether it should also contain references to the later history of the given institutes, also in the present day. The Romanist thought that such references were necessary because they brought "a lot of animation" into the presented matter. He also held the view that comparative remarks made it possible to perceive the relation of the problems inherent in antiquity to contemporary ones and to determine certain parallels and contrasts (Kolańczyk, 1965, p. 254; Kodrębski, 1995, pp. 241-242). He believed that a Roman law textbook should present the matter "in the problem-based formulation, with an indication of the political, economic and social need to regulate the specific legal problems of the Roman state, with a strong emphasis on various possibilities, directions and attempts to solve them. The conceptual outline of a given legal institute in the shape that Roman law actually achieved would emerge only in the conclusions and, consequently, would not necessarily always be provided in the form of a complete definition. An attempt at evaluation and criticism of the manner in which a given institute functioned in the Roman state, its economic and social effects and its class edge, possibly with an indication of its further development, for example, in the form of references to modern civil law, could add the finishing touch" (Kolańczyk, 1965, p. 251). It should be highlighted that a reference to "the class edge" was, in the case of K. Kolańczyk, more of "a methodological label" that was welcomed by the authorities of the time and did not stem from the author's beliefs (Kuryłowicz, 2019, p. 942).

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3. "PROBLEM CONTACT POINTS" AS A CHANCE FOR THE TEACHING OF ROMAN LAW

Kazimierz Kolańczyk indicated in the course of work on his textbook that the purposefulness of teaching historical-legal subjects can be amply demonstrated by placing emphasis on problem relationships with the present day (Wiliński, 1970). Those relationships, which the Poznan professor called "problem contact points", would prove to be particularly useful for students getting acquainted with Roman law. That approach was based on his previous teaching experience, as he highlighted in his letter of 22 December 1973 addressed to Bogusław Leśnodorski:

*"The problem of linking antiquity with the present day, updating our venerable scientific discipline has been my concern for a long time. For many years I have conducted lectures with two teaching aids: on the one hand, an excellent Italian edition of a selection of sources /*breviarum iuris Romani*/ and, on the other hand, the Civil Code, the Family and Guardianship Code, or the Code of Civil Procedure. For many years I have observed animation among students both in Poznan and Torun when* ad oculos *I showed them problem contact points between Roman law and modern law. I am very glad that I managed – thanks to the help from my friends, Romanists and Civilists – to convince the Polish Scientific Publishers of the advisability of including this comparative apparatus in the footnotes to the textbook."*[3]

As a result, his textbook addressed the need to connect the past with the present. The scholar indicated that the footnotes included approximately 400-500 problem contact points between Roman law and modern substantive and procedural civil law, and even in some points with criminal law (Nancka, 2021, pp. 164-165). That approach was in line with the issue of the problem-centered inclination of Roman law discussed for some time by civilists and legal historians (Wiliński, 1970, pp. 345-346). With such a presentation of the matter of Roman law, students would turn to the Civil Code more eagerly and thus better prepare for the study of modern law (Nancka, 2021, p. 165). In the course of those discussions, it was also emphasized that "the more thorough the lawyer's knowledge of Roman law, the easier it was for him to master the new system of civil law" (Ohanowicz, 1969, p. 177), and also that there was no possibility "for anyone to be a good civilist without a thorough knowledge of the method of Roman lawyers" (Szpunar, 1969, p. 181). The textbook by K. Kolańczyk fitted in with the set course and differed significantly from the textbooks by R. Taubenschlag and W. Osuchowski, which were considered "not easily accessible" because of their lack of references to modern law (Nancka, 2021, p. 165).

However, this did not mean that the scholar distanced himself from pure Roman law. In his work, he tried to keep "within the bounds of historical authenticity," which was manifested in the fact that the textbook presented pure Roman law. In that regard, he agreed with a view expressed by Milan Bartošek, who pointed out that "the real relevance of Roman law lies in its historicism and authenticity" (1966, pp. 101, 111; Kolańczyk, 1973, p. 10; Czech-Jezierska, 2019). For this reason, the Institutes of Gaius and the Institutes of Justinian provided a basis for the textbook by K. Kolańczyk, whereas the Digest of Justinian served as a supplementary material. Moreover, K. Kolańczyk held the view that it was permissible to go beyond the literal reading of texts in order to make "an interpretation of their sense based on the general historical probability, an analogy, a working hypothesis or finally scientific intuition". Thus, he set a clear boundary between

[3] Archive of the Polish Academy of Sciences, branch in Poznań (hereinafter: APAN Poznań), file No. P. III-76, Kazimierz Kolańczyk File (hereinafter: KK File), vol. 32, Kazimierz Kolańczyk's letter to Bogusław Leśnodorski of 22 December 1973.

the activity of the 19th-century Pandectists, who reworked and adapted Roman private law to the needs of contemporary practice and the 20th-century Roman law didactics, in which Roman law was no longer intended to function as a general theory of civil law (1973, p. 10-11).

4. THE METHODOLOGICAL RENEWAL OF THE TEACHING

As noted by Adam Wiliński, the textbook by K. Kolańczyk was a highly successful attempt at "the methodological renewal" of the Roman law didactics. The textbook stood out from others because it linked the particular institutes of Roman law to the economic and social background of ancient Rome and its content was diversified by giving prominence to significant legal institutes (Wiliński, 1974, pp. 238, 240). In the opinion of its author, the textbook published in 1973 contained "an element of rationality and novelty."[4] K. Kolańczyk indicated that "the author's intention was not only to help a student to master the material, but above all, to think through and understand the subject known in the academic tradition for its exceptional degree of difficulty. The material was presented in a selective way, ignoring everything that was only of an erudite and antiquarian significance, and emphasizing everything that was significant for the ancient society and, moreover, what has survived in one form or another to this day. The author's ambition in this part was the problem-based presentation, so highly recommended and so fruitful in contemporary civil studies."[5] The adoption of a flexible vision made it possible to point to the significance of principal institutes, and at the same time show the peripheral nature of others (Kolańczyk, 1973, p. 11).

The Slovak Romanist Karol Rebro highlighted that by shifting from an isolated perspective on Roman law, K. Kolańczyk sought to detect problem relationships, in particular with substantive and procedural law, the history of law, and political and legal doctrines (1975, p. 952). Karol Rebro pointed out that the Poznan scholar tried to show the reader how Roman lawyers solved legal problems that were relevant to the Roman society. That approach was of utmost significance to students because they could see that a resolved problem raises an issue that remains relevant in the present day, in completely different social conditions. In this way, the Romanist succeeded in combining two elements very correctly – scholarly and didactic. Moreover, as K. Rebro specified, the textbook by K. Kolańczyk contained much less bibliographic material than the work by W. Osuchowski and was therefore more accessible to a student (1975, p. 952). A proper treatment of scientific documentation was one of the most important issues related to the creation of the textbook by the Poznan scholar. Kazimierz Kolańczyk highlighted in the introduction to the textbook that he assumed at the outset that references to immense specialized literature, often scattered and inaccessible, were not the purpose of a study of a didactic nature. The author of the textbook also believed that the needs and capabilities of its readers should be taken into account during the creation of that type of study, with the corresponding adjustment of the scientific apparatus (Kolańczyk, 1973, p. 11).

The Polish Romanist Franciszek Wycisk highlighted in "Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung" that the Roman law textbooks available in the Polish publishing market at the time were not sufficiently suited to the

[4] APAN Poznań, file No. P. III-76, KK File, vol. 121, Kazimierz Kolańczyk's letter to the Polish Scientific Publishers – Editors of Legal Publishing of 25 January 1972, p. 2.
[5] APAN Poznań, file No. P. III-76, KK File, vol. 121, Kazimierz Kolańczyk's letter to the Polish Scientific Publishers – Editors of Legal Publishing of 25 January 1972, p. 1.

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needs of students (1974). The textbook by R. Taubenschlag was too concise and thus failed to provide a student unfamiliar with the intricacies of Roman law with the sufficient clarity of the presentation of the matter, whereas the work by W. Osuchowski was too lengthy (Wycisk, 1974, p. 551). By contrast, the textbook by K. Kolańczyk was adapted to the current methodology in every respect. As F. Wycisk underlined, the textbook put emphasis on certain common problems that occurred also in the general history of the state and law, as well as in law and in civil procedure. Another advantage of the textbook lay in breaking with the purely dogmatic, formalistic and "flattened" presentation of material, making it easier for a student to master it. K. Kolańczyk also sought to show a practical sense of legal institutes, describing them against a fairly broadly drawn social, economic and historical background. He also managed to avoid the mechanical presentation of the legal institutes in the textbook. He paid more attention to some of them because of their significance, giving less space to those of lesser importance (Wycisk, 1974, p. 552). All of this meant that the textbook by K. Kolańczyk – as F. Wycisk pointed out – presented the didactics of Roman law in a new, previously unused manner (1974, p. 553).

5. SUCCESSIVE EDITIONS – A FURTHER NEED FOR A NEW APPROACH?

The textbook got a good reception from both academics and students. The Poznan scholar received letters connected with the reception of the work, in which the numerous strengths of the work were praised, and certain improvements were suggested (Nancka, 2021, pp. 174-175). Kazimierz Kolańczyk started work on the second edition already in 1974, although the textbook did not differ significantly from the previous edition. The Romanist pointed out that "the general methodological and constructive assumptions of the textbook will remain unchanged."[6] The source material underwent slight modifications – new releases were included, in particular in the area of modern civil studies. However, the fundamental changes concerned the issues raised by the readers of the work. In his review published in "The Journal of Law and History," Adam Wiliński called for a more detailed definition of the particular concepts and institutes of Roman law, "especially where the correct definition can be easily and doubtlessly built on the basis of the source material and where it concerns an institute close to the relevant civilist concepts."[7]

The content-related improvement of the second edition of the textbook resulted from the inclusion of a passage concerning the subsequent history of Justinian legislation and Roman law in the era of feudalism and capitalism.[8] The Poznan scholar intended to include that passage already in the first edition of the textbook, but the limited number of publisher's sheets forced him to abandon the intention. It became possible with the preparation of the second edition, and K. Kolańczyk argued that such a change would bring substantial benefits to readers. He pointed out that the included passage was "a clear bridge that would lead the reader straight from antiquity to the present day. I believe that this bridge should not be missing in the very textbook that for the first time – with such general applause of readers – points to numerous problem relationships between the ancient Roman law and modern civil, substantive and procedural law. The

[6] APAN Poznań, file No. P. III-76, KK File, vol. 20, Kazimierz Kolańczyk's letter to editor Kazimierz Nowicki of 29 March 1975, p. 1.
[7] APAN Poznań, file No. P. III-76, KK File, vol. 20, Kazimierz Kolańczyk's letter to editor Kazimierz Nowicki of 29 March 1975, p. 1.
[8] APAN Poznań, file No. P. III-76, KK File, vol. 20, Appendix no. 4 to the letter of 29 March 1975.

postulated outline explains how such problem contact points became possible in the first place."[9]

The changes concerned also some technical issues. In the first edition of the textbook, Kazimierz Kolańczyk deliberately refrained from using space and italics in order to distinguish the particular institutes. It was his intention to let the readers find the most significant issues in the text independently. As it turned out, for some it was too difficult a task. As a result, the author decided to distinguish the titles of sub-points, surnames, technical terms introduced into the text in an essential manner, definitions and initial definitional approximations, and the points of emphasis of the lecture. Italics were used to mark foreign terms.[10] The introduction of the live pagination of paragraphs was a significant technical improvement. It was a further proof of hearing the voices of readers, who had practical difficulties in finding headings placed in the text. In order to meet the readers' expectations, the author improved the second edition of the textbook by introducing a designation of the paragraph and point under discussion on a given page, regardless of normal pagination.[11] The introduction of an index of Latin terms and expressions, which was expected by students, grew out of the same need.[12]

6. PERMANENCE OF THE CHANGES IN DIDACTICS

The textbook by Kazimierz Kolańczyk had many strengths that determined its success. As compared to the other existing textbooks, it impressed its readers with its novelty of the approach. Roman law was shown as a vital discipline having a powerful meaning for the present day. The changes introduced into the second edition of the textbook were designed not only to improve it but also to adapt it to the requirements arising from the realities of the time. The second edition coincided with a reform of legal studies implemented in 1975. The new program of legal studies introduced at the time aimed at the application of "the principle of elasticity" (Czech-Jezierska, 2015; 2018; Nancka, 2022, pp. 46-48; Wołodkiewicz, 2015, pp. 243-244). This meant that it was to be based on "the modernization of studies, and thus on the reconstruction of didactic forms and, above all, on a renewal of the teaching content" (Baszkiewicz, 1975, p. 28). In reality, the modification of the legal studies programme led to a mechanical joining of the subjects. The project introduced far-reaching changes with regard to historical-legal subjects. Instead of the previously offered courses in the history of the Polish state and law, general history of the state and law, and Roman law; two new subjects were introduced: history of state systems and history of law, whereas the history of political-legal doctrines became an optional subject (Nancka, 2022, p. 53). Roman law was taught within the history of law, in a very modest number of teaching hours (Czech-Jezierska, 2018, p. 19). Not only did it lose the status of an independent subject, but due to a reduction in the number of teaching hours, the possibility of conducting classes as before the reform was eliminated. Despite those adversities, the Romanist decided to prepare another edition of the textbook, which, jointly with the first edition of the year 1973, held an important position on the not very rich, domestic publishing market. Owing to the modification of the program of legal studies, the textbook was adapted to a situation where the point of gravity of teaching Roman law would shift to a much wider extent to the academic textbook. The direction taken by the author of the textbook proved to be so

[9] APAN Poznań, file No. P. III-76, KK File, vol. 20, Appendix no. 4 to the letter of 29 March 1975, p. 2.
[10] APAN Poznań, file No. P. III-76, KK File, vol. 20, Appendix no. 1 to the letter of 29 March 1975, pp. 1-2.
[11] APAN Poznań, file No. P. III-76, KK File, vol. 20, Appendix no. 3 to the letter of 29 March 1975, pp. 1-2.
[12] APAN Poznań, file No. P. III-76, KK File, vol. 20, Appendix no. 5 to the letter of 29 March 1975.

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good that he did not introduce any further modifications and improvements to the third edition, limiting himself only to correcting obvious errors.

It is clear that the model of the textbook adopted by Kazimierz Kolańczyk had a lasting effect on the teaching of Roman law. The thought-provoking textbook, stimulating a reader to further reflection and search, became a model for a textbook on the subject for many years. The pattern, which places particular emphasis on "the problem contact points", showing the relationships between Roman law and the laws currently in force, and highlights the prominent role of some institutes, is still relevant today, as evidenced by the fact that the study has been published in subsequent editions and reprints. The unquestionable success of the textbook contributed to a change in how the didactics of Roman law is viewed in Poland, which may have helped Roman law survive the difficult times of the reform of legal studies. Paradoxically, although Roman law has been pushed into the framework of the history of law since 1975, the textbook by the Poznan professor has enjoyed continued popularity. The study filled an acute gap, has provided a model for an academic textbook for years and still is an attractive proposition for those who are looking for didactic help to learn Roman law.

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THE DARK SIDE OF SOCIAL MEDIA: HOW DOES CRIMINAL LAW BEHAVE? / Maria Antonella Pasculli

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Abstract: *The paper focuses on the mechanisms, offences and practices connected to unchartered (underdeveloped) crimes in the information society. The virtual world represents a central part of modern (modem) life, especially during the COVID-19 pandemic. Omnipresent social media, media sharing platforms, chat sites, web forums, and blogs radically change the way current societies operate. These instruments attract more and more attention from public security planners. This type of research is a normative legal study. The approach used is the law approach and conceptual approach. The legal material consists of primary and secondary legal materials. Basically, the Criminal law system has to adapt to social media to emphasise the legality principle (structure of cases in point) and guarantee measures (prohibition of broadening liability) in the post-modern world. This topic shall look at the role and the problems of criminal law related to multiple profiles, analysing the criminological aspects proposed below.*

Key words: *European Policies; Hate Speech; Social media; Criminal Law*

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1. STARTING FROM THE END AS A NEW BEGINNING OF "CRIMES": THE EUROPEAN POLICIES ON HATE CRIMES

According to the last communication from the Commission to the European Parliament and the Council on 9 December 2021,[1] the European Commission published a praenormative initiative to extend the list of EU crimes to hate speech and hate crime. The final purpose is to create "a more inclusive and protective Europe".

