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HUMAN RIGHTS LITIGATION IN AFRICA UNDER ATTACK: ANALYSIS OF BACKLASH AGAINST REGIONAL AND SUB-REGIONAL COURTS / Ayyoub Jamali, Martin Faix

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Abstract: *Human rights values, to which international organisations adhere, serve not only as the working premise for achieving their goals but also constitute an inherent part of their legal framework and judicial decisions. Established by States that claim to share a fundamental set of values from the outset and are committed to reflecting these values throughout their activities, the African Union is no exception. The organisation articulated its fundamental principles and values in its founding Treaties, which include, among others, 'respect for democratic principles, human rights, the rule of law, and good governance.' Over time, various preventive, monitoring, and enforcement mechanisms have been developed to realise these human rights objectives in the continent. This progress includes the establishment of the African Commission in 1987 and the creation of the African Court in 1998, as well as the expansion of human rights jurisdiction of sub-regional courts over time. This article delves into the resistance faced by the judicial mechanisms used to enforce human rights in Africa. As demonstrated, in all cases under discussion, a State subject to an adverse ruling of the court responded by questioning its legitimacy and authority, advocating for institutional reforms to weaken the fledgling human rights system on the continent. The article highlights the similarities and differences between all cases, illustrating that the impact of political reaction in the case of the continental African Court and the SADC Tribunal has been much more severe than the ECOWAS and the EACJ court. It is argued that the institutional design of the courts, the scale of the community, relative State power, the subject matter of the judgment, the requirement to obtain consensus to revise the founding treaty of the courts, and the engagement of civil societies played crucial roles in determining the type and outcome of backlash in the cases under discussion.*

Key words: *Human Rights Courts; Resistance; African Court on Human and Peoples' Rights; African Sub-Regional Courts; SADC; ECOWAS; EACJ*

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1. INTRODUCTION

Human rights values to which international organisations adhere have been not only the working premise for achieving their goals but also an inherent part of their legal framework and judicial decisions (Buchanan, 2008; Scheppele, Kochenov and Grabowska-Moroz, 2020). Founded by States, which claim to share a set of fundamental values to begin with, and which they are keen on reflecting throughout their activities, the African Union (AU) is no different. The organisation laid its fundamental principles and values in its founding Treaties,[1] which among others include 'respect for democratic principles, human rights, the rule of law, and good governance'.[2] Over time, different preventive, monitoring, and enforcement mechanisms have been developed to realise these human rights objectives in the continent. This includes from the establishment of the African Commission on Human and Peoples Rights in 1987 and the creation of the African Court on Human and Peoples Rights (ACtHPR) in 1998 to the expansion of the human rights jurisdiction of subregional courts over time.

However, in the exercise of their jurisdiction over human rights disputes, all these judicial bodies have come under increasing pressure and resistance from member states. At the continental level, the African Court of Human and Peoples Rights (ACtHPR) has faced a new form of backlash where several of its member states decided to partially withdraw from the Court and thus limit its jurisdiction in individual communication (Faix and Jamali, 2022). In South Africa, the Southern African Development Community (the SADC Tribunal or the Tribunal) was *de facto* suspended in the aftermath of its decision on a highly controversial case related to Zimbabwe's land reform program (Nathan, 2013). In East Africa, the Kenyan government sought to eliminate the East African Court of Justice (EACJ) after a decision challenging an election to a subregional legislature, the East African Legislative Assembly (EALA) (Alter, Gathii and Helfer, 2016). A similar trend can be observed in West Africa where the political leaders of Gambia tried to limit the human rights jurisdiction of the Court of the Economic Community of West African States (ECOWAS) following its decision on a case upholding the allegation of torture of a dissident journalist (Alter, Helfer and McAllister, 2013). All these examples illustrate a pattern of resistance against international courts in Africa that threaten to undermine the foundation of the human rights legal system in this continent.

Although the challenges and issues of human rights law enforcement in Africa are a common theme that run through literature and discussed by stakeholders and academics (Cole, 2010; Daly and Wiebusch, 2018; Faix and Jamali, 2022; Murray et al., 2017; Pityana, 2004; Ssenyonjo, 2012; Viljoen, 2018), less scholarly attention has been paid to the comparative study of resistance to those courts in Africa that have jurisdiction on human rights disputes. This contribution, therefore, aims to conduct a comparative study analysing the aforesaid case of resistance to the four African regional and subregional courts and shed light upon the causes and consequences of each case of backlash.

The article draws on empirical, analytical, and descriptive methods. The first substantial part of the study elaborates on the four cases of backlash against the regional and subregional courts highlighting those case-laws which have led to the instigation of backlash against them; section three discusses the similarities and differences across the four cases, arguing that the variation in institutional settings explains why the continental African Court has faced a different form of backlash compared to the

[1] The EU values are enshrined in Article 2 of the Treaty on the European Union whereas the CoE values are listed in Article 3 of its Statute.
[2] Organisation of African Unity (OAU), *Constitutive Act of the African Union*, 1 July 2000, art. 4 (m).

subregional ones. It is further argued that the relative State power, the need to obtain consensus to revise the founding treaty of each court, the subject matter of judgements, and the engagement of civil societies explain divergent outcomes of backlash against the subregional courts; section four evaluates the implications of backlash in all four cases for the protection and promotion of human rights in Africa; the last section provides some concluding remarks and it summarises the key findings of this paper.

2. INSTANCES OF BACKLASH AGAINST THE AFRICAN REGIONAL AND SUB-REGIONAL COURTS

2.1 The Continental African Court

The ACtHPR was established in terms of Article 1 of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (Protocol), adopted in June 1998, in Ouagadougou, Burkina Faso, by the then OAU (Ebobrah, 2011).[3] The Protocol came into force on 25 January 2004, and the Court became operational in 2006.[4]

The main controversial feature of the African Court concerns its contentious jurisdiction, where State parties and the African Intergovernmental Organization are the only entities that have standing in the proceedings.[5] Individuals and non-governmental Organisations (NGOs) can directly appeal to the Court provided that the respondent state made an additional declaration under Article 34(6) of the founding protocol recognizing the Court's competence to receive such complaints.[6] Although only 33 states have ratified the ACtHPR's Protocol,[7] there are only eight states that have recognised the ACtHPR's jurisdiction in individual communications. This includes Burkina Faso, Ghana, Gambia, Niger, Guinea, Bissau, Malawi, Mali, and Tunisia.[8]

However, in the exercise of its power in the adjudication of individual complaints, the African Court has faced a new form of backlash from four of its member states who decided to withdraw their declarations under the said article and thus limit its jurisdiction in individual disputes. These decisions were mainly prompted by the Court's attempt to rule on individual petitions alleging violations of human rights by their respective national governments.

2.1.1 Rwanda

Rwanda became a state party to the Founding protocol of the African Court in May 2003. However, it was not until January 2013 that the country made a declaration under Article 34(6) of the Protocol, thus accepting the jurisdiction of the Court to hear cases filed directly by individuals and NGOs against it.[9]

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[3] *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (adopted 10 June 1998, entered into force 25 January 2004)* Art. 1 (Founding Protocol).

[4] Executive Council Sixteenth Ordinary Session 25 - 29 January 2010 Addis Ababa, Ethiopia Report of the African Court on Human and People's Rights, para. 1.

[5] Founding Protocol (n 3), art. 5 (1).

[6] *Ibid.*, art. 5 (3).

[7] Activity Report of the ACtHPR, Executive Council Forty Second Ordinary Session 16 January - 16 February 2023 Addis Ababa, Ethiopia, Ex.cl/1409(Xlii) (Activity Report 2022), p. 2-3.

[8] *Ibid*.

[9] Declarations, African Court on Human and Peoples' Rights. Available at: https://www.african-court.org/wpafc/declarations/ (accessed on 22.07.2023).

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In 2014, the case of *Ingabire v. Rwanda* triggered an unprecedented reaction from the Rwandan government, leading the country to withdraw its declaration under Article 34(6) of the Founding protocol. As a result, the African Court's jurisdiction to receive cases from individuals and NGOs against Rwanda was curtailed. The case was centred on allegations of human rights violations against opposition leader Victoire Ingabire. She was arrested after giving a public speech about reconciliation and ethnic violence at the Genocide Memorial Centre. She was later sentenced to 15 years in prison on charges that included spreading genocide ideology, aiding and abetting terrorism, sectarianism, undermining internal security, and denying the 1994 genocide against the Tutsis.[10] Since the Rwandan Genocide of 1994, the government has implemented new laws to regulate the denial or minimization of the genocide and restrict speeches that could potentially cause ethnic violence (Faix and Jamali, 2022). The Ingabire case posed a significant challenge to the African Court as it involved sensitive and contentious issues, raising questions about how the Court should proceed.

The Rwandan authorities requested to withdraw the country Declaration under Article 34(6) of the Protocol shortly after the Ingabire case was scheduled to be heard by the ACtHPR in March 2016. The government sent a letter verbale to the AU Commission, which reads as follow:

> 'Consequent to the 1994 genocide against the Tutsi was the most heinous crime since the Holocaust and Rwanda, Africa and the world lost a million people in 100 days;
>
> CONSIDERING that a Genocide convict who is a fugitive from justice has, pursuant to the above-mentioned Declaration, secured a right to be heard by the Honourable Court, ultimately [sic] gaining a platform for reinvention and sanitisation, in the guise of defending the human rights of the Rwandan citizens;
>
> CONSIDERING that the Republic of Rwanda, in making the 22 January 2013 Declaration, never envisaged that the kind of person described above would ever seek and be granted a platform on the basis of the said Declaration;
>
> CONSIDERING that Rwanda has established strong legal and judicial institutions entrusted with and capable of resolving any injustice and human rights issues;
>
> NOW THEREFORE, the Republic of Rwanda, in exercise of its sovereign prerogative, withdraws the Declaration it made on the 22nd day of January 2013 accepting the jurisdiction of the African Court for Human and Peoples Rights to receive cases under Article 5(3) of the Protocol and shall make it afresh after a comprehensive review.[11]

Furthermore, the Rwandan ambassador to the AU provided a more detailed explanation for the withdrawal. He stated that the Rwandan government realised that the Declaration was being abused by the judges due to the absence of a clear position by the

[10] ACtHPR, *Ingabire v. Rwanda*, application. no. 003/2014, judgment of 24 November 2017, paras. 8, 114.
[11] Republic of Rwanda, Withdrawal for Review by the Republic of Rwanda from the Declaration Made Under Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Ministry of Foreign Affairs and Cooperation, 000164, 24 February 2016.

Court regarding genocide convicts and fugitives. This realisation prompted the decision to withdraw, as the ambassador: 'That is why we withdrew.'[12]

Rwanda's statements appear to constitute an attack on the independence and legitimacy of the ACtHPR. However, it should be noted that the ability of a genocide fugitive to directly bring a case to the ACtHPR does not necessarily call into question the impartiality or independence of the court. The power and authority of a judicial institution are determined by its statutes and rules, and the ACtHPR protocol and rules do not contain any provisions that limit jurisdiction or admissibility based on the alleged participation of a petitioner in the incitation genocide.[13] As such, Rwanda's objections to the jurisdiction of the court based on the perceived misuse of the Article 34(6) Declaration appear to be unfounded.

It is notable that the exit of Rwanda from its additional Declaration under Article 34(6) of the Protocol was not only motivated by the individual facts of the Ingabire case, but rather indicative of a larger trend in the socio-political governance of the country. This is supported by the submission of multiple applications against Rwanda by the political opponents of the government, which raised sensitive socio-political questions within the country. The cases of Victoire Ingabire, *Kennedy Gihana and others v. Rwanda*,[14] *General Kayumba Nyamwasa and others v. Rwanda*,[15] and *Laurent Munyandilikirwa v. Rwanda*,[16] all touch upon various issues such as passport invalidation, the amendment of the Constitution to remove presidential term limits, and allegations of human rights violations. The decision to withdraw from the Declaration can therefore be seen as an attempt by the government to avoid scrutiny by the ACtHPR on these sensitive socio-political matters (Adjolohoun, 2020; Daly and Wiebusch, 2018; Windridge, 2018).

Notwithstanding the absence of any specific provision in the founding protocol pertaining to the conditions governing withdrawal from the additional Declaration, the ACtHPR expounded on the matter in its ruling on jurisdiction issued on 3 June 2016 in the Ingabire case. The ACtHPR acknowledged the legitimacy of Rwanda's request to withdraw from Article 34(6) of the Protocol but stipulated a one-year notification period before such a withdrawal would take legal effect. Furthermore, the ACtHPR clarified that the withdrawal would not affect any pending applications before the Court.[17]

2.1.2 Tanzania

Following Rwanda's withdrawal from the ACtHPR's jurisdiction in individual petitions, some positive developments took place, as several states decided to recognise the Court's jurisdiction in individual petitions. For example, Benin submitted its Declaration instrument around the same time when Rwanda partially exited the Court,[18]

[12] Rwanda rejects calls to endorse African rights court. In: The Citizen, published on April 19, 2021. Available at: https://www.thecitizen.co.tz/news/Rwanda-rejects-calls-to-endrse-African-rights-court/1840340-3292644-b8tdluz/index.html (accessed on 22.06.2023).

[13] Founding Protocol (n 3), art. 3, 5, and 34(6); Rules 26, 33 and 40 of Court Rules (2010).

[14] ACtHPR, *Kennedy Gihana and others v. Republic of Rwanda*, application no. 017/2015, judgment of 28 November 2019.

[15] ACtHPR, *General Kayumba Nyamwasa and others v. Republic of Rwanda,* application no. 016/2015, *Order on the Request for Interim Measures***,** 24 March 2017, para. 3

[16] ACtHPR, *Laurent Munyandilikirwa v. Republic of Rwanda*, application no. 023/2015, Case Summary, paras. 1-2.

[17] ACtHPR, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, application. no. 003/2014, Ruling on Withdrawal of Declaration, 3 June 2016, paras. 51-68.

[18] Declarations, African Court on Human and Peoples' Rights. Available at: https://www.african-court.org/wpafc/declarations/ (accessed 22.06.2023).

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and both Tunisia and Gambia recognised the jurisdiction of ACtHPR under Article 34 (6) of the Protocol in 2017 and 2018, respectively.[19] This recognition of the Court's jurisdiction was crucial for enhancing its legitimacy and authority by allowing it to exercise jurisdiction over more states, thus increasing its caseload and contributing to the development of its jurisprudence.

However, this positive development was short-lived as Tanzania, which had ratified the ACtHPR founding Protocol in 2006 and deposited its Declaration instrument recognizing the jurisdiction of the Court in individual communication in 2010,[20] announced in December 2019 that it would withdraw its Declaration instrument concerning the Court's competence in individual petitions. In its withdrawal notice, Tanzania did not provide additional explanation to justify its decision, except a general statement that the Declaration instrument under Article 34 (6) of the Protocol was incompatible with the Constitution of the state.[21] However, scholars argue that Tanzania's withdrawal decision was prompted by the ACtHPR judgment in the case of *Ally Rajabu and Others v. United Republic of Tanzania*,[22] which concerned the issue of the imposition of the death sentence for murder convictions (De Silva, 2019; Faix and Jamali, 2022).

It should be noted that Tanzania's withdrawal from the ACtHPR's jurisdiction in individual petitions can also be attributed to the country's high number of cases filed against it and judgments issued against it by the Court. Tanzania has been the subject of most of the ACtHPR judgments, with the highest number of cases filed by its citizens and NGOs, and the highest number of judgments issued against it. Of the 76 cases finalised by the Court and 176 pending cases, Tanzania is subject to 33 and 105 cases, respectively.[23] Furthermore, the Court held Tanzania responsible for human rights violations in 23 of 26 merit judgments, ordering the country to remedy the violations.[24] This high number of cases against Tanzania has fuelled the perception among critics and opponents of ACtHPR that the country was being 'unfairly targeted' (Faix and Jamali, 2022).

Furthermore, Tanzania's withdrawal can also be linked to the rise of populism in the country and the subsequent democratic backsliding (Brandes, 2018; Faix and Jamali, 2022).[25] Since the regime change in 2015, Tanzania has been accused of taking a path towards authoritarianism, resulting in erosion of freedoms and crackdowns on human rights activists, free media, and political opponents.[26] The government has increased censorship by banning and suspending major newspapers from releasing critical

[19] *Ibid*.
[20] *Ibid.*
[21] *Ibid.*
[22] ACtHPR, *Ally Rajabu and Others V. United Republic of Tanzania*, application no. 007/2015, judgment of 28 November 2019.
[23] Contentious Matters, African Court on Human and People's Rights. Available at: http://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21#finalised-cases (accessed 22.07.2023).
[24] Activity report of the African Court on Human and Peoples' Rights, 1 January – 31 December 2018, EXECUTIVE COUNCIL Thirty-Fourth Ordinary Session 07 - 08 February 2019, Addis Ababa, Ethiopia.
[25] Empirical evidence suggests that courts operating in populist environments are often subject to the resistance of populist politicians.
[26] Tanzania: Climate of fear, censorship as repression mounts. In: Amnesty International, published on October 28, 2019. Available at: https://www.amnesty.org/en/latest/news/2019/10/tanzania-climate-of-fear-censorship-as-repression-mounts/ (accessed on 22.07.2023); see Tanzania. In: Freedom House. Available at: https://freedomhouse.org/country/tanzania/freedom-world/2020 (accessed on 23.07.2023); Oppressive' laws come under the spotlight. In: The Citizen, published on October 29, 2019. Available at: https://www.thecitizen.co.tz/news/1840340-5328760-format-xhtml-10vh1ldz/index.html (accessed on 22.06.2023).

content. The change of government and its subsequent repression of human rights defenders and media explain its decision to restrict the jurisdiction of the Court in individual communications (Faix and Jamali, 2022).

2.1.3 Benin

Benin had initially accepted the ACtHPR's competence to adjudicate cases submitted by individuals and NGOs in February 2016. However, the government announced its decision to withdraw its Declaration in March 2020, citing a series of court judgments against it as the reason for its withdrawal.[27]

In its notice of withdrawal from the ACtHPR on 24 March 2020, the Benin authorities stated that the decision to withdraw the additional Declaration resulted from excessive interference by the ACtHPR in matters beyond its competence, causing serious disturbances to municipal legal order and economic attractiveness of the member states (Adjolohoun, 2020). Specifically, it referred to the *Kodeih* case in which the ACtHPR ordered Benin to suspend the execution of a domestic order on the seizure of property to recover a bank debt in a commercial dispute between private persons (Adjolohoun, 2020).

In addition, the government spokesperson provided a statement justifying the withdrawal decision arguing that withdrawal was a consequence of observable 'dysfunctions and slippages at the High Court'.[28] The spokesperson criticised the ACtHPR's decisions in recent years for 'serious incongruities' and noted how these also led Tanzania and Rwanda to limit the court's jurisdiction in individual petitions (Faix and Jamali, 2022).

Benin's notice of withdrawal from the ACtHPR and subsequent statements from the authorities suggest that the *Kodeih* case was not the sole reason for the government's decision. Another case that prompted the government to abandon its additional Declaration was the case of *Sébastien Ajavon*. In this case, the ACtHPR ordered the government to postpone a communal election until it delivered a merit judgment on the case instituted by Sebastien Ajavon, an exiled political leader who had been sentenced to 20 years of imprisonment for drug trafficking. In response to this order, the Minister and government spokesperson argued that withdrawal was necessary 'in order not to jeopardise the interests of a whole nation and the duty of a government that is responsible for running elections on time'.[29]

Although it is clear that Benin cited the *Kodeih* and *Ajavon* cases to justify its withdrawal, the underlying reason for this decision may be related to deeper socio-political problems in the country. Between November 2018 and April 2020, Benin received eight unfavourable decisions from the ACtHPR, most of which involved political opposition figures (Adjolohoun, 2020; Faix and Jamali, 2022).

Therefore, Benin's decision to withdraw from the ACtHPR jurisdiction may be seen as a strategy by the authorities to increase impunity and block the investigation of

[27] ACtHPR, *Khomi Koutche v. Republic of Benin*, application no. 013/2020; ACtHPR, *XYZ v. Republic of Benin*, application no. 010/2020; ACtHPR, *Ghaby Kodeih and Nabih Kodeih v. Republic of Benin*, application no. 008/2020; ACtHPR, *Ghaby Kodeih v. Republic of Benin*, application no. 006/2020; ACtHPR, *Houngue Eric Noudehouenou v. Republic of Benin*, application no. 004/2020; ACtHPR, *Sébastien Germain Marie Aïkoue AJAVON v. Republic of Benin*, application no. 062/2019.

[28] Benin withdraws from top African HR protocol. In: *APA News*, published on April 24, 2020. Available at: https://www.journalducameroun.com/en/benin-withdraws-from-top-african-hr-protocol/ (accessed on 22.05.2023).

[29] *Ibid.*

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human rights by an independent judicial body.[30] This assumption is supported by the decision of the Benin Constitutional Court, dated 30 April 2020, which held that the provisions of the Supplementary Protocol of the Court of Justice of the Economic Community of West African States (ECOWAS) are not enforceable against Benin, and any actions resulting from its implementation are void.[31] In practical terms, this implies the withdrawal of Benin from the jurisdiction of the ECOWAS Court of Justice, which is not provided for by the applicable statutes (Faix and Jamali, 2022).

2.1.4 Côte d'Ivoire

The Government of Côte d'Ivoire is the latest state to have curtailed the jurisdiction of ACtHPR with respect to individual petitions, leaving only eight states that allow individuals and NGOs to submit cases directly to the court. In June 2013, Côte d'Ivoire had accepted the jurisdiction of the ACtHPR to receive cases brought by individuals and NGOs. However, in April 2020, the government withdrew from the special declaration, prompting concerns about political motivations.[32]

Although Côte d'Ivoire had not previously had a contentious relationship with ACtHPR, its decision to withdraw from the special declaration in April 2020 appears to have been politically motivated. The government's decision was likely prompted by the ACtHPR ruling in the case of *Guillaume Kigbafori Soro and Others v. Côte d'Ivoire*. The judgment called on the state to suspend the arrest warrant for Guillaume Kigbafori Soro and to release dozens of members of his political party on bail.[33]

This ruling was met with fervent contempt by the authorities in Côte d'Ivoire, who accused the court of making 'political decisions' that encroach on the country's sovereignty of the country, undermine its legal order, and create genuine legal insecurity (Faix and Jamali, 2022).[34] The Ivorian Minister of Communication further criticised the ACtHPR, stating that it was incapable of fulfilling its role and suggesting that the decision to withdraw from the special declaration was a consequence of 'intolerable actions that the African Court has allowed itself in its actions' (Faix and Jamali, 2022).[35] As a result, the Ivorian government refused to comply with the provisional order of the African Court, and Soro was subsequently sentenced in absentia to 20 years of imprisonment and five years of deprivation of civil and political rights, thus making him ineligible to run for the subsequent presidential election in October 2020.[36]

[30] *Ibid.*

[31] Constitutional review of the ECOWAS Court 2005 Supplementary Protocol, the Constitutional Court of Benin, Decision No. 20-434, 30 April 2020.

[32] Declarations, African Court on Human and Peoples' Rights. Available at: https://www.african-court.org/wpafc/declarations/ (accessed 22.06.2023).

[33] ACtHPR, *Guillaume Kigbafori Soro and Others v. Republic of Côte d'Ivoire*, application no. 012/2020, Order for Provisional Measures, 22 April 2020, para. 42.

[34] Diplomatie: la Côte d'Ivoire retire la déclaration de compétence à la Cour africaine des droits de l'homme et des peuples, Gouvernement de Côte d'Ivoire. Available at: http://www.gouv.ci/_actualite-article.php?recordID=11086&d=5 (accessed on 23.07.2023); Ivory Coast withdraws from African Human Rights and Peoples Court. In: *Africanews*, published on April 30, 2020. Available at: https://www.africanews.com/2020/04/30/ivory-coast-withdraws-from-african-human-rights-and-peoples-court/ (accessed on 22.07.2023).

[35] Ivory Coast withdraws from African Human Rights and Peoples Court. In: *Africanews*, published on April 30, 2020. Available at: https://www.africanews.com/2020/04/30/ivory-coast-withdraws-from-african-human-rights-and-peoples-court/ (accessed on 22.07.2023).

[36] ACtHPR, *Guillaume Kigbafori Soro and Others v. Republic of Côte d'Ivoire*, application no. 012/2020, Order for Provisional Measures, 15 September 2020, para. 6; Côte d'Ivoire presidential hopeful Guillaume Soro

The above analysis indicates that the reasons behind the withdrawal of states from the ACtHPR are predominantly anchored in domestic socio-political factors. While Tanzania cited the incompatibility of Article 34(6) with its constitution as the basis for its withdrawal, other states have articulated a more unified rhetoric of resistance, grounded in principles of non-interference and sovereignty. In addition to these factors, a plausible theory that could explain the pattern of withdrawal is the two-tier structure of ACtHPR, which exposes it to vulnerability. This vulnerability affords states the option of partially or fully withdrawing from the Court without incurring significant political or reputational costs. Therefore, it is understandable that states such as Rwanda, Tanzania, Benin, and Côte d'Ivoire have opted to remove themselves from the ACtHPR jurisdiction while remaining within the system and achieving their objectives without significant political or legal implications.

2.2 The SADAC Tribunal

The pre-existing Southern African Development Co-ordination Conference was founded in 1980 to foster the cause of national political and economic liberation in Southern Africa. In 1993, it was transferred to the SADC by the SADC Treaty, with the focus on integration of economic development. The SADC Treaty envisioned the creation of a Tribunal,[37] that was officially established in 2005 in Windhoek, Namibia, where it is based.[38] Comprising of 15 Southern African states and modelled on the structure of the European Court of Justice, the Tribunal has the competence to hear individual complaints of alleged human rights violation provided that all available domestic remedies have been exhausted, and it is also empowered to issue advisory opinions.[39]

However, in the exercise of its competence to rule on human rights disputes, it faced with an unprecedented backlash from the Zimbabwean government that eventually led to its *de facto* suspension. On 11 October 2007, Mike Campbell (PVT) Limited, a Zimbabwean-registered company, filed a suit with the Tribunal challenging the expropriation of agricultural land in Zimbabwe by the government of that country. In 2008, the Tribunal delivered a landmark decision and ruled in favour of the applicants by holding that the land redistribution program of Zimbabwe's President Robert Mugabe amounted to the violation of several provisions of the SADC Treaty, including the principle of non-discrimination based on race and the right to access to justice.[40]

Given its colonial history, the Mugabe government met the *Campbell* judgment with contempt and adopted a very clear noncompliance policy. The Minister of State for National Security, Lands, Land Reform and Resettlement stated that the Tribunal was 'daydreaming' because we are not going to reverse the land reform exercise. There is nothing special about the 75 farmers and we will take more farms. It is not discrimination

sentenced to 20 years in jail. In: *CGTN Africa*, published on April 28, 2020. Available at: https://africa.cgtn.com/2020/04/28/cote-divoire-presidential-hopeful-guillaume-soro-sentenced-to-20-years-in-jail/ (accessed on 23.07.2023).

[37] Treaty of the Southern African Development Community (SADC Treaty), art. 16.

[38] History and Treaty, Southern African Development Community. In: *SADC*. Available at: https://www.sadc.int/pages/history-and-treaty (accessed on 25.06.2023).

[39] SADC Treaty, art. 9; The current Member States of SADC Tribunal are Angola, Botswana, the DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles,42 South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

[40] SADC Tribunal, *Campbell and Others v. Zimbabwe (Merits)*, Case No. SADC (T) 2/2007, 28 November 2008, paras. 16-17.

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against farmers, but correcting land imbalances'.[41] The then president Mugabe characterised the judgement as 'an exercise in futility' (Nathan, 2013), and he further reacted that 'some farmers went to the SADC Tribunal in Namibia, but that's nonsense, absolute nonsense, no one will follow that ... We have courts here in this country, that can determine the rights of people. Our land issues are not subject to the SADC Tribunal.' (Chinaka, 2009). This was followed by a judgement of the Zimbabwe High Court, which found the Tribunal's finding to be null and void because it was *ultra vires* (Chigara, 2009).

Following unsuccessful attempts to implement the decision, the applicants twice returned to the Tribunal seeking the court to take further action against the Zimbabwean government (Viljoen and Viljoen, 2012). In both cases, the Tribunal established that the Zimbabwean government failed to comply with its decision and therefore referred the case to the Summit for further action.[42] This triggered a chain of events that culminated in Zimbabwe's submission of a legal opinion challenging and questioning the legality of the SADC Tribunal rulings on the grounds that the Protocol on the Tribunal was never ratified by two thirds of the member states, including Zimbabwe (Alter et al., 2016; Ebobrah, 2011). Meanwhile, the Zimbabwean government lobbied a number of SADC member states to back its plan to *diminish* the Tribunal. Zimbabwe's legal objection was raised up to be discussed at the 2010 SADC Summit, where a compromise was reached to name an independent consultant to conduct a review of the role, functions, and responsibility and terms of reference of the SADC Tribunal (Alter et al., 2016; Viljoen, 2018). Furthermore, the Zimbabwean government pursued a strategy to block the Summit plan to renew the appointment of judges whose terms were about to expire. It refused to agree for the prolongation of the term of the judges, an act that requires the unanimous agreement of all member states (Viljoen, 2012, p. 501). In the absence of a quorum of 5 judges, the Tribunal could therefore no longer hear new cases, and thus it was *de facto* suspended. Finally, in 2014 some Member States drafted and signed a new protocol limiting the jurisdiction of the Tribunal to only inter-state dispute and providing for the withdrawal of a Member State from the Tribunal on a one-year notice of period.[43]

2.3 The East African Court of Justice

The EACJ is one of the organs of the East African Community (EAC) established in 2001 by the Treaty to Establish the East African Community (EAC Treaty) to ensure the interpretation and application and compliance of the EAC Treaty.[44] Comprising of five Member States, it has jurisdiction to hear interstate disputes as well as individual complaints where the exhaustion of domestic remedies is not a prerequisite to submit a case to the court. The EACJ has also the competence to issue advisory opinions and preliminary rulings on the request of courts.[45]

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[41] They are day-dreaming. IOL, published on December 1, 2008. Available at: https://www.iol.co.za/entertainment/they-are-day-dreaming-427469 (accessed on 24.07.2023).

[42] SADC Tribunal, *Campbell and Others v. Zimbabwe*, Case No. SADC (T) 3/2009, 5 June 2009; SADC Tribunal, Fick *and Others v. Zimbabwe*, Case No. SADC (T) 1/2010, 16 June 2010; Article 33(1)(a) of the SADC Treaty stipulates that 'sanctions may be imposed against any Member State that persistently fails, without good reason, to fulfil obligations assumed under this Treaty', and by virtue of Article 33(2) the Summit is empowered to determine and impose sanction on a case-by-case basis.

[43] Draft Protocol of the SADC Tribunal, 18 August 2014, art. 50.

[44] East African Court of Justice. COURT / ABOUT US. Available at: https://www.eacj.org/?page_id=19 (accessed on 23.07.2023).

[45] East African Court of Justice. Access to Court. Available at: https://www.eacj.org/?page_id=31 (accessed on 24.07.2023).

The most controversial aspect of its jurisdiction concerns human rights disputes. The court does not have an explicit human rights mandate, but it sometimes provides for the extension of its jurisdiction in human rights matters in the future when the member states decide to conclude a protocol to this effect.[46] Although this protocol has not yet been adopted, the court has already asserted that it has the authority to deal with disputes involving human rights.[47]

However, the case that triggered the backlash against the EACJ was not explicitly related to a human rights dispute. In the case of *Anyang Nyong'o v. Attorney General of Kenya,* the applicants claimed that the decision of the Kenyan government to allocate the seat of judges of the EALA among the national political parties based on their strength at the national parliament constitutes a violation of the provision of the EAC treaty which requires state parties to hold an election to choose judges of the EALA.[48] The court issued an interim measure that prevented the list of nominees presented by the Kenyan government from taking office until it decided on the merits of the case.[49]

The government official met the ruling with scorn, accusing the court of undermining its national sovereignty (Viljoen and Viljoen, 2012). The government took several channels to respond to the decision. At first, it sought to eliminate the court with the cooperation of two other Member States, but its proposal was not sympathetically received by them.[50] To avoid an adverse ruling on merit, it then tried to put pressure on its two judges in the court. This tactic also failed as a result (Onoria, 2010).[51]

The government then prepared an amendment to the EAC Treaty that brought some changes to the court structure, jurisdiction, and access rule. The amendment split the court into sections, with the first instance division and an appellate division;[52] it established that the court had no power to review cases for which the 'jurisdiction [is] conferred by the Treaty on organs of Partner States';[53] additional grounds were added for the removal of judges, beyond misconduct and infirmity;[54] and most importantly, a time limit was introduced requiring a case to be submitted to the court within two months from the date of commission or knowledge of the impugned act.[55] The amendment received the support of other Member States, and thus it was adopted and entered into force in March 2007.

Despite the government's attempt to avoid an adverse ruling in the *Nyong'o* case (Onoria, 2010), the court finally delivered a merit judgement confirming its previous position that the selection of judges is in violation of the ECA Treaty and ordered the government to hold an election according to the rules stipulated by Article 51 of the EAC

[46] Art. 27(2) 1999 EAC Treaty (as amended).
[47] EACJ, *Katabazi and 21 Others v Secretary General of the East African Community and Another,* Ref. No. 1 of 2007 [2007] EACJ 3, 1 November 2007.
[48] EACJ, *Anyang Nyong'o v. Attorney General of Kenya*, Reference No. 1 of 2006, 27 November 2006; EAC Treaty, Art. 50 stipulates that 'the elected members shall, as much as feasible, be representative of specified groups, and sets out the qualifications for election'.
[49] *Ibid*.
[50] Tanzania and Uganda were the only other member states of the East African Community (EAC) at the time. Rwanda and Burundi did not join the EAC until several years later.
[51] The government threatened its two judges in the court to avoid any adverse ruling on the merits otherwise it would file a suit against them seeking to be removed from their position by accusing them of engaging in corruption, unethical practices and absence of integrity in the performance of their judicial duties in their home country. Refusing to surrender, the government withdrew allegation against one of them, and as to the second one the ECAJ confirmed his impartiality.
[52] EAC Treaty (revised), Art. 28(2).
[53] *Ibid*., Art. 27(1).
[54] *Ibid*., Art. 26(1), 26(2).
[55] *Ibid*., Art. 30(2).

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Treaty.[56] Failing to receive support from other Member States to discredit the judgment, the Kenyan government eventually complied with it and thus held an election required by the EAC Treaty.

2.4 The ECOWAS Court of Justice

The ECOWAS Court of Justice was created by the revised Treaty of the ECOWAS. Comprising of 15 states, the mandate of the court is to ensure the observance of law and of the principles of equity and in the interpretation and application of the provisions of the revised Treaty and all other legal instruments adopted by the Community.[57]

Since acquiring jurisdiction over human rights complaints in 2005, the ECOWAS court has issued numerous decisions finding the Member States to be in violation of human rights norms. Individuals are allowed to file a complaint with the court without the need to exhausted domestic remedies. Yet, in the exercise of this mandate, the court experienced resistance from the Gambian government. Among the suits that led to the unprecedented contempt of Gambia was the case of *Manneh* regarding the detention and alleged torture of a dissident journalist for releasing articles critical of the government.[58] Despite numerous calls, the government refused to cooperate and participate in the proceeding before the ECOWAS court (Viljoen and Viljoen, 2012). In the absence of the government, the court issued a judgment holding Gambia responsible for the violation of several provisions of the Charter and ordering the government to release Manneh from unlawful detention and pay him compensation of US $100,000.[59] In response, the Gambian government tried to challenge the basis of the decision by submitting a request to the ECOWAS Commission seeking to revise the ECOWAC protocol, thus limiting the court's human rights jurisdiction and introducing the requirement of exhausting domestic remedies (Alter et al., 2013).

The proposed revision received a series of protests from NGOs and civil societies who filed a motion to the ECOWAS court questioning the legality and legitimacy of the proposed amendment (Viljoen and Viljoen, 2012). They argued that the amendment will undermine the capacity of the court to 'deal effectively with tyrannical governments that violate citizen rights' in a region 'where the judiciary is an arm of the executive'.[60]

Meanwhile, the ECOWAS Council of Ministers appointed a Committee of Legal Experts to seek its advice on the proposed amendment. Experts prepared their recommendation advising the Council to reject the proposal. Following the extensive mobilization and campaign of civil society and the opinion of experts, the Council of Justice Ministers refused to adopt the amendment proposed by Gambia to revise the ECOWAS protocol.

[56] EACJ, *Anyang Nyong'o v. Attorney General of Kenya*, Reference No. 1 of 2006, 27 November 2006, p. 36.
[57] See art. 4 of the 1993 revised ECOWAS Treaty on the principles of ECOWAS; Fifteen nations are currently members of ECOWAS: Benin, Burkina Faso, Cape Verde, Coˆte d'Ivoire, the Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Nigeria, Senegal, Sierra Leone, and Togo.
[58] ECOWAS Court, *Manneh v. The Gambia* (2008) AHRLR 171 (ECOWAS 2008), para. 5.
[59] *Ibid.*, paras. 41, 44.
[60] Four IFEX members, civil society groups fear Gambia proposal will prevent ECOWAS court from ruling in Saidykhan case. In: *IFEX*, published on September 28, 2009. Available at: https://ifex.org/four-ifex-members-civil-society-groups-fear-gambia-proposal-will-prevent-ecowas-court-from-ruling-in-saidykhan-case/ (accessed on 22.07.2023).

3. DIVERGENT BACKLASH: DIFFERENT OUTCOME

As we have seen, ACtHPR faced different form of backlash compared to the subregional courts. While the former experienced resistance in the form of withdrawal from its special declaration, resistance against subregional courts was pursued through the State's attempt to amend and revise the founding treaty of each respective court. What can explain this different form of resistance against ACtHPR compared to the sub-regional ones? The answer lies largely in the differences between their institutional settings. Although membership in the African Union (AU) does not oblige Member States to accept the jurisdiction of the ACtHPR, membership in the subregional communities requires the State to accept the jurisdiction of sub-regional courts. Additionally, unlike the ACtHPR where direct access for private litigants is allowed upon signing an additional declaration by the respondent state, all three subregional courts provide direct access for individual complaints alleging human rights violations by their national governments. That is said, the special nature of the ACtHPR allows States to have full or partial access to it, and as such Rwanda, Tanzania, Benin, and Côte d'Ivoire curbed the jurisdiction of the Court without losing their membership in neither the ACtHPR nor in the AU. Therefore, this form of backlash was the easiest and least expensive option for these states to exercise resistance and reach their aim of marginalizing and weakening the fledgling continental human rights court. Exercising the same type of resistance to withdraw from the subregional courts was not a legally viable option without losing membership in the community as a whole; something which would otherwise cause a considerable economic and political capital for Zimbabwe, Gambia, and Kenya.

In addition, a simple majority is required to modify the Court's jurisdiction and access rules.[61] In this respect, the scale of the African Court is larger than that of the subregional level where they have a greater geographic proximity, allowing for strategic political and economic closeness. Taking into account the political and cultural diversity across the African continent, reaching an agreement to amend the founding protocol of the ACtHPR would therefore not be a feasible option for Member States to express their resistance against it.

Although it is said that the exercise of backlash against the ACtHPR reached an outcome due to the weakness in the institutional design of the Court, the divergent outcome of backlash against the subregional courts can be explained by different factors. First of all, the subject matter of the cases decided by each subregional court played an important role in determining the outcome of backlash against them. The decision of the ECOWAS court against the Gambian government concerned a flagrant abuse of human rights, torture of a journalist, which no government would publicly endorse. That may be a reason why there was no sympathy for the Gambia proposal to amend the ECOWAS treaty. The EACJ decision against the slate of the Kenyan government concern a dispute over the boundary between community and national law, which could be seen as the court's attempt to intrude into the internal affairs of states that favour opposition groups. This may explain why Tanzania and Uganda finally accepted the Kenyan proposal to revise the EACJ court. The subject matter of the case involving Zimbabwe was by far the most controversial. Many African states struggle with the consequences of postcolonial land policy, which left most fertile lands in the hands of white farmers. This may explain why Mugabe's message was more sympathetically received when he argued that 'if it happens to us, it happens to you next' (Alter et al., 2016). Therefore, the matter of communication in the case of the SADC

[61] Founding protocol (n 3).

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Tribunal played an important role in convincing African leaders to support and adopt the amendment that significantly changed the mandate of the Tribunal.

Secondly, different economic and political powers of the states initiated the backlash can also provide explanation for the divergent outcome of backlash against the subregional courts. In East Africa, Kenya is the undisputed economic and political power. In the south, even though Zimbabwe's economy was in decline, its political dominance in the region is largely established due to the influence of its then charismatic leader, President Mugabe who was seen as a champion of anticolonial struggle in Africa. Gambia is a clear outlier among these countries, a small and fragile country with limited economic and political power in West Africa. This as such provides another explanation why the proposal of the Gambian government was easily rejected by the ECOWAS Member States (Alter et al., 2016; Viljoen and Viljoen, 2012), but the backlash against the other two subregional courts was more of a success story.

Furthermore, it has been argued that one of the main reasons for the failure of Gambia's attempt to weaken the ECOWAS court is the participation of civil societies who played a crucial role in determining the fate of backlash through their extensive involvement in official meetings, sending a message to governments that their actions and conducts are being scrutinised – a strategy that could cost a considerable political capital for the national governments (Alter et al., 2016; Viljoen and Viljoen, 2012).

The successful outcome of backlash against the SADC Tribunal is also the result of the ambiguity existing in the SADC Treaty, where it fails to determine what happens when consensus cannot be reached to appoint the judges of the Tribunal. This in fact gave the Zimbabwean government an upper hand in the negotiation with other member states to dictate its position on them when drafting the amendment to the SADC Treaty.

However, the need to obtain consensus to modify the constituent treaty of each subregional court explains why the backlash against the ECOWAS court as well as the initial attempt of Kenya to dismantle the EACJ court did not produce any outcome. In this regard, it should be mentioned that the small scale of the EAC community contributed to the success of Kenya in its subsequent attempt to restructure the EACJ court; a community that consists of only five Member States whose leaders meet regularly and share a more similar vision of 'what defines Africa'.

4. IMPLICATION OF BACKLASH

In all cases under discussion, a state reacted to an adverse ruling of the court by questioning its legitimacy and advocated for institutional reform to weaken the fledgling human rights system. Nevertheless, the impact of the political reaction has thus been much more severe in the case of SADC and the ACtHPR than in the other two subregional courts. Yet, these instances of resistance have a wide range of implications on the authority and development of the African regional and sub-regional courts in general and especially on the protection and promotion of human rights across the continent.

The immediate effect of withdrawal from the ACtHPR is related to its operation. There are only a few states that accepted its jurisdiction in individual communication, and importantly its docket is largely dependent on the cases submitted by the citizens of those states orchestrating the backlash, especially its host state, Tanzania. While Tanzania accounts for 37 of the 76 finalized cases of the Court, and 105 of its 167 pending cases, Rwanda, Benin and Côte d'Ivoire account for 10, 1, 4 of finalized cases

and 6, 11 and 27 of pending cases, respectively.[62] Depriving the Court from this portion of cases will therefore undermine the endeavour of the Court at large by significantly reducing its caseload, and thus losing its ability to develop its jurisprudence. That is said, the right of petition by individuals is the lifeblood for the effective operation of African Court; something vital for strengthening its authority and expanding its jurisprudence. The same assumption holds true in the case of SADC Tribunal, where it will no longer be able to rule on individual petitions when the amendment will enter into force. It is through this individual petition mechanism that human rights are given a concrete meaning. In the adjudication of individual petitions, human rights norms that may otherwise seem general and abstract are put into practical effect. In the absence of an individual complaint mechanism, the human rights norms will remain illusory, and the Court and Tribunal will be like a *toothless tiger* unable to uphold human rights protection within their respective jurisdictions.

The backlash against the EACJ court has wide-ranging implications, with a particularly notable concern being the imposition of a restrictive two-month time limit for initiating a case with the court. This temporal constraint creates a substantial barrier for individuals, potentially dissuading them from immediately challenging the actions of officials. The underlying issue is the perceived inadequacy of this time frame for the average citizen to pinpoint when a contested act has occurred. The compressed timeline may inadvertently obstruct access to justice, as it may not allow individuals enough time to gather the necessary information and assess the implications of their case (Onoria, 2010).

This limitation also places undue pressure on litigants to make hurried decisions, which can compromise the quality of their case presentations. Consequently, the implementation of such a rigid time frame introduces practical challenges and has the potential to impact the comprehensive examination of alleged wrongdoings, thereby undermining the democratic principle of holding officials accountable for their actions. Moreover, it is essential to recognise that the time limit for submitting an application to the European Court of Human Rights is four months after the final domestic judicial decision in the case, highlighting the importance of a reasonable timeframe for ensuring access to justice and thorough case preparation.[63]

Moreover, the introduction of additional grounds for the removal of judges, particularly based on allegations of misconduct or impropriety within their home country, not only raises serious concerns but also opens avenues for national governments to exert undue pressure on the judiciary, effectively punishing judges for decisions perceived as unfavourable. This is exactly what Kenya pursued in *Nyong'o* case. In essence, these amendments create a precarious situation in which governments can exploit the judicial system to serve their own interests. By alleging misconduct or impropriety, authorities can initiate investigations into judges, leading to their suspension and subsequent removal from office. This, in turn, allows for the appointment of temporary judges during the suspension period. Regrettably, this newfound power may be abused by governments seeking to replace independent-minded judges with more compliant alternatives who are inclined to safeguard the government's interests in legal proceedings (Onoria, 2010).

[62] African Court on Human and Peoples' Rights. Available at: http://www.african-court.org/en/index.php/cases (accessed on 26.07.2023).
[63] Council of Europe: Parliamentary Assembly, Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms 2021, 19 January 2013, Doc. 13093.

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In the broader context, this not only undermines the independence of the judiciary but also erodes the fundamental principles of a fair and impartial legal system. It introduces a vulnerability in which the rule of law is compromised, and the judiciary becomes susceptible to manipulation by those in power. Such a scenario poses a significant threat to the democratic fabric of a nation, as the judiciary's role as a check on executive power is compromised, and the principles of justice are jeopardised.

The denial of direct access to judicial remedies before the ACtHPR and the SADC Tribunal for African citizens carries potentially catastrophic consequences, and two crucial factors should be considered in this context.

Firstly, a considerable number of African states are widely acknowledged to have a poor record of domestic human rights protection. The continent boasts a diverse range of governmental systems, spanning from democratic states to authoritarian regimes (Repucci, n.d.).[66] Many nations are grappling with extensive human rights violations arising from persistent civil conflicts, political instability, humanitarian disasters, and so on (Faix and Jamali, 2022).[64] Democratic backsliding has become a prevalent issue in several African states (Durotoye, 2016; Hess and Aidoo, 2019; Faix and Jamali, 2022). These states rigorously uphold principles of national sovereignty and non-interference (Cole, 2010; Faix and Jamali, 2022).

Secondly, and of utmost importance, the level of judicial independence within the African continent remains notably low (Alter et al., 2016; de Wet, 2016). National courts across the continent frequently face unwarranted interference from the executive, resulting in biased decisions in their favour (Heyl, 2019). In the absence of an independent judiciary, African citizens find it impossible to obtain effective and efficient domestic remedies for alleged human rights violations. This underscores the vital role that regional and subregional courts could play in filling this gap by offering remedies to individuals alleging human rights violations by national authorities.

In the case of the South, citizens from this region would practically lose their ability to seek remedies beyond their national borders, given that none of the SADC member states accepted the jurisdiction of the ACtHPR in individual communication. The interconnected issues of poor domestic human rights protection and low judicial independence highlight the urgent need for accessible regional and sub-regional avenues for citizens to address human rights violations.

5. CONCLUDING REMARKS

This paper investigated the instance of backlash against four regional and subregional courts in Africa that exercise jurisdiction over human rights disputes. In all cases under discussion, a State subject to an adverse ruling of the court responded by questioning its legitimacy and authority and advocated for institutional reforms to weaken the fledgling human rights system in the continent. Nevertheless, the outcome of the backlash has been much more severe in the case of the SADC Tribunal and the African Court than in the other two sub-regional ones. This is largely explained by their differences in institutional settings, relative state power, the subject matter of the cases, participation of civil societies, the need to obtain consensus to modify the constituent treaty of each court, and the silence of the SADC Treaty when consensus cannot be reached to appoint the tribunal judges.

As a response to the backlash, the role of civil societies in determining the fate of backlash in the case of the ECOWAS court should serve as an example for the other

[64] 47th Activity Report of The African Commission On Human And Peoples' Rights.

courts to repeal any future attack initiated by the Member States. This strategy may also be vital for the ACtHPR to put pressure on the governments to reconsider their decisions of withdrawal from Article 34 (6) of the Founding protocol.

From a legal point of view, the ACtHPR should take a different approach on the withdrawal request of states from its additional declaration. Most of the states decided to withdraw their declarations in the aftermath of the adverse ruling of the Court in a single case. Considering that the Founding Protocol is silent on the issue of denunciation, the additional declaration pursuant to Article 34 (6) emanates from the Protocol which is subject to the law of treaties, and thus for its denunciation or termination, the provisions of Articles 54 and 56 of the Vienna Convention on the Law of Treaties (VCLT) should be applied very strictly. Consequently, denunciation or withdrawal from a treaty is only possible if it is established that the parties intended to allow this, or the ability to do so is implied by the nature of the treaty.[65] There is no evidence suggesting that the African states intended to include a possibility of denunciation or withdrawal from the founding protocol.

The decision of states to limit the jurisdiction of the ACtHPR in individual communication goes against the principle of *pacta sunt servanda,* which requires the parties to a treaty to perform their obligations in 'good faith'.[66] This assumption was held by the High Court of Tanzania in its ruling on a case where the legality and legitimacy of the country's participation led to the suspension of the SADC Tribunal by invoking the principle of 'good faith' established under the VCLT and thus held that the member states of the SADC Tribunal are required to fulfil their obligations under the SADC Treaty in good faith.[67] The African states should act in 'good faith' and therefore may not simply react to an unfavourable decision of ACtHPR by withdrawing their additional declaration, which fundamentally undermines the Court's ability to uphold human rights within its jurisdiction.

Furthermore, in December 2018, the South African Constitutional Court delivered a judgment on a case submitted by private litigants questioning the legality of the country's participation in the decision to abolish the SADC Tribunal. The Constitutional Court reaffirmed the position of the lower court and ruled that the participation of the president in the decision to suspend the SADC Tribunal and his signature of the subsequent SADC Protocol was unconstitutional, unlawful, and irrational (Erasmus, 2019).

In fact, the decisions of the Tanzanian High Court as well the South African Constitutional Court also raise fundamental questions about the legality and legitimacy of the attempt of the SADC Summit to strip the SADC Tribunal of its powers. Furthermore, it is worth to mentioning that the new Zimbabwean government has decided to revoke the Mugabe land programme and thus return the land to those farmers who had their land seized under the said scheme.[68] Taking into account that the

[65] United Nations (1969). Vienna Convention on the Law of Treaties, published on May 23, 1969. Document symbol: United Nations, Treaty Series, vol. 1155. Available at: https://www.refworld.org/docid/3ae6b3a10.html (accessed on 27.07.2023), art. 56.
[66] *Ibid*., art. 26.
[67] Case of Tanganyika Law Society versus Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania and the Attorney General of the United Republic of Tanzania. Available at: https://africanlii.org/sites/default/files/Judgment.%20TLS%20vs%20Ministry%20of%20Foreign%20Affairs%20and%20International%20Cooperation%20%26%20AG%2C%20Misc%20Civil%20Cause%20No.%2023%20of%202014._0.pdf (accessed on 22.05.2023).
[68] Zimbabwe to return land seized from foreign farmers. In: BBC News, published on September 1, 2020. Available at: https://www.bbc.com/news/world-africa-53988788 (accessed on 22.07.2023).

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amendment has not entered into force yet, all these developments can in turn generate some political leverage for civil society when lobbying and pressuring governments for reinstating the SADC Tribunal as a vital judicial player in the southern part of Africa.

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OVERVIEW OF THE CHURCH'S PROPERTY LAW IN THE CZECH LANDS DURING THE MIDDLE AGES / Pavel Krafl

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Abstract: *Aim of the study is to provide an overview of the issue of Church property law in Bohemia and Moravia during the Middle Ages. Specifically, we consider the territory of the Prague and Olomouc dioceses. The main founder of churches and ecclesiastical institutions in the early Middle Ages was the duke, while from the 12th century magnates also became involved in founding these institutions. In the early period of founders, the property donated to the Church was treated in the spirit of respecting the rights of the proprietary churches. The law of patronage, which was progressively implemented during the 13th century and first half of the 14th century, brought change. In order to exclude the assets of ecclesiastical institutions, including the serfs who lived there, from the general legal system, immunities were important. Bishoprics and individual monasteries received immunity documents from the mid-12th century, and to a greater extent from the early 13th century.*

Key words: *Medieval Canon Law; Church's Property Law; Immunity of Ecclesiastical Estates; Bohemia and Moravia.*

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1. INTRODUCTION

In the Middle Ages, church property, that is to say the assets of the Church, comprised property which belonged to public church entities. One mark of church property was the purpose for which it was designed, i.e., the holding of church services, the support of clergy and other persons active within the Church, and for pastoral and charity activities. According to institutional theory, the property belonged to individual church entities (Hrdina, 2002, pp. 311–313). Church institutions acquired property through pious legacies to the church such as immovable property, and also through revenue arising from these. Church institutions were also able to acquire a small amount of income through easements. Some Church officials and authorities may also have received income through fees and fines. We also come across fief law in regard to Church property. Property was alienated through the sale, pledge, and confiscation of property by secular authorities. Our aim is to provide an overview of the issue of Church property law in the Czech lands during the Middle Ages. Specifically, we consider the territory of the Prague and Olomouc dioceses, which were part of the Mainz ecclesiastical province. In 1344, the bishopric of Prague was elevated to an archbishopric, with the Archdiocese of Prague, the Diocese of Olomouc, and the newly-established Diocese of Litomyšl comprising the Prague ecclesiastical province.

The basic edition of documents from Bohemia and Moravia is the *Codex diplomaticus et epistolaris regni Bohemiae* (CDB), which now goes back to 1283. The Moravian *Codex diplomaticus* (CDM), which ends in 1411, can also be used. Also important is the regesta of documents on Bohemian and Moravian history, *Regesta diplomatica nec non epistolaria Bohemiae et Moraviae* (RBM), which currently covers the period to 1369. This edition is followed by the regesta catalogue for the period of Wenceslas IV, i.e., for the years 1378–1419 (RBMV). The Vatican's *Monumenta* (MVB; Eršil, 1980), which includes documents from 1305–1431, holds an important place in the history of ecclesiastical law in the Czech Lands. The edition of the Moravian Land Tables, set up by the noble provincial court for registering the ownership of allodial properties, was edited by Josef Chytil (Chytil, 1856a, 1856b). Josef Emler undertook a reconstruction of the Bohemian Land Tables, which are not extant (Emler, 1870–1872). Statutes published by bishops are significant in regard to property law – in particular, in terms of the law of patronage and affairs related to the alienation of property. Legatine statutes, provincial statutes, diocesan statutes, and synodal protocols of the Prague (arch)bishops up to the Hussite Revolution were compiled in editions by Rostislav Zelený, Jaroslav Kadlec, Jaroslav V. Polc, and Zdeňka Hledíková (Polc and Hledíková, 2002). Pavel Krafl edited the diocesan statutes of the Bishops of Olomouc (Krafl, 2014). Of the official editions of the books of the Archbishopric of Prague, one should note the confirmation books of 1354–1419, published by František Antonín Tingl and Josef Emler (Tingl and Emler, 1867–1886), and the erection books of 1358–1407, published by Kliment Borový and Antonín Podlaha (Borový, Podlaha, Pelikán and Pátková, 1875–2002). The papers of the Vicars General of the Prague Archbishopric from the period after 1379 contain numerous records on disputes over benefices and patronage law. These books were edited by Ferdinand Tadra (Tadra, 1893–1901). The Bishopric of Olomouc books of fiefs are available in Karel Lechner's publication (Lechner, 1902). The urbaria of Church institutions were the subject of a work put together by Josef Emler (Emler, 1881). The urbarium of the monastery of Canons Regular of St Augustine in Třeboň was edited by Adolf Ludvík Krejčík (Krejčík, 1949). The urbaria of the Cistercian monastery in Žďár nad Sázavou from the 15th century were published by Metoděj Zemek and Josef Pohanka (Zemek and Pohanka, 1961). Miroslav Černý prepared the edition of a tract which was produced by the ecclesiastical lawyer Kuneš of Třebovle on the orders of the Archbishop of Prague, Jan of Jenštejn. The tract looks at the escheat of rural farms in the estates of the Archbishopric of Prague (Černý, 1988; 1999, pp. 136–153).

2. ACQUISITION OF PROPERTY

Bořivoj I, Duke of Bohemia, had the first church in Bohemia built in Levý Hradec, and the Church of the Virgin Mary built at Prague Castle. Some of the first churches built by his successors included, for example, St Peter's rotunda in Budeč, St George's Basilica and St Vitus's rotunda at Prague Castle, and St Peter's rotunda in Starý Plzenec. The Benedictine monasteries of St George at Prague Castle, Břevnov, and Ostrov were founded (Merhautová, 2006, pp. 154–157). The churches which were set up at the dukes' castle seats around the country had parish rights. A group of priests worked there, headed by an archpriest, who were appointed by the duke or castle governor (Bláhová, Frolík and Profantová, 1999, p. 363). In the second half of the 11th century, magnates began setting up churches on their estates, with larger numbers of village churches established in the 12th century. These remained chapels without parish rights for the meantime. During the second half of the 12th century, these rural churches gradually gained independence (Kadlec, 1991, pp. 90–91; Bláhová, Frolík and Profantová, 1999, pp.

425, 540; Pauk, 2000, pp. 37–44, 184–185) with the borders of parishes becoming stable in the 13th century. The borders of parishes became fixed as the network of villages and towns was formed, i.e. settlements became concentrated. One of the conditions for the establishment of a parish, and thus for a chapel to become a parish church, was the availability of sufficient benefices, including an income for the parish priest, allowing him to maintain the church and hold services. Formally, the diocesan bishop made the decision on establishing a parish church (Hledíková, 2007, pp. 24–26).

In the early period, the relationship between the church founder and the church was set up along the lines of a proprietary system. Churches which were set up were owned by their founder, i.e. the duke. This arose from the idea that anything that stands on the territory of the owner is the property of the owner, including churches and monasteries. A church and its income represented a specific type of asset for the founder, whether sovereign or nobleman, and it was private property. The owner actually appointed a priest to the church, and demanded a part of the church's income, including the inheritance of the priest. If a church was unoccupied, all its income went to the owner. The founder even had ownership rights to the revenues of monasteries. Monasteries were required to provide the duke with accommodation and hospitality (Kadlec, 1991, pp. 85–87, 92; Bláhová, Frolík and Profantová, 1999, pp. 361–362, 364, 425).

Until the early 12th century, monasteries in Bohemia and Moravia were set up by the Czech duke and members of the ruling dynasty (e.g. the Olomouc, Brno and Znojmo princes). The hermit, St Prokopius, founded the Sázava monastery in the first third of the 12th century. Beginning in the 12th century, magnates also established new monasteries, their donations adding to the previous dukes' and princes' foundations. Beginning in the 13th century, it was mainly the King of Bohemia and members of the royal family, including the Margraves of Moravia and members of the high nobility, who were behind most foundations. In the 14th century, bishops also founded new monasteries.[1] Under Charles IV (1346–1378), the King of Bohemia and also the Roman Emperor, the newly founded institutions were also integrated into the emperor and king's broader political conceptions, and in some cases we can see that foundations were not accompanied by large property subsidies or the consistent interest of the monarch. King Wenceslas IV (1378–1419) ended the Bohemian king's involvement in the foundation of such properties, and did not establish even a single Church institution (Hledíková, 1982, pp. 6–7, 32–34; 2010, pp. 108, 136–137).

One of the oldest methods by which pious foundations were set up was by donation to God and the saints. Thus, the owner surrendered their property to a mystical subject. Another older way of making a donation with pious intention was dedication. The monastic community received the property for use, but were not the owner. A benefaction for pious purposes, i.e. gifted people and property, was given the ancient Czech term, *záduší* (*fabrica ecclesiae* in Latin) (Vaněček, 1933, pp. 25–28, 34, 39). The disposition of the founders and their foundations suggested a similarity with ownership. The founder applied the right of care. Founders' rights had their roots in a special tax which monasteries paid to the monarch. It was applied from the era of Wenceslas II (1283–1305) (Vaněček, 1933, pp. 51, 56–57, 71–73; Borovský, 2005, pp. 105–132). Newly

[1] The foundation of monasteries according to individual time periods and orders is given in the map in *Akademický atlas českých dějin* (Krafl and Šimůnek, 2014). – On foundation activities to the end of the 12th century, see Pauk, 2000, p. 45–57; on the foundation activities of major noble families at the end of the 12th century and in the 13th century, see ibidem, p. 59–178. Royal foundations of the 14th century are discussed in the study Hledíková, 1982; reprint in: Hledíková, 2010, p. 106–162; recently Bláhová, 2007. For monasteries in Moravia in the 13th and 14th century other than those founded by the king, see Borovský, 2004.

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elected abbots paid the monarch a fee, which was called *ostrožné* (Ryba, 1997). In regard to rights of care, their keepers applied lordship rights over monastic subjects in the post-Hussite period (Vaněček, 1937, pp. 50–56).

Church institutions gradually acquired immunity, i.e. exemption for estates and people, e.g. the serfs settled within these estates, from the powers of the duke and his officials. The immunity documents issued by the Duke or King of Bohemia for specific Church institutions progressively changed. They differed from each other in terms of the content, which gradually expanded until it affected a greater range of rights such as royal privileged rights (*regály*), obligations, and jurisdictions. We differentiate between economic immunity and judicial immunity (Janiš, 2013, p. 157). Economic immunity affected work (corvée) and wages and taxes. In terms of work, this included armed service, corvée at royal fortresses, the felling of trees in the forest (*přeseky*), and work on paths and bridges, for which ducal duties were collected. Wages included cuts (*nářez*) and fees (*poplatek*). This also included the ancient obligation to host and sustain the duke and his people as he travelled across the country. The monastery might obtain escheat immunity, in which the founder waived his rights to rural escheat. Rarely, monasteries were able to receive tax immunity, more frequently receiving customs immunity. The great privilege of 1222 and the privilege of 1253 were efforts to generally regulate the issue of economic immunity (Vaněček 1937, pp. 89–97, 104–106, 113, 117–125). Judicial immunity was contained within the royal privileges of 1221 and 1222. This led to the Prague diocese becoming exempt from the jurisdiction of the old ducal (afterwards royal) castle courts. Also important was the restoration and expansion of privileges for the Prague Bishopric in 1289. In the second half of the 13th century, monasteries received full jurisdiction over their serfs in criminal matters (Vaněček, 1928, pp. 45–50, 57; 1939, p. 51). Until the second half of the 13th century, there was no broad prosecution of serfs in Moravia, however, as the privileges of 1221 and 1222 did not apply here. Monasteries received exclusive immunity documents in Moravia from the mid-13th century. Around the mid-14th century, procedural immunity disappeared, losing its importance as a result of the strengthening of the courts of manorial lords (Vaněček, 1931, pp. 30, 38, 42).

The Olomouc Bishopric received the first immunity document in 1144. The generally worded document applied to the castle of Podivín, with all the people of the bishopric exempted from the powers of all persons with rank or status. This was followed by a document from 1146–1148 issued by Vladislav II (1140–1172), who exempted the people of the bishopric from the power of the Moravian princes and their heirs, and exempted them from taxes, fees, and land corvée. By the end of the 12th century, the Premonstratensian monastery in Hradisko, Olomouc (1160), the Benedictine monastery in Kladruby (1177), and the collegiate chapter in Vyšehrad (1187) had received immunity privileges with a limited number of specific prerogatives (Janiš, 2013, pp. 157–159; Vaněček, 1937, pp. 77–78).

The number of immunity documents increased from the early 13th century. The monastery in Hradisko, Olomouc, received immunity privileges as early as 1201, the Olomouc Bishopric did so in 1207, and this was followed by other Church institutions. In 1221, Přemysl Ottokar I, King of Bohemia (1197–1230), restored privilege for the Prague Bishopric, where the king granted all freedoms, and also waived all enforcement and harassment placed on it, as well as general tax. A year later, Přemysl Ottokar I issued privileges for all monasteries and chapters of the Diocese of Prague. These received the same privileges as the Prague Bishopric before them. A number of religious orders also received privileges for their property: the Order of Saint John from Vladislav Henry, Margrave of Moravia (1197–1222) in 1213, and the Teutonic Order in 1222 from King Přemysl Ottokar I. (Janiš, 2013, pp. 159–164).

Immunity documents written in line with a single form were issued to the Cistercian nuns monastery in Oslavany, the Cistercian monastery in Velehrad (1228), and the Premonstratensian monastery in Hradisko near Olomouc (1233, 1234), and the latter monastery also received privilege combining passages from the Oslavany-Velehrad form and passages from the privilege for the Bishopric of Olomouc of 1207. The Velehrad immunity document has its roots in the immunity privilege for the Bishopric of Olomouc of 1207, and, through that, in the immunity document of 1146–1147. The Oslavany-Velehrad form also influenced the privilege for the Premonstrate monastery in Louka near Znojmo and the monastery in Rajhrad near Brno (both 1234). The influence of the Olomouc form was also seen in the privilege for the Cistercian nuns in Předklášteří near Tišnov (1234) and for the monastery in Doubravník (1235) (Vaněček, 1931, pp. 44–47; Janiš, 2013, pp. 164–168). Church institutions, especially monasteries, sometimes acquired counterfeit immunity documents in order to secure property and rights against secular powers.[2]

Regular and secular Church institutions were the largest receivers of monarchs' confirmation documents. In Moravia between 1310 and 1411, for example, of a total of 1735 confirmations for Moravian receivers, 35% were issued for monasteries and 10.5% for secular Church institutions, in particular the Olomouc Bishopric. Those most active in their endeavours at securing confirmation of their privileges were the Cistercian and Poor Clare monasteries, followed by the Benedictines and Premonstrates (Martínková, 2003, pp. 15–17, 138, table pp. 217–224). The Pope was able to issue a protection document for a monastery, in which the monks and their property were under the protection of St Peter and the Holy See. These could include a list of specific assets (Hruboň, 2017, pp. 141–143).

The Cistercian monasteries were amongst the largest owners of land. The largest landowner within this order in Bohemia was the monastery of Zlatá Koruna, which acquired a hundred and fifty villages through extensive colonisation. The monasteries in Hradiště nad Jizerou, Pomuk, Plasy and Vyšší Brod had between seventy and ninety villages. The monasteries in Sedlec, Zbraslav and Osek had around fifty villages. The smallest domains, with around ten villages, were those of the monasteries in Svaté Pole and Skalice (Charvátová, 2013, p. 338).

The economics of a monastery and its administration traditionally comprised two units: a large rental estate, the village of its serfs, and a managed estate, meaning the manorial farm yard with its associated farmland. In the Cistercian order, farming on this managed estate did not just involve traditional farms, but also included monastic granges, which were like large farming centres, which farmed on consolidated land. The granges were mainly farmed by lay-brothers, alongside paid labourers. Granges were typical for the Order of Cistercians, and while they are assumed to have existed in Bohemia, there is no direct evidence of their existence there, with one exception. That exception is the grange of the Plasy Monastery in Kaznějov. The grange was headed by an administrator known as a grangiarius. Eventually, the system of granges was abandoned, and they were transformed into traditional villages (Charvátová, 2013, pp. 333, 339–341).

The 13th century and first third of the 14th century were marked by an increase in donations to existing Church institutions, meaning an expansion of monastic property and a broader spectrum of protection holders in addition to the main founder (or his heirs). Some property, in particular that of noblemen's foundations, found itself under the

[2] On dubious and couterfeit charters, see Hrubý, 1936, p. 73–165. List of counterfeits professing to be from the 11th and 12th centuries is given in the table Pauk, 2000, pp. 250–258.

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protection of a number of noblemen, who collected a salary for their protection. The overarching protection from the King of Bohemia, often the main protection holder, was able to secure the monastery with the surest legal guarantees of property tenure. By the 13th century, the king had concentrated the founders' rights for most monasteries in Moravia in himself (Borovský, 2005, pp. 70–72).

The Bohemian King Charles IV endeavoured to ensure that large monasteries which held a large amount of land became a part of the royal, or margravial, domain. He aimed to suppress the founders' rights (protection, repair) of the noblemen who founded the institutions, or who had donated parts of estates. In his proposed code for Bohemia, Maiestas Carolina, Charles IV attempted make all monasteries and all estates subordinate to the Bohemian King. He managed to get all large monasteries in Moravia in the 1350s to come under the Margravial chamber. The monarch's tool here was to transfer the monastery to his own protection, as was the case, for example, with the Oslavany monastery (Borovský, 2005, pp. 74, 76, 80–81).[3] In 1362, the Margrave of Moravia, John Henry (1349–1375) issued a series of documents with the same wording, which set up eleven chamber monasteries. These did not represent a general law, but rather customary privileges addressed to the individual monasteries. The margrave made the monasteries subordinated to his chamber, whom they were to exclusively turn to in the event of disputes (Borovský, 2005, p. 81). In the post-Hussite period, the repair of some monasteries was transferred to the nobility, sometimes to a royal city. This first occurred in the 1440s in regard to the Žďár nad Sázavou monastery, with repairs taken over by the Lords of Kunštát. The repair rights of half of the royal monasteries in Moravia were transferred to the nobility under the reigns of George of Poděbrady (1458–1471), Matthias Corvinus (1469–1490), and Vladislav II (1471–1516) (Borovský, 2005, pp. 207–224).

If a Church institution acquired allodial property, i.e. free or "table" estates, through purchase or gift, the previous owner was required to ensure that the acquirer of the property was entered in the Land Tables (*tabulae terrae*), this registration undertaken at a meeting of the provincial court (Janiš, 2013, p. 144). This ensured that the property rights of the Church institution to the newly acquired allodial property in terms of land law would be respected. For the provincial court, it was the entry in the Land Tables which was relevant in any dispute over ownership, not the deed for a particular estate.

A standard component of the document by which the allodial property was sold by a member of the nobility was an obligation to ensure that the new owner of the property would be entered in the Land Tables at the next meeting of the provincial court. Compliance with this obligation could be enforced by the legal institute of obstagium, according to which the purchaser was able to call upon the seller to stay with his people and horses at an honourable inn in a selected city at his own expense until the situation was remedied (Čáda, 1922, pp. 28–29; Vaněček, 1975, pp. 193–194; Lojek, 2016, pp. 449–450). The transfer of the property was undertaken through a circuit (*circuitio*), which referred to the ritual circumnavigation of the borders of the acquired property for its legal determination (bordering).[4]

The provincial court in Bohemia held the Land Tables for records of the allodial property of the nobility from the era of Přemysl Ottokar II (1253–1278), specifically from

[3] Before this on the special protection of the sovereign, see Vaněček, 1938, p. 18–31, on Oslavany p. 28–29.
[4] An example from within the Church is given in Razim, 2022, pp. 52–59 (determining circuits in the event of the sale of the village by Ojíř of Lomnice to the monastery in Waldsassen in 1287). On the participants in boundary setting, ibid. pp. 103–126.

1260–1278, although these were burnt in a fire at Prague Castle in 1541.[5] In Moravia, Land Tables were kept from 1348, separately at the Olomouc regional court and at the Brno regional court (Chytil, 1856a; 1856b). The extant continuous market volumes contain records of the property bought by monasteries, with more frequent records of property donated to the monasteries. An example of the former is the purchase of a meadow by the Cistercian monastery in Staré Brno, which was entered in the land tables at a meeting of the Brno provincial court on 3 July 1349. An example of the latter would be a record of the assets donated by the Margrave of Moravia John Henry to the Augustinian monastery located behind the walls of the city of Brno, and the newly founded Carthusian monastery in Královo Pole, listed at a meeting of the Brno provincial court on 19 January 1376 (Chytil, 1856a, p. 9, no. 157; p. 121, no. 389 and 390).

The Prague Archbishopric office kept erection books (*Libri erectionum*) between 1358 and 1419, into which it recorded documents on donations. The agenda was in the hands of the vicars general. Seven of the eleven extant erection books have been published. At the turn of 1398, the original single chronological row within the erection books was divided up into two parallel rows. Most entries are for 1405–1412 (Hledíková, 1994, pp. 252–253). From 1384, the erection books and judicial books of the vicars general were kept in one department or office, with the erection books and judicial books being written by the same scribe, and this resulted in both books influencing each other. We can find court records in the erection books, which should be in the judicial books. They moved away from the original form, in which documents were copied word-for-word into them. Instead, there were increasingly objectively formulated records, maintaining only the directives of documents (*dispositio*). From a substantive perspective, they were no longer about the actual erection of benefices, but rather donations to one of the existing benefices (Hledíková, 1966, pp. 169–170).

A wave of the founding of altar benefices usually followed once a broad network of parish churches had been formed. Within the Diocese of Prague, this began to be seen from the turn of 14th century – to begin with, mainly at the Prague cathedral church and other churches founded by the bishop, members of the ruling dynasty, and persons close to them. Gradually, donations of altar benefices were also seen in parish churches, especially in towns and cities or where there was a wealthy patron. From the mid-14th century, the number of gifts given by less wealthy and poorer noblemen and burghers increased. This was a manifestation of intense piety and endeavours at securing a good afterlife for the benefactor and family members, and, last but not least, evidence of the donor's prestige. Such donations mostly involved the gifting of a permanent salary ranging from a few groschen to many tens of threescore of groschen, and to a lesser extent, the donation of fields, meadows, forests, a house, or part of a watercourse. In some cases, they involved semi-donations, in which the Church institutions purchased a salary for a sum significantly below the standard price, representing ten times the annual interest. Donators requested services from the priest in the form of anniversaries – Church services on the anniversary of their date of death, or else a few days afterwards. Gifts dedicated to the alter benefices in Bohemia in the pre-Hussite era reached a peak in the period from 1406 to 1410, with between sixty and seventy donations annually (Hledíková, 1994, pp. 251, 253–255, 258).[6]

With the city conditions of Prague's Old Town, the largest number of altar benefices demonstrably set up by burghers was concentrated within the main parish

[5] Josef Emler provided a reconstruction of market tables on the basis of extant documents, official extracts, court findings, and records of diet resolutions, see Emler, 1870, pp. 397–606; 1872.
[6] For the study of the foundation of altar benefices, erection books were used, e.g. in Adámek, 2002.

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churches located directly on the square or nearby. The parish Church of Our Lady before Týn could boast the largest number, with twenty-four altar foundations. The burgher founders were also the church's parishioners. We can find altar benefices set up solely by burghers in parish churches with a burgher or Church patron. Where churches had a royal patron, the nobility or court noblemen directly played a role alongside burghers. In Prague's New Town and Prague's Lesser Town, the foundation of alter benefices was less frequent compared to the Old Town (Hledíková, 1984a, pp. 122, 124, 126).

During the period of George of Poděbrady's rule, most donations were recorded in the administrators' official book marked VI 6, with a smaller number in the book marked VI 5. Almost a hundred donations are recorded (Mařík, 1984, p. 134). Donations to Church institutions are also evidenced from the Jagiellonian period, specifically to altars and churches. These are recorded in the official books of the Archbishopric of Prague administrators – in particular, the book marked VI 8, and to a lesser extent, book VI 11. The donators went to the administrators with extracts from the Land Tables so that they could amend them to include the donation. The files contain a record that the donator arrived at the office, with the wording of the extracts from the Land Tables (Macháčková, 1985, p. 241).

Sometimes a parish church was incorporated into a monastery (or another Church institution). This involved incorporating the parish prebend into the monastery. A precondition for incorporation was the possession of the right of patronage over the church in question, this patronage right having been previously acquired by the monastery or other institution by donation. The office of the priest was transferred to the monastery, which became the direct owner of the property associated with the benefice. Following this, there was a vicar working at the church, not a parson. There were two types of relevant incorporations – specifically, *incorporatio in usus proprios,* which involved the requirement to present the vicar of the church to the bishop, and *incorporatio in usus proprios et pleno iure,* which involved the right to directly appoint and dismiss the vicar without the requirement to present him to the bishop. Upon the request of the monastery or other Church institution, the incorporation could be undertaken by the diocesan bishop or the Pope, although mostly it was an incorporation based on the decision of the Pope. It usually occurred in connection with the full enforcement of the law of patronage (Hinschius, 1873; Scharnagl, 1936; Lindner, 1951; Plöchl, 1961, pp. 419–422).[7]

The institution of the incorporation of churches was reflected in the Würzburg legatine statutes of 1287, which reminded monastery superiors that suitable vicars should secure spiritual care for incorporated churches. Before the law of patronage and the canon law form of incorporation was enforced, monasteries occasionally received a parish church as a gift from the aristocratic owner. An example of this is the gift of the parish church in Rožmberk to the monastery in Vyšší Brod, made by Hedvika, widow of the Vok of Rožmberk, with the consent of their sons Jindřich and Vítek or Rožmberk, and then again in 1278 by Jindřich of Rožmberk. In 1271, Hedvika's gift was affirmed by Bishop Jan III of Prague (1258–1278). It is also evidence of the application of the ownership rights of churches (CDB V/2, no. 645, p. 272; CDB VI/1, no. 21, pp. 63–64; no. 82, pp. 137–138). The correction and negation of this act in the spirit of canon law is the confirmation of the transfer of the law of patronage (!) to the monastery in 1290 made by

[7] On the incorporation within Bohemia using the example of monasteries of Canons Regular of St Augustine, see Krafl, 2010a; Krafl, Mutlová and Stehlíková, 2010, pp. 43–47; Krafl, 2018a, pp. 43–47; on the example of Cistercian nuns, see Krafl, 2010b, p. 463; Krafl, 2001, pp. 209–210; for administrators of the Cistercian incorporated churches, see Foltýn, 2000, pp. 87–91.

Bishop Tobiáš of Benešov (1279–1296), who had a more developed legal awareness (Pangerl, 1865, no. 35, pp. 39–40; RBM II., no. 1495, p. 644. Krafl 2021b, pp. 14–15; Krafl, 2021a, pp. 28–29; Šebánek, 1956, pp. 83–84).

Within the Church context, proof of the application of profit à rendre was the so-called "iron cows". This legal institute meant that the holder of the property was required to give the owner wages for cattle, often a pound of wax per cow. The holder was personally and permanently responsible for the cattle. This was used to resolve the pious legacy of the Church in villages in a number of cases (Adamová, 1972, pp. 139–141; 2021, pp. 527–528). We know of two lists of iron cow feepayers from the early 15th century for the church in Milotice, Kyjov. They are extant in inscriptions in an older missal, compiled before this in 1341 by a local priest, Heřman, which is today found in the library of the Chapter of Olomouc. One of the lists gives information on twenty-three cows leased by seventeen parishioners; another notes thirty cows leased by twenty-seven parishioners (Bistřický, 1961, pp. 34–35). The Cerekvice urbarium of 1400 also includes a list of so-called "iron cow" feepayers (Nový, 1962, p. 139).

3. ON PROPERTY MANAGEMENT

All parishes, chapters and archdeaconries were organised as a *beneficium* or *prebend*. This involved life-long financial security based on the holding of the lent estate and property with the purpose of fulfilling official and administrative duties (Hledíková, 1977, p. 62; 2010, p. 331).

The church's material provisions comprised the assets of the parish, i.e., the benefice, which included the assets meant to cover the prebend – held by the parson in the case of a parish. The second component of the church's assets was its fabric (*fabrica ecclesiae*), which was a foundation used for religious purposes. Its revenue was used to look after the church building and church equipment, and whatever was needed for services and sacramental acts, spiritual care, and for performing duties determined by the patron or partial donor, such as requiems, prayers, and maintaining an eternal light. If it was in regard to a hospital, it was designated for looking after the poor or for another pious objective. The fabrica ecclesiae and prebends developed from the originally undifferentiated dowry of the church (*dos*). For the 14th century, we can now reliably determine the demarcation between these two parts of the church's material provisions. The lay administrator of the fabric assets was the sacristan (*vitricus ecclesiae, magister cechae*) (Zilynská, 1998; Nový, 1962, pp. 154–155).

While in monasteries the monks collectively used the revenues of the monastery's estates and salaries, in cathedral or collegiate chapters the assets were divided up across individual canonical benefices. Benefices were part of the chapter, and the canon was the user of the assets, but was so with the consent of the chapter. Thus, the chapter operated a limited joint economic policy, in contrast to monasteries, where monks were able to make joint decisions. This division of assets in chapters occurred during the 12th and 13th centuries; in earlier chapter periods, the chapter's assets were shared. To begin with, the income for the provost was taken out of the chapter's assets. In setting up a new canonry in an earlier period, its link to an incorporated church was used as security, while, exceptionally, a benefice was set up as a new foundation (Pátrová, 2008, pp. 506–507, 532).

In the first phase of its existence, Prague's cathedral chapter also followed the rules of shared living and had collective assets. The administrator of the chapter's assets was the provost. Following reorganisation of the chapter in 1068, its salaries, representing an entire quarter of all the chapter's incomes, were separated from the

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salaries of other canons. The remaining three quarters of the chapter's income was divided up amongst the other canons. A lack of sources means we cannot determine the time when the property of the bishop was separated from the property of the chapter, but the 12th century and first half of the 13th century are considered likely. It is similarly unclear when separate assets of individual canon benefices emerged, though they evidently emerged during the 13th century and early 14th century (Maříková, 2011, pp. 103–104).

The Prague chapter statutes of 1350 attribute competence regarding assets not just to the provost as the main representative, but also to the dean. The dean was responsible for reviewing assets, keeping a list of incomes and movable assets for altars, and administrating vacant chapter benefices. He was able to make independent decisions on expenditure up to a sum of one threescore. The canons administered the estates and incomes related to their benefices entirely independently. They discussed changes to assets, but their right of disposal was restricted in certain cases, requiring chapter consent. Besides immovable assets, individual canon benefits also included permanent salaries, chimney tax (*fumales*), and sometimes the right of patronage over the local church. In addition to this, there were the chapter's shared assets (*mensa communis*). These were mainly villages known as "obedience", whose management was undertaken by individual canons on the decision of the chapter (*oboedientiarius*). Various payments going to the shared treasury comprised the other part of the shared assets (Maříková, 2011, pp. 105–107, 111–113, 116).

The cathedral church's church treasury with its valuables was subject to attack during unstable periods. For example, during the period of Otto of Brandenburg's rule in Bohemia after the death of King Přemysl Ottokar II, the Prague cathedral church treasury was robbed in 1279 by Otto's servants (Podlaha and Šittler, 1903, p. 9). When they left for exile at the beginning of the Hussite Revolution, the Prague Cathedral Chapter had the Prague church's valuable assets moved out of Prague, in particular its church treasury. The valuables were spread out and kept at fortified sites, such as Karlštejn Castle, and the fortified Celestine monastery at Oybin, near Žitava (Zittau today). A number of relics, statues, crosses, monstrances, chalices, bishop's and canon's crosiers, and other small valuables were transferred to Karlštejn at the end of July 1420. Some of the objects, including the monstrances and other silver and gold artefacts, were used by castle garrisons to pay for their costs in 1425. In April 1420, the cathedral sacristan Racek of Bířkov transferred three sealed chests to Oybin on the orders of King Sigismund of Luxembourg (1420–1437) and the superiors of the Prague Cathedral Chapter. The treasure was carried under the armed escort of Hynek Lupáč of Dubá. Sacristan Ondřej attempted to look after the remaining artefacts which stayed in the Prague cathedral church (Podlaha and Šittler, 1903, pp. 84–86; Vodička, 2017, pp. 162–164).[8]

In addition to other documents, the tax register of Archbishopric goods of 1379 and the Archbishopric urbarium of the final decade of the 14th century allow for reconstruction of the land tenure of the Prague Archbishopric, albeit an incomplete one. In terms of the territorial spread of the archbishopric estates, they were located along the main routes out of Prague to the fringes of the country. They were used by the archbishop when travelling across the archdiocese. During the time of Bishop Tobiáš of Benešov, there were attempts at strengthening the territory so that they would be able to defend it in the event of the weakening of royal power. The largest bishopric estates were found in the south-east of the country. During the struggle between King Wenceslas II and Záviš of Falkenštejn and his allies, the bishopric estates in the Pelhřimov, Chýnov and Štěpánov

[8] The content of the St Vitus treasury for the medieval period is also recorded in a large number of inventories from 1354–1512 (Podlaha and Šittler, 1903, p. I–C).

districts in particular were attacked. Archbishopric assets were used to secure the foundation of a number of monasteries of the Canons Regular of St Augustine (Boháč, 1979, pp. 165–167, 169–171, 176–178).

Different administrative districts of the archbishopric estates were governed by burgraves. In regions with a greater concentration of estates, such as the Pelhřimov region, there were a number of burgraves, based in major economic centres. The burgraves looked after the running of the economy in their assigned district and ensured the due payment of financial interests, benefits-in-kind, and corvée labour. Alongside village iudex and constable, they exercised lower judicial power. It was the archbishopric subchamber which had supreme judicial power over serfs. The bailiff (*vilicus, procurator*) was responsible for administering manorial courts. Castle scribes assisted the burgrave. There were guards protecting the castles, and other people serving at the castle were birdcatchers, fishermen, bee-keepers, cooks, and barbers. Forests were managed by foresters and gamekeepers. Officers from the category of unaristocratic holders of fief ("nápravník") to protect the manor were introduced, and they were equipped with a spear or crossbow and wore a helmet or were on horseback. Near the castle was a farmyard, where serfs took the grain harvested from the lord's fields, the hay from meadows, and the wood from forests. Money and benefits in kind from serfs were supplied to the castle by serfs. Even in remote parts of administrative districts there were noble courts where there were a few areas of the lord's fields and fishponds (Boháč, 1979, pp. 180–181).

A register of the property of the Olomouc bishopric is provided by the deed of Jindřich Zdík from 1131. It includes an inventory of two hundred and five villages. One hundred and twelve documents document the extent and character of the holdings of the Olomouc bishopric for the period up to 1281. Documents from the time of Bruno of Schamburg mention one hundred and sixty-six localities in which there were larger or smaller estates owned by the Olomouc bishopric. Some of them are known from the previous period (Hrabová, 1964, pp. 15, 38, 39).

The significance of landed property in the Middle Ages was not seen in ownership itself, but rather in the benefits which arose from it (interest). An example of the application of ownership rights over villages or their parts by Church authorities is the collection of taxes from serfs. Details on these taxes arising from assets are recorded in urbaria. We differentiate between two types of urbaria – urbaria in the form of a list of taxes paid and urbaria in the form of an account. The former provides the total number of fields, taxes collected, and sometimes also other sources of income, while the latter gives the number of holders of farms, their names, the size of their fields, the taxes determined, and summaries for individual villages. These types were not clearly differentiated, however, and they were sometimes added to, always depending on the scribe's individual approach. Simply the creation of a written list of taxes is evidence of a change in the organisation and running of the manor. A detailed list allowed for better control over the collection of taxes (Nový, 1962, pp. 186–187).[9]

The oldest extant urbarium is evidently the urbarium of the Cistercian monastery in Vyšší Brod from the end of the 1270s (Čechura, 1986b, pp. 5–26). There is a fragment

[9] For a commentary on urbaria with a list of them in an appendix, see Graus, 1957, p. 317–356. – A number of ecclesiastical institutions' urbaria are summarised in the edition by Emler, 1881. These are the urbarium of the Prague Bishopric, p. 1–3; urbarial records of the monastery in Roudnice nad Labem, p. 4–19; a fragment of the urbarium of the monastery in Pohled, p. 20–22; the urbarium of the monastery in Chotěšov, p. 23–52; the urbarium of the monastery in Ostrov, p. 53–91; the urbarium of the Prague Archbishopric, p. 92–150; the urbarium for the monastery in Břevnov, p. 151–218; the urbarium of the monastery in Strahov, p. 219–301; the urbarium for the provost of the Prague church, p. 302–308; the urbarium of the monastery in Zbraslav, p. 309–312.

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of the Prague Bishopric urbarium from 1283–1284, which already shows that monetary taxes predominated over benefits-in-kind, with the smallest part comprising corvée labour (Nový, 1960, pp. 210–227; Graus, 1957, pp. 327–328). The urbarium of the Cistercian monastery in Pohled near Havlíčkův Brod dates back to 1327–1329. It contains information on the size of land plots and the duties of each fee-payer in the village (Nový, 1965, pp. 49–50, 53–55).

During the 1340s, urbaria were produced in other Cistercian monasteries. A number of records of an urbarial nature from this period are contained in the Codex Damascus of the Cistercian monastery in Osek (Nový, 1965, pp. 19–22, 29–31, 56–59). An extract from the urbarium of the Cistercian monastery in Zbraslav appears to have been produced in 1343. It takes the form of a list of villages with a determination of their affinity to specific monasterial farmyards (Nový, 1965, pp. 42–46; Graus, 1957, p. 329). A fraction of the urbarium of the Cistercian monastery in Sedlec from the period around 1340 is also extant. The urbarium contains the sizes of the individual farms of serfs. It shows mainly monetary payments, and to a limited extent also benefits-in-kind. It is comparable to Osek monastery's second urbarium from 1390, although the Osek urbarium is more detailed (Nový, 1965, pp. 46–48, 55).

Urbarial records for the years 1341–1407 are extant for the monastery of Canons Regular of St Augustine in Roudnice nad Labem (Nový, 1965, pp. 33–38; Graus, 1957, pp. 328–329), with another urbarium of the order dating back to 1378 for the canonry in Třeboň (Krejčík, 1949, pp. I–III, IX–XXI, 3–10). The urbarium for the Premonstrate monastery in Chotěšov of 1367 comprises two parts, with the first part written in Latin, and the second in Czech. There are extant only copies of this urbarium (Graus, 1957, pp. 329–330; Haubertová, Hofmann and Lešický, 1993, pp. 76–78). An urbarium for the Prague Archbishopric was set up in 1390 (Graus, 1957, pp. 331–332). A fraction of the urbarium for the period of the 1370s and 1380s, and a fraction for the year 1407 are extant, showing records of urbarial duties at the farmsteads of the Brno Collegiate Chapter (Nekuda, 1962, pp. 62–65).

The Benedictine monastery in Břevnov's 1406 urbarium is divided up by individual areas, and does not state the division of serfs' land (Graus, 1957, p. 334). There is an extant 1410 urbarium for the Premonstrate monastery in Strahov, which gives an overview of taxes from fifty-six villages in various parts of Bohemia (Nový, 1963, pp. 39–69; Graus, 1957, pp. 506–507). A list of income sources from 1415 for the St Catherine Augustinian nuns monastery in Prague contains records of an urbarial nature (Graus, 1957, p. 337). There is also an urbarium for the Cistercian monastery in Hradiště nad Jizerou from the pre-Hussite period (Graus, 1957, pp. 333–334; Emler 1884). Three urbaria record the obligations of serfs to the Cistercian monastery in Žďár nad Sázavou (from 1407, 1462 and 1483) (Zemek and Pohanka, 1961, pp. 10–11, 61–151). Another extant list of urbarial obligations from the early 15th century is the urbarium of the Cistercian monastery in Zlatá Koruna (Šusta, 1907, pp. 312–322). A 17th century copy contains the extant text of the 1438 urbarium of the Brno Herburga Dominican Monastery (Zaoral, 1965, pp. 233–241).

Parish urbaria were also set up, one example being an extant urbarium for the church in Jistebnice dating back to 1414–1419 (Graus, 1957, p. 337). We have an annual register of payments and benefits-in-kind provided to the St Vitus Church in Český Krumlov for 1446 (Kalný, 1976, p. 45, no. 38). A register of interest from individual farmers from twenty-five villages to the parson in Bavorov dates back to the end of the 15th century (Kalný, 1976, p. 21, no. 1).

Only the son of the farmer would inherit rights to the farm, and no longer daughters, widows or other family members. In 1386, the Archbishop of Prague, Jan of

Jenštejn (1378–1395/1396), announced his intention of abandoning his right on rural escheat at the Prague Archbishopric's estates. Canonist Kuneš z Třebovle prepared the text of archbishop´s privilege. A dispute broke out over this issue. Scholasticus Vojtěch Raňkův of Ježov spoke at a meeting of the cathedral chapter against the privilege. He wrote the tract *Apologia*, in which he refuted the archbishop's right to abolish rural escheat (Černý, 1999, pp. 45–61; Boháček, 1961, pp. 108–115; Černý, 1988; Kadlec, 1969, pp. 51–57). The archbishop then commissioned Kuneš of Třebovel to respond with a tract, and he then wrote *De devolucionibus non recipiendis*. This tract includes a description of the dispute between M Vojtěch Raňkův of Ježov and Archbishop Jan of Jenštejn, followed by Jenštejn's privilege and Kuneš's extensive arguments, based on a large number of canon law authorities. Kuneš demonstrates the right of rural farmers to bequeath moveable and immovable assets to their children of both sexes (Černý, 1999, pp. 62–80, 136–151; see too Černý, 1988; Boháček, 1961, pp. 108–129; 1951; 1975, pp. 72–73; Černý, 2020, pp. 230–231).

A brick Gothic church in a village or unfortified town offered grateful refuge in a period of danger, and so in some cases churches featured fortified elements. A beam latch was used to barricade the entrance door from within. Secure rooms were set up on the storeys above the sacristy, while sacristies were secured using heavy entrance doors and tiny windows. The church tower provided strategic advantages to defenders. In late Gothic churches, we can also sometimes find features for attack, such as embrasures. External defensive elements, if present, usually comprised a ditch and rampart. In the legatine statutes declared in Würzburg in 1287, papal legate Giovanni Boccamazza prohibited churches from being occupied in the event of minor wars or feuds, from being given armed defenders, and also from being renovated in order to fortify them: his directive sanctioned excommunication. Fortification, i.e. rebuilding or the addition of fortifying elements, could not be undertaken without the consent of the relevant prelates. Bishop of Prague Tobiáš of Benešov based his synodal ban of 1288 on Giovanni Boccamazza's statute. His provisions were particularly aimed at church patrons (Krafl, 2022, pp. 251–252, 254; 2021c, pp. 83–85).[10]

The defence of a church or monastery could also be undertaken by an ecclesiastical advocate (*advocatus ecclesiae*), a lay person who was personally free. He protected the church or monastery militarily, represented it at secular courts, and was able to exercise secular jurisdiction over serfs. He was not the same as a village iudex, who was otherwise common in villages in the Czech lands and was a serf. Nevertheless, if an advocate was assigned to Church estates, he de facto replaced the rural iudex and his jurisdictional and administrative powers in regard to serfs. Two articles refer to ecclesiastical advocates in Giovanni Boccamazza's legatine statutes of 1287. He decided that advocates who did not take due care in defending churches' rights should be removed from their office. We can find provisions regarding ecclesiastical advocates in the Mainz provincial statutes of 1292. In Moravia, they are mentioned in the 1318 diocesan statutes of Bishop Konrád I (1316–1326) in regard to the collection of Church tithes (Krafl, 2021b, pp. 17–18; 2021a, pp. 34–35).

Ecclesiastical advocates were not generally common in the Czech lands; they were more typical for particular locations or microregions in Moravia, and were introduced in North Moravia at the estates of the Olomouc Bishopric. In the 16th century, they were free, or hereditary, advocates, lease advocates, and elected advocates. The early period of hereditary advocates corresponded to high medieval colonisation, and

[10] On dating Tobiáš´s synod, see Krafl, 2021d, p. 17.

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they were seen in the Hukvaldy, Budišov, Mírov-Svitavy and Osoblažsko-Ketř (Kietrz) estates. The third category, elected advocates, was rare. During periods when war was a threat, advocates from the Bishopric of Olomouc estates were required to ensure they had a military horse and military groom (Jirásek, 1956, pp. 354, 356–357, 362).

Margrave of Moravia, John Henry, with the consent of his younger brothers John Soběslav and Prokop, decided in the foundation charter of the Carthusian monastery in Královo Pole from 1375 that an advocate's position would be established in order to defend the monastery, and he directly permitted the prior and convent to appoint and dismiss ecclesiastical advocates with his consent or the consent of his successors (CDM X., no. 258, p. 270).

In contrast to the rest of Bohemia, where there were iudices in villages, there were ecclesiastical advocates throughout the entire east Bohemian region of Kladsko (Kłodzko in Polonia today), who were termed bailiffs (*scultetus*). They were subordinate to the royal chamber. The monastery of Canons Regular of St Augustine in Kladsko acquired bailiffs in Štivnice and Starkov, and this related to donated villages. The Bohemian king Charles IV donated both bailiffs to Archbishop of Prague Arnošt of Pardubice, founder of the monastery, who then transferred them to the monastery (Krafl, 2018b; 2018a, pp. 32–39).

Bishop of Olomouc Bruno of Schaumburg set up a fief system on the assets of the Bishopric of Olomouc. Extant fief documents have enabled the nature of the fief rights to be ascertained. The fief was inherited along the male line and was not to be disposed of. Each vassal who accepted the fief was also required to purchase an estate from his own resources which corresponded to a half of the fief, later a third of the fief. From the fief awarded, the vassal was required to deliver to the canons of the cathedral chapter one measure of wheat from the field. The estates purchased from the wages were exempt, and were also inherited along the female line. Fields which the vassal farmed at his own expense, fields harvested by his servants, and iudex fields were also exempt from tax. The vassal was required to do military service for the Bohemian King and the Bishop of Olomouc. The fief-holder observed fief law, which was applied at the church in Magdeburg (Sovadina, 1974, pp. 438, 457–458; Hrabová, 1964, pp. 107–108; Knoll 2005, pp. 18, 20–21; see too Lapčík, 2005, pp. 39–40).

A fundamental change to the system which Bishop Bruno introduced was made by his heir, Dětřich of Hradec (1281–1302). Bishop Dětřich allowed fiefs to be sold if absolutely necessary, breaching the principle of the inalienability of fiefs, and this led to the loosening of the relationship between the liege lord and vassals (Kyasová, 1960, p. 152; Sovadina, 1974, p. 460). While Bruno of Schaumburg's fief document was based absolutely on a uniform form, Dětřich's documents show more individual traits. His documents emphasise more the vassal's obligation to perform military service. The vassal was no longer required to purchase additional estates (Janiš, 1997, pp. 341–342). The oldest list of fiefs in the Bishopric of Olomouc was evidently produced some time in 1317 (Lechner, 1902, I., pp. 3–8).[11]

There was a precization of fief administration, with the first extant fief court protocol dating back to 1364. In 1420, the Bishop of Olomouc, Jan Železný (1416–1430), decided that the sitting fief court should consist exclusively of vassals who were members of the lower nobility, i.e., knights. During the Hussite Wars period, the fief court did not meet, and the bishopric's fiefs were ravaged (Lapčík, 2005, pp. 41–42). The Bishopric of Olomouc also had fiefs in Bohemia (Vorel, 1991).

[11] On dating of the list, see Dostál, 1981, pp. 90–91.

4. THE ALIENATION OF PROPERTY

Canon law incorporated a tool in regard to lost property, *remedia spolii,* and this operated through the legal protection of members of the clergy expelled from their property (*exceptio spolii*) and through proceedings to recover the property (*actio spolii*) (Vladár, 2014, pp. 54–63, 165–172). The Pope was able to put a monastery or other ecclesiastical institution suffering material loss under his protection, and in this matter call upon the diocesan bishop to act in its favour.[12] In the 14th century, a delegated papal judge was often appointed to defend the rights of the ecclesiastical institution, in this case, property rights. In addition, ecclesiastical institutions were also able to claim their property rights through a proceeding at the regular diocesan ecclesiastical court. Disputes over property with a member of the nobility were often arbitrated. Ill treatment of the ecclesiastical institution's property could also arise from the behaviour of a superior there or from the prebend holder's poor management.[13]

Provisions against thieves of Church property are consistently found in diocesan statutes. Bishop of Prague Jan IV of Dražice issued a provision in his diocesan statutes of 1308 against those who stole and plundered Church property. They were excommunicated, and the church in which they were present was placed under interdict. In towns and villages, churches were to be closed upon their arrival. The Prague synodal statutes of 1329–1332 stress that those who took Church property were together with their counsellors ipso facto excommunicated, referencing the Mainz provincial statutes of 1310. The consideration of serfs is evident on the part of Archbishop of Prague Jan of Jenštejn, who issued an order on 18 October 1385 which emphasised that Church property also included the farms of farmers who were serfs of the Church authority, including horses, animals, clothing, and other items (Krafl, 2017, pp. 244, 246, 248; 2014, pp. 5–8).

The diocesan statutes of Bishop Jan Volek (1334–1351) of 1349 begin with a series of provisions focused on thieves of Church property in the Diocese of Olomouc, which ruled that wherever such thieves were present, religious services should not be held until the goods were returned. These refer back to the provisions of the Mainz provincial statute of 1261. Bishop of Olomouc Johannes Noviforensis (1364–1380) restored and reiterated the validity of this provision of Jan Volek in his diocesan statutes of 1380, after servants to Margrave of Moravia Jošt (1375–1411) burnt down the Olomouc Cathedral Church. Jan Volek's provisions were so important that the Olomouc Chapter had them transposed into notarial instruments in 1387 and 1388. Patriarch of Antioch and commendator of the Olomouc Bishopric Václav Králík of Buřenice (1413–1416) transferred Jan Volek's provisions word-for-word into his diocesan statutes of 1413 (Krafl, 2017, pp. 240–243; 2014, pp. 4–5).

Secularisation had a major impact on the Church's asset base in Bohemia in the Hussite and pre-Hussite periods. The secularisation of Church property took place in three ways. The first method of secularisation typical for Bohemia was the direct confiscation of property by Hussite representatives, whether noblemen or towns, which involved the implementation of the ideas of a poor Church. The second method involved the pledge and sale of property by ecclesiastical institutions in the period prior to the outbreak of the Hussite Revolution in 1419. This resolved their debts, which had arisen from relying heavily on collecting taxes from serfs with a fall in the value of coins (Čechura, 1986–1987, p. 96; 1986a, pp. 32–35; Borovský, 2005, pp. 134, 202–207).

[12] For the final quarter of the 13th century, see e.g. Krafl, 2021b, p. 16; 2021a, p. 31.
[13] For examples from the final third of the 13th century, see Krafl, 2021b, pp. 16–17; 2021a, pp. 31–33.

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The third method of secularisation related to the activities of Sigismund of Luxembourg, who needed funds to pay his mercenary troops. He resolved the issue through a pledge of Church institution assets, using his founder's rights. When King Wenceslas IV, his predecessor, made use of pledges, he pledged only revenues of the monasteries and not monastery property itself. It was subsequently Sigismund of Luxembourg who began pledging property directly from 1420. In 1422, he issued a number of appeal documents which imply that the pledges made were in breach of legal practices at the time. A large number of Church property pledges occurred in 1436–1437, because of a lack of funds (Bárta, 2016a, pp. 58–64, 70–92, 130–131; 2014, pp. 383–389; Borovský, 2003; 2005, pp. 194–202).

Regarding the Hussites, processes in various parts of the land can be characterised as a combination of armed actions against monasteries; the individual spontaneous secularisation of Hussite noblemen, including the secularisation of small estates by the lower nobility; the secularisation of Hussitism's power centres, in particular Tábor; and the continuing feudalisation of Hussite governors, with one aspect of these processes being the confiscation of pledged Church estates. Events were particularly dynamic in the initial years of 1419 and 1420 (Čechura, 1988, pp. 47–62; 1996; 2008, pp. 5–19).

Estimates suggest changes in land ownership in Bohemia during the Hussite Revolution comprising around 30–40% of the total area. The Church's land tenure fell by roughly 90%. In total, Sigismund of Luxembourg's total pledges are estimated at 490,000 threescores of Bohemian groschen, with the price of pledged estates higher. Most of the changes in ownership in Bohemia benefited the Catholic nobility, especially the Rožmberks, Švamberks, Švihovskýs of Rýzmberk, and the Lords of Michalovice. Of the utraquists in Bohemia, a large number of properties were acquired by members of the lower nobility. A number of previously less important families saw great increases in their properties, such as the Smiřickýs, the Trčkas of Lípa, and the Vřesovickýs (Čornej, 2000, pp. 657–658). Moravia did not see such changes in ownership structure. In total, a third of properties remained in Church hands there, even in the post-Hussite period (Papajík, 2003, pp. 132–134).

Efforts at restitution encountered resistance not just from the utraquist towns and nobility, but also from Catholic noblemen. The diet in Benešov in 1474 looked at the issue of Church assets occupied by the Catholic noble families of the Házmburks, Plavenskýs and Švamberks. The Church institutions were entitled to redeem the pledges as a whole, but were generally unable to do so, because of a lack of funds. The Kolovraty family also defended their villages originally belonging to the Church. The Rožmberks reluctantly released assets after 1500 which they had previously taken under protection (Macek, 2001, p. 191). Under Bohemian influence, the Moravian estates rejected the acquisition of property by ecclesiastical institutions. In 1486, the nobility and royal towns agreed that no burgher should give the Church landed property. In 1511, the provincial diet in Olomouc ruled that members of the Church, with the exception of the Bishop of Olomouc, should not be allowed to purchase landed property (Macek, 2001, p. 192).

5. CONCLUSION

The main founder of churches and ecclesiastical institutions in the early Middle Ages was the duke, while from the 12th century magnates also became involved in founding these institutions. Gifts went to a mystical object, specifically God and the saints. In the early period of founders, the property donated to the Church was treated in the spirit of respecting the rights of the proprietary churches. The law of patronage, which

was progressively implemented during the 13th century and first half of the 14th century brought change. The most common holders of the right of patronage in the Bohemian Kingdom and the Moravian Margraviate were the king, the margrave, individual noble families, bishops, monasteries, chapters, Royal towns, and occasionally patrician families. A priest who applied for a parish benefice had to submit proof of his ordination and a presentation document from the church patron. Following confirmation from the vicar general, he received a confirmation document showing that he was the authorised holder of the particular parish benefice. Parish benefice confirmations were recorded in the confirmation books held by the vicars general.

In order to exclude the assets of ecclesiastical institutions, including the serfs who lived there, from the general legal system, immunities were important. Bishoprics and individual monasteries received immunity documents from the mid-12th century, and to a greater extent from the early 13th century. The foundation of larger properties of major ecclesiastical institutions continued to be accompanied by partial donations. The spectrum of donors expanded to include burghers as well as persons of noble origin. These always involved pious gifts in order to secure salvation for the donor and his family members through requiem masses regularly celebrated on particular days in the donated church or monastery. Within the Archbishopric of Prague, donations were recorded in erection books. Once noble allodial ownership property books were introduced at the provincial court, property transfers to Church institutions were secured through entries in these books (tabulae terrae, or Land Tables). Monasteries' assets were often expanded to include parish benefices. A monastery which had the right of patronage over a parish church was able to ask for the incorporation of that church from the Holy See. The monastery then became, according to canon law, a parson of the parish church and also owner of the assets of the parish benefice.

Ecclesiastical institutions' property tenures can be reconstructed on the basis of extant documents (foundation and donation documents, immunity privileges, etc.), and, for the late Middle Ages, also on the basis of records in the Land Tables. For the Archbishopric of Prague, we can also make use of the tax register for Archbishopric goods from 1379. The application of property rights in villages can be shown through the collection of taxes from serfs. These are recorded in urbaria, which are extant for some monasteries, and exceptionally also for some parish churches. In chapters, assets were assigned to individual canon benefices. In contrast, in monasteries, assets were shared by all. Some assets of the Olomouc Bishopric were held in the manner of a fief. Judicial matters regarding bishopric fiefs were dealt with by the fief court, where there were also fief books.

The assets of ecclesiastical institutions were often subject to attempts at alienation and theft. These included direct theft and the seizure of property, the application of alleged property entitlements (such as in cases of unclear ownership of the right of patronage), and endeavours at secularisation made by reformist religious attitudes. They also included the unauthorised awarding of benefices. Assets could be the subject of a pledge, which could be made by the church institution or the former founder in respect of founder's rights. Even these cases mostly ended in the secularisation of monasteries due to an inability to redeem the pledge. This was typical for the pledges of the King of Bohemia, Sigismund of Luxembourg during the period of the Hussite Revolution. An ecclesiastical advocate could act as a protector of the monastery's property. In disputes over property, judicial proceedings could take place at ordinary courts (the episcopal court, the metropolitan court, the Rota Romana papal court), or a special papal judge could be appointed as a conservator of rights.

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A PROCEDURAL APPROACH TO THE PUBLIC INTEREST IN MIGRATION CONTROL WHEN APPLYING ARTICLE 8 OF THE ECHR / Jennie Edlund, Václav Stehlík

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Abstract: *This research explores the European Court of Human Rights' (ECtHR or the Court) application of Article 8 of the European Convention of Human Rights (ECHR) when engaging the public interest in migration control. The study research explains the current case law of the Court and examines when the public interest in migration control can be applied as a legitimate aim. The research is questioning whether the public interest in controlling migration can be used as a legitimate aim when an interference of the right to family life has been established and whether the public interest in migration control should be seen as a static factor. The research claims that the Court's unclear way of distinguishing between positive and negative obligations and its lack of assessing the public interests when balancing the personal interests against the public interests in controlling migration makes the case law inconsistent and unclear. In order to make the case law more consistent the research suggests that the Court should use a procedural approach like in cases where the State's interest in public safety is engaged.*

Key words: *Human Rights; Migration Law; Family Life; Article 8 of the ECHR; Family Unification; Migration Control*

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1. INTRODUCTION

Several scholarly sources have pointed out various problematic matters connected to the application of Article 8 of the ECHR in the migration context.[1] It has even been highlighted that in the area of immigration law, the protection offered by the ECHR to children and family life is arguably at its weakest (van Buren, 2007, p. 123).

When it comes to the balancing act between the individual rights and the public interest in migration control, the literature has so far mostly been dedicated to the examination of individual rights and the Court's approach towards the interest in family life. Less focus has been addressed to the consideration of how and when the public interest in migration control is being assessed and whether the Court evaluates how the applicants endanger this interest.

[1] See among others Leloup (2019); Klaassen (2019); Jacobsen; (2016) and Kilkelly (2010).

This research explores the ECtHR's application of Article 8 of the ECHR when engaging the public interest in migration control. The research explains the current case law of the Court and examines when the public interest in migration control can be applied as a legitimate aim. The research is questioning whether the public interest in controlling migration can be used as a legitimate aim when an interference with the right to family life has been established and whether the public interest in migration control should be seen as a static factor. The research claims that the Court's unclear way of distinguishing between positive and negative obligations and its lack of assessing the public interest when balancing the personal interests against the public interest in controlling migration makes the case law inconsistent and unclear. In order to make the case law more consistent the research suggest that the Court should use a procedural approach like in cases where the State's interest in public safety is engaged.

2. THE ECtHR'S CURRENT ASSESSMENT OF ARTICLE 8 OF THE ECHR

This research focuses on how the Court is determining cases where an applicant is applying for admission or trying to regularise an irregular stay based on family ties. Expulsion cases where a settled migrant[2] is facing expulsion due to criminal conviction will be included, for the purpose of comparison and with the intent of explaining the difference in treatment. When analysing these cases, the research concentrates on the Court's assessment when it comes to weighing the public interest in migration control against the right to family life.

The ECHR lacks reference to immigration or the right to enter or being expelled from a country. However, the applications filed before the ECtHR assert a right under Article 8 ECHR to have a national or migrant lawfully resident in the host country joined by third-country national (TCN) family members and for a migrant not to be expelled from the host country's territory in defence of the established family ties.

The primary purpose of Article 8 of the ECHR is to protect against arbitrary interference with family life by public authority.[3] The manner in which the ECtHR examines whether the state has complied with its obligations under Article 8 ECHR depends on the nature of the immigration case. In admission cases, the Court states that refusal of entry does not constitute an interference with the right to respect for family life, but rather that it is necessary to determine whether the State has a positive obligation to allow the entry and residence of a foreign national on the basis of the national right to respect for family life. In these cases, the applicant must prove that there are obstacles to establishing or continuing a family life in the country of origin.[4]

In some cases, the Court does not make a sharp distinction between negative and positive obligations. This can be seen in cases where the foreign national remains in the host country without a right to residence and is aware of the uncertain residence right while developing family ties. In such cases, only in the most exceptional circumstances will the expulsion of the applicant constitute a breach of Article 8 ECHR.[5]

In expulsion cases, the court examines whether a state has a negative obligation not to deport a foreigner who is a settled migrant with a right of residence. The criteria

[2] When using the term 'settled migrants' the authors are referring to foreign nationals with a long-term lawful residence right.
[3] See Council of Europe, Guide on Article 8 of the European Convention on Human Rights – Right to respect for private and family life, home and correspondence, Updated on 31 August 2022, p. 8 para 5.
[4] See for instance ECtHR, Gül v. Switzerland, app. no. 23218/94, 19 February 1996.
[5] See ECtHR, Rodrigues da Silva and Hoogkamer v the Netherlands, app. no. 50435/99, 31 January 2006.

set out in the case law constitute a solid test of whether an interference with the right to respect for family life of a settled foreign national is justified under Article 8(2).[6]

In all cases, regardless of positive or negative obligations for the State, a fair balance has to be struck between the competing interests of the individual and the community as a whole.

The ECtHR's case law on Article 8 of the ECHR in the migration context states that the boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are, nonetheless, similar and in both contexts, the State enjoys a certain margin of appreciation.[7] Furthermore, Article 8 does not contain a general obligation for a State to respect the immigrant's choice of country of residence and to authorise family reunification within its territory. Nevertheless, in a case involving both family life and immigration, the extent of a State's obligation to admit into its territory relatives of persons living there varies depending on the particular circumstances of the persons concerned and the general interest.

This said, there is a widely different approach towards cases where settled migrants are facing expulsion because of criminal offences compared to non-settled migrants[8] facing expulsion for administrative breaches of immigration law.

2.1 The Assessment of Settled Migrants Facing Expulsion because of Criminal Offences

When it comes to settled migrants, case law provides fairly clear guidance on how to determine whether expulsion violates Article 8 ECHR and whether the State has a negative obligation not to expel the applicant.[9] The case law on Article 8 paragraph 2 provides for a detailed justification test with individual steps. It must be determined whether there is an interference with the right to respect for family life[10] and whether the interference with the right to respect for family life is in accordance with the law.[11] For an interference to be justified, it must have a legitimate aim. Within the text of Article 8(2), five legitimate aims are listed. The interference should be 'in the interests of national security, public safety or the economic wellbeing of the country', made 'for the prevention of disorder or crime', must be necessary for 'the protection of health or morals', or should be necessary 'for the protection of the rights and freedoms of others'. This list is comprehensive.

Finally, interference should be necessary in a democratic society. According to the case law,[12] 'necessary in a democratic society' means that there is a 'pressing social need' that justifies the interference with the protected right and that the interfering measure is proportionate to the aim responding to that need. In other words, in order for the Court to decide whether there is a violation of Article 8(2), it has to apply a proportionality test and strike a fair balance between the interests of the community and

[6] See ECtHR, Boultif v. Switzerland, app. no. 54273/00, 2 August 2011, and ECtHR, Üner v. The Netherlands, app. no. 46410/99, 18 October 2006.
[7] ECtHR, Gül v. Switzerland, app. no. 23218/94, 19 February 1996, para 38.
[8] When using the term 'non-settled migrants' the authors are referring to migrants who either are seeking admission or are trying to regularise an irregular stay.
[9] ECtHR, Boultif v. Switzerland, app. no. 54273/00, 2 August 2011, and ECtHR, Üner v. The Netherlands, app. no. 46410/99, 18 October 2006.
[10] See for instance ECtHR, Boultif v. Switzerland, app. no. 54273/00, 2 August 2011, para. 37.
[11] See ECtHR, Madah and others v. Bulgaria, app. no. 45237/08, 10 May 2012, para. 95.
[12] See among others ECtHR, Nasri v. France, app. no.19465/92, 13 July 1995, para.41, and ECtHR, Boughanemi v. France, app. no. 22070/93, 24 April 1996, para. 41.

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in particular those mentioned in Article 8(2) and the interest of the individual that is the right to respect for his or her 'family life' (Milios, 2018, p. 421).

In sum, the Court weighs the relocation difficulties for the deportee's partner or children against the public interest in controlling public safety which might tip the balance in favour of the State. This was the case in Üner v. the Netherlands.[13] In this case the Court found that public safety outweighed the right to family life after the applicant had been convicted of manslaughter and assault.[14] However, in the Boultif case, the Court found the interference with the applicant's rights to family life was disproportionate to the aim of public safety.[15] The case concerned an Algerian citizen who was facing deportation after being convicted of armed robbery. The court found that the Algerian national's Swiss wife could not have followed him to Algeria as she would encounter difficulties there and since the applicant only posed a limited threat to public order, the interference was disproportionate.

When looking at the recent case law, the Court has been taking a more procedural approach in expulsion cases.[16] This approach means that the Court takes the quality of the decision making process at the legislative, the administrative and the judicial stage as decisive factors for assessing whether government interference in the right to family life was proportionate (Popelier and van de Heyning, 2017, p. 9). The Court looks at the decision making process of the national authorities instead of conducting a substantive proportionality review (Gerards, 2014, p. 52). If the Court finds that the national authorities have assessed the proportionality of the measure on the basis of careful and informed balancing of the interests at stake, the Court will more easily be convinced that the measure is proportionate (Popelier and van de Heyning, 2017, p. 10). On the other hand, if the national measure was taken without such consideration, the Court will more easily decide that it is disproportionate.

This approach can for instance be seen in the Loukili case.[17] In this case, the applicant had entered the Netherlands 40 years ago. Still, the Court found that the national authorities and domestic courts carefully examined the facts and reviewed all the relevant facts which emerge from the Court's case-law in detail.[18] The Court put particular emphasis on the seriousness and repetitive nature of the offences committed and their impact on society as a whole. This was balanced against the lack of proper substantiation of the applicant's interaction with his children and his social and cultural ties with Morocco. Therefore, the Court accepted that the domestic authorities adequately balanced the applicant's right to respect for his family life against the State's interests in public safety and preventing disorder and crime.

In the case I.M. v. Switzerland[19] that concerned the refusal of renewal of residence permit of the applicant and the issuance of a removal order on the basis of a criminal conviction for rape committed 2003, the Court found that the Federal Administrative Court had failed to fully assess the impact that the measure of removal would have on the applicant. The Court stated that the evolution of the applicant's conduct, the occurrence of the crime, the applicant's deteriorating medical condition, and his social, cultural and family ties to the host country were not sufficiently examined in

[13] ECtHR, Üner v. The Netherlands, app. no. 46410/99, 18 October 2006.
[14] *Ibid*., para 58.
[15] ECtHR, Boultif v. Switzerland, app. no. 54273/00, 2 August 2011, para 53.
[16] For a general overview of the procedural approach, see Arnardóttir (2017) and Gerards (2017).
[17] ECtHR, Loukili v. The Netherlands, app. no. 57766/19, 11 April 2023.
[18] *Ibid*., para 60.
[19] ECtHR, I.M v. Switzerland, app. no. 23887/18, 9 April 2019.

the decision. The Court referred to its own case law[20] and pointed out that it is necessary to make the assessment with consideration of both the gravity of the crime committed by the applicant, the interests of the society, and the applicant's individual rights, particularly his right to private and family life under Article 8 of the ECHR.[21]

2.2 The Assessment of Non-Settled Migrants Facing Expulsion for Administrative Breaches of Immigration Law

In cases concerning non-settled migrants, there is a mix of positive and negative obligations that sometimes are difficult to distinguish. For migrants seeking an entry, the Court needs to determine whether the State is under a positive obligation to allow entry. This is determined by the so called 'elsewhere test'[22] which means that in order for the State to have a positive obligation to admit the applicant has to show that family life can't be exercised anywhere else apart from the host State.[23]

In cases where the applicant's immigration status was precarious at the time of family formation, the court does not consider it necessary to determine whether the disputed domestic decision constitutes an interference with the exercise of the right to respect for family life or whether it should be viewed as a case where the defendant state fails to fulfil a positive obligation.[24] The Court has stated that only in the most exceptional circumstances will the applicant's expulsion constitute a violation of Article 8 ECHR.[25] In addition to the 'elsewhere test' the Court uses a variety of criteria to ascertain whether there are exceptional circumstances in the case.[26]

This mix of positive and negative obligations, and the lack by the Court of establishing what obligations the state has, creates an uncertainty and challenge in distinguishing between cases. The difficulty to distinguish between cases and whether a State has a negative or positive obligation has been explained by the dissenting judge Martin in the Gül v. Switzerland case.[27] According to the judge, the refusal of the Swiss authorities to let a son reunite with his parents can be considered both as a negative and positive obligation.[28] The refusal by the Swiss authorities to let the son and the parents be reunited can be considered as an action from which the Swiss authorities should have refrained from and therefore be seen as a negative obligation. However, the action can also be viewed as a failure by the Swiss authorities to take the action and make the reunion possible i.e., a positive obligation. In the dissenting judge Martin's opinion, this illustrates that the ECtHR's approach should be exactly the same irrespectively whether the case concern a positive or a negative obligation.

[20] It referred to ECtHR, Üner v. The Netherlands, app. no. 46410/99, 18 October 2006.
[21] Other cases where the Court has used the procedural approach see ECtHR, Ndidi v UK, app. no. 41215/14, 14 September 2017, Final 29 January 2018, paras. 75-82; ECtHR, Alam v. Denmark, app. no. 33809/15, 29 June 2017, paras. 33-37, and ECtHR, Hamesevic v. Denmark, app. no. 25748/15, 8 June 2017, paras. 41-43.
[22] The term 'elsewhere test' is borrowed from Milios (2018, p. 13).
[23] See ECtHR, Sen v. The Netherlands, app. no. 31465/96, 21 December 2001.
[24] See for instance ECtHR, Nunez v. Norway, app. no. 55597/09, 28 June 2011, para. 69; ECtHR, Osman v. Denmark, app. no. 38058/09, 14 June 2011, para. 53, and ECtHR, Konstantinov v. The Netherlands, app. no. 16351/03, 26 April 2007, para. 47.
[25] See ECtHR, Rodrigues da Silva and Hoogkamer v the Netherlands, app. no. 50435/99, 31 January 2006.
[26] See the different factors the Court is considering in ECtHR, Rodrigues da Silva and Hoogkamer v the Netherlands, app. no. 50435/99, 31 January 2006, para. 39.
[27] ECtHR, Gül v. Switzerland, app. no. 23218/94, 19 February 1996.
[28] See dissenting opinion of judge Martin, para 9, in ECtHR, Gül v. Switzerland, app. no. 23218/94, 19 February 1996.

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The difficulty or uncertainty whether a case is treated as a positive or negative obligation case can be seen in I.A.A. and Others v. United Kingdom.[29] The case concerns the admission of 5 Somali siblings who wanted to join their mother in the UK. In this case the Court recognised that an interference with the right to family life has taken place for all applicants.[30] However, the Court does not justify the interference of the right according to the justification test with different steps under Article 8(2) of the ECHR, namely in accordance with the law, in pursuit of a legitimate aim and necessary in a democratic society. Instead, the Court is using the elsewhere test and comes to the conclusion that there are no insurmountable obstacles for the mother to join her children in Ethiopia and that there is no breach of the best interests of the child principle. Therefore, the Court finds that the UK government had struck a fair balance between the applicants' interests in developing family life in the responding state on the one hand and the State's own interest in controlling migration on the other.[31]

Another example where the mix of positive and negative obligations results in an unclear application of Article 8 is in the Omoregie case.[32] This case concerned a Nigerian asylum seeker who was rejected, but stayed in Norway without resident status. He got married to a Norwegian woman, with whom he had a child who had Norwegian nationality. Mr. Omoregie had not committed any crimes but had breached immigration law. In this case, the Court first recognise an interference and finds that the interference pursued the legitimate aims of preventing 'disorder or crimes' and protecting the economic well-being of the county.[33] However, when assessing the question of necessity, the Court first refers to the factors indicated in the Üner judgement, which is a case concerning negative obligations, and underlines that the State must strike a fair balance between the competing interests of the individual and of the community as a whole and that in both contexts the State enjoys a certain margin of appreciation. The Court continues to explain that in a case which concerns family life as well as immigration, the State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest and refer to cases concerning positive obligation and mixed obligations.[34] The Court then finds that the national authorities had struck a fair balance between the personal interests of the applicants on the one hand and the public interest in ensuring an effective implementation of immigration control on the other.[35] This means that the Court determines the case as a case of mixed obligations, uses the justification test under Article 8(2) of the ECHR, but applies the legitimate aim of controlling migration even though it's not one of the aims listed under Article 8(2) of the ECHR.

Another case, where the Court uses the justification test under Article 8(2) in an alleged positive or mixed obligations case, is the case Biraga v. Sweden.[36] This case concerned a rejected asylum seeker who sought to regularise her resident status based on her marriage with a foreign national with a valid resident permit with whom she had a child. The Court stated that it did not find it necessary to determine whether there was an interference with the right to respect for family life or whether the State failed to comply with a positive obligation, since in both contexts the State has to strike a fair balance

[29] ECtHR, I.A.A. and Others v. United Kingdom, app. no. 25960/13, 31 March 2016.
[30] *Ibid*., para. 42.
[31] *Ibid*., para. 47.
[32] ECtHR, Omoregie and others v. Norway, app. no. 265/07, 31 July 2008.
[33] *Ibid*., para. 56.
[34] *Ibid*., para. 57.
[35] *Ibid*., para. 68.
[36] ECtHR, Biraga and Others v. Sweden, app. no. 1722/10, 3 April 2012.

between the competing interests involved.[37] However, then the Court proceeds to discuss whether the interference - which it did not find necessary to determine – was justified.[38] The Court determines that it finds no grounds for concluding that the national authorities failed to strike a fair balance between the applicant's interests on the one hand and the State's interests in controlling immigration on the other.[39]

It is also worth noting that in cases where the Court clearly underlines whether the State is under positive or negative obligations, the balancing test is distorted by the interest in controlling migration. This can be seen in the case Berisha v. Switzerland[40] where the Court is determining whether the State is under a positive obligation and whether it has the duty to allow the applicants to reside legally on its territory.[41] When weighing the personal interests against the States interests the Court does not find that the respondent State has failed to strike a fair balance between the applicants' interests in family reunification on the one hand and its own interests in controlling immigration on the other.[42] However, the Court does not consider the circumstances regarding the migration control and what implications this specific case has for the society. The only interest considered is the personal interest.

Although, in the case El Ghatet v. Switzerland[43] the Court uses a different method and applies the procedural approach even though the case concerns first entry. The case concerned a 15- year-old boy from Egypt who applied for admission to reunite with his father in Switzerland. The father left his son behind when he left Egypt to seek asylum in Switzerland. His application for asylum was rejected but he acquired a residence permit 1999 after marrying a Swiss national. The son relocated to Switzerland 2003 for purpose of family reunification but was sent back to Egypt 2005 in light of conflicts between him and the father's spouse. After the father separated from the wife the son lodged another request for family reunification. The Court underlined that its task is to ascertain whether the domestic courts secured the guarantees set forth in Article 8, particularly taking into account the child's best interests, which must be sufficiently reflected in the reasoning of the domestic courts. It further stated that the domestic court must put forward specific reasons in light of the circumstances of the case, not least to enable the Court to carry out the European supervision entrusted to it. Where the reasoning of domestic decisions is insufficient, with any real balancing of the interests in issue being absent, this would be contrary to the requirements of Article 8 of the Convention.[44] When applying the principles in the case-law and with regards to the circumstances in the case, the Court considered that no clear conclusion can be drawn whether or not the applicants' interest in a family reunification outweighed the public interest of the respondent State in controlling the entry of foreigners into its territory.[45] The Court found that the national court did not place the child's best interests sufficiently in the centre of its balancing exercise and its reasoning contrary to the requirements under the Convention and the CRC. Therefore, the Court found a violation of Article 8.

[37] *Ibid*., para. 55.
[38] *Ibid*., para. 56.
[39] *Ibid*., para. 64.
[40] ECtHR, Berisha v. Switzerland, app. no. 948/12, 13 July 2013 (Final 20/1/2014).
[41] *Ibid*., para. 47.
[42] *Ibid*., para. 61.
[43] See ECtHR, El Ghatet v. Switzerland, app. no. 56971/10, 8 February 2017.
[44] *Ibid*., para. 47.
[45] *Ibid*., para. 52.