This *ambitious* initiative fits into the contest of EU actions already in place to counter illegal hate speech and violent extremist ideologies and terrorism online, such as Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain

[1] European Commission (2021). *Communication from the Commission to the European Parliament and the Council: A More Inclusive and Protective Europe: Extending the List of EU Crimes to Hate Speech and Hate Crime,* Brussels, 9.12.2021 COM(2021) 777 final. The Commission reiterated that combating hate speech and hate crime is part of its actions to promote the EU's core values and ensure that the EU Charter of Fundamental Rights is upheld. Any form of discrimination, as laid down in Art. 19 TFEU, is prohibited. Hate crime and hate speech go against the fundamental European values set out in Art. 2 TEU.

forms and expressions of racism and xenophobia using criminal law,[2] the EU Code of Conduct on countering illegal hate speech online,[3] the proposed Digital Services Act,[4] the 2021 Regulation on addressing terrorist content online,[5] finally the EU Internet Forum.[6]

In this document, the working group by European Commission clearly explains the role of criminal law through well-structured steps: a) considering hate speech and hate crime as an area of crime (at the international level);[7] b) considering hate speech and hate crime as an area of particularly serious crimes;[8] c) considering criminal law response in the Member States.[9] As we can see, there are strong, effective indications for building and strengthening criminal liability for hate crimes.

The prevailing focus is on controlling freedom of expression, as one of the pillars of a democratic and pluralist society, due to the sharp increase in hate speech and hate crime in Europe during the past decade, especially through the use of the Internet and social media in pandemic experience. In this way, the balance between freedom of speech and hate speech is blown.

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[2] Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. *OJ L 328*, 6.12.2008, pp. 55–58. Available at: http://data.europa.eu/eli/dec_framw/2008/913/oj (accessed on 15.11.2022).

[3] The EU Code of conduct on countering illegal hate speech online. The robust response provided by the European Union. In *European Commission*. Available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en#theeucodeofconduct (accessed on 15.11.2022). The Code of conduct on countering illegal hate speech online was signed on 31 May 2016 by the Commission and Google (YouTube), Facebook, Twitter and Microsoft hosted consumer services (e.g. Xbox gaming services or LinkedIn). In 2018 and 2019, Instagram, Google+, Dailymotion, Snap and Jeuxvideo.com have joined. This means the Code now covers 96% of the EU market share of online platforms that may be affected by hateful content. See European Commission (2019). *Assessment of the Code of Conduct on Hate Speech on line. State of Play*. Available at: https://www.statewatch.org/media/documents/news/2019/oct/eu-com-assessing-code-of-conduct-online-hate-speech-12522-19.pdf (accessed on 15.11.2022).

[4] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in the Member States concerning the provision of audiovisual media services. *OJ L 303*, 28.11.2018, p. 69–92. Available at: https://eur-lex.europa.eu/eli/dir/2018/1808/oj (accessed on 15.11.2022).

[5] Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online. *OJ L 172*, 17.5.2021, p. 79–109. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32021R0784 (accessed on 15.11.2022).

[6] The EU Internet Forum is a Commission-led and voluntary-based initiative to work jointly with the tech industry and other relevant stakeholders to counter violent extremist content online.

[7] For example, the European Commission against Racism and Intolerance ('ECRI') of the Council of Europe issued a General Policy Recommendation No.15 on Combating Hate Speech in December 2015, available at: https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/recommendation-no.15 (accessed on 15.11.2022); Council of Europe Recommendation No. R (97) 20 of the Committee of Ministers to the Member States on 'hate speech, available at: https://rm.coe.int/1680505d5b (accessed on 15.11.2022).

[8] European Commission (2021). *Communication from the Commission to the European Parliament and the Council: A More Inclusive and Protective Europe: Extending the List of EU Crimes to Hate Speech and Hate Crime*, Brussels, 9.12.2021 COM(2021) 777 final, pp. 9-12.

[9] "*As a result of transposing the Framework Decision into national law, hate speech is criminalised in all the Member States on grounds of race, colour, religion, descent, national or ethnic origin. Furthermore, Member States have explicitly criminalised hate speech also for other protected characteristics: 20 Member States criminalise hate speech on grounds of sexual orientation and 17 Member States on grounds of sex/gender. In addition, 14 Member States criminalise hate speech on the ground of disability and 6 Member States on grounds of age. Moreover, 8 Member States have (either alternatively or in addition) criminalised hate speech without defining the protected characteristics of the groups, and leaving the criminalisation of hate speech open, aiming at protecting any minority group or part of the population.*" European Commission (2021). *Communication from the Commission to the European Parliament and the Council: A More Inclusive and Protective Europe: Extending the List of EU Crimes to Hate Speech and Hate Crime*, Brussels, 9.12.2021 COM(2021) 777 final, p. 13.

Ensuring the protection of speech through a criminal law response is a contradictory expression (Coe, 2015). We know that the law is a political and ethical *equilibrium* in multiple areas of common values.

The proposed extension of the list of areas of EU crimes to hate speech and hate crime is based on Art. 83(1) TFEU, which lays down an exhaustive list of areas of crime for which the European Parliament and the Council may establish minimum rules involving the definition of criminal offences and sanctions applicable in all EU Member States. The normative text justifies the extension by pointing out that hate speech and hate crime are so serious crimes because of their harmful impacts on the individuals and on society at large, undermining the foundations of the EU or international community as well. The EU strategies provided for the identification of hate speech and hate crime as a new, distinct area of crime. The practical challenges can involve an effective and comprehensive criminal law approach to these phenomena at the EU level and domestic level.

2. GENERAL BACKGROUND ON CRIMINAL LAW APPROACH

The context of the present research is aimed at focusing on criminal law enforcement. According to the pillars of the EU enlargement strategy, at the core of the research challenge is the elaboration of the concept: who protects who in a virtual world? What is the role of criminal legislation? Could the criminal law system be a real answer to the research questions related to hate speech et al. in social media?[10]

The thesis statement is to examine social media from the criminal perspective from multiple points of view (Salter, 2017). First of all, criminal law strongly opposes the use of social media by criminal offenders to organize or facilitate criminal events.

The primary purpose is the protection of victims, primarily the children. Consequently, criminal law facilitates the use of social media by law enforcement agencies to manage large gatherings of people, investigate crimes, or handle other events.

The criminal perspective seeks to figure out the development and consequences of the most important alternative to real crimes in the Society of Risk in a time of the collapse of the public security and the transformation of social control forms (Prieto Curiel, Cresci, Muntean and Bishop, 2020; Surette and Gardiner-Bess, 2014). There is an extensive body of literature examining legacy media and crime. According to Surette and Gardiner Bess (2014), the complex link between media and crime supposes multiple research lines, but there are plenty of hypothesis. So in few pages we'll draw from "cutting-edge criminological and discussing theories.

Information Technology and "social" telecommunication technologies have caused relevant changes in criminal law and criminal procedure, showing - first of all - how a crime could have its effects at many more locations than the place where the perpetrator acted. Google earth and social companies increase the *locus commissi delicti* in a virtual world, where a lot of people are online in different – technological - ways. Orwellian memories here we are! Big Brother is watching all of us because of the traces we leave. In a space of freedom to express and communicate, the Internet is a new big planet of possible, real offences.

The objectives of this contribution are divided into tasks:

a) criminal legal analysis: the paper will go beyond a traditional legal dogmatic analysis, as it aims to lay the foundations for a new conceptualisation of offences,

[10] For more details, see Heinze (2022); Surette (2014); or Higson-Bliss (2020).

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jurisdiction and *locus delicti*, conflicting jurisdiction, transnational dimension of cybercrime, criminal liability of legal entities; the searching of evidence in cyberspace; the age "below which it is prohibited to engage in sexual activities with a child";

b) specific focus on children's protection, especially for what concerns the potential threats such as (1) child exploitation; (2) production, distribution, and possession of child pornography; (3) exposure to harmful content; (4) grooming, harassment, and sexual abuse; and (5) cyberbullying.[11] The latest technologies make it easier for criminals to contact children in ways that were not previously possible. Children are particularly vulnerable to the exploitation of online predators because they rely heavily on networking websites for social interaction. Offenders use false identities (who is the perpetrator)? In chat rooms to lure victims into physical meetings, thus connecting the worlds of cyber and physical crime (Dombrowski, LeMasney, Dickson, Ahia, 2002, pp. 66-67). When this happens, virtual crime often leads to traditional forms of child abuse and exploitation such as trafficking and sex. The victims of online exploitation must live with their abuse for the rest of their lives (see Schurgin O'Keeffe, Clarke-Pearson, Council on Communications and Media, 2011);

c) dogmatic and sociological analysis of emerging trends in human behaviours, known as hate expressions, hate speech, and hate crimes;

d) the social perception of crime online; how media can change in expansion of crimes (terrorism).

3. SOCIAL MEDIA AND CRIMINAL LIMITATIONS OF SPACE

In the "jungle" of social media, criminal law helps to identify the offences beside national and international criminal systems regarding the principle of respect of legality (the rule of law and due process to guarantee compliance). What conduct is a crime in social media?

In respect of the legality principle, which conduct is a crime? Can we criminalize virtual sexual acts? And with which sanctions? Is the attempt, aiding, or abetting of these criminal conducts criminal offences? Virtual crimes have real-world victims.

According to legality, the criminal approach suggests we certainly acknowledge the offences beside national and international criminal systems, applying the principles of jurisdictions (territoriality, active and passive nationality, personality, universality).

Why is the criminal jurisdiction in social media such a big problem? Social media does not recognise the *locus commissi delicti*. Before a law enforcement agency can investigate a cybercrime case, it has to have jurisdiction. The first thing that must be determined is whether a crime has taken place at all (Klip, 2014).

Following national criteria to legally find *locus commissi delicti*, any principle - universality/territoriality et al. - could be simply applied without considering in this case conflicting jurisdictions.

Starting from the legal concepts to connect conduct to a certain place of commission, where is the *locus delicti* in cyberspace? For instance, Italian and French doctrines discussed on a-territoriality principle, as a form of "loss of location" (Klip, 2014, p. 387).[12] Which issues support a basic theory when an offence has been committed on its own territory and its effects are above around the globe? Which norms should be

[11] Cyber grooming, the use of the Internet by an adult to form a trusting relationship with a child with the intent of having sexual contact, is a criminal offence in several countries. This is in line with the provision of the Convention of the Council of Europe on the Protection of Children against Sexual Exploitation (CETS 201) which criminalises sexual solicitation. See Quayle, Allegro, Hutton, Sheath and Lööf (2014).

[12] For a complete report by 17 states see Klip (2014, p. 387 et seq.).

applied (the conduct or the effects of the crime respecting the territoriality; the atrocity of the crime, respecting the universal jurisdiction; the transnational dimension of crimes)? This is a crucial point that plays a significant role in practice and in legal theories. Recently, many authors have wondered how to solve the conflict between new computer cybercrime and traditional criminal jurisdiction has become a hot topic in the field of criminal law (Xiaobing and Yongfeng, 2018).

Traditional criteria are bound to make radical changes, which is unacceptable to all countries (Xiaobing and Yongfeng, 2018, pp. 795–796; Khalifa, 2020, pp. 26–42). Innovative hypotheses have been proposed: a) theory of new sovereignty, called the theory of 'network autonomy', or called 'radical independent jurisdiction theory', based on an independent virtual world with its own values and rules, as opposed to the real-world; b) theory of jurisdictional relativity by which computer cyberspace has new jurisdiction, as in the high seas, Antarctica and outer space, establishing new rules; c) theory of website jurisdiction, under two conditions, as spatially and temporally stability and the certain relationship between the website and jurisdiction. There is an interesting comparison of multiple criteria that merges tradition and evolution in virtual/real jurisdiction.

By the way, the location of the emerging crime such as the place of transmission, or website, the place of visit, and the location of the network terminal proposed are basically in accordance with the principle of territorial jurisdiction and personal jurisdiction, approaching the problem of space effectiveness to the traditional criminal jurisdiction system (Xiaobing and Yongfeng, 2018, p. 797).

4. SOCIAL MEDIA AND CHILDREN PROTECTION

Children represent the most vulnerable part of society. As a result, it is necessary to take special care in protection of their rights (Staksrud, 2013; Gillespie, 2002, p. 411; OECD, 2011). It is not an overstatement to consider the need to bring this care to a higher level, especially in cyberspace. It is much easier to bring up and control the behaviour of children if one can see them and know-how and where they are spending their free time.[13]

However, it is much more demanding if children are online, since they can connect to the Internet nearly everywhere; still, even if they are home, without a constant oversight by a responsible person (parents or tutors), no one really knows whom they are talking to or what they are doing. As a result, children with possibilities of an adult but with maturity adequate to their age are exposed to threats of cyberbullying, paedophilia or organized crime.[14] Where is Criminal law to prevent and fight online threats? The

[13] A high percentage of older children have Internet access: 93% of American children had access to the Internet in 2007 (Lenhart and Madden, 2007, p. 48). In 2006 in Japan, this was the case for 65% of children aged 10-14 and 90% of teenagers aged 15-19. In the European Union, 75% of 6-17 year-olds were reported by their parents in 2008 to use the Internet; the percentage ranged from 93-94% in Finland, Iceland and the Netherlands to 50% in Greece and 45% in Italy (Livingstone and Haddon, 2009, p. 111). Ofcom's research shows that 99% of UK children aged 12-15 use the Internet, 93% of 8-11 and 75% of 5-7 (2010).

[14] Some studies suggest that rates of unwanted exposure also increase with age and that the number of children exposed to pornography online has increased over time. According to a national study, the percentage of young American Internet users seeing unwanted sexual material online increased from 25% in 2000 to 34% in 2005, even though parents used more filtering, blocking and monitoring software (55% in 2005 compared to 33% in 2000. However, a survey that measured the impact of exposure to pornography on 10-17 year-olds found that relatively few children were distressed: of the 34% who reported having seen pornographic content online, only 9% reported being "very or extremely upset". The same study stresses that younger children are more likely to be distressed. Between 2000 and 2006, both exposure and impact seem to have increased. See Wolak, Mitchell and Finkelhor (2006); Livingstone, Kirwil, Ponte, and Staksrud (2014).

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Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007) contains provisions criminalising the use of new technologies to sexually harm or abuse children.[15]

Furthermore, children are not only a target or "object" of possible wrongdoing, but without proportional regulations, they are also a source of harmful activities. A video or a funny picture uploaded by their peers can turn a child overnight from being a completely private figure to being publicly humiliated.

Criminal investigations could help identify the victims. The growth of the Internet gives criminals greater opportunities to entrap new victims, including children, specifically in times of emergencies for the security of underage citizens.[16] Criminal law approach in online protection children passes through the Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography;[17] the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, 201/2007; the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography.[18] The Lanzarote Convention is the real and complete answer to the criminal perspective at the European (and international) level. The text contains criminal law provisions, creating substantive law notions before missing them.