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This procedural approach can also be seen in the case Guliyev and Sheina v. Russia.[46] This case concerned an Azerbaijan national who was expelled after overstaying an authorised stay in Russia. The applicant didn't apply for Russian residence permit while developing family life in Russia with his wife, with whom he had three children. The Court referred to the case law where the States had mixed obligations.[47] However, the Court found that in the present case, unlike in the four cases referred to, the domestic courts neither carefully balanced the different interests involved – including the best interests of the children – nor made a thorough analysis as to the proportionality of the measure applied against the first applicant and its impact on the applicants' family life. Consequently, they failed to take into account the considerations and principles elaborated by the Court and to apply standards which were in conformity with Article 8 of the Convention.[48] It is also interesting to note that the Court found the decision on the applicant's administrative removal fall short of Convention requirements and did not touch upon all the elements that the domestic authorities should have taken into account for assessing whether the measure was "necessary in a democratic society" and proportionate to the legitimate aim pursued.[49]

Nevertheless, the case law shows that the unclear mix of positive and negative obligations, which occurs in cases because of either irregular residence or voluntary departure and readmission, results in an inconsistent application of Article 8 of the ECHR. The Court uses different tests and it is unclear why it is doing so and when it is using which test. The way the Court is using the legitimate aim of controlling migration is also problematic and infuses the application of Article 8 and makes the right to respect for family life in the migration process very unstable. The following chapter outlines some of the problems linked to the interest in controlling migration.

3. PROBLEMS CONNECTED TO THE PUBLIC INTEREST IN MIGRATION CONTROL

Several problems arise when the Court mixes positive and negative obligations in the assessment and uses the interest in controlling immigration as a legitimate aim. It is conflicting with the Court's own case law to recognise an interference with the right to family life but not justifying it according to Article 8(2) of the ECHR. Additionally, using the public interest in controlling migration as a legitimate aim infuses the balancing assessment since migration control tends to generally override all other interests without any explanations.[50] This research is specifically pointing out three main problems which are connected to the application of migration control.

3.1 Using the Public Interest in Migration Control When an Interference has been Established

In cases concerning the entry of foreign nationals, the Court assumes no interference with the right to respect for family life, therefore the justification test of Article 8(2) of the ECHR is not triggered (Connelly, 1986, p. 572). Instead, the Court has to determine whether the state is under a positive obligation to allow for entry and residence, based on the right to respect for family life. The Court is then assessing

[46] ECtHR, Guliyev and Sheina v Russia, app. no. 29790/14, 17 April 2018.
[47] ECtHR, Omoregie and others v. Norway, app. no. 265/07, 31 July 2008; ECtHR, Antwi v. Norway, app. no. 26940/10, 14 February 2012.
[48] ECtHR, Guliyev and Sheina v Russia, app. no. 29790/14, 17 April 2018, para. 58.
[49] *Ibid*., para. 59.
[50] See for instance ECtHR, Berisha v. Switzerland, app. no. 948/12, 13 July 2013 (Final 20/1/2014).

whether a fair balance has been struck under Article 8(1) and not under the second paragraph of the article. The first paragraph does not limit the public interest, as can be seen from the second paragraph. Since there are no restrictions in the first paragraph, the State can rely on all the interests of the community and in particular on the control of immigration. Furthermore, when applying the first paragraph, the authorities must not demonstrate that exclusion is necessary to achieve the objectives of the immigration policy and that exclusion was the only and least burdensome measure available to achieve the objectives, as is the case with the application of the second paragraph of Article 8 (Schotel, 2012, p. 38). Although, a fair balance still has to be struck between the competing interests of the individual and the community as a whole. Nevertheless, Article 8(1) is more favourable for States to apply.

Although, as soon as an interference of a right to family life has been established the second paragraph of Article 8 is triggered and only the listed legitimate aims under that paragraph can be used. Consequently, since the public interest in migration control is not one of the legitimate aims under the second paragraph, it cannot be used when an interference has been established. However, as can be seen from the ECtHR case law, the Court still uses the public interest in migration control as a legitimate aim, even though an interference with the right to family life has been established.[51] This is troublesome and can be seen as in conflict with the Court's own case law.

Therefore, this research suggests that in cases where an interference of the right to family life has been established, the legitimate aim of the economic well-being of the country should be engaged instead of the aim of controlling migration. This was done in the case Berrehab v. The Netherlands.[52] The Court identified the case as one that engaged the legitimate aim of economic wellbeing and considered that a proper balance was not achieved between the interests involved and that there was therefore a disproportion between the means employed and the legitimate aim pursued.[53] Even though this case concerned a settled migrant, which was emphasised in the judgement,[54] the Court's way of assessment should be the same in a case concerning a non-settled migrant. The outcome might be different depending on the particular circumstances in the individual case, but the way the Court assesses whether Article 8 has been violated should not differ.

3.2 Public Interest in Migration Control as a Static Factor

In cases where an interference has not been established, and the Court is rightfully using the public interest in controlling migration in the balancing act, other problems arise. One problem is that the public interest in migration control does not seem to change depending on the factual circumstances of the individual case, which makes the balancing act distorted.

In fact, when using the public interest in controlling public safety in the balancing act, the public interest can be seen to have two factors.[55] One of the factors is the importance of deportation of a foreign national offender. This is considered to be a 'good' because of factors that are not related to the individual, the so-called extrinsic factor.[56]

[51] See ECtHR, I.A.A. and Others v. United Kingdom, app. no. 25960/13, 31 March 2016, and ECtHR, Omoregie and others v. Norway, app. no. 265/07, 31 July 2008.
[52] ECtHR, Berrehab v. The Netherelands, app. no. 10730/84, 28 May 1988, para. 25.
[53] *Ibid*., para. 29.
[54] *Ibid*., para. 29.
[55] See Collinson's argumentation on extrinsic and intrinsic factors in Collinson (2020).
[56] *Ibid*., p. 34.

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The importance of deportation can be seen as a static factor that reflects the relative importance of the public policy of deporting foreign national offenders in comparison to the legitimate aims that may support the removal of a foreign national.

Factors such as the type of crime, the length and type of sentence imposed, the relative severity of the offence (such as whether there were aggravating or mitigating circumstances), and whether the offence was an aberration or pattern of offending behaviour, are all considered relevant to the severity of the need to deport and are factors linked to the individual foreign national offender, the so-called intrinsic factor.[57] In other words, this public interest is related to the factual circumstances of the individual case that can be seen as connected to the seriousness of the crime.[58]

Thus, in the balancing test the importance of deportation is a static factor and does not vary depending on the circumstances in any individual case. However, the severity of the crime can vary and therefore be seen as a movable factor of the public interest side of the balancing exercise. This means that the importance of deportation and severity of the need to deport stand in relationship with each other to determine the overall weight given to the public interest side of the balance.[59]

Moreover, this can be seen in the *Boultif* case where the Court found the applicant only presented a limited danger to public order and therefore found the interference with the applicant's rights to family life disproportionate to the aim of public safety.[60]

However, when the Court is using the public interest in migration control as a legitimate aim in the balancing act, there is no movable factor present in the Court's assessment. When using the interest in public safety, a criminal conviction can vary in severity and consequently tip the balance in favour of the personal interests. This flexibility does not seem to exist when using the interest in migration control. The public interest in migration control does not seem to have a factor related to the factual circumstances of the individual case. The only factor seems to be the importance of controlling migration. This makes the public interest in migration control static that does not change.

There is a problem when the public interest in migration control is seen as a static factor that has to be weighed against the personal interest in family life that vary depending on the individual circumstances of the case. It's not logical to have a static factor on one side of the balancing test that has to be weighed against a movable factor on the other side.

Moreover, it is not defensible when the overall weight of the public interest is determined in an individual case only with reference to the importance to control migration as the only factor of the public interest side of the balancing exercise.

In order to strike a fair balance between the interests both have to vary depending on the circumstances in the individual case. Therefore, the public interest in controlling migration, like the public interest in controlling public safety, should also be related to the factual circumstance of the individual case. These circumstances could for instance be related to the severity in administrative breaches of immigration law, whether the applicant's entry or stay in the host country can be seen as a burden for the country and how this is a burden for the state.

[57] *Ibid*., p. 34.
[58] *Ibid*., p. 35.
[59] *Ibid*., p. 34.
[60] ECtHR, Boultif v. Switzerland, app. no. 54273/00, 2 August 2011, para 53.

3.3 The Lack of Assessment on How the Refusal of an Applicant Secures the Legitimate Aim

The research is questioning the Court's lack of explaining how the applicant is endangering the public interest in migration control. The paper finds that in cases concerning non-settled migrants, the Court just concludes that national authorities didn't act arbitrarily or otherwise transgressed the margin of appreciation.[61] In cases concerning settled migrants facing expulsion due to a criminal conviction, the Court uses a procedural approach and conclude that as long as national authorities put forward enough reasons for their decision, the Court would, in line with the principle of subsidiarity, consider that the domestic authorities neither failed to strike a fair balance between the interests of the applicants and the interest of the State, nor to have exceeded the margin of appreciation available to them under the Convention in the domain of immigration. According to the case law, it is necessary to make the assessment with considerations of both gravity of the crime committed by the applicant, the interests of the society and the applicant's individual rights.[62]

The research suggests that the same assessment should be applied in cases concerning non-settled migrants trying to regulate an irregular stay. Enough reasons should include seriousness of the immigration breach and the impact on the society. The statement 'the maintenance of effective immigration controls is in the public interest' is insufficient. The State would need to explain what makes immigration control 'effective', what public interests are being furthered by effective immigration control and what evidence there is that the public interests are furthered in the manner asserted (Collinson, 2020a).

According to the Court's case law, where the reasoning of domestic decisions is insufficient, with any real balancing of the interests in issue being absent, this would be contrary to the requirements of Article 8 of the Convention. Therefore, all interests have to be taken into consideration when assessing the States interests in migration control. Consequently, the Court must require from the States, as it does in cases concerning settled migrants facing expulsion due to a criminal conviction, that they put forward enough reasons for their decisions and make assessment with consideration of both gravity of the immigration breach committed by the applicant, the interests of the society and the individuals' rights.

4. CONCLUSION

This research is highlighting the inconsistent application of Article 8 of the ECHR that occurs in cases where there is an unclear mix of positive and negative obligations because of irregular residence or voluntary departure and readmission. The research points out the different application of Article 8 of the ECHR in expulsion cases concerning settled migrants where the Court is using a procedural approach compared to the application in cases concerning non-settled migrants where the Court is using different tests and it's unclear why it is doing so and when it is using which test.

The research is questioning whether the public interest in controlling migration can be used as a legitimate aim when an interference of the right to family life has been established. The research suggests that once an interference of the right to family life

[61] See for instance ECtHR, Berisha v. Switzerland, app. no. 948/12, 13 July 2013 (Final 20/1/2014).
[62] See ECtHR, I.M v. Switzerland, app. no. 23887/18, 9 April 2019 and ECtHR, Üner v. The Netherlands, app. no. 46410/99, 18 October 2006.

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has been established the legitimate aim of controlling immigration cannot be used. Instead, the legitimate aim of the economic well-being of the country can be used as could be seen in the case *Berrehab v. The Netherlands*.[63]

In cases, where the Court rightfully applies the interest of controlling migration, other problems arise. One problem is that the public interest in migration control is seen as a static factor. Thus, when the Court is using the public interest in migration control as a legitimate aim in the balancing act there is no movable factor present in the Court's assessment. When using the interest in public safety a criminal conviction can vary in severity and consequently tip the balance in favour of the personal interests. This flexibility does not seem to exist when using the interest in migration control. The public interest in migration control does not seem to have a factor related to the factual circumstances of the individual case. The only factor seems to be the importance of controlling migration. In order to strike a fair balance between the interests both have to vary depending on the circumstances in the individual case. Therefore, the public interest in controlling migration, like the public interest in controlling public safety, should also be related to the factual circumstance of the individual case. These circumstances could, for instance, be related to the severity in administrative breaches of immigration law, whether the applicant's entry or stay in the host country can be seen as a burden for the country, and how this is a burden for the state.

Finally, the research claims that the Court does not assess how the refusal or expulsion of an applicant secure the legitimate aim of controlling migration. The paper suggests that when it comes to non-settled migrants trying to regulate an irregular stay the Court should apply the same assessment as in cases concerning the expulsion of settled migrants and use the procedural approach. This means that in order for the Court, in line with the principle of subsidiarity, to consider that the domestic authorities neither failed to strike a fair balance between the interests of the applicants and the interest of the State, nor to have exceeded the margin of appreciation available to them under the Convention in the domain of immigration, the national authorities have to put forward enough reasons for their decision. According to the Court's case law, where the reasoning of domestic decisions is insufficient, with any real balancing of the interests in issue being absent, this would be contrary to the requirements of Article 8 of the Convention.[64] Therefore, it is necessary to make the assessment with considerations of both gravity of the breach committed by the applicant, the interests of the society and the applicant's individual rights.

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[63] ECtHR, Berrehab v. The Netherelands, app. no. 10730/84, 28 May 1988, para. 25.
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POSSIBILITIES AND APPROACHES OF THE EUROPEAN COURT OF HUMAN RIGHTS AND COURT OF JUSTICE OF THE EUROPEAN UNION IN FUNDAMENTAL RIGHTS PROTECTION IN THE CONTEXT OF ENVIRONMENTAL LITIGATION / Tímea Lazorčáková

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The paper presents a partial output within the research project APVV-20-0576 entitled "Green Ambitions for Sustainable Development (European Green Deal in the Context of International and National Law)"

Abstract: *Two judicial bodies, but both without right to protect the environment established. This is also how the coexistence of the two important judicial bodies located in the European area could be briefly characterized. The European Court of Human Rights and the Court of Justice of the European Union were created for different purposes, but their jurisprudence in the area of environmental protection and the protection of people's lives and health from the negative consequences of climate change overlap more than it might seem at first sight. We find certain similarities in terms of ensuring a certain degree of protection of fundamental rights in the context of the environment. The European Court of Human Rights has a priority in terms of the protection of fundamental rights in Europe, but in the field of the environment it faces several problems. Especially when we are talking about the protection of rights for future generations, where there is no direct victim or direct violation of fundamental rights, only a very high risk of their violation. On the other hand, the Court of Justice of the European Union has a much greater assumption of effectiveness, which has the potential to change the legislation of the member states and thereby indirectly ensure the protection of people's lives and health. Recently, the activity of the European Commission has been increasing in the interest of achieving climate neutrality, and this also means greater pressure on the states in the interest of the complete and correct transposition of European regulations in the field of the environment. In case of deficiencies, the European Commission can intervene by filing a lawsuit according to Article 258 of the TFEU, and achieve the required remedy. Although, such a procedure is not primarily aimed at the protection of fundamental rights, the positive impact on their protection cannot be neglected.*

Key words: *European Court of Human Rights; Court of Justice of the European Union; Standards of the Environmental Protection; Environmental Litigation for Future Generations*

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1. INTRODUCTION

In the European area, there are two judicial institutions with a strong influence, a strong basis of functioning and a relatively extensive decision-making activity. In a relatively small space, two significant bodies for the protection of legality, European standards and human rights coexist, which are the European Court of Human Rights (hereinafter „ECHR") and the Court of Justice of the European Union (hereinafter „CJEU"). These two judicial bodies have a different basis of functioning, they were created within two different organisations and with a relatively different focus of decision-making activity. Nevertheless, they can overlap in some areas.

These two judicial bodies work side by side and respect each other's positions. For stability and a high level of protection and enforceability of rights in Europe, it is important that their decision-making activities do not contradict each other, but they must mutually understand the peculiarities that their legal bases bring. At the same time, it is very important that they do not question their decision-making activity.

The ECHR cannot interpret the law of the European Union in the proceedings, even if the complainant invoked it. Although the ECHR can also use legally binding acts of the European Union, it does not approach their interpretation as such. Only the CJEU is responsible for the interpretation of treaties and acts of institutions or bodies of the European Union. Other judicial authorities, including the ECHR, would not have to perceive all the significance and nature that characterise the law of the European Union.

On the other hand, the CJEU takes into account the European Convention on Human Rights as a minimum standard for the protection of fundamental rights. Charter of Fundamental Rights of the European Union binding the meaning and scope of the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms shall be the same. This provision shall not prevent Union law providing more extensive protection.[1]

It is therefore obvious that these judicial bodies function differently, but they respect each other. Their decision-making power should be the same, but practice shows that the effectiveness and enforceability of their decisions is different.

The research issue answered in this paper is the following: Which judicial authority in Europe represents a more appropriate and effective tool for the protection of fundamental rights in the context of the environment? This question can be answered by evaluating the approaches and possibilities of the CJEU and the ECHR in proceedings related to the environment and fundamental rights. The aim of the article is to gradually examine the existing jurisprudence and proceedings initiated in recent years at the CJEU and the ECHR and, based on them, reach conclusions on the limits and possibilities of effective protection of fundamental rights. A significant part of the article is the third chapter, which contains an overview of the jurisprudence of the CJEU and the ECHR from recent years in climate cases. The aim of this part is to define the approach of both judicial bodies to climate cases, how they deal with the fact that international legal documents aimed at the protection of fundamental rights do not include the right to protect the environment, and how such climate cases become the subject of proceedings. Examining these cases leads to an analysis of the approach of both judicial bodies to the possible resolution on climate cases. In the cases of the ECHR, it is particularly important to focus on the protection of the environment for the future and therefore to point out to the new climate cases that have been initiated at the court and are aimed at protecting the life and health of future generations. In the cases of the CJEU,

[1] Article 52 point 2 of Charter of Fundamental Rights of the European Union.

it is necessary to come to terms with the fact that its role is not primarily to protect fundamental rights. Another aim is the evaluation of how, through the activities of the European Commission and subsequently the CJEU, it is possible to achieve protection of the environment and, indirectly, the protection of the fundamental rights of persons, through proceedings according to Art. 258 TFEU. The essential part of the contribution is also an assessment of the limits brought by the practice in proceedings before the ECHR, as well as an examination of the limited possibilities of the CJEU in fundamental rights protection. By examining the existing and emerging jurisprudence, it is possible to compare the possibilities and approaches of both judicial bodies in the interest of the protection of fundamental rights in the context of the environment and to formulate conclusions about a more appropriate way of achieving environmental protection and the related protection of fundamental rights.

2. COMPARISON OF THE WORK OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE COURT OF JUSTICE OF THE EUROPEAN UNION

The ECHR and the CJEU work on different basis with different aims. The ECHR was created by the Council of Europe in order to protect human rights in Europe. In contrast, the CJEU was created as a body of the European Union that would provide a basic framework for the interpretation of European Union law. The ECHR ensures the protection of fundamental rights set forth in the European Convention on Human Rights against their violation by the contracting states, and the CJEU ensures compliance with the law by interpreting founding treaties or other legally binding acts of the European Union.

European Convention on Human Rights (hereinafter „Convention") represents a live document that develops under the influence of changes and thus adapt its interpretation to the needs of the time. At the same time, the Convention should clearly have the main and most important position in terms of the protection of fundamental rights.

The founding treaties, apart from the primary provisions that define the values on which the European Union is based,[2] do not contain explicit protection of fundamental rights. However, we cannot forget the Charter of Fundamental Rights of the European Union, which also has the status of primary law of the European Union and which contains a list of fundamental rights that require protection. The Charter was only adopted several decades later, which proves that the European Union was not created in the interest of protecting fundamental rights. However, progress and the importance of fundamental rights protection forced it to reflect on this change. The CJEU played an important role in the process of shaping the protection of fundamental rights in the European Union. Its jurisprudence preceded the formal enshrining of the protection of fundamental rights in the Charter. It dealt with the issue of fundamental rights for the first time in 1996 in the Stauder judgment.[3] In his decision-making activity, several decisions can be found that at least confirm the need for the protection of fundamental rights and elevate them to a higher level. Despite this, the Charter is not often referred to in environmental cases, thus not fully exploiting its potential (van Zeben, 2022).

However, there is also a difference in how such proceedings are initiated. An individual, a group of individuals or a non-governmental organisation may apply directly to the ECHR for a violation of the rights established by the Convention. Since the ECHR

[2] Article 3 of Consolidated version of the Treaty on European Union.
[3] CJEU, judgment of 12 November 1969, Erich Stauder v. Stadt Ulm – Sozialamt, C-29-69, ECLI:EU:C:1969:57.

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was created to protect fundamental rights, it is important that potential victims of fundamental rights violations have direct access to it. In contrast, the path for an individual to the CJEU is more complicated. Acting in the interests of the interpretation of European Union law opens the way mainly for states and their judicial authorities to initiate preliminary proceedings. It is not very common for an individual to appeal to the CJEU, and these proceedings do not have that much weight in Europe. Proceedings at the ECHR, which is addressed by a large number of complainants and which has a broad decision-making activity, have much greater meaning. It is obvious that the victim of a violation of the fundamental right will turn to the ECHR after exhausting national remedies. There can be no doubt about the importance of its action in the interest of protecting the fundamental rights contained in the Convention. But what about the protection of rights that the Convention does not contain? It is the area of environmental protection that is newly developing, in which the CJEU also finds its place. The basis of the actions of any of these judicial bodies does not include the right to protect the environment. Despite this, proceedings aimed at improving the state of the environment, as well as protecting people's lives and health, are ongoing at both judicial bodies.

3. CASE LAW IN THE CONTEXT OF ENVIRONMENTAL PROTECTION

Considering the current climate change, the level of the state of the environment and their impact on people's lives, it can be concluded that there is a tangible basis for the application of requirements for states to fulfil their obligations in the field of the environmental protection, precisely through the jurisprudence of judicial authorities. For a long time, there were mostly procedural rights in the context of the environment, i.e., so that individuals or non-governmental organisations could participate in lawsuits against states on national authorities for insufficient measures to protect the environment or to take measures against excessive environmental pollution. However, it is much more important to talk about material rights, such as the right to a favourable environment, or the right to protect life and health from the adverse consequences of the environment. The protection of such material rights brings concrete results.

Although international documents aimed at the protection of fundamental rights do not contain the right to environmental protection itself, such a right is applied in the context of fundamental rights that already have their international legal anchoring.

3.1 Case-Law of ECHR

Despite the fact that the Convention does not include the right to environmental protection, the ECHR has created a relatively extensive and sophisticated case-law in this area over the decades. The first proceedings did not concern the direct impact of the negative consequences of climate change on people's lives and health. Rather, they were aimed at protection against noise or air pollution. Gradually the decision-making activity grew on actions against health damage due to the bad state of the environment and the inaction of the states. In recent year, case-law even aims to protect future generations.

The Convention does not contain the right to environmental protection; therefore, the ECHR interprets the environmental obligations of states in the light of international law and European law, which uses as an aid to fill the gaps in Convention. At the same time, it connects them to the fundamental rights that the Convention already contain. During the proceedings, the ECHR fulfil the lack of a right to a healthy environment by relying on other rights, such as the right to life (Article 2 of the Convention), the right to a fair trial (Article 6 of the Convention), or the right to respect for private and family life (Article 8 of the Convention).

For the first time, the ECHR linked the unfavourable condition of the environment with the impact on human rights in the 1994 decision López Ostra v. Spain. The case concerned the impact of a waste-treatment plant on the lives of people in its vicinity. ECHR noted that environmental pollution ultimately affects the private and family life of the affected individuals and thus linked it to the right to private and family life. During the proceedings the Commission noted, *inter alia*, that hydrogen sulphide emissions from the plant exceeded the permitted limit and could endanger the health of those living nearby and that there could be a causal link between those emissions and the applicant's daughter's ailments.[4] However, ECHR stated that naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health. Whether the question is analysed in terms of a positive duty on the State - to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8.[5] Court considers that the State did not succeed in striking a fair balance between the interest of the town's economic well-being – that of having a waste-treatment plant – and the applicant's effective enjoyment of her right to respect for her home and her private and family life.[6] That´s why the ECHR decided that there has been a breach of Article 8 of the Convention.

Ten years later, the bad condition of the environment was linked with the right to life. It is the case of Öneryıldız v. Turkey, where the applicants sought a declaration that the Turkish government's inaction had violated the right to life as well as the right to property and an effective remedy. The case involved the destruction of a slum built on a waste dump that exploded due to a build-up of methane. Several homes burned down and 39 people died. ECHR stated that it was impossible for the administrative and municipal departments responsible for supervising and managing the tip not to have known of the risks inherent in methanogens or of the necessary preventive measures, particularly as there were specific regulations on the matter. Furthermore, the Court likewise regards it as established that various authorities were also aware of those risks, at least by 27 May 1991. It follows that the Turkish authorities at several levels knew or ought to have known that there was a real and immediate risk to a number of persons living near the Ümraniye municipal rubbish tip. They consequently had a positive obligation under Article 2 of the Convention to take such preventive operational measures as were necessary and sufficient to protect those individuals.[7] The government accepted the creation of illegal dwellings on the waste dump, created a policy of non-integration and did not take measures to evict people from there. The government did not inform people about the risks associated with inhabiting these areas and did not take any practical measures such as closing the waste dump to avoid methanogens. Several people died directly as a result of this state inaction. The government of Turkey has not taken adequate measures and a causal link can be established between inaction in the area of environmental protection (waste disposal) and the death of persons. Consequently, the ECHR stated, that there has been a violation of Article 2 of the Convention in its substantive aspect, on account of the lack of appropriate steps to prevent the accidental death of nine of the applicant's close relatives and also a violation of Article 2 of the Convention in its procedural aspect, on account of the lack of adequate

[4] ECHR, López Ostra v. Spain, app. no. 16798/90, 9 December 1994, para. 47.
[5] *Ibid.,* para. 51.
[6] *Ibid.,* para. 58.
[7] ECHR, Öneryıldız v. Turkey, app. no. 48939/99, 30 November 2004, paras. 101-102.

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protection by law safeguarding the right to life.[8] This case is important in the way of link between state inaction and right to life affection, which was breached at the end.

The common denominator of both cases is the fact that they deal with the already existing negative impact of the bad conditions of the environment on people's lives and health, and therefore only after the death of persons or the disruption of private and family life, the victim's relatives deal with compensation for the resulting loss. However, they do not address the protection of people's life and health from the negative consequences of a poor environmental condition as such through precautionary measures.

The newly filed complaints before ECHR open a completely new dimension of the protection of fundamental rights in terms of predictability and protection necessary for the future generations. They do not provide a protection only after a specific violation of fundamental rights. Since 2020, the complainants claim that the defendant states have failed to fulfil their obligations to protect rights under the Convention, interpreted in the light of the obligations enshrined in the Paris Agreement from 2015. Several complaints are directed against specific states after exhaustion of national remedies for problems concerning particular persons due to inaction of States. However, the cases directed against several member states of the Council of Europe, due to non-fulfilment of obligations aimed at mitigating the negative consequences of climate change, have become much more important in protecting the environment for future generations. Since 2020, 12 climate complaints have been filed before ECHR.

For example, complain of Müllner, Austrian citizen with a temperature-dependent form of multiple sclerosis, against the Austrian government for violations of his human rights for failing to set effective climate measures to reduce GHG emission and ultimately contrast the effect of climate change. High temperature has negative effect on persons with multiple sclerosis and due to inactivity of the government, there is a violation of his right to family and private life and threat of life.[9] Other complaint was filed by the association of senior women arguing that the Swiss government failed to protect the Applicants' rights to life and private life under Arts. 2 and 8 ECHR, by failing to adopt the necessary legislative and administrative framework to do its share to prevent a global temperature increase of more than 1.5°C above pre-industrial levels.[10] Other two complains have been filed against Norway. One by non-governmental organisation Greenpeace and the other by the Norwegian Grandparents' Climate Campaign. The Norwegian government in issuing new licenses for oil and gas exploration in the Arctic (Barents Sea) that will allow new fossil fuels to market from 2035 and beyond, violated plaintiff's right to life and right to respect for private life and family life.[11] Two complains have been also filed against United Kingdom. By Plan B. Earth and Humane Being due to systematically failing to take practical and effective measures to address the threat from man-made climate breakdown, future pandemics and antibiotic resistance created by

[8] *Ibid.*, decision.

[9] Information available at: Müllner v. Austria (2021). In: *Climate Change Litigation Databases*. Available at: http://climatecasechart.com/non-us-case/mex-m-v-austria/ (accessed on 31.10.2023).

[10] More information at: KlimaSeniorinnen v Switzerland (2020). In: *Climate Change Litigation Databases*. Available at: http://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-council-and-others/ (accessed on 31.10.2023).

[11] More information at: Greenpeace Nordic and Others v. Norway (2021). In: *Climate Change Litigation Databases*. Available at: http://climatecasechart.com/non-us-case/greenpeace-nordic-assn-v-ministry-of-petroleum-and-energy-ecthr/ (accessed on 31.10.2023); and The Norwegian Grandparents' Climate Campaign and others v. Norway (2021). In: *Climate Change Litigation Databases*. Available at: http://climatecasechart.com/non-us-case/the-norwegian-grandparents-climate-campaign-and-others-v-norway/ (accessed on 31.10.2023).

factory farming. Case pended by Human Being has been already declared inadmissible due to insufficiency affection by the alleged breach of the Convention.[12] For now, the last case is Engels and Others against Germany, in which they object to insufficient legislation to achieve the goals of COP21.[13]

As mentioned before, there are also few important complains filed against several member states. The first one, Duarte Agostinho, have been filed by six Portuguese children against thirty three member states of Council of Europe, due to their failure to comply with their commitments in Paris Agreement in order to limit climate change. The complaint alleges a violation of Articles 2, 8 and 14 of the Convention. They point to the fact that non-fulfilment of obligations contributes to global warming and results, among other things, in heat waves that affect the living conditions and health of the complainants. They emphasise the absolute urgency of taking action in favour of the climate and consider that, in this context, it is crucial that the Court recognise the States' shared responsibility and exempt the applicants from the obligation to exhaust the domestic remedies in each member state.[14] Currently, the matter has been referred to the Grand Chamber for a decision, as it raises a serious question regarding the interpretation of the Convention. Numerous important entities entered the case as amicus curiae, such as Amnesty International, Save the Children, and European Commissioner for Human Rights, Climate Action Network Europe or special rapporteurs of the United Nations. Also, the case Carême against France, wants to follow up, due to authorities' failure to act that constitutes a violation of their obligation to protect the right to private and family life, within the meaning of Article 8 and to guarantee the right to life, within the meaning of article 2. Complainant asked the Council of State to cancel the Government's refusal to take additional measures to meet the Paris Agreement objective of reducing GHG emissions by 40% by 2030.[15] Due to inactivity there is a threat of negative consequences of climate change. Complainant wants to connect the case with Agostinho.

Apart from this procedure, two other complaints have been filed in relation to thirty-two member states of the Council of Europe, with the Italian complainant as their common denominator. In the first case, the complainant complains that he suffers from allergies and psychological problems due to fear for the future, as he lives in the flood zone of Matera, which is more prone to floods due to climate change. In second case, citizen of Dolomite region complains that global warming showed its effects in her living area through "Storm Vaia," an unusually severe wind and rainstorm that felled around 20 million trees. Both cases are based on the fact, that States as parties to the Convention which are also parties to the 2015 Paris Agreement, have not taken sufficient measures to implement their obligations. Complains contain violation of the positive obligations of States under Articles 2 and 8 to protect the environment; of Article 14, since the harmful

[12] More information at: Humane Being v. the United Kingdom (2022). In: *Climate Change Litigation Databases*. Available at: http://climatecasechart.com/non-us-case/factory-farming-v-uk/ (accessed on 31.10.2023); and Plan B.Earth and Others v United Kingdom (2022). In: *Climate Change Litigation Databases*. Available at: http://climatecasechart.com/non-us-case/plan-bearth-and-others-v-united-kingdom/ (accessed on 31.10.2023).

[13] More information at: Engels and Others v. Germany (2022). In: *Climate Change Litigation Databases*. Available at: http://climatecasechart.com/non-us-case/engels-and-others-v-germany/ (accessed on 31.10.2023).

[14] Information available at: ECHR, Duarte Agostinho and Others v. Portugal and Others, no. 39371/20, December 2020 (Information Note on the Court's case-law 246).

[15] Information available at: Carême v. France (2021). In: *Climate Change Litigation Databases*. Available at: http://climatecasechart.com/non-us-case/careme-v-france/ (accessed on 31.10.2023).

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effects of global warming would hit the younger generations harder; of article 13, alleging that the domestic remedies would not be effective since she would be forced to lodge a complaint in the courts of 33 States.[16] These cases are similar to the Agostinho case, but the complaints were filed later. Therefore, it is assumed that the decision in the Agostinho case will be issued earlier, and this will set the framework for other complaints filed in the interest of environmental protection.

3.2 Case Law of the CJEU

Although a large part of the proceedings before the CJEU are preliminary, it is important to think also about the proceedings that the European Commission can initiate against individual member state for the violation of obligations arising from the founding treaties. Access to justice in the field of the environment is limited for individuals before the CJEU, but the competences of the European Commission are increasingly being used to initiate proceedings against a member state in the field of the environment as well. The European Commission can issue a reasoned opinion for a member state's non-fulfilment of the obligations set out in the founding treaty after allowing that state to submit comments. If the given state does not comply with the opinion within the period determined by the European Commission, the European Commission may submit the matter to the CJEU. If it submits the matter to the CJEU because it considers that the member state has breached its obligation to notify the measure by which it adopted a directive in accordance with the legislative procedure, it may, if it considers it appropriate, specify the amount of a lump sum or penalty that the member state has to pay. If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.[17]

Founding treaty gives the European Commission the possibility to initiate proceedings against member states for incorrect, incomplete transposition of European Union law, as a result of insufficient transposition measures that have been notified, or even in situations where member states have not notified the transposition measures at all. The initiation of proceedings related to bad application practice, which can reach the CJEU, is no exception. Such activities initiated by the European Commission, whether in the form of formal announcements, reasoned opinions or even proceedings before the CJEU, represent an important element in the protection of the environment in the member states and, in that context, the protection of fundamental rights.

The environment is an area in which the European Union is becoming increasingly active. For several years now, it has been issuing several legally binding acts aimed at protecting the environment - air, water, or soil. Within the adoption of the European Green Deal, these activities have increased even more. However, the member states face several problems of correct and complete transposition of obligations arising from the European environmental law. When we look at the period of the last seven years, we find that the European Commission started more than 2,600 infringements against member states for shortcomings in the transposition in the field of environment and

[16] Information available at: Uricchio v. Italy and 32 other States (2021). In: *Climate Change Litigation Databases*. Available at: http://climatecasechart.com/non-us-case/uricchio-v-italy-and-32-other-states/ (accessed on 31.10.2023); and De Conto v. Italy and 32 other States (2021). In: *Climate Change Litigation Databases*. Available at: http://climatecasechart.com/non-us-case/de-conto-v-italy-and-32-other-states/ (accessed on 31.10.2023).

[17] Article 260 par. 3 of the Treaty on the Functioning of the European Union.

climate area.[18] In this way, the European Commission is putting pressure on the member states in order to change their legislation and to correct and complete the transposition of the EU environmental directives. That can stable the basis for the Europe as a climate-neutral continent and the European Green Deal can become a reality.

Despite the considerably high number of infringements, only about 70 proceedings initiated by the European Commission for non-fulfilment of environmental obligations by member states have been brought before the CJEU so far. Since the introduction of the European Green Deal project, dozens of lawsuits have been filed by the European Commission for non-fulfilment of obligations under Article 258 of the Treaty on the Functioning of the European Union. The CJEU has already decided 10 of them.

The first case in 2020 was against the Kingdom of Sweden for failure to fulfil the obligations set out in Council Directive 91/271/EEC of 21 May 1991 on the treatment of municipal waste water in its Articles 4, 5, 10 and 15. Sweden did not provide secondary or equivalent treatment of municipal wastewater originating from the agglomerations of Lycksele, Malå, Mockfjärd, Pajala, Robertsfors and Tänndalen, thereby failing to fulfil its obligations arising from Article 4 of this Directive in conjunction with its Articles 10 and 15. Sweden did not provide more demanding treatment of municipal wastewater originating from the agglomerations of Borås, Skoghall, Habo and Töreboda, thus failing to fulfil its obligations arising from Article 5 of this directive in conjunction with its Articles 10 and 15. And at the same time, it failed to fulfil the obligation to inform the European Commission of the fulfilment of the requirements established by the directive. The CJEU stated that a distinction must be made between the obligations to achieve the result that member states derive from Articles 4 and 5 of Directive 91/271, with the aim of verifying the compliance of wastewater discharges from municipal wastewater treatment plants with the requirements of Annex I, point B of this Directive, and permanent the obligation that member states have under Article 15 of this Directive to ensure that this discharge meets the quality conditions required over time from the commissioning of the treatment plant. It follows that Article 15 of Directive 91/271 has an autonomous scope and a different objective than its Articles 4 and 5. A possible violation of the control obligations arising from this Article 15 does not automatically mean a violation of the requirements laid down in the aforementioned Articles 4 and 5.[19] The existence of non-fulfilment of the obligation must be assessed according to the situation in the member state on the deadline set in the reasoned opinion. The Sweden did not ensure that the wastewater originating from the agglomerations of Lycksele, Malå and Pajala underwent secondary treatment or equivalent treatment before discharge, thereby failing to fulfil its obligations under Article 4 of Directive 91/271 in conjunction with Article 10 of this Directive and, at the same time, did not provide the necessary information to European Commission. Thereby Sweden failed to fulfil its obligations arising from Article 4 par. 3 of the Treaty of European Union.

The second case is directed against the Slovak Republic. The European Commission requests CJEU to determine that the Slovak Republic, by not developing

[18] Information available through database "European Commission at work", https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=false&active_only=0&noncom=0&r_dossier=&decision_date_from=01%2F01%2F2015&decision_date_to=&DG=CLIMA&DG=ENV&title=&submit=Search

[19] CJEU, judgment of 2 September 2021, European Commission against Kingdom of Sweden, C-22/20, ECLI:EU:C:2021:669, paras. 50-51.

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action plans[20] and not notifying the European Commission of the summaries of the action plans for larger road sections and larger railway sections listed in the annex to this judgment, has not fulfilled its obligations of Article 8 par. 2 and Article 10 par. 2 of the Directive 2002/49/EC of the European Parliament and of the Council of June 25, 2002, which concerns the assessment and management of environmental noise in conjunction with Annex VI of this directive.[21] The Slovak Republic did not fulfil this obligation within the specified period, therefore the CJEU found a violation of the relevant articles of the directive. At the same time, reiterated that a member state cannot justify failure to fulfil its obligations arising from the Treaty on the Functioning of the European Union by pointing out that other member states have also violated their obligations.

Another case was related to noise, when the European Commission filed a lawsuit against Portugal, for not drawing up strategic noise maps concerning five main roads, not drawing up action plans for the agglomerations of Amadora and Porto, 236 main roads and 55 main railway axes, and not fulfilling the obligations to notify these facts as transposition measures to the European Commission. In this way, Portugal has not fulfilled its obligations arising from Article 7 paragraph 2 first subparagraph, Article 8 paragraph 2 and Article 10 paragraph 2 of Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 on the assessment and management of environmental noise (hereinafter "Environmental Noise Directive").[22] Member States have the obligation to draw up action plans based on the results of the noise maps with regard to the prevention and reduction of environmental noise, if necessary and in particular if exposure levels may cause harmful effects to human health.[23] The fact that there are currently no people in affected area does not entitle the member states to neglect the fulfilment of this obligation, as the implementation of action plans should also have a preventive effect in the future. The CJEU stated that the Environmental Noise Directive does not establish any exception for member states to not develop action plans for the main railway axes located on their territory. Article 3 letter o) of the Environmental Noise Directive, contains this obligation for railway lines on which more than 30,000 train crossings are recorded per year.[24] Thus, Portugal has not fulfilled the obligations set out in Article 7 paragraph 2 the first subparagraph, Article 8 paragraph 2 and Article 10 paragraph 2 of the Environmental Noise Directive, once it did not develop strategic noise maps, action plans and did not notify the European Commission by the necessary measures. The CJEU decision thus indirectly protected people from noise in the affected areas of Portugal, not only nowadays but also in the future, despite the fact that proceedings were not initiated for the violation of fundamental rights. At the same time, fundamental rights have not yet been violated in this case. Such action appears all the more important from the point of view of preventive protection of fundamental rights,

[20] Action plans are drawn up in particular to determine the priorities that may be identified by exceeding any relevant limit value or other criteria chosen by the member states for agglomerations and for major roads as well as major railway lines within their territories, including their updating.

[21] CJEU, judgment of 13 January 2022, European Commission against Slovak republic, C-683/20, ECLI:EU:C:2022:22.

[22] Environmental Noise Directive is aimed to protect people from environmental noise mainly in construction areas, in public parks or other quiet areas in the agglomeration, in quiet areas in the open country, near schools, hospitals and other buildings and areas sensitive to noise. Article 2 of the Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise (Ú. v. ES L 189, 18.7.2002).

[23] *Ibid.*, Article 1.

[24] CJEU, judgement of 31 March 2022, Commission européenne contre République portugaise, C-687/20, ECLI:EU:C:2022:244.

aimed at fulfilling obligations and ensuring the correct and complete transposition of legally binding acts of the European Union.

Another case was filed by the European Commission against Bulgaria on the grounds that Bulgaria did not carry out a review and update of the initial assessment of the current environmental status of the relevant waters and the environmental impact of human activities on them, did not establish what constitutes good environmental status, did not establish environmental targets and related indicators, and did not send updates of these matters to the European Commission, thereby failing to fulfil the obligations arising from Article 5 par. 2 letters a) points i), ii) and iii), as well as Article 17 par. 2 and 3 of Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive).[25] Marine Strategy Framework Directive sets out the obligations of member states to develop environmental objectives, to ensure the updating of marine strategies and to cooperate in the field of marine regions and sub regions. The first determination of marine strategies was to be carried out in 2012, and subsequently updated every 6 years. For non-fulfilment of this condition, the European Commission initiated proceedings in relation to Bulgaria in the form of a reasoned opinion with a deadline of December 2019. Bulgaria has undertaken to review and update its maritime strategies, as well as to notify these updates by June 30, 2020. Specifically, the obligation of the member state to take all measures necessary to achieve the result set by the Directive is a binding obligation imposed by Article 288, third paragraph of the TFEU and by this Directive itself. This obligation to take all necessary measures of a general or specific nature applies to all the authorities of the member states. In addition, Marine Strategy Framework Directive does not provide any exemption from the obligations of member states arising from its Article 17 paragraph 2 and 3. Article 14 of this Directive refers only to those exceptions in which the member state can identify cases where the environmental objectives and good environmental status cannot be achieved in every respect, but that wasn´t relevant in this case.[26] Bulgaria adopted first organizational measures to fulfil the obligations imposed according to Article 17 par. 2 letters a) and b), as well as Article 17 par. 3 of the Marine Strategy Framework Directive on July 16, 2018. That is one day later than it was set by the directive. In addition, the agreement was concluded on March 16, 2021 in order to implement the measures necessary for the Bulgaria to fulfil its obligations. According to the settled jurisprudence of the CJEU stated above, the existence of non-fulfilment of the obligation should be evaluated in relation to the situation of the member state as the date of the deadline set in the reasoned opinion, while later changes cannot be taken into account.[27] In connection with that, the CJEU judged that the action by the European Commission is justified and found a violation of the obligations arising for the member states from Article 17, paragraph 2 letters a) and b), as well as Article 17 par. 3 of the Marine Strategy Framework Directive.

The following two cases relate to the daily limit value valid for concentrations of micro particles (PM10) in the sense of Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (hereinafter „Ambient Air Quality Directive") in conjunction with its Annex XI. Submissions were filed against France and Slovakia, for failure to fulfil the obligations arising from Article 13 paragraph 1 regarding the limit values of PM10 particles in the air and Article 23 paragraph 1 second subparagraph for not developing air quality plans for the zone of

[25] CJEU, judgment of 28 April 2022, European Commission against Bulgaria, C-510/20, ECLI:EU:C:2022:324.
[26] *Ibid.*, paras. 44-45.
[27] *Ibid.*, para. 39.

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Paris and Martinique as far as France is concerned, and for the zone of Banská Bystrica and Košice Region as far as Slovakia is concerned, in order to achieve the limit value for the protection of human health set in Annex XI. The European Commission objected that it was a systematic and continuous failure to meet the requirements for compliance with the limit values of PM10 concentrations. Exceeding the limit value of PM10 in the ambient air is in itself sufficient to establish a violation of the provisions of the Ambient Air Quality Directive, even in a situation where they show a structural downward trend.[28] If the limit values are exceeded, member states have the obligation to establish appropriate measures to ensure that the period for exceeding these limit values is as short as possible and may include special additional measures to protect vulnerable groups of the population, especially children.[29] Exceeding the limit values of PM10 undoubtedly has harmful effects on human health and the quality of the environment. Topographical and climatic peculiarities, which are particularly unfavourable for the dispersion of pollutants and occur in the affected areas, especially in the Banskobystrický region, cannot exempt the Slovak Republic from responsibility for exceeding the PM10 limit values. On the contrary, these particularities represent elements which, as follows from Annex XV, section A, point 2 letter c) and d) of Ambient Air Quality Directive must be taken into account within the air quality plans that this member state is obliged to draw up according to Article 23 of this Directive.[30] France additionally prepared plans to improve air quality, but did not take appropriate measures in time to ensure that the period of exceeding the limit values for PM10 was as short as possible. Exceedances of the daily limit value set for PM10 therefore have been systematic and persisted for more than nine and six years after the deadline when member state was obliged to take all appropriate and effective measures to comply with the requirement that the period of exceedance of these values must be as short as possible.[31] As a result, he found a violation of the relevant provisions of the directive. The Slovak authorities also announced several additional measures aimed at ensuring good air quality, as well as compliance with PM10 limit values, which were related to household heating, transport and soft measures. However, the European Commission believed that these additional measures are not effective enough to lead to a significant improvement of the situation in the affected regions and agglomerations in the short term. The CJEU pointed to the systematic and persistent exceeding of limit values in the concerned areas for nine years, despite the exemption granted in 2010 to 2011 and continuously for eight years since the expiry of that exemption.[32] CJEU reiterated what it has already been stated that non-compliance can be systematic and persistent despite a possible partial downward trend resulting from the collected data, which did not lead to this member state complying with the limit values. Therefore, in this case too, CJEU found a violation of the relevant provisions of the Ambient Air Quality Directive.

Another case also concerns the Slovak Republic, in the context of caring for forests, creating care programs, regulating logging, and taking measures to prevent threats to forests and eliminate the consequences of damage caused by natural

[28] CJEU, judgment of 28 April 2022, European Commission against French republic, C-286/21, ECLI:EU:C:2022:319, para. 46.
[29] *Ibid.*, para. 63.
[30] CJEU, judgment of 9 February 2023, European Commission against Slovakia, C- 342/21, ECLI:EU:C:2023:87, para. 68.
[31] CJEU, judgment of 28 April 2022, European Commission against French republic, C-286/21, ECLI:EU:C:2022:319, para. 77.
[32] CJEU, judgment of 9 February 2023, European Commission against Slovakia, C- 342/21, ECLI:EU:C:2023:87, para. 136.

disasters. Specifically, it is a failure to fulfil the obligations arising from Article 6 par. 2 and 3 and article 7 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (hereinafter "Habitats Directive") in conjunction with article 4 par. 1 of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (hereinafter "Bird Directive").[33] The aim of the directives is to preserve or possibly restore natural habitats and species of wild fauna and flora, which are important for the European Union, in order to achieve the more general objective of the directive, which is to ensure a high level of environmental protection. If a plan or project, which is not directly related to or necessary for the management of the site, may threaten its objectives, must be considered as having a significant impact on the site. The assessment of that risk have to consider the characteristics and environmental conditions typical for the related location.[34] On the one hand, the protection of the special areas of conservation must not be limited to measures to prevent external interference and disturbance caused by human, but must also include positive measures to protect and improve the condition of the site. Member state by approving the Rescue Program, has shown that it is aware of the decline of the habitat and population of these species and that it wants to correct this situation, under the individual decisions taken by the nature protection authorities until June 20, 2020, with the aim of limiting or prohibiting forestry activity in the territories of the habitats of the mountain hornbill (Tetrao urogallus). However, these measures are incomplete, if they do not represent protective measures systematically developed to meet the ecological requirements of this species and each of the habitat types found in the twelve special areas of conservation declared for its protection.[35] At the same time, the Slovak Republic has not adopted special protective measures regarding the habitats of the mountain deaf. Slovakia developed protection plans in individual areas, but these were neither completed nor implemented at the time of submitting the reasoned opinion. Therefore, the CJEU found a violation of the relevant articles of the directives.

Two other cases concerning the exceeding of limit values for nitrogen dioxide (NO2) were filled against Spain and Greece. It is also a case of non-fulfilment of obligations arising from Ambient Air Quality Directive, specifically articles 13 par. 1 and 23 par. 1 in conjunction with Annex XI.[36] The reservation based on the violation of the aforementioned Article 13 must be taking into account the established jurisprudence of the CJEU, according to which the procedure regulated in Article 258 of the Treaty on the Functioning of the European Union is based on an objective finding of non-compliance by the member state and the obligations imposed by the Treaty on the Functioning of the

[33] In terms of the Habitats Directive, member states shall take appropriate steps to prevent damage to natural habitats and habitats of species in specially protected areas, as well as prevent from disturbance of species in areas designated as protected. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. Article 6 of the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Ú. v. ES L 206, 1992, s. 7; Spec. ed. 15/002).

[34] CJEU, judgment of 22 June 2022, European Commission against Slovak republic, C-661/20, ECLI:EU:C:2022:496, para. 59.

[35] *Ibid*., paras. 100, 106-107.

[36] Ambient Air Quality Directive lays down measures aimed at defining and setting objectives relating to ambient air quality in order to prevent or reduce harmful effects on human health and the environment. In this context, Article 13 par. 1 of the Ambient Air Quality Directive stipulates that the member states ensure that in all their zones and agglomerations the levels, especially NO2 in the ambient air, do not exceed the specified limit values set in Annex XI. Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe.

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European Union or a secondary legal act.[37] There is no "de minimis" threshold for the number of areas in which the limit values set by Ambient Air Quality Directive may be exceeded, or the number of sampling points in a given area in which such limits are exceeded.[38] Under the examination of the first reservation, the Kingdom of Spain has systematically and consistently failed to fulfil its obligations under the combined provisions of Article 13 para. 1 and Annex XI of limit values set for NO2 in area of Barcelona and Madrid in the period from 2010 to 2018 and in area Vallès – Baix Llobregat, from 2010 to 2017.[39] At the time of the lawsuit, there was no national plan to improve air quality. The Kingdom of Spain apparently did not take adequate measures in time to ensure that the period during which the values were exceeded was as short as possible in the areas covered by this measure. Exceeding these limit values therefore remains systematic and persistent for at least eight years.[40] Spain argued that exceeding the limit values is because of the high number of diesel vehicles. Spanish argument, that the economic costs associated with the policy changes on diesel vehicles justify the need of longer period for the implementation and effectiveness of the measures to be taken, cannot be a reason of exceptionally long period for ending the exceeding the limit values set for NO2 by Ambient Air Quality Directive, such as those assumed in this case.[41] The development of air protection plans is possible only on the basis of a balance between the goal of reducing the risk of pollution and the various public and private interests.[42] Greece did not take appropriate measures in time to ensure that the period of exceeding the annual limit value set for NO2 was as short as possible in the Athens area. Exceeding this annual limit value therefore remained systematic and persistent in this agglomeration for at least ten years.[43] In both cases, therefore, a violation of the relevant articles of the Ambient Air Quality Directive was established.

For now, the last proceedings before the CJEU are held against Poland, in connection with forestry. Poland has not fulfilled its obligations arising from Article 6 par. 1, Article 6, paragraph 2, Article 12 paragraph 1 letter a) to d), Article 13 paragraph 1 letter a) and d) and Article 16 par. 1 of the Habitats Directive, as well as Article 4 par. 1, Article 5 letter a), b) and d) and Article 16 par. 1 of the Birds Directive. Poland should has taken protective measures containing the appropriate management plans, specially designed for the given sites or incorporated into other development plans, and appropriate statutory, administrative or contractual measures that correspond to the ecological requirements of the types of natural habitats listed in the Annex I and species listed in Annex II, occurring in these locations. Poland also should has taken appropriate steps to prevent damage to natural habitats and habitats of species in specially protected areas, as well as disturbance of species for which the areas have been designated as protected, if such disturbance would be substantial in relation to the objectives of this Directive. Even more, measures should be taken to create a system of strict protection of animal species and plant species, including prohibitions and exceptions related to them, measures to create a general system of bird protection; as well as ensuring special attention to species at risk of extinction, species sensitive to specific changes in habitats,

[37] CJEU, judgment of 22 December 2022, European Commission against Spain, C-125/20, ECLI:EU:C:2022:1025, para. 68.
[38] *Ibid.*, para. 88.
[39] *Ibid.*, para. 158.
[40] *Ibid.*, para.176.
[41] *Ibid.*, para. 182.
[42] CJEU, judgment of 16 February 2023, European Commission against Greece, C-633/21, ECLI:EU:C:2023:112, para. 58.
[43] *Ibid.,* para. 68.

species that are considered rare due to their small number or limited distribution in a given area, and other species that require special attention due to the specific nature of their habitats . At the same time, Poland did not fulfil its obligations arising from Article 6 par. 3 of the directive on biotopes, in conjunction with Article 6 par. 1 letter b) and Article 9 par. 2 of the Convention on Access to Information, Public Participation in the Decision-Making Process and Access to Justice in Environmental Matters by excluding the possibility for environmental organizations to challenge forest management plans with an action to review the legality of the substantive and procedural aspects of forest management plans. The CJEU emphasized that endangered habitats and species are part of the natural heritage of the European Union, so the adoption of protective measures belongs to all member states due to the common responsibility. The member states are particularly obliged to ensure that their legislation intended to ensure the transposition of the directives be clear and precise.[44] By adopting Article 14b par. 3 of the Act on Forests in national legislation, which stipulates that forest management carried out in accordance with the requirements of administrative procedures in the field of forest management does not violate provisions relating to the protection of special natural resources, groupings and elements, violated the obligations arising from Article 6 paragraph 1 and 2 of the Habitats Directive, as well as Article 4 par. 1 of the Birds Directive.[45] Although the Aarhus Convention, and especially its article 6 par. 1 letter b) leaves the contracting states with a certain amount of discretion when it comes to examining the significant impact of the activity on the environment, this does not change the fact that, in view of the jurisprudence mentioned in points 172 and 173 of CJEU judgment, the Habitats Directive specifies the requirements that must be formulated due to the importance of the impact on the environment in the field of European nature protection. Negative impacts on the protection objectives of European protected areas should in principle be considered significant within the meaning of this provision of the Aarhus Convention, and therefore environmental protection organizations are entitled to demand that the competent authorities verify in each individual case whether the proposed activities can have such a significant influence.[46] Poland was obliged to ensure that environmental protection organizations had the opportunity to submit to the court a proposal for an effective review of the legality of the substantive and procedural aspects of forest management plans in accordance with the provisions of the Forest Act, as long as these plans fall within the scope of Article 6 para. 3 of Habitats Directive.[47]

4. NEW CLIMATE CASES ISSUES

In the cases of direct damage to health due to states´ inaction in connection with the unfavourable state of the environment, it is possible to reach a conclusion about the violation of a fundamental right by a specific state in relation to specific persons, impose a sanction for this and call on the state, to avoid such further action. However, this solves individual situations when the violation has already occurred. Such decision-making activity usually does not have any impact on political and legislative changes, or application changes in individual member states. Only actions aimed at future

[44] CJEU, judgment of 2 March 2023, European Commission against Poland, C-432/21, ECLI:EU:C:2023:139, para. 72.
[45] *Ibid.,* para. 113.
[46] *Ibid.,* para. 175.
[47] *Ibid.,* para. 176.

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generations could have such impact, assuming that the ECHR would decide on them in a way that there is a violation of fundamental rights due to the inaction of states.

There is no doubt that the ECHR played an important role in the early jurisprudence on human rights-based environmental protection. The ECHR works with the European Convention on Human Rights as a live document and tries to adapt it to the times. It faces new and innovative human rights issues and it is extremely important to have other mechanisms for dealing with situations. New problems may require new methods. The necessary element of development of the international human rights in any context and by any actors, is the interpretation in the light of present-day conditions and requiring the increasingly high standard in the area of the protection of human rights and fundamental liberties correspondingly (Viljanen, 2009).

However, these procedures face several problems, and that´s why I think that ECHR will not change the approach and consequences of his decision-making activity. However, there can be no doubt about the importance of these cases and the fact that whatever the ECHR decides, it will be an important precedent at least due to expressed thoughts and argumentation.

Their first limit is the fact that the ECHR is not interested in making political decisions in the 'difficult social and technical sphere' of environment. Its goal is to supervise and deal with violations of fundamental rights, and not to proactively and preliminarily deal with a potential problem that has not yet arisen with respect to human rights.

Another limit is that ECHR can easily dismiss a complaint for non-exhaustion of national remedies. It is impossible to exhaust all national remedies in all states, especially in the new recent climate cases before the ECHR, which are directed against all member states. Several entities that file complaints before the ECHR file them without exhausting them, with the argument that the complaint is directed against several states and that exhausting them is unrealistic. From the available information, it appears that the ECHR at least accepts these complaints for further proceedings. Therefore, it seems that a failure to exhaust national remedies should not be a reason for rejecting these complaints as inadmissible. However, the problem may be how to deal with the extraterritoriality of these cases. So far, the ECHR has not ruled cross-border environmental damages in any of the environmental cases. A decision that would state a violation of fundamental rights by the state against persons located in the territory of another state would be very progressive and would mean a change in the way of fulfilling the obligations by any member state of the Council of Europe. Residents of Slovakia could complain before the ECHR for environmental damage caused, for example, by inaction of Greece. And this is hardly imaginable.

Another limit is the question of how the ECHR will respond to the condition of a victim status of a fundamental rights violation. Complainants in these cases are not directly affected on their rights in real time. The fear of the threat of fundamental rights due to climate change and poor environmental quality is directed more towards the future. How the ECHR approaches the condition of the victim status in these cases will say a lot about how it will approach the solution of complex and urgent proceedings of today's times, which can have a significant impact on the protection of fundamental rights. In the Cordella v. Italy judgment, the Court stated that individuals are 'personally affected' by the measure complained of if they find themselves in a situation 'of high environmental risk', in which the environmental threat 'becomes potentially dangerous for the health and well-being of those who are exposed to it (Schmid, 2022). This could provide the basis for the same approach in new climate cases, and the condition of victim status could be fulfilled this way. Especially, when we consider Articles 2 and 8 of the

European Convention on Human Rights, which are the most frequently used in the context of climate cases. However, Corina Heri, for example, points to the possible connection of new climate cases to Article 3 of the European Convention on Human Rights, which has largely been ignored in climate litigation so far and could play a meaningful role, including in capturing experiences of climate anxiety. This is particularly the case when the vulnerability of specific groups and individuals, can facilitate access to justice and underscore the raison d'être not only of states' positive obligations but also of the convention itself (Heri, 2022).

However, the greatest difficulty in these cases will be to demonstrate that there is a causal connection between the inaction of the state in the field of environmental protection and the impact of such inaction on fundamental rights. In several cases before ECHR, we could see the connection between the inaction of the state and the violation of fundamental rights. States have a positive obligation to protect persons under their jurisdiction, and such protection must be effective, timely and expedient. If this does not happen, we can talk about the direct impact of states' inaction on the fundamental rights of individuals. So far, however, this has only been done in relation to a specific violation of a fundamental right. In the case of Tătar v. Romania the ECHR ruled that governments have a positive duty to introduce regulatory initiatives governing the licensing, commissioning, operation and control of hazardous activities and that these administrative and regulatory regimes must include appropriate provisions to allow the public to assess the risks. It also established that the above requirements apply to risks arising from natural disasters (e.g., Budayeva et al. v. Russia in relation to landslides and Kolyadenko et al. v. Russia in relation to flash floods). In these cases, ECHR formulated conclusions about the need of states to take preventive measures to prevent natural disasters. However, the difference in the new climate cases is that this risk was very real and it is only a matter of time before a landslide would occur and directly threaten people's lives.

No violation has yet been established in the new climate disputes, but it is very likely that one will occur. However, it is not clear whether it will be in 5, 10 or 15 years. Although the risk exists, it is difficult to predict when a fundamental right will be violated. So, there is not a direct threat to life. However, is it possible to abstractly formulate the premise of declaring the violation of a fundamental right only on an abstract basis and without the possibility to clearly determine when it will occur and whether the negative consequence will still not be averted by the states? In my opinion, this is the reason, why the ECHR will not find a violation of the fundamental right of persons in such new climate cases. On the other hand, even if there is no violation of the right to life or the right to health, the expression of a legal opinion in the decision itself is not excluded. The ECHR can come to a certain opinion and point out the need to act by individual states. Well, here we come to the problem of enforceability. Only the statement in the decision, which contains the rejection of the complaint, is not legally enforceable and the states will not accept it. It will be just another text in black and white about what states should be doing but are not doing. In addition, any of the Grand Chamber cases is likely to encourage litigants to continue to file ever more human rights-based cases both in Europe and beyond. Especially in the context of a special regulation adopted for the sake of environmental protection at the EU level. It is assumed that the number of cases related to environmental protection in the context of air protection, greenhouse gas limitation, forest protection, or agriculture will grow. This is also the view of the Grantham Research Institute and the European Union Forum of Judges for the Environment (see Setzer, Narulla, Higham and Bradeen, 2022). Therefore, it will be particularly important what

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position the ECHR will take in new climate cases, and its first decision will be undoubtedly significant for further developments.

On the other side, the CJEU was not originally created in the interest of protecting fundamental rights. Even the European Commission activities against member states due to non-fulfilment of environmental obligations are not aimed at protecting of fundamental rights. At the same time, the number of climate cases before CJEU is not large. However, with the adoption of the European Green Agreement in 2019, the European Union became much more involved in environmental protection and put pressure on member states to achieve climate neutrality.

In recent years, there has been an increase in legislative activities at the level of the European Union, which concern the creation of new secondary legal acts in the field of air, water or energy, as well as the revision of already existing legal acts to make them more effective and responded to the needs of the time. Although lawsuits under Article 258 of the Treaty on the Functioning of the European Union are not aimed at the protection of fundamental rights, it is impossible to ignore the clear benefit of ensuring compliance with obligations by states in terms of protecting the life and health of persons under the jurisdiction of the European Union. Although these environmental obligations are not a priori aimed at the protection of fundamental rights, their observance will undoubtedly ensure the protection of human lives and health. The area of environmental protection, which is being created at the level of the European Union and which is being completed by the jurisprudence of the CJEU, is different from the system represented by the Council of Europe. Nevertheless, its importance and significance cannot be neglected. Determining the limit values of substances in the air, controlling waste water management, or emissions trading will undoubtedly have a significant impact on the lives and health of millions of people. Even the CJEU itself in its decisions, especially those related to compliance with limit values of substances in the air, points out the need to comply with them, as their systematic exceeding has a negative impact on the health of people and especially children.

Also, for example, the Professor De Schutter talks about the importance of the operation of the European Commission in the interests of the enforcement and protection of fundamental rights. He explores a number of new practices that could be introduced to strengthen the use of infringement proceedings as a fundamental rights enforcement tool, including the status of the complainant who brings an alleged violation of EU law to the attention of the Commission (De Schutter, 2017).

From the cases outlined in this study, it can be concluded that the CJEU does not interfere in the protection of fundamental rights and tries to avoid any statements regarding the need to protect people's lives and health when formulating its legal opinions and conclusions in judgments. CJEU focuses its attention exclusively on the fulfilment of obligations by states, which result from individual directives aimed at protecting individual areas of the environment. In principle, the statement that exceeding the limit values has a negative impact on the health of people and especially children, is the only statement in which the need to observe the limit values is noted as the need of their protection. Nevertheless, decision-making activity in this area, as well as the activity of the European Commission itself, has an undoubted and undeniable importance from the point of view of protecting people's life and health, and thus fundamental rights.

In addition, with effective application of Art. 260 par. 3 of the TFEU, we can also talk about more effective enforcement of transposition obligations by member states. Since the decision C-543/17 Commission against Belgium, Court for the first time formulated an extensive interpretation of the notification obligation covering not only 'non-communication', but 'partial communication' of transposition measures as well. As

Ramírez-Cárdenas Díaz stated, this rule practically allows to impose a financial sanction on an EU Member State already at the conclusion of the first infringement procedure (Article 258 TFEU), in a case of failure to notify the transposition measures of a directive. The threat of sanctions already in the conclusion of the first infringement procedure serves a suitable preventive mechanism for the fulfilment of the environmental obligations arising from EU law and, in this context, for the protection of human life and health (Ramírez-Cárdenas Díaz, 2020).