5. SOCIAL MEDIA AND HATE CRIMES

The Organisation for Security and Cooperation in Europe ('OSCE') refers to hate crimes as "criminal offences committed with a bias motive towards a certain group within society".[19]

To be considered a hate crime, the offence must comply with two criteria: first, the conduct (as act or acts) has to be an offence according to criminal law (the so-called base crime); second, the conduct (as act or acts) has to be led by bias against the person

[15] Council of Europe. *Global Project on Cybercrime, Protecting Children against Sexual Violence: the Criminal Law Benchmarks of the Budapest and Lanzarote Conventions* (Discussion paper), December 2012. Available at: https://rm.coe.int/16802fa3e2 (accessed on 15.11.2022).

[16] The Internet is increasingly influential in the lives of adolescents. Although there are many positives, there are also risks related to excessive use and addiction. It is important to recognize clinical signs and symptoms of Internet addiction (compulsive use, withdrawal, tolerance, and adverse consequences), treat comorbid conditions (other substance use disorders, attention deficit hyperactivity disorder, anxiety, depression, and hostility), and initiate psychosocial interventions. More research on this topic will help to provide consensus on diagnostic criteria and further clarify optimal management. See OECD (2020); and Simpson (2018).

[17] Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography. *OJ L 13/44,* 20.01.2004, pp. 44-48. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AL%3A2004%3A013%3ATOC (accessed on 15.11.2022). The constituent elements of criminal law are made common to all Member States. For critical issues see Henry and Powell (2016).

[18]The many improvements introduced by the Directive include the more refined definition of child pornography, increased criminal penalties, the criminalisation of the possession and acquisition of online child sexual abuse materials, the introduction of the new offence of 'grooming' and a provision related to the removing and/or blocking of websites containing child pornography. For critical issues on criminal-law approach, see Jurasz and Barker (2021).

[19] This is the operational definition used by OSCE in their reports on Racist and Xenophobic Hate crime (2021), Gender-based Hate crime (2021), Antisemitic Hate Crime (2019), and Anti-Muslim Hate Crime (2018), based on the OSCE Ministerial Council Decision No. 9/09 on combating hate crimes of 2 December 2009, agreed by consensus by all OSCE States, including all EU Member States. The concept behind such definition and its practical implication is further explained by OSCE Office for Democratic Institutions and Human Rights (2009, p. 16). See also Policy Department for Citizens' Rights and Constitutional Affairs (2020, pp. 22-23); or Wilson and Land (2021).

chosen as a "target". Both elements are present in the real and in the virtual world with all the consequences.[20]

The first element of hate crime represents the *actus reus* under domestic criminal law. The base offences may in theory include any criminal offence against persons or property, or the public peace, including manslaughter, assault, harassment, damage to property, hooliganism, etc. The gravity of the criminal offence is irrelevant: hate crimes can take the form of *petty* crimes, misdemeanours, or serious offences equally. The spectrum of base crimes varies from jurisdiction to jurisdiction, as national substantive criminal law provisions show great differences in this regard.

The second element of hate crime represents the *men's area,* such as peculiar reason we can easily trace as bias. The *hate* reason is the perpetrator's injury towards any target: perpetrators send a detailed hate message against people not accepted for their "race"/ethnicity, religion, nationality, sexual orientation, gender identity, or disability, inciting their followers to commit violence.

Online Hate can be expressed through many types of media, including text, images, videos and audio, such as cyberbullying, cyberstalking, harassment, and stirring up hatred through peculiar content (text, image, video, audio). Unlike offline crimes, online crimes once posted, sent or photographed, remain hosted on the Internet indefinitely. Online hate is a permanent offence that spreads and crosses the web to a large audience quickly, committed anonymously. Criminal law or criminology needs to know who commits a hate crime, who is the hate victim, and why the author commits a hate crime. The real nature of the Internet does not allow us to give correct answers.

According to a relevant report by the Italian Police (see Chirico, Gori and Esposito, 2020; and Amnesty International Sezione Italiana, 2020), this path grafts a spiral of hated we define "the Pyramid of Hate" developed by the Anti-Defamation League.[21]

[20] See Harawa (2014); in the article, the case law about the expressions of bias on social media is listed. See also Deflem and Silva (2021); and Furedi (2020). Furedi argued how the practice of safe space has blended uncomfortably well with the social distancing that was called for because of the COVID-19 pandemic. As such, the quarantining practices that were enacted because of a dangerous virus mirrored the quarantining that was already advocated as a kind of self-isolation from the harm that might result from dangerous opinions. In this social climate that also promotes diversity and tolerance, the mere utterance of an unpopular opinion can lead someone to be reprimanded, suspended, fired from employment, and indeed cancelled from social life itself.

[21] ADL. Pyramid of Hate. Available at: https://www.adl.org/sites/default/files/documents/pyramid-of-hate.pdf (accessed on 15.11.2022). Adaptation of the so-called "Allport's Scale of Prejudice".

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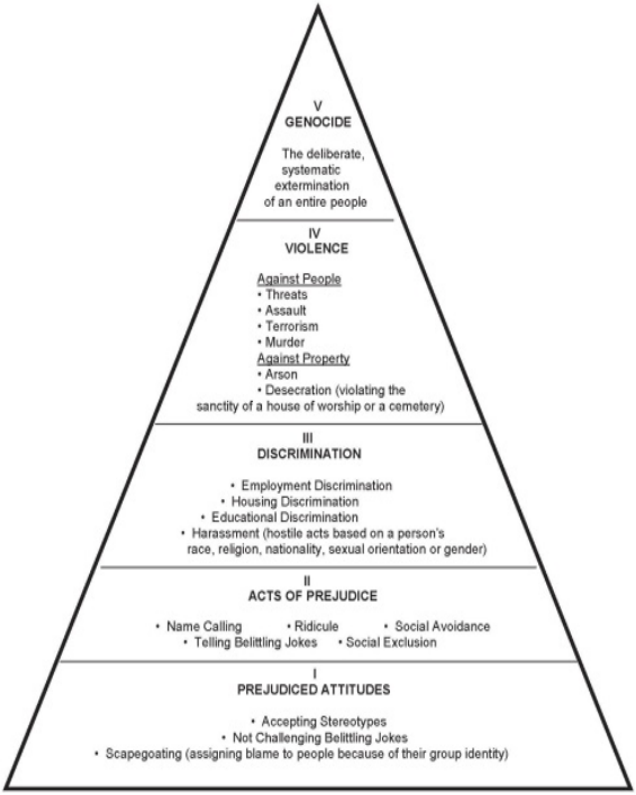
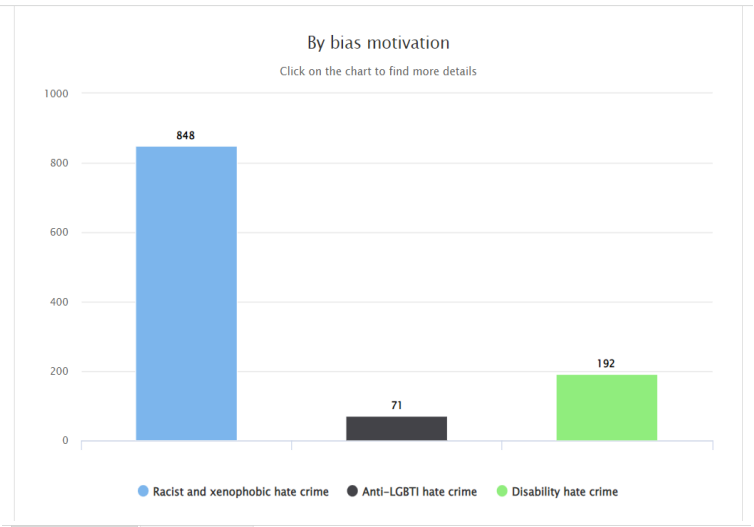
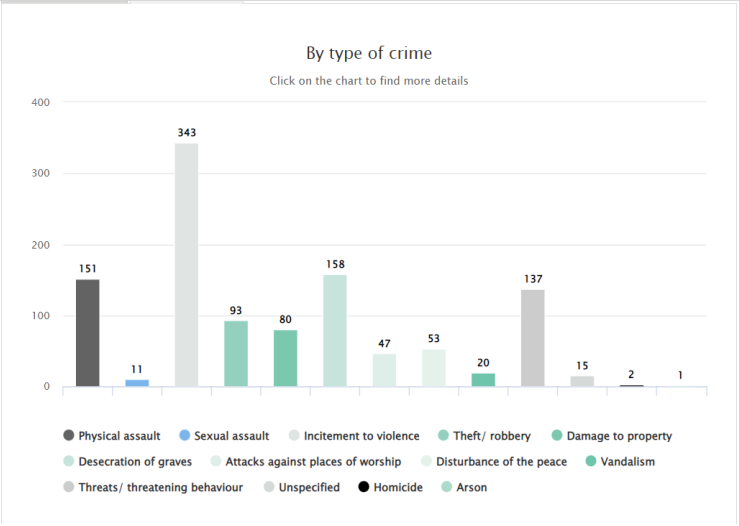


5.1 Statistical Data on Hate Crimes in Italy in 2020

The data presented here include information from the police database (SDI) and information gathered by the Observatory for Security against Acts of Discrimination (OSCAD). The selected charts below consist of SDI data covering the following bias motivations: "race/colour"; ethnicity; nationality; language; anti-Semitism; bias against Roma and Sinti; bias against Muslims; and bias against members of other religions; and OSCAD data on hate crimes motivated by bias against "sexual orientation and transgender identity" and bias against people with "disability".[22]

[22] See OSCE ODIHR. Hate Crime Reporting. Italy. Available at: *https://hatecrime.osce.org/italy* (accessed on 15.11.2022).


By bias motivation
Click on the chart to find more details
1000
800
600
400
200
0
848
71
192
Racist and xenophobic hate crime
Anti-LGBTI hate crime
Disability hate crime


By type of crime
Click on the chart to find more details
400
300
200
100
0
151
11
343
93
80
158
47
53
20
137
15
2
1
Physical assault
Sexual assault
Incitement to violence
Theft/ robbery
Damage to property
Desecration of graves
Attacks against places of worship
Disturbance of the peace
Vandalism
Threats/ threatening behaviour
Unspecified
Homicide
Arson

6. SOCIAL MEDIA AND EXPANSION OF CRIMINAL RESPONSIBILITY

There are threats from or associated with social media that we have discussed above, and then there are threats on social media with dangerous effects on the expansion of crimes (terrorism and media).

The main aim of this criminal perspective is to find an appropriate way to fight with negative results of intolerance, which is performed on the Internet and important social networks. Today, when social networks are becoming the most important medium, with its significance exceeding all other means, it is important to watch their impact. Because the content publicised on these media is not objectively effectively controllable, it is difficult to combat with content that may be subject to criminal law. The vast majority of negative comments and other content on social networks are not criminal, and cannot be considered as "hate speech".[23] We must be able to distinguish those that can lead to a crime. Our goal is to find appropriate tools that would help with identifying content that is dangerous and can lead to committing a crime. These activities are often supported by radical movements and propaganda. In a technological determinism Criminal law can afford viewer and synoptic societies, finalized to social construction of crime.

Terrorism and radicalization have become a growing trend in recent years. Open borders in Europe and the resulting free movement of persons within the Schengen area pose potential threats in the form of uncontrolled flow of illegal migrants, which may include persons with criminal background and experience of fighting in crisis areas. Ongoing fights in conflict zones have an impact on more distant areas, and military intervention of Western countries in crisis regions results in an increased probability of carrying out terrorist attacks on the territory of the foreign powers involved in these conflicts or against their citizens and interests beyond their borders.

Terrorist and violent extremist activities have developed, they are on the rise and represent a serious threat in the European Union. These activities are not only committed by organized groups. While after 2001 the most likely threat was that of mass attacks with high numbers of casualties perpetrated by large foreign terrorist organizations, currently Europe's fears are mainly associated with the return of radicalized citizens of European countries with experience of fighting alongside foreign radical Islamists.

The most immediate threat in the territory of Europe are exactly attacks carried out by individuals or small groups of attackers who agree with the mistaken ideology of global violent jihad and objectives of some of the larger terrorist networks, but they neither belong directly to them, nor are they supported by them. While such an attack is not as sophisticated as coordinated actions of major terrorist networks, the risk of its success is much higher, since this type of attack is almost unpredictable.

In addition, a growing number of Europeans travel abroad where they undergo training and fighting in a combat zone, becoming even more radical, and after their return they may pose a threat to the security of Europe. For fighters active mainly in Syria, Europe is becoming a logistical base, ground for recruitment of new members of radical groups, as well as a provider of finance for fighters during their stay outside of the conflict zone. In addition to the danger inherent in the virtually free movement of such persons within Europe, fears are also caused by the fact that during their stay such fighters came into contact with other radical Islamists and either completed their combat training or became directly involved in the fighting, which gave them the experience and knowledge needed to plan and carry out a terrorist attack. The EU estimates that up to 20% of foreign fighters in Syria could be citizens of Western Europe.

[23] Especially nowadays, it is important to respect free speech as a part of "social discussion".

The use of online tools for the recruitment and dissemination of propaganda is increasing, making it difficult to anticipate or detect acts of violence. In fact, self-radicalization through the Internet presents additional risks not only to European countries, but also to many Muslim countries. Terrorist propaganda is easily accessible on the Internet, and materials are already available also in European languages, increasing their understanding and attractiveness to potential converts and foreign fighters. While in the past, jihadist forums were the main source of information and focal point of dissemination of propaganda, today their importance is declining and social networks are taking a lead, on which one can freely access information about the daily activities of terrorists in a combat zone and which also offer an opportunity to interact with recruiters, as well as the fighters themselves.

However, it is not only the threat connected to terrorism that needs to be studied under the headline of violent radicalization. At the same time, misusing the current migration crisis in Europe, extremism is on the rise in Europe also with regard to internal radicalization of European citizens including those in Eastern and East-Central Europe, that have no experience whatsoever with terrorism or Islamist radicals. In this part of Europe, violent radicalization mostly takes the form of right-wing extremism aimed both against Muslims and foreigners considered as a potential threat, but also against any other minorities (Roma, LGBTI) in the relevant Member States of their operation (hate crime, violent attacks, riots), being thus in their nature anti-democratic, albeit presenting themselves as an alternative to the mainstream opinions and mainstream political movements.

Still, there are possibilities to fight against this development by deeper understanding of the problem, enlightening the true nature and characters of these movements together with their historical parallels, or even through officially intervention by law enforcement agencies – e.g. dissolving the radical political parties and prosecuting crimes perpetrated by members or supporters of such political parties or other related official or unofficial formations. Thereby, from a wider social, sociological, psychological, criminological, and legal point of view, many questions seem open and worth studying – mainly as to the sources of these extremist radicalizations (unemployment, economic problems, failure of education systems), methods and ways of acquiring support by citizens (alternative media platforms, social network recruitment, hoaxes, conspirations), as well as means of prevention and re-education of the perpetrators (de-radicalization).

Based on the above, it is clear that in the current situation it is highly necessary to focus on the prevention and prosecution of extremism and radicalization in European societies.

7. NO CONCLUSIONS (AS USUAL) BUT...

Social media is a relatively new phenomenon, which quite naturally shows interconnection with various aspects of everyday life, unfortunately including also negative features such as criminal activity and terrorism. Social media is a venue for numerous cybercrime activities ranging from phishing and identity theft to extremist hate speech and propaganda, cyber trolling, stalking, grooming, and child pornography, up to the organization of riots and violent acts including acts of terrorism and cyber warfare (information war).

Criminal law is one rational approach to online (off-line) offences and their punishment. As we can see, this is not just a matter of doctrine. It is not just a set of rules. It is underpinned by ethical and political principles designed to ensure both justice

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for the individual and protection of the community in which the individual inhabits (Edwards, 2018).

Even if art. 83(1) TFEU represents minimum rules on the definition of criminal offences and sanctions "new" crimes, in particular, the adoption of minimum criminal law rules can cover all forms of online offences, regardless of the means used. Domestic legislation could support a wide range of methods in analysing criminal law, including statistical studies, gender-based vision, critical race theory, and criminology. Only through legal instruments, we will discuss the collapse of modern criminal justice and the transition to postmodernity.

Online criminal studies could 'rewrite' the general principles of criminal liability regarding justice system as a global discipline in a virtual world.

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COMMENTARIES

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ECtHR: CHOCHOLÁČ v. SLOVAKIA (Application No. 81292/17, 7 July 2022) / Andrej Beleš

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Abstract: *The purpose of this commentary is primarily to analyse the judgment of the ECtHR in case of Chocholáč v. Slovakia on 7 July 2022 and the related ruling of the Constitutional Court of the Slovak Republic of 2017. In these decisions, the courts dealt with the general prohibition on the possession of pornographic materials in the serving of a prison sentence. What is interesting about these decisions are the fundamental substantive differences in terms of the assessment of the legitimacy and proportionality of that prohibition in relation to the right to privacy and the right to information of persons in the serving of a prison sentence. The practical implementation of the ECtHR decision must be seen in the context of the problems of the Slovak prison system.*

Key words: *Serving of a Prison Sentence; Pornography; Right to Privacy; Right to Information; ECtHR; Constitutional Court*

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1. INTRODUCTION AND CONTEXT OF THE SLOVAK PRISON SYSTEM

Some decisions of the *European Court of Human Rights* (ECtHR) from 2022 point out fully the inconsistency of the Slovak legislation in the field of prisons with the standards emphasised by the *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (CPT) and the ECtHR.

The problems with the Slovak prison system stem primarily from the high number of prisoners – convicted persons serving prison sentences and accused persons in custody. Within the countries of the European Union, the Slovak Republic is one of the countries with the highest number of imprisoned persons per capita.[1] In 2021, the ratio was 183 prisoners per 100 000 inhabitants. The reason for this situation is mainly due to the pro-punitive setting of penal policy, which is characterised by generally high incarceration rates (see Turay, 2020, p. 42; Beleš, 2018, pp. 1029-1042), insufficient use of alternative punishments, including house arrest with an electronic monitoring system (Beleš, 2019).

[1] The average number of accused and convicted persons in custodial and penal institutions in 2021 was 10 388, see Generálne riaditeľstvo Zboru väzenskej a justičnej stráže (2022).

Consequently, the high number of imprisoned persons causes problems with prisoners' accommodation capacities, and limited possibilities for pedagogical and psychological work with convicts. Prison overcrowding also increases the demands on maintaining the prison order, protection of life, health and other rights and interests, which leads to the application of intense restrictive and safety measures. Therefore, the current situation of prison system in the Slovak Republic is not satisfactory, neither in the sphere of the application when deciding on convicted persons, namely in the area of imposing non-conditional prison sentences, nor in the legislative sphere, which regulates the conditions of imprisoned persons, decisions on them in the context of the duration and course of their sentences, which are often not in line with the case law of the ECtHR, the recommendations of the CPT and the subsequent decision-making of the constitutional judiciary.

A critical assessment of the Slovak prison system in the context of violations of fundamental rights and freedoms has been made by the ECtHR, in particular in the decisions *Maslák v. Slovakia (no. 2)* of 31 March 2022, complaint no. 38321/17, and *Chocholáč v. Slovakia* of 7 July 2022, complaint no. 81292/17, respectively. The first case (*Maslák*) concerned the subjecting a detainee to a special high-security regime in the light of inadequate legal protection against abuse, whereby the Court found a violation of the right to respect for private and family life according to Art. 8 of the Convention.

The second case (*Chocholáč*) is specific in that it concerns the experience of sexuality as a part of the limited private life of convicted persons in prison and their possible right to possess pornographic materials depicting so-called *classical heterosexual intercourse between a man and a woman*. In this context, two fundamental questions arose, namely:

- whether the possession of pornographic material can fall within the material scope of the fundamental right to private and family life under Article 8 of the Convention,
- whether the prohibition on the possession of pornographic material in the interests of maintaining order and morality in the custodial setting is a proportionate restriction on the right to private and family life.

2. CIRCUMSTANCES OF THE CHOCHOLÁČ CASE AND THE ASSESSMENT OF THE CASE BY THE SLOVAK CONSTITUTIONAL COURT

In 2013, the applicant was serving a life prison sentence in Ilava Prison in a single-occupancy cell within a separate prison section reserved exclusively for life prisoners. Contact visits (conjugal visits) are not allowed in this regime of imprisonment.

The applicant visited a fellow prisoner in his cell, taking with him his personal belongings, including a *Plus 7 dní* magazine in which he had cut-out erotic/pornographic pictures from commonly sold erotic/pornographic magazines, such as *Fontána, Inspirace, OKM, Tabu, České péčko,* and others, pasted. According to the applicant, these pictures depicted adult men and women engaged in heterosexual intercourse. During an inspection of the *Plus 7 dní* magazine in front of the applicants' cell, members of the Prison and Judicial Guard Corps ("the Corps") confiscated the magazine from the applicant, which, according to the Corps, constituted a seizure of evidence.

Subsequently, the applicant was notified of the initiation of disciplinary proceedings for violation of the prohibition on the possession of printed matter and objects that endanger morality under Section 40(i) of Act No. 475/2005 Coll. on the Execution of Prison Sentences (hereinafter referred to as the "Act on the Execution of Prison Sentences"). For the above-mentioned unlawful conduct, the applicant was given

a **disciplinary penalty – a reprimand**. The applicant then lodged a complaint with the Regional Public Prosecutor's Office and subsequently with the Prosecutor General's Office seeking annulment of that decision, but both complaints were dismissed as unfounded. In the decision, the Prosecutor General's Office stated, inter alia, that pornography was one of the attributes endangering morality and the possession of such printed matter was prohibited for the convict, referring to section 40(i) of the Act on the Execution of Prison Sentences.

The applicant then lodged a complaint to the Constitutional Court of the Slovak Republic for violation of his fundamental rights as a last national remedy. This complaint was eventually rejected by the **ruling of the Constitutional Court of the Slovak Republic in case II. ÚS 819/16**.[2] In his complaint, he stated that the pasted images were of an erotic nature and the depiction of sexual intercourse was, in his opinion, wrongly called pornography. He also pointed out in his constitutional complaint that he considered that "*being heterosexually oriented is a right guaranteed by Article 9 of the Convention and, in his opinion, Article 10 of the Convention also guarantees him the right to express it in words, writing or images, for example in the form of a photograph. He also referred to his right to privacy, whether by means of photographs in any medium, the Internet, television, or a magazine*", or referred to his right to privacy, since it was an expression of "*beliefs and sexual orientation in the form of pictures, and thus photographs pasted in a magazine, which also constituted his privacy protected by Article 8 of the Convention.*"[3]

In the context of the interference with fundamental rights and freedoms, the applicant also **questioned the legality and proportionality of such a measure, in particular its reasonability and necessity**: "*In his view, the same materials that can endanger morality in an environment where children are, such as a nursery, cannot be considered to endanger morality in a penal institution, where, according to the applicant, there is the highest concentration of evil per square meter in the whole republic.*"[4] According to the applicant, the threat to morality must be interpreted in accordance with the Slovak Criminal Code (offence under Article 371 of the Criminal Code – the threat to morality), i.e. only products which are pornographic and which show disrespect for human beings, violence, intercourse with an animal can threaten morality. On the contrary, erotic depictions of heterosexual intercourse cannot threaten the morality of a mentally healthy person.

The applicant considered that the prohibition of erotic material was related to the fact that such material would cause the convicted person to desire a woman that he could not satisfy in the standard way, which might lead to aggression and an attempt to escape. According to the applicant, however, the opposite is true: "*isolation in prison causes loneliness, stress and, for some, aggression: 'the only neutral or even positive compensatory means of relieving the pressure described above is 'masturbation', which has beneficial effects - the release of endorphins [...] It is clear, according to the applicant, that the best means of stimulating oneself are just qualified materials with pornographic content of a heterosexual nature and classical sexual themes of 'man and woman'.*" [5] The applicant added that if the possession of ordinary pornography did not constitute a danger to morals for persons at liberty, there was no reason, according to the applicant, to suppose that there could be a danger to morals for mentally competent adults in the serving of a prison sentence.

[2] Slovakia, Constitutional Court of the Slovak Republic, II. ÚS 819/16 (15 March 2017).
[3] *Ibid.*, par. 3.
[4] *Ibid.*, par. 3.2.
[5] *Ibid.*, par. 3.5.

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The applicant's objections were addressed by the Ilava Prison. In the opinion of that establishment, the possession of printed matter with pornographic content by convicted persons while serving a prison sentence is restricted in accordance with the provisions of section 4 of the Act on the Execution of Prison Sentences, according to which a convicted person is obliged during the serving of a sentence to submit to restrictions on those fundamental rights and freedoms the exercise of which would be contrary to the purpose of the serving of the sentence or which cannot be applied with regard to the serving of the sentence. The Institute added: "*In the conditions of a prison establishment, which is [...] a multicultural environment and in which privacy cannot be guaranteed, allowing the possession of printed matter with pornographic content, in view of [...] the heterogeneous composition of the convicted persons, would not only lead to a threat to morality but also to a disturbance of interpersonal relations and of the order in the institution.*"[6] Moreover, if the possession of pornography were generally allowed in serving of prison sentences, it would not be possible to exclude its transmission also among juvenile convicts.

According to the applicant, the Constitutional Court of the Slovak Republic should have assessed the constitutional complaint from the point of view of the prohibition of torture and inhuman treatment under Article 3, the right to respect for private and family life under Article 8, the right to freedom of thought under Article 9 and the right to freedom of expression under Article 10 of the Convention. The Court began its observations by essentially praising the applicant for his constitutional complaint, which "*contributes to the constitutionally relevant debate concerning the extent of restrictions on the human rights and freedoms of persons in serving of prison sentence, all the more so when it comes to the unusual, taboo, even slightly controversial subject of pornography and its availability to persons in serving of prison sentence.*"[7]

The court made a material assessment of the case from the point of view of the right to privacy (Article 16(1) of the Constitution of the Slovak Republic, Article 8(1) of the Convention) and the right to information (Article 26(1) of the Constitution of the Slovak Republic, Article 10(1) of the Convention). **Pornography** [an aesthetically mastered and culturally valuable literary, artistic or scientific audio-visual work (e.g. a film work), photographic work, verbal work (...) or architectural work which depicts human beings having natural intercourse with adults, or other sexual intercourse or other similar sexual intercourse between adults, or depicts the naked body of an adult, including the sexual organs] **and its production, distribution, making available or possession are subsumed within the right to information under Article 10 of the Convention in terms of its material scope**. The material scope of the right to privacy under **Article 8** of the Convention arises, according to the Constitutional Court, where these works are **primarily connected to the intimacy of these particular subjects** (owner, exhibitor, addressee). A pornographic work is connected with the intimacy of those persons if it depicts them or depicts the intimate situation of a person close to them.[8] Thus, the Constitutional Court defined the relationship between pornography and private life on the basis of what the pornography depicts and not on the basis of the pornography's meaning to the possessor. The Constitutional Court thereby **interpreted the concept of private life[9] in a relatively restrictive manner**. Child pornography, pornography depicting disrespect or violence, pornography depicting sexual intercourse with an animal, or pornography depicting

[6] *Ibid.*, par. 5.1.
[7] *Ibid.*, par. 10.
[8] *Ibid.*, par. 12.3; see as well par. 12.11 of this ruling.
[9] Art. 16 of the Constitution of the Slovak Republic is a general provision on the "inviolability of privacy" and Article 19 specifically protects "private life" (Svák, 2021a, pp. 235-244).

sexually pathological practices (which did not relate to the case under examination) are completely outside the protection of the right to privacy or right to information.

The Constitutional Court drew attention to the constitutional as well as the Convention's licence to restrict the right to information and the right to privacy. According to the Court, the legality of the restriction of rights is fulfilled. The legitimacy of the restriction of rights is fulfilled by the legitimate aim of preventing a threat to morality in the area of serving of the prison sentence and at the same time preventing a threat to security and fulfilling the aim of the serving of the sentence.

A pornographic literary, art, or scientific work (to which the protection of Articles 10 and 8 of the Convention applies) is capable of endangering morality with respect to particular addressees. The Court found that the prohibition of the possession of printed matter and items endangering morals and the subsequent imposition of a disciplinary penalty interfered with the convicted person's right to information under Article 10 of the Convention (but not with his right to privacy, as the printed matter did not directly concern him). However, that **interference is justified on the ground that pornography is in all circumstances capable of undermining the morale and security of a penal institution**: "*Pornography, in general, may serve, on the one hand, as a stimulant for the convicted person in custody to engage in autoeroticism, but, in combination with the specific features of the penal institution environment and the natural instincts of human beings described above, it may incite sexual or violent offences committed, for example, against fellow prisoners.*"[10]

The Constitutional Court added that it was not called upon to resolve the question of whether access to pornography in prison serves as a stimulant to autoeroticism or, on the contrary, is the cause of the commission of offences and the overall decline in morality. Therefore, the court chose to give credence to the **"rational lawmakers"** that relied on expert knowledge in determining the prohibition on the possession of pornography while serving prison sentence. Moreover, the court did not presume to instruct the institutions supervising the serving of prison sentence to interpret the blanket ban on pornography in custody in terms of balancing the interests in a particular case.

Critically, the Constitutional Court thus **avoided the standard test of proportionality** of the interference with fundamental rights, in which it would have examined the appropriateness, necessity, and proportionality of the measure in question. The Court **preferred to "trust" that the legislator had "good reasons" for enacting the legislation**, and also found that differentiated access to pornography by prisoners was practically impossible.

3. THE ECtHR'S ASSESSMENT OF THE CASE

First of all, the ECtHR recalled that even a convicted person serving a prison sentence does not lose his or her rights. Tolerance and generosity are the hallmarks of a democratic society, and a prisoner must not be automatically deprived of his rights simply because public opinion demands it (or because public opinion considers pornography immoral). The Court considered the present case from the perspective of the **right to privacy, since sexual life falls within the personal sphere of the individual and thus within the material scope of Article 8** of the Convention. The seizure of pornographic material from the applicant and the disciplinary sanction he received for its possession accordingly constituted an interference with that right. [11]

[10] Slovakia, Constitutional Court of the Slovak Republic, II. ÚS 819/16 (15 March 2017), par. 12.14.
[11] ECtHR, Chocholáč v. Slovakia, app. no. 81292/17, 7 July 2022, par. 56.

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I am of the view that the material scope of Article 8 of the Convention in relation to the possession of pornographic material **should have been examined in more detail** and the court should have given further reasons as to why the principle of the right to privacy came into play and **specifically in what way the sex life was restricted** (the convicted person was not prohibited from masturbating, only the possession of pornography was prohibited). This is because the right to privacy cannot be seen as a "*residual right*"[12] which applies when other provisions of the Convention are not applicable in terms of substantive scope. Indeed, in terms of the inclusion of the protection of gender identity and sexual life, the Court has so far ruled mainly on the status and rights of transsexual and homosexual (or non-binary) persons or on the sanctioning of certain sexual practices (Kratochvíl, 2012). On the other hand, it should be added that the content of the right to privacy is subject to evolution, the individual concepts corresponding to the sub-rights to privacy are interpreted extensively and new rights are created (Svák, 2021b, p. 163). Nor did the Court in the *Chocholáč* case examine, in addition to Article 8 of the Convention, the possible alternative or cumulative application of Article 10 of the Convention.