5. CONCLUSION

Of the mentioned judicial bodies, the European Court of Human Rights is the judicial body that has been given jurisdiction in the area of fundamental rights protection. However, the current proceedings before the European Court of Human Rights are not aimed at the protection of individual rights, as is usual, but also at the protection of fundamental rights of future generations. Taking into account the complexity of the disputes presented, the uncertainty that these proceedings bring and the very abstract understanding of the violation of fundamental rights in the represented cases, it is very likely to express that the European Court of Human Rights will not follow the path of preliminary caution and will not find a violation of the fundamental right in them. When we generalize the legal statements that can be brought by the decision of the European Court of Human Rights, we can come to the conclusion that it probably only expresses the general obligation of states to comply with international standards and obligations to which they have committed themselves, including the implementation of measures to protect people's lives and health from climate change. However, such conclusions are very general and basically meaningless. They are not enforceable and will not bring the desired change. However, the adoption of an additional protocol to the European Convention, which would enshrine the right to a healthy environment, as recommended by the Parliamentary Assembly in 2021, could bring a change in the perception of threats to fundamental rights due to climate change and environmental damage. Such an anchoring would mean a completely different approach of the European Court of Human Rights. It would no longer have to supplement the protection of fundamental rights with international documents, but would have support directly in its basis. Subsequently, there would be no doubt about the relevance of the decisions and creation of stable jurisprudence of the European Court of Human Rights also in the field of climate disputes. Until then, it is necessary to state, that the European Commission is more effective.

European Commission continuously puts pressure on the member states for correct and complete transposition of obligations in the area of the environment. The European Commission and subsequently the Court of Justice of the European Union point to specific shortcomings of transposition, specific problems faced by the legislation or the application practice of the states and repeatedly call on the states to correct them. Extensive communication and consistent monitoring of the fulfilment the obligations in their submission therefore appear to be more effective than blindly submitting complaints to the European Court of Human Rights. It is true that the European Court of Human Rights is a very important body in human rights protection, and it is used by an innumerable number of complainants in order to protect current and future rights. However, in the area of the environment, it appears to be not efficient and effective enough. The protection of the environment and the related protection of fundamental rights represent the rights of a new generation, which were not known at the time of the adoption of the Convention. The need to protect something like that was not considered. Therefore, the activity of the European Union and its bodies appears to be more effective

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and progressive. We can already state, following the outlined decisions, that the protection that the Court of Justice of the European Union can provide is not only consequential but also preventive. The activity of the European Commission thus represents a way to achieve the fulfilment of obligations by the member states and thus avert the harmful consequences of climate change, to have a preventive effect in the interest of maintaining a stable level of the environment and, last but not least, to ensure the timely protection of fundamental rights that is directly affected or endangered by the negative consequences of climate change.

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GREENER COMPETITION LAW VIA NEW GUIDELINES ON HORIZONTAL AGREEMENTS (?) / Mária T. Patakyová

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Abstract: *The protection of environment is mentioned already in the preamble of the Treaty on European Union, in the Maastricht Treaty version. The omnipresent climate change reminds us of the importance of this protection. Is it possible to take into account the protection of environment also during the application of competition law? If so, to what extent is this desirable? In order to answer these questions, the article focuses on horizontal agreements, namely the new Guidelines on Horizontal Agreements. After presenting the view on green horizontal agreements on the EU level, the article focuses on application of competition law in the Slovak Republic. The main finding of the article is that, first, the protection of environment may be taken into account when applying competition law. This is very desirable from the perspective of protection of environment. However, the devil is in the detail and it may prove to be a particularly difficult job for a competition authority such as the Antimonopoly Office of the Slovak Republic to enforce Article 101 TFEU with respect to a green agreement. At the same time, it is a tricky job for undertakings to stay in line with Article 101 TFEU when they conclude a horizontal green agreement.*

Key words: *Green Competition Law; Protection of Environment by Object Restrictions; Willingness-to-pay; Act No. 187/2021 Coll. on Protection of Competition; Guidelines on Horizontal Co-operation Agreements*

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1. INTRODUCTION

Protection of environment is inevitable. This is also recognised by the European Green Deal.[1] Certain fields of law, such as public procurement law, have already worked with green goals as their secondary goals frequently, although on a rather voluntary basis (Blažo, Kováčiková and Máčaj, 2021, p. 74). In any case, protection of environment should be a genuine protection, not a greenwashing in form of a pure marketing without a real impact.

If there is a lack of real and efficient effort from the public sphere, the private sphere should be able to step in. For instance, if animal welfare cannot be secured by a

[1] Communication from the Commission. The European Green Deal. Brussels, 11.12.2019 COM (2019) 640 final.

public regulation, private sector should be allowed to secure the animal welfare. Or should it not?

Apparently, if there is a wish for common movement in a sector, it will arguably take a form of a horizontal agreement between undertakings (in the form of an agreement, a concerted practice or a decision by association of undertakings). One example is the CEDEC decision[2] from the end of 1990s, where the members of an association (CEDEC) "*agree*[d] *no longer to manufacture or to import washing machines that* [did] *not meet the criteria that they* [had] *agreed upon. The agreement* [set] *a standard of energy efficiency, with which all the washing machines that the parties manufacture*[d] *or import*[ed] [had] *to comply. By this obligation, the parties* [were] *no longer free to produce or to import machines under categories D to G, as they* [had been] *free to do, and actually* [had done]*, before the agreement*".[3] Due to the fact that the variety of the products was being limited and the prices went up due to the agreement, it was assessed as a restriction by object.[4] However, the Commission took a view that the cumulative conditions of what is today Article 101(3) TFEU were fulfilled.

More recently, there is a well-known Dutch case, Chicken of tomorrow, which demonstrates how tricky it would be for such a private movement to be in line with Article 101 TFEU. This case has already been analysed by many scholars (Stefano, 2020; Campo Comba, 2022; Cambien, 2022).

In general, the core stone of problem between protection of competition and protection of environment is that the environmental protection is in tension with economic aspects (Blažo, Kováčiková and Mokrá, 2019, p. 262). Greener solutions in production or distribution may result in more expensive products, therefore being at odds with consumer surplus, at least pricewise.

The EU is entrusted with competition policy (exclusive competence – Article 3 (1) b) TFEU) as well as environmental policy (shared competence – Article 4 (2) e) TFEU). Article 7 TFEU prescribes that the EU "*shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.*" Therefore, competition policy shall be consistent with environmental policy and not go against it.

There are many voices calling for greener understanding of competition law (Campo Comba, 2022, p. 2; Monti, 2020, p. 131). A profound analysis of green possibility for competition law by Derdak suggests that "*sustainability cannot be considered an aim of current competition law* [but] *there is nothing inherent in antitrust legislation that would prevent making sustainability its goal*" (Derdak, 2021, p. 63). Although the consumer welfare is considered to be a main objective of EU competition law (Campo Comba, 2022, p. 2; Cambien, 2022 p. 2); is not in itself an obstacle for greener interpretation of competition rules. Consumer welfare, understood in its broader sense, taking into account all the parameters of competition he/she/it can benefit from (e.g., price, output, product quality, product variety or innovation), may encompasses certain green considerations. Similar finding was reached by Campo Comba (2022, p. 7).

Despite the fact that analysing the goals of competition law would be an interesting topic for a paper, we will not look into it further. The centrepiece of this article lies elsewhere.

[2] Commission Decision of 24 January 1999 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case IV.F.1/36.718. CECED).
[3] *Ibid*., p. 30.
[4] *Ibid*., p. 37.

In this article, we are asking the following questions: is it possible to take into account the protection of environment also during the application of competition law? If so, to what extent is this desirable? Naturally, an exhaustive answer to these questions would surpass the limits of an article. Therefore, we will try to answer them with respect a rather practical topic - a green view within the assessment of horizontal agreements. Thus, the article will dive into the New Horizontal Guidelines[5] (the "***NHG***").

The article is organised as follows. First, it will deal with the presented questions from the perspective of EU competition law. It will present the Chapter 9 of the NHG and analyse several aspects of it. Second, the attention is moved to the Slovak Republic, i.e., how the Antimonopoly Office of the Slovak Republic (the "***AMO***") would address the identified issues of application of Article 101 to green (sustainable) agreements. Main findings are summarised in the conclusion.

2. NEW HORIZONTAL AGREEMENTS GUIDELINES – EU LAW PERSPECTIVE

In this part, we will analyse a specific application of competition law to horizontal agreements. Naturally, agreements aiming at green goals may arise also in vertical relations, as tested by Picht, however, we will focus on the horizontal ones, mainly for the sake of comprehensiveness of this article (Picht, 2023).

The NHG are a highly current topic as they were issued just very recently. The question of sustainability agreements had been vividly discussed when the draft of the NHG circulated. Several critiques may be identified, e.g., such as problematic quantification of sustainability parameters (Picht, 2023, p. 10), many sustainability agreements not being able to fit in within the 101(3) TFEU as interpreted by the NHG (Campo Comba, 2022, p. 6), lack of clarification for certain notions and overshooting the mark in several respects (Kalben, 2022, p. 20).

With respect to green competition law, there are two important parts of the NHG we shall cover next: first, application of 101(3) TFEU to sustainability agreements (with certain considerations with respect to 101(1) TFEU); second, non-application of the ancillary restrains doctrine.

2.1 Application of Article 101(3) TFEU to Sustainability Agreements

As put by Andriychuk, Article 101(3) TFEU is not only about consumer welfare, but about balancing competition with other legitimate societal values (2021, p. 29). The adopted version of the NHG understands sustainability in relation to terms: economic, environmental and social.[6] Therefore, it covers wider spectrum of objectives than purely green ones. Judging from this definition of sustainability agreements alone, one would believe that, since the adoption of the NHG, many horizontal agreements are compatible with EU competition law. However, the situation is not so straightforward. The NHG, para. 519 reminds that negative externalities of competition shall be primarily addressed by public policies or sector-specific regulation.[7] Cooperation between undertaking is only a secondary way of elimination of negative externalities.

In order to allow (certain) types of sustainability agreements, the NHG promotes the use of Article 101(3) TFEU. Therefore, even agreements promoting sustainability

[5] Communication from the Commission. Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023/C 259/01).
[6] NHG, para. 517.
[7] This is further confirmed by NHG, para. 564 with respect to indispensability of a sustainability agreement.

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goals are considered to be against 101(1) TFEU (provided, of course, that other conditions of application of the provision of Article 101(1) TFEU are met). Naturally, there are sustainability agreements that will not have as their object or effect restriction of competition. This is the case when parameters of competition, such as price, quality, quantity, choice or innovation are not affected. For instance, sector-wide awareness campaigns are considered to be outside of Article 101(1) TFEU.[8]

With respect to Article 101(1) TFEU, it is important to note that for the determination of whether the agreement restricts competition by object, sustainability objective is taken into account.[9] Therefore, genuine (i.e., not fake or pretended) sustainability agreements will mostly escape their designation as by object agreements. This is a crucial point, since, firstly, the agreement may benefit from the De Minimis Notice.[10] If an agreement restricts competition by object, the De Minimis Notice is not applicable.[11] Secondly, enforcement of Article 101 TFEU towards agreements restricting competition by effect is more difficult for competition authorities.

If an agreement is anticompetitive pursuant to Article 101(1) TFEU, there is a possibility to pass through the individual exemption provided for by Article 101(3) TFEU. However, there are four cumulative conditions which apply to all agreements, sustainability agreements included. The NHG provides details on how this should work in practice.

First, efficiency gains. The agreement is required by the Article 101(3) to contribute "*to improving the production or distribution of goods or to promoting technical or economic progress*". Para. 558 of the NHG gives examples to efficiencies produced by sustainability agreements: "*use of less polluting production or distribution technologies, improved conditions of production and distribution, more resilient infrastructure, better quality products*", and reduction of supply chain disruptions, shortening the time it takes to bring sustainable products to the market, facilitation the comparison of products.

Although the acceptable efficiency gains look broad, they are not without limits. First, they must be objective, concrete and verifiable. That is easy to accept. However, the very wording of Article 101(3) as primary law of the EU can be stretched only to certain extent. For instance, it is doubtful whether improving the animal welfare, without direct link to improvement of the quality of the (final) product could be subsumed under efficiency gains.

Second, indispensability.[12] Article 101(3) TFEU requires the agreement to "*impose on the undertakings concerned* [only such] *restrictions which are* […] *indispensable to the attainment of these objectives*". Para. 562 of the NHG takes the view that "[i]*n principle, each undertaking should decide for itself how to achieve sustainability benefits, and insofar as consumers value such benefits, the market will reward good decisions and sanction bad ones*". Consequently, sustainability agreement may be indispensable if, e.g., consumers find it difficult to objectively assess the value of greener products;[13] it is necessary to avoid free-riding on the investments in advertising of greener products by a

[8] NHG, paras. 527-531.
[9] NHG, para. 534.
[10] Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) (2014/C 291/01) ("***De Minimis Notice***").
[11] De Minimis Notice, para. 13.
[12] We follow the systematic of the NHG, not the wording of the 101(3) TFEU.
[13] NHG, para. 563.

pioneer undertaking;[14] otherwise economies of scale would not be reached, such as with respect to a sustainability label.[15]

In our view, to meet the indispensability criterion together with the pass-on to consumers will be a tough task for undertakings. If consumers are enlightened enough, they will buy the more sustainable version of a product on their own. If they are not, it will be difficult to meet the pass-on to consumers criterion, as mentioned below.

Third, pass-on to consumers. Article 101(3) TFEU requires the agreement to allow "*consumers a fair share of the resulting benefit*". This part of the NHG (paras. 569-591) is arguably the most interesting one. The Commission presents three types of benefits, through which an agreement can fulfil this criterion.

- Individual use value benefit. This is a traditional type of benefit that improves the product for the user, e.g., it improves its quality or decreases its prices. For instance, bio apples have better taste and are healthier than apples growing using chemicals.[16]
- Collective benefit. In this case, even though the product itself is not better, it is more sustainable - not only for the consumers on the relevant market, but also for a wider part of society. What is important here is that consumers *qua* beneficiaries either substantially overlap with the consumers on the relevant market, or their form part of it.[17] As an example we may imagine the use of organic fertiliser which does not improve the quality of the apples, but is less polluting for soil and air. Buyers of the apples are people living in the area, therefore, they will benefit from better soil and air.[18]
- Individual non-use value benefit. In our view, this category is very similar to the collective benefit, however, there is a lack of the substantial overlap between the beneficiaries and consumers. For instance, if apples grow on trees using less water where these apple trees are in a different area/state than the buyers of the apples.[19] What is important, this type of benefit is acceptable only if consumers are willing to pay for it. "*Consumers who are willing to pay more for such products may perceive them to be of a higher quality precisely because of the benefits accruing to others*".[20] Undertakings wishing to benefit from this type of benefit in order subsume their agreement under 101(3) TFEU must prove the actual preferences of the consumers, their willingness-to-pay.

As we can see, the individual use value benefit and the collective benefit are not such a novelty in competition law, at least from a principal perspective. The former one improves the product and the latter improves the position of consumers of the product, although it is also beneficial for others, non-consumers of the product. Here, we may refer to the CEDEC decision mentioned above, where the Commission took into account individual economic benefits (saving on electricity bills) and collective environmental benefits, where the Commission referred to the Community objective of a rational

[14] NHG, para. 566.
[15] NHG, para. 567.
[16] NHG, paras. 571 and 572.
[17] NHG, para. 584.
[18] The Commission uses the example of less polluting fuel. The buyers (drivers) are to a substantial extent the citizens and therefore they are breathing cleaner air. NHG, para. 585.
[19] The Commission uses the example of clothes made from sustainable cotton using less fertilisers and water. The cotton grows in a different place than where the consumers (buyers of the clothes) are. NHG, para. 585.
[20] NHG, para. 578.

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utilisation of natural resources, namely saving in marginal damage from (avoided) carbon dioxide emissions. [21] However, it is not clear from the CEDEC decision whether the collective environmental benefits would be enough on their own.

The novelty might have come in the individual non-use value benefit. This, however, did not happen. The requirement of the willingness-to-pay makes it a hardly possible route for undertakings. Moreover, if we take into account the indispensability condition mentioned above, one may wonder how consumers may be willing to pay extra money for more sustainable product and at the same time the agreement between undertakings is necessary. If consumers are willing to pay, why the undertakings do not choose this more sustainable product on their own? Of course, there might be a need to solve certain first-mover-disadvantage issues.[22] None the less, in our view, the application of this type of benefit is limited.

Fourth, and last, no elimination of competition. In the wording of 101(3) TFEU, this criterion requires the agreement not to "*afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question*." Importantly, the Commission states in para. 593 of the NHG that "[t]*his last condition may be satisfied even if the agreement restricting competition covers the entire industry, as long as the parties to the agreement continue to compete vigorously on at least one important parameter of competition*". Consequently, this requirement will be possibly the least difficult to fulfil.

2.2 Non-Application of the Ancillary Restrains Doctrine

As it flows from discussion above, if undertakings wish to conclude a sustainability agreement and to fulfil the requirements of Article 101(3) TFEU, they have a tough journey ahead of them. There would be a possibility of how this journey might have been shortened to a significant extent. That is through ancillary restrains doctrine based on the case-law of *Wouters*[23] and *Mecca-Medina*[24].

The essence of the ancillary restrains doctrine lies in the agreement having its goal outside of competition, however, there is some ancillary restriction of competition related to the agreement. A legitimate objective (public policy) may justify non-application of Article 101 TFEU (Jones, Sufrin and Dunne, 2019, pp. 252-256). These agreements need to meet only two conditions:

- to have and objective goal. This would be relatively easy task for sustainability agreements, as their very purpose (if they are genuine sustainability agreements and not fake ones) is to protect environment, promotes sustainable solutions, etc.;
- to fulfil the proportionality test.

This is a different assessment from the two-fold assessment of Article 101 (para. 1 followed by para. 3). The ancillary restrains doctrine asks whether the main operation of an agreement, which does not restrict competition, is likely to happen if the ancillary restriction of competition caused by this main operation did not occur (Torre and Fournier, 2017, p. 127).

There are scholars advocating that application of *Wouters* route might have been useful, such as Costa-Cabral (2021, p. 7). On the other side, while analysing the case law

[21] Commission Decision of 24 January 1999 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case IV.F.1/36.718. CECED), pp. 47-57.
[22] NHG, para. 578 and the footnote no. 402.
[23] ECJ, judgement of 19 February 2002, Wouters and Others, case C-309/99, EU:C:2002:98.
[24] ECJ, judgement of 16 July 2006, Meca-Medina and Majcen v Commission, case C-519/04 P, EU:C:2006:492.

of the ancillary restrains doctrine, Kalben claims that the application of this doctrine to sustainability agreements is not so straightforward (2022, p. 6). Mainly, the previous cases were set into a different legal and factual background. In *Wouters*, there was a delegated legislation and in *Meca-Medina*, the case was aiming to eventual pro-competitive framework. On the other hand, it seems that Kalben accepts the ancillary doctrine if the legitimate aim that sustainability agreements were to pursue would be set by national legislator (2022, p. 7).

Anyhow, the Commission, in a very laconic way, denies the applicability of the ancillary restrains doctrine to sustainability agreements.[25] There is no explanation to this effect. We may only assume that it would be difficult to apply by competition authorities (not being environmental agencies).

In our view, the application of ancillary doctrine would solve many issues presented above with respect to Article 101(3) TFEU. There would be no need for fitting the agreement within narrowly constructed efficiency gains, or finding how different types of benefits serve consumers or whether they are willing to pay for them. On the other hand, the threat of pure greenwashing of agreements will be much higher. Moreover, competition authorities are hardly competent for assessing whether a sustainability goal is or is not proportional in a setting of a particular agreement. This assessment is definitely less economic and arguably more arbitrary than what the Commission presented in the NHG. Although, as we will show in the next part, there is sometimes little room for economic approach even under the NHG.

3. NEW HORIZONTAL AGREEMENTS GUIDELINES – SLOVAK PERSPECTIVE

In the Slovak Republic, the AMO is the national competition authority ("***NCA***"). It applies EU competition law, empowered by Regulation 1/2003[26] as well as Slovak law pursuant to APC. The wording of Section 4 para. 1 and para. 4 of the APC is basically the same as the wording of Article 101 para. 1 and para. 3. The AMO follows the Commission and EU rules when it comes to the application of competition law (Patakyová, 2020).

The Slovak competition legislation, the APC in particular, does not contain any specific provision on sustainability agreements. Slovakia is not a pioneer as its western neighbour Austria, which has a specific "green exemption" (Robertson, 2022).

When it comes to practice of the AMO, we are not aware of any specific case related to green agreements. No such case has happened in near past, at least pursuant to annual reports of the AMO.[27]

Due to these specificities of Slovak competition law (or rather the lack of them), Slovakia, and the AMO in particular, serves as a great field for testing of how the Chapter 9 of the NHG may work in practice. In the following part, we will consider what can be problematic from the practical perspective. We will give three examples.

3.1 On by Object Restrictions

In the past decade, we may identify important shifts and movements in the assessment of by object restrictions. This article does not provide a suitable room for a

[25] NHG, para. 521 *in fine*: "[a]*greements that restrict competition cannot escape the prohibition laid down in Article 101(1) simply by referring to a sustainability objective*".

[26] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[27] Antimonopoly Office of the Slovak Republic. Annual reports. Available at: https://www.antimon.gov.sk/vyrocne-spravy/?csrt=952048084485701238 (accessed on 30.10.2023).

thorough discussion on these developments. It would be also inappropriate taking into account the research questions discuss herein. Hence, suffice it to say that, there has been a tendency to see by object restrictions in a broader context (e.g., C-32/11 *Allianz Hungária*[28])[29], although this analysis may be minimalistic (C-373/14 P *Toshiba*[30]; C-469/15 P *FSL Holdings*[31]), however certain aspects typical for the assessment of by effect restrictions may be relevant (C-228/18 *Budapest Bank*[32]). The last mentioned case was already referred to by e.g., C-306/20 *Visma Enterprise*[33].

In any case, we agree with Bergqvist that currently, it is important to distinguish between obvious and less obvious by object agreements, where the latter requires more profound analysis (Bergqvist, 2020, p. 14). Subsequently, competition authorities investigating a possible by object infringement of EU competition law may be in doubts as to what extent the analysis is necessary.

It is in this state of affairs that the NHG is introduced. Naturally, the aim of a possible by object agreement is taken into account in general. For instance, in a very recent case C-331/21 *EDP – Energias de Portugal and Others*[34], the CJEU held in para. 103 that "*where the parties to an agreement rely on its procompetitive effects, those effects must, as elements of the context of that agreement, be duly taken into account for the purpose of its characterisation as a 'restriction by object', in so far as they are capable of calling into question the overall assessment of whether the concerted practice concerned revealed a sufficient degree of harm to competition and, consequently, of whether it should be characterised as a 'restriction by object'*".

Combining the current tendency of the assessment of by object agreements with para. 534 of the NHG[35] leads to the conclusion that it will be difficult for competition authorities such as the AMO to prove that a green agreement is a by object agreement. If so, it will be probably only the "less obvious by object" category. Therefore, the AMO, being quite a small competition authority with a strong need to prioritise,[36] will probably not be keen on enforcing agreements which are green. This may be good news for the genuine green agreements. However, it may easily lead to greenwashing of anticompetitive agreements.[37]

[28] CJEU, judgement of 14 March 2013, Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal, case C-32/11, ECLI:EU:C:2013:160.

[29] This tendency has been criticized Nagy (2013) and Patakyova (2015).

[30] CJEU, judgement of 20 January 2016, Toshiba Corporation v European Commission, case C-373/14, ECLI:EU:C:2016:26.

[31] CJEU, judgement of 27 April 2017, FSL Holdings and Others v European Commission, case C-469/15 P, ECLI:EU:C:2017:308.

[32] CJEU, judgement of 2 April 2020, Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others, case C-228/18, ECLI:EU:C:2020:265.

[33] CJEU, judgement of 18 November 2021, SIA „Visma Enterprise" v Konkurences padome , case C-306/20, ECLI:EU:C:2021:935.

[34] CJEU, judgement of 26 October 2023, EDP – Energias de Portugal SA, EDP Comercial – Comercialização de Energia SA, MC retail SGPS SA, formerly Sonae MC SGPS SA, Modelo Continente Hipermercados SA v Autoridade da Concorrência, case C-331/21, ECLI:EU:C:2023:812.

[35] "*Where the parties to an agreement substantiate that the main object of an agreement is the pursuit of a sustainability objective, and where this casts reasonable doubt on whether the agreement reveals by its very nature, having regard to the content of its provisions, its objectives, and the economic and legal context, a sufficient degree of harm to competition to be considered a by object restriction (371), the agreement's effects on competition will have to be assessed. This is not the case where the agreement is used to disguise a by object restriction of competition such as price fixing, market sharing or customer allocation, or limitation of output or innovation*."

[36] It shall be noted that although the AMO as an NCA shall have autonomy in setting its priorities, this is not limitless. "*Cartels can be hardly excluded from 'top priorities' of a NCA*" (Blažo, 2020, p. 125).

[37] Although, certain authors do not see a reason to be afraid of greenwashing (Costa-Cabral, 2021).

3.2 On Efficiency Gains

We have already pointed out that the application of ancillary restrains doctrine on sustainability agreements would solve certain issues, but would open the others. The unsuitability of competition authorities to assess sustainability objectives was one of them. However, even in the current version of the NHG, there is a problem of assessment of sustainability objectives.

Pursuant to para. 558 NHG, the Commission understands the efficiency gains as: "*the use of less polluting production or distribution technologies, improved conditions of production and distribution, more resilient infrastructure, better quality products*". How could this be applied by the AMO? For instance, is the purchase and use of electric cars less polluting than the use of older fuel cars with low consumption? The former might seem more ecological, however, the production of a new car is definitely less polluting than the use of existing car. Is the AMO in a position to assess this? And what about more subjective questions, such as animal welfare?

Naturally, the efficiency gains are part of the 101(3) assessment, therefore, it is for the parties of the agreement to prove that the agreement meets the conditions. In our view, it is easy to produce evidence that your solution is less polluting (e.g., electric cars are less polluting), however, is this also an objective true in a broader context? This would be for the AMO to control.

3.3 On Willingness to Pay Method

Within Article 101(3) TFEU, the criterion of pass-on to consumers in particular, three forms of benefits have been identified: individual value benefits; collective benefits; individual non-value benefits. As mentioned above, the last one may be applied only if consumers are willing to pay for this more sustainable solution.

We would like to point out that the assessment of the willingness to pay method would be very difficult for the AMO, as it would be arguably proved by a survey. To name but a few problems. First, consumers may be unaware about the impact of their actions. Second, the answer to a question depends on the wording of the question. Third, the location or the type of the consumer is important for the answer. Richer consumers might be less sensitive to a small increase in price for the benefit of environment than socially disadvantaged consumers. Fourth, and last, the fact that surveys are not always reliable may be seen on the exit polls compared to real outcomes of the elections.[38] In our opinion, to assess a survey provided by undertakings will be difficult by the AMO.

4. CONCLUSION

The deterioration of environment and the ongoing climate change call for an immediate and strong solution. In a situation where these problems are not properly addressed by the public sphere, the private sphere may be called to stepped in. These considerations inspired us to find answers to questions: Is it possible to take into account the protection of environment also during the application of competition law? If so, to what extent is this desirable?

In order to answer these questions, we dived into a practical rather than theoretical field, as we partially analysed the new guidelines on horizontal agreements (the NHG). We found out that the Commission preferred the environmental

[38] In Slovak parliament elections 2023, the difference between exit poll and real outcome was substantial (23,5% vs. 17,96% for a particular political party), see Filo (2023) and Statistical Office (2023).

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considerations to occur mainly in the 101(3) assessment. Looking into the particularities of the NHG from the perspective of the AMO, we may establish that it will be a real challenge to apply the NHG. Green agreements blur the waters of by object infringements, they may be pursuing objectives which are hardly assessed by the AMO *qua* economic and not environmental institution and that even "hard evidence" such as consumer surveys may prove to be difficult for the assessment in practice.

Therefore, our answer to the first question is that it is indeed possible to take into account the protection of environment, also during the application of competition law. However, is this desirable? From the environmental perspective, it is desirable indeed. However, from the practical perspective, we may be afraid of greenwashing of anticompetitive agreements, as well as of persecution of genuine green agreements, because they will not be able to provide enough objective evidence, which could be easily assessed by the AMO within 101(3) assessment.

In the current state of affairs, we consider competition authorities, such as the AMO, to be ill-placed for the assessment of environmental issues. An easy solution would be for the AMO to ask for cooperation other institutions, such as the Ministry of Environment or the Ministry of Economy. However, there is a risk that these institutions would prefer their agenda, e.g., the Ministry of Environment would support all green solutions. Moreover, Ministries are political institutions, whereas the AMO is an independent authority. Therefore, this easy solution would be hardly a panacea for the assessment of sustainability agreements.

In our view, a welcome solution would be if public institutions (possibly the Commission) provided more guidance on these questions.[39] Which efficiency gains are considered within the first criterion of 101(3)? What are the good practices of the surveys necessary for proving the willingness to pay? Clearer rules would enhance legal certainty as well as promote green approach to horizontal agreements.

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A FRAMEWORK FOR EFFECTIVE SMART CONTRACTING /

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Abstract: *Smart contracts are event-driven computer programs used to automatically execute all or parts of the agreements between two or more entities, pursuant to their specifications. The self-executing and self-enforcing attributes of smart contracts present numerous potential benefits, such as cost efficiency, accuracy, and reliability, as well as the potential to support several sustainable development goals. Smart contracts can be very efficient in many sectors, with important automation, procurement, financial, and other supply chain management features. For this study, a systematic literature review was performed, with a view to assessing, synthesizing, and critique the current state of legal and security aspects of smart contracts. The analysis of publications and reports gathered allowed the identification and mapping of the most relevant aspects and revealed numerous issues and vulnerabilities associated with the use of this technology. This paper provides the following contributions: the study and organization of a large corpus of relevant publications; the review of smart contract definitions, from several perspectives; an outline of smart contract characteristics; a framework for effective smart contracting, addressing legal and security issues and proposing several improvements.*

Key words: *Smart Contract; Cybersecurity; Risk; Legal Enforceability*

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1. INTRODUCTION

Sophisticated technologies increasingly impact the traditional business methods and the way in which various transactions are conducted. Smart contracts, for instance, are regarded as a key component of the fourth industrial revolution, with a major potential for numerous domains (Lin et al., 2022).

Numerous organizations are already embracing this technology, due to the significant potential benefits, such as reduced transaction costs; increased reliability; enhanced forms of collaboration or enforcement protocols; and improved sustainability (as contracts eliminate the need to use paper). Moreover, according to a survey cited in the Data Act (2022), 79% of the respondents regard smart contracts, in the co-generated data on the Internet of Things (IoT) context, as an effective data access and use tool.

The potential use of smart contracting is very large, encompassing, for example, decentralized financial (DeFi) services (Makarov & Schoar, 2022; Khan et al., 2021;

Zetzsche, Arner, & Buckley, 2020); construction industry (Ye, Zeng, & König, 2022); energy industry (Mishra et al., 2022); supply chains (Groschopf et al., 2021; Chang et al., 2019); crypto-assets exchange (In Re Bibox Group Holdings Ltd. Decs. Litig., 2021); non-fungible tokens trading (NFTs) (Hermès International and Hermes of Paris v. Rothschild, 2022); real estate ownership and transactions registration (Stefanović et al., 2022); prediction market (Kushwaha et al., 2022); loan industry (Symbiont.io v. Ipreo Holdings, 2021); digital rights management; streamline of operations in the retail industry (e.g., allowing the creation and delivery of orders), insurance industry, and healthcare services processes (i.e., sharing patient information and automate insurance payments); etc. Furthermore, smart contracts can be very instrumental in supporting several the United Nations sustainable development goals (SDGs), such as, for instance, Goal 3 (health and well-being), Goal 17 (partnerships, to coordinate and trace international aid transactions), Goal 8 (decent economic growth, through universal access to services such as banking or insurance), etc. (UNCTAD, 2021; Hughes et al., 2019).

Nonetheless, alongside the significant promises of smart contracts, there are several major conceptualization, implementation, and execution challenges (Zheng et al., 2020). These challenges are related to important legal and security requirements and can pose significant problems in practice. Moreover, the conventional software engineering process models are not fully adequate for the smart contracting environment, as these models do not adequately account for aspects such as the immutability of smart contracts upon deployment, assuming that modifications can be made easily via upgrades upon the software release (Sillaber et al., 2021). Therefore, the effective use of smart contracts depends on how well these issues or challenges are addressed.

There is a large corpus of relevant smart contracts literature. For instance, the Scopus search on <"smart contract" AND legal> displayed 572 documents, while the <"smart contract" AND security> search resulted in 5,030 documents; the Clarivate <"smart contract" AND legal> search displayed 184 results; the IEEE Xplore search on <"smart contract" AND "security issues"> produced 103 results; the Google Scholar search on <"smart contract" AND "legal issues"> displayed about 3,010 results. The literature discusses numerous related topics in detail, from technical, legal, or practical perspectives (Madine et al., 2023; Sahoo et al., 2022; Wu et al., 2022; Zhang et al., 2022; Barboni et al., 2022; Hewa et al., 2022; Ghodoosi, 2021; Reyes, 2020; United Nations/CEFACT, 2020; Manupati et al., 2020; Hasting, 2020; Singh et al., 2020; Fairfield, 2014).

This paper is structured as follows. The next section presents the research methodology, questions, and contributions. Section 3 contains two subsections, a review of smart contract definitions and a description of the essential characteristics of smart contracts, respectively. Section 4 analyses legal challenges related to smart contracting. Section 5 proposes a framework for effective smart contracting. The framework is understood as a "conceptional structure," an "openwork," or a "skeletal support used as the basis for something being constructed" (Webster Dictionary, 2023; The Free Dictionary, 2023). Finally, the paper draws the conclusion.

2. RESEARCH METHODOLOGY, QUESTIONS, AND CONTRIBUTIONS

This paper is based on an extensive literature review, from a variety of fields. As Snyder (2019) remarks, through the integration of findings and perspectives from numerous empirical findings, a literature review has the potential to better address research questions. Literature review is considered "an excellent way of synthesizing research findings to show evidence on a meta-level and to uncover areas in which more

research is needed, which is a critical component of creating theoretical frameworks" (Snyder, 2019, p. 333).

The aim of the systematic literature review was to assess, synthesize, and critique the current state of the aspects concerning legal smart contracts in practice. This research found a complex corpus of relevant publications. Initially, several keywords and search strings were determined, such as "smart contracts vulnerabilities;" <"smart contract" AND vulnerabilities>; <"smart contract" AND "legal aspects">; <"smart contract" AND "security issues">. The identification of the relevant materials was based on keywords and strings searches in bibliometric databases, such as Scopus, Clarivate, and IEEE Xplore, and the search engines (Google and Google Scholar). To narrow the results, additional search strings were developed. The highest attention was given to journal articles, international organizations documents, laws and legal bills, and legal cases.

The materials obtained were filtered, processed, and organized based on the quality and relevance assessment. The most relevant materials were analysed in-depth, with respect to the following aspects: categories, issues, and contributions. The study of the materials employed content analysis, to systematically identify the relevant issues.

The paper aims to answer the following four research questions:

- How are smart contracts defined?
- What are the main characteristics of smart contracts?
- What legal aspects must be observed in the creation and execution of smart contracts?
- What are the most concerning smart contract security vulnerabilities and risks?

The main contributions provided by this paper are as follows: the study and organization of a large corpus of relevant publications; the review of smart contract definitions, from several perspectives; an outline of smart contract characteristics; a framework regarding effective smart contracting, from a legal and a security perspective, with several proposed improvements.

3. SMART CONTRACTS

3.1 Definitions

Smart contracts are difficult to define as there are multiple types and deployment, integration, and execution possibilities. Another issue is the imprecise, often interchangeable, use of terms such as "smart contract," "algorithmic contract," "executable contracts," "smart contract code," "legally binding smart contracts," "smart legal contracts," etc. Several international organizations and states have adopted legislation regarding smart contracts (Ferreira, 2021).

International Organizations

According to the United Nations Commission on International Trade Law (2020: 8), the expression "smart contract" is a "misnomer," as it refers to a program that is neither a "contract" nor, in the artificial intelligence sense, "smart." Nevertheless, there are numerous definitions of smart contracts, from various perspectives (technical, legal, etc.). The United Nations Commission on International Trade Law (2022: 3) conceptualizes "smart contracts" as "instances of the use of automated systems to perform contracts."

The International Telecommunication Union (2019) defines "smart contract" as being a program, available on a distributed ledger system, which encodes rules for certain transactions, validated and triggered by certain conditions. The Chamber of Digital

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Commerce (2018), defines "smart contract" as computer code, stored on a distributed ledger, which, when certain specified condition or conditions happen, runs automatically, in accord with pre-specified functions and writes the results into that distributed ledger.

United States

In **Tennessee** (TN Code § 47-10-201), "smart contract" is defined as "an event-driven computer program, which executes on an electronic, distributed, decentralized, shared, and replicated ledger that is used to automate transactions, including, but not limited to, transactions that:

- Take custody over and instruct transfer of assets on that ledger;
- Create and distribute electronic assets;
- Synchronize information; or
- Manage identity and user access to software applications."

Arizona (AZ Statute § 44-7061) and **North Dakota** (N.D. Cent. Code § 9-16-19) have identical definitions and define the "smart contracts" as an "event driven program, with state, which runs on a distributed, decentralized, shared and replicated ledger that can take custody over and instruct transfer of assets on that ledger."

In **Wyoming**, the Decentralized Autonomous Organization Supplement (17-31-102) defines "smart contract" means "an automated transaction, as defined in W.S. 40-21-102(a)(ii), or any substantially similar analogue, or code, script or programming language relying on a blockchain which may include taking custody of and transferring an asset, administrating membership interest votes with respect to a decentralized autonomous organization or issuing executable instructions for these actions, based on the occurrence or nonoccurrence of specified conditions."

European Union

In the **European Union**, the Data Act (2022) provides the definition of "smart contract" in Art. 2 (16): "computer program stored in an electronic ledger system wherein the outcome of the execution of the program is recorded on the electronic ledger."

In **Italy**, Art. 8-ter of Law No. 12/2019 defines "smart contract" as a computer program which works on distributed ledgers, and which can bind parties involved based on the previously defined effects by those parties.

In **Malta**, the Digital Innovation Authority Act (2018) defines "smart contract" as "a form of innovative technology arrangement consisting of: (a) a computer protocol; and, or (b) an agreement concluded wholly or partly in an electronic form, which is automatable and enforceable by execution of computer code, although some parts may require human input and control and which may be also enforceable by ordinary legal methods or by a mixture of both."

3.2 Characteristics of Smart Contracts

Advanced technologies allowed significant developments in automated contracts and transactions, extensively discussed in the literature. Surden (2012), for instance, proposes the classification of technologically advanced contracts into "data-oriented" and "computable" contracts, which allow the expression of contractual terms in computer-readable forms. A taxonomy for "algorithmic contracts" is proposed by Scholz (2017, p. 136): algorithmic contracts are distinguished by the role played by the algorithm involved (that is, tool or agent), by the tasks involved (such as gap-filling or negotiation), and, concerning negotiating algorithms, as "black box algorithm" or "clear box algorithm." Cohney & Hoffman (2020, p. 323) discuss "transactional scripts," defined as "a persistent

piece of software residing on a public blockchain [...] executed as a part of an exchange, the code effectuates a consensus change to the state of a ledger."

Smart contracts represent "the mature end of the evolution of electronic agreements over several decades" (Webach & Cornell, 2017, p. 317). Smart contracts represent an attempt to improve the formation and enforcement of obligations, as Fairfield (2022, p. 84) observes, "the interface between human—natural—language and computer programs matters, and legal constructions of human encounters with automatic systems have profound legal significance."

Smart contracts can be regarded as predefined relationships, as actions of a party triggers actions of another party. Smart contracts must "be considered contracts because they are agent-generated mechanisms to shift rights and obligations" (Webach & Cornell, 2017, p. 338). However, while Reyes (2020, p. 991) regards smart contracts as "merely another step in the chronological development of technology that enables computable contracting," Werbach & Cornell (2017, p. 318) note that "while smart contracts can meet the doctrinal requirements of contract law, they serve a fundamentally different purpose."

In practice, smart contracts involve two or more parties agreeing to a set of rules and intended results, which are coded. The data required by the contract is fed into blockchains from external sources. Real-time data feeds are named "oracles," and can be software- or/and hardware-based. Oracles can be internal or external, a fact that induces the risk of malicious or wrong data, without possible recurses to application layer security protocols.

Smart contracts can take several forms. Smart contracts can be simple (for instance, for Bitcoin transactions) or complex (for instance, certain contracts running on the Ethereum blockchain), in certain cases involving multiple conditions or the use of other smart contracts and several parties. Based on the type of execution, smart contracts can be classified as known or pre-fixed execution and linked to certain events or conditions.

Raskin (2017, p. 310) distinguishes between strong and weak smart contracts, the former with prohibitive costs of revocation or modification, while the latter including contracts that can be altered upon execution with relative ease. From a legal perspective, on the other hand, the European Law Institute (2022, pp. 13-4) distinguishes four smart contract types: (i) "mere code," with no legal agreement;" (ii) "a tool to execute the legal agreement," with the legal agreement existing off-chain;" (iii) "a legally binding declaration of will, such as an offer or acceptance or constitute a legal agreement itself;" and (iv) "merged with the legal agreement," therefore existing both on-chain and off-chain.

Smart contract requirements are specified as statement properties. Distinct types of logic are employed to express the specifications of smart contracts. These logics include temporal, dynamic, deontic, and defeasible logics (to define rights, obligations, and exceptions) (Tolmach et al. 2021). However, it is difficult to code in a smart contract what happens when there are contract performance deficiencies, or when one party is in breach of the terms of the contract. This aspect is further complicated by the fact that the code development tool chain, according to Zou et al. (2021), is not strong enough.

The basic components of smart contracts are the properties (static and variable), the code (which describes the commitments), and the ledger. After consensus is reached by the parties involved, the contracts are validated and authenticated, then written to a block in the blockchain iteration.

According to their specifications, and depending, potentially on other smart contracts, part or the entire code/agreement is automatically executed (Loon v. Department of Treasury, 2023). The execution of smart contracts writes any resulting

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data into the distributed ledger. Smart contract must be deterministic (i.e., the output must be the same on all nodes executing the code). However, certain smart contracts receive data from other smart contracts, raising sequencing and synchronizing challenges.

Initially, smart contracts were represented in a low-level, assembly-like language (Gec et al., 2023, p. 6). Currently, smart contacts can be written in several languages, such as Solidity, Vyper, Rust, Yul, Java, JavaScript, Python, Scrypto, etc. There are also libraries of modular, reusable smart contracts. The source code is compiled and executed inside blockchains. Noteworthy, smart contract code is limited in size, due to the blockchain infrastructure constraints, usually having between a few dozen to hundreds of lines of code. There are several platforms on which smart contracts can be deployed, such as Ethereum, Binance Smart Chain, Solana, or Cardano.

Smart contract transactions are instructions signed cryptographically from parties' accounts. These can be regular transactions (transactions from one account to another), contract deployment transactions, and execution of contracts (which interacts with a deployed smart contract). However, private keys involved are vulnerable to malicious attacks, which can result in significant losses for victims (Rivelli v. Doe, 2022).

The life cycle of smart contracts includes the contract generation, which comprises parties' negotiations, the formulations of specifications, and the writing and verification of the code, the release, and the execution (Wu et al., 2022). Essential smart contract characteristics are related to the blockchain technology: cryptography-based; transparent; quasi real-time execution; independence from any centralized party.

While smart contracts are conceived as immutable, there are instances where periodic developments are encountered, for instance, to update or upgrade certain services or for achieving interoperability, through newer versions of the contract and the deactivation of the old contract.

Certain smart contracts can easily be placed under the contract doctrine; however, others require interpretive work, for the application of contract law. However, not every smart contract can be construed as "legal contract." Certain smart contracts can represent a part of a large contract, others can be used to automatically execute other contracts, and some may not be contracts at all. Furthermore, smart contracts can be part of hybrid contracts, which combine natural language and code: certain obligations being recorded in a natural language, while others being coded in computer form, deployed on a distributed ledger.

Smart contracts can be valid under the United Nations Convention on Contracts for the International Sale of Goods (CISG), as they can satisfy the offer and acceptance requirements (Duke, 2019). While smart contracts can be legally binding, that is not the case where they were not regarded by parties as having the implications of traditional contracts.

There are numerous rules and principles of contract law which apply to smart contracts. In general, smart contract can be construed as enforceable in each jurisdiction if they are acceptable under the relevant fraud statute (contracts cannot have illicit purposes) and comprised all the essential terms applicable to traditional contracts' life cycle (Woebbeking, 2019). These requirements regard the parties' identification, the offer, the acceptance, the consideration, competency, and capacity.

Contracts are governed by the law chosen by the parties, which, according to the Rome I Regulation, must be "made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case" (Art. 3). Parties can opt for the law applicable to the whole or to part only of the contract. Moreover, in situations involving international

parties, the Hague Principles on Choice of Law in International Commercial Contracts 2015 can be chosen as the choice of law.

With respect to data-sharing, according to the European Union Data Act, smart contracts must comply with several requirements, including robustness and access controls that preclude functional errors or manipulations by unauthorized entities; termination and interruption in a safe manner; archiving and continuity capabilities; and consistency with applicable data-sharing agreements.

4. LEGAL CHALLENGES

Smart contracts are different from traditional contracts as they include, alongside the terms agreed by the parties, terms that are mandatory for the execution of the smart contract. To be legally enforceable, smart contracts must comply with the requirements of contract law. According to Schwartz & Scott (2003, p. 543), contract law "has neither a complete descriptive theory, explaining what the law is, nor a complete normative theory, explaining what the law should be." The legal requirements of a contract vary by jurisdiction; however, they include agreement (all contract parties accept the terms as they are presented); consideration (something of value offered to all contract parties); certainty; completeness; intention of the parties to make the agreement legally enforceable; and formal requirements.

The first requirement in the process of forming legally binding smart contracts is the agreement, which comprises an offer and the acceptance of that offer. The offer is an expression of the willingness to observe and execute the contractual terms, once accepted by the other contract party. Smart contract acceptance effectively amounts to the assent to offer's terms or conditions (Raskin, 2017). This requirement is not significantly different compared with traditional contracts; however, unlike in the case of traditional contracts, smart contract acceptance comes through performance.

The enforceability of smart contracts is determined at state-level. Several states recognize explicitly the legal authority to use smart contracts in electronic transactions. In Tennessee, for instance, smart contracts can exist in commerce and "No contract relating to a transaction shall be denied legal effect, validity, or enforceability solely because that contract contains a smart contract term" (TN Code § 47-10-201). In North Dakota, for another example, contracts may "not be denied legal effect, validity, or enforceability solely because the contract contains a smart contract term" (N.D. Cent. Code § 9-16-19).

Nonetheless, smart contracts may raise various legal considerations and numerous issues with respect to contract law requirements. Some of the problems encountered regard semantic consistency and common consent (Tong et al., 2022). For instance, computer code makes it difficult to express or define the semantics of certain situations, numerous legal concepts being exceedingly difficult to formalized (for example, "reasonable," "adequate," "minimal," "good faith," etc.). Moreover, even where the smart contract code has been executed, that does not necessarily imply that the contract is legally compliant and complete. Further, smart contracts, written in programming languages, raise readability and verification challenges (that is, the source code of a smart contract and the compiled code, to avoid any differences).

Additionally, as Fairfield & Selvadurai (2022, p. 117) point out, the assumption that people or organizations intend whatever code do when executed on decentralized ledgers "does not fit well with the law of contract." In certain cases, the code may "not reflect the considered, consciously anticipated choices of their corporate users" (Scholz, 2017, p. 137). The practical execution of the code will depend on the circumstances at

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the contract execution time, which may result in situations which were not considered when the code was deployed, or which are not currently desirable or even legal. Consequently, the fact that the code has been executed does not necessarily mean that the contract is certain or complete from a legal perspective.

Challenges may also arise with respect to the fact that there is currently no straight forward way to modify or amend a smart contract, thus creating challenges regarding the certain for the parties involved. For instance, a major practical problem arises when a smart contract party discovers errors in the code after it has been executed. Moreover, smart contracts cannot get information about outside events as they cannot include HTTP requests. Additionally, certainty may also be a challenge, as code may include variables, function modifiers, and events, thus allowing numerous actions, as well as with respect to the termination of smart contracts.

Another important legal aspect regards the way the parties "sign" the code. In the context of smart contracts, this can be done by applying the digital signatures to the coded transactions. Given the many potential complex arrangements, automated assessment may be insufficiently coded. The risk that the jurisdiction involved is not clearly determined or considered is very real, and this can result in the impossibility of determining whether the contract is lawful or not, as this depends on the actual applicable legislation.

The problem is further exacerbated by the difficulty of ascribing actual locations to digital code or transactions, a challenge which demands thoughtful consideration, as this can negatively impact the use of smart contracts in cross-border transactions. This aspect raised the question whether the parties should "have smart contracts governed not by a specific country's laws, but by supranational law, or even by soft law principles, such as the UNIDROIT Principles of International Commercial Contracts (De En Goh, 2022, p. 35).

The problematic aspects also include contract performance, since contracts are often drafted in ways which allows levels of "discretion, open-endedness, or abstraction to allow flexibility given future uncertainty" (Surden, 2012, p. 633). Even more difficult, in practice, can be to determine and address the breach of a smart contract, for instance, in cases of failures to perform, or where the performance is defective or interrupted. If a security breach is due to computer code, rather than to the actions of malicious persons, there can still be liability for the breach. In fact, the European Union Data Act (2022), in Art. 30, regarding essential requirements for data sharing, stipulates that vendors of applications using smart contracts must effectively address aspects regarding robustness (i.e., ensure that smart contract "avoid functional errors and to withstand manipulation by third parties"); safe termination and interruption; (c) data archiving and continuity; and (d) access control. The Data Act also stresses the importance of adopting common specifications for smart contract interoperability.

Code-only contracts can raise numerous issues with respect to their content and execution. On the other hand, contracts that, prior to being coded, have been agreed in a natural language, present a lower smaller scope for interpretation or disputes. This is an important aspect, at least from an execution and remedies perspective.

Ballell (2019), for instance, raises the issue of remedies related to the use of automated systems to perform contracts. Indeed, a few problems may arise in the contract life cycle, which can be associated with a range of remedies. However, numerous questions can be asked as to what extent the current remedies approaches, where "reliance on formal remedies is less frequent in smart contracts" (DiMatteo & Poncibó, 2019, p. 823), are adapted to smart contracting and whether technology-enabled

automatic remedies are warranted (including, but not limited to the reversal of the effects of the smart contract code performance).

Several other important legal obligations, from multiple regulators, may also come into play with the execution of smart contracts, such as:

- Consumer protection (Forbes, 2022; D'Onfro, 2020), which regards several rights on the data involved, as well as the possibility to cancel the contract, conformity with existing standards, clearly stated remedies, and potential losses, which could be incurred, following certain unfair terms (Durovic & Willett, 2023).
- Securities laws (Risley v. Universal Navigation, 2023);
- Processing of personal data and the protection of privacy in electronic communications (Wu et al., 2022; Wan et al., 2022; Robles, 2020);
- Protection of intellectual property rights, which can be complex and, sometimes, difficult to anticipate, as it may regard, on one hand, the algorithms, code, trade secrets, and/or patentable materials used for the development of the smart contracts (Kleiman v. Wright, 2020), as well as the rights of other parties that have ownership interests, and which may be affected by during the execution of smart contracts.
- Prevention of discrimination.

5. FRAMEWORK

5.1 Security Issues

Cyberattacks are on the increase, both in numbers and sophistication, effectively rendering computer information systems and transactions vulnerable to numerous threats and attacks (Vasiu & Vasiu, 2018). According to a Statista survey (2023), more than half of the respondents consider data security as being the most critical cybersecurity area.

Apart from the known security risks, blockchains and smart contracts, due to several specific factors, such as the decentralized approach, the need to access external data sources, and the vast amounts of data that can be difficult to synchronize, present additional attack opportunities, which can result in major losses for victims. For instance, smart contracts may depend on the execution of parts of other smart contracts, and this kind of situation could lead to synchronization or sequencing issues. Further, not encountered in the case of text-based contracts, smart contracts present the risk of code programming errors or that the execution is subverted, resulting in unwanted or unintentional transactions. As deployed smart contracts are irreversible, the security problems are difficult to address, situation which can result in significant irreversible losses.

A list of attacks that occurred since 2016 on smart contracts can be found in Chu et al. (2023). Further, there are functional or transactional risks, which regard, for example, the limitations or failures of the underlying blockchain. Successful base-layer network attacks, for instance, can lead to application layer failures.

This situation underlines the importance of the security aspect. Zou et al. (2021), for instance, found that there was a remarkably high emphasis on ensuring smart contracts' code security; however, also found that 71.6% of the conducted survey respondents agreed that it was difficult to guarantee the security of smart contacts during development. This is genuinely concerning, as the value of the assets that can be stolen can be extremely high (for instance, the Decentralized Autonomous Organization

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or the parity multi-sig wallet hacks), and extremely difficult to track and recover the assets involved.

Smart contracts are vulnerable to several threats or risks. Atzei, Bartoletti, & Cimoli (2017) distinguish three levels: language, virtual machine and blockchain. Smart contract vulnerabilities regard numerous causes or types, such as reentrant calls, unexpected inputs, or unexpected branch executions (Otoni et al., 2022). Several taxonomies were proposed for smart contract vulnerabilities (Atzei, Bartoletti, & Cimoli, 2017) and numerous publications discuss these vulnerabilities (Ethereum, 2023; Zhou, et al., 2022; López Vivar et al., 2021; Porambage et al., 2021; He et al., 2020). Kushwaha et al. (2022), for instance, categorizes Ethereum smart contract vulnerabilities into three "main root causes" and seventeen "sub-causes" categories.

The most concerning vulnerabilities and risks associated with smart contracts are as follows.

Reentrancy: A severe vulnerability, which occurs when a function is called repeatedly, before the execution of a function is completed, and, as the variables of the function do not get updated after each call, can create serious issues. Reentrancy can be a single function, when attackers control one function, called recursively to conduct the unauthorized activity, and cross-function, when several functions, with shared implications, are controlled by attackers. Several techniques can be used to prevent this type of vulnerability (Zhou et al., 2022).

Overflow: This happens when the size of the value exceeds the constraints for a data type (top or lower, causing overflow or underflow) (Sayeed, Marco-Gisbert, & Caira, 2020). Addition, multiplication, and division overflows are the most encountered overflows in smart contracts (Fei et al., 2022).

Block randomness: Refers to the fabrication of malicious miners of blocks that result in deviation from the normal outcome of the pseudo-random generator (Zheng et al., 2020).

Callstack depth: Regards the situations where external calls fail, due to the exceeding of the maximum call stack. These situations, if not addressed adequately, permit attackers the forcing of malicious output.

Timestamp dependency issues: Refers to situations when the block timestamp which triggers the execution of an operation, is compromised by malicious attackers.

Transaction ordering dependency: Occurs due to concurrent orders of execution, which can result in incorrect execution results when the transactions depend on each other.

Data withholding: Occurs when the producer publishes blocks without sharing the data used to build the block. In such situations, the full nodes cannot verify the updates correctness, thus giving to the malicious block proposers the possibility to subvert the protocol rules push invalid state transitions.

Access control problems: When inadequate authorization or authentication mechanisms are in place, attackers can corrupt the smart contract data and/or functions or sign unauthorized transactions.

Unchecked Request Vulnerability: Where data or addresses are called by external controls, attackers can arbitrarily specify addresses, functions, and parameters related to such external calls (Chu et al., 2023). In successful attacks, smart contracts would perform functions that where not considered by the developers, resulting in financial losses for the victims (Chu et al., 2023).

Denial of service: Results in the disruption of the execution of a smart contract, by reverting the call every time.

To address these risks, parties employ code testing, however, there are numerous challenges to this, such as the difficulty to consider all cases or scenarios; potential flaws in compilers and virtual machines; lack of guidance for testing; lack of tools to measure code testing; gas consumption; etc. (Zou et al. (2021). Further, the validation of smart contracts requires a deep understanding of laws and of the semantics and potential events of each smart contract, to produce a complete set of scenarios, which may not be easy to develop, in several cases. Additionally, smart contracts may interact with unverified, even potentially malicious outside code (Bräm et al., 2021), further compounding the problem.

5.2 Necessary Improvements

Smart contracts can be legally binding agreements, however, not necessarily always. Incomplete or inharmonious legal provisions create uncertainty regarding the legal requirements or enforceability of smart contracts, potentially reducing the opportunities or willingness to use them. Further, currently it is difficult to code numerous aspects, for instance, regarding dynamic-adjustments, remedies, or consideration of new events, which would trigger the execution of smart contracts. Therefore, there is a clear need to adopt and harmonize adequate legal provisions, and to establish smart contract development, testing, and review standards, considering smart contracts' characteristics, limits, and vulnerabilities.

Smart contract must be fully tested, from entry, logic, and termination functions to access rights, considering the number of calls that can be handled and unexpected or unintended behaviours and data input issues. There should be acceptable and enforceable ways which stipulate how the risks and the liabilities related to the execution of smart contracts are allocated between the parties involved, as well as arbitration clauses. At least in the case of complex contracts, the development of hybrid contracts will allow to specify, in a clear manner, essential components, such as governing law or necessary contract updates.

The standardization of data representation, processing, and verification procedures should also receive appropriate consideration, as it is imperative to ensure untampered, unaltered, timely, and trustworthy data input to smart contracts. The development of templates which match various requirements, thoroughly tested, adaptive and allowing for dynamic specifications or requirements. Certified auditing services for smart contracts should also receive adequate consideration.

Smart contracts must be easily amendable or upgradable and terminable. The upgrade or termination of smart contracts, however, must be done in a safe manner, to prevent any attacks, with all parties involved approving the update or termination before its initiation. Furthermore, in cases of smart contract termination, no contract functions should be callable, all access or execution rights revoked, and, as appropriate, make impossible the contract reinstate.

The analysis and protective measures related to the security of smart contracts is of paramount importance. Therefore, developers and owners must ensure strong identity verification and adequate technical measures, to prevent unauthorized data access or modification or use of smart contract functions and the availability and reliability of the services provided, and the authentication of data (from authorized users only). Wrong or malicious calls must be immediately detected and reported to administrators.

The development of fuzzing execution, which would allow for the mining of potential security vulnerabilities, with a view to minimizing the security risks, is an

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important consideration in this context. Further, the development of formal specifications, which will allow for complex verification, to demonstrate the absence of coding errors (since, once deployed on blockchains, it is almost impossible to make revisions).

To prevent malicious or involuntary executions of smart contracts, the execution must be conducted in a time-controlled manner, with the owner having control over contract termination and interruptions. All the nodes must follow security protocols compliant with the smart contract requirements.

Finally, as the development, the execution, and the disputes involving smart contracts can be highly specialized, it is necessary to train and certify software engineers, law, and security professionals, with respect to all the aspects involved.

6. CONCLUSION

The automated execution of agreements through smart contracts presents numerous potential benefits. The range of agreements is very vast, ranging from business transactions or certain rights transfers to assets swaps and other complex types of transactions. This technology can increase the efficiency, traceability, and transparency of transactions, as well as other benefits. However, while smart contracts may play a significant role in future transactions, the technology is not yet fully developed, with numerous issues which must be addressed adequately. These issues regard the interplay of the coding various semantics and potential scenarios, the legal, and the security aspects.

This paper provides a framework for effective smart contracting. Smart contracts still face significant challenges in practice and will gain broad acceptance only if the technology fully satisfies the legal and security requirements. This mandates numerous improvements to the current situation. The paper analysed the main legal and security issues and challenges and proposed several improvements. The paper allows for the identification of specific smart contract requirements, underlines the main problems, and offers a platform for comprehensive system requirements conceptualization and systems management.

This study's multidisciplinary underpinnings facilitate the holistic understanding of the complex issues related to smart contracts and the findings can be useful for lawmakers, lawyers, researchers, and smart contract developers.

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METROPOLISES - THE CONTEMPORARY CHALLENGE TO LOCAL GOVERNMENTS / Monika Augustyniak

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Abstract: *Metropolisation is a process that includes the consequences of global phenomena transferred to the level of metropolitan areas, being the result of various legal and social processes, which is best illustrated by the example of French and Polish institutional solutions. France has been chosen to perform the analysis on due to the uniqueness of its legal regulations in the field of the issues covered in the study (e.g., the institution of metropolitan poles [le pôle métropolitain]). The possibility of creating a metropolis in its current form has existed in France since 2010, but the legislative bodies are still introducing changes to strengthen the legal position of this institution. The French legal order continues to reinforce the role and importance of the metropolis as a unit of inter-municipal cooperation that can take over the department and region's essential competences to manage the metropolitan area more effectively. In a sense, France is becoming a model of organisation and functioning for contemporary metropolises in Poland, which are beginning to emerge as a certain remedy to the effectiveness issue of performing supra-regional tasks. This article provides an analysis of the law as it stands for legal regulations concerning the organisation and functioning of metropolises both in France and Poland in a comparative and legal context, with the aim of making postulates regarding the choice of a right formula for performing tasks in contemporary local governments.*

Key words: *Metropolisation; Metropolitan Governance; Inter-Communal Cooperation; the Draft Metropolitan Coherence Pact; the Metropolitan Area*

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1. INTRODUCTION

A local government system is subject to constant evolutionary processes. After almost thirty years of its functioning in Poland, it can be assumed that the major organisational and functional problems have been resolved (Dolnicki, 2014, p. 5). However, the issue of a metropolitan area system remains unresolved.

The essential territorial organisation of the state in the Polish legal system includes communes, districts, and voivodeships (Augustyniak, 2014, p. 16). Although the legislator recognises the need to introduce a metropolitan union into the organisational structure of a local government, they do not make the union a unit of local government. The French legislator, seeing the essence of a metropolis in the performance of tasks

within a contemporary local government, creates a socio-normative framework for the functioning of large city agglomerations, which become a certain indicator of an organisational model for the functioning of contemporary self-governing communities (Marcovici 2019). Their goal is to increase the effectiveness of the performance of public service undertakings and tasks, as well as to satisfy the needs of the supra-local inhabitants of large agglomerations.

Metropolises constitute a new formula for the performance of tasks in the contemporary local government (Izdebski, 2021, p. 7), which is why the analysis of their organisation and functioning from the comparative law perspective is necessary in the discussion of the developments in the legal status of the Polish metropolitan union.

2. METROPOLITAN UNION IN THE SILESIAN VOIVODESHIP: A NORMATIVE CONTEXT

The Act of 9 March 2017 on Metropolitan Union in the Silesian Voivodeship[1] introduced a new organisational and legal structure aimed at the performance of public service tasks of a supra-local character, the formula of which goes beyond the current essential territorial organisation of the state. The Upper Silesia - Zagłębie Metropolis was created on 1 July 2017 based on the Regulation of the Council of Ministers.[2] Pursuant to Art. 1 of the Act in question, the metropolitan union is an association of communes of the Silesian Voivodeship which are characterised by the existence of strong functional links and advanced urbanisation processes and which are situated in the spatially coherent area inhabited by at least 2,000,000 people. Undoubtedly, the metropolitan union is not a commune union within the meaning of the constitutional acts of local governments. Even the correct application of the regulations to inter-commune, district, or commune-district unions is inadmissible in this case. Therefore, it is a new institution within the framework of a local government. The members of a metropolitan union created in the area of the Silesian agglomeration can only be communes.

The metropolitan union in the Silesian Voivodeship is an additional subject, the creation of which does not change the way in which the units of the fundamental territorial organisation in the area of the Upper Silesian agglomeration function. Its role is to carry out new supra-communal tasks that have not been performed to date.

The legislator granted the metropolitan union a legal personality by entrusting to it the performance of public service tasks in its own name and under its own responsibility. It also granted the metropolitan union independence consisting in judicial protection. At the same time, the legislator did not empower the local communities, which is why the metropolitan union in the constitutional sense lacks the subject of local government, i.e., the inhabitants. However, it possesses three other characteristics of a local government, the object, the tasks, and the supervisory body (Dolnicki and Marchaj, 2017). Granting the attributes of communes, districts, and voivodeships to the union attests to the recognition of the union's role in the local government's structure. The union constitutes a vital element which is the expression of the decentralisation of public service tasks (cf. Auber and Cervell, 2012, p. 265). However, it should be noted that the metropolitan union is not a structure in which the communes falling within the subjective scope of that union are independent regarding their participation in that organisational

[1] See the Act of 9 March 2017 on the Metropolitan Unions in the Silesian Voivodeship (Journal of Laws of 2017, point 730) - hereinafter the "Act on Metropolitan Union".

[2] Cf. § 1 of the Regulation of the Council of Ministers on the Creation of a Metropolitan Union in the Silesian Voivodeship under the name 'The Upper Silesia - Zagłębie Metropolis' of 26 June 2017 (Journal of Laws of 2017, point 1290).

and legal structure. The obligatory membership of the city of Katowice in the union derives directly from the provisions of the Act on Metropolitan Union. The members of the union are specified in the application for the creation of a metropolitan union submitted by the city council of Katowice. The application is addressed to the Minister of Public Administration through the Silesian Voivode. The legislator does not provide for the procedure of leaving the union, but it does regulate the possibility of changing the borders and the area of the metropolis, even though this process concerns admitting new communes to the union.

The system of the metropolitan union is regulated by statutory provisions. The statute of the union and its changes are to be agreed upon with the Prime Minister at the request of the Minister of Public Administration. This agreement constitutes a supervisory element (the judgement of the Regional Administrative Court, with its seat in Gliwice, of 2 March 2009, IV SA/Gl 904/08).

The legislator includes two bodies in the union's authorities: the general meeting and the board of the metropolitan union; it is inadmissible to extend this group of bodies. The tasks of the general meeting of the metropolitan union as a decision-making and control body include passing resolutions regarding the matters falling under its exclusive jurisdiction. Pursuant to Art. 23 of the Act on Metropolitan Union, the exclusive jurisdiction of the general meeting includes passing metropolitan union development polices, the union's statute, framework studies on the conditions and directions of the spatial planning of the metropolitan union, and the union's budget. The list of tasks also includes the consideration of the report on the metropolitan union's budget implementation and the financial statements of the union; elections to and dismissals from the board and the determination of the remuneration of the board's chairman, passing the resolution on granting or not granting discharge to the board for the implementation of the union's budget, and passing resolutions regarding the financial matters of the metropolitan union which exceed the limits of the regular management board.

The general meeting supervises the union and the organisational units created by the metropolitan union by means of a review panel. The review panel is an obligatory panel within the union composed of at least three members, none of whom is the chairman or the vice-chairman of the general meeting. Those regulations are in line with the provisions laid down in this regard in the constitutional acts of local governments.[3] The tasks of the review panel include assessing the implementation of the metropolitan union's budget and requesting the general meeting to either grant or deny discharge to the board. The discharge proposal is subject to the assessment of the Regional Chamber of Audit. Failing to adopt the resolution regarding the discharge to the board results in the adoption of the resolution denying that discharge which is equivalent to requesting a dismissal of the board, unless the board has already been dismissed for another reason at the end of a financial year.

The union's general meeting is composed of deputies from communes within the metropolitan union, one from each commune. By law, the deputies may either be the communes' executive authorities or their proxies. Consequently, the composition of the meeting may vary because the local major *(wójt)* has the authority to replace the proxy representing a particular commune within the union at any time.

[3] This involves three Acts: the Act of 8 March 1990 on Commune Self-government (consolidated text Journal of Laws of 2023, item 40, as amended); the Act of 5 June 1998 on District Self-government (consolidated text Journal of Laws of 2022, item 1526, as amended); the Act of 5 June 1998 on Voivodeship Self-government (consolidated text Journal of Laws of 2022, item 2094, as amended).

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In areas not specifically regulated in terms of the functioning and organisation of the body constituting the union, the legislator requires the application of regulations regarding voivodeship councils.[4]

The union's executive body is composed of five members, including the board chairman, chosen by the general meeting by secret ballot. The board chairman is the first to be chosen, then the rest of the members are chosen at his/her request. The board members are bound by the citizenship requirement. Moreover, the board membership may not be concurrently held with the membership in a body of a local government unit, serving as an executive body in a particular commune or its deputy, holding the office of a voivode or vice-voivode or holding a mandate as a member of parliament or a senator.

The board performs the tasks of a metropolitan union that are not reserved for the general meeting. These tasks include, in particular, implementation of the meeting's resolutions, management of the metropolitan union's property, preparation of the draft budget and implementation of the budget of the metropolitan union; and management, coordination, and control of the activities of organisational units of the metropolitan union, including the recruitment and dismissal of their managers. The board, as a collegial body, makes decisions in the form of resolutions adopted by a simple majority of votes in the presence of at least half of the statutory composition of the board members. Resolutions are adopted by open ballot unless the Act states otherwise.

The rules and mode of operation of the board constitute statutory matters of the union. The executive body of the union performs its tasks by means of a metropolitan office as an auxiliary apparatus, the organisation and operational mode of which are specified in organisational rules adopted by the board.

As far as the organisational structure of the union is concerned, the legislator provides for a secretary and a treasurer who take part in the work of the board. They are also granted powers to take part in the deliberations of the meeting in an advisory capacity.

The three-level system of a local government ultimately formed on 1 January 1999 provides for a dualistic division of tasks of a territorial self-government unit into local and regional. The former, performed by the commune and the district, consists of satisfying the basic needs of the inhabitants by means of publicly available benefits. The latter, which are performed by the voivodeship, concentrate more on organising and ensuring appropriate living conditions. In practice, the above-described division of tasks into local and regional is not adapted to the specificities of metropolitan areas. The functional ties between the units of local government cause the tasks of particular communes to overlap and form common metropolitan tasks, which should be performed by all the communes (Augustyniak, Dolnicki and Marchaj, 2023).

In the subjective scope of the metropolitan union, the legislator includes public service tasks concerning:

- shaping the spatial order;
- social and economic development of the area of the metropolitan union;
- planning, coordinating, integrating, and developing public collective transport, including road, railway, and other rail-guided transport, as well as sustainable urban mobility (Misiejko, 2017);
- metropolitan passenger transport;

[4] A voivodeship council is the legislative and controlling body of the voivodeship self-government. The organisation and tasks of this body are regulated by the Act of 5 June 1998 on Voivodeship Self-government (consolidated text in the Journal of Laws of 2022, item 2094, as amended.).

- cooperating in the determination of national and voivodeship routing in the area of the metropolitan union;
- promoting the metropolitan union and its area. (cf. Art. 12 of the Act on Metropolitan Union).[5]

Moreover, the metropolitan union can perform public service tasks belonging to the scope of local government units' activities, or coordinate the performance of those tasks through an agreement with a local government unit or an association of local government units. This regulation introduces a new formula for union task performance. The legislator also provides for the possibility that public service tasks falling within the scope of state government administration's activities are carried out by the union through an agreement with a state government body.

3. METROPOLISES IN FRANCE: A NORMATIVE CONTEXT

The legal status of self-government communities in France is primarily regulated by the provisions of the Constitution of the French Republic[6] and the General Code of Territorial Communities (*Code général des collectivités territoriales* - CGCT[7]). Under the CGCT provisions, communes such as Paris, Lyon, and Marseille acquired a special legal status. The communes in Paris, Lyon, and Marseille are appropriately divided into municipalities (Art. L. 2511-3 CGCT).

The metropolises in the French Republic are created so that the performance of public service tasks by self-government authorities is more effective and coherent, adequate to the current needs of the inhabitants of large urban agglomerations. The actions, involving research and economic activity support and development of large urban projects which serve the inhabitants of territorial communities allow us to recognise the metropolises as the right formula for carrying out local government tasks, which provides attractive conditions to live, study, and work there. Metropolises offer their inhabitants constant development, including the development of the city area and the possibility to implement projects of a metropolitan character.

Since 2010, in the French Republic, new forms of metropolitan cooperation have emerged, including:

1. metropolises: Grand Paris, Aix-Marseille-Provence, Lyon and other metropolises, regulated by common law - *métropoles de droit commun*[8];
2. metropolitan areas - *le pôle métropolitain*;
3. territorial and rural balance centres - *pôle d'équilibre territorial et rural* (Luchaire, 2016, p. 11).[9]

The idea of a metropolis emerged in France at the beginning of the 1960s, and the normative establishment of agglomerative communities took place on the basis of the

[5] Cf. Judgement of the Regional Administrative Court of Gliwice of 13 May 2019, III SA/Gl 226/19, Legalis no. 1943614.
[6] The Constitution of the French Republic of 4 October 1958 (Constitution du 4 octobre 1958 (JORF n° 0238 du 5 octobre 1958, page 9151)).
[7] CGCT – source: https://www.legifrance.gouv.fr. (accessed on 03.07.2021).
[8] Among the metropolises, two 'euro-metropolises' stand out: the Eurométropole de Strasbourg and the Eurométropole de Lille. They occupy a special place considering their connections to the institution of the European Union (Faure, 2014, p. 418).
[9] The territorial and rural balance centres are tools of collaboration between EPCIs in rural areas outside of the cities. In a certain sense, they are the equivalents of metropolitan centres. In accordance with Art. L5741-1 CGCT, they are public institutions created through an agreement between several EPCIs.

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Act of 31 December 1966, as a herald of contemporary metropolises.[10] The organisation and functioning of metropolises in France were regulated by the Act of 16 December 2010 on the Reform of Territorial Communities (*loi du 16 décembre 2010 de reformę des collectivités territoriales*[11]) and the Act of 27 January 2014 on the Modernisation of Territorial Public Activities and the Affirmation of Metropolises/Cities (*de modernisation de l'action publique territoriale et d'affirmation des métropoles,* the so-called MAPTAM).[12] In relation to the reforms of the local government, the institution of a metropolis in the French Republic began to experience a renaissance, resulting in a constantly increasing number of metropolises and metropolitan areas performing supra-local tasks. According to Art. L5217-1 CGCT, a metropolis is a public institution of intracommunal cooperation (*établissement public de coopération intercommunale*, EPCI) which groups several communes "in one piece and without an enclave" to form a space of solidarity in order to devise a common project for development as well as a project for economy, ecology, education, culture, and social matters on their territory which would serve to improve the competitiveness and coherence in the functioning of the collaborating communes.

Metropolises aim to strengthen the Republic's territories through actions supporting the economic revival of the state. Since January 2019, the French Republic has established 21 metropolises. La Métropole de Nice Côte d'Azur was the first metropolis established in France in December 2011, currently encompassing 49 communes (around 544,977 inhabitants).

Considering the special legal status of Lyon, Marseille, and Grand Paris metropolises, this article will only discuss the constitutional and legal elements of these three metropolises.

3.1 The Lyon Metropolis

Among the French metropolises, the Lyon Metropolis (Métropole de Lyon) stands outas a territorial community within the meaning of Art. 72 of the Constitution of the French Republic. This community was created on 11 January 2015 based on Art. 26 of the Act of 27 January 2014 - MAPTAM). The Lyon Metropolis was established to replace the Lyon urban community (Grand Lyon), within its territorial borders, and the department of Rhône (Augustyniak, 2017, p. 76).

It should be emphasised that, despite its name, it does not constitute a typical metropolis within the meaning of the Act of 16.12.2010 and 27.01.2014, and it does not fall under the public units of intercommunal cooperation (EPCIs). Except for this metropolitan area, the department continues to exercise its competences. This community encompasses 59 communes and has about 1.3 million inhabitants. Its basic activities include promoting innovation and strengthening economic dynamics in the area of the Metropolis, undertaking actions supporting sustainable development of the

[10] Loi n° 66-1069 du 31 décembre 1966 relative aux communautés urbaines (JORF du 4 janvier 1967 page 99, source: https://www.legifrance.gouv.fr, accessed on 09.06.2023).

[11] Loi n° 2010-1563 du 16 décembre 2010 de réforme des collectivités territoriales (JORF n° 0292 du 17 décembre 2010 page 22146, texte n° 1, accessed on 09.06.2023).

[12] The Act no. 2014-58 of 27.01.2014 on the Modernisation of Territorial Public Activities and the Affirmation of Metropolises (Cities) (*de modernisation de l'action publique territoriale et d'affirmation des métropoles*) (JORF n° 0023 du 28 janvier 2014, page 1562 texte n° 3; source: https://www.legifrance.gouv.fr, accessed on 09.06.2023).
The Act of 27.01.2014 (La loi MAPTAM du 27 janvier 2014) accentuated the role of the city as the leader in facilitating collaboration among local governments and their public institutions in terms of exercising their powers regarding sustainable mobility, organisation of local public services, as well as spatial planning and local development (to learn more on this subject see Auber and Cervell, 2015, p. 47).

community and improving the quality of life of its inhabitants. The Metropolis aims to ensure conditions for economic, social, and environmental growth by means of metropolitan infrastructure (Art. L3611-2 CGCT). The competences of the Lyon Metropolis are broader than those of other French metropolises (Luchaire, 2016, p. 28).

The specificity of the Lyon Metropolis is based on the fact that, in the context of a delegation of powers, it can replace the region and the state in the performance of some tasks. The region may transfer some of its powers to the Metropolis through an agreement. The scope of the competences of the Lyon Metropolis encompasses the following activity areas: economic, social, and cultural development, planning of the metropolitan area; local housing policy; urban policy; management of public services; protection and improvement of the natural environment, and the environment protection policy (Art. L. 3641-1 CGCT).

The bodies of the Lyon Metropolis include the Metropolis Council (*Le Conseil de la Métropole*) and its chairman (*Le président du conseil*). The council is the decision-making body, and the chairman is the executive body of the metropolis. The Metropolis Council is composed of members elected by direct universal suffrage on the basis of the provisions of the Electoral Code - *Code électoral* (Cauchois, 2014). The Metropolis Council adopts resolutions on the matters within its competence. It is composed of 165 members, representing 59 communes within the Lyon Metropolis, and is convened by the chairman no less frequently than once every quarter. The council's chairman is elected by secret ballot requiring an absolute majority vote from the members of the Metropolis Council. His/her tasks include organising the council's work and conducting meetings, implementing the council's resolutions and those of the standing committee (*commission permanente*), managing expenditures and implementing the budget.

Within the structure of the Lyon Metropolis, nine Territorial Conferences of Mayors (*Les conférences territoriales des maires*) are active, which play a consultative role. They group several communes which serve as a consultation and discussion place for matters of a metropolitan nature, and their opinion is shared with the decision-making body of the metropolis. The rules for the organisation and functioning of these bodies are specified in the internal regulation of the Metropolis Council.

Pursuant to Art. L3633-2 CGCT, the Metropolitan Conference (*La conférence métropolitaine*) is appointed in the Lyon Metropolis as a consultative and coordinating body in matters of importance to the metropolis. This body consists of mayors of the communes, and serves as the body for the cooperation between the Metropolis Council and the communes within the Lyon Metropolis. By law, this body is chaired by the chairman of the Metropolis Council. The main tasks of the Metropolitan Conference include the creation of the Metropolitan Cohesion Pact project (*le projet de pacte de cohérence métropolitain*) between the metropolis and the communes within its area. It is a framework document regarding the coordination of metropolitan actions, specifying the strategy for transfering powers from the Lyon Metropolis to the communes within its territory, based on the provisions of Art. 1111-8 CGCT. Under the same conditions, the strategy for delegating particular competences from the communes to the Lyon Metropolis is proposed. The Metropolitan Cohesion Pact is subsequently adopted by the Council of the Lyon Metropolis following obligatory consultations with councils of the communes belonging to the Metropolis.

Within the Lyon Metropolis, a Metropolitan Area (*Le Pôle Métropolitain*) is active, which, as a special form of collaboration, is made up of the following areas: Métropole de Lyon, the urban community of Saint-Etienne, ViennAgglo, CAPI Porte de l'Isère, and since 2016, the agglomeration community of Villefranche (CAVBS) and the inhabitants of the communes of eastern Lyon (CBEC). In accordance with Art. L5731-1 CGCT, a

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metropolitan area is established as a public institution through an agreement among public institutions engaged in intracommunal cooperation with their own taxation and, in appropriate cases, the Lyon Metropolis. The goal of this institution is the performance of tasks of metropolitan importance in order to promote the management model, sustainable development, and territorial solidarity.

The metropolitan area is a form of collaboration that enables the pooling of resources in order to facilitate the development of common projects, initiated by the founding agglomerations. It allows these agglomerations to associate with due regard for each agglomeration's autonomy and decision-making (Verpeaux and Janicot, 2015, p. 430).

3.2 The d'Aix-Marseille Provence Metropolis

The d'Aix-Marseille Provence Metropolis (*la métropole d'Aix-Marseille Provence*) in accordance with Art. L5218-1 CGCT encompasses all communes included in the urban agglomeration Marseille Provence Métropole and the agglomeration community of Pays d'Aix-en-Provence.

Pursuant to Art. L5218-9 CGCT in the area of the Aix-Marseille-Provence Metropolis, a Metropolitan Conference of Mayors is held, the opinion of which is taken into account by the Council of the Aix-Marseille-Provence Metropolis during the development and implementation of the metropolitan policy. The conference is convened by the chairman of the Council of the Aix-Marseille-Provence Metropolis who, by law, is also the chairman of the conference. The mode and rules for the functioning of this body are specified in the internal regulation of the Council of the d'Aix-Marseille-Provence Metropolis. The metropolis bodies are the council and the chairman of the metropolis. The council meets in plenary session several times a year in the Pharo Chamber in Marseille. The Metropolis Council includes 240 members who represent the interests of the communes - the territories with which they are connected - with due regard for the demographical diversity of those areas. The council elects its chairman, who also presides over the office of 33 members. The chairman is supported by two consultative bodies: the Metropolitan Conference of Mayors and the Development Council. The Development Council includes representatives from the economic, social, cultural, and association sectors of the Aix-Marseille-Provence Metropolis. The tasks performed by this body are of a consultative nature and pertain to the main directions of activities of the Aix-Marseille-Provence Metropolis, the perspective and planning documents, design, and assessment of local polices promoting sustainable development of the metropolitan territory. Moreover, the council may issue opinions on any matter that falls within the scope of its competences. The yearly report on the council's activities is prepared and presented to the metropolis council (cf. L5218-10 CGCT). The range of competences of the Aix-Marseille-Provence Metropolis is significantly broader than that of the other French metropolises (Faure, 2016, p. 423).

3.3 The Grand Paris Metropolis

The Grand Paris Metropolis (La Métropole du Grand Paris) was created pursuant to Art. L5219-1 CGCT in order to define and perform the metropolitan activities aimed at improving the living environment of its inhabitants, reducing inequalities among the territories it incorporates, and developing a sustainable urban model in terms of social and economic resources, which would be more attractive and competitive for the benefit of the whole state. It has been functioning since 1 January 2016 and encompasses 131

communes. This Metropolis performs, among others, the following tasks and competences on behalf of and in favour of its communes in terms of:

- planning of the metropolitan area;
- local housing policy (housing policy; financial aid regarding social housing; activities in support of social housing; and activities in support of housing for disadvantaged persons);
- economic, social and cultural development and planning (the creation, development and management of industrial, commercial, tourist, port, and airport areas of metropolitan importance; activities in support of metropolitan economic growth; construction, placement, maintenance, and exploitation of main cultural and sports facilities of international or national significance; and participation in the preparation of applications for large international cultural, artistic, and sporting events which take place within its territory);
- protection and improvement of the environment and life environment policy (among others, combatting air pollution, monitoring pollution, and noise; development and adoption of a climate-air-territorial planning in accordance with Art. L. 229-26 du code de l'environnement (Environmental Code), management of the water environment, and flood prevention (Auber and Cervelle, 2015, p. 79).

The Grand Paris Metropolis has two consultative bodies appointed to debate, provide information on, and assess projects. The first consultative body includes 131 mayors of the Metropolis, and the second has 104 members - the inhabitants of the Paris Metropolis and qualified persons from economic, social, environmental, and cultural communities. The cooperation bodies promoting the dialogue between the partners and the Metropolis include:

- The Territorial Conference of Chairmen as a coordination body including the Metropolis Chairman, the Chairman of Paris, and 11 Chairmen of Territories (areas) making up the Metropolis. This body is the place for exchanging views and a platform for dialogue. It especially enables the involvement of areas belonging to the Metropolis in the preparation of strategic documents and specification of procedures for exercising powers in accordance with the principle of subsidiarity between the metropolitan area and particular metropolitan areas.
- The Conference of the Chairmen of the neighbouring EPCIs, whose aim is to address the challenges related to the development of large suburban areas. The Grand Paris Metropolis cooperates with all neighbouring areas, and to this end, it may enter into metropolitan cooperation agreements.
- The Conference of the Chairmen of Grand Paris Urban Public Services. The Metropolis cooperates with urban public services, especially in the context of energy management, air quality improvement, circular economy, and the introduction of large metropolises to climate change adaptation.

The Grand Paris Metropolis has a decision-making body – the Metropolis Council – made up of 209 metropolitan members appointed by the city councils of 131 member communes in accordance with the provisions of Art. L. 5211-6-1 CGCT. At least one representative is appointed per commune. The second body of an executive character is the Metropolis Chairman, who is elected by the metropolitan members by secret ballot by an absolute majority of the members. His/her tasks include calling board meetings, establishing the order of business and implementing the Council's resolutions. Additionally, he/she is also responsible for the implementation of the budget. Moreover,

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the structure of the Grand Paris Metropolis includes a Metropolitan Office (*Le Bureau*), responsible for specifying strategies and main directions for the metropolis. It is a body that deliberates on matters assigned to it by the Council. The Office is made up of the Metropolis Chairman, who leads its activities, and 20 vice-chairmen and 10 deputy members representing all the political parties. The tasks of the Office include preparing the agenda for the Metropolis Council meeting and its projects to be voted upon.

4. CONCLUSION

The beneficiaries of the actions of large urban agglomerations are the inhabitants of particular territorial communities. Metropolises in the French Republic constitute formalised forms of supra-local cooperation, exemplified by the Lyon Metropolis, which holds a special legal status as a territorial community. In contrast, the legislator has so far created only one metropolitan union in the Polish legal order. New projects are constantly emerging with regard to the creation of metropolitan unions in Poland; however, they have not gained support from the legislator to date.

Metropolitan areas create a highly complex structure that encompasses many territorial communities (communes, cities, districts) and many subjects of self-government and state government. According to Dolnicki and Marchaj (2017), "Their development consists of functional integration of new areas and the 'densification' of the central area as a result of increasing economic turnover and the number of jobs. The scale and significance of these phenomena for the state calls for the application of appropriate methods for the integration of agglomeration management". That is why it is of significant importance to indicate an appropriate model for the functioning of metropolises in the Polish legal order, even if it would lead to a potential debate on the changes to the basic territorial division of the state so that some of the metropolitan areas could function as units of local government, such as the Lyon Metropolis. Currently, the Lyon Metropolis is the only structure of its kind in France. It could become a model for the territorial organisation of urban areas. This construction constitutes an interesting normative novelty which, in the authors' opinion, could be the answer to the needs of large Polish cities if this institution were reproduced in the Polish legal order, of course, under an appropriate Act. It forms a certain alternative to metropolitan institutions or a metropolitan union.

The introduction of new legal instruments to the Polish local government, such as the Metropolitan Area (*Le Pôle Métropolitain*), which is a form of cooperation aimed to create metropolitan dynamics in large urban agglomerations (through pooling of resources of the communes in order to facilitate the implementation of common projects initiated by the founding agglomeration), constitutes an interesting normative proposition.

The metropolitan areas existing in the French Republic constitute new institutional tools for the development of a partnership between communities, which are increasingly attracting considerable interest from urban agglomerations and the inhabitants of self-governing communities. The dynamics of the projects and the cooperation networks they create seem to be the best way to ensure that the needs of the inhabitants of large cities are satisfied, also in the Polish legal order. A metropolitan area, as a formula which enables the pooling of resources in order to facilitate the implementation of common projects proposed by the founding agglomerations, is an interesting option for the functioning of a similar formula of metropolitan cooperation in large agglomerations in the Polish legal order. The French models are worth reproducing both at a constitutional as well as functional level, because they are self-governing

structures that respond to the expectations of the inhabitants of contemporary self-governing communities.

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REAL PROPERTY TAX IN SLOVAKIA – SCOPING REVIEW /

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Abstract: *Real property tax is a common type of tax applicable often as a local tax and a source of local revenues, which is also the case in the Slovak Republic. This topic is gaining importance in general due to the decreasing revenues of local budgets and the increasing financial requirements of municipalities to ensure services for the citizens. Even though there is a wide range of available scientific literature on the topic, it has not yet been systematically summarized to identify the thematic spectrums of interest to the scientific community and there are areas not yet covered by the research. This review aims to identify the state of knowledge (scientific literature) on the issue of real property tax in the Slovak Republic and the research gap. For this reason, the authors have included the broadest possible range of available scientific literature on the topic of Slovak real property tax searched through the most relevant international databases (Web of Science and Scopus) and a complex national database comprising the works of Slovak academia (CREPČ), even in its broader context of local taxation and local government. The results were acquired by use of the method of a scoping review. Our findings show an increasing trend in the number of publications and authors on the topic in the course of time and their comparable focus on the legal and economic aspects. We identified a high preference for general assessment and certain topics in particular (e.g. tax revenues, tax rates) together with a lower interest in very specific problems and more interdisciplinary issues, where we see the potential for further research.*

Key words: *Real Property Tax; Slovakia; Scoping Review; Local Taxes; Local Government*

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1. INTRODUCTION

Since 2005, local self-government in the Slovak Republic ("SR"), municipalities in particular, have acquired a formally-legal true local source of their income system in the form of local taxes ("LTs"), with the competence of determining their fundamental

elements, especially the tax rates. As the municipalities became the authorities that imposed them by their local laws and performed their administration, their importance, their competencies but also their administrative burden rose. From a fiscal perspective, the most important LT is the real property tax ("RPT"), applied as a typical LT (Bird and Slack, 2004), while the rest of the LTs altogether do not represent a significant income source (Vartašová and Červená, 2022). This fact, together with the numerous legislative amendments, some of which led to a gradual limitation of municipal competencies (Vernarský, 2016) and persistent application problems accompanying their administration (e.g., Jamrichová, 2021; Kukuľa, 2019; Vartašová and Červená, 2019a; Vernarský, 2007), might be the reason for having quite a wide spectrum of scientific literature on local taxation issues and RPT in particular. Many academics in the SR are known for dealing with this tax (e.g., Balážová, Červená, Kubincová, Jamrichová, Liptáková, Maličká, Molitoris, Papcunová, Poliak, Rigová, Vartašová, Vernarský e. a.) together with an increasing number of other authors interested in this topic; thus, over time, the volume of such literature has risen, though, there are no systematic or summarizing reviews on this topic known to the authors. Such a situation may likely lead to opacity and duplicity in research on the one hand and the omission of some relevant problems from the research on the other hand.

For these reasons, a scoping review was conducted to systematically map the research done in this area, as well as to identify any existing gaps in the knowledge gained. Preferred Reporting Items for Systematic Reviews and Meta-Analyses Extension for Scoping Reviews (PRISMA-ScR) guidelines (Tricco et al., 2018) were followed. In this context, the form of a scoping review was chosen as opposed to a systematic review (the focus of which is narrower or more specific and its implementation is less rapid) to map the concepts underpinning the research area and the main sources and types of evidence available (Arksey and O'Malley, 2005).

Besides proving the increasing number of publications and publishing authors, the study shows that the authors are mostly interested in researching the legal and economic view on the RPT and neglect more interdisciplinary-oriented research, where we see a wide potential for further research. Similarly, fewer authors prefer dealing with very specific issues and some topics are being continuously written about on multiple bases (e.g., tax rates, adequacy of tax revenues).

2. LITERATURE REVIEW

Fiscal decentralisation in the SR underwent a long and ever-changing process and, alongside the assignment of multiple tasks and responsibilities (Plaček, Ochrana, Půček, Nemec, 2020)[1], since 2004, local self-government was given a source of funding of a truly local nature – represented by LTs (Cakoci and Červená, 2018; Štrkolec, 2007). Vybíhal (2020) concludes that LTs are one of the pillars of decentralisation, especially in the fiscal area. The changes in the structure of the municipal revenues in the course of the process of fiscal decentralisation between 2000 and 2017 is summarized by Maličká (2019). There are still vivid debates on the successfulness of this process in terms of the balance of tasks and powers on one side and the appropriate funding on the other (e.g., Bujňáková, 2018; Holíková, Mikušová Meričková and Jakuš Muthová, 2022; Liptáková and Rigová, 2021; Plaček et. al., 2020; Vartašová and Červená, 2019a) and especially as regards the level of dependence on state transfers (Bobáková, 2016; Molitoris, 2010; Vartašová and Červená, 2022), but the primary interest of our research is the RPT as the

[1] Outreaching 4,300 according to the Association of Towns and Municipalities of Slovakia (2018).

most relevant (budgetary significant) LT (Balážová, Papcunová and Tej, 2016; Belkovicsová, 2020; Maličká, 2017). The revenue from this tax was accruing to the municipal budgets even before the 2004 reform, however, the change of its position from a state tax to a local one is perceived as a positive change and corresponds to the general view of theoreticians and practitioners on this tax as being local by nature, principal, and an own-source revenue for local governments (Bahl, Linn and Wetzel, 2013; Freire and Garzón, 2014), especially those representing legal sciences (Babčák, 2012; Molitoris, 2010; Štrkolec, 2008). The fundamentals of the respective legislative rules, however, were not changed and thus, the tax kept the three-tier structure of taxing land, buildings, flats and non-residential premises, i. e. in quite a broad context in line with the variability of the recurrent property taxes´ scope – Bird and Slack (2002) state that property taxes are generally levied on all types of properties – residential, commercial, and industrial, as well as on farm properties, however, countries may apply various models – e.g. taxing only land or only buildings or omitting some areas from taxation.[2]

Most complex theories on recurrent property taxes and their conceptual issues are presented more frequently by foreign authors (Bird and Slack, 2004; McCluskey, Cornia and Walters, 2012; Slack and Bird, 2014; Youngman and Malme, 1994; e.a.); more attention is paid to the situation in transition or developing countries (e.g., Bahl and Martinez-Vazquez, 2007; Bahl et al., 2013 or Bryson, 2010), but, some authors surprisingly deal even with the Slovak situation (e.g., Bryson, 2010; Bryson and Cornia, 2004; McCluskey and Plimmer, 2011). Concerning domestic authors, the legislative aspects of the Slovak RPT regulation were broadly analysed by Vartašová and Červená (2019a) and the latest commentary on the Act on Local Taxes is provided by Kubincová and Jamrichová (2022). A comparison of Slovak RPT from a legal and fiscal perspective with the system applied by other Visegrad Group countries is provided by Vartašová and Červená (2022) and RPT´s role within the sub-national tax revenues at the EU countries level was analysed by Maličká (2017).

Especially in foreign literature, much attention is paid to the preferred basis of taxation – whether it would be the area or the market value (Bryson and Cornia, 2004, Brzeski, Románová and Franzsen, 2019; Malme and Youngman, 2001; McCluskey et al., 2012), which is the issue that is less frequently and usually only partially analysed by domestic authors (e.g., Kubincová, 2021; Prievozníková and Vojníková, 2014; Románová, 2021), given the fact that the dominant basis of taxation is area, or rather a calibrated area, and the switch to ad-valorem is so far only in theoretical terms. Domestic authors are especially emphasizing the issues of tax rates policy (Cíbik, 2018; Katkovčin, 2018; Poliak, 2015a; Sobotovičová and Janoušková, 2020; Štrkolec, 2019; Valach, 2019; Vernarský, 2016; e.a.) and (in)adequacy of tax revenues (Balážová et al., 2016; Papcunová and Nováková, 2019; Poláček, 2017; Rigová, Flaška and Kološta, 2020; Tóth, Csanková and Kováč, 2015; Vartašová and Červená, 2022; e.a.), even though, it is also the foreign authors that stress the low tax revenues (e.g., McCluskey and Plimmer, 2011). Besides, the research is often focused on the procedural issues of tax administration (Horváthová and Maličká, 2012; Kubincová, 2019; Kubincová, 2020; Poliak, 2014; Štrkolec, 2007; Vernarský, 2007; e.a.) or particular hereto associated problems like the lack of personnel staff in connection with a high number of small municipalities (Klimovský, 2009; Liptáková and Rigová, 2021; Vartašová and Červená, 2019b).

[2] Typical in developing countries like those in Africa is taxation of only urban not rural areas (Franzsen and McCluskey, 2017).

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3. METHODOLOGY

The authors used a method of scoping review as proposed by Arksey & O'Malley (2005) and later developed by Tricco, et al. (2018). Preferred Reporting Items for Systematic Reviews and Meta-Analyses Extension for Scoping Reviews (PRISMA-ScR) guidelines (Tricco et al., 2018) were followed. Minor amendments to the PRISMA guidelines were made in terms of coping with the demanded journal article structure. Even though this method was developed in medical sciences, it has already been applied in other disciplines (Pedrosa, Martins and Breda, 2022) and we found this form to be particularly appropriate for our purposes.

To identify the relevant documents, the authors have chosen the databases they considered as most relevant based on their experience, namely, two international databases (Scopus and Web of Science – "WoS") and one local ("CREPČ" – the central database of academic publications in the SR covering works published since 2007[3], representing a complex database in local conditions) and the search was conducted between 14-16 June 2022. The authors chose to search the databases based on the most relevant search terms as presented in Table 1. No other filters of a language, year or place of publication were used. As shown in Table 1, beyond the above-mentioned databases´ search results, the authors included a defined number of other relevant publications known to authors from their previous research.

Table 1. Electronic search strategy applied

Source	Terms searched	Field searched	No. of results	Other filters	No. of results after filters
Scopus	Real Property Tax* OR Real Estate Tax* AND Slovak*	Title, abstract, keyords	6	x	6
	Local Tax* AND Slovak*		93	Subject area: social sciences, economics econometrics, finance	47
Web of Science	Real Property Tax* OR Real Estate Tax* AND Slovak*	Title	2	x	2
	Real Property Tax* AND Slovak*	Topic	15	x	15
	Real Estate Tax* AND Slovak*		14	x	14
	Local Tax* AND Slovak*	Title	7	x	7
	Local Tax* AND Slovak*	Topic	168	Busines economics; social issues, government law, sociology, social sciences other topics	57

[3] The works published before may be included only on a voluntary basis.

CREPČ 2*	Daň z Nehnuteľností (=Real Property Tax)	All fields	18	x	18
	Real Property Tax		10	x	10
	Real Estate Tax		9	x	9
	Miestne Dane (=Local Taxes)		64	x	64
	Miestna Daň (=Local Tax)		3	x	3
	Local Taxes		59	x	59
	Local Tax		49	x	49
CREPČ 1*	Daň z Nehnuteľností (=Real Property Tax)	All fields	27	x	27
	Real Property Ttax		0	x	0
	Real Estate Tax		9	x	9
	Miestne Dane (=Local Taxes)		90	x	90
	Miestna Daň (=Local Tax)		5	x	5
	Local Taxes		67	x	67
	Local Tax		10	x	10
publications on the topic known from previous research			16	x	16

** CREPČ 1 database comprises the works from 2007 to 2017 and CREPČ 2 from 2018 to the present.*

The summary of the publications generated was reviewed for duplicate records. The authors started the screening and data extraction by reading off the titles of the records, and, in the second round, the abstracts to exclude irrelevant records based on mutual consideration. In this phase, the authors extracted the full text of the identified records through the Scopus/WoS databases, the EndNote application, from the publisher (open access publications), online using basic search tools (www.google.com; www.researchgate.net; Proquest database) and by physical searches at the Pavol Jozef Šafárik University Library in Košice. This process is summarized in the PRISMA-ScR flow diagram for the selection of sources of evidence (Figure 1).

After the completion of the full texts, the process of charting them was started and, these characteristics of the publications in question were monitored: formal characteristics (year of publication, author, author's affiliation, country of publication, language of the work, type of publication) and content characteristics (scientific discipline, keywords, content focus).

Regarding the classification of publications according to scientific disciplines, we followed the classification according to the Directive of the Ministry of Education, Science, Research and Sport of the Slovak Republic No. 55/2022 dated 15 September 2022 on the system of disciplines of science and technology and the codebook of

disciplines of science and technology. We also used the JEL Classification System, but since we identified only 22% of the publications already containing the JEL codes, we assigned the remaining publications with the JEL codes according to our professional assessment.

Before the analysis of the keywords, we modified them as regards the unification of the terminology from the grammatical[4] and then the semantic point of view[5] to enable a summary of the too-diverse results.

The content focus of the publications was the main focus of the authors´ research. For this purpose, the publications were classified under four groups according to the dominant subject of the individual publications, i.e. publications that a) directly examine RPT, b) those that examine RPT only indirectly – as a part of LTs, since general aspects of LTs are also applicable to RPT, c) publications focused on a broader context, namely the area of local self-government or municipalities and their financing, fiscal decentralisation and similar more general aspects, but which influence or indirectly affect RPT as a source of municipal revenue, and d) those which examine (also) other (perhaps unrelated) aspects. All these four categories were internally divided according to the intensity of focus on the subject, namely fully, partially and marginally. Numerous publications were included in more categories due to the overlap of their content, as the authors tried to capture the essence/area of research of the analysed works as accurately as possible.

4. RESULTS

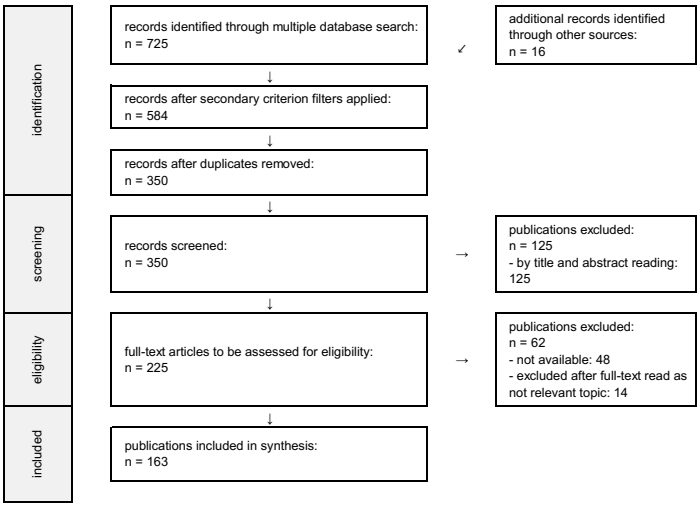
Altogether, the authors identified 743 records. Of this number, 99 were identified through the Scopus database, 206 through the WoS database, 420 through the CREPČ database and 16 were known from the authors´ previous research; after applying the secondary criterion in the Scopus and WoS databases, the number of results was reduced to 584 in total. Of these, 234 publications were excluded as duplicates, and the authors screened the remaining 350 records, of which the authors excluded 125 records

[4] E.g., Slovakia, Slovak Republic, Slovak republic.

[5] Income, revenue (*income/revenue*); local tax/taxes, local fee/fees, local taxes and fees, fee, importance of local taxes, local taxes functions (*local taxes/fees*); differences, disparities, economic/fiscal/regional disparities (disparities); local economics, economics of local government (*economics of local government*); municipal/local finance (*local finance*); finance, public finance (*public finance*); financial/fiscal autonomy, relative fiscal autonomy, tax autonomy (*financial autonomy*); financial/fiscal/tax self-sufficiency (*financial self-sufficiency*); tax administrator/administration (*tax administration*); income, revenue, tax income, tax/non-tax/own/own tax revenue, revenue importance, tax income concentration, fiscal determination of tax revenue, income tax revenues, local government revenue (*income/revenue*); costs, expenditures (*cost/expenditures*); power, competence, control competence (*competence*); tax regulation/law (*tax law*); subnational/local government, local self-government (*local self-government*); property tax, real property/estate tax, land tax, tax on buildings (*real property tax*); appeal, review of proceedings, remedy (*remedies*); churches, religious organisations (*churches*), reporting duty, tax return (*reporting duty/tax return*); balance of the budget management, budgetary determination of tax, local/municipal/state/public budgets, budget (*public budgets*); farms, agricultural farms/firms (*agricultural farms*); indicators of financial creditworthiness, financial creditworthiness (*financial creditworthiness*); legislation, law-making, generally binding regulations, Tax Code, Act on Local Taxes (*legislation*); municipal office, municipality (*municipality*); municipal borrowings, repayable receipts, loans (*loans*); regional/municipal/local development (*local development*); post-Socialist economies, transition countries (*post-Socialist economies*); taxpayer, feepayer (*taxpayer/feepayer*); transfers, inter-governmental relations/transfers, transfers from state budget (*intergovernmental transfers*); payment order/tax collection, tax enforcement procedure, tax arrears (*tax collection*); tax base formulae, valuation, value principle, tax assessment, tools (*tax assessment*); conduct *in fraudem legis*, circumvention of law, abuse of law, tax evasion (*tax evasion*); ability-to-pay principle, good governance principle, taxation principles, tax fairness (*tax principles*); fiscal federalism, fiscal decentralisation (*fiscal decentralisation*).

as not falling within the scope of the study. The procedure resulted in the identification of 225 publications that were subjected to an availability test. At this stage, 48 records were excluded as unavailable and 14 were excluded as not related to the research topic after reviewing the full-text. The detailed data and process is presented in a flow diagram based on the PRISMA-ScR model. This resulted in 163 full-text documents, which were further analysed by the authors. The bibliographical list of these is available in Appendix 1; the complete charting results are available in Appendix 2.[6]

Figure 1. PRISMA-ScR flow diagram for selection of sources of evidence



The group of analysed publications in terms of the number of publications in the monitored period and the number of authors who published at least one publication in the respective year is summarized graphically in Chart 1, where we identified an upward trend in both categories. It is worth mentioning that the amount of the works under analysis does not cope with the development of the total CREPČ publications in the field of social and behavioural science, where a dramatic 6.7-fold increase between 2012 and 2014 was observed, followed by a gradual decline since then. The first included work is recorded from 1997, the year 2022 is incomplete due to the decisive date of the search. In summary, we identified 105 authors[7] dealing with the studied issue, of which 32 were authors of more than 1 work, the most numerous author published 16 works, and 12 authors published 5 or more works. The detailed information is presented in Chart 2. Out of the 163 works, 56 were co-authored.

[6] Due to their extensiveness, appendixes 1 and 2 are not part of this paper, but they are available on the website of the Bratislava Law Review, namely here: blr.flaw.uniba.sk/index.php/BLR/article/view/393

[7] We merged the authors that changed their surname in connection with their marriage, which, to the best of our knowledge, involved three authors (A. Románová » A. Vartašová; K. Prievozníková » K. Cakoci; and T. Kubincová » T. Jamrichová).

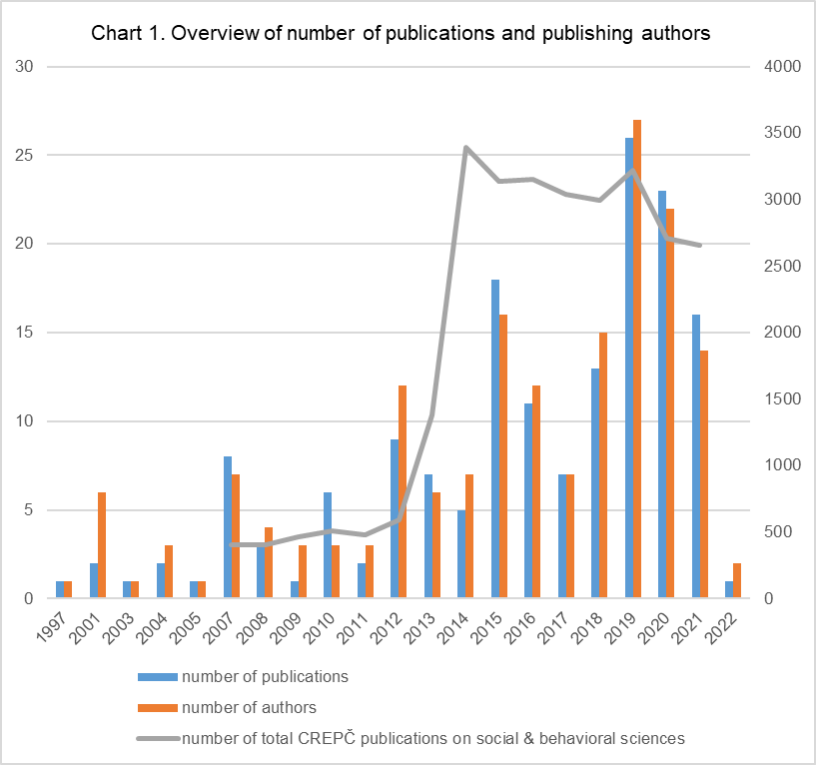
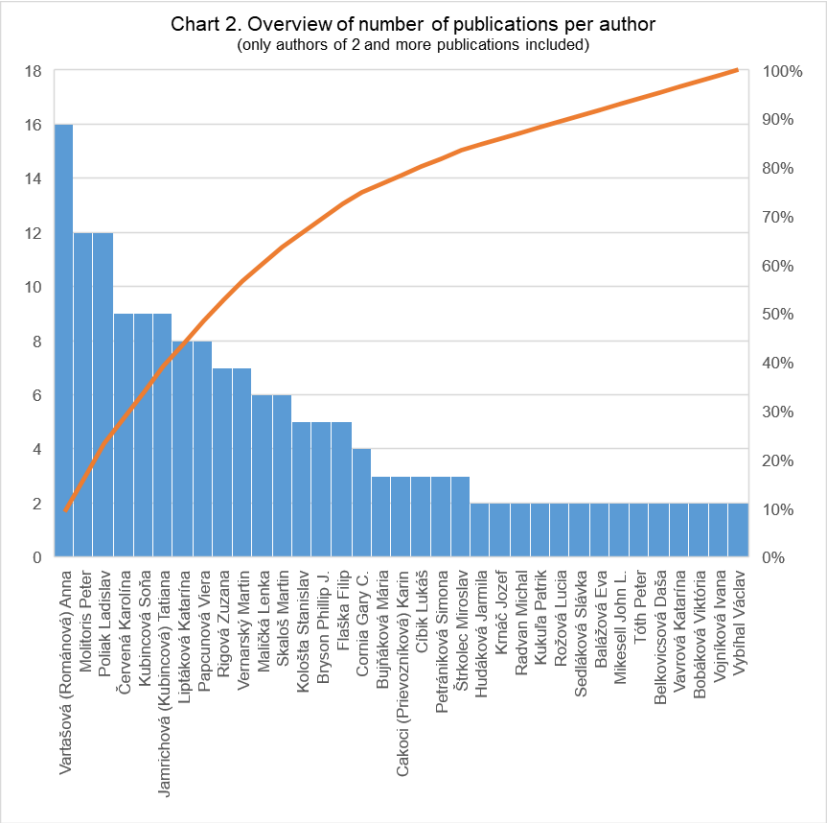


Chart 1. Overview of number of publications and publishing authors
30
25
20
15
10
5
0
4000
3500
3000
2500
2000
1500
1000
500
0
1997
2001
2003
2004
2005
2007
2008
2009
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019
2020
2021
2022
number of publications
number of authors
number of total CREPČ publications on social & behavioral sciences



As it is visible from Chart 3, 58.9% of the outputs were published in proceedings, 33.1% in journals, 6.7% in monographs and 1.2% in other sources (working papers, World Bank publications).

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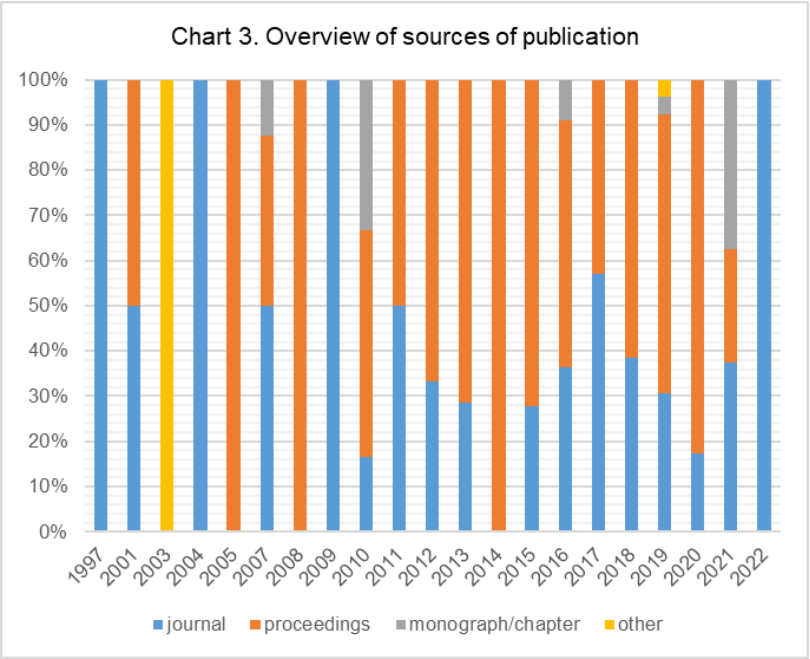
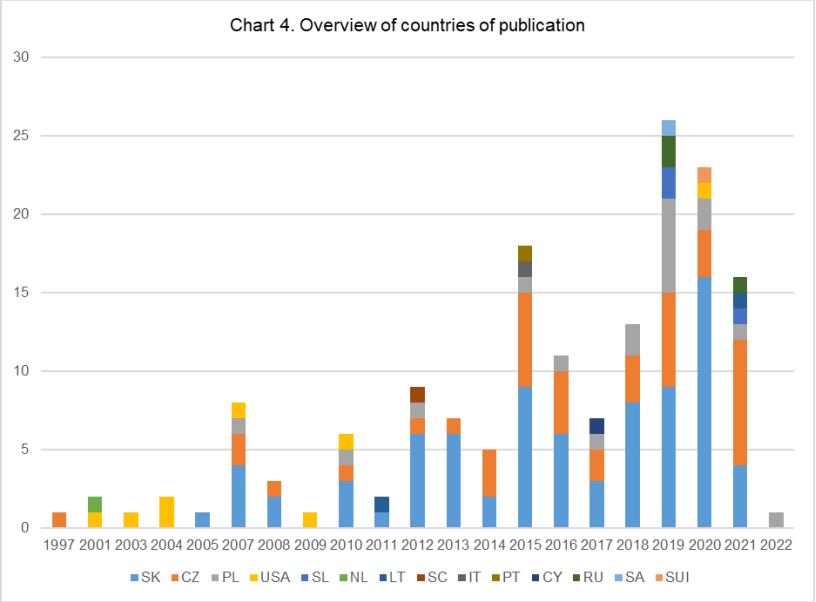


As expected, the majority of 68.1% of the works are in Slovak, 28.8% in English, 1.2% each in Czech and Polish and 0.6% in Russian. Most authors have an affiliation in the SR (82.9%), followed by the Czech Republic ("CR") (6.7%); more surprising is the share of authors affiliated in the USA (4.8%) and the appearance of authors operating in Poland, Germany, South Africa and the United Kingdom. A significant majority of papers were published within the SR, CZ and Poland (49.4%, 25.8% and 11.0%, respectively), which is logical given the geographical space and linguistic affinities, followed by the USA (4.9%), 1.8% each in Slovenia and Russia; other countries, even though sporadic, is interesting as well. These are summarized in Chart 4.



Analysing the content of the publications, we started with the scientific disciplines. In terms of such, we identified papers focusing on legal sciences, economic sciences, social sciences (sociology) and mathematical sciences (statistics). While 42.3% of the publications were devoted primarily to legal sciences (business and financial law – specifically tax law) and 30.7% to economic sciences, the remaining papers were of a mixed nature, with a predominance of legal-economic focus (22.7%), followed by the economic-sociological spectre of research (3.7%) and we identified also one economic-statistical paper (0.6%).

Using the JEL Classification System, we identified only 34 publications that originally contained JEL codes. The remaining almost 78% of publications did not contain such a classification. The highest incidences were in the H category (Public Economics) with a total of 71.4%, R category (Urban, Rural, Regional, Real Estate, and Transportation Economics) with a proportion of 10.7%, and K category (Law and Economics) with a proportion of 7.1%. The used JEL codes are presented in Chart 5. After evaluating the remaining publications in terms of their inclusion in the JEL classification, we identified the JEL Codes distribution for the whole group of publications as presented in Chart 6. Most of the publications showed features of several JEL subgroups and thus we applied a combination of them. Classifications of category K (Law and Economics) had the largest representation, at 44.9%, followed by category H (Public Economics) at 39.7%. The other categories - O (Economic Development, Innovation, Technological Change, and Growth), R (Urban, Rural, Regional, Real Estate, and Transportation Economics), Z (Other Special Topics), E (Macroeconomics and Monetary Economics), P (Political Economy and Comparative Economics Systems) were represented in shares of 3.2%, 2.5%, 2.5%, 1.9%, and 1.6%, respectively.

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Chart 5. Overview of publications contaiing JEl Codes

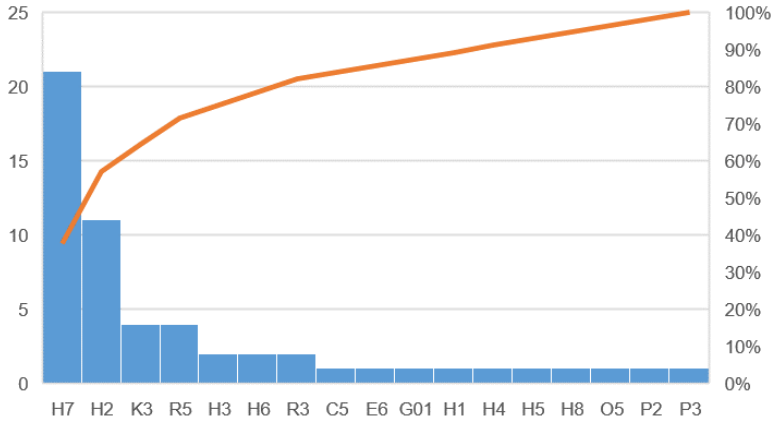
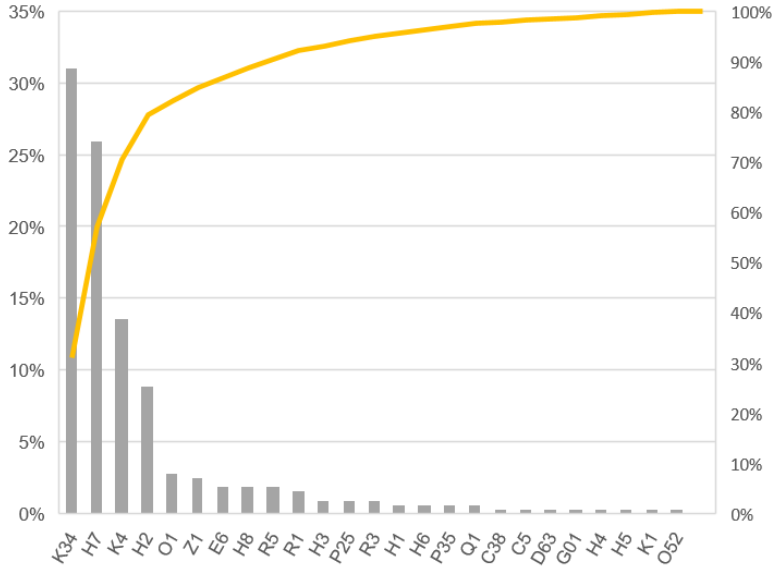


Chart 6. Overview of JEL classification of all analysed publications



As regards the keywords, 23 publications did not contain any keywords. From the remaining publications, we identified 273 keywords that underwent the summarization process described in the methodology before their analysis. After this review, 132 individual keywords were identified; the frequency and occurrence over time of the most

frequently used keywords are evaluated graphically in Chart 7 and Figure 2. For reasons of clarity, Chart 7 includes only those keywords used more than once and Figure 2 those keywords used a minimum of 5 times.

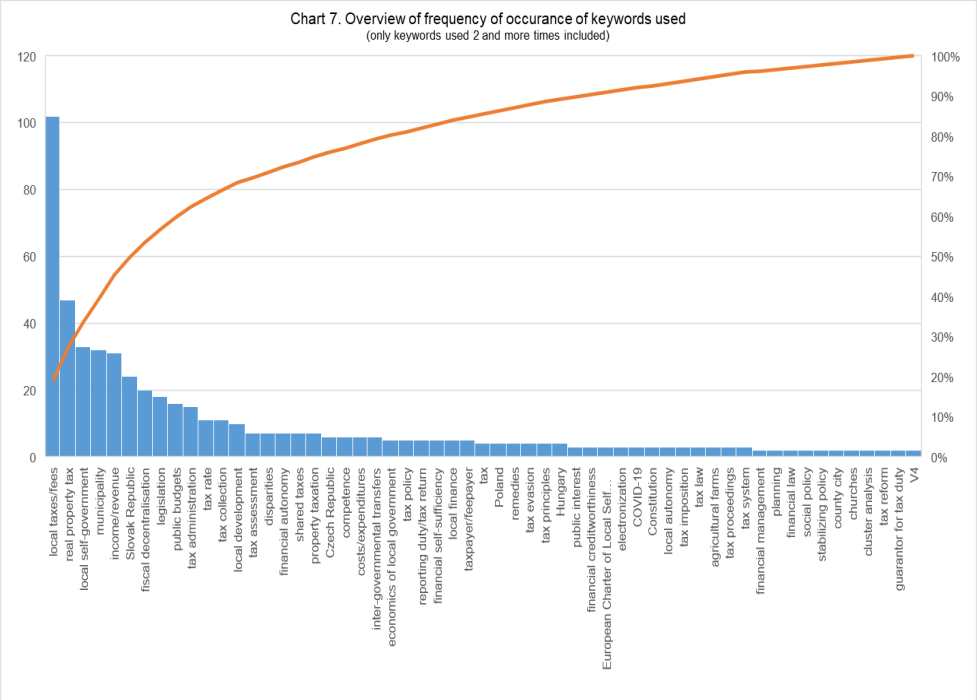


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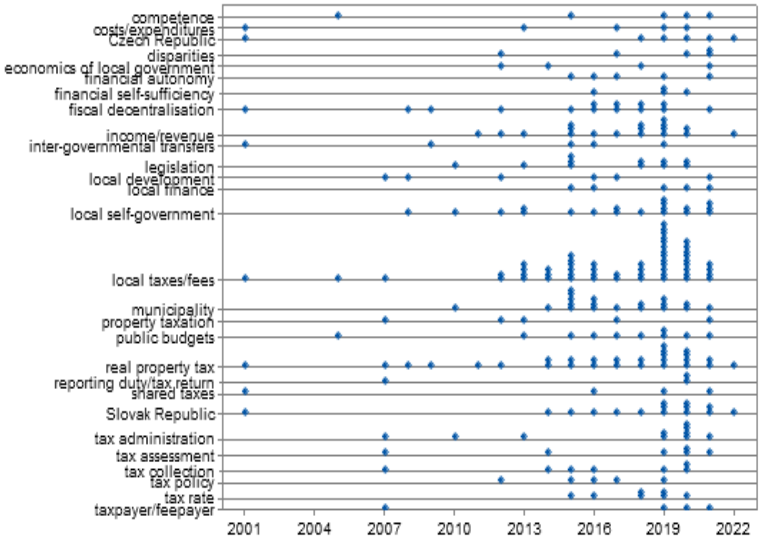
Figure 2. Overview of occurrence of particular keywords in time



For keyords used 5 or more times. Each symbol represents up to 4 observations.

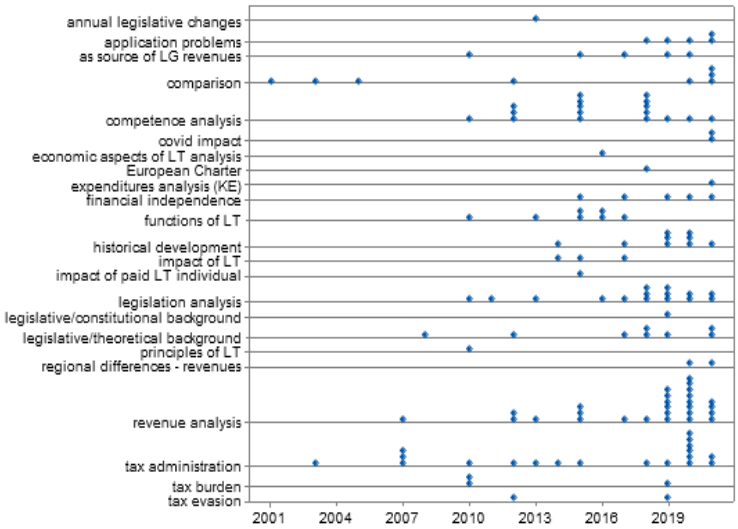
In terms of content focus, up to 85 publications were classified under two or more content categories. 101 publications (of which 22 rather partially and 17 rather marginally) examined RPT directly. LTs were covered by 102 publications (of which 15 rather partially and only 2 rather marginally) and local government by 51 publications (of which 4 rather partially). Other issues were addressed in 12 publications.

Starting from the most general, in the third group of thematic focus on local self-government, the dominant research areas were revenue analysis (21 out of 51 publications), the system of local self-government funding (17), fiscal decentralisation (13), fiscal/tax autonomy/independence (8), dependence on state funds and shared taxes (6). 6 publications contained an international comparison (mostly within SR/CR). If we include the remaining topics such as expenditures, the impact of Covid-19 on local governments' budgets, regional fiscal disparities, etc., we can conclude that most of these publications dealt with local government financing issues. Only sporadically occurring were other aspects of the publications´ main focus, such as the role of LTs in regional development or constitutional and legal aspects of local government. Among the fourth group of other areas, some interesting topics emerged, such as the transition from a socialist to a market economy, privatisation, the computerisation of public administration, the fight against corruption, the role of municipalities in urban development and the real estate market or mathematical models for the distribution of taxes and transfers to municipalities. Overall, this thematic area is dominated by the economic or non-legal dimension of the issues.

Within the narrower subject area of the local taxes group, the focus of publications varied more significantly. From the viewpoint of individual thematic

subgroups, most publications were devoted to the analysis of LT revenues (27 out of 102), where not only the overall situation in the SR was analysed, but frequently the situation of specific cities or regional towns. However, from a comprehensive perspective, most attention was paid to legal aspects. Legal analysis (generally or specifically – e.g. regarding tax rates, tax exemptions or reductions) was covered by 15 publications, legal/constitutional-theoretical background or principles of LTs were covered by 11, analysis of municipal competencies (especially in imposing LTs) was found in 17 works, tax administration and various procedural-legal issues (e.g. recovery of tax arrears, but even more specific like the computerisation of tax administration) was addressed by 18, development of legal regulation was presented in 9, the application problems and the position of LTs as a source of municipal revenue in 5 and 2 publications analysed the legal regulation in the context of the European Charter of Local Self-Government. 7 works analysed the functions of LTs, 5 specifically addressed the financial or tax self-sufficiency/independence of municipalities, and to a lesser extent other specific issues (dealing with the tax burden, illegal actions, the impact of LTs on the local economy or selected companies, the impact of Covid-19 or regional differences in LT revenues). 8 works included a significant international comparative element.