In examining the legitimacy of the interference with the right to privacy, the court noted that the purpose of section 40(i) of the Act on the Execution of Prison Sentences is to protect public morals. At the same time, the Court noted that the Slovak Constitutional Court had been wrong to conclude that the aim was also to protect order and security as well as the rights and freedoms of others: such conclusions of the Constitutional Court were "*purely abstract and without any link to the facts of this case at all*". There was nothing in the facts to suggest the involvement of third parties and the applicant was disciplined only for possessing pornographic material for his own purposes. Therefore, it is also questionable whether the protection of public morals as a general public interest objective to restrict the right to privacy has been met at all.[13] Nevertheless, the Court went on to examine proportionality, i.e. whether the measure in question was necessary in a democratic society.

At the beginning of its consideration of the measure at issue, the Court noted that the prohibition against the possession of pornography was absolute and that the prison educator (contrary to the government's contention) did not have discretion to decide that a disciplinary offence had not been committed when considering the disciplinary offence. The court also reiterated that the deprivation from direct intimate contact was long-standing in the applicant and the pornographic material found on his person was not generally prohibited but was freely available for sale to adults.

With regard to proportionality in relation to public morality, the Court recalled that there was no uniform view in the Contracting Parties to the Convention on the content of this concept, or on what values should be protected under the concept of morality. Therefore, States have a wide margin of appreciation in this area. The margin of appreciation means self-limitation of the court, which leads to respect for the State's appreciation within the granted range of discretion, especially in matters of application of the Convention to the particular facts of the case (Kopa, 2014, pp. 29-32).

However, the limitation of a fundamental right within the State's discretion **must not be based solely on the assessment that a certain conduct *per se* (possession of pornography) offends public opinion**.[14] In the light of the purposes of punishment (re-education and ensuring that the convicted person will lead a proper life in the future), the

[12] "*Article 8 may not be understood as 'catch-all provision' [...]*" (Grabenwarter, 2014, p. 184).
[13] ECtHR, Chocholáč v. Slovakia, app. no. 81292/17, 7 July 2022, par. 62.
[14] *Ibid.*, par. 70 and 71.

Court recognises that national law may prohibit the possession of certain material. However, sanctioning the applicant for possession of pornography was not based on an assessment of his particular case in terms of whether the fulfilment of the purposes of the sentence was being undermined. Finally, the Constitutional Court also confirmed that the prison administration is not practically able to deal with individual cases in a differentiated manner. The Constitutional Court **referred to the notion of rational lawmakers, but it has not been shown that the legislation in question is based on expert knowledge,** which would demonstrate that the legislation in question is appropriate and necessary to fulfil the stated objective.

On the basis of the foregoing, the Court concludes that **the absence of an assessment of the proportionality** of the restriction of the fundamental right **at both the legislative and the individual level** establishes that the margin of appreciation has been exceeded.[15] Therefore, there has been a violation of the right to privacy under Article 8 of the Convention.

In his dissenting opinion, Judge Wojtyczek stated that the case did not fall within the material scope of the right to privacy under Article 8 of the Convention because the interference with that right must reach a certain level of seriousness, and access to pornography was not sufficiently relevant to an individual's private life. He also stated that a growing tendency to increase the scope of the criminalisation of pornography could be identified in a number of acts of international law and European Union law (soft law). According to the judge, the prohibition of pornography pursues several objectives, in particular the fulfilment of the purpose of punishment, the preservation of order as well as the prevention of gender stereotyping and violence against women. According to the judge, an individualised and non-discriminatory assessment of which convicts can and cannot possess pornography is unenforceable.

Furthermore, judge Derenčinović stated (as dissenting opinion) that access to pornography does not fall within the material scope of Article 8 of the Convention because it does not reach a sufficient level of seriousness. In assessing that degree, the court should have taken into account two criteria: the purpose of the use of the confiscated pornographic material, and the consequences of the confiscation for the applicant.

4. CONCLUSION

The Constitutional Court of the Slovak Republic primarily assessed the prohibition of access to pornography by convicted persons from the point of view of interference with the right to information under Article 10 of the Convention, stating that interference with the right to privacy under Article 8 of the Convention could only occur if the pornographic materials directly concerned the person whose privacy was at stake. The Constitutional Court thus proceeded to an **overly restrictive interpretation of the protection of privacy** under Article 8. The Constitutional Court's conclusions regarding the absence of interference with the right to information can be regarded as alibi-like, since the Constitutional Court relied only on the fact that "rational lawmakers" must have had good reasons for a general prohibition of convicts' access to pornography, without examining those reasons in detail.

This approach was critically assessed by the ECtHR when it pointed out that the proportionality of the general prohibition of convicts' access to pornography had not been assessed at the general legislative level, and the legislation did not allow for an

[15] *Ibid.,* par. 77.

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assessment of proportionality even at the individual level. However, the ECtHR examined the measures in question solely from the perspective of the right to privacy, **giving a very brief justification of the substantive scope of Article 8** of the Convention, and **did not address the possible interference with the right to information under Article 10** of the Convention. I also preferred to assess it in the light of Article 10 of the Convention in my earlier paper (Beleš, 2017).

Beyond that, it should be noted that, just as a general domestic legislative prohibition in relation to prisoners requires more detailed justification, an assessment by the ECtHR would also require a **more detailed examination of the necessity of the measure in question** (in terms of whether there are indeed less restrictive measures that are reasonable and appropriate), or a broader assessment also in terms of the protection not only of the right to privacy, the right to information, but also the **protection of human dignity**. The possibilities of application of the above-mentioned ECtHR decision in the conditions of the Slovak prison system will require a separate penological research.

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ICJ: UKRAINE v. RUSSIAN FEDERATION (Order of 16 March 2022 in the Case Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide) / Lukáš Mareček

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Abstract: *The author of the paper writes about the order of the International Court of Justice indicating provisional measures on a basis of Ukraine's request. The request was to a larger degree granted. In the paper, the author points out that the fact that the order was issued does not resolve the issue of jurisdiction, which remains to be decided and could be crucial for Ukraine to maintain in its argumentation as the link between the case and the Genocide Convention (1948) seems to be rather weak. Secondly, the author thinks about the consequences of the "not to aggravate the situation" measure which was imposed also on Ukraine.*

Key words: *Provisional Measures; Jurisdiction; Ukraine; Russian Federation; International Court of Justice*

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1. INTRODUCTION

International armed conflict between the Russian Federation and Ukraine, which started in the year 2014 resulted in the military occupation of the Crimean Peninsula and in the rise of separatist movements in eastern regions of Ukraine. This armed conflict even further escalated on 24 February 2022 when the Russian armed forces invaded further into Ukrainian state territory.

One of the motives why the Russian government decided to undertake full-scale aggression against Ukraine was the claim that the Russian minority in Ukraine is a victim of the anti-Russian genocide perpetrated by Ukrainian authorities.[1] Thus, the Russian

[1] „As I [that is Vladimir Putin] said in my previous address, one cannot look at what is happening there without compassion. It is simply not possible to stand all this anymore. It is necessary to immediately stop this nightmare – the genocide against the millions of people living there, who rely only on Russia, only on us. These aspirations, feelings, pain of people are the main motivation for us to take the decision to recognise the people's republics of Donbas… Its [that is special military operation] goal is to protect people who have been subjected to abuse and genocide by the regime in Kyiv for eight years. And for this we will pursue the demilitarisation and denazification of Ukraine, as well as bringing to justice those who committed numerous bloody crimes against civilians, including citizens of the Russian Federation." (e.g., Al Jazeera Staff, 2022; Gotev, 2022).

Federation has a responsibility to protect members of the Russian nation from genocide in Ukraine and in doing so it can use also armed force.

Three days later, on 27 February 2022, Ukraine in response filed an application instituting proceedings against Russian Federation and simultaneously requested the indication of provisional measures.

In this submission, Ukraine requested the International Court of Justice (henceforth only "the Court") to indicate the provisional measures aimed to suspend the military operation undertaken by Russian armed forces; to ensure that other military or irregular armed forces will also take no further steps in military operations; to refrain from any actions that may aggravate the dispute and provide assurances for this reason and finally to provide reports to the Court on measures taken to implement the Court's order on a regular basis.

The Court issued its order on 16 March 2022, which is itself a demonstration that the Court is able to issue an order on provisional measures in a quite short time if the situation is urgent, as the average time for issuance of such an order was around 60 days according to current ten cases moving average.

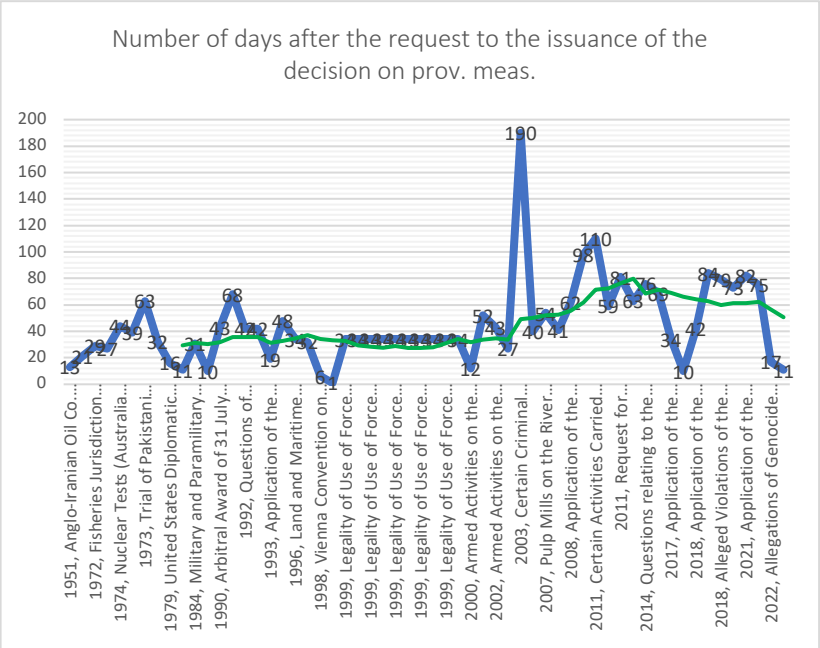

Chart no. 1: blue (thick): number of days by each case, green (thin): moving average of ten cases. Source: Author (Mareček, 2022).

2. LACK OF JURISDICTION?

In its order, the Court partially granted the request. The Court is not limited by the *petitum* of the request and may issue provisional measures differently from those

requested or even indicate provisional measures that were not requested as it follows from its power to indicate provisional measures also *proprio motu*, although the Court never used its power to indicate measures without any prior request.

The Court granted the request of Ukraine in the first point, though slightly modified.[2] It indicated the duty of the Russian Federation to immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine, as well as in the second point which is to ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations.[3]

The first point of the operational part of the order is theoretically the clearest as it directs to the action of Russian armed forces that commenced on 24 February 2022. This point does not address the situation in Crimea, where the armed forces of the Russian Federation were present and thus operating even before the above-mentioned date. The second point[4] could be interpreted as including actions in armed conflict of separatists or private military contractors/mercenaries, also only after the date 24 February 2022.

Against these provisional measures were Russian judge Gevorgian and Chinese judge Xue.

The reasons for voting against were based on a lack of jurisdiction of the Court. Judge Gevorgian argued[5] that the jurisdiction of the Court must be based on the consent of parties as it follows from the consensual character of the international judiciary.

The consensual character of the international judiciary follows from the principle of sovereign equality of states where one state cannot force another state to accept the jurisdiction of a selected court. Consent to the jurisdiction of the International Court of Justice could be given in three ways:

a) Consent given by a declaration per art. 36 of the Court's Statute (optional clause), which Russia never gave.

b) Consent given by a special agreement made by parties concerning an existing dispute, which was not concluded.

c) Consent given by a judicial clause in an international treaty – this is claimed by Ukraine to be the basis for jurisdiction, as the Genocide Convention (1948) contains such a provision in article nine.

That is why Ukraine filled an application against Russian Federation not on a basis of aggression, which would be *prima facie* out of the scope of the Court's jurisdiction, but on a basis of genocide, as Russia is a party to the Genocide Convention (1948), being a successor to the Soviet Union, which did not make a reservation to this

[2] The Court excluded second half of the request which worded „The Russian Federation shall immediately suspend the military operations commenced on 24 February 2022 that have as their stated purpose and objective the prevention and punishment of a claimed genocide in the Luhansk and Donetsk oblasts of Ukraine" and imposed only "The Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine." Request for Indication of Provisional Measures Submitted by Ukraine, § 20 (a). Available at: https://www.icj-cij.org/public/files/case-related/182/182-20220227-WRI-01-00-EN.pdf (accessed on 30.09.2022); Order of 16 March 2022 in the case Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), § 86 (1).

[3] Order of 16 March 2022 in the case Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), § 86.

[4] Similarly, as first point, the second point was also granted in a modified way.

[5] Declaration of Vice-President Gevorgian, § 1, 7. Available at: https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-01-EN.pdf (accessed on 30.09.2022).

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provision. Basically, Ukraine's claim is that the allegation of genocide does not justify the use of armed force.

Judge Gevorgian however argues, that "it is evident that the dispute that Ukraine seeks to bring before the Court, in reality, relates to the use of force by the Russian Federation on Ukrainian territory."[6]

This is confirmed also by the Court's case-law:[7] "The threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention."[8]

And thus, according to judge Gevorgian, the Court, in this case, lacks *prima facie* the jurisdiction *ratione materiae* and in such a case the Court cannot indicate provisional measures. A Court may issue provisional measures only in cases where there is at least a possibility, that the jurisdiction of the Court is given.

However, what distinguishes this case from the previous (Yugoslavia's applications in 1999) is that in this case, Ukraine does not claim that the Russian invasion is an act of genocide, but that the aggression cannot be justified by an allegation of genocide.

The indication of provisional measures in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the application or the merits themselves,[9] therefore the case could be declared inadmissible at a later stage.

We may agree with the arguments of judge Gevorgian as the case is indeed rather connected to the rules of *ius ad bellum* than with rule prohibiting the genocide. It is possible that the motive for aggression were claims of genocide, but there is a violation of a *ius ad bellum*, not a commission of genocide by the Russian side. In other words, the subject-matter of the dispute must relate to the interpretation, application or fulfilment of the disputed international treaty. In this case it is quite evident that the case is about the interpretation, application or fulfilment of *ius ad bellum* rules and principles – namely about the principle on the prohibition on the use of force against the territorial integrity or political independence of another state in any manner inconsistent with the purposes of the United Nations, as enshrined in article 2 of the United Nations Charter. Not about the interpretation, application or fulfilment of Genocide Convention (1948), which deals with genocide as a crime under international law, thus dealing with the criminal responsibility of an individual and with the duty of the state to prevent it and to punish perpetrators. The dispute is not about the prevention of genocide or about the responsibility of individuals, but the question is if a state can use force against another state on the basis of the commission of genocide. Therefore, the question relates to a different set of rules and principles. Shortly - genocide here is not the core issue, it is rather a question if genocide justifies the use of force, and use of force is the core issue here.

Ukraine claims that the Genocide Convention (1948) embodies a right "not to be subjected to another State's military operations on its territory based on a brazen abuse of Article I of the Genocide Convention"[10] which does not seem like a strong argument,

[6] Declaration of Vice-President Gevorgian, § 5. Available at: https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-01-EN.pdf (accessed on 30.09.2022).
[7] Term used not in the precedential meaning.
[8] Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, § 40-41, p. 138.
[9] Order of 16 March 2022 in the case Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), § 85.
[10] Ukraine's Request for the indication of provisional measures, § 12. Available at: https://www.icj-cij.org/public/files/case-related/182/182-20220227-WRI-01-00-EN.pdf (accessed on 30.09.2022).

as the purpose of the Genocide Convention (1948) indeed is not to protect the states from aggression, but to protect individuals (the humankind to be concrete according to the preamble) from genocide. The consent given by the Soviet Union, and thus by Russia, was therefore given in relation to the prevention and suppression of genocide, not concerning the prevention and suppression of aggression where thus the Court lack jurisdiction.