Figure 3. Overview of thematic focus subgroups (LTs group)



As far as the topic of RPT itself is concerned, most of the publications were devoted to the analysis of legislation. As many as 57 out of 101 publications were in general devoted to the analysis of legislation, of which 9 publications dealt with application issues, 6 publications dealt with the development of legislation, 5 with current legislative changes, 5 with the analysis of municipal law-making in RPT matters and the related case law and 3 focused mainly on procedural issues. Publications analysing property tax revenues accounted for a significant share – up to 33. Of these, a minority

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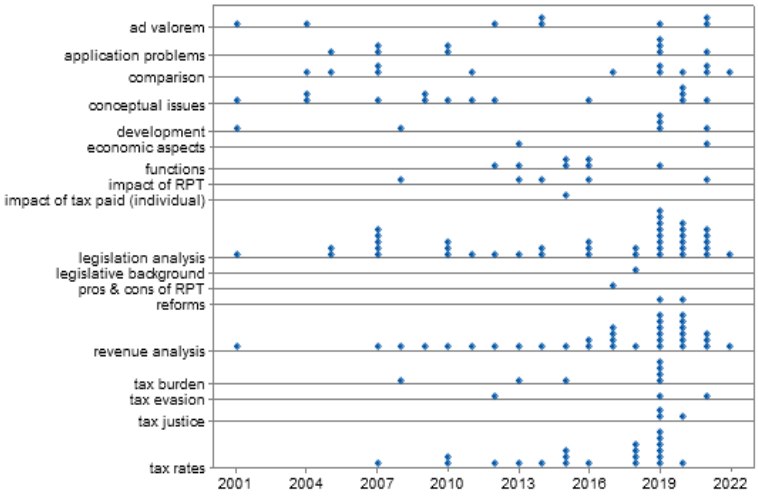
focused on the analysis/development of revenues in specific cities or a sample of cities, 3 dealt in particular with taxes paid by farms or levied upon agricultural land, and one publication with the relationship of the efficiency of tax collection in the context of municipal personnel costs. Another important thematic group consisted of publications dealing with the analysis of the tax rate, either from a legislative or economic perspective (21) and the closely related topic of the tax burden (7). More conceptual issues (e.g. issues of tax policy setting, the appropriate level of tax administration, the position of tax in the tax system and the role of tax as a source of revenue for local government) were analysed in 14 publications, 8 dealt with the concept of taxation in the sense of defining the market value base as opposed to the area based system, especially in the context of the proposed but still unrealized reforms; 3 publications each dealt with issues of tax fairness and tax evasion. Tax functions (mostly in the context of LT functions, but also specifically targeted at RPT – such as in the context of promoting intangible cultural heritage, land use or regional development) were presented by 7 works; significant tax impacts were addressed by 6 publications, in particular in terms of the impacts on specific legal entities, churches (to the extent of exemptions and concessions), local economy or regional development in the context of the contribution of taxes paid by farms. A kind of international comparison (in general or targeted at EU, CEE countries, V4 countries, SR/CR) included 12 works. Despite the frequent overlapping of individual topics (e.g., the analysis of tax rates is actually part of municipal law-making), we tried to identify the main focus of the publications.

Figure 4. Overview of thematic focus subgroups (RPT group)



5. DISCUSSION

The results confirm an increase in the number of publications on the topic, plus an increase in the number of authors dealing with the topic. The majority consisted of domestic authors and domestic publications, as was expected. Rather less expected is the relatively high share of foreign authors dealing with the issue of Slovak RPT. The emergence of Czech authors is not surprising, based on frequent cooperation (co-authorship), common history, and the similarity of the legal/tax system, or was caused by applying a comparative approach (usually SR/CR), but the interest of a number of US and even UK authors could hardly be foreseeable. Their publications were typically addressing the topic of RPT in the context of the transition period from socialism to a market economy and the follow-up periods of fiscal decentralisation, where the structural changes in the tax system were emerging and their quite robust analysis covered the then situation in RPT taxation, potential changes and the possibilities for reforms (largely regarding the value-based taxation), together with experienced opinions or suggestions (e.g., Bryson, 2010; Bryson and Cornia, 2004; Bryson, Cornia, Čapková and Konček, 2001; Brzeski et al., 2019; McCluskey and Plimmer, 2011; Nam and Parsche, 2001).

The diversity of the countries of publication is interesting, though expectedly, based on the trend that even domestic authors prefer publishing abroad (for a higher credit of publication) and the rising variability of available publishing sources (cf. Urbanovics, 2022).

From the representation of scientific disciplines, it may be concluded that the legal and economic aspects were both targeted by a similar number of publications (without apparent differences). Interestingly, the presence of aspects of other disciplines is very limited and, as a result, the interdisciplinary approach of the research on RPT is almost purely economic-legal, which may be the sphere for further development of future research activities. As regards the JEL classification, the overall situation was similar, however, there was a slightly lower share of K category (Law and Economics) (approx. 45%). We assume that the reason for this slight discrepancy is that some of the works where we identified some legal aspects and thus classified them under interdisciplinary (legal-economic) groups were not assigned also with the K category JEL code by the author of such publications. There were also differences between the shares of K category and H category in the group of publications originally possessing the JEL Code and the total group of publications after our assignment of JEL Codes. We assume that this difference is because it is not typical to apply this (primarily economic) classification in the legal sciences.

As regards the keywords, the most frequently used term was "local taxes/fees", which shows that the majority of authors see the importance of RPT within the context of local taxation and that only the second place was held by the term "RPT", followed by local self-government and municipality. This corresponds to the fifth place being held by the term "income/revenue" and the ninth place by "public budget". Usage of other keywords like fiscal decentralisation, financial autonomy/self-sufficiency, local finance and shared taxes create together with the above mentioned a large interest group of authors dealing with RPT as a source of municipal revenues. Another larger group of frequently used keywords represents the purely legal aspects, especially those targeted at tax administration issues (legislation, tax administration, tax rate, tax collection, tax assessment, competence, etc.). Except for the term "local development", much less frequently mentioned were the conceptual issues, such as tax principles, tax & other policies, tax reforms, quality of law and sustainability. The opposite side of the chart is, however, interesting as well, as it shows the special interests of authors, i.e., besides the

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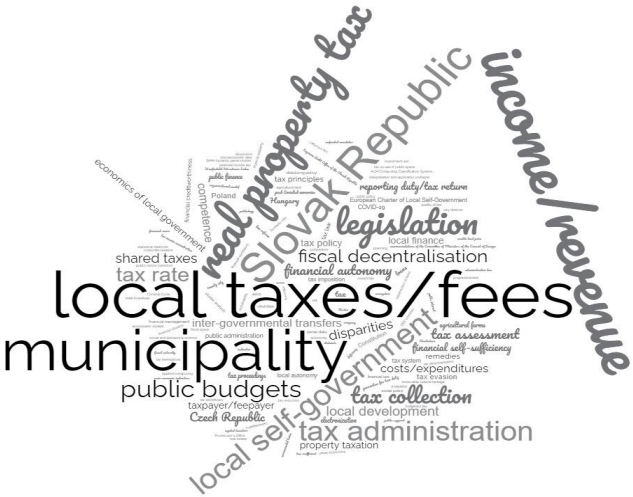
frequently dealt issues. There was a very low incidence of other topics (to the once-mentioned words) such as agricultural farms, churches, European Charter of Local Self-Government and the recommendations of the Committee of Ministers of the Council of Europe, post-socialist economies and CEE, Covid 19, the financial crisis, corruption, immovable cultural heritage, social and behavioural science, statistical methods, econometric model, cluster analysis, urban economics and planning and even electronisation, which, in particular, was very surprising given the new challenges and potential benefits of the currently developing digital age (Kačaljak, 2020).

Figure 5. Keyword usage word-cloud



We, however, need to note that some authors did not choose keywords (from our point of view) appropriately, either in terms of using a disproportionate (non-standard) number of keywords (even up to 10), long phrases, incorrect English translation, inconsistently with the subject of the research or words with an unclear meaning. This made the basic content of the evaluation more complicated.

Within the thematic scope of the works assessed, we may conclude that the dominant targets of the publishing activities within the topic of RPT are all those aspects relating to viewing the tax as a local revenue source, followed by an analysis of the various aspects of the legislative construction of the tax. Arriving at a different conclusion would be a surprise–- in the former case given the fact that the fiscal function of taxes is the primary and the most important one (Bird and Slack, 2002; McCluskey et al., 2012) and in the latter case by the principle of legality (Štrkolec, 2019; Vernarský, 2007) stemming from the essence of the tax, which is, in fact, a forced interference with an individual´s proprietary rights, for which reason the tax duty and, in general, the rules for such

interference have to be precisely and unambiguously determined by law (principle of legal certainty).

What was not so much expected, from our point of view, is that actually very few authors dealt with more specific issues or more interdisciplinary issues containing e.g., political sciences, sociology, information technology or other areas. We, for example, identified only a few publications dealing with the relations of the real estate market or urban development (Bryson, 2010; Románová, 2021; Tvrdoň and Síbert, 2015), which, from our viewpoint, is a good example of an area with a wide space for serious interdisciplinary research. This topic is quite well addressed by foreign literature (Gillespie, 1969; Gnat, 2021; Ihlanfeldt, 1984; OECD, 2018; Taranu and Verbeeck, 2022; Votava, Komárková and Dvořák, 2021; etc.), however, more robust research concerning the domestic conditions is unknown to the authors. We identified only one author who aims more of his publications at the non-fiscal functions of real property tax or perhaps more broadly of LTs (e.g., Poliak, 2015b; Poliak, 2016) and generally such other functions were rarely targeted (e.g., Adamišin and Marcinová, 2012; Kalamárová, 2013). Likewise, only a few publications touched on the impacts of the tax on a specific taxpayers group (mentioned were agricultural farms: Gecíková and Papcunová, 2007, churches: Gyuri and Jesenko, 2016, specified legal entity: Tóth et al., 2015) which we see as an inadequately low interest of authors in dealing with such targeted research issues. The reason for such a situation may be similar to that of other aspects discovered, being that more publications were targeted on research in the conditions of only some particular cities (Liptáková and Krnáč, 2019, Vartašová and Červená, 2020) or small groups of cities (Bobáková and Rožová, 2019, Cíbik, 2020). In our experience, the unavailability of more structured data on individual municipalities/cities may be the reason, in the latter case that is also connected to the very high number of municipalities (Klimovský, 2009). A good practice example in this context is Hungary where all the data on the LT applied by municipalities (including tax rates) are searchable in one place–- a specialised web portal of the Hungarian national treasury.

In terms of an evaluation of the results, a rather surprising sub-conclusion is that a large part of the publications dealt with a very general analysis of the institute of RPT (also LTs or fiscal decentralisation), often in a descriptive way without focusing on a specific problem/aspect, and a second sub-conclusion is the significant "duplication" of works. We identified a relatively large number of papers that addressed the same problem/aspect as if disregarding the previous state of research in the field. Examples include a repeated assessment of the development and status of fiscal decentralization, a repeated analysis of property/local tax revenues in the context of municipal/local government revenues, and a repeated general assessment of the legal regulation. The focus on more specific problems was not as frequent as we expected, and in contrast, a larger proportion of works dealt with very frequently analysed problems. For example, out of 62 works explicitly dealing with property tax, 18 (29%) (besides perhaps also other issues) analysed the tax rates and 24 (39%) analysed property tax revenues.

In this context, we see the value of the practical contribution of this review in creating a summarized overview of the state of knowledge existing on the studied issue, speeding up the process of its assessment, facilitating access to a comprehensive set of publications dealing with this topic, and identifying research gaps worthy of more detailed investigation. To the best of our knowledge, there is no such summarization work using a PRISMA scoping review approach in the field of legal sciences or taxation in general.

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5.1 Limitations

This review has four main limitations. Firstly, it concerns the search policy using the selected search terms. Despite using alternative terms, there is a risk of omitting relevant literature in case it lacks particular words in its title, abstract, keywords or topic in the case of WoS/Scopus databases. Secondly, it is the choice of searched databases and the incompatibility of the databases. With a large number of databases collecting scientific publications, there might be relevant publications falling out of the search strategy, especially as regards the foreign literature. Since domestic scientific literature has been registered in the CREPČ database comprehensively since 2007, there is a minimum of such a risk, nevertheless, the domestic works published before 2007 are most likely omitted. Thirdly, in the case of foreign authors/sources, potentially existing non-English publications might be omitted.

6. CONCLUSIONS

Based on the results obtained, we can conclude that the subject under study is the focus of interest for scholars and academics working on the subject of taxation. However, delving a little deeper, we find that, compared to previous years, more and more authors are dedicating themselves to this topic, and are publishing their results in journals that are included in world databases[8], which allows for better dissemination of knowledge in the international space. One must also take into account the pressure exerted by the university management not only on the quality but also on the number of publications, due to the interdependence of the outputs from publication activity on university budgets (direct dependence of the size of the budget on the number of articles in the journals with higher quartiles). This can also explain the increase in the number of publications not only in local journals but especially in world-renowned journals.

On the other hand, a certain percentage of articles are still not available as full text versions, which is a limitation not only for the scientific community but especially for the general public dealing with tax issues. Open Science is the way to solve this problem. It is supported by various projects, one example in Slovakia is Open Science CVTI SR[9] and Open Access journals are part of it. Several authors deal with this issue in more detail, e.g., Khabsa and Giles (2014), Ross-Hellauer et al. (2020), Tennant et al. (2016) or Veletsianos and Kimmons (2012).

Another conclusion we have drawn is about the content of publications. Based on the findings, and taking into account the interest of the public, since these taxes affect everyone who owns real property, as well as the interest of politicians in an effective system for setting and collecting this type of tax, we believe that this topic should be studied in a more interdisciplinary way, focusing more not only on legal and economic analyses–- e.g. urban development, the impact of digitalisation, or other social science disciplines. This would be useful not only for the Slovak government but also for the governments of other countries. Even though these taxes are a local matter with a specific approach applied for each country, mainly due to different historical and geographical circumstances, whether there will be significant harmonisation within the EU or not, it is a combined effort not only of Slovakia but of all countries to solve the problem of taxation within the framework of the EU and to search for an optimal tax system. In particular, this issue always emerges during the preparation of municipal

[8] For example, we found only one publication of a Slovak author indexed in Scopus or Web of Science before 2012 while eight in 2019.
[9] See https://otvorenaveda.cvtisr.sk/en-gb/openscience-in-slovakia/.

budgets and, in the long term, before and immediately after the parliamentary elections. Future research could also focus on the impact of exogenous factors on taxation, such as the impact of the Covid-19 pandemic on municipal budget revenues and expenditures and also the impact of rising inflation and increases in energy costs on the expenditure side of municipal budgets.

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ALTERNATIVE MEANS FOR RESOLVING ADMINISTRATIVE DISPUTES IN UKRAINE IN THE LIGHT OF EUROPEAN INTEGRATION / Yuliia Vashchenko

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Abstract: *This paper aims at the exploring the issues of the legal regulation of alternative means for administrative disputes resolution in Ukraine in frames of European integration. The importance of alternative dispute resolution in the field of administrative legal relations has been emphasised by the Committee of Ministers of the Council of Europe in a number of its recommendations. Alternative means have been introduced in administrative procedure and administrative justice in some European countries, including Ukraine. However, the ADR mechanisms in administrative legal relations still are not widely used primarily because of the lack of the clear legal regulation. In this paper, the core problems related to the use of alternative means for dispute resolution in administrative procedure and administrative justice have been identified and recommendations on enhancement of legal regulation of certain instruments in Ukraine have been provided based on the European approaches and the best practices of the selected states – members of the Council of Europe.*

Key words: *Administrative Dispute; Administrative Justice; Conciliation of Parties; Mediation; Dispute Settlement with the Participation of the Judge*

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1. INTRODUCTION

The importance of the alternative means for resolution of disputes arising in different spheres of social relations has been widely recognised. More often, the use of alternative dispute resolution (hereinafter – ADR) is considered in relation to civil, criminal and commercial matters. The implementation of progressive European standards in Ukrainian legislation has been emphasised by scholars (e.g., Ladychenko and Golovko, 2017). The use of the ADR mechanisms in the field of administrative legal relations has been recommended by the Committee of Ministers of the Council of Europe. Following these recommendations, some countries – members of the Council of Europe, including Ukraine, introduced such mechanisms in the field of administrative procedure and/or administrative justice. However, they are still not widely used and their legal framework needs to be enhanced.

In the conditions of the full-scale aggression of the Russian Federation in Ukraine some judicial institutions do not work; it influences the terms of the consideration of cases the number of which significantly increased.[1] The use of the ADR in the sphere of administrative relations will contribute in tackling this problem.

The hypothesis of the study is the insufficiency of legal regulation of alternative means for administrative dispute resolution in Ukraine and necessity of its enhancement with consideration of the core principles elaborated by the Committee of Ministers and the best practices of the selected states – members of the Council of Europe.

A wide range of general methods of scientific research has been used for the purpose of this research. In particular, the method of comparative legal analysis made it possible to explore the legal framework for the ADR in the selected states – members of the Council of Europe and to define the best practices. The system-functional method, methods of analysis and synthesis, and the method of theoretical generalisation helped to generalise existing approaches to the ADR mechanisms in the administrative legal relations and elaborate the recommendations regarding their improvement.

The first part of the paper focuses on the theoretical issues of the ADR in the field of administrative procedure and justice, recommendations on the use of the ADR in administrative legal relations formulated by the Committee of Ministers, and the legal framework for the ADR mechanisms in the administrative procedure and justice in the selected states – members of the Council of Europe. The second part of this paper provides the analysis of the legal regulation of the certain alternative means for administrative disputes resolution in Ukraine, identifies their core commonalities and differences, advantages and challenges, and presents the recommendations on the enhancement of the legal framework elaborated with consideration of the European principles and best practices from the selected European states.

2. ADR MECHANISMS IN THE ADMINISTRATIVE PROCEDURE AND ADMINISTRATIVE JUDICIAL PROCEEDINGS: EUROPEAN APPROACHES AND THE EXPERIENCE OF THE SELECTED STATES – MEMBERS OF THE COUNCIL OF EUROPE

In last decades, the issues of alternative dispute resolution in administrative procedure and justice have been discussed by scholars from different countries (e.g., Kavalnė and Saudargaitė, 2011; Tsurtsumia, 2021). Radical changes in social relations led to changes in administrative relations and the role of the public administration as well. Whereas previously the ADR instruments were mostly associated with civil, criminal, and commercial proceedings, currently they have been also introduced in the administrative procedure and administrative judicial proceedings *"depending on the flexibility of the relations in this field and taking into account the impact of administrative traditions"* (Kovač, 2016), in particular, in certain European countries – members of the Council of Europe.

The ADR mechanisms in administrative disputes resolution, similar to the ADR in civil, criminal and commercial disputes resolution, aim at saving the time of the dispute resolution, reducing the court workload, and saving the costs for litigants. Due to the ADR mechanisms, disputes are not only formally and legally, but also *de facto* resolved (Kovač, 2016).

[1] Supreme Court. The state and mediation: the judge of the Supreme Court outlined the perspectives of out-of-court dispute resolution and restorative justice. Available at: https://supreme.court.gov.ua/supreme/pres-centr/news/1456227/ (accessed on 20.09.2023)

The ADR mechanisms in the administrative procedure and administrative judicial proceedings are characterised by specificities. First, they aim at the resolution of disputes of specific nature – public disputes – the disputes related to public interest (interests). Different types of such administrative disputes can be specified based on the instruments of public administration (e.g., administrative acts, regulatory acts, administrative contracts, plans and factual actions). The ADR mechanisms cannot be used in some types of administrative disputes, e.g., where the dispute raises issues of public concern, such as ecologically sustainable development (Preston, 2011). Secondly, one of the parties to the dispute is always the public administration entity (public authority, local self-government authority, or other public administration entity). These peculiarities can lead to the restrictions, both objective and subjective, for the use of the ADR mechanisms. One of the problems is that public administration entities shall act only in frames of their competence defined by law. If the possibilities of use of ADR mechanisms are not clearly defined by law, it would be problematic (if even possible) to use it by certain public administration entities. The ADR cannot achieve the objectives of the procedure if it is does not meet the legally provided objectives of a specific relation, which in case of public law matters implies an *a priori* limited range (Kovač, 2016). Therefore, the adequate legal framework for the ADR in the administrative relations that provides the public administrative entities with necessary discretionary powers is crucial. At the same time, it shall be taken into consideration that such discretionary powers cannot be unlimited; possible options always should be defined by the respective legal norm (Vrabko et al., 2018).

The next problem is the readiness of the public administration entities – parties to a dispute – to recognise their mistakes (if any) and for the amicable procedures with private persons. In this case, it is worth to mention the position of the European Commission for Democracy Through Law (Venice Commission): governments and parliaments must accept criticism in a transparent system accountable to the people (Venice Commission, 2019).

The ADR mechanisms in the administrative disputes (i.e., disputes between the public administration entities and the private persons), where the public administration entity is a party to a dispute, shall be distinguished from the ADR mechanisms that are functions of the public administration entities, where the public administration entities help private persons – parties to a dispute – to resolve their disputes within out-of-court procedure. In particular, the national energy regulatory authorities can be empowered with the function to use the ADR in order to resolve disputes between the electricity and gas economic entities and their consumers in accordance with the Electricity[2] and Gas[3] Directives. E.g., the Regulatory Office for Network Industries (URSO) – the energy regulator of the Slovak Republic – performs the ADR function according to Section 3(2)(a) of Act No. 391/2015 Coll. on alternative dispute resolution, as amended. The ADR aims at amicable settling a dispute between the parties to the dispute, which are the seller (e.g., electricity/gas/water/heat supplier) and the consumer (e.g., household consumer). The energy regulator in such procedure acts independently, impartially, and with due diligence, taking into consideration the protection of the rights and legitimate interests of both the

[2] Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast). OJ L158, 14.06.2019, pp. 125-199.

[3] Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC. OJ L 211, 14.08.2009, pp. 94-136.

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consumer and the seller.[4] The ADR mechanisms in such categories of disputes are regulated, in particular, by Directive 2013/11/EU of 21 May 2013 on ADR for consumer disputes,[5] Regulation (EU) 524/2013 on online dispute resolution for consumer disputes.[6] In recent years, the issues of the implementation of the EU requirements on ADR mechanisms for consumer disputes in the EU Member States attract attention of the academic society (e.g., Vačoková, 2020).

The Committee of Ministers of the Council of Europe emphasises the importance of the alternative means for resolving disputes between administrative authorities and private persons in a number of its recommendations. Such recommendations constitute soft law on alternative means in administrative proceedings.

In Recommendation No R (81) 7[7] the Committee of Ministers of the Council of Europe points out that the court procedure is often so complex, time-consuming and costly that private individuals, especially those in an economically or socially weak position, encounter serious difficulties in the exercise of their rights in member states. It is recommended that state parties should take measures to facilitate or encourage, where appropriate, the conciliation of the parties and the amicable settlement of disputes before any court proceedings have been instituted or in the course of proceedings.

According to Recommendation No R (86) 12[8] of the Committee of Ministers of the Council of Europe, the Member States are invited to consider encouraging, where appropriate, a friendly settlement of disputes, either outside the judicial system, or before or during judicial proceedings.

In Recommendation Rec (2001) 9[9] the Committee of Ministers of the Council of Europe emphasises that judicial proceedings, in some cases, may not always be the most appropriate to resolve administrative disputes. Means of alternative dispute resolution can be easier, more flexible, speedier, less expensive; they allow more discretion. It stresses the importance of the regulation of alternative means and defines, among other, that such regulation should aim at provision the necessary information regarding the possible alternative means, encouraging the independence and impartiality of conciliators, mediators and arbitrators, fair proceedings based on the respect of rights of the parties and the principle of equality, transparency in the use of alternative means and a certain level of discretion, the execution of the solutions made via alternative means. The Recommendation defines the alternative means that may be used (or their usage can be

[4] Alternative dispute resolution (ADR). Available at: https://www.urso.gov.sk/alternative-dispute-resolution-adr/ (accessed on 20.09.2023).

[5] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No2006/2004 and Directive 2009/22/EC. OJ L 165/63, 18.06.2013, pp. 63-79.

[6] Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR). OJ L 165, 18.06.2013, pp. 1-12.

[7] Recommendation No R (81) 7 of the Committee of Ministers to Member States on Measures Facilitating Access to Justice (adopted by the Committee of Ministers on 14 May 1981 at its 68th Session). Available at: https://rm.coe.int/168050e7e4 (accessed on 20.09.2023).

[8] Recommendation No R (86) 12 of the Committee of Ministers to Member States concerning measures to prevent and reduce the excessive workload in the courts adopted by the Committee of Ministers on 16 September 1986 at the 399th meeting of the Ministers' Deputies. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804f7b86 (accessed on 20.09.2023).

[9] Recommendation of the Committee of Ministers of the Council of Europe to Member States on alternatives to litigation between administrative authorities and private parties Rec (2001) 9 adopted by the Committee of Ministers on 5 September 2001 at the 762nd meeting of the Ministers' Deputies. Available at: https://rm.coe.int/16805e2b59 (accessed on 20.09.2023).

made compulsory) prior to judicial proceedings, such as internal reviews, conciliation, mediation, and the search for a negotiated settlement, and the alternative means that may be used during judicial proceedings, such as conciliation, mediation and negotiated settlement, possibly following a recommendation by the judge. It is stressed in the Recommendation that in all cases, the use of alternative means should "allow for appropriate judicial review which constitutes the ultimate guarantee for protecting both users' rights and the rights of the administration". Such judicial review will depend on the alternative methods used; the use of alternative means should lead to the suspension or interruption of the time-limits for judicial proceedings.

The Recommendation mentioned above defines that the conciliation and mediation can be initiated by the parties, by the judge, or be made compulsory by law. Conciliators and mediators can invite an administrative authority to repeal, withdraw or modify an act on grounds of expediency or legality. It should be noticed that this Recommendation does not provide notions and clear distinction between the conciliation and mediation. As to the negotiated settlement, it is stated that, "unless otherwise provided by law, the administrative authorities shall not use a negotiated settlement to disregard their obligations. In accordance with the law, public officials participating in a procedure aimed at reaching a negotiated settlement shall be provided with sufficient powers to be able to compromise."

In order to help member states to implement the abovementioned Recommendation the European Commission for the Efficiency of Justice (CEPEJ)[10] developed the Guidelines for a better implementation of the existing Recommendation on alternatives to litigation between administrative authorities and private parties (2007).[11] In these Guidelines, the CEPEJ pays attention to the necessity and problems of use of alternative means for public disputes resolution. Lack of awareness among public administration entities regarding the use of alternative means for public disputes resolution, distrust of courts to the development of non-judicial alternatives to litigation in public administering, lack of professionals that can be mediators or conciliators, and lack of specialised research on the matter are defined between the core problems. It is recommended that the member states approve the regulations regarding the alternative means. As to the use of alternative means in courts, it is stated that the member states shall define when and how to use different types of alternative means in administrative dispute resolution, in particular, internal review, conciliation, mediation, negotiated settlement, and arbitration. The Guidelines emphasise the role of judges in the development of alternatives to litigation between administrative authorities and private persons. As to the concrete powers of judges on this matter, it is recommended that judges should have the power to recommend to the parties to use such alternatives as conciliation, mediation and negotiated settlement, and arrange information sessions. Such alternatives should be available, either by the establishment of court annexed schemes or by directing parties to lists of neutrals. In judicial review, judges must take into account parties' agreement, unless it is against the public interest. For these purposes, the judges shall have a full knowledge and clear understanding regarding the

[10] The European Commission for the Efficiency of Justice (CEPEJ) was established on 18 September 2002 with Resolution Res (2002)12 of the Committee of Ministers of the Council of Europe. The aim of the CEPEJ is the improvement of the efficiency and functioning of justice in the member states, and the development of the implementation of the instruments adopted by the Council of Europe to this end. Available at: https://www.coe.int/en/web/cepej/about-cepej (accessed on 20.09.2023).

[11] European Commission for the Efficiency of Justice (CEPEJ). Guidelines for a better implementation of the existing Recommendation on alternatives to litigation between administrative authorities and private parties (7 December 2007). Available at: https://rm.coe.int/1680747683 (accessed on 20.09.2023).

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alternatives, their peculiarities, procedures, and benefits. It is recommended to arrange the information sessions, to establish the training programmes regarding the alternatives. Also, the Guidelines stress the importance to foster institutional and individual links between judges and neutrals, in particular, via joint conferences and seminars.

Based on the following approaches, different alternative means of administrative dispute resolution are used in the administrative proceedings in certain countries – members of the Council of Europe.

In particular, the use of mediation is prescribed by the Code of Administrative Justice in France (Code de justice administrative. Chapitre III: La mediation (Articles L213-1 a L213-14).[12] Mediation can be initiated by the parties to a dispute or by the judge. Mediation is conducted by the mediator who informs the judge about the results of the mediation – whether the parties came to the agreement or not.

Conciliation procedure is defined by the Code of Administrative Court Procedure of Estonia.[13] As referred to in para. 137, division 5, if all parties and third parties agree to this, the court may conduct conciliation proceedings in which participants in proceedings, with the assistance of the judge, resolve their dispute by negotiations. In this case, the court will issue a corresponding order by which it also orders a stay of proceedings in the administrative matter until the conclusion of conciliation proceedings. It should be noticed that another court panel is appointed to conduct conciliation proceedings. During the negotiation the court, in particular, explains the procedure and objective of conciliation and the rights of the participants of conciliation proceedings, hears the positions of the participants, ascertains, as specifically possible, the interests of the participants and the possibilities for protecting those interests in relation to the subject matter of the dispute, discusses with the participants of proceedings the possibilities for resolving the dispute by a compromise (para. 138, division 5 of the Code). Conciliation procedure is concluded: by approval of the compromise and termination of proceedings in the administrative matter; by resumption of proceedings in the administrative matter without having reached a compromise, if the corresponding application is made by a participants in proceedings; by resumption of proceedings in the administrative matter without having reached a compromise, in the case that the court does not consider a compromise likely to be reached within reasonable time, or considers conciliation proceedings to be impractical for other reasons. If proceedings are resumed, the initial court panel continues conducting proceedings in the matter. In the case of a resumption of proceedings, a participant in proceedings may not rely on any declaration or admission made by another participant during conciliation proceedings (para. 140, division 5 of the Code). The out-of-court mediation is not regulated by the Code of Administrative Procedure of Estonia. The Conciliation Act of Estonia[14] governs only proceedings in civil matters and does not cover the administrative disputes.

In Latvia, there is the Mediation Law approved on 22 May 2014.[15] Some scholars, in particular, Litvins, G. (2019), considered this Law as an umbrella law for different types of disputes, including administrative ones. However, at the same time, they pay attention

[12] Code de justice administrative. Available at: https://www.legifrance.gouv.fr/codes/id/LEGISCTA000033424088

[13] Code of Administrative Court Procedure of the Republic of Estonia (passed 27.01.2011). Available at: https://www.riigiteataja.ee/en/eli/512122017007/consolide (accessed on 20.09.2023).

[14] Conciliation Act (passed on 18.11.2009). Available at: https://www.riigiteataja.ee/en/eli/530102013028/consolide (accessed on 20.09.2023)

[15] Mediation Law of the Republic of Latvia of 22 May 2014. Available at: https://likumi.lv/ta/en/en/id/266615-mediation-law (accessed on 20.09.2023).

that no special provisions regarding the use of mediation in administrative proceedings are included in this Law or in other acts of legislation. In fact, in the definition of the subject of regulation of the Mediation Law there are no limitations regarding the types of disputes regarding which mediation can be used. However, in the Informative Reference to Directive of the European Union which is part of the Mediation Law it is stated that this Law contains legal norms arising from Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. Based on these provisions, one may conclude that this Law aims at the regulation of mediation in civil and commercial matters and does not cover administrative disputes. Thus, special regulation regarding the use of mediation in administrative proceedings is needed. However, the Administrative Procedure Act of the Republic of Latvia[16] (which covers both administrative procedure and administrative judicial proceedings) includes special provisions related to the alternatives, namely settlement (primarily, sections 80-1, 107-1 of the Administrative Procedure Act). As referred to in Section 107-1 of the Administrative Procedure Act if a court (judge) believes that a settlement is possible in a case, the court (judge) may explain the possibilities of entering into a settlement (administrative contract) to participants to the proceedings, and also make recommendations for the conditions of a settlement. The court (judge) may explain possibilities of entering into a settlement both in writing and in court hearing. The court (judge) may convene a court hearing only to discuss this issue.

In Lithuania, out-of-court mediation for administrative disputes is possible, but is used very seldom (Tvaronavičienė, Kaminskienė, Rone, and Uudeküll, 2022). Lithuanian Law on Mediation[17] that came into force on 1 January 2021 covers also administrative disputes.

In Poland, mediation can be used before the start of administrative proceedings according to the Law on Administrative Proceedings before Administrative Courts.[18] It is stated that at the request of the complainant or an authority, lodged before the trial has been designated, mediation proceedings may be carried out in order to clarify and consider the factual and legal circumstances of the case and to determine by the parties the manner of its settlement within the limits of the existing law. Mediation proceedings may be carried out even if the parties have not requested that such proceedings be instituted (Art. 115 of the Act). Mediation proceedings shall be conducted by a mediator appointed by the parties or by the court (if the parties have not reached any agreement regarding the mediator) (Art. 116). On the basis of arrangement made during the mediation proceedings, the administrative authority shall set aside or modify the challenged act or shall made or take other action in accordance with the circumstances of the case within the limits of its own jurisdiction and competence. If the parties have made no arrangement as to the manner of settlement of the case, it shall be subject to a hearing by the court (Art. 117).

In the Slovak Republic, alternative means, including mediation, are not used for administrative dispute resolution. The Law on Mediation and amendments to certain laws of the Slovak Republic approved in 2019[19] covers mediation in disputes arisen in

[16] Administrative Procedure Act of the Republic of Latvia. Available at: https://likumi.lv/ta/en/en/id/55567-administrative-procedure-law (accessed on 20.09.2023).
[17] Law on Mediation of the Republic of Lithuania. Available at: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.325294/asr (accessed on 20.09.2023).
[18] The Law on Proceedings before administrative courts of 30th August 2002. (Dziennik Ustaw of 2018, item 1302 – consolidated text).
[19] Zákon č. 420/2004 Z.z. od 25.06.2004 O mediácii a o doplnení niektorých zákonov. Available at: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2004/420/ (accessed on 20.09.2023).

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civil, family, commercial, and labour relations, and does not regulate mediation in administrative disputes. The Law on Administrative Judicial Proceedings of the Slovak Republic[20] includes the right of the complainant to withdraw his complaint as a whole or in some part until the court delivers a judgement (para. 63 of the Law), and it can be done in cases when a settlement was achieved between the parties. In this case, the administrative court will terminate the proceedings in this part. However, the first-instance court does not examine the reasons for withdrawal of complaints. The issues of alternative dispute resolution in the field of administrative relations are subject to special research in the Slovak Republic. In particular, Molitoris, P. stresses the advantages of use of alternative means for dispute resolution in the administrative relations and the importance of implementation of the recommendations of the Committee of Ministers of the Council of Europe (Molitoris, 2016a; Molitoris, 2016b). He pays attention that *"means of alternative disputes resolution could represent one of the tools contributing to the speeding up of court proceedings by eliminating the excess of administrative court agenda"* (Molitoris, 2016a). As to the use of alternative means in the administrative procedures, the researcher points out that the Administrative Procedure Act[21] includes the institution of conciliation (§3(4), §48). However, conciliation can be used in very limited types of administrative procedures, mostly related to neighbour disputes or cases of administrative violations (Molitoris, 2016b, p. 76). This institution cannot be used for the disputes between the participants of the procedure and the administrative authority, because conciliation is a bilateral or multilateral agreement between the participants of the procedure (Vrabko et al., 2019). Molitoris, P. stresses that the notions of conciliation and mediation are not used in the Administrative Judicial Procedure Code of the Slovak Republic. In his opinion, the institution of "complainant's satisfaction" prescribed in this Code (Art. 101) can be considered as similar to conciliation. However, he emphasises that the administrative authority shall be empowered with the right to change its decision in question for the purposes of use the "complainant's satisfaction" institution by special competence norm. In frames of current legal regulation, it would be "safer" for the administrative authority to wait for the final judgement (Molitoris, 2016a). The researcher concluded that *"the space which has opened up during the drafting of the new comprehensive administrative courts adjudication codification for a wider utilization of alternatives to litigation has been mostly left unused. This fact, connected with the absence of relevant regulations governing the procedures to be adhered to by administrative bodies in administrative proceedings, can potentially result in the situation when the anticipated effect represented by the speeding up of court proceedings secured, inter alia, by alternative means of disputes settlement is not achieved"* (Molitoris, 2016a).

In Romania, there is no in-court conciliation procedure. The Law on Administrative Disputes does not regulate the arbitration proceeding as alternative means for resolving administrative disputes regarding administrative acts in general. However, the arbitration procedure provided by the Civil Procedure Code is applicable to administrative contracts.[22]

Considering mentioned above, in some selected countries (e.g., France, Estonia, Poland, Latvia) certain types of alternative means for dispute resolution are implemented

[20] Správny súdny poriadok (z 21. mája 2015). Available at: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2015/162/ (accessed on 20.09.2023).
[21] Zákon č. 71/1967 Zb. O správnom konaní (správný poriadok) (1967). Available at: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1967/71/ (accessed on 20.09.2023).
[22] Administrative Justice in Europe – Romania Report. Available at: https://www.aca-europe.eu/en/eurtour/i/countries/romania/romania_en.pdf (accessed on 20.09.2023).

in administrative proceedings, whereas in some other countries – no (in particular, Slovakia, Romania).

In the report of the Working Group on Mediation of the European Commission for the Efficiency of Justice "The impact of CEPEJ Guidelines on Civil, Family, Penal and Administrative Mediation" (European Commission for the Efficiency of Justice, 2018) it is stated that the abovementioned Administrative Mediation Guidelines and Recommendations had little to no impact in the majority of states. However, they had an impact in Hungary, Montenegro, and Ukraine while adopting the legislation on administrative mediation, whereas in Denmark, Finland, Ireland, Norway, Armenia, and Slovakia the mediation in administrative justice is not used. Experts of the abovementioned Working Group stressed the importance on the enhancement of regulations regarding the use of alternative means in administrative procedure.

3. CONCILIATION OF PARTIES, MEDIATION, AND DISPUTE SETTLEMENT WITH THE PARTICIPATION OF THE JUDGE IN THE ADMINISTRATIVE JUDICIAL PROCEEDINGS IN UKRAINE

3.1 Conciliation of Parties, Mediation and Dispute Settlement with the Participation of the Judge in the Administrative Judicial Proceedings in Ukraine: General Overview

3.1.1 The Conciliation Parties

The institution of conciliation of parties has its roots on the Ukrainian land from the period of Kievan Rus. Scholars pay attention that certain provisions related to this institution can be found, in particular, in such sources as "the Tale of Bygone Years" and "Russkaia Pravda" (Arakelian, 2019).

Currently, legislative provisions regarding alternative means for resolving administrative disputes are included in the following legal acts of Ukraine: Law of Ukraine "On Administrative Procedure",[23] Law of Ukraine "On Mediation",[24] and the Code on Administrative Judicial Proceedings of Ukraine.[25]

The Law of Ukraine "On Administrative Procedure" is a framework legal act that establishes the core principles and regulates the stages of the general administrative procedure. The process of development of this Law took approximately 22 years. It was approved on 17th of February 2022 and enters into force on 15th of December 2023. This Law defines the rights of the participants of the administrative complaint proceedings to conciliation (point 10, part 1, Art. 28 of the Law). In order to realise this right all participants shall request (joint request is to be submitted) to provide the time for conciliation (point 5, part 1, Art. 64 of the Law). The subject of administrative complaint consideration (in the majority of cases – an administrative authority of higher level) shall inform the participants of the administrative proceedings about the possibility to resolve the dispute via conciliation in frames defined by law (part 3, Art. 84). It should be stressed

[23] Закон України «Про адміністративну процедуру» від 17.02.2022 №2073-IX. Голос України, 15.06.2022 №123 [Law of Ukraine "On Administrative Procedure" of 17.02.2022 No2073-IX. Golos Ukrajiny, 15.06.2022 No123]. Available at: https://zakon.rada.gov.ua/laws/show/2073-20#Text (accessed on 20.09.2023).

[24] Закон України «Про медіацію» від 16.11.2021 №1875-IX. Відомості Верховної Ради, 2022, №7, ст. 51 [Law of Ukraine "On Mediation" of 16.11.2021 No1875-IX. Vidomosti Verkhovnoji Rady, 2022, No7, Art. 51]. Available at: https://zakon.rada.gov.ua/laws/show/1875-20#Text (accessed on 20.09.2023).

[25] Кодекс адміністративного судочинства України від 6 липня 2005 №2747-IV. Відомості Верховної Ради України, 2005, №35-36, №37, ст. 446 [Code on Administrative Judicial Proceedings of Ukraine of 6 July 2005 No2747-IV. Vidomosti Verkhovnoji Rady,2005, No35-36, No37, Art. 446]. Available at: https://zakon.rada.gov.ua/laws/show/2747-15/ed20170803#Text (accessed on 20.09.2023).

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that the participants of the administrative proceedings have the right to conciliation at any stage of the administrative proceedings. In this case the administrative authority shall issue the decision on termination of such administrative proceedings, if only actions of the participants do not violate the law and do not infringe any right, freedom, or legal interests of other persons (part 3, Art. 65 of the Law). However, it should be emphasised that the conciliation is possible for resolution of disputes between participants of the administrative procedure and the administrative authority is not a participant of the administrative procedure. Therefore, as in the Slovak Republic, conciliation cannot be used for administrative disputes (disputes with the administrative authority). Also, there are no special provisions regarding the use of mediation in this Law.

The Code on Administrative Judicial Proceedings of Ukraine (hereinafter – the Code) specifically defines three possible ways of amicable dispute resolution between public administration entities and private persons: conciliation of parties, dispute settlement with participation of the judge, and mediation.

It should be noted that according to the Code, parties can reach conciliation by themselves, without external help, or via procedures of dispute settlement with participation of the judge, or via mediation.

First of all, the right to conciliation of parties is among the key procedural rights of the parties. It is stipulated that parties can achieve conciliation, in particular, via mediation, at any stage of the judicial process; in this case, the proceedings in the administrative case shall be closed (part 5, Art. 47 of the Code).

It should be emphasised that parties and their representatives shall fairly use their procedural rights; abuse of procedural rights is prohibited. In particular, it is not allowed to approve the conciliation conditions that aim at the violation of rights of third parties (Art. 45 of the Code).

Not all parties to administrative disputes have the right to conciliation of parties. Thus, according to the Code, the Representative of the Verkhovna Rada of Ukraine in Human Rights (Ukrainian Ombudsman), public bodies, self-government bodies, natural persons and legal entities) can bring an action before the court in the interests of other persons. However, such participants don't have the procedural right to conciliation of parties (Art. 54, part 1 of the Code).

During the preliminary case hearing, the court shall identify whether the parties have a will to resolve the dispute via conciliation, via out-of-court settlement through mediation, or to apply to the court regarding the conduct of dispute settlement with the participation of the judge (point 2, part 1, Art. 180 of the Code).

Two articles of the Code are directly devoted to the conciliation procedure – Art. 190-191.

As referred to in Art. 190 of the Code the parties may resolve the dispute, in whole or in part, on the basis of mutual compromise. The conciliation of parties can be devoted only to the rights and duties of the parties. Court shall not accept the refusal of a complainant from the complaint, acceptance of the complaint by the respondent, and shall not recognise the conciliation conditions if these actions contradict to the law or violate rights, freedoms or interests of any person (part 6, Art. 47 of the Code). The parties can reach the conciliation on conditions that exceed the frames of the subject of suit, if such conciliation conditions do not infringe rights or legal interests of third persons. The conciliation conditions cannot contradict to the law or fall outside the competence of the public administration entity. Upon the motion of the parties, the court suspends the proceedings for the time requested by the parties for conciliation. The conciliation conditions the parties to the dispute shall provide in the application on conciliation of the parties. The application can be submitted in the format of a single document signed by

all parties, or in the format of the application on conciliation conditions submitted by on party and the written consent with conciliation conditions submitted by other party. Until the court ruling on conciliation of parties is rendered, the court shall explain to the parties the consequences of such decision, check if the representatives of the parties are not limited in the right to conciliation. The conciliation conditions shall be approved by the court ruling. By this ruling, the case proceedings are terminated. The court shall refuse the approval of the conciliation conditions and continue the case hearings if the conciliation conditions contradict to law or infringe the rights or legal interests of other persons or if they cannot be executed; or one of the parties to conciliation is represented by the legal guardian whose actions violate the interests of the person represented.

As to the impossibility of conciliation of parties to the administrative dispute if it infringes rights or legal interests of third persons, the Supreme Court in its judgement in case No. 640/16646/21 of 12 July 2022[26] pays attention that the third person that was not involved in the proceedings can challenge the judgement regarding the approval of conciliation procedure if this judgement directly related to rights or duties of such person (new rights or new duties were imposed, changed or revoked). As an example of the court ruling on the approval of conciliation conditions can be provided the ruling of the Supreme Court in case No. 9901/898/18 of 13 June 2019.[27]

The requirements on the execution of the conciliation conditions are defined by Art. 191 of the Code. It is stated that the parties shall execute the conciliation conditions. The court ruling on conciliation conditions approval is an enforcement document and can be executed according to the enforcement procedure stipulated by law (Law of Ukraine "On Enforcement Procedure" No. 1404-VIII of 2 June 2016).

As to the court fee in case of conciliation of parties, it shall be equally distributed between the parties of the dispute, unless parties agreed on another distribution (Art. 141 of the Code). If conciliation took place before the merits hearing, the court decides on return of 50% of the paid court fee to the complainant. If the conciliation took place when the case was under consideration by appeal court or cassation court the court decides on return of 50% of the court fee paid upon the submission of the certain appeal or cassation complaints (Art. 142 of the Code).

3.1.2 Dispute Settlement with the Participation of the Judge

Dispute settlement with participation of the judge was introduced in the legislation of Ukraine in 2017, via amendments to procedural codes, including the Code on Administrative Judicial Proceedings of Ukraine. In 2021, the Code on Administrative Judicial Proceedings of Ukraine was amended with the provisions related to mediation due to the adoption of the of Law of Ukraine "On Mediation" of 16 of November 2021 No. 1875-IX.

Dispute settlement with the participation of the judge shall be mutually agreed by the parties before the merits hearing begins. It cannot be conducted in certain categories of cases with the peculiarities of hearings (e.g., cases connected with the elections of the President of Ukraine, upon administrative complaints on elimination of obstacles and prohibition of interventions in realisation of the right to freedom of peaceful assembly),

[26] Judgement of the Supreme Court in case No640/16646/21 of 12 July 2022. Available at: https://reyestr.court.gov.ua/Review/103944034 (accessed on 20.09.2023).
[27] Ruling of the Supreme Court in case No9901/898/18 of 13 June 2019. Available at: https://reyestr.court.gov.ua/Review/103944034 (accessed on 20.09.2023).

as well as in the cases when the third party with independent demands on the subject of an action joins the case (Art. 184 of the Code).

Dispute settlement with the participation of the judge is conducted by the judge (the judge who prepared the case for hearing – in case of collegial hearing). The court issues the court ruling about dispute settlement procedure and decides on the suspension of the proceedings. Thus, the procedure of dispute settlement with the participation of the judge is conducted by the same judge who hears the administrative case (not by the special "court mediation" judge, like in some countries, e.g., in Estonia).

It should be emphasised that dispute settlement with the participation of a judge can be used only once in the case. Thus, if this procedure did not lead to the peace-making results, it cannot be used one more time (Art. 185 of the Code).

The Code regulates the procedure of dispute settlement with the participation of the judge in the format of joint and (or) closed meetings. Parties have the right to participate in such meetings via video conference according to this Code. Joint meetings are conducted with the participation of all parties, their representatives and a judge. Closed meetings are conducted with each party separately upon the initiative of a judge. A judge directs dispute settlement with a participation of a judge for the achievement of the conciliation of parties. A judge can pronounce a break in the proceedings, taking into consideration the merits of the case. At the beginning of the first joint meeting, a judge shall clarify to the parties the goal and the procedure of dispute settlement with the participation of a judge, as well as the rights and duties of the parties.

During the joint meetings, a judge detects the grounds and the subject of the complaint, reasons of objections, explains to the parties the fact in proof according to the category of the case, invites the parties to provide proposals regarding the ways of the peaceful dispute settlement, and makes other actions aimed at the peaceful dispute settlement by parties. A judge can offer the possible way of the peaceful dispute settlement to the parties.

During the closed meetings, the judge has a right to pay attention of the party to the case law in similar cases, to offer to the party and (or) its representative the possible ways of peaceful dispute settlement. However, during dispute settlement procedure the judge does not have the right to provide the parties with the legal advises and recommendations, and to examine the evidences. It should be noticed that abovementioned provisions regarding the role of the judge in a such procedure are not clear. The main question is how to use the professional experience in order to help parties to the dispute to find the most appropriate solution, but without providing any legal advice.

The information received by any of the parties, as well as by a judge during dispute settlement is confidential. During dispute settlement with the participation of a judge the minute is not filled in and the fixation via technical means is not allowed. If necessary, the interpreter is engaged for the participation during the meetings. The interpreter is warned about the confidential character of the information received during dispute settlement with the participation of a judge.

According to the abovementioned Recommendation of the Committee of Ministers of the Council of Europe Rec (2001) 9, the regulation of the alternative means resolution shall promote the conclusion of alternative procedures within a reasonable time by setting time-limits or otherwise As referred to in Art. 187 of the Code the procedure of dispute settlement with the participation of the judge shall be performed during the reasonable term, that cannot exceed 30 days from the day of issuing the court ruling regarding its performance. The term of dispute settlement with the participation of a judge cannot be prolonged. It should be noticed that this time is not enough for this

procedure and is considered by professionals as one of the core obstacles for the use of this procedure. Thus, the Code provisions regarding the time-limits for the procedure of dispute settlement with the participation of the judge are not in correspondence with the Recommendation Rec (2001) 9 in part of reasonability of time.

Concerning the approach to "reasonability" of term for dispute settlement with the participation of the judge the attention should be paid to the case law of the Supreme Court. In particular, the Supreme Court in its judgement in case No160/12705/19 of 01 February 2022 stresses that "reasonable terms" in administrative justice cover the following aspects: 1) reasonable term – the shortest from possible term for consideration and resolution of administrative case, however it cannot be associated with the fast consideration of the case: the duration of reasonable terms shall be the shortest, but enough for the full investigation by the court and assessment of arguments and evidences provided by the participants; 2) the duration of the "reasonable term" is influenced by different factors, both objective (behaviour of participants, complexity of the case, necessity for submission and assessment of additional evidences, the court's workload, etc.) and subjective character (the behaviour of the judge and the staff of the court's apparatus).[28]

According to Art. 188 of the Code, dispute settlement with the participation of a judge is terminated:

- if the party submits an application regarding the termination of dispute settlement with the participation of a judge;
- if the term of consideration is expired;
- upon the initiative of a judge in case of delaying tactics used by any of parties to the dispute;
- if the parties reached conciliation and submitted to the court the application regarding conciliation or the complainant submitted the application regarding the leaving the claim undecided, or in case of refusal of the complainant from the complaint, or recognition of the complaint by the defendant.

The judge shall issue the ruling regarding the termination of dispute settlement with the participation of the judge. Such ruling is not subject to appeal. At the same stage the judge considers on renovation of the case proceedings.

It should be emphasised one important provision of Article 188 of the Code. In case of termination of dispute settlement with the participation of the judge, in particular, in cases of submission an application regarding the termination of dispute settlement with the participation of a judge or if the term of consideration is expired, the further consideration of the case shall be conducted by another judge (not this one, initially considered the case and conducted dispute settlement with the consideration of the judge). This provision in practice can be used by parties for the unfair (but lawful) tactics of changing the judge. There is one exception from this rule: the same judge will hear the case after unsuccessful dispute settlement procedure with the participation of the judge, if this procedure was initiated by the judge, however, before the end of the term stipulated in the ruling on beginning of the case proceedings the party rejected its conduct (part 4, Art. 37 of the Code).

[28]Judgement of the Supreme Court in case No. 160/12705/19 of 01 February 2022. Available at: https://reyestr.court.gov.ua/Review/103027454 (accessed on 20.09.2023).

3.1.3 Conciliation of the Parties to the Administrative Dispute via Mediation

As was mentioned above, the parties to the administrative dispute have the right to conciliation, including by means of mediation, at any stages of administrative judicial proceedings.

The mediation procedure is regulated by the abovementioned Law of Ukraine "On Mediation". Mediation is defined as out-of-court voluntary, confidential, structural procedure, during which parties with help of the mediator (mediators) try to prevent or to settle the conflict (dispute) by means of negotiations.

The Law of Ukraine "On Mediation" is not limited only to civil and commercial disputes, but clearly covers other certain types of disputes, in particular, administrative disputes and cases on administrative violations. Thus, mediation in administrative disputes in frames of administrative procedure shall be conducted according to requirements of this Law.

Participants of mediation are the mediator (mediators), parties of mediation, their representatives, defenders, the translator, the expert, and other persons agreed by the parties of mediation.

The mediator is a specially trained neutral, independent, impartial natural person. The Law of Ukraine "On Mediation" stipulates the requirements to the person that can serve as a mediator. It is stated that the mediator can be a natural person that has completed a basic training for mediators in Ukraine or abroad, has no convictions, and has legal capacity. It should be noticed that the Law does not include any provisions regarding the education requirements for the person of the mediator. However, such requirements can be stipulated by subjects that would use the mediation services, or by the professional associations of the mediators – for those that want to be included in their registers. The requirements are established by the abovementioned Law regarding the professional training for the future mediators.

The Law stipulates that the parties of mediation, as well as the mediator have the right to withdraw from the participation in mediation.

The core rights and obligations of the mediators are defined by the Law. In particular, the mediator has the right to define independently the mediation methodology, to obtain the necessary information regarding the conflict (dispute) from the parties. As to the financial aspects, the mediation services can be free of charge or chargeable (Art. 11 of the Law of Ukraine "On Mediation").

Concerning the obligations of the mediator, in particular, he/she shall: prepare for mediation and conduct it according to the law, mediation rules and the code of professional ethics of the mediator; provide the parties to the dispute/conflict with the code of professional ethics that he/she follows; keep secret information; moderate the mediation procedure (Art. 12 of the Law of Ukraine "On Mediation").

What is important: the mediator shall consult the parties to the conflict/dispute about the mediation procedure and fixation of its results, but cannot provide concrete recommendations/consultations regarding the solution or to issue the concrete decision on the matter of the conflict/dispute (Art. 7). Otherwise, it shall be considered as a violation of the legislative requirements on neutrality of the mediator.

The mediation procedure is completed by:

- conclusion by the parties of the agreement upon the mediation results;
- expiring the term for mediation and/or agreement on mediation;
- withdrawal by at least one party or the mediator (mediators) from the participation in mediation;
- recognition of the party to mediation or the mediator as an incompetent person;

- death of the natural person – a party to mediation or liquidation of the legal entity – a party to mediation;
- in other cases, defined by the mediation agreement and rules on mediation conduct (Art. 17 of the Law on Mediation).

According to the Law on Mediation the agreement upon the results of mediation shall include, in particular, the obligations agreed by the parties, methods and terms for their execution, as well as consequences in case of their non-execution or undue execution (Art. 21 of the Law on Mediation). It is important to point out that the parties to the agreement can go beyond the matter of the conflict/dispute defined in the agreement of mediation conduct, and the subject of claim (in case of mediation in court hearings). Of course, the agreement upon the results of mediation cannot include provisions that infringe the rights or legal interests of other persons, or public interest.

The Code on Administrative Judicial Proceedings of Ukraine includes provisions specifically related to mediation. Thus, the conduct of mediation does not influence the term for bringing an action before the administrative court (part 6, Art. 122 of the Code). It is stated that the court can announce the break in the preliminary hearings if the parties decided to use out-of-court dispute resolution via mediation (part 6, Art. 181 of the Code). The court hearings shall be suspended by the court upon the motion from both parties with the request to provide the time for conciliation via mediation. It should be noticed that the person cannot be the representative of the party if he/she was a mediator during the mediation regarding the dispute connected with the case that is being heard by the court (part 3, Art. 58 of the Code). The mediators cannot be involved as witnesses in administrative judicial proceedings related to the information obtained during out-of-court mediation procedure where they rendered the mediation services (point 2, part 1, Art. 66 of the Code).

3.1.4 Commonalities and Differences between Mediation and Dispute Settlement with the Participation of the Judge

Based on the analysis of the legislative provisions regarding mediation and dispute settlement with the participation of the judge, the following commonalities of these procedures can be defined. Both of them:

- are alternative means for administrative disputes resolution;
- lead to conciliation of parties to the administrative dispute;
- help the parties to find their own solution to dispute resolution;
- require consent of all parties to the administrative dispute;
- require suspension of court hearings;
- help to decrease the court workload.

The core differences between these two procedures are presented in the table below:

Mediation	Dispute settlement with the participation of the judge
Regulated by the Laws of Ukraine "On Mediation", "On Administrative Procedure", and the Code on Administrative Judicial Proceedings of Ukraine.	Regulated by the Code on Administrative Judicial Proceedings of Ukraine.

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Conducted by an independent intermediary – mediator chosen by the parties.	Conducted by a legal professional – the judge that conducts case hearings. The judge is defined according to the court procedure and cannot be chosen by the parties.
The mediator can withdraw from the participation in mediation any moment.	The judge cannot withdraw (only within the procedure of judge-rejection/self-rejection in cases and according to the procedure prescribed by the Code).
Can be used in different modes and at different stages of dispute resolution – prior to court hearings, during the court hearings, and even after the court ruling rendered.	Can be used after the bringing an action before the court (after payment of the court fee), but before the start of hearings on the merits (thus, only during the court hearings in the first instance).
The mediator can provide the parties with the consultations and recommendations regarding the procedure of mediation and fixation of its results, however, cannot provide the parties with the consultations and recommendations regarding the decision on the matter of the conflict/dispute or to issue the decision on the matter of the dispute/conflict between the participants of mediation.	During the closed meetings, the judge can direct party's attention to the case law in similar disputes, as well as offer to the party and (or) its representative the possible ways of amicable dispute settlement, however, cannot provide the parties with legal advises and recommendations or assess the evidences in the case.
The term of mediation is not restricted by law.	The term of dispute settlement with the participation of the judge cannot exceed 30 days.
Mediation can be used in all disputes.	Cannot be used in cases with third persons with an independent claim, and in some categories of cases defined by the Code (part 2, Art. 184)
Free of charge or chargeable.	Starts when court fees have been already paid.

Taking into consideration the current legal regulation of mediation and dispute resolution with the participation of the judge, the procedure of mediation looks more attractive (at least to start with) for the parties if they really want to find solutions for amicable dispute resolution. They can turn to the mediation at any stage of administrative complaint procedure, which is free of charge, whereas in order to bring an action before the administrative court the court fee shall be paid. Mediation looks more attractive option also during the court hearings, considering the fact that it can be used at each stage of the court hearings, the term for mediation is not limited by law (however, the parties to the administrative dispute shall keep on mind that the mediation procedure does not influence the limitation period). The mediation is regulated by special Law of Ukraine "On Mediation" and its regulation is clearer for all participants (especially in part of rights and obligations of the intermediary – a mediator) than legal regulation of dispute settlement with the participation of the judge.

3.1.5 Conciliation of Parties in the Administrative Judicial Proceedings: Challenges and Possible Solutions

Despite the existence in Ukraine of special legal regulations for alternative means for administrative dispute resolution, namely, regarding conciliation of parties, dispute settlement with the participation of the judge, and mediation, these procedures are not very popular. Professionals pay attention that there is not enough case law in administrative proceedings regarding the use of the institution of dispute settlement with the participation of the judge (Lazebny, 2021).

First, due to novelty of procedures mentioned above, the lack of experienced neutrals (in case of mediators), the lack of experienced judges (in case of dispute settlement with the participation of the judge) could be mentioned among the reasons.

According to the current legislation, the "mediation" judge (the judge in dispute settlement procedure with the participation of the judge) is the same judge that conducts case hearings. The lack of necessary mediation experience, the uncertainty of regulation of rights of the judge in the proceedings (how to help the parties, but not to provide legal advises and not to examine evidence), limited and very short term for the duration of dispute settlement with the participation of the judge (30 days), the usage of this procedure by parties in order to change the judge (in case of unsuccessfulness of such a procedure in the majority of cases the new judge will continue the case hearings) makes this procedure undesirable for judges. One of the possible solutions would be the introduction of the institution of "conciliation"/ "mediation" judges, as for, example in Estonia, and enhancement the provisions of the Code regarding their powers. In particular, the idea to train special "judges-mediators" was expressed by Smokovych M., the Head of the Cassation Administrative Court as Part of the Supreme Court (The Institution of the Dispute Settlement with the Participation of the Judge Requires Enhancement, 2019). In case of abovementioned changes in the procedure and positive case law, and also taking into consideration the level of people's trust that administrative justice in general enjoys in Ukraine, it could become attractive for private persons.

"In-court mediation" in the form of dispute settlement with the participation of judges is not very popular among private persons – complainants, considering the fact that it starts after they paid court fees, hired representatives, prepared necessary documents; they expect to win, not to reach a compromise (Lazebny, 2021).

Second, and very important reason, is the unreadiness of public administration entities for amicable resolutions of administrative disputes. It should be stressed that the public administration entities in Ukraine are not ready to recognise mistakes. In the majority of cases public administration entities use all stages of administrative proceedings (from local administrative courts to Cassation Administrative Court as part of the Supreme Court). Such position of public administration entities makes the administrative complaint procedure unattractive for private persons. In the majority of cases, the public administration entities of higher level (the subjects of consideration of administrative complaints) support the challenged decisions of public administration entities. On the one hand, public administration entities are bound by the competence stipulated by the Constitution and laws of Ukraine. They can act only on the basis, by means, and for the execution of the Constitution and laws of Ukraine (part 2, Art. 19 of the Constitution of Ukraine).[29] But, on the other hand, there is a room for discretionary powers defined by law, and the public administration entities can go to the compromise

[29] Конституція України від 28.06.1996 [Constitution of Ukraine of 28.06.1996]. Відомості Верховної Ради України (ВВР), 1996, No30, Art. 141.

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in frames of discretionary powers. This institution has been finally regulated by the Law of Ukraine "On Administrative Procedure". As to the discretionary powers of public administration entities, another very important aspect shall be taken into consideration: the public administration entity is bound by its regulations approved on the basis of discretionary powers. In particular, the Supreme Court in its judgement of 28 September 2021 in case No. 640/20081/18 (arising from the action filed by the public joint-stock company "Dniprogas" against the National Energy and Utility Regulatory Commission)[30] stresses, based on the case law of the European Court of Human Rights (Case of Rysovskyy v. Ukraine (Application no.29979/04) that the public authority shall follow its own procedures; the logic of the decisions of the public authority, as well as the possible consequences of such actions shall be precise and clear, and the person shall not be responsible for the mistakes made by the public authority. Thus, powers of the public administration entities to use ADR mechanisms shall be clearly defined by legislation.

4. CONCLUSION

The Committee of Ministers of the Council of Europe in a number of its recommendations emphasises the importance of alternative means for resolving disputes arisen between administrative authorities and private persons as they can be easier, more flexible, speedier, less expensive and allow more discretion.

The use of alternative methods for administrative disputes resolution is characterised by specificities arisen from the peculiarities of administrative disputes where one of the parties is usually the public administration entity bounded by its competence. These peculiarities may cause difficulties in the implementation of such mechanisms in administrative procedure and administrative justice. The efficiency of alternative means in administrative disputes depends on adequate legal regulation. The possibility to use the alternative means for administrative dispute resolution, the types of alternative mechanism and their clear regulation shall be provided by national legislation.

In the last decades, certain types of alternative means have been introduced in administrative procedure and administrative justice in some European countries – members of the Council of Europe, including Ukraine. Out-of-court mediation and dispute settlement with the participation of the judge are among the most popular means for alternative resolution of administrative disputes. European countries use different approaches to implementation of alternative dispute resolution. In certain selected European countries – members of the Council of Europe (e.g., France, Estonia, Poland, Latvia) some types of alternative means for dispute resolution are implemented in administrative proceedings, whereas in some others – no (in particular, Slovakia, Romania). In some countries, the legal regulation of conciliation procedure cannot provide clear answer whether it is applicable to administrative disputes or not (e.g., Latvia). In Lithuania, out-of-court mediation for administrative disputes is possible, but used very seldom. In the Slovak Republic, it is possible to use conciliation in administrative procedure, however, it is not applicable in disputes with administrative authorities.

The Code on Administrative Judicial Proceedings of Ukraine stipulates that conciliation of parties can be achieved, in particular, via the procedure of dispute settlement with the participation of the judge (introduced in 2017) and the mediation (introduced in 2021). The introduction of these instruments shall be considered as a

[30] Judgement of Supreme Court in case 28 September 2021 in case No 640/20081/18. Available at: https://reyestr.court.gov.ua/Review/99977286 (accessed on 20.09.2023).

positive step on the way of implementation of recommendations of the Committee of Ministers of the Council of Europe. The use of the procedure of dispute settlement with the participation of the judge and mediation would decrease the workload of judges, make the dispute resolution less harmful for parties, less expensive (in some cases), and faster. However, the use of conciliation of parties in the administrative proceedings in Ukraine is not so popular than in civil or economic proceedings. Lack of specification of the procedure of dispute settlement with the participation of the judge, time limits for the procedure (which cannot be considered as reasonable in the meaning of Recommendation Rec (2001) 9 of the Committee of Ministers of the Council of Europe), lack of necessary skills among judges, as well as competence limits of the public administration entities – parties to a dispute can be mentioned among the key reasons. The introduction of the institution of "conciliation"/ "mediation" judges, as for example in Estonia, and enhancement the provisions of the Code regarding their powers can be considered as a possible solution. Therefore, certain legislative amendments, as well as changes of the public administration entities and judges' attitude to the instruments of conciliation of parties via special trainings, conferences, workshops, etc. are necessary for the effective implementation of the ADR institution in the field of administrative procedure and administrative justice in Ukraine.

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PECULIARITIES OF LABOUR RIGHTS PROTECTION IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS / Oleg M. Yaroshenko, Hanna V. Anisimova, Roman Ye. Prokopiev, Ivan P. Zhygalkin, Oleksandr A. Yakovlyev

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Abstract: *The practice of defence of labour disputes is quite dynamic. That is why the analysis of labour rights protection in the European Court of Human Rights (ECtHR) is quite relevant. The purpose of the study is to analyse the current case law of the European Court of Human Rights on the protection of labour rights; to analyse the ECtHR's interpretation of the concept of forced labour and the right to form trade unions; to summarise the problematic issues of the ECtHR's case law in the field of labour rights protection and ways to resolve them. The methodological basis of the study is general and special methods and techniques of cognition. The article substantiates that one cannot complain directly to the ECtHR about deprivation of the opportunity to work, denial of access to the workplace, or refusal to hire. The European Convention explicitly states only 2 rights: the right to form and join trade unions and the prohibition of forced and compulsory labour. The author explains the concepts of forced labour and the right to form trade unions and outlines the problematic issues of the European Court of Human Rights case law in the field of labour rights protection and ways to resolve them.*

Key words: *Forced Labour; Compulsory Labour; Discrimination; Interference with Privacy; Labour Rights; ECtHR*

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1. INTRODUCTION

In modern international law, the case law of the European Court of Human Rights plays a leading role in setting labour standards at the regional level within the Council of Europe. This practice, which has been formed in the field of international law, is gradually being implemented in the systems of national labour law and labour legislation,

influencing the development of these systems. At the same time, labour law as a system of legal norms governing social and labour relations in different countries consists of many regulations: laws, decrees, governmental resolutions, various departmental acts, as well as local norms in force in specific production and non-production structures - among employers. All of them must comply with the Council of Europe's standards in the field of labour law, including the case law of the European Court of Human Rights.

Modern socio-economic conditions - diversity of ownership forms, market relations, the introduction of new management methods, freedom of entrepreneurship, and formation of the labour market - inevitably make significant changes not only to the content of labour relations but also to the legal status of its subjects, in particular, to the content of the category "right to work". From a scientific point of view, the relevance of the right-to-work issue is primarily due to the reform and dynamics of labour legislation. The absence of a clear legal concept of regulation of labour relations of employees who have binding rights about the employer reduces the level of guarantees of their labour rights.

At present, the realisation of the right to work is associated with several acute problems, such as discrimination against employees, restriction or infringement of labour rights, remuneration, unemployment, and labour migration. Since the right to work is a key issue in the field of labour relations, it is a fundamental human right that receives special attention at the national, including legal, social, and international levels. That is why this issue is urgent and should be comprehensively and fundamentally studied. The subject matter of the study is driven by the need for a scientifically based system of legal definition, realisation, and protection of the right to work and is a guarantee of harmonious labour relations.

It should be noted that in recent years, domestic and foreign scholars have been actively researching the problems of the European Court of Human Rights, but, unfortunately, much remains unknown about this phenomenon. In particular, for example, at the doctrinal level, the issues of labour rights protection in the European Court of Human Rights have not yet been sufficiently studied. Although there have been significant positive changes in the protection of labour rights in recent decades, this problem is still relevant today.

Labour rights have a complex nature, and therefore the question of their concept and normative content, the principles of their implementation have recently been actively studied and published by such jurists as O. Bakhanov (2020), N. Hetmantseva (2016), O. Kovalenko (2016), O. Yaroshenko (2016, 2020). V. Mantouvalou (2014) identified certain principles that underpin the right to work in the case law of the European Court of Human Rights, which can serve as guidance in the interpretation of existing provisions of the Convention. K. Kolben (2010) analysed Labour Rights as Human Rights. K. Lörcher and I. Schömann (2013) made their research on The European Convention on Human Rights and the Employment Relation.

Despite numerous studies of the case law of the European Court of Human Rights, the issue of protection of labour rights by the Court is the least covered. Fundamental work in this context is the work of V. Lutkovskaya (2005), who paid attention not only to the problems of consideration of individual complaints in the European Court of Human Rights, but also to issues related to the organisation, activities, and process of the European Court of Human Rights. The judicial acts of the European Court of Human Rights in the field of labour and other relations directly related to them have not yet received sufficient theoretical study. In addition, the law enforcement practise of the European Court of Human Rights has revealed a number of problems that require a systematic analysis. That is why, in the framework of our research, it is

necessary to analyse, both theoretically and practically, the legal nature of the judicial acts of the European Court of Human Rights, in particular in the field of labour and other directly related relations.

The purpose of the study is to analyse the current case law of the European Court of Human Rights on the protection of labour rights; to analyse the ECtHR's interpretation of the concept of forced labour and the right to form trade unions; to summarise the problematic issues of the ECtHR's case law in the field of labour rights protection and the ways to resolve them.

2. MATERIALS AND METHODS

The methodological basis of the study was formed by a dialectical approach to understanding the protection of labour rights in the European Court of Human Rights. The study is also based on a systematic approach, which is to study the complex system of protection of labour rights in the European Court of Human Rights. Furthermore, the approach used in the research process has become integrated. The integrated approach has largely overcome the shortcomings of analytical jurisprudence, as it has made it possible to organically combine legal tools and basic legal ideas - deep principles of law. For example, during the writing of the article, such general scientific methods as analysis, synthesis, analogy, deduction, induction, and abstraction, were used as methods of achieving new knowledge.

The inductive method allowed one to generalise and formulate the approaches of scientists to the protection of labour rights in the European Court of Human Rights. The deductive method allowed the author to consistently argue the position. Other formal logical methods, such as analysis, synthesis, generalisation, and abstraction, were used to conclude. In addition, during the writing of the article, such a special legal scientific method as formal law was used. The formal-legal method is used for the generalisation, classification, and systematisation of research results, as well as for the correct presentation of these results.

The use of the above methods made it possible to investigate the issues considered in the study as deeply as possible and found that the issue was not only theoretical but also of great practical importance. The normative basis of the work was the European Convention on Human Rights. In the process of research, the materials of law-making, law enforcement, and interpretive practice were studied. In particular, the empirical basis of the study was the decisions of the European Court of Human Rights. The theoretical basis of the study was fundamental monographs, and scientific articles by domestic and foreign authors on the protection of labour rights in the European Court of Human Rights.

3. RESULTS

The right to work belongs to the second generation of rights – socio-economic rights – and is not reflected in the European Convention on Human Rights.[1] Thus, it is not possible to complain directly to the ECtHR about deprivation of the opportunity to work, denial of access to a workplace, or refusal to hire. The European Convention directly defines only 2 rights – the right to form and join trade unions and the prohibition of

[1] Council of Europe. Convention for the Protection of Human Rights and Fundamental Freedoms. *Council of Europe*, 4 November 1950. Available at: https://www.echr.coe.int/documents/convention_eng.pdf (accessed on 15 March 2022).

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slavery, servitude, and forced or compulsory labour - while the rest are guaranteed at the international level (United Nations (UN), International Labour Organization (ILO)).

Labour rights are very specific, and their nature is the reason why states themselves set the limits within which they can guarantee them. First, labour law faces a variety of problems and situations. The list of specific rights may be too limited, as labour relations can be heterogeneous and vary by industry, region, and other factors. International instruments, such as ILO Conventions and UN Declarations, often establish the general principle of a minimum standard. This means that states are obliged to guarantee certain minimum rights, but they also have the freedom to expand these rights and provide additional guarantees according to their needs and realities.

Labour laws should adapt to changes in society, the economy, and technology. Predetermined rights may not be sufficient to address the new challenges and opportunities that arise in the modern world. Employee rights can be very specific and diverse, depending on the type of work and industry. Predetermined rights may not be sufficient to provide adequate safeguards in all areas.

The prohibition of forced labour is enshrined in the national legislation of all countries of the world, and provisions on its prohibition are contained in such international legal acts as the Universal Declaration of Human Rights of 10.12.1948, Article 8 of the International Covenant on Civil and Political Rights of 16.12.1966, ILO Convention concerning the Abolition of Forced Labour, No. 105 of 25.06.1957. The latter, by the way, proclaims the absolute prohibition of forced labour and imposes, by Articles 1 and 2, an additional obligation on states that have ratified it to abolish forced or compulsory labour, to take effective measures for the immediate and complete abolition of the following types of forced or compulsory labour and not to resort to any form of it a) as a means of political influence or education or as a means of punishment for holding or expressing political views or ideological beliefs contrary to the established political, social or economic system; b) as a method of mobilizing and utilizing labour for economic development; c) as a means of maintaining labour discipline; d) as a means of punishment for participation in strikes; e) as a measure of discrimination on the grounds of race, social and national origin or religion (Gnatenko et al, 2020).

Quite interesting in this regard is the case of Chowdury and Others v. Greece No. 21884/15,[2] in which the Court expanded the interpretation of the concept of forced labour and human trafficking. It should be noted that in its legal positions, the ECtHR traditionally approaches the interpretation of the concept of forced or compulsory labour in a limited manner and is not inclined to expand it. For example, in the case of Vnuchko v. Ukraine, the Court considered that the dispute did not reveal any element of slavery, forced or compulsory labour and refused to recognise unpaid work as forced labour, and in Stummer v. Austria[3] it ruled that compulsory work which the applicant performed as a prisoner without the right to participate in the old-age pension system, should be considered as "work normally required of a person in detention" within the meaning of Article 4, paragraph 3 (a) of the Convention, and not as part of "forced or compulsory labour (Bakhanov, 2020).

However, in several cases, the Court has departed from the established practice. In particular, in the aforementioned case of Chowdury and Others v. Greece, the Court ruled that the unpaid work of irregular migrants in Greece falls within the scope of forced labor and human trafficking. The application was filed by forty-two Bangladeshi nationals who worked on a farm picking strawberries under the supervision of armed guards. Their

[2] ECtHR, Chowdury and others v. Greece, app. no. 21884/15, 30 March 2017.
[3] ECtHR, Stummer v. Austria, app. no. 37452/02, 7 July 2011.

employment was voluntary, they were provided with food and housing and could move freely around the territory. The employer did not pay for their work for six months and warned them that they would receive their salary only if they continued to work (Konopeltseva, 2017).

It should be noted that the Convention does not contain the concept of human trafficking. The Court in its earlier judgments, in particular Rantsev v. Cyprus and Russia, no. 25965/04,[4] concluded that human trafficking falls under the prohibition of Article 4 and is a form of forced labour." In this case, the complexity of qualifying the actions of the "employer" was because the plaintiffs voluntarily agreed to perform work and had the opportunity to freely leave it. The court held that the initial consent to employment "is not sufficient to exclude the qualification of these relations as forced labour", and voluntary consent is only one of the factors to be taken into account in the context of all the circumstances of the case. The Court also drew attention to the vulnerable situation of the Bangladeshi workers, who, being illegal migrants, could not use legal remedies to protect their rights, as well as to the terrible working and living conditions set out in the Greek judgment (they lived in makeshift huts made of cardboard, nylon, and bamboo without a toilet and running water) (Hetmantseva, 2016).

In this case, the Court also analysed the provisions of the Council of Europe Convention on Action against Trafficking in Human Beings (ratified by Ukraine on 21.09.2010), as a result of which the Court came to the following important conclusion: "If an employer abuses its power or takes advantage of the vulnerability of its employees to exploit them, it means that they do not agree to work voluntarily."

Based on the foregoing, we can conclude that forced labour is currently interpreted by the ECtHR as including unpaid wage arrears to employees in a vulnerable position. The vulnerability of the employees in this case was established by the Court based on a combination of the following factors: 1) they were deprived of the opportunity to seek legal protection; 2) they were illegal migrants; 3) they had no money and no housing. In other words, in the absence of at least one of these factors, the Court could conclude that the employer's actions do not qualify as forced or compulsory labour. This means that the mere fact of non-payment of wages to employees is not sufficient evidence of the existence of forced or compulsory labour, for example, in cases against Ukraine such as Vnuchko v. Ukraine No. 1198/04,[5] Popov v. Ukraine No. 23892/03,[6] in which the applicants complained about the lack of wages and other benefits as a violation of Article 4 § 1 of the Convention (Kovalenko, 2016).

The judgment under consideration is no less interesting from the point of view of the respondent states' fulfilment of its own positive and procedural obligations in the applicant's situation. According to the ECtHR, to fulfil the positive obligation to criminalise and effectively prosecute those guilty of acts prohibited by Article 4 of the Convention, member states must establish a legislative and regulatory framework to prohibit and punish forced or compulsory labour, slavery, and servitude. The Court noted that Greece had a legal and legislative framework to combat human trafficking and had ratified the Council of Europe Convention on Action against Trafficking in Human Beings, but the measures taken by the national authorities to prevent it were insufficient (Sychenko and Chernyaeva, 2019).

In particular, the Court found that the local police were aware of employers' refusal to pay migrant workers, but did not take adequate measures to prevent human

[4] ECtHR, Rantsev v. Cyprus and Russia, app. no. 25965/04, 7 July 2011.
[5] ECtHR, Vnuchko v. Ukraine, app. no. 1198/04, 14 December 2006.
[6] ECtHR, Popov v. Ukraine, app. no. 23892/03, 14 December 2006.

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trafficking and protect the applicants. The local police department also believed that the fact that the applicants were free to move around indicated that there were no signs of forced labour. In turn, the ECtHR ruled that "a situation of human trafficking may exist despite the victim's freedom of movement". In addition, the national court interpreted the concept of human trafficking from a very narrow perspective, focusing on whether this situation was equated with slavery, which resulted in the acquittal of the defendants. Thus, the Court found a violation of the state's procedural obligations under Article 4(2) of the Convention (Mantouvalou, 2014).

Of course, this decision is very important for victims of human trafficking around the world. For Ukraine, the significance of this decision can hardly be overestimated, given that human trafficking in its various forms remains one of the national problems. In particular, according to the statistics of the Prosecutor General's Office of Ukraine, as of 2022, 133 criminal offenses in the form of human trafficking were registered, which is 91 criminal offenses less than in 2021 and 74 criminal offenses less than in 2020. Such a significant decrease in the number of registered criminal offenses in 2022 under martial law may indicate their latent form and therefore pose a serious threat. After all, among the cases of labour exploitation of Ukrainian citizens, 97% of all identified victims of human trafficking for sexual exploitation are women. As for victims of forced labour, 76% of victims are men.

As we noted above, the ECtHR judgment emphasised the need to create a legal framework for the prohibition and punishment of forced or compulsory labour, slavery, and servitude, referring specifically to the provisions of criminal law. In Ukraine, the criminal law regulation of combating human trafficking has gone through several stages of evolution and has been amended several times. Its latest version was adopted by the Verkhovna Rada of Ukraine within the framework of the Law of Ukraine "On Amendments to Article 149 of the Criminal Code of Ukraine to Bring it in Line with International Standards" of September 6, 2018. Thus, Ukraine has implemented positive obligations arising from Article 4 of the Convention, in particular the criminalization of forced labour and ratification of the Convention on Action to Suppress Trafficking in Persons, which will certainly contribute to the expanded interpretation of the provisions of Article 149 of the Criminal Code of Ukraine by national courts in the light of acts adopted by the Council of Europe (Kolben, 2010).

Another example of an expanded interpretation of the concept of "compulsory or mandatory case" is the ECtHR judgment in the case of Chitos v. Greece[7], in which the Court concluded that the exception provided for in subpart. "(b) of Article 4, paragraph 3 of the Convention should be interpreted as applying only to compulsory military service (i.e., does not include contractual military service). The ECtHR ruled that the actions of the Greek authorities violated the prohibition of forced labour enshrined in Article 4, paragraph 2, of the Convention. This ruling demonstrates that the ECtHR emphasises the importance of the principle of proportionality in the relationship between the state (employer) and the military officer (employee), who is obliged to reimburse the costs incurred by the state for his training. In our opinion, the legal positions of the ECtHR expressed in this case can be applied in domestic practice, in particular to labour disputes on early termination of employment with a contract serviceman. Indeed, as can be seen from the case file, the established violation of Article 4 of the Convention is due to the shortcomings of the procedure for the early termination of a military contract and the imperfection of the current procedure for obtaining monetary compensation by the state for years not worked.

[7] ECtHR, Chitos v. Greece, app. no. 51637/12, 4 June 2015.

Thus, as the analysis shows, in recent years there has been a tendency to gradually expand the interpretation of the Convention in the field of human rights in labour relations, including the prohibition of forced or compulsory labour. For labour law, the expansion of the content of the Convention by the European Court of Human Rights is of particular importance, as it allows to increase the list of issues on which it is possible to apply for the protection of labour rights. The European Court of Human Rights has a significant impact on the implementation of the prohibition of forced labour. The Court's judgments not only determine the directions of further improvement of labour legislation on social protection of employees, ensuring the right to a fair trial etc., but also generally affect the creation of an effective mechanism for the realisation and protection of labour rights by international standards and modern trends in the development of labour relations (Yaroshenko, 2016).

In its case law, the ECtHR has established standards for understanding the content and legal regulation of freedom of association and trade union activity. Since, according to the ILO Declaration of Fundamental Principles and Rights at Work, the right to freedom of association and trade union activity, the right to collective bargaining, the prohibition of forced labour and child labour, and the prohibition of discrimination in respect of employment and occupation are fundamental labour rights, the ECtHR additionally acts as a regional mechanism for monitoring compliance with fundamental labour rights by ILO member states (Sychenko and Perulli, 2023).

In addition, the legal positions of the ECtHR serve as the basis for the protection of labour rights of employees in national courts and, according to some scholars, should constitute the ideological and legal (value) basis for the administration of justice in Ukraine. ECtHR judgments serve as guidelines in resolving court cases similar to those considered by the ECtHR; they contribute to the rule-making of state bodies, thus bringing national legislation closer to the standards of the Council of Europe. Given the nature of the ECtHR judgments and observations, understanding them as a source of law should not only concern a particular case but also the development of proposals for measures to be taken by Ukraine to eliminate future violations (Lörcher and Schömann, 2013).

The proper functioning of independent trade unions is of great importance both for the protection of labour and socio-economic rights of human beings and citizens and for building an effective civil society. At the same time, a prerequisite for the establishment and, accordingly, the operation of trade unions is the exercise of the constitutional right to form trade unions by persons who have the right to do so under the law. This right is enshrined in key international legal acts in the field of human and civil rights. Under Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, everyone has the right to freedom of peaceful assembly and freedom of association with others, including the right to form and join trade unions to protect their interests. That is, among all forms of the right to association, the right to form trade unions is separately highlighted in the text of the convention. At the same time, as the case law of the European Court of Human Rights shows, different states parties to the Convention periodically face problems with both the realisation of the right to form trade unions and ensuring freedom of activity of already established trade unions (Sychenko, 2019).

First of all, it is necessary to define what is meant by the right to form trade unions. The legal literature notes that the right to form trade unions includes the right of citizens to form trade unions based on free expression of will, to join and leave them, the right to elect their employees to protect the interests of trade union members, to participate in the internal life of the organisation, as well as the right to freely carry out trade union activities. The right to form trade unions can be exercised through: the free

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and unimpeded establishment of trade unions, joining already established trade unions, participation in the work of trade unions, free and unimpeded withdrawal from trade unions, refraining from joining trade unions, participation in the termination of trade union activities by the procedure established by applicable law. So, let us consider the peculiarities of the realisation of certain forms of the right to form trade unions in the ECtHR case law (Sicilianos, 2020).

In its judgments, the ECtHR has repeatedly emphasised that part 1 of Article 11 of the Convention considers freedom of trade unions as a separate form (special aspect) of freedom of association and part 2 of this Article does not exclude any type of profession from the scope of Article 11. Therefore, it is worth analysing the ECtHR's approaches to understanding freedom of association in general. The ECtHR defines freedom of association as the right to form and join a group or organisation for the pursuit of any common purpose. Freedom of association can be exercised by all citizens who wish to join an association for the achievement of common goals without interference from the state. It is noted that the right to successfully achieve such goals is not guaranteed by Article 11 of the Convention.

Freedom of association must be exercised without interference by the state. At the same time, part 2 of Article 11 of the Convention provides for the possibility of imposing restrictions on the exercise of these rights if they are provided for by law and are necessary for a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others. The ECtHR notes that pluralism and democracy are inherently based on compromise, which involves various concessions, both on the part of individuals and groups. Associations must sometimes be willing to limit their freedoms to ensure greater stability in the country as a whole. In its judgment in the case of Gorzelik and others v. Poland,[8] the ECtHR concluded that the state's actions in restricting the right to association were justified, as they were taken to protect the state's electoral system, which is a necessary element of a democratic society as referred to in Article 11 of the Convention. At the same time, when considering cases on restriction of the right to association, the ECtHR finds out whether such interference by the state was proportionate to achieve the legitimate aim pursued by it (Zuiderveen Borgesius, 2020).

Thus, when deciding on the legality of restrictions on the right to organise by the state, the ECtHR, first of all, determines whether the restrictions applied by the state were proportionate and necessary in a democratic society, regardless of whether the provisions of the national legislation of the respective state provide for the possibility of applying such restrictions. The ECtHR judgment in the case of Tüm Haber Sen and Çınar v. Turkey[9] is indicative in this regard. In this case, the ECtHR considered compliance with the Convention of the decision to compulsorily terminate the activities of a trade union on the grounds of a legal ban on the establishment of trade unions by civil servants. The ECtHR ruled that although part 2 of Article 11 of the Convention provides for the possibility of imposing legal restrictions on the exercise of the right to form trade unions by persons who are members of public authorities, in this case, the state did not provide adequate evidence that the establishment or functioning of a trade union formed by public servants poses or may pose a threat to society or the state (Lutkovskaya, 2019).

Article 11 of the Convention does not establish the right to refrain from joining trade unions, i.e., it does not enshrine the negative aspect of the right to form trade

[8] ECtHR, Gorzelik and others v. Poland, app. no. 44158/98, 17 February 2004.
[9] ECtHR, Tüm Haber Sen and Çınar v. Turkey, app. no. 28602/95, 21 February 2006.

unions. In one of the cases considered by the ECtHR, the defendant argued that Article 11 does not provide or guarantee any right not to be forced to join an association, and this right was deliberately not included in the provisions of the Convention. In this regard, the ECtHR noted that, unlike Part 2 of Article 20 of the Universal Declaration of Human Rights (no one shall be forced to join any association), the provisions of the Convention do not directly contain a negative aspect of the right to association. At the same time, the ECtHR emphasised that if we assume that these provisions are deliberately not included and therefore cannot be considered as enshrined in the Convention, and therefore the negative aspect of freedom of association falls completely outside the scope of Article 11 and any compulsion to join a particular trade union is compatible with the provisions of Article 11, the very essence of freedom of association is levelled and loses its meaning (Sauer, 2019).

Since the Convention must be interpreted in the light of modern conditions, Article 11 of the Convention should be considered as covering a negative right to association. That is, any compulsion to join a trade union contradicts the concept of freedom of association in its negative sense, and employees should be free to decide whether or not to join a trade union without being subjected to any sanctions or other negative consequences. In addition, the ECtHR takes into account the fact that the protection of freedom of expression and freedom of opinion guaranteed by Articles 9 and 10 of the Convention is one of the purposes of guaranteeing freedom of association and that such protection can be effectively ensured by guaranteeing both positive and negative rights to freedom of association (Merrills and Robertson, 2022).

We would also like to note the conclusions and interpretations provided by the ECtHR in the case of the United Union of Locomotive and Fire Engine Drivers v. the United Kingdom, which considered the legality of expelling an employee from the union. The trade union appealed to the ECtHR against the impossibility of excluding an employee who expressed and promoted views incompatible with the values of the trade union. At the same time, the legislation of the United Kingdom did not provide for such an exclusion and the national courts upheld the employee's claim that his expulsion from the union was unlawful (Yaroshenko et al., 2020a).

In considering the case, the ECtHR emphasised that the right to form trade unions includes, in particular, the right of trade unions to formulate their own rules and manage their affairs, and these rights are recognised in the International Labour Organization's Freedom of Association and Protection of the Right to Organize Convention. Based on the results of the case, the ECtHR ruled that there was a violation of Article 11 of the Convention since just as an employee must be free to join or refuse to join a trade union, the trade union must be free to choose its members. Art. 11 of the Convention cannot be interpreted as imposing an obligation on any of them to join. Thus, when considering the right of a person to form a trade union, the right of trade unions to establish their own rules on membership conditions and the right of trade unions to freely choose their members should be borne in mind and taken into account (Chernetska and Andriichenko, 2019).

Thus, various aspects of the right to freedom of association in trade unions are widely reflected in the case law of the ECtHR. Since the ECtHR considers freedom of trade unions as a separate form (special aspect) of freedom of association, when studying the ECtHR case law on the exercise of the right to form trade unions, one should take into account the relevant positions of the ECtHR on the understanding of freedom of association in general. The ECtHR case law is important for the realisation of the right to organise in the States Parties to the Convention. Thus, the absence of a provision in Article 11 of the Convention that no one shall be forced to join any association gave

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grounds to argue that this provision was deliberately not included in the text of the Convention, so the right not to be forced to join an association is not guaranteed by it, and on this basis, individual employees were obliged to be a member of the relevant trade union to keep their jobs. However, the ECtHR concluded that such an approach negates the very essence of freedom of association, so any compulsion to join a trade union contradicts the concept of freedom of association in its negative aspect.

4. DISCUSSION

In the field of labour rights protection, the European Court of Human Rights may face several problems in its law enforcement practice. Let us summarise the main problems that arise. Timing of cases – the ECtHR has a significant workload, and cases can take a long time to be considered. A long waiting period can be a problem for those seeking justice in the field of labour rights, especially in situations where the case requires immediate consideration, for example, in the case of dismissal on illegal grounds.

Lack of effective enforcement – the ECtHR may rule in favour of applicants on labour rights, but sometimes the enforcement of these decisions is delayed or ineffective, especially when states do not follow the ECtHR recommendations. Limited competence – the ECtHR may be limited in resolving certain labour cases, especially if the case concerns national aspects and does not involve a violation of the Human Rights Convention. Differences in interpretation – the interpretation of the Convention's articles may differ, and this may lead to differences in the ECtHR judgments, especially in labour cases.

Limited impact – ECtHR judgments are binding, but may not always force states to make the necessary changes to national legislation and practice to protect labour rights. Inequality before the law – there may be a problem of inequality before the law in labour cases. Some complainants may have more resources and opportunities to lodge complaints with the ECtHR, while others, especially members of vulnerable groups, may be less represented. Restrictions on the ability to express their position – some applicants may be limited in their ability to express their position or provide relevant evidence to the ECtHR, which may affect the objectivity of the proceedings. Dependence on national courts – the ECtHR usually assigns the first level of review to national courts. In some cases, national courts may incorrectly apply international labour standards, which may lead to inaccuracies in the resolution of the case at the ECtHR level (Yaroshenko et al., 2020b).

Limitations of the Convention – the ECtHR may be limited to considering cases in situations where states indicate the existence of a "set of circumstances" that limit their ability to fulfil certain obligations under the Convention. These problems in the field of labour rights protection in the context of the ECtHR emphasise the importance of continuous monitoring and improvement of law enforcement practice and reform of national labour rights protection systems to ensure greater efficiency and fairness.

Solving the problems of the European Court of Human Rights case law in the field of labour rights protection requires a comprehensive approach and cooperation between various stakeholders, including the state, judicial authorities, applicants, and civil society organisations. In our opinion, the following points may help to address these challenges.

Strengthening internal reform – the ECtHR could undertake internal reform to improve the efficiency and speed of case processing. This could include increasing the number of judges, simplifying procedures, and improving the court's operations. Raising awareness – States and civil society organisations could work to raise awareness and education about human rights and the procedures for filing complaints with the ECtHR.

This will help citizens better understand their rights and options. Increase resources – states can allocate more financial and human resources to improve the work of the ECtHR.

This will reduce the time for reviewing cases and improve the quality of decisions. Involvement of civil society organisations – Civil society organisations can play an active role in monitoring and analysing cases, supporting claimants, and influencing policy decisions on labour rights reforms. International cooperation – States can cooperate internationally to share experiences and improve labour rights practices.

Reform of national legislation – states can reform their national legislation to address issues related to the protection of labour rights and ensure that national courts are in line with international standards. For example, the problem of international and national labour law in Ukraine is the correlation of the European Court of Human Rights judgments with the national labour law system. According to Art. 17 of the Law of Ukraine "On the Execution of Judgments and Application of the Case Law of the European Court of Human Rights", national courts apply the case law of the ECtHR as a source of law. However, this law does not define the place of the respective source of law in the system of law, does not outline its legal force, and does not indicate whether it will be applied only as a normative or descriptive part (Pudzianowska and Korzec, 2020).

Nor do the relevant provisions in other legislative acts. Therefore, it can be concluded that there is a legal gap in this regard. Although simple logic still suggests that the narrative part of the judgment will also apply, as it sets out the position of the ECtHR, there is no specific guidance on the legal force of such an act and its place in the system of court decisions. legal acts in the hierarchy. Therefore, it is unclear how national courts should act if the ECtHR case law contradicts Ukrainian law or international treaties ratified by Ukraine and is considered to be the national law of Ukraine.

Thus, there is a gap in the legislation regarding the relationship between international and national labour law, namely, the place of the European Court of Human Rights case law in the national legal system in the field of labour law. Solving the problems of law enforcement practice requires the time and effort of all stakeholders. It is important to ensure access to fair and effective protection of labour rights in all countries and at all levels.

5. CONCLUSION

In today's world, in the era of globalisation, the interdependence of citizens and states is becoming increasingly objective and inevitable, which is manifested, among other things, in the growing mutual influence of international and national law. Of particular importance in these processes is the case law of the European Court of Human Rights, which establishes standards and principles, in particular in the field of labour law, as they not only promote the development of international cooperation in the field of labour but also play an important role in protecting the labour rights and legitimate interests of citizens of the Council of Europe.

The judgments of the European Court of Human Rights not only determine the directions for further improvement of labour legislation on social protection of employees, ensuring the right to a fair trial, etc. but also generally affect the creation of an effective mechanism for the implementation and protection of labour rights by international standards and modern trends in the development of labour relations.

The right to work as a socio-economic right is not included in the European Convention on Human Rights. The Convention only guarantees the right to form and join trade unions and prohibits slavery, servitude, and forced and compulsory labour. Other

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labour rights are regulated by international documents, such as ILO Conventions and UN declarations. Labour rights have their specifics and require restrictions that may be imposed by states. International standards establish a minimum of rights that must be ensured, but states have the freedom to expand these rights according to their needs. Labour laws should be ready to adapt to changes in society, economy, and technology, as the rights of workers can be very diverse depending on the industry and type of work.

In addition, the ECtHR's positions on labour rights are the basis for the protection of these rights in national courts and are the ideological and legal foundations that some researchers recognise as the valuable basis of judicial proceedings in Ukraine. ECtHR judgments become guidelines for resolving similar cases in national courts; they contribute to the development of legislation by public authorities, which brings national legislation closer to the standards of the Council of Europe. Taking into account the content of the ECtHR judgments and observations, they should be considered as a source of law relating not only to a particular case but also as a source of proposals for measures to be taken by Ukraine to prevent further violations of legal norms.

The analysis shows that in recent years, there has been a gradual expansion of the interpretation of the European Convention on Human Rights in the field of labour rights, including the fight against forced or compulsory labour. The expansion of the interpretation of the Convention by the European Court of Human Rights is of particular importance for the field of labour law, as the range of issues that may be aimed at protecting labour rights is expanding. The Court's judgments affect the development of labour legislation, social protection of employees, and the right to a fair trial and generally contribute to the creation of an effective mechanism for the protection of labour rights by international standards and modern trends in the development of labour relations (Schmahl, 2022).

Various aspects of the right to join trade unions are widely represented in the case law of the European Court of Human Rights. Since the ECtHR considers trade union freedom as a separate aspect of freedom of association, it is important to take into account the relevant positions of the ECtHR on the general understanding of freedom of association when analysing the ECtHR case law on the right to participate in trade. The ECtHR case law is of great importance for the realisation of the right to join trade unions in the countries party to the Convention. For example, the absence of a provision in Article 11 of the Convention prohibiting coercion to join any association led to the argument that this provision was deliberately excluded from the text of the Convention, and therefore the right to refuse compulsory membership in an association is not guaranteed, and on this basis, individual employees may be obliged to join a trade union to keep their jobs. However, the ECtHR concluded that such an approach violates the very essence of freedom of association, so any compulsory membership in a trade union contradicts the concept of freedom of association in its negative aspect.

In the area of labour rights protection, the European Court of Human Rights faces numerous problems in law enforcement practice. The main ones include the length of case consideration, ineffective enforcement of judgments, limited competence, differences in interpretation, limited effect of the Convention, inequality before the law, limited ability to express its position, dependence on national courts, and limited ability to express its position. provisions. Addressing these issues requires a comprehensive approach and cooperation between states, courts, applicants, and civil society organisations. Measures may include internal reform of the ECtHR to increase efficiency, raise awareness of human rights, allocate additional resources, engage civil society organisations, international cooperation, and reform national legislation. Addressing

these issues is essential to ensure fair and effective protection of labour rights in all countries and at all levels.

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COMMENTARIES

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ECtHR: ERIK ADAMČO v. SLOVAKIA (Application no. 19990/20, 1 June 2023): The Proportionality Factor in the Question of the Use of the Testimony of a Cooperating Accused with an Impact on the Overall Fairness of the Criminal Proceedings / Stanislav Mihálik, Lukáš Turay

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Abstract: *The main task of the presented commentary is primarily the analysis of the decision of the European Court of Human Rights (ECtHR) in the case of Erik Adamčo v. Slovakia (Application no. 19990/20) dated June 1, 2023. This analysis specifically considers the implications for legal practice in the conditions of the Slovak Republic. The legal framework focuses on cooperating individuals and their testimonies during criminal proceedings, particularly considering the necessity of perceiving the proportionality of using such evidence in relation to guarantees securing the overall fairness of the proceedings. Examining this question is particularly significant in cases involving statements of individuals who admitted to committing criminal activities in the initial stages of criminal proceedings and subsequently agreed to cooperate with the prosecution in order to obtain certain benefits. The inherent issue in this regard is not merely the use of this type of evidence but rather the manner in which it is utilised, emphasising the perception of the benefits associated with its provision.*

Key words: *Collaborating Witnesses; Eyewitness Testimony as the only Evidence; Right to a Fair Trial; Overall Fairness of the Proceedings; ECtHR*

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1. INTRODUCTION OR HOW TO VIEW PENITENTS IN THE SLOVAK REPUBLIC

The institute of the Cooperating Accused became part of the Criminal Code No. 301/2005 Coll. (hereinafter referred to as the Criminal Code or TP) through the recodification in 2005. In professional literature, we can encounter various terms simplifying the name of a cooperating accused, such as "crown witness" or "penitent." We

believe that these terms may not necessarily be synonymous. Kandalcová (2017, p. 75) states that the term "crown witness" is derived from the concept of a "crown witness," in the context of which it refers to a witness who provides crucial testimony in favour of the prosecution (in the current reality of the prosecution). Considering "crown witness" as a synonym for the term "cooperating accused" is, in our opinion, incorrect. A "crown witness" can also be a person who directly witnessed an act with their own senses and may not necessarily be accused of participating in criminal activity. In layman's terms, the term "penitent" is most commonly mentioned. Some courts have even adopted this terminology in their decisions.[1] In our opinion, the terms "penitent" and "cooperating accused" should not be interchangeable. We agree with the views of Vrtíková and Mokrá, who suggest that the current legal status of a cooperating accused provides a relatively strong motivation for such individuals to lie, solely to obtain the benefits presumed by law, which may ultimately lead to impunity in criminal proceedings (Vrtíková and Mokrá, 2023, p. 18). Therefore, a penitent individual may dishonestly contribute to the discovery of criminal activity to avoid personal punishment.

The legal regulation of a cooperating accused is primarily governed by § 218 of the Criminal Code. This provision allows[2] the prosecutor to suspend criminal prosecution after meeting three cumulative conditions: a) The accused significantly contributed to the investigation of corruption, the crime of establishing, conspiring, or supporting a criminal group, or a crime committed by an organised criminal group or a criminal group, or terrorist crimes, or to the identification or conviction of the perpetrator of this crime; b) society's interest in clarifying such a crime exceeds the interest in prosecuting the accused for such a crime or another crime; c) conditional suspension of criminal prosecution may not apply to the organiser, instigator, or orderer of the crime whose clarification the accused contributed to (Čentéš et al., 2021, p. 226).

From the above legal regulation, it can be deduced that this institute has a relatively narrow scope, as it is limited on one hand by the person of the perpetrator and the legal qualification of the act constituting the crime in which they were involved. The first limiting factor is the fact that this institute can only be applied in the case of serious crimes, the proof of which is often complicated (Štrkolec, 2022, p. 132). In the case of corruption, in particular, proving such a crime is very complicated because both parties involved (the briber and the bribed) often benefit from corrupt behaviour. Their interest in revealing such wrongful conduct is often minimal. However, the application of this institute is even more problematic in the case of criminal groups or groups of people engaged in criminal activities. Currently, § 129 of the Criminal Code contains definitions of terms such as a group of persons (paragraph 1), an organised group (paragraph 2), an extremist group (paragraph 3), a criminal group (paragraph 4), and a terrorist group (paragraph 5), as well as activities and support for criminal and terrorist groups (paragraphs 6 and 7). An organised group according to § 129 paragraph 2 of the Criminal Code, an extremist group according to § 129 paragraph 3 of the Criminal Code, a criminal group according to § 129 paragraph 4 of the Criminal Code, and a terrorist group according to § 129 paragraph 5 of the Criminal Code are special forms of a group of persons that are associations for the purpose of committing criminal activities and are characterised by a certain level of organisation (Vojtuš, 2020, p. 135). For the purposes of this issue, we will focus on an organised and a criminal group only. The Criminal Code recognises two basic forms of organised crime. An organised group, as defined in § 129

[1] For example, Resolution of the Supreme Court of the Slovak Republic 1Tdo/27/2023, Resolution of the Constitutional Court of the Slovak Republic IV. ÚS 10/2022, etc.
[2] In this context, we must point out that it is an option for the prosecutor, not an obligation.

paragraph 2 of the Criminal Code, is an association of at least three persons for the purpose of committing a criminal offense, with a certain division of designated tasks among individual members of the group, whose activities are characterised by planning and coordination, increasing the likelihood of successfully committing a criminal offense. The second form of organised crime is the so-called criminal group, which is defined in § 129 paragraph 4 of the Criminal Code as a structured group of at least three persons that exists for a certain period of time and acts in a coordinated manner with the aim of committing one or more crimes, the crime of money laundering according to § 233 or some of the corruption crimes according to the eighth chapter of the third part of the special section for the purpose of direct or indirect financial gain. In practice, the distinction between a criminal group and an organised group is often highly contentious. In recent times, we have witnessed a relaxation of the definitional characteristics of a criminal group in comparison to those of an organised group.[3] In practical application, there are situations where the specialised prosecution authorities cannot definitively determine whether it is an organised group or a criminal group, which directly impacts the possibility of applying the institute of a cooperating accused. For the correct application of the conditional suspension of criminal prosecution of a cooperating accused, it is essential to preserve the right of defence for individuals against whom the cooperating accused testifies. During the preparatory proceedings, it is at least necessary for the defence attorney of the accused who is not cooperating to be present during the questioning of the cooperating accused. The decision on whether the accused can participate in such an act and ask questions to the person being questioned should be made by the police officer. This is especially the case when the accused does not have a defence attorney, and the act consists of questioning a witness, where there is a reasonable expectation that it will not be possible to conduct it in court proceedings (Čopko and Romža, 2018, p.149).

2. FACTS OF THE CASE ERIK ADAMČO (MAIN CIRCUMSTANCES)

The foundational framework of the submission to the European Court of Human Rights (hereinafter "the Court" or "ECtHR") can be considered a reference to the alleged unfairness in the criminal proceedings against Erik Adamčo (hereinafter also referred to as "the applicant"), with regard to Article 6 §§ 1 and 3 (d) of the European Convention on Human Rights (hereinafter referred to as "the Convention").[4] He was convicted in two cases of murder committed in the form of complicity (related to organised crime). The alleged unfairness was said to rest in the fact that, in proving the applicant's guilt, the testimonies of accomplices in criminal activity who cooperated with the prosecution, in connection with promises of immunity or other benefits, played a significant role as evidence. The objection was not to the use of this type of evidence itself (or the use of such evidence in the evidentiary process in general), but the applicant's arguments focused on the manner of their use, considering their inconsistency (especially in relation to one of the testimonies). In the submission, E. Adamčo also pointed out the insufficient justification and arbitrariness of the decisions in question.

From the perspective of the argumentation, the focus was primarily on three testimonies (individuals B, C, E). In chronological terms, the first testimony was that of individual E (at that time in custody for another unrelated murder), who, in October 2012,

[3] Resolution of the Supreme Court Case No. 5To 9/2013.

[4] In the case of Article 6 §§ 1 of the Convention, the relevant part is: *"In the determination ...of any criminal charge against him, everyone is entitled to a fair ...hearing ...by [a] ...tribunal..."*.

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confessed to murdering person D (with the testimony also incriminating the applicant).[5] In March 2016, the motion to reopen the case (retrial) was denied, citing inconsistencies in the testimony of individual E (compared to the evidence obtained in the original trial). The decision of the district court was subsequently affirmed in the appellate proceedings. The second testimony is from individual B (from March 2014), who was serving a sentence for several other murders at that time. This person admitted to ordering the arrival of person A with the intention of murdering them, and the applicant was supposed to be among those who brought them.[6] Finally, the testimony of individual C is also relevant (who was also among those supposed to bring person A to person B), and in this context, they testified about the involvement of the applicant in the aforementioned criminal activity (the murder of person A).[7]

The prosecution in the case of the applicant was primarily based on the testimonies of individuals B, C, and E. However, during the proceedings at the first instance, these individuals were heard as witnesses not only for the purpose of maintaining adversarial proceedings but also other witnesses were called, and various types of evidence were repeatedly presented. Considering additional facts in this particular case, it is relevant to mention the extensive forensic examination, especially concerning the causes of death of individuals A and D, the mechanism of their occurrence, and the psychological profiles of the accused. In the course of the defence arguments, the applicant primarily pointed out fundamental inconsistencies in the testimonies of individuals B, C, and E (regarding contradictions in their statements, the number of individuals involved in criminal activities, and practical mutual discrepancies in relation to selected facts; perhaps the most significant discrepancy in terms of their testimonies was the statement of individual E on how he was supposed to shoot person D, as it was entirely inconsistent with the expert's findings). Despite the arguments presented by the applicant, he was found guilty of both murders, and a 25-year prison sentence was imposed on him. In terms of the evidentiary situation, the testimonies of individuals B, C, and E were of primary importance, supplemented by the statements of other witnesses (who, however, had acquired information indirectly, from the perpetrators themselves).

However, in terms of the presented text, what is crucial in connection with cooperating witnesses (based on the applicant's objection) is the argumentation of the district court that the testimonies of individuals testifying in favour of the prosecution (in relation to the promise of relevant benefits) were approached "particularly carefully" and "particularly attentively", observing their internal logic and connections with other evidence. The identified ambiguities, especially in connotations with evidence of a more objective nature, did not, however, undermine the credibility of individual testimonies of cooperating witnesses. The assessment of the benefits provided itself was not the subject of its own argumentation; however, the court noted that the process of providing benefits itself was assumed by legislation and, therefore, legally approved (with the addition that the witnesses ultimately not only described the actions of the objector but

[5] Criminal proceedings against person E were suspended (even in connection with two other murders), precisely due to significant contributions to the investigation of organised crime. However, the Court did not have information about how the criminal proceedings against this person continued in these cases.

[6] In the case of person B, the court established that he was accused of complicity in relation to person A, with the decision that criminal proceedings would take place in a separate proceeding (without any further information about the course of the proceedings).

[7] Regarding person C, the indictment was temporarily suspended in 2014 (as the person significantly contributed to the investigation of organised crime through their actions). It was demonstrated that charges were brought against this person in 2022 (referring to the so-called pre-trial proceedings). However, the court did not have additional information.

practically incriminated themselves as well). From a reasoning perspective, it was further stated that inconsistency in testimonies and the existence of discrepancies are rather expected phenomena, especially assuming that prearranged testimonies or testimonies given under pressure would exhibit signs of agreement and consistency. Therefore, it was ultimately established by the court that the argument within which the testimonies would be false lacks logic.

Within the appeal proceedings, the applicant persisted in his argumentation and further supported it by emphasising the inadmissibility of the testimonies of individuals B, C, and E as witnesses, as they were, in fact, perpetrators. The applicant pointed out primarily the fact that, given their access to the case file (in the position of perpetrators), these individuals could tailor their testimonies to meet the prosecution's requirements. In addition to challenging the admissibility of such evidence per se, the applicant also raised procedural considerations of admissibility by assessing the proportionality of such evidence in terms of the benefits provided to these individuals (and their appropriateness). The applicant also highlighted other cases in which they themselves acted as perpetrators, and cooperating perpetrators similarly went unpunished. He added that the provided benefits were not only disproportionate (practically at the level of immunity) but were also practically exempt from judicial control (as they were in the hands of the prosecution). Specifically, they pointed to individual B, for whom the benefit granted was the commutation of a life sentence.

In this case, the appeal was rejected, with the court primarily noting that the applicant's argumentation focused on challenging the reasoning of the decision or the process of evaluating evidence. However, it is important to highlight a passage from the reasoning of the appellate court, which pointed out that the use of testimonies from cooperating witnesses is a relevant element in criminal proceedings. Still, it can be considered relatively controversial to add that such evidence practically does not need to be supported by other types of evidence (because the control of this type of evidence should be the starting point). Furthermore, the appellate court stated that in this particular case, the testimonies of cooperating witnesses were supplemented (and confronted) with a series of other pieces of evidence (in accordance with the principle of free evaluation of evidence, as one of the fundamental principles of proving, as envisaged by the Code of Criminal Procedure in the conditions of the Slovak Republic).

In the appeal on points of law, the applicant built his argumentation on the previously submitted proposals but added that, in cases of complicity, the testimonies of co-accused (especially concerning cooperating individuals) need to be supported to strengthen the overall evidentiary situation. However, they stated that, in this case, the testimonies of cooperating accused were used in a way that made other related pieces of evidence procedurally sustainable. The Supreme Court of the Slovak Republic, acting as the appellate court, deemed the appeal on points of law inadmissible, citing the nature of the examination that comes into consideration within the appeal.

The applicant subsequently turned to the Constitutional Court of the Slovak Republic through a constitutional complaint, highlighting, in light of the arguments presented, primarily an infringement on the right to a fair trial. On December 17, 2019, the Constitutional Court of the Slovak Republic declared the specific complaint as inadmissible, emphasising particularly the sustainability of the conclusions of the lower courts with respect to constitutional guarantees. It was specifically pointed out that individual types of evidence (including the contested testimonies) were evaluated in the context of the entirety of the evidence. At the same time, it was stated that the conclusion that the courts did not address or deal with the benefits provided to cooperating individuals (in the procedural position of witnesses) could not be drawn.

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3. ECtHR CASE ASSESSMENT

The Court evaluated the applicant's request as admissible and considered the merits of the case. In terms of general principles, the Court noted that the right to a fair trial under Article 6 of the Convention does not contain rules regarding the admissibility of a certain type of evidence *per se*, as it is within the discretion of each state.[8] In this case, the Court emphasised the need for a strict distinction between the admissibility of evidence and the right to a defence in relation to specific evidence presented in criminal proceedings. This reflects the role of evidence, which is not only to assess the first of the questions but to determine whether the course of proceedings (as a whole), including the possible exercise of the right to defence, or the method of obtaining evidence, can be perceived as fair. In connection with the specific case, it is appropriate to mention that there is an undisputed proportionality between the strength and reliability of certain evidence in relation to the need for other types of evidence. Although this is not inherently unfair to the criminal proceedings as such, it can be stated that the greater the reliability of the evidence, the proportionally lower the need for corroborative evidence.[9] In such cases, the principle of *in dubio pro reo* (any doubt should benefit the accused) ultimately applies. The Court also confirmed that the use of inculpatory testimony from an accomplice in the crime (usually in the position of a cooperating witness) is permissible, even when it concerns a person acting in the field of organised crime.[10] However, it added that the use of this type of evidence may practically challenge the overall fairness of the proceedings, especially considering the argument that such testimonies may be motivated by seeking an advantage, immunity, or revenge.

In the context of applying general principles to the factual circumstances of the case, the Court first noted that according to the words of the Government of the Slovak Republic itself, the conviction of the perpetrator was not based solely on the testimonies of witnesses B, C, and E (although these testimonies, construed and confirmed the potential connection of the applicant to the murders, were designated as key testimonies, with reference to the testimonies of other witnesses and the factual conclusions of experts). In connection, the Court pointed out that, for example, the experts did not address the question of the person who caused the death, but rather focused on the mechanism and causes of death. Therefore, with regard to the significance of the testimonies of cooperating witnesses for the criminal responsibility of the applicant, these had unquestionable procedural weight.

The subject of the Court's examination should primarily be the assertion of the applicant's objections concerning the relevant evidence in the context of domestic proceedings,[11] considering the correlation when the framework of the control itself (and its intensity) must be directly proportional to the benefits provided to cooperating individuals.[12] Regarding the handling of this matter at the national court level, the Court noted that the district court described the examination process of the relevant evidence as "particularly careful" and "especially attentive", dealing with the internal logic of these pieces of evidence in relation to the overall evidentiary situation. It also highlighted the

[8] As is also evident from: ECtHR, Schenk v. Switzerland, app. no. 10862/84, 12 July 1988; ECtHR, Jalloh v. Germany [GC], app. no. 54810/00, 11 July 2006; and ECtHR, Moreira Ferreira v. Portugal (no. 2) [GC], app. no. 19867/12, 11 July 2017.

[9] See ECtHR, Lee Davies, v. Belgium, app. no. 18704/05, 28 July 2009 and ECtHR, Bašić v. Croatia, app. no. 22251/13, 25 October 2016.

[10] See ECtHR, Xenofontos and Others v. Cyprus, app. nos. 68725/16, 74339/16 and 74359/16, 25 October 2022.

[11] For that, see ECtHR, Adamčo v. Slovakia, app. no. 45084/14, 12 November 2019.

[12] See ECtHR, Erdem v. Germany (dec.), app. no. 38321/97, 09 December 1999.

approach and findings of the Constitutional Court of the Slovak Republic, stating that the testimonies, as evidence, were not evaluated like any other evidence, given their nature. Specifically, their assessment did not take into account the advantages belonging to cooperating witnesses. However, the Court found the wording of this statement unconvincing, particularly for its practical unsustainability, where the appellate court and appellate court on points of law referred to the principle of free evaluation of evidence and considering such evidence like any other. Here, too, the Court established that the naming of the approach (whether it involves applying a principle or a tool of domestic law) is not crucial; rather, it is the approach itself and its result, especially concerning the objection raised by the applicant. In the final analysis, the Court concluded that despite the courts acknowledging that due attention was given to the extent and impact of the benefits, especially concerning the testimonies of individuals B and C, it was narrowed down only to expressing the thesis that the provision of benefits was in accordance with the legal regulations. The testimony of individual E was assessed by the Court as full of inconsistencies, where the evidentiary situation practically aimed to confirm the version of events presented by E. The testimony itself, in the context of other evidence, should have been subject to critical scrutiny.

In the context stated, the Court noted that the manner in which the courts responded to the applicant's objections apparently distorts the essence of the relevant evidence, lacking internal coherence in its justifications. It pointed out, for example, a difference to the Xenofontos and Others case, specifically regarding the absence of impartiality in the conduct of cooperating witnesses (conversely, the exclusion of impartiality in the conduct of these individuals was absent). As a result, the Court concluded that the courts at the level of the Slovak Republic did not genuinely pay any relevant attention to the extent of the benefits obtained by cooperating witnesses (or, at most, there were only hints of such investigation, with the court highlighting the complainant's properly raised objections concerning the factual circumstances of the case, which unquestionably challenged the described approach). This occurred despite the applicant's objections being raised, or the possibility of a contradictory hearing of the relevant witnesses (with the responses to the objections being only abstract answers from the courts). *„The simple principle of contradiction is in our criminal proceedings in a modified form, because its application in absolute form... in which the judge acts as an independent arbitrator guiding the process of proving... is unrealistic"* (Romža, 2018, p. 36).

The Court pointed out the considerable extent and significance of the benefits (as described in the text above). It considered this in the context that prejudicial proceedings, in this element (with regard to accessing the cooperating witness), can be described as a lack of judicial control. The overall fairness of the proceedings was therefore disrupted, precisely in terms of the importance of the testimonies of cooperating witnesses, particularly concerning their use (and the practically absent weighing of the provided benefits in relation to their significance in establishing the complainant's guilt). Due to the lack of these guarantees of justice, a violation of Article 6 of the Convention was declared in this case.

4. MEANING AND IMPLICATIONS OF THE DECISION FOR THE PURPOSES OF APPLICATION PRACTICE IN THE SLOVAK REPUBLIC

However, how to comprehensively assess the impacts of the decision on the practical application in the environment of the Slovak Republic? Firstly, it is important to note that the Court's decision did not call into question the institution of the cooperating accused as such (or, more broadly, cooperating individuals), as it represents a standard

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institution within the legal frameworks of states. Rather, the scrutiny was directed at the manner in which it is utilised, which has already raised concerns in several cases before the Court.

Based on the examination of available cases, the problem primarily arises from the combination of two fundamental assumptions (excluding the existence of the testimony of the cooperating accused as an assumption in itself). The first assumption is that such testimony constitutes the main inculpatory evidence, which is usually supplemented by a framework of indirect evidence. It often happens that even though such testimony should be the beginning of the evidentiary process, creating a logical, internally consistent, and sustainable framework for the decision itself, it is perceived as a kind of conclusion of the evidentiary process in the form of universal proof. Testing such testimony within the framework of other evidence allows for establishing its truthfulness and, ultimately, its procedural usability. It is undisputed that even in this case, the principle of free evaluation of evidence must guide the process of proving. However, as evidenced by the Court's decision-making activities, such testimony must be perceived with particular care, not only in isolation (as evidence per se) but primarily in the context of the overall evidentiary situation.

The second assumption concerns the extent to which the benefits provided to such cooperating individuals are taken into account. The Court itself expressed a certain degree of concern in the analysed case that, despite the declared status, some cases of provided benefits become, in practice, a form of immunity for the person (moreover, fully under the control of law enforcement authorities, without the possibility of judicial review). It is then essential not only to be aware of the framework of benefits but also, using a modified proportionality test, to weigh them in relation to the significance of such testimony for the criminal process. Failure to meet this requirement can become a reason for the absence of guarantees in ensuring the justice of the criminal process as a whole. In the conditions of the Slovak Republic, several fundamental principles apply in criminal proceedings, with the principle of promptness and fairness being applicable even during the preparatory proceedings: *"...the competent procedural bodies ...must be guided by the principle of speed and fairness of criminal proceedings"* (Romža, 2018, p. 89).

As for the response to the situations highlighted by the Court, it is understandable that their resolution does not lie in a change in legislation, i.e., objective law. It is appropriate to state that, from the perspective of the procedural line of the institution of the cooperating accused (or cooperating individual), this can be considered constant in the conditions of the Slovak Republic, especially in connection with the recodification of criminal law effective since January 1, 2006. It is even necessary to mention that *"...the possibility of obtaining a better position for a person exists* [at the stage] *before bringing charges."* (Vrtíková and Mokrá, 2023, p. 41). In a comprehensive sense, it involves a set of tools that act attractively in connection with active cooperation in clarifying criminal activities. At the pre-indictment stage, one such tool is the temporary suspension of the filing of charges; after filing charges, this can include facultative termination of the criminal prosecution of the cooperating accused, conditional termination of the criminal prosecution of the cooperating accused, suspension of the criminal prosecution of the cooperating accused, and ultimately, the guilty plea agreement. At this point, it is necessary to add that, effective from November 1, 2011, it was explicitly stipulated that *"...a person who significantly contributed to clarifying said criminal offenses may temporarily defer the filing of charges for such a crime or for any other crime..."* (Vrtíková and Mokrá, 2023, p. 41), with regard to influencing the motivation of individuals to participate in investigating criminal activities.

However, as mentioned above, and also highlighted by the Court, the problem in this case lies in the application practice. Not only has this been demonstrated in several cases examined by the Court,[13] but the General Prosecutor's Office of the Slovak Republic (as the highest state authority within the system of entities comprising the Public Prosecutor's Office of the Slovak Republic; hereinafter referred to as the "General Prosecutor's Office") has responded to this situation through its standpoint. In 2019, it pointed out that it is aware of the situation, and although the institution of the cooperating accused (the standpoint uses the term "crown witness") itself is not in conflict with the Convention, an application problem arises when such testimony is the only direct incriminating evidence. They emphasised, above all, the absolute impunity associated with such situations. In its standpoint, the General Prosecutor's Office also stated that it would consider initiating legislative measures concerning the relevant institution. Despite this statement, no such initiative has been taken to this day (Pirošíková, 2023).[14] As evident from the text, the General Prosecutor's Office identified situations that it perceives as problematic in terms of their impact on the overall justice of criminal proceedings, similar to the concerns expressed by the Court. Thus, it is not the application of the institution itself, but rather the situation where benefits are not provided in proportion to the significance of the witness's testimony. In such a situation, these benefits can be seen as disproportionate.

In terms of the utmost topicality of the processed issue, it is appropriate to highlight a legislative initiative by the Ministry of Justice of the Slovak Republic, which was approved by the Government of the Slovak Republic at the time of finalising this commentary. It is necessary to note that this is a relatively comprehensive amendment to the Criminal Code, which substantially touches upon the Code of Criminal Procedure, specifically the concept of cooperating persons. Since its inception, the Government of the Slovak Republic has pointed out the problem of a kind of "abuse" of the institution of cooperating individuals or the lack of sufficient control regarding the use and provision of benefits in pre-trial proceedings. The proposal touches upon the focal point of this institution in several significant aspects. The first is the theoretical-methodological aspect, as it proposes the legislative establishment of the concept of a "cooperating person," which would substantively encompass both a cooperating accused and a cooperating suspect (i.e., at the pre-trial stage). Such a person is someone accused or suspected of committing a criminal offense who significantly participates or is expected to participate in elucidating certain criminal offenses listed in the relevant provisions of the Criminal Procedure Code or the Criminal Code, or who contributes to the identification or conviction of their perpetrators. Similarly, the definition of the term "benefit of a cooperating person," i.e., a benefit provided for by the Criminal Procedure Code or the Criminal Code in their respective provisions, or any other benefit related to procedural actions, other proceedings, or the omission of authorities or persons to act under this law, which was provided, facilitated, otherwise secured, proposed, or formally or informally promised to a cooperating person by a court or an authority active in criminal proceedings in exchange for their participation in elucidating criminal offenses, identification, or conviction of their perpetrators, is also expected. The definition of these terms is related

[13] ECtHR, Adamčo v. Slovakia, app. no. 45084/14, 12 November 2019; ECtHR, Vasaráb a Paulus v. Slovakia, app. nos. 28081/19 and 29664/19, 25 and 29 May 2019, etc.

[14] Likewise in Proposal of the law amending and supplementing Act No. 300/2005 Coll. Criminal Code as amended by later regulations, and amending and supplementing certain laws. Available at: https://rokovania.gov.sk/RVL/Material/29089/1 (accessed on 07.12.2023).

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to the interest in eliminating theoretical vagueness associated with the mechanism of cooperating individuals, as these are commonly used terms.[15]

The proposed provision of the Code of Criminal Procedure is of particular importance, as it not only legislatively establishes and specifies the conditions for the cooperation of individuals with law enforcement authorities, but primarily delimits the concept of legality review of such cooperation (within the ongoing criminal prosecution). Therefore, it requires proper documentation of the cooperation itself and, last but not least, its disclosure, no later than in proceedings before the court, if the examination of such a person is required (or reading the testimony of such a person following the appropriate procedural steps), to whom benefits were promised or provided. The scope and content of benefits provided to cooperating individuals are, according to the proposed regulation, a circumstance necessary to determine and verify the impartiality and credibility of a witness. Investigative files would, in this regard, include not only records of the cooperation of such individuals in the specific case but also in other criminal cases (the right to study such a file may be restricted by the prosecutor only in cases of exceptionally serious reasons). This is associated with the proposed intertemporal provision defining the procedure regarding ongoing criminal prosecutions (as of the effective date of the amendment to the Criminal Procedure Code).[16]

One of the most significant changes proposed in the amendment to the Criminal Procedure Code, regarding cooperating individuals, includes the introduction of a deadline for temporary suspension of the indictment (with the possibility of extension) and the establishment of a judicial element of control concerning the termination of the criminal prosecution of a cooperating accused and the conditional termination of the criminal prosecution of a cooperating accused. According to the proposed legal framework, the prosecutor would only have the authority to propose such a procedure, and the judge for preparatory proceedings would make the decision after reviewing the case file and hearing the accused, or other individuals involved (which, incidentally, allows for an appellate review or appellate on points of law review of such decisions). The proposer emphasises in the explanatory memorandum to the bill that this constitutes a significant element in the process of setting up so-called "repentance benefits." It is particularly highlighted in this context that there is a practical impossibility of judicial control when it comes to the provision of benefits to cooperating individuals *de lege lata*.[17]

5. CONCLUSION

The purpose of this commentary was not only the analysis of the Court's decision in the case of Erik Adamčo v. Slovakia (Application no. 19990/20) but, above all, an examination of the impacts of this decision on legal practice in the conditions of the Slovak Republic. It is necessary to realise that the issue of cooperating persons in criminal proceedings is a controversial topic with many problematic questions, as evidenced in several cases decided by the Court. The case of Erik Adamčo was not the first in which it was stated that the application of this tool (and thus not the tool itself) causes interference with the fairness of criminal proceedings as a whole. Already in 2019, after the Court's decision in the case of Branislav Adamčo v. Slovakia (Application no. 45084/14), the General Prosecutor's Office stated that legislative intervention was

[15] Proposal of the law amending and supplementing Act No. 300/2005 Coll. Criminal Code as amended by later regulations, and amending and supplementing certain laws. Available at: https://rokovania.gov.sk/RVL/Material/29089/1 (accessed on 07.12.2023).
[16] *Ibid.*
[17] *Ibid.*

necessary. However, such intervention did not come, and the manner of using the testimonies of so-called "penitents" continued to raise questions in the conditions of the Slovak Republic, not only among the general public but also in the professional community.

It is necessary to mention that the starting points outlined by the Court in the decision under discussion were embraced to some extent by the proposer in the explanatory memorandum concerning the above-presented principles of the amendment to the Criminal Procedure Code. Specifically, the need to assess and weigh the benefits provided in relation to evaluating the testimony of cooperating individuals is noteworthy. Similarly, the proposed incorporation of a judicial element in relation to the termination and conditional termination of the criminal prosecution of such persons. The proposer himself presents this proposal as a platform through which it is possible to ensure compliance with and respect for the constitutional principle of conducting criminal proceedings only in a lawful manner. In addition to the principles of criminal proceedings, it is essential to oversee the safeguarding of the basic rights and freedoms of the accused and the individuality of each accused person (Kurilovská and Krásná, 2023, p. 303). On the other hand, in connection with the presented amendment, many practical questions arise, especially whether the necessity of keeping and disclosing records of a cooperating person (in relation to granted benefits, no later than in the stage before the court) will not result in the practical non-application of the institute in question. This consideration takes into account concerns that further criminal proceedings, in which the person acts as a cooperating individual (and, for example, has not yet been charged in such criminal proceedings), might be jeopardised.