Similarly, judge Xue stated that "Ukraine's contention that the Russian Federation's allegation of genocide against Ukraine is just "an excuse for Russia's unlawful aggression" raises doubt that this is a genuine case about genocide… the issues they have raised are concerned with the questions of recognition [that is of separatist entities as states] and use of force in international law. They do not appear to be capable of falling within the scope of the Genocide Convention."[11]

Aside from the political declarations of Vladimir Putin, which itself could be binding on the state,[12] Russia in a document delivered to the Court on 7 March 2022[13] argued that the justification for the "military operation" is self-defence. Article 51 of the United Nations' Charter (1945) allows the use of force in (individual or collective) self-defence *vis-à-vis* attacking state only when an armed attack *occurs*. It is evident, that in February 2022 armed attack against Russia by Ukraine was not occurring. What is discussed in field of self-defence is the right to pre-emptive self-defence when the armed attack is not occurring, but is *imminent*. In short, we can say that the doctrine does not see universal recognition of this broader right to *pre-emptive* self-defence,[14] nevertheless, the situation in February would fall neither under the condition of imminent attack. The situation was quite the opposite as the Russian armed forces were gathering around the frontiers of Ukraine and the USA spoke publicly that they have intelligence that they are planning to attack. In spite of how weak this Russian argument for self-defence is, it is true that self-defence does not fall under the scope of the Genocide Convention (1948).

Therefore, even if the Court did not see *prima facie* lack of jurisdiction in the case, the judges may eventually come to this opinion at a later stage of the proceedings.

Even at this stage, Judge Bennouna, who voted for the provisional measures, described the link between unlawful use of force and the Genocide Convention (1948) as "artificial," and that "the Convention does not cover, in any of its provisions, either allegations of genocide or the use of force allegedly based on such allegations."[15] Therefore it is possible that at a later stage he will change its voting.

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[11] Declaration of Judge Xue. Available at: https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-03-EN.pdf (accessed on 30.09.2022).

[12] Nuclear Tests (Australia v. France), Judgement, I.C.J. Reports 1974, § 49, p. 253.

[13] Document (with annexes) from the Russian Federation setting out its position regarding the alleged "lack of jurisdiction" of the Court in the case, available at: https://www.icj-cij.org/public/files/case-related/182/182-20220307-OTH-01-00-EN.pdf (accessed on 30.09.2022).

[14] E.g., „The conclusion is thus clear: 'armed attack' in the sense of Article 51 is an actual armed attack, which happens ('occurs'), not one which is only threatened.... Many authors acknowledge that a threat may be so direct and overwhelming that it is just not feasible to require the victim to wait to act in self-defence until the attack has actually started... A formula expressing this idea and its limits, which is not uncontroversial s in the Caroline case in 1841: There must be 'a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation'... It is thus at least defensible that the principle of necessity and immediacy, as expressed in the Caroline formula, be considered as part of customary international law, even under the United Nations Charter... this is as far as pre-emptive self-defence possibly goes under current international law." (Bothe, 2003, pp. 229, 231). Or „the language of Article 51, whether wise or not, was not designed to accommodate the Caroline principle." (Reisman and Armstrong, 2006, p. 532).

[15] Declaration of Judge Bennouna, § 5, 11. Available at: https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-02-EN.pdf (accessed on 30.09.2022).

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On the other hand, judge Robinson developed an argument in favour of *prima facie* jurisdiction on eight pages of his separate opinion. He distinguishes two elements of the dispute. The first element is whether, based on Russia's allegations, Ukraine has breached its obligations under the Genocide Convention (1948). In its second element, Ukraine sees the dispute as the question of whether Russia has the right under the Genocide Convention (1948) to engage in the military action initiated against Ukraine. Concerning the second one, the judge Robinson said that the Court has jurisdiction *ratione materiae*, but he emphasised that his opinion was made in the "view of the relatively low evidentiary threshold applicable at this stage of the proceedings."[16] Hence it is also possible that in later stages of the proceedings, where a higher evidentiary threshold is applicable, he will change his mind about the Court's jurisdiction.

The case is not fully lost, but the harder task stays before Ukraine. Ukraine will have to argue why there is a link between the military operations of the Russian armed forces and the Genocide Convention (1948). Probably we will see an argumentation that the responsibility to protect doctrine does not follow from current international law or argumentation that such doctrine, if not to be rejected in this case, at least does not follow from the Genocide Convention (1948).[17]

Article 1 of the Genocide Convention (1948) confirms, that the contracting parties have obligation to undertake steps to prevent the crime of genocide. Responsibility to protect doctrine, in its second pillar (responsibility to react) speaks about the right of another state to use armed force to protect victims of genocide[18] in another state – in older terminology about so-called humanitarian intervention.[19] The discussion on this doctrine is still ongoing. However, "military intervention for human protection purposes is only considered when the Security Council gives its authorization… From a legal point of view… nothing has changed, because military intervention for human protection purposes without the authorization of the Security Council is still illegal." (Molier, 2006, p. 52; see also Pattison, 2010, pp. 43-51). In other words, the international community concluded that states have the responsibility to protect human rights in other states, but it has to be done within the limits set by the United Nations Charter (1945) – humanitarian intervention has to be on a basis of the collective security. This is already broader concept than the one anticipated by the drafters of the United Nations Charter (1945) that gave the power to authorise the use of force to the UN Security Council only in cases when the international peace and security (not human rights *per se*) requires such an action. The Court already previously said, that all states have a responsibility to prevent genocide, thus taking appropriate measures even against other states,[20] but also that "the use of

[16] Separate Opinion of the Judge Robinson, § 30. Available at: https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-04-EN.pdf (accessed on 30.09.2022).

[17] „...it seems clear that there are two facets of the dispute between the two States. The first is factual: do acts perpetrated by Ukraine amount to the crime of genocide, as Russia seems to have alleged? Ukraine contends that the charges are frivolous. The second is legal: does the Genocide Convention authorise Russia to use force in order to prevent genocide outside its territory?" (Schabas, 2022).

[18] For explanation of the crime of genocide and protected groups see e.g., Ozoráková (2022).

[19] There are three pillars of responsibility to protect – responsibility to prevent, responsibility to react and responsibility to rebuild. The responsibility to react arises "If preventive measures fail to resolve the situation and the State is unable or unwilling to deal with the situation, the measures of intervention by other states of the international community may be necessary. These coercive measures may include political, economic and legal measures, and just in exceptional cases they may also include military actions." (Trnovszká, 2016, p. 45).

[20] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, § 443, p. 43.

force could not be the appropriate method."[21] Maybe we will have further points of reference on this question in the judgment delivered in this case. At this point, however, the unauthorised use of force is impermissible.

3. OBLIGATION NOT TO AGGRAVATE

The Court did not grant Ukraine's fourth request to provide a report on a regular basis by Russian Federation to the Court on the measures taken to implement the order. It is unclear why the Court decided not to indicate such a measure, as it is seen as one of the possible methods how to rise the compliance rate of its decisions, (Lando, 2015, pp. 27-33) even though in the current highly escalated dispute we may presume, that no real measures would be there to report by the Russian side. The reasons are two – firstly the political reasons to continue in military operation are simply too high and the reporting obligation in this situation would be futile; and secondly, Russia boycott the preceding as it maintains that the Court lack *prima facie* jurisdiction and thus it does not have any power to indicate a such a provisional measure. The Court remained in constatation that "in the circumstances of the present case, however, the Court declines to indicate this measure."[22]

And finally, the Court partially granted third Ukraine's request to impose an obligation to refrain from any action and to provide assurances that no action is taken that may aggravate or extend the dispute or render this dispute more difficult to resolve.[23]

The Court granted it in the sense that the requested measure was indicated, but it was not indicated only towards Russian Federation, as was requested, but went *ultra petitum* and indicted it also towards Ukraine, which makes this provisional measure controversial.

It is unclear what actions of Ukraine would be aggravating the situation. Could alleged, not confirmed, action of Ukraine's armed forces inside of Russian territory (e.g., Al Jazeera and News Agencies, 2022), for the sake of the argument, be understood as being against this provisional measure? We should keep in mind that some military actions during self-defence might be directed also outside of defending state if that is necessary and proportional. Or could the relatively successful counteroffensive that liberates territories that were not under the effective control of Ukraine before 24 February be aggravating the situation? Perhaps the political and diplomatic efforts towards other states to impose further sanction measures or retorsions against the aggressor are contrary to the Court's order?

An argument against this provisional measure was, understandably, provided namely in the declaration of judge Daudes nominated *ad hoc* by Ukraine.[24]

The third provisional measure was indicated unanimously, thus including the votes of judges Gevorgian and Xue. Even though the Russian and Chinese judges respectively voted against the suspension of Russian military operations on Ukraine's territory, it is hard to see how continuing military operations would not aggravate the situation. Thus, in this sense even these two judges ordered the suspension of military

[21] § 268, see also Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, § 430, p. 14.
[22] Order of 16 March 2022 in the case Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), § 83.
[23] Ukraine's Request for the indication of provisional measures, § 20 (c). Available at: https://www.icj-cij.org/public/files/case-related/182/182-20220227-WRI-01-00-EN.pdf (accessed on 30.09.2022).
[24] Declaration of Judge *Ad Hoc* Daudet. Available at: https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-06-EN.pdf (accessed on 30.09.2022).

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operations, even though not explicitly by voting for the first point, but by implication from the third point of the Order's operative part.

4. CONCLUSION

The International Court of Justice partially granted the request of Ukraine to indicate provisional measures in a surprisingly short time. This itself shows that the Court can be flexible if the situation needs it.

However, the dispute is far from being resolved. Even if the Court found that it does not lack *prima facie* jurisdiction Ukraine will have to develop an argument connecting the case with the Genocide Convention (1948).

The weak point is in fact that the case is somehow connected to Genocide Convention (1948) because of allegations of genocide, but it is hard to identify which particular provisions of this convention were, in fact, violated by Russia. The dispute is rather about the prohibition on the use of force against the territorial integrity or political independence of another state than about the interpretation, application and fulfilment of the Genocide Convention (1948).

The order indicating provisional measures might seem to be controversial also in the fact that the Court indicated measures not to aggravate the situation also towards Ukraine. It seems to be unclear if some of the actions taken in the exercise of the inherent right to self-defence might constitute an act aggravating the situation.

This obligation was adopted unanimously. Thus, even the judges that did not vote for the obligation on suspension of military activities of Russian armed forces in Ukraine, by consequence voted for such an obligation by reasons of the third point of the operational part of the Court's order as it is hard to see how ongoing military operations are not aggravating the situation.

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REPORTS

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REPORT FROM THE COMMERCIAL LAW AND ECONOMIC LAW SECTION ON THE INTERNATIONAL SCIENTIFIC CONFERENCE BRATISLAVA LEGAL FORUM 2022 (BRATISLAVA, 12 – 13 SEPTEMBER 2022)/

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International scientific conference Bratislava Legal Forum took place from 12-13 September 2022 at the Faculty of Law of the Comenius University in Bratislava with the main theme on *"Rule of Law and Academia in the Turbulences of 100 years"*. This year's conference was more significant because it was part of the celebrations of the 100th anniversary of the founding of the Faculty of Law of Comenius University in Bratislava.

The conference had sixteen sections focusing on different topics connected to the main theme. Section of the Commercial law and Economic law was dedicated to the topic: *"Recodification of company law - sources of inspiration and expected solutions to the challenges of the third millennium"*. Twenty-one international and national speakers participated in this section with various challenging presentations. Section was moderated by Professor Mária Patakyová and Associate Professor Jana Duračinská, as the section was supported by the project VEGA 1/0349/22 "*Restructuring as a preventive tool for dealing with the threat of bankruptcy*".

The topic of the section's discussion was inspired by the ongoing recodification of company law in the Slovak Republic. The focal points of the debate were inspirations on which the proposed legislation is based. International speakers brought key elements to the section as they reported on the experiences with the company law reforms and other contemporary challenges in their home jurisdictions.

The Commercial law and Economic law section was opened by Professor Patakyová from the Faculty of Law of the Comenius University in Bratislava, who is a member of the advisory board of the recodification of company law in the Slovak Republic, with a topic: *"Slovak company law over time"*. This contribution was important for contextual and historical understanding of the Slovak company law in connection with the ongoing process of recodification.

Following, Professor Hans De Wulf from the Faculty of Law of the Ghent University in Belgium presented to the audience the Belgian experience with the recodification of company law. The key elements of the Belgian reform of the company law were elimination of "gold plating", increase in flexibility of the company law and creation of open company law. Professor Iris Barsan from the Université Paris-Est Créteil (UPEC) in France focused in her presentation on recent tendencies in development of the French corporate law with emphasis on the introduction of CSR-related topics into French corporate legislation. Professor Barsan highlighted the challenges and anticipated impacts on member states' company laws by the Proposal of a Directive on Corporate Sustainability Due Diligence as well. Professor Krzysztof Oplustil from the Jagiellonian University Cracow in Poland presented recent developments in Polish company law with focus on the regulation of corporate groups, as this issue is still a very controversial legal transplant from German and French law. Professor Tibor Tajti from the Central European University (CEU) in Vienna, Austria rounded the panel with contribution on control and contemporary company law problems. Professor Tajti focused his presentation on the aspects of group of companies, power of the executive directors and inter-generational transfer of SMEs. The first panel was closed by Associate Professor Jana Duračinská from the Faculty of Law of the Comenius University in Bratislava with a presentation on the preventive restructuring and its impact on Slovak company law, as this issue cannot be omitted from the recodification process of company law.

The first panel was followed by contributions of Associate Professor Lucia Žitňanská and Associate Professor Kristián Csach from the Faculty of Law of the University in Trnava, Slovakia. Both of them lead the recodification process of the company law in the Slovak Republic under the Ministry of Justice of the Slovak Republic. Associate Professor Kristián Csach opened the second panel with contribution on the topic: *"Which examples to follow in the recodification of corporate law?"* Following, Associate Professor Lucia Žitňanská elaborated on the conceptual issues of responsibility of members of corporate bodies as a one of the fundamental topics of the recodification process of the company law. Dr. Andrea Moravčíková, Vice-president of the Supreme Court of the Slovak Republic, tackled the proposed changes of the procedural law in connection the company law recodification. In this panel, Associate Professor

Kateřina Eichlerová from the Faculty of Law of the Charles University in Prague, commented on the concepts of representation in companies proposed in the Slovak recodification process. The experience from the Czech Republic is of a specific value as they have experience from more than five years of application of the new regulation in private law relations.

Following these two panels, the Commercial law and Economic law section continued with various presentations on company law topics pointing out challenges that shall be addressed in the recodification process by speakers from the Faculty of Law of the Comenius University in Bratislava and other universities as well.

To sum up, the Commercial law and Economic law section on the conference Bratislava Legal Forum 2022 with focus on the company law recodification process in the Slovak Republic brought vivid discussions fuelled by valuable experiences from foreign colleagues and highlighted challenges by national speakers. These discussions may serve as sources of inspiration for new regulation as the recodification process must necessarily confront the challenges of contemporary corporate law.

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THE EFFICIENCY OF PRE-TRIAL PROCEEDINGS – CURRENT STATE AND PRO FUTURO CHALLENGES (BRATISLAVA, 12 – 13 SEPTEMBER 2022) / Patrícia Krásná, Stanislav Mihálik

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On September 12 and 13, 2022, the international scientific conference *"Bratislava Legal Forum 2022"* was held under the auspices of the Alumni Club of the Comenius University in Bratislava, Faculty of Law. The central theme of the plenary session was *"The rule of law and the academy in the storms of 100 years"*. This year's conference was significant because it was also part of the celebration of the 100th anniversary of the founding of the Comenius University in Bratislava, Faculty of Law.