While the actual impact of the decision in the case of Erik Adamčo v. Slovakia (aside from the financial aspect) is the "mere" need to rectify the existing situation (thus removing the interference with the legality of the criminal proceedings as a whole), one consequence is the possibility of reopening the proceedings (retrial), which the Court considers, under the circumstances, as the most suitable form of remedy. From the perspective of the General Prosecutor's Office, this is perceived as a legal benefit. However, it is essential to realise that it is the result of the incorrect application of a legal norm. A basic generalisation of the principles stated by the Court in these matters would have sufficed, practically applying approaches created at the supranational level. The legislator's vision rests precisely on these principles, and only time will tell if it will be realised not only in a proclaimed manner.

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ECtHR: ŻUREK v. POLAND (Application No. 39650/18, 16 June 2022): Constitutional Crisis and the Judge's Freedom of Expression / Mateusz Wojtanowski

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Abstract: *The article is devoted to the analysis of the judge's freedom of expression in a constitutional crisis, using the ECtHR case of Żurek v. Poland as an illustration. The argument begins with a discussion of the facts of the case and the judgment. At this point, I argue that the category of discriminatory legalism is relevant to the facts of the case. Further, two interrelated problems are addressed, which are considered to be particularly relevant for the expression of the judge in the course of the constitutional crisis. These are: 1) the relevance of Article 10 in relation to speaking in one's professional (here: judicial) capacity, and 2) an attempt to determine whether the judge's opposition to a constitutional crisis is an exercise of his or her freedom or a duty. On both issues, I also present the position of Judge Wojtyczek, who challenged the majority views in his separate opinion (partly dissenting, partly concurring). I believe that the disagreement between Wojtyczek and the majority goes to fundamental philosophical-legal issues and can be described as a friction between the analytical and post-analytical approaches to law.*

Key words: *Freedom of Expression of a Judge; Constitutional Crisis; Human Rights; ECtHR; Post-analytical Philosophy; Legal modalities*

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1. INTRODUCTION

On 16 June 2022, the European Court of Human Rights, sitting as a Chamber, ruled in the case of *Żurek v. Poland*.[1] The applicant in this case, Waldemar Żurek, is a media-active judge who has been a vocal opponent of the legislative changes relating to the reform of the judiciary introduced by the illiberal political power in Poland. The relevant changes, it can be argued, were part of a process called the Polish constitutional crisis.[2] The Court held by six votes to one that there has been a violation of Article 6 § 1 of the

[1] ECtHR, Żurek v. Poland, app. no. 39650/18, 16 June 2022.
[2] It should be noted that during the editorial process, the illiberal political grouping that has governed Poland since 2015 has lost the parliamentary elections, paving the way for a possible end to Poland's constitutional crisis.

European Convention on Human Rights (right of access to court)[3] and unanimously that there has been a violation of Article 10 of the Convention (freedom of expression).[4] As regards the right of access to court, the applicant alleged that he had been denied access to a court to contest the premature and allegedly arbitrary termination of his term of office as a judicial member of the National Council of the Judiciary. As far as the freedom of expression is concerned, the applicant complained of the measures taken by the authorities in connection with the views that he had expressed publicly in his professional capacity concerning legislative reforms affecting the judiciary. It can be said that the ECtHR has generally recognised the applicant's position. Adam Bodnar, the former Polish Ombudsman, described this case as "a real milestone in relations with European institutions", which, although it is one among the rulings of the ECtHR and the CJEU in relation to the Polish constitutional crisis, is "of absolutely exceptional importance" (Bodnar, 2022).[5] Sharing the above assessment, the paper is essentially based on the case of *Żurek v. Poland*. I believe that this case helps to illustrate the key issues relating to the response of the judge to a constitutional breakdown. In this regard, my focus is on Article 10 (freedom of expression), leaving aside issues related solely to Article 6. It is not my intention to reproduce the exact structure of the Court's reasoning, but rather to refer to it in relation to certain selected problems. It should be emphasised that the work relates exclusively to proceedings before the ECtHR and not the proceedings before the CJEU, which also concerns Waldemar Żurek (see: Kozlová, 2023, pp. 72-80; Pech, 2023, pp. 48-50).[6]

As far as the question of a constitutional crisis is concerned, it can certainly be conceptualised in a number of ways. However, what seems to be crucial here is the category of politico-legal culture, understood as influencing, *inter alia*, readings of the legal text and constructions of legal professional culture (Jabłoński and Kaczmarek, 2019, pp. 16-21). It can be argued that a constitutional crisis means that the political-legal culture, understood as a fundamental factor in giving coherence to practices related to the law, is being called into question. The Polish constitutional crisis, the course of which has been described in the literature (see: Sadurski, 2019, pp. 58-161; Pech, Wachowiec and Mazur, 2021, pp. 5-17),[7] will be used in the course of the discussion as an example of this phenomenon. Over the last few years, the institutions designed to counterbalance political power, and until recently perceived as the flagship achievements of Polish liberalism, have become the government's mouthpieces. Importantly, the Polish judges' response to the constitutional breakdown is institutional rather than individual (Matthes, 2022, p. 473). This is a significant difference from other examples of judicial resistance reported in the literature (cf. Graver, 2018, p. 849). Although the article deals directly with judicial expression in relation to the problem of the constitutional crisis, it is also relevant in the context of the generally diagnosed increase in the importance of the issue of the

[3] The Convention for the Protection of Human Rights and Fundamental Freedoms (1953).

[4] The Court also unanimously decided that it was not necessary to examine the admissibility and merits of the complaint under Article 13 of the Convention (right to an effective remedy).

[5] Bodnar identifies numerous reasons in support of his position. The most important of these seems to be the observation that, prior to this ruling, European human rights standards were unclear as to whether judges should comment on government policy. The ruling sends a message to judges facing a constitutional crisis that it is legitimate to oppose political power. At the same time, Bodnar seems to imply that the ruling is highly symbolic, as it concerns a judge who is recognised as a key figure in the fight for the rule of law in Poland (there has been explicit recognition of this by the ECtHR, which is an exceptional situation for a judge) and who is known for his desire to bring the judiciary closer to society.

[6] CJEU, judgement of 6 October 2021, W.Ż., C-487/19, ECLI:EU:C:2021:798.

[7] As for the ECtHR's account of the Polish constitutional crisis, see: ECtHR, Grzęda v. Poland (GC), app. no. 43572/18, 15 March 2022, esp. §§ 14-28.

judge's expression (see: Kakhidze, Jimsheleishvili and Chitashvili, 2021, p. 15; Seibert-Fohr 2021, p. 100).

The argument begins with a discussion of the facts of the case and the judgment. At this point, I argue that the category of discriminatory legalism is relevant to the facts of the case. Further, two interrelated problems are addressed, which are considered to be particularly relevant for the expression of the judge in the course of the constitutional crisis. These are: 1) the relevance of Article 10 in relation to speaking in one's professional (here: judicial) capacity, and 2) an attempt to determine whether the judge's opposition to a constitutional crisis is an exercise of his or her freedom or a judicial duty. On both issues, I also present the position of Judge Wojtyczek, who challenged the majority views in his separate opinion (partly dissenting, partly concurring).[8] I believe that the disagreement between Wojtyczek and the majority goes to fundamental philosophical-legal issues and can be described as a friction between the analytical and post-analytical approaches to law.

2. FACTS OF THE CASE AND THE JUDGMENT

The applicant, Waldemar Żurek, is a judge at the Krakow Regional Court (*sąd okręgowy*, which is the second of three common court levels). He joined two leading Polish judges' associations – Iustitia and Themis – in 2001 and 2010 respectively, and was twice elected to the National Council of the Judiciary (*Krajowa Rada Sądownictwa* - "the NCJ"). Pursuant to Article 186(1) of the Polish Constitution, the latter institution shall safeguard the independence of courts and judges. The applicant has extensive experience as a spokesperson for judicial bodies, having acted in this capacity not only for the Krakow Regional Court and Iustitia, but also for the NCJ itself. In the context of the constitutional crisis in Poland, the applicant publicly expressed his views or commented in the media on various legislative reforms affecting the Constitutional Court, the NCJ, the Supreme Court and ordinary courts, pointing to the threats to the rule of law and judicial independence stemming from the Government's proposals. The applicant's activity has led to the public perception that he is one of the most important voices of a judiciary and has been praised by legal discourse and the liberal media.[9] The other side of the coin was the perception of an illiberal discourse, which consistently portrayed the applicant as a political activist who contravenes his obligations as a judge.[10] Moreover, Waldemar Żurek was also targeted by the smear campaign in the public media which has resulted in a wave of hate speech directed at him.

In this context, the authorities have taken a number of actions against the applicant. Without entering at this point into the doubts concerning their relevance to the case, submitted by Judge Wojtyczek,[11] as well as the lack of the full definition of the

[8] In fact, it is also necessary to draw on Wojtyczek's separate opinion appended to Baka v. Hungary (GC), app. no. 20261/12, 23 June 2016 and – even though the case concerned MP – his separate opinion attached to Szanyi v. Hungary, app. no. 35493/13, 8 November 2016.

[9] See the accounts referred to in Żurek v. Poland, § 46, § 84 and § 185.

[10] As a digression, it is worth noting that the model of the "judicial culture of silence" to which the supporters of illiberalism sometimes refer is not their invention. Rather, they have exploited beliefs about the role of judges that were cultivated by the Polish legal discourse itself prior to 2015. At that time, a very restrictive, not to say oppressive, interpretation of the judge's expression was dominant. It was based on Article 178(3) of the Constitution of the Republic of Poland (1997), which stipulates that a judge shall not belong to a political party, a trade union or – and this is the key clause here – perform public activities incompatible with the principles of independence of the courts and judges.

[11] Separate opinion of Judge Wojtyczek, § 3.2. (ECtHR, Żurek v. Poland, app. no. 39650/18, 16 June 2022).

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ECtHR's own position,[12] it may be stated that the impugned measures under consideration are as follows:

1. applicant's dismissal from the position of court spokesperson;
2. audit by the CBA (Centralne Biuro Antykorupcyjne – the Central Anti-corruption Bureau) of the applicant's financial declarations;
3. inspection of the applicant's work ordered by the Ministry of Justice;
4. applicant's dismissal from his position as spokesperson of the Cracow Regional Court;
5. declassification of the applicant's financial declaration;
6. pending disciplinary proceedings against the applicant.

With regard to the nature of the first of these measures, the effect in question was produced *ex lege*, as a consequence of the newly adopted legislation which terminated the NCJ members term of office (arguably, with the view of weakening judicial independence[13]). Other actions concern the application or enforcement of law by authorities controlled or appointed by the executive, and the relevant question is their relationship to the law. Although some of the measures have been questionable in this respect, it seems that generally they had a legal basis.[14] At any rate, the crux of the case of *Żurek v Poland* is not that the authorities have acted in a completely arbitrary manner from a legal point of view. It was more about the instrumentalisation of the law – making use of it in such a way as to target perceived political opponents. The term "discriminatory legalism", coined by Kurt Weyland, is appropriate here (Weyland, 2013, pp. 23-25). The maxim of this notion is "For my friends, everything; for my enemies, the law!" This means that those who wield political power (interestingly, Weyland was originally writing about Latin American left-wing populists) use "formally legal authority in discretionary ways to promote their cronies and allies while punishing or intimidating critics and opponents in politics and society" (Weyland, 2013, pp. 23). In my view, this leads to an instrumentalisation of the law, because although the relevant actions are based on the specific provisions, the latter are often read in isolation, distorting their purpose, which can be discerned from the politico-legal culture of the community. I believe that this is what happened in the case in question. Although it can be argued that impugned measures were motivated by extra-legal motives, including informal orders from politicians, they found an alibi in specific provisions and could therefore be presented *pro foro externo* as lawful activity. The actions taken by the CBA against the applicant, started after his increased involvement in the debate concerning judicial reforms, seem to be particularly illustrative here. The CBA's venture of investigating the financial affairs of the applicant and his wife included gathering information from multiple banks/financial institutions and interrogations (including the questioning of the applicant's elderly parents and a man who had bought a tractor from him many years earlier). The "comprehensiveness" of the CBA's actions is demonstrated, among other things, by the fact that the land purchase, which took place twenty-two years before the audit, was also within the CBA's area of interest. The metaphor of discriminatory legalism, developed by Adam Bodnar, is appropriate here. He wrote of a light bulb that does not illuminate the entire room, which is in semi-darkness, but instead illuminates one corner with a strong, dazzling light (Bodnar, 2020).

[12] ECtHR, Żurek v. Poland, app. no. 39650/18, 16 June 2022, § 209.
[13] ECtHR, Grzęda v. Poland (GC), app. no. 43572/18, 15 March 2022, esp. § 348.
[14] The Court assessed that legality of applicant's dismissal from his position as spokesperson of the Cracow Regional Court was problematic. Nevertheless, it assumed that the interference was "prescribed by law" because, in the Court's view, the impugned interference violated Article 10 for other reasons (§ 215). For the applicant's view on this point, see § 165.

Referring to the list of impugned measures listed above, the Court appears to have considered the relevance of the following: the second, third, fourth (albeit with a caveat), fifth and sixth. As for the first one, it was excluded from the analysis (although again the ECtHR position is nuanced here).[15] In relation to the three-step test, the Court accepted, despite serious doubts, that the interference was "prescribed by law" and had a legitimate aim. It was the question of the "necessity in a democratic society" condition on the basis of which the ECtHR concluded that there had been a violation of Article 10.[16] What seems to be important in cases involving discriminatory legalism, the Court took into account the particular importance of the context and considered the sequence of events as a whole, rather than as separate and distinct incidents.[17] The paramount importance of freedom of expression on matters of general interest was also stressed.[18] Under these circumstances, the ECtHR unanimously held that there had been a violation of Article 10 (freedom of expression). However, as Judge Wojtyczek's separate opinion shows, there was a significant difference of opinion between this judge and the majority, which will be discussed below.

3. TWO SELECTED PROBLEMS

3.1 Speaking in One's Professional Capacity and Article 10

According to the ECtHR "the impugned interference was prompted by the views and criticisms that the applicant had publicly expressed in exercising his right to freedom of expression". In this regard, the Court observed that "the applicant expressed his views on the legislative reforms in issue in his professional capacity as a judicial member of the NCJ and the spokesperson of this body".[19] As we can see, on the one hand, the ECtHR mentions the category of freedom of expression – which gives the very legitimacy to deal with the case on the basis of Article 10 – and on the other hand, it was also emphasised that the applicant was speaking in his professional capacity.[20] What comes to the fore here, as the Court itself points out, is the link between the case at issue and the case *Baka v. Hungary*. In the latter case, the applicant was required by law to comment on judicial reforms, but the ECtHR recognised that he was under protection of Article 10. The structure of the Court's reasoning in *Żurek v. Poland* again indicates that Article 10 applies to situations where a public official speaks in his or her professional capacity, which view is, however, contested.

In its submission, the Government pointed out that the dismissal of the applicant from the position of spokesperson of the court would, at the most, limit his ability to represent that institution publicly. According to the Government, the above is in no way connected with Article 10.[21] It was not surprising that judge Wojtyczek expressed a similar view in his separate opinion, since his earlier separate opinions had taken the

[15] ECtHR, Żurek v. Poland, app. no. 39650/18, 16 June 2022, § 208 and § 209.
[16] *Ibid.*, § 214-229.
[17] *Ibid.*, § 211.
[18] *Ibid.*, § 229.
[19] *Ibid.*, § 220.
[20] The same reasoning can be found in § 224, which echoes ECtHR, Baka v. Hungary (GC), app. no. 20261/12, 23 June 2016, § 171.
[21] ECtHR, Żurek v. Poland, app. no. 39650/18, 16 June 2022, § 169.

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same line.[22] The dissenting opinion attached to the case in question reads: "In my view, Article 10 does not apply to official speech of public office holders, it applies to utterances expressing the personal views of individuals". Wojtyczek explained that "[t]he applicant could either express his personal views (while speaking in his private capacity) or – when speaking in his professional capacity as spokesperson of the NCJ – had the obligation to present not his views but the position of this State organ on the legislative reforms in issue".[23] Reference should also be made to judge Wojtyczek's dissenting opinion appended to the case of *Baka v. Hungary*. As he stated "[t]he sphere of judges' [official – M.W.] speech cannot be regarded as a domain of personal choice, but instead as a field subject to precise legal obligations, which have been imposed in the public interest and which restrict the choices available to a judge".[24] Moreover, in his dissenting opinion attached to the case of *Szanyi v. Hungary* Wojtyczek stated that judges' "freedom of speech is limited in many ways and, in particular, by the duty to speak in defence of judicial independence".[25] I read the structure of Wojtyczek's argument as follows. It is based on the distinction between expressing one's views and speaking in one's professional capacity (here we limit the argument to the judicial one), which also seems to generally imply specific legal modalities: freedom for the former and duty for the latter. In his view, while the majority acknowledges that the applicant was under a duty to speak, it also accepts that Article 10 does not cover the relevant utterance. However, it should be added for the sake of clarity that judge Wojtyczek ultimately recognised that Article 10 did apply in the case in question (unlike in the case of *Baka v. Hungary*). This is because the relevant facts of the case included also a series of utterances which Wojtyczek considered as presenting the personal views of the applicant, expressed in his capacity as a citizen (referring to the list presented in the previous section, he took into account: the second, third and fifth).[26]

My position is not a centrist one. I support the general idea of the ECtHR. As it seems, what the Court is trying to say is that the discourse of freedom of expression and the discourse of duty are not completely separate universes, but can intertwine and enter into functional relationships. Even if a component of a factual situation, read in isolation, formally concerns a duty, the ECtHR reads it in the general context of a person's situation, which may lead one to see the connection of this element to the idea of freedom of expression. In contrast to Wojtyczek's attachment to abstract compartmentalisation, this is a contextual and holistic approach. I will make three arguments in support of the majority position. First, the very distinction between expressing one's views and speaking

[22] It is also noteworthy that the problem under consideration was addressed in the recently enacted CCJE Opinion No. 25 (2022) on freedom of expression of judges (§ 9). The relevant point reads as follows: "The Opinion does not address questions concerning judges' reasoning in their judgments, as this is the performance of a judicial duty and not an exercise of an individual right". It is not clear, however, whether the authors intended to exclude the exercise of judicial duties as a whole (with the emphasis on the reasoning in the judgments) or whether it is only the reasoning in the judgments that is excluded. The message of the document as a whole is all the more obscured by the fact that in another paragraph (§ 61) the findings of the judgment of Žurek v. Poland are simply repeated.

[23] Separate opinion of Judge Wojtyczek, § 3.1. (ECtHR, Žurek v. Poland, app. no. 39650/18, 16 June 2022).

[24] Separate opinion of Judge Wojtyczek, § 7 (ECtHR, Baka v. Hungary (GC), app. no. 20261/12, 23 June 2016).

[25] Separate opinion of Judge Wojtyczek, § 3 (ECtHR, Szanyi v. Hungary, app. no. 35493/13, 8 November 2016).

[26] It is also worth noting that Wojtyczek's crusade against the majority seems to have a hidden agenda. What he is trying to do is to portray the majority as stretching recognised and highly institutionalised principles to extend the scope of the ECtHR's jurisdiction. Judge Wojtyczek is of the opinion that human rights are being used here as a pretext for interference in national conflicts between authorities. See in particular: Separate opinion of Judge Wojtyczek, § 18 (ECtHR, Baka v. Hungary (GC), app. no. 20261/12, 23 June 2016). In the context of the Polish constitutional crisis, the Court is generally criticised for breaking with previous jurisprudential patterns and treating cases as illustrating "something bigger" (cf. Leloup and Kosař, 2022).

in one's professional capacity becomes problematic in the context of the identity of the person holding the office of judge. On the one hand, it is difficult to "extract" completely unofficial expressions of such a person. As a matter of fact, categories such as the judicial integrity[27] or the dignity of judicial office[28] potentially encompass all of the activities of the person holding the office of judge. Any of them may fall victim to the reasonable observer test (Wojtanowski, 2022), or the ECtHR's objective approach to the issue of impartiality.[29] According to Wojtyczek "It is important to stress that when acting in a private capacity an individual may undertake freely any actions which are not forbidden by law, and may pursue any interests that he or she wishes, including the most selfish ones".[30] As far as judges are concerned, due to the requirements of professional ethics, there does not seem to be a "private capacity in this sense. On the other hand, judges are not fully determined by the legal material in the course of their professional activity, which is related, *inter alia*, to the problem of the open texture of language (cf. Bix, 1993, pp. 7-35). Accordingly, it is not possible to perform the functions of a judge without involving the individual axiological sense (Jabłoński and Kaczmarek, 2019, pp. 20-21). In my view, both the dimension of the "judge as an individual" and the dimension of the "judge as an institution" should be recognised in judicial identity. It cannot be reduced to one or the other. The ECtHR rightly moves our political-legal culture in this direction.

Secondly, Wojtyczek sees the *Baka v. Hungary* case as an example of internal conflicts within the public authorities, not as a human rights issue.[31] This affects his understanding of the relevant part of *Żurek v Poland*. Judge Wojtyczek's conceptualisation is incapable of perceiving the judge's speech in his or her professional capacity as an exercise of freedom of expression. Nevertheless, I am of the opinion that the logic of human rights, if understood as the protection of the individual against the public authorities, is at work here. Of all the public powers, the judiciary is recognised as the least dangerous (cf. Prebensen, 1998, p. 15). Its power to influence depends to a large extent on the respect for rulings by political authorities and the legal culture of society, rather than on its own instruments of coercion (incidentally, I believe that this is the reason why Article 10 § 2 explicitly mentions, among all the public powers, only the judiciary).[32] This is particularly evident under conditions of constitutional crisis and struggle between the political power and the judiciary. If we understand human rights as aimed at protecting the individual from Leviathan, then their historical rationale fits the case in question. In *Szanyi v Hungary*, Wojtyczek himself pointed to distrust of those in power as the foundation of modern constitutional democracy, and to the role of human rights in protecting the individual from the state.[33] However, in applying these intuitions to the case of *Żurek v. Poland*, he seems to completely ignore the context of the constitutional crisis, which involves the possibility of a significant structural imbalance of power between the branches of the state. Wojtyczek writes as if his argument were related to the framework of checks and balances in a stable constitutional democracy.

[27] See: CCJE, Opinion no. 3 (2002), § 50, ii; Bangalore Principles (2002), value 3.
[28] Basic Principles on the Independence of the Judiciary, § 8; Universal Charter of the judge (2017), article 3-5; Bangalore Principles (2002), 4.2, 4.6, 4.11.4. Commentary on Bangalore Principles (2007), § 115.
[29] ECtHR, Daktaras v. Lithuania, app. no. 42095/98, 10 November 2000; cf. CCJE, Opinion no. 3 (2002), § 20.
[30] Separate opinion of Judge Wojtyczek, § 4 (ECtHR, Baka v. Hungary (GC), app. no. 20261/12, 23 June 2016).
[31] Separate opinion of Judge Wojtyczek, § 18 (ECtHR, Baka v. Hungary (GC), app. no. 20261/12, 23 June 2016).
[32] This part of the argument should not be read as a denial of the dangers associated with the judiciary as an element of the political system, since it too can fail to respect certain autonomies and disrupt the functioning of the separation of powers. I do not deny that is advisable to maintain a degree of suspicion towards the judiciary.
[33] Separate opinion of Judge Wojtyczek, § 2 (ECtHR, Szanyi v. Hungary, app. no. 35493/13, 8 November 2016).

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Thirdly, the existence of an important link between speaking in one's professional capacity and expressing one's opinion, as well as between performing a duty and exercising freedom of expression, can be demonstrated by referring to the "chilling effect". The finding that the authorities intended to create the "chilling effect" is a diagnosis of the purpose for which the interference was committed. Of course, such a finding has legal significance.[34] As the Court stated in the case in question, referring to the measures taken by the authorities: "it appears that they could be characterised as a strategy aimed at intimidating (or even silencing) the applicant in connection with the views that he had expressed in defence of the rule of law and judicial independence".[35] It can even be argued *a fortiori* that if a judge faces reprisals for expressing a particular view that he or she is obliged to express (as in the case of Waldemar Żurek acting as a spokesperson for judicial body), he or she should all the more not express it if he or she is not obliged to do so. Measures of political power that are formally aimed at official speech can – from a functional point of view – affect the expression of one's opinion.[36] Furthermore, it is not only the applicant's freedom of expression that is at stake. The "chilling effect", although it applies directly to the applicant, also refers to a certain general social impact of the case.[37] In the context of the constitutional crisis, the point of the "chilling effect" is to sting the judiciary (for example, the audits carried out by the CBA concerned 5 judges out of a total of about 10,000 judges in Poland[38]), but to have a systemic effect, paralyzing the entire structure.

3.2 Confronting the Constitutional Crisis: Exercise of Freedom or Judicial Duty?

With regard to the judge's reaction to a constitutional crisis, it is worth considering the following two passages, which refer to both freedom and duty: "(…) it is evident that the applicant, acting as its spokesperson, had the right and duty to express his opinions on legislative reform affecting the judiciary";[39] "the general right to freedom of expression of judges to address matters concerning the functioning of the justice system may be transformed into a corresponding duty to speak out in defence of the rule of law and judicial independence when those fundamental values come under threat".[40] In Wojtyczek's opinion, there is a contradiction here, since "Freedom of speech means *inter alia* freedom from any obligation to speak. Where an obligation to speak and to express certain views begins, the freedom of speech ends".[41] As far as the judge's reaction to a constitutional crisis is concerned, it should be noted that the issue of oscillation between freedom and duty is at no time new. It appeared in the case of *Baka*

[34] ECtHR, Kudeshkina v. Russia, app. no. 29492/05, 14 September 2009, § 99, § 100; ECtHR, Baka v. Hungary (GC), app. no. 20261/12, 23 June 2016, § 167.
[35] ECtHR, Żurek v. Poland, app. no. 39650/18, 16 June 2022, § 227.
[36] It is Wojtyczek himself who seems to have discerned the possibility of the relation concerned: Separate opinion of Judge Wojtyczek, § 5, *in fine* (ECtHR, Szanyi v. Hungary, app. no. 35493/13, 8 November 2016).
[37] The impact of the chilling effect not only on the applicant, but also on others, has also been highlighted by the Council of Europe Commissioner for Human Rights (ECtHR, Żurek v. Poland, app. no. 39650/18, 16 June 2022, § 107), the applicant (§ 167), the Polish Judges' Association Iustitia (§ 200) and the Court itself (§ 227).
[38] According to the submission of the applicant (ECtHR, Żurek v. Poland, app. no. 39650/18, 16 June 2022, § 167).
[39] ECtHR, Żurek v. Poland, app. no. 39650/18, 16 June 2022, § 220 *in fine*.
[40] *Ibid.*, § 222.
[41] Separate opinion of Judge Wojtyczek, § 3.1. (ECtHR, Żurek v. Poland, app. no. 39650/18, 16 June 2022).

v. Hungary.[42] A variety of positions can also be found in international soft law.[43] Finally, the interesting accounts of third party interveners in the case in question should be mentioned as well.[44] There is no room here for a comprehensive analysis of these materials. However, it can be stated that the opposition of judges to unconstitutional legislation or to unconstitutional political practices is sometimes presented in discourse as an exercise of freedom of expression, and sometimes as a performance of a duty. Importantly, where reference is made to a duty, it is sometimes still unclear whether this is a legal duty or one deriving from another normative system.

To begin with, I agree that relevant passages of the judgment can be considered as disappointing in terms of their clarity. However, I believe that the majority position does not have to be read as a contradiction. As a matter of fact, we are dealing here with the fluid problem area. One can reasonably claim that both "freedom" and "duty" are relevant in this context, but they refer to different dimensions of the problem. In my view, we should make a distinction between the judge's general attitude to constitutional breakdown (the abstract dimension) and the specific situations in which the judge may find himself or herself in the course of his or her professional activities (the concrete dimension). With regard to the former, as I have argued above, the identity of the judge is to be deeply rooted in the individual concerned. Moreover, the participation of judges in the national discourse on the constitutional crisis allows the public to benefit from their expertise. It is therefore fair to say that the judge has a kind of general obligation to act in defence of the constitutional order, even outside a strictly professional context, which may mean speaking out on social media or taking part in demonstrations. However, in my opinion, we are talking here about an obligation arising from professional ethics, whereas from a legal point of view such actions would be an exercise of freedom of expression. Notwithstanding the above, there is the problem of the specific situations in which judges find themselves in the exercise of their professional activities. According to Amnesty International and the International Commission of Jurists, who made the submission as third-party interveners, "This right [to protect and enforce judicial independence – M.W.] became an imperative when judges spoke from a position where they had a duty to voice certain concerns, such as where they were designated as a representative or spokesperson for a judicial institution".[45] Nevertheless, I think that we should not think only of high-profile judges in this context, as this would create a risk of paternalism within the community of judges, i.e. implying that only judicial elites are reflective and capable of making responsible decisions. Indeed, in the course of adjudication, any judge may encounter threads that involve a constitutional crisis. When a judge decides on a case involving, for example, acts enacted by an illiberal political authority that are blatantly incompatible with higher-level regulations, or when a judge examines an unlawful practice of a political authority in a judicial review, the appropriate response should be captured as a legal obligation (besides being an ethical obligation). Perhaps provocatively, it can be argued that judges are simply fulfilling their standard

[42] ECtHR, Baka v. Hungary (GC), app. no. 20261/12, 23 June 2016, §125, § 168; cf., to make reference to the judgement from another jurisdiction: Inter-American Court of Human Rights, López Lone et al. v. Honduras, 5 October 2015, § 173.
[43] CCJE, Opinion no. 18 (2015), § 41; Opinion no. 25 (2022), § 60, § 61; Special Rapporteur on the independence of judges and lawyers, Report on freedom of expression, association and peaceful assembly of judges (2019), § 90, § 102; ENCJ, Sofia Declaration on judicial independence and accountability (2013), vii.
[44] The Commissioner for Human Rights of the Republic of Poland (§ 182 of Żurek v. Poland); The Helsinki Foundation for Human Rights (§ 188); Amnesty International and the International Commission of Jurists (§ 193, 194); Judges for Judges Foundation and Professor L. Pech (§ 196, § 198).
[45] ECtHR, Żurek v. Poland, app. no. 39650/18, 16 June 2022, § 194.

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professional responsibilities when they confront a political authority that enacts unconstitutional regulations or cultivates unconstitutional practices.

4. CONCLUSION

After discussing the facts of the case and the ruling, the above remarks have focused on two aspects of the judgement that are crucial to the question of judicial expression in a constitutional crisis. First, the relationship between speaking in one's professional capacity and the category of freedom of expression proved to be an important issue. I agree with the approach adopted by the majority, strongly criticised by the Judge Wojtyczek, that official speech of the judge can be protected by Article 10, despite the fact that it is formally the performance of a duty. I have tried to show that, in the case of a judge, the idea of a clear distinction between professional and private capacity is generally beleaguered. We should not reduce the judge to either an "individual" or an "institution", since both of these aspects are important for judicial identity. In my opinion, when a judge is harassed by a political power during a constitutional crisis, he or she is "covered" by the idea of human rights protection, even if he or she is formally performing a judicial duty. This is all the more important in view of the "chilling effect". Secondly, the paper considered whether resisting a constitutional crisis should be treated as a duty of the judge. I think it is appropriate to speak of an abstract duty in this regard, but one that is ethical rather than strictly legal in nature. Notwithstanding this, in the exercise of his or her professional activities, a judge may find himself or herself in situations where an appropriate response to unconstitutional legislation or practice would be a legal obligation (e.g., while adjudicating or acting as a spokesperson for a judicial institution).

In the course of the argument, it became clear that the disagreement between the Judge Wojtyczek and the majority goes to some fundamental questions about how to think about the law and its interpretation. The former relies on highly institutionalised distinctions (expressing one's views v. speaking in one's professional capacity, or in terms of legal modalities: exercising freedom of expression v. performing a duty), giving them a dogmatic status. Judge Wojtyczek simply refers to these distinctions as "existing", reifying them and erasing their axiological and functional entanglement. The majority embraced a very different approach to thinking about legal modalities (even if it cannot adequately define its position and the judgement may appear opportunistic). Against the background of cases relating to judicial expression in conditions of constitutional breakdown, it recognised that the discourse of freedom of expression and the discourse of duty are not completely separate universes, but can intertwine and enter into functional relationships. In my view, it is the philosophy of law that is at stake in the dissension described above. I believe that we are dealing here with an illustration of friction between the analytical and post-analytical approaches to law, represented by Judge Wojtyczek and the majority, respectively. To put it in Rortian terms, this is an example of the contest between the entrenched and the new dictionary (Rorty, 1989, p. 9). The post-analytical approach is sceptical of attempts to reduce legal practices to universally applicable structures or patterns, supposedly established once and for all. Accordingly, it is also at odds with the slave-like conformity to the dichotomies (Bator, 2019, p. 23; Stambulski, 2019, p. 70). Responsible participation in legal culture may sometimes require not so much the application of pre-established criteria to facts, but rather imagination and sensitivity (cf. Bator, 2019, p. 37). The post-analytical way of thinking allows us to recognise the dynamics of culture, and thus to be better equipped to deal with new problems, such as a constitutional breakdown. I believe that Wojtyczek's analytical

approach – seeing an organ of the state where one should rather see a harassed human being – can lead to an alienation of the law in the manner of Kafka's *The Trial.* It should be emphasised, however, that the post-analytical approach is not a rejection of analytical tools, but changes the way they are used. It seems that the problem of legal modalities is illustrative here. According to the post-analytical approach, we should refer to them taking into account the relevant social structures and institutional landscape, which may lead to a rejection of the conclusions that would follow from adherence to abstract compartmentalisation.[46] Legal modalities are a product of history and have no divine guarantees. They are our tools, not our gods.

Finally, I am aware of the potential accusation that my argument has been shaped in too one-sided manner and that proponents of illiberalism have some important points in the current dispute over the shape of Polish and European culture. It is true that the Polish judiciary was plagued by significant problems before 2015. In my opinion, two of them were the most important. First, I would point to the paternalism of the judicial elite, which allows them to be ironically described as the *elohim* of ancient Israel (after Parau, 2012, p. 638, in the Romanian context) or platonic philosopher kings (after Sulikowski, 2012, p. 120). Secondly, it is important to note the underestimation of the social aspect of the law, causing its alienation (which helps to explain why protests in defence of the rule of law in Poland were disappointing in terms of their size). I am in agreement with the general diagnosis that the construction of liberalism in Poland has been, paradoxically, too insistent and too superficial (cf. Sulikowski, 2023, pp. 15-26; Mańko, 2019, p. 77). However, even if the Manichean interpretation of the struggle between good and evil does not fit the description of the current situation in Poland, the Virgilian statement about the cure that turns out to be worse than the disease does. In the words of Waldemar Żurek himself "The authorities are using the problems of the judiciary as a pretext to dismantle the justice system".[47]

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[46] It is worth referring to Scott Veitch, who shows that what from an orthodox legal perspective is supposed to be a right or a freedom can in fact be embedded in a set of duties (see, for example, Veitch, 2018, p. 106; Veitch, 2021, p. 77). The illustration analysed in the course of this paper, as I have tried to convince the reader, leads to the somewhat opposite conclusion - it invites us to see the logic of human rights protection where we are formally dealing with an obligation.

[47] ECtHR, Żurek v. Poland, app. no. 39650/18, 16 June 2022, § 43.

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CJEU: WM AND SOVIM SA v. LUXEMBOURG BUSINESS REGISTERS (Joined Cases C-37/20 and C-601/20): Rethinking Transparency of Ultimate Beneficial Owners Registers/

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Abstract: *Rules against money laundering and terrorist financing are an area of law in which the European Union is significantly active and introduces many innovations. Public registers of beneficial ownership were one of the crucial tools with which this legislation promoted the openness of corporate structures in the European environment. For this reason, the judgment of the European Court of Justice in the Joined Cases C-37/20 and C-601/20, WM and Sovim SA v. Luxembourg Business Registers, which cancelled public access to beneficial ownership registers, caused an immense response. Part of the public sees this step as a major blow to the transparency and part as a victory for the rights of individuals. This paper explains the factual situation in the given case, summarises the Advocate General's opinion and analyses the reasons that led the Court to the presented conclusions. The author also reflects on the jurisprudence of the Court, which led to the issuance of this decision and its importance in the field of AML and the protection of the right to privacy in general. Based on these facts, the conclusion presents the possible development of future beneficial ownership registers in the EU.*

Key words: *Register of Beneficial Owners; AML; Sovim Case; Transparency; Data Protection; Right to Privacy; CJEU*

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1. INTRODUCTION

In recent years, the European Union ("the EU") has been at the forefront of efforts[1] to combat money laundering and countering the financing of terrorism ("AML"). It regularly brings the highest legislation standards in this area, which tries to reflect new trends in circumventing AML rules and incorporate Financial Action Task Force ("FATF") recommendations. Currently, the European Commission has mainly dealt with the

[1] The position of the EU in the field of AML regulation in the world is based on the analysis of various international organisations, primarily the FATF, which issues its Recommendations (the latest version - Recommendations 2012, as amended in November 2023).

implementation of the 6th AML directive[2] and the proposal of an extensive legislative package in the area of AML,[3] while some earlier regulations in this area are understood as a legislative standard on which further development is based.

Such a piece of legislation is, for example, the 4th AML directive,[4] which came into effect on 26 June 2017 and brought new obligations in the area of customer due diligence by obliged entities (e.g., banks), but in particular, ordered Member States to obtain and hold current and accurate information on beneficial ownership of legal entities in a central register which would be accessible by any person or organisation with the ability to demonstrate a legitimate interest. The 5th AML directive[5] then came into force on 10 January 2020 and amended the 4th AML directive, bringing some obligations concerning high-risk third countries' virtual – cryptocurrency exchanges, but mainly changing access to the central registers on beneficial ownership established by the previous directive. The registers became open to the general public, and people who wanted to gain access to its data no longer needed to prove a legitimate interest. The registers of beneficial owners have become an essential element of AML measures, as they have introduced broad obligations for all legal entities in the EU. The directive itself justifies this change by saying that *"public access to beneficial ownership information allows greater scrutiny of information by civil society, including by the press or civil society organizations, and contributes to preserving trust in the integrity of business transactions and of the financial system* and *the need for accurate and up-to-date information on the beneficial owner is a key factor in tracing criminals who might otherwise be able to hide their identity behind a corporate structure"* (The 5th AML directive, recitals 25, 30).

The regulation of beneficial ownership is an influential measure that has spread to many countries of the world. In addition to the EU Member States, it is currently in effect in many countries in Europe, Africa, Asia and South America. Altogether, approximately 32 states have established a public register of beneficial owners today, and many others have adopted it as a commitment to the future (The map: Worldwide commitments and action, 2023). From this point of view, publicly available registers of beneficial owners are therefore perceived as *state-of-the-art* in the field of AML and a fundamental element on which new measures will be based in the future (Radon and Achuthan, 2017, p. 103). However, part of the professional public or the business sector, for a longer time, perceived the conflict between the right to privacy along with the protection of personal data and the publicity of data in the registers and pointed out their discord, even though the establishment of these registers has become one of the main topics of AML policies today (Milaj and Kaiser, 2017, p. 125).

Precisely in the context of the above, the decision of the Court of Justice of the EU ("CJEU"), sitting as the Grand Chamber, in Joined Cases C-37/20 and C-601/20 in WM and Sovim SA v. Luxembourg Business Register, may have appeared surprising for part

[2] Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law.

[3] On 20 July 2021, the European Commission presented a package of legislative proposals to strengthen the EU's AML regulatory framework, for example by establishing the European Anti-Money Laundering Authority. Available at: https://finance.ec.europa.eu/publications/anti-money-laundering-and-countering-financing-terrorism-legislative-package_en (accessed on 18.12.2023).

[4] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC.

[5] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU.

of the professional public and non-governmental organisations. In this case, the Court, within the assessment of two requests for a preliminary ruling, expressed the incompatibility of the general public's access to the data in the beneficial ownership registers with the right to privacy and the protection of the personal data of the beneficial owners.

The paper aims to subject the Court's decision to analysis and clarify what facts led the CJEU to conclusions that deviate from the legislation other EU institutions considered a new standard. In terms of structure, the paper will provide an overview of the background of the mentioned case, the Opinion of the Advocate General, and the decision and reasoning of the Court, while the conclusion will provide comments regarding the importance and expected further development in this area.

2. CASE BACKGROUND

The analysed case involved two disputes between Luxembourg companies and the Luxembourg Business Register, which were filed at the Luxembourg District Court. The 4th AML directive, as amended by the 5th AML directive and also the Luxembourg law,[6] which transposed the directives, allowed an exception from the mandatory disclosure of data on beneficial owners, namely *on a case-by-case basis in exceptional circumstances where such access would expose the beneficial owner to the risk of fraud, kidnapping, blackmail, violence, or intimidation, or where the beneficial owner is a minor or otherwise incapable* (The 4th AML directive as amended, Article 30(9)). Both companies applied to the Luxembourg Business Register for an exemption, although each for a different reason, and both of these applications were rejected; therefore, the companies brought complaints to the Luxembourg District Court.

YO, a real estate company, requested to restrict access in registry to personal information regarding WM, its beneficial owner, on the ground that the general public's access to that information would seriously, actually and immediately expose WM and his family to a disproportionate risk and risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation, since his position as executive officer requires him frequently to travel to countries whose political regime is unstable and where there is a high level of crime, which creates a significant risk of mentioned eventualities (WM and Sovim SA v Luxembourg Business Registers, 2022, para. 21).

Sovim SA, a Luxembourg company, requested that access to the information concerning its beneficial owner contained in the registry be restricted solely to the state authorities, financial institutions and persons acting as public officers. Sovim justified this request with the legal opinion that granting public access to the identity and personal data of its beneficial owner would infringe on the right to respect for private and family life and the right to the protection of personal data, according to Articles 7[7] and 8[8] of the Charter of Fundamental Rights of the European Union ("the Charter"). It also constitutes an infringement of several provisions of the General Data Protection Regulation ("the

[6] Law of 13 January 2019 establishing a Register of Beneficial Ownership, Mémorial A 2019, No 15.

[7] Article 7 of the Charter: *„Everyone has the right to respect for his or her private and family life, home and communications."*

[8] Article 8 of the Charter:

„1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority.".

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GDPR") (WM and Sovim SA v Luxembourg Business Registers, 2022, para. 27). Sovim claimed that this obligation was primarily affecting the principles relating to the processing of personal data contained in Article 5 of the GDPR and also, inter alia, Article 25, which stipulates that only personal data necessary for each specific purpose of the processing shall be processed.

Luxembourg District Court decided to stay the proceedings in both cases and to refer questions to the CJEU for a preliminary ruling. The Court raised several questions about the interpretation to be given. Case C-37/20 WM mainly included the concepts of exceptional circumstances, risk and disproportionate risk within the meaning of Article 30(9) of the 4th AML directive as amended. In Case C-601/20 Sovim, the Luxembourg District Court asked, in particular, whether the general public's access to the data in the registry of beneficial owners is compatible with the Charter and the GDPR.

3. REASONING OF THE COURT'S JUDGMENT

3.1 Opinion of the Advocate General

Advocate General G. Pitruzzella delivered his Opinion on the request for a preliminary ruling from the District Court of Luxembourg before the CJEU's decision on 20 January 2022. In his Opinion, the Advocate General divided the preliminary questions asked by the Luxembourg court into three key areas. In the first place, he examined the validity of the public access to beneficial ownership information and its system of exceptions in the light of the rights to respect for private life and protection of personal data enshrined in the Charter (Opinion of the Advocate General G. Pitruzzella, 2022, para. 34). A second set of questions aimed to verify the compatibility of the public access to beneficial ownership information with several provisions of the GDPR (Opinion of the Advocate General G. Pitruzzella, 2022, para. 35). A third group of preliminary questions concerned the interpretation of the 4th AML directive as amended in terms of exceptions to the regulation of public access to information on beneficial ownership (Opinion of the Advocate General G. Pitruzzella, 2022, para. 36).

Before answering these primary questions, the Advocate General ("AG") made some preliminary remarks regarding the principle of transparency in Union law, which also plays a fundamental role in the cases under discussion. First, he stated that based on the constitutional traditions of individual member states, state activity must be determined by transparency and that this transparency may only be limited in exceptional cases. This fact contrasts with the confidentiality of the private sphere, protected by the recognition of the fundamental right to privacy, the object of which is respect for private life. However, for reasons of an objective or subjective nature, there may be a general interest in knowing some aspects belonging to the private sphere of an individual. For such reasons, the scope of the principle of transparency has been expanded, for example, to the regulation of financial markets, in which this principle contributes to the fight against such phenomena as corruption or terrorism. According to the AG, the acceptability of such interference with the right to privacy is also confirmed by the jurisprudence of the CJEU.[9] In this part, the AG concluded that, although transparency is characteristic of the public sector, it can apply to some aspects of the activities of private entities as long as these affect the fundamental interests of society (Opinion of the Advocate General G. Pitruzzella, 2022, para. 48).

[9] Here, the AG refers to cases such as CJEU, judgment of 9 November 2010, Volker und Markus Schecke and Eifert, Joined Cases C-92/09, C-93/09, ECLI:EU:C:2010:662, or CJEU, judgment of 18 June 2020, Commission v Hungary (Transparency of Associations), C-78/18, EU:C:2020:476.

The AG further provided an analysis in which he examined individual groups of preliminary questions as they were defined. He identified that the disclosure of beneficial owners' data is an interference with the rights established by the Charter, while the interference itself is acceptable as long as it is legal, respects the essence of these rights, corresponds to the objectives of general interest and is proportional (Opinion of the Advocate General G. Pitruzzella, 2022, para. 80). After discussing these conditions, the AG came to the opinion that the harmful effects on the persons affected by the publicity of registers can be considered moderate, due to the limited scope and not particularly sensitive nature of the personal data that is the subject of the intervention. Thus, he considered the interference with the fundamental rights guaranteed in Articles 7 and 8 of the Charter to be not particularly serious, as they do not in themselves allow to obtain accurate information about the persons concerned and therefore do not directly and intensively affect the intimacy of their private life (Opinion of the Advocate General G. Pitruzzella, 2022, para. 104). Despite this conclusion about the most fundamental issue of the proceedings, the AG proposed invalidating part of the 4th AML directive as amended. The EU legislator amended Article 30(5) subpara. 2 and 3 of the 4th AML directive[10] so that individual Member States can extend the range of personal data available to the general public. Thus, while the AG considered the range of affected data defined by the directive to be a moderate interference with the rights of individuals, it is possible to expand it[11] and thereby increase the intensity of the interference. For these reasons, the AG proposed to declare Article 30(5) subpara. 2 and 3 of the 4th AML directive as amended as invalid insofar as it provides that all members of the public have "at least" access to the data mentioned there enabling member states to expand the number of published data. The AG also reached an interesting conclusion concerning the access to data in the registers. He concluded that to ensure that beneficial owners have sufficient guarantees to protect their data against the risk of abuse, it is necessary for the Member States to be aware of the identity of the members of the public accessing these registers and to provide the beneficial owner with information on these persons if this proves necessary to ensure respect for fundamental rights. AG proposed to achieve this intention by, for example, the obligation to register persons before accessing the register (Opinion of the Advocate General G. Pitruzzella, 2022, para. 208).[12]

Furthermore, the AG commented on individual preliminary questions and provided his Opinion on interpretation issues. The most important part of his Opinion was the proposal to declare parts of the 4th AML directive as invalid, as this indicated what a certain part of the professional public (especially those on the private sector side) had perceived for a longer time (Noseda, 2022; or Prince Michael von und zu Liechtenstein, 2017), that the publication of personal data of beneficial owners, even if carried out in the public interest, may to a certain extent violate the rights of these persons. In part, this Opinion foreshadowed the development of the decision in the main case, even though the AG was more moderate in his Opinion.

[10] The persons or organisations referred to in point (c) shall access **at least** the name, the month and year of birth, the nationality and the country of residence of the beneficial owner as well as the nature and extent of the beneficial interest held.

[11] The AG provided in para. 104 of the Opinion as an example of serious interference in particular access to a person's exact contact details, such as address of residence or residence, which was an approach chosen by several Member States.

[12] Several member states made access to the register conditional on the registration of persons already before the decision in the matter, for example, Germany, Luxembourg, Spain, and Austria while other states such as Denmark, Romania or Slovakia allowed full access to the register without user authentication (European e-Justice Portal Beneficial ownership registers interconnection system 2023).

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3.2 Judgement of the CJEU

While the AG, in his Opinion, provided a relatively comprehensive legal elaboration of the case facts and the development of EU law in the subject area, the CJEU was more concise and direct in its decision. In the judgment, the Court focused mainly on the first of the preliminary questions asked in the case of Sovim (Case C-601/20), namely the issue of compliance of point (c) of the first subparagraph of Article 30(5) of the 4th AML directive as amended, which provides that *"Member States must ensure that information on the beneficial ownership of legal entities incorporated within their territory is accessible to any member of the general public"*, with Articles 7 and 8 of the Charter.

In this regard, the Court first had to deal with whether the general public's access to data on beneficial owners interferes with the rights of respect for private and family life and personal data protection. According to the Court, it was apparent that the publication of data on identified individuals within the scope of AML directives in publicly accessible registers affects the fundamental right to respect for private life, being of no relevance in that respect that the data concerned may relate to activities of a professional nature[13] (WM and Sovim SA v Luxembourg Business Registers, 2022, para. 38). It was also apparent from the Court's settled case law[14] that making personal data available to third parties constituted an interference with the fundamental rights, while it did not matter whether the published private information was sensitive or whether the persons concerned had been inconvenienced in any way (WM and Sovim SA v Luxembourg Business Registers, 2022, para. 39).

Since the CJEU came to the opinion that there was an interference with the rights of respect for private and family life and protection of personal data, it further examined the seriousness of that interference. In this regard, the Court noted that the published data allows a profile to be drawn up concerning specific personal identifying data, e.g., the state of the person's wealth and the economic sectors, countries and specific undertakings in which he or she has invested (WM and Sovim SA v Luxembourg Business Registers, 2022, para. 41). Moreover, making such information available to the general public can also cause a situation where it will be freely accessed also by persons who, for reasons unrelated to the objective of the AML directives, seek to find out about the material and financial situation of a beneficial owner. As long as such data has already been made available to the general public, it can be viewed, stored and disseminated freely, and it is practically impossible for the affected persons to defend themselves against abuse effectively. For these reasons, the CJEU considers the general public's access to information on beneficial ownership a serious interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter (WM and Sovim SA v Luxembourg Business Registers, 2022, para. 44). There has already been a departure from the Opinion of the AG, who considered it a moderate interference.

Considering that fundamental rights of respect for private and family life and protection of personal data are not absolute rights, limitations can be made, but any limitation on the exercise of the rights must be provided for by law and respect the essence of these rights. Proportional limitations may be made on the rights and freedoms only if they are necessary and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others (The Charter, Article

[13] The court referred to its previous decisions regarding the protection of rights enshrined in Articles 7 and 8 of the Charter, in particular CJEU, judgment of 9 November 2010, Volker und Markus Schecke and Eifert, Joined Cases C-92/09, C-93/09, ECLI:EU:C:2010:662.

[14] The CJEU refers, for example, to the judgment of 21 June 2022, Ligue des droits humains, C-817/19, EU:C:2022:491.

52(1)). The CJEU examined the fulfilment of these conditions concerning the publication of data on beneficial owners to assess the acceptability of its interference with fundamental rights.

1. Observance of the principle of legality

While this principle states that any limitation of the exercise of fundamental rights must be established by law, the answer to this aspect was quite evident as the publication of data on beneficial owners for the general public was provided for by the 5th AML directive, amending the 4th AML directive. CJEU, therefore, concluded that the legality principle was observed (WM and Sovim SA v Luxembourg Business Registers, 2022, para. 49).

2. Respect for the essence of the fundamental rights guaranteed in Articles 7 and 8 of the Charter

The Court approached this criterion so that it does not appear that the publication of information on beneficial owners for the general public would violate the essence of the rights outlined in Articles 7 and 8 of the Charter. Data published in registers of beneficial owners included information on the identity of the beneficial owner and details of his beneficial interest, and even though the scope of data published by individual Member states was not listed exhaustively by the 4th AML directive, only adequate information related to the purposes of that directive were to be collected and published (The 4th AML directive as amended, Article 30(1)). For this reason, in the opinion of the CJEU, no collection of information that would undermine the essence of the rights of respect for private and family life and protection of personal data should occur in terms of the provisions of the AML directives (WM and Sovim SA v Luxembourg Business Registers, 2022, para. 54).

3. The objective of general interest recognized by the European Union

The Court also examined whether public access to beneficial ownership data fulfils any of the objectives of general interest recognised by the EU. The primary purpose of adopting this measure, according to recital 30 of the 5th AML directive, was that such access "allows greater scrutiny of information by civil society and contributes to preserving trust in the integrity of business transactions and of the financial system" and "can contribute" to combating the misuse of legal entities for money laundering or terrorist financing.

In the opinion of the CJEU, the goal of preventing money laundering and terrorist financing is an objective of general interest that is capable of justifying even serious interferences with fundamental rights (WM and Sovim SA v Luxembourg Business Registers, 2022, para. 59), whereas referred to its earlier decision in case C-817/19 Ligue des droits humains, where collection and use of travellers data was considered in line with the EU's fundamental rights, while Member States had been granted even broader powers if there was a demonstrable threat of terrorism (Kuşkonmaz, 2023, p. 301). Despite this opinion, the CJEU continued to address the principle of transparency, since the Council of the European Union directly referred to this principle in connection with the general public's access to information on beneficial ownership. The principle of transparency, arising from Articles 1 and 10 TEU and Article 15 TFEU, however, affects mainly activities on the part of the public sector, while the obligation to publish data on beneficial owners applies across the board, especially to the private sector. For this reason, the CJEU reached the opinion that the principle of transparency cannot be considered, as such, an objective of general interest capable of justifying the interference

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with fundamental rights (WM and Sovim SA v Luxembourg Business Registers, 2022, para. 62). The Court dealt with the question of the objective of general interest relatively briefly and even though it devoted more space to the principle of transparency, the relevant conclusion of this section is the fact that the goal of preventing money laundering and terrorist financing is a sufficient objective of general interest. This conclusion also stems from the subsequent parts of the decision, but in this part, its significance is slightly lost due to the brevity with which the Court addressed it and a slight departure to the principle of transparency.

4. Whether the interference at issue is appropriate, necessary, and proportionate

In the concluding part, the Court focused in detail on the critical issue of the judgement, which is whether interference with the fundamental rights of respect for private and family life and protection of personal data was appropriate, necessary, and proportionate concerning the objective pursued.[15] From the Court's point of view, it was necessary to ascertain that the general public's access to information on beneficial ownership is appropriate for attaining the objective of general interest, further that the interference with rights is limited to the lowest necessary level and, lastly, that the importance of the objective is not disproportionate to the seriousness of this interference (WM and Sovim SA v Luxembourg Business Registers, 2022, para. 66).

As mentioned, the Court identified the prevention of money laundering and terrorist financing as an objective of general interest in connection with the general public's access to information on beneficial ownership. Also, in the opinion of the CJEU, this measure is appropriate to achieve the objective in question because public access to data and increased transparency creates an environment that is less likely to be used for such illegal purposes (WM and Sovim SA v Luxembourg Business Registers, 2022, para. 67).

When examining the necessity requirement, the Court returned to the previous wording of point (c) of the first subparagraph of Article 30(5) of the 4th AML directive, where access to beneficial ownership data was conditional on demonstrating a legitimate interest. The concept of 'legitimate interest' did not have a uniform interpretation. The Commission subsequently decided for practical reasons to abandon its use in the 5th AML Directive, as it considered the adoption of the definition to be difficult (WM and Sovim SA v Luxembourg Business Registers, 2022, para. 70). On the contrary, the CJEU considered the fact that the adoption of a uniform definition of a legitimate interest was a difficult task as an insufficient argument for justifying the necessity of the general public's access to data on beneficial ownership. The Court also argued that the publicity of beneficial ownership data allows greater scrutiny of information by civil society since, in its opinion, the press and various societal organisations have a legitimate interest in accessing this information. Therefore, in the Court's view, general public access could not be considered strictly necessary (WM and Sovim SA v Luxembourg Business Registers, 2022, para. 76).

On the question of proportionality, the CJEU came to the opinion that there is no proper balance between the objective of general interest pursued and the fundamental rights enshrined in Articles 7 and 8 of the Charter or sufficient safeguards protecting data against the risks of abuse. Although, according to the Court, the 5th AML directive defines

[15] The requirement of proportionality, in addition to aptitude and necessity, is based on the court's settled case-law, referring for example to the judgment of 5 April 2022, Commissioner of An Garda Síochána and Others, C-140/20, EU:C:2022:258, paragraph 93, where the CJEU examined the compliance of retention traffic and location data and their use in criminal proceedings with the EU law.

a specific range of published data, provides an exception from publication in exceptional circumstances and allows Member States to make access to data subject to registration, at the same time, the extent of published data is not sufficiently defined and identifiable.[16] The Court also considered the role of combatting money laundering and terrorist financing as a matter for the public authorities and entities such as banks. The transfer of these tasks, through the publicity of data to the general public, increased the interference with the rights of respect for private and family life and the protection of personal data. However, according to the Court, it did not bring additional benefits compared to the previous regime (WM and Sovim SA v Luxembourg Business Registers, 2022, para. 83-85).

For the stated reasons, point (c) of the first subparagraph of Article 30(5) of the 4th AML directive as amended, enabling the general public's access to information on beneficial ownership, did not pass the proportionality test performed by the CJEU and was declared invalid by its decision. The CJEU subsequently did not deal with further questions of the Luxembourg District Court, as it did not consider it necessary given its decision.

4. CONCLUSION

With its judgment in the dispute between corporate transparency and privacy protection, the CJEU firmly sided with privacy. It also deviated from the Opinion of the AG, whose proposal was not as resolute as the judgment. In general, in the EU, there are different approaches to data transparency between the individual member states, with the EU institutions often leaning towards greater openness. However, the CJEU invalidated one of the very significant measures in the area of AML and set the limits of interference with the rights of respect for private and family life and protection of personal data. Even the fact that it rejected transparency in the private sector as an objective of general interest (WM and Sovim SA v Luxembourg Business Registers, 2022, para. 62) indicates that states cannot arbitrarily interfere with the rights of subjects, even if it is convenient for them (Siems, 2023, p. 9). The judgment of the CJEU may seem surprising given the fact that the publication of data on beneficial ownership was an essential milestone in AML regulation, which was recommended for a long time by AML standard bearers such as the FATF (FATF, 2019, p. 16). However, it was preceded by the development of the jurisprudence of this Court and the attitude of some member states that are not supporters of broad transparency. In the individual decisions to which the CJEU referred, it indicated for a longer period its approach in the event of a conflict between mandatory data disclosure and the right to privacy. For example, in the judgment in the case, *Ligue des droits humains*,[17] the Court considered that the retention of passengers data for reasons of protection against terrorism and crime is consistent with the law if it is limited to the necessary period and scope, then in the judgment of case *Commissioner of An Garda Síochána*[18] it decided that the general and indiscriminate retention of traffic and location data relating to electronic communication is contrary to EU law. In the past, the Court ruled in favour of the protection of personal data and privacy

[16] Third subparagraph of Article 30(5) of the 4th AML directive as amended provided that: „*Member States may, ... provide for access to additional information enabling the identification of the beneficial owner. That additional information shall include* ***at least*** *the date of birth or contact details in accordance with data protection rules*."
According to the court, the words "*at least*" were problematic.
[17] CJEU, judgment of 21 June 2022, Ligue des droits humains, C-817/19, ECLI:EU:C:2022:491.
[18] CJEU, judgment of 5 April 2022, Commissioner of An Garda Síochána, C-140/20, ECLI:EU:C:2022:258.

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even in cases where the publication of data was connected with the element of protection of public resources, such as in the case of *Volker und Markus Schecke and Eifert*,[19] which concerned the publication of data on recipients of subsidies from agricultural funds or in the case *Vyriausioji tarnybinės etikos komisija*,[20] where Lithuanian law required beneficiaries of public funds to file declarations of interest, including some data from their personal life. In this context, the French Constitutional Court also made an interesting decision in 2016 that declared the publication of the register of beneficial owners of trusts as an infringement on the right of respect for private life (Panico, 2020, p. 494). It is necessary to point out that, even after the changes brought by the 5th AML directive, the registers of beneficial owners of trusts on the EU level remained in the access regime for persons that can demonstrate a legitimate interest (The 4th AML directive as amended, Article 31(4)). This fact is apparently connected with the decision mentioned above of the French Constitutional Court.

The conclusion of the Court in WM and Sovim SA v Luxembourg Business Registers was largely criticised by part of the professional public, which are supporters of openness and claim that public access to data on beneficial owners significantly helped the fight against money laundering (Tax Justice Network, 2022). Essential actors in this field are investigative journalists and non-governmental organisations, which generally do not have access to data intended for state authorities and often work with leaked data or information from whistleblowers. However, such sources are available sporadically, therefore, the availability of public sources of data is vital for the work of these actors. The decision of the CJEU in this matter is thus perceived as a significant setback to efforts to combat transnational corruption (Haberly et al., 2023, p. 24). On the other hand, advocates of personal data protection can counter the argument that the relevant public should continue to have access by demonstrating legitimate interest (Brewczyńska, 2022, p. 6). In such a case, access to data might be less comfortable, but the rights of persons would be protected, and at the same time, important actors could carry out their activities. It is, therefore, questionable whether, despite the usefulness of the third sector in the fight against money laundering, the permanent online publication for everyone is justified under these conditions. Some experts agree with the Court's decision that unrestricted online disclosure of beneficial ownership to everyone may have gone too far (Siems, 2023, p. 10).

The judgment of the CJEU in the case of WM and Sovim SA in Luxembourg Business Registers is significant for the EU institutions and individual Member States. It hints at further developments in the field of AML law and sets the conditions for other state registries or any area where the state publishes data about citizens. The level of information sharing between the state and the public differs in individual Member States. While some share large amounts of data about their citizens online, privacy and confidentiality prevail elsewhere (Miller, 2017, p. 93). In its legislation, the EU must find a consensus between these different approaches and set the level of transparency and privacy to an acceptable level. The decision of the CJEU in question may be necessary in the future, not only for the EU legislation, but also for specific laws adopted at the national level of the Member States. In the area of AML legislation, the Court was particular in how it envisions adjustments in this area to align with the rights of individuals. It is clear from the decision that the appropriate objective of general interest is preventing money laundering and terrorist financing, and, on the contrary, new rules should not be based

[19] CJEU, judgment of 9 November 2010, Volker und Markus Schecke and Eifert, Joined Cases C-92/09, C-93/09, ECLI:EU:C:2010:662.
[20] CJEU, judgment of 1 August 2022, Vyriausioji tarnybinės etikos komisija, C-184/20, ECLI:EU:C:2022:601.

only on the principle of transparency, which should not apply to the openness of the private sector. The Court also quite clearly defined who should have access to the data in the register – journalists, non-governmental organisations, or even business partners of the company should in all circumstances be included in the circle of subjects with a legitimate interest (WM and Sovim SA v Luxembourg Business Registers, 2022, para. 74). All these details provided helpful guidance for the Commission in planning amendments to this legislation. In the article, we also addressed the Opinion of the Advocate General, which was more moderate than the court in privacy protection, but also provided very interesting opinions regarding the necessary improvements in AML. His Opinion and judgment showed the need for a precise definition of the data to be published so that it could not be disproportionately expanded.

The AG also suggested introducing a general obligation to require the registration of persons with access to data in the registers so that the state can ensure their protection. Likewise, it is essential to introduce exceptions to data disclosure that are functional and not just formal (Opinion of the Advocate General G. Pitruzzella, 2022, para. 280). Other experts also see the obligation to register as the right step. However, it is essential that the technical solution for registration is practical and enables quick access to data by relevant actors. In this context, for example, the possibility of using the European eID and data wallet, which would enable the automatic sharing of information from various state registers, for example, with registered press, financial authorities and investigative authorities, is pointed out (Mooij, 2023, p. 8). The most crucial task following the decision, is for the EU Commission to re-functionalise the sharing of information on beneficial ownership, is the correct design of the definition of legitimate interest. As we mentioned above, the Court here provided relatively broad guidance as to whom it considers subjects fulfilling this definition, but it is clear that it will be in the interest of the EU institutions to define this criterion in the broadest possible way. The EU is aware of this task, and several reports indicate progress in achieving it. In March 2023, the Parliament approved the AML/CFT package proposal, which also regulates