The main goal of the international scientific conference was to create a space for professional and purposeful discussion between experts from application practice on the one hand and academics on the other. Because the exchange of valuable professional information in the context of such events brings effective solutions to numerous detected problems. In accordance with the stated goal, the international scientific conference was

divided into a plenary session and parallel discussions in thematically focused sections, in which speakers and discussants focused their interest on current issues important for individual areas of law.

Discussion in Section no. 13 – Criminal law, Criminology and Criminalistics, in Slovak, Czech and English, was conducted as part of a project supported by the Research and Development Support Agency APVV no. 19-0102 *"The efficiency of pre-trial proceedings – research, evaluation, criteria and influence of legislative changes."* The given section was aptly titled: *"The efficiency of the pre-trial proceedings – current state and challenges for the future."* The guarantors of the subject Section of criminal law, criminology and criminalistics were important internationally recognized experts in the field of criminal law, Dr. h. c. prof. JUDr. Lucia Kurilovská, PhD., rector of the Police Academy in Bratislava and prof. JUDr. Jozef Čentéš, PhD., head of the Department of Criminal Law, Criminology and Criminalistics of the Comenius University Bratislava, Faculty of Law, who is also the head researcher responsible for the mentioned project. The aforementioned supported the importance and justification of this international scientific conference.

In the mentioned section, in the context of discussions during both days, experts from academic circles, but also from practice, spoke. A total of 32 contributions were made in the relevant section, making the said section of the international scientific conference one of the largest in terms of the number of participants. Stimulating contributions of individual speakers from domestic and foreign institutions stirred up a rational discussion and thus supported the purposeful development of the efficiency of the pre-trial proceedings of its examination, evaluation, criteria and also the impact of legislative changes. The presented information contributed to the development of scientific knowledge, but also to the application experience, the formulation of effective conclusions and practical recommendations for purposeful scientific activity, but also for specific actions in application practice for the future.

In the subject section spoke as the first member of the research team of the APVV 19-0102 project, prof. JUDr. Jozef Čentéš, PhD. (responsible project researcher) in co-authorship with doc. JUDr. Ján Šanta, PhD., LL.M., MBA, they addressed the topic "*Effectiveness of pre-trial proceedings in matters relating to the person of the coaccused,"* project researchers Dr. h. c. prof. JUDr. Lucia Kurilovská, PhD. and kpt. JUDr. Patrícia Krásná, PhD., LL.M. followed up on the mentioned pair with their contribution in co-authorship on the topic *"Legitimacy of the adversarial principle in preparatory proceedings."* In the next part of the conference presented their contribution doc. JUDr. Radovan Blažek, PhD. (topic of the contribution "The impact of the case law of the European Court of Human Rights on the effectiveness of pre-trial proceedings in the Slovak Republic") and JUDr. Stanislav Mihálik, PhD. and JUDr. Filip Vincent in co-authorship (topic of the contribution "Evaluation of the efficiency of the pre-trial proceedings with regard to its selected institutes"). In the last part of the first day of the international scientific conference, from the members of the research team also spoke prof. JUDr. Tomáš Strémy, PhD., who addressed the topic as part of the starting points of the project *"Current challenges for the defence (not only) in pre-trial proceedings."*

During the second day of the conference, members of the research team of the project in question were also represented among the speakers, in the morning part of the section of criminal law, criminology and criminology, namely doc. RNDr. Tatiana Hajdúková, PhD. (in co-authorship with JUDr. Samuel Marr, LL.M), who addressed the topic *"The Act on Victims of Crime in the context of the principle "Nemo turpitudinem suam allegans auditor" and its selected shortcomings from a de lege lata perspective"*, likewise doc. Ing. Stanislav Šišulák, PhD. (topic of the contribution *"Criminal consequences of*

unlawful acts of extremism on the Internet"), JUDr. Lukáš Turay, PhD. (topic of the contribution *"(Il)legality and (un)constitutionality of the penalty of forfeiture of property"*) and JUDr. Juraj Drugda, PhD. (topic of the contribution *"Effectiveness of the use of specific means of evidence in the course of pre-trial proceedings"*). In the afternoon part of the section of the second day of the international scientific conference, the members of the research team of the APVV 19-0102 project also spoke – doc. JUDr. Marek Kordík, PhD., LL.M and Mgr. Ing. František Vojtuš, PhD. (in co-authorship) with a contribution on the topic *"Empirical analysis of the impact of selected factors on the shortened investigation"* and JUDr. Jakub Ľorko, PhD. (topic of the contribution *"Parallels of the efficiency of detention and imprisonment in Slovak prison conditions"*).

The facts presented confirmed how important it is to focus on the efficiency of the pre-trial proceedings through research, but also through the direct exchange of well-founded facts related to it. A peer-reviewed collection (in print and also in electronic form) will subsequently be published from the presenting relevant facts that were heard during the course of the Section of Criminal Law, Criminology and Criminalistics.

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INTERDISCIPLINARY ASPECTS OF THE STATUS OF TRANSGENDER PEOPLE IN SOCIETY (BRATISLAVA, 22 SEPTEMBER 2022) / Olexij M. Meteňkanyč, Ľubomír Batka

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On 22 September 2022, the Comenius University Bratislava hosted an international scientific conference entitled "Interdisciplinary Aspects of the Status of Transgender People in Society" that was organised by the research team of the grant project VEGA 1/0350/21, which focuses on the ethical and legal aspects related to the informed consent of transgender minors. The project team, led by Professor Ľubomír Batka, is based at the Faculty of Law of the Comenius University Bratislava. The conference itself was held in the renovated premises of the Infocentre of Comenius University on Štúrova Street in Bratislava, which provided the organisers, participants and members of the public with a pleasant and comfortable venue for this scientific event. The primary aim of the conference was to organise a substantial discussion on the status

of transgender people in society with the potential to identify shortcomings in the current legislation (not only) of the Slovak Republic. For this purpose, a number of experts dealing with the issue from diverse scientific fields (not only law, but also psychiatry, psychology, sociology, philosophy or theology) were invited in order to truly present the complex and interdisciplinary position of transgender people in our society. Due to the larger number of participants, the conference was structured into five thematic blocks, as follows: block No. 1: Human Rights and Ethical Aspects; block No. 2: Experiences from Abroad; block No. 3: Life Experiences; block No. 4: Medical aspects; block No. 5: Miscellaneous.

The conference was opened with a short welcome by Dr. Karin Raková, deputy head of the project VEGA 1/0350/21, who at the same time briefly presented the ongoing project described above at the Faculty of Law of the Comenius University Bratislava. Professor Batka then presented the opening paper focusing on the phenomenon of transgenderism, autonomy and responsibility, emphasizing that the current concept of autonomy in ethical debate combines an element of liberalism (self-determination) as well as elements of the ethics of responsibility. He stressed that emphasizing the ethical principle of autonomy and giving way to paternalism in transgender health care does not mean sacrificing responsibility for health. Autonomy as a capacity constitutes the ethical basis for consent, which is an expression of the will to take responsibility for one's health. He also focused on adolescents, pointing out that in light of the emerging knowledge about adolescents' gender identity, an individualised approach to clinical care appears to be ethical. However, legislation that would allow an adolescent to transition solely on his or her own right of self-determination, regardless of the ICD-11 diagnosis of gender incongruence, cannot be ethically recommended from his perspective. However, he also stressed that it is right that there should be standard diagnostic and therapeutic procedures (SDTPs) for the health care of transgender people in Slovakia as well. Failure to adopt the SDTPs and to apply them in practice violates the principle of beneficence as well as the principle of equity in the provision of health care.

Following the opening presentation, the first thematic block was opened with a focus on the human rights and ethical aspects of the status of transgender people (not only) in Slovakia, moderated by Dr. Olexij M. Meteňkanyč and featuring a total of four presenters. The first speaker was Dr. Zuzana Magurová from the Institute of State and Law of the Slovak Academy of Sciences, on the topic "The human and legal spectrum of trans people's rights", where she touched upon a number of interesting issues, in particular, she presented the global and European/regional system of protection of human rights of trans people, compared it with the current Slovak legal order, as well as addressed the issue of appropriate legal terminology concerning the LGBTI+ community. The second paper in this block was presented by Dr. Lucia Plaváková, lawyer and human rights activist, and during her presentation she primarily focused on various legal aspects of the rights of transgender people in the case law of the European Court of Human Rights (ECtHR) and other courts in Europe (she focused on four legal issues: 1. the right to legal transition, 2. the conditions of transition, 3. parenthood, and 4. discrimination and hate speech) and comprehensively presented the conclusions reached by the ECtHR in its decision-making over time. In particular, she emphasised the conclusion of the ECtHR that the right to gender self-determination, or the freedom to define one's sexual identity, fell within the scope of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Mgr. Michaela Dénešová from the Faculty of Social and Economic Sciences of the Comenius University Bratislava was the third presenter, presenting partial results of her research, which she conducted in cooperation with the *Inakosť* initiative. The central idea that was evident across all the conclusions presented in the contribution was the unsystematic approach of the state towards transgender

people in Slovakia and the fundamental negative impacts that are associated with such an approach in practice. The final contribution in the introductory block was given by Mgr. Zuzana Pavlíčková, from the Slovak National Centre for Human Rights, on the topic "Attempts to restrict legal gender recognition in Slovakia". She focused on the limitations of the legal recognition of gender in the Slovak Republic, in particular on the absence of legal regulation allowing legal gender recognition in relation to personal data and identification documents, on forced sterilization of transgender persons and compulsory divorce of marriages of transgender persons contracted before transition as a condition for the legal gender recognition, and on the definition of gender as an immutable characteristic determined by a person's sex at birth. After the presentation of the opening four papers, a fruitful discussion was opened in which a number of conference participants took part.

The second block focused on selected contributions of foreign guests and their experiences in two countries in particular: Austria and the Czech Republic. For this reason, this session was held in English and moderated by Associate Professor Matej Horvat. The first presentation was given by Associate Professor Igor Grabovac from the Medical University of Vienna, focusing on various (mostly medical) aspects of the health and well-being of transgender people in Austria. The paper reflected on a number of issues, ranging from the appropriate terminology used when referring to the LGBTI+ community, to an analysis of the pathological elements occurring in the trans community, to presenting experiences of discrimination directed towards the LGBTI+ community within the healthcare system in Austria. Dr. Lovro Marković, also working at the Medical University of Vienna, followed him with his contribution, but with a closer focus on selected medical aspects of transgender transition in the case of our south-western neighbours. As part of his presentation, Dr. Marković described in more detail the forms of transition, the best practices in this area recommended by the World Professional Association for Transgender Health (WPATH), as well as addressed in more depth the Austrian context of health care provision for gender reassignment. The final presentation in this session was given by the tandem of co-authors, Dr. Maroš Matiaško and Dr. Sandra Sakolciová, who focused on the rights of transgender people in Slovakia and the Czech Republic and pointed out that increased protection can be achieved through litigation as a tool for enforcing rights, not only in the context of national judicial institutions, but also in the context of European ones. In this regard, the co-authors also presented a number of live cases that they were currently representing and described the desired results that they intend to achieve through the chosen tool of strategic litigation. Similarly, the last speech in the second block was followed by a rich discussion, which was mainly intertwined along two lines: the socio-medical status and transition of transgender people in Austria and the actual effectiveness and benefits of strategic litigation as a procedural tool in the courtrooms.

Following a short lunch, there was a third, special session, in which people with direct life experience of the position of transgender people in our society spoke. Specifically, more detailed information and autopsies were presented by mothers of transgender people, namely Dr. Pavlína Čierna, who addressed the current situation of transgender people in Slovakia and, from her perspective, pointed out the problematic consequences of the current Slovak legislation (also with the help of appropriate accompanying artistic materials); as well as by Mgr. Viera Hincová from the A-Centrum, who focused on the recent situation of transgender people in Slovakia in terms of the intersectionality of transgenderism and other handicaps. The course of this session, as well as the discussion that followed it, was moderated by Dr. Martin Hamřik.

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The fourth panel was moderated by Professor Batka and focused on the medical aspects of the status of transgender people in society. The panel was opened by Dr. Barbora Vašečková from the Psychiatric Clinic of University Hospital Bratislava, who discussed the possibilities and limits of health care for transgender people in the context of Slovak legislation. In her contribution, Dr. Vašečková stressed that health care provided to transgender people in Slovakia has serious limits. The lack of binding medical practices in this area endangers health and, in her view, leads to secondary traumatisation of individuals and also jeopardises the fulfilment of the Slovak Republic's international commitments. At the same time, she pointed out that the paths to rectify the current situation are clearly prepared at the expert level, but that there is a lack of sufficient will and determination on the part of the current political representation. Subsequently, Dr. Michal Patarák from the F.D. Roosevelt University Hospital with Polyclinic in Banská Bystrica was the next presenter with the paper "Gender incongruence implies no psychopathology: contemporary psychiatry's view of gender incongruence". Dr. Patarák emphasised that gender incongruence is a marked and persistent discrepancy between an individual's experienced gender and his or her assigned sex, a condition that is not characterised by any psychopathology. It may be accompanied by dysphoria, anxiety or depression, but not because of itself, but because of conflict with society, which may lead to accentuated stress, internalised transnegativity or maladaptation. At the same time, he pointed out that in the 11th revision of the International Classification of Diseases, gender incongruence is classified as a condition related to sexual health, whereas previously, as transsexualism, it was included among mental and behavioural disorders. This change is not only fully justified from his point of view, but also has a significant destigmatizing potential. The final contribution in this session was given by Dr. Lucia Berdisová, who presented a paper entitled "Medical, legal and human rights discourse on transgender people". Dr. Berdisová claimed that although medical discourse is usefully employed to maintain and improve a certain standard of human rights, such as women's reproductive rights, we need an immersion in human rights discourse. Human rights discourse was perceived as a discourse about human rights and needs vertically claimable from the public authority – the state, but also operating horizontally while being strongly open-ended. It is essentially a political discourse. By describing the characteristics of the discourses, also based on the Ministry of Health's expert guidance on gender reassignment, Dr. Berdisová argued that the medical and legal discourse on human rights cannot replace the human rights discourse. Interesting contributions, so it is not surprising that all three attracted considerable attention, which resulted in a wide-ranging discussion after they were delivered.

The final block was moderated by Dr. Raková and included four diverse presentations. The first was delivered by Associate Professor Michal Vašečka from the Bratislava Policy Institute, focusing on public attitudes towards transgender people in Slovakia on the background of low inclusiveness towards otherness in Slovak society. These attitudes were documented on the background of several sociological surveys conducted in Slovakia and abroad. At the same time, in his presentation, Associate Professor Vašečka pointed out, among other things, the structural causes of the rejection of LGBTI+ people in Slovak society, as well as the factors influencing the increased homophobia and transphobia among various groups of the population. Dr. Michaela Kušnieriková from the C.S. Lewis Bilingual High School followed with her presentation, focusing on the theological roots of the churches' attitudes toward transgender people. The aim of this contribution was to identify the theological foundations on which churches base their attitudes towards transgender people. Then Dr. Renáta Kišoňová presented her contribution on the importance of face, physicality and identity for

transgender people, pointing out the significance of self-identification through physicality, both for cisgender and transgender people. Dr. Kišoňová specifically addressed the issue of the face as a long-standing subject of research in philosophy, psychology, art and anthropology (including in relation to transgender persons). The final paper of the conference was delivered by Dr. Olexij M. Metenkanyč, who focused in his contribution on the recent decision-making activity of the highest Czech judicial authorities, which he critically analysed and at the same time presented arguments confirming from his point of view the thesis that by accepting and maintaining the validity and effectiveness of the first sentence of Section 29(1) of Civil Code (Act No. 89/2012 Coll.) by the highest Czech judicial authorities, the objectification of transgender people has been promoted.

As the final session featured a number of quite provocative statements and conclusions, a rather lively discussion was launched after the session was over. It was finally (after a considerable amount of time!) concluded with the final word of Professor Batka, who thanked all present for their participation, inspiring contributions, valuable insights and lively dialogue on many diverse aspects of the status of transgender people (not only) in the conditions of the Slovak Republic.

It can be stated that the programme of the conference was very rich and the content was of a high expert level. Considering that the problems related to the health care and well-being of transgender people can only be addressed comprehensively, the conference had to have an interdisciplinary character, which indeed the organizers of the conference managed to do, as it was attended by experts from the fields of law, psychiatry, philosophy, sociology, theology, as well as by mothers of transgender children. This fulfilled the intended goal of the conference, i.e. to find out which different factors influence how transgender people (not only) live in Slovakia. Indeed, the overall efforts of the conference organisers helped to create a pleasant academic and professional atmosphere, which also contributed to the development of personal relationships and contacts between members of the domestic and foreign legal (and broader) scientific community. At the same time, it has shown that interdisciplinarity can invaluably enrich the legal world and offer a different – even critical – perspective on the law.

The importance of the international scientific conference is also underlined by the fact that in the near future, the collection of proceedings will be published, in which a large part of the contributions will be published, as well as other scientific articles and studies of the persons who chose to participate passively in the conference in question. We believe that this will result in scientifically valuable publications with highly recent content, which can become an important source of reference for the academic community, but also with their topicality can be of interest to students who will want to broaden their range of knowledge with the findings presented at this conference. This is confirmed by the fact that the collection of proceedings will be freely and online available to the wider public.

In conclusion, the conference met the demanding expectations set by the conference organisers. On behalf of the organizing team, we would like to sincerely and respectfully thank all participants for their high quality and erudite contributions. We believe that we will meet many of them again during the next conferences organised by the Faculty of Law of Comenius University Bratislava, which will again be thematically attractive and informatively enriching not only for the legal but also for the general scientific public.

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SIMPLIFICATION AND ELECTRONISATION OF ADMINISTRATIVE PROCEEDINGS (POZNAŃ, 26 – 28 OCTOBER 2022) / Matúš Radosa

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On the 26th to 28th of October 2022, the Faculty of Law and Administration of the Adam Mickiewicz University in Poznań, organised an international scientific seminar entitled "Simplification and Electronisation of Administrative Proceedings" with the following round table discussion, which was organised under the auspices of Mgr. Beniamin Rozczyński from Adam Mickiewicz University, within the framework of the research project "Simplification and Electronisation of Administrative Proceedings" (2020/37/N/HS5/01045) on simplification of administrative proceedings in the Visegrad Group Countries. The project was funded by the National Science Centre in Poland. The seminar was held in person.

The aim of the seminar and following discussion was to determine and compare the legal development and tools of simplifications of the administrative procedures within legal systems of the V4 countries with main regard to electronisation of the administrative procedure.

As lectors of the seminar, a total of seven participants from the V4 countries presented and discussed their scientific findings on the topic. The prime was on domestic participants. From the Adam Mickiewicz University in Poznań, Faculty of Law and Administration, it was prof. Wojciech Piątek, Mgr. Beniamin Rozczyński and Dr. Andrzej Paduch. From Masaryk University in Brno, Faculty of Law, Mgr. Denisa Skládalová

attended alongside with Dr. Bertold Barányi from Eötvös Loránd University, Faculty of Law. From Comenius University in Bratislava, Faculty Law, JUDr. Matúš Radosa from the Department of Administrative and Environmental Law took part with abovementioned lectors. As an active audience, numerous PhD. students from the domestic university attended the seminar and the following discussion.

Several topics regarding the simplification of administrative proceedings were the subject of the seminar. Mgr. Beniamin Rozczyński opened the conference with a speech and welcomed all participants. His speech was followed with his lecture and presentation of the first module of the seminar. Mgr. Rozczyński firstly introduced aims of the related research and methods used within the research. He continued through the topic of models of administrative simplification in the V4 countries and concluded his lecture with presenting the aims and objectives of administrative simplification from the perspective of the V4 countries.

In the second module named "Constitutional requirements for the simplification of administrative proceedings", Mgr. Denisa Skládalová highlighted the key constitutional standards for simplification of administrative procedure in Czech Republic. She presented several approaches of the Constitutional Court of Czech Republic in relation with boundaries and hazards of simplification and oversimplification of proceedings with pointing out on relevant decision-making practice.

JUDr. Matúš Radosa continued with his outcome from the research related to theoretical concept and types of simplification in practice of administrative proceedings in Slovak Republic, conceptually explaining unitary, comprehensive and special solutions of administrative simplification. JUDr. Radosa continued with functions of simplification and concluded the module with the impact of simplifications in administrative proceedings on the course of administrative court proceedings in Slovak Republic.

Dr. Andrzej Paduch then continued in module named "Axiological conditions for simplifying administrative proceedings" related to Polish legal system, highlighting the idea and importance of simplification in administrative proceedings followed by presenting the simplification aspects from the perspective of the functioning and powers of the authority and state. Impact of simplification of administrative proceedings on guarantees of the rights of parties to proceedings and rights of other participants in the proceedings were also significantly presented during his lecture.

Dr. Bertold Barányi continued with the module "Electronisation as a special form of administrative simplification". In this seminar module, Dr. Barányi covered very specific aspects and tools of electronisation in public administration, such as electronic delivery, electronic signature, remote access to electronic procedural files and possibilities of using internal IT resources by public administration entities with accent to Hungarian legal system. Regarding procedural aspects, Dr. Barányi also presented pros and cons of electronic initiation of administrative proceedings, remote participation in procedural activities of a public administration entity, electronic evidence in administrative proceedings and electronic administrative file. Automation of activities of a public administration entity and European administrative e-cooperation were the final topics of the module.

Every lector within the scope of respective research and lecture module also presented the findings regarding partial and specific scientifical theses, e. g. "The COVID-19 pandemic was a motivating factor for both public administrations and litigants to start using e-government" or "Contact between the party to the proceedings and the public administration body should take place primarily in remote form and in case it is not possible to settle in remote form – in mixed form." These theses reflected the most recent

issues in electronic public administration and simplification of administrative proceedings.

At the end of the lecture part of the seminar, Mgr. Beniamin Rozczyński together with prof. Wojciech Piątek presented the practical research carried out and its overall results. After the final presentation, the lectors and present audience took part in very active discussion about the topics of the seminar and also about *de lege ferenda* solutions within the V4 countries.

The seminar together with the following general discussion provided a presentation of several interesting views on simplification and electronisation of administrative proceedings. The event represents a valuable result of research within the above-mentioned project, and it is the basis for further research and the contribution of the proposals to the application practice. Significantly valuable was also very strong comparative outcome from respective research of the lectors as all of the V4 countries took part in the seminar and related scientific activities.

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LAW STUDENTS PROVIDING LEGAL SUPPORT IN AN INTERNATIONAL HATE SPEECH PROJECT / Sandra Žatková

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1. INTRODUCTION

During the past years, the Faculty of Law of the Comenius University in Bratislava has been running "legal clinics" which are courses that provide students with an opportunity to develop their legal skills and prepare them for their future careers as lawyers. One of them is focused specifically on the non-profit sector, thus merging practical education with non-profit agenda where the resources are scarce.

Students who apply for the Legal Clinic for the Non-Profit Sector are instructed by clients, non-governmental organisations, to work on specific legal problems. The tasks can be various, from delivering a legal analysis, drafting a lawsuit to joining longer-term projects. This is usually the first opportunity for aspiring lawyers to work on a real case involving communication with the client[1] and requiring professionalism and respect for ethics and advocacy principles. Of course, students are assigned to mentors and supervisors involved in the clinic who are a combination of *pro bono* attorneys, faculty employees and other legal professionals.

For this academic year 2022/2023, the faculty selected five students based on their motivation, previous skills and/or study accomplishments. They were assigned to a non-governmental organisation called Forum for Human Rights (hereinafter referred to as "FORUM"). FORUM focuses on international human rights litigation and advocacy in Central Europe, including the Slovak Republic. It is active before the UN human rights bodies, the European Court of Human Rights and the European Committee of Social Rights. Besides, the organisation represents dozens of cases before national courts.

[1] Despite the term „client", legal support is provided to non-governmental organisations always *pro bono*.

2. HATE SPEECH PROJECT

One of the projects that FORUM is implementing is called "Challenging Online and Offline Roma Discrimination in Europe" (hereinafter referred to as the "project" or "hate speech project").[2] This project is simultaneously being implemented by FORUM's partners in other countries as well, namely in Bulgaria (EOA) and Romania (ROMAJUST), under the coordination of the European Roma Rights Centre (ERRC). Project aims is to tackle challenges of online hate speech as well as other crimes and discrimination Roma people face daily in the above-mentioned countries.

FORUM contacted various institutions, including the Faculty of Law of the Comenius University in Bratislava, and presented its call for volunteers of both, Roma and non-Roma origin. The five law students participating in the Legal Clinic for the Non-Profit Sector joined forces with the lawyers from the FORUM under the mentoring and supervision of Mrs. Sandra Zatkova, PhD. from the Department of International Law and International Relations, who acts as a volunteers' coordinator and of Mr. Adam Koszeghy, PhD. from the Department of Legal History and Comparative Law, who is the contact person and head of the clinic.

The project represents a joint cooperation of five law students from the Comenius University, other thirteen volunteers with a different academic/work background and lawyers of the FORUM, together defending victims of discrimination and hate speech. The main task is to collect evidence of hate speech on social media, which will form the basis for subsequent legal action against perpetrators or other responsible actors. Participation of students with legal background in the project is therefore essential.

The project is still ongoing, but the team has already achieved some preliminary goals and is on a good track to continue to build upon the work which has been done so far and to, hopefully, fulfil its potential to promote equality and respect towards all and to mobilise people not to remain indifferent to discrimination and hate speech. The next parts of this report provide a chronological overview of the activities, cooperation, accomplishments and upcoming plans.

3. ACTIVITIES & ACCOMPLISHMENTS

In order to achieve the best results, synergy and teamwork among all the actors involved in the project is important. The ERRC, as the coordinator of all participating countries, suggested creating a distinct identity of the individual teams. During the introductory meeting, which took place at the premises of the University Library in Bratislava (project's partner), the Slovak team came up with the name "ROMAntici" (in English "ROMAntics"), created profiles on social media and a webpage which serves as a blog to publish articles. Since October 2022, ROMAntici have been using a hashtag #svietinasieti. In English, it means "light on the internet", since the aim is to share positive, inspirational and educational content. One of the law students, for example, suggested to publish short articles informing public in a friendly (non-legal) language about important judgments of the European Court of Human Rights concerning rights of vulnerable groups. The first article that will be published summarises the case Lakatosova and Lakatos v. Slovakia (Appl. No. 655/16, 11 December 2018) concerning

[2] The project is funded by the European Commission Citizens, Equality, Rights and Values Programme (CERV-2021-EQUAL). Views and opinions expressed are however those of the author only and do not necessarily reflect those of the European Union or the granting authority. Neither the European Union nor the granting authority can be held responsible for them.

the failure of Slovak authorities to investigate the possible racist motive behind the shooting and killing of members of a Roma family by a police officer.

As it was indicated above, the main task of all volunteers is to collect evidence of hate speech on social media. These findings are then properly documented and will serve as a basis for any upcoming legal steps. Students and other volunteers are also supposed to report hate speech to social media and document this process. To learn the best practices for documenting and reporting illegal content (tools, tips and challenges), FORUM organised an on-site training in Bratislava with digiQ, a Slovak NGO specialising in internet security, fake news and hate speech. The legal context concerning hate speech and freedom of expression was provided to the volunteers by FORUM lawyers at the beginning of the project.

As a follow-up, law students were asked to prepare a more complex insight into the relevant legal regulation and possible legal strategies. They reviewed an already existing report from the Czech Republic prepared by FORUM and amended it to reflect the Slovak situation. In the sixty pages long document, the students covered mainly national and international framework of protection against online hate speech. The last part is dedicated to legal strategies in hate speech cases. The report will serve as a practical tool for assessing the most appropriate litigation strategies in cases that will be dealt with by the FORUM and volunteers within the project.

One of the strategies that has already been undertaken by volunteers and FORUM lawyers after a consideration, is filing several complaints to the newly established Council for Media Services (until 1 August 2022 as Council for Broadcasting and Retransmission). Volunteers identified hate speech cases that were serious (incited violence against Roma people) but were not deleted by social media even though the volunteers reported them as illegal using tools provided by the social media. According to the Act No. 264/2022 Coll. on Media Services, the Council is entitled to warn the reported platform or eventually, to impose a fine. Hate speech project participants now await an update concerning the procedure and steps undertaken by the Council in the reported cases.

In the series of trainings, students and volunteers took part in a workshop designed for them by the Slovak Academy of Sciences (SAV). The workshop took place at the Comenius University Information Centre and online simultaneously as a part of the Week of Science and Technology in Slovakia.[3] The scientists from SAV presented aspects of the online environment, indicators of hate speech, but also possible motives and typology of people who tend to express themselves hatefully. Important was the discussion about how to "burn but not burn out", what to do with potential frustration caused by monitoring hate speech and what are the possible symptoms of burnout syndrome. During discussions, participants also shared their personal experiences with discrimination and feelings during documenting hate speech.

This aspect of the project, namely students and volunteers of non-Roma and Roma origin working together, sharing their thoughts, shall be underlined as one of the highlights of the project and an example of good synergy, equality and inclusion.

4. CONCLUSION

Participation in the Legal Clinic for the Non-Profit Sector, specifically in the project run by FORUM, enables students of the Faculty of Law to be part of a longer-term

[3] The event can be found here (in Slovak): https://tyzdenvedy.sk/podujatia/cyberhate-prevencia-frustracie-a-vyhorenia-pri-monitorovani-nenavistnych-prejavov-skolenie-pre-dobrovolnikov/ (cited on 6 December 2022)

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project where strategic litigation is used as a tool for improving the situation of a vulnerable group. It is not only a great opportunity for law students to improve their legal skills, but also vice versa, they are a great benefit for the project. Students and volunteers are not only assigned challenging tasks, but they have a real opportunity to form the project and realise their ideas. Besides discussing and recommending legal strategies, the project has also other dimensions which are creative and can help achieve the goals of the project. For example, the participants can engage in counterspeech or create campaigns and use online tools and their expertise to spread the voice supporting important values, including tolerance and the protection of human rights. During the introductory meeting in September, Mr Miroslav Broz discussed with them the topic of activism and online/offline campaigns. As the head of the Czech association Konexe, he told the story of a tough, but eventually successful campaign against the situation in Lety u Pisku – a place where Roma genocide took place, but the communist Czechoslovak government decided to build there a pig farm instead of a cemetery or a memorial.

Even though the urgency of the problem of hate speech against Roma seems to be overshadowed in media by the COVID pandemic or the war in Ukraine, it is still a pressing issue in our society supported not only by reports[4] and statistics,[5] but also by the empiric data gathered by the project participants. In the upcoming months, students, volunteers and lawyers will consider further legal actions, starting with the criminal complaints towards the perpetrators. Besides drafting legal documents, the documenting and reporting of the evidence will continue. Since some of the participants are academics or aspiring academics and scientists, more ideas related to legal and interdisciplinary research have been discussed. Results and further achievements of the project will be presented in the next report.

[4] See e. g. Report on the Slovak Republic by ECRI: https://rm.coe.int/ecri-6th-report-on-the-slovak-republic/1680a0a088 (cited 6 December 2022)
[5] See the graph by digiQ: https://digiq.sk/ako-sme-zvladli-boj-s-nenavistou-v-roku-2021/ (cited 6 December 2022)

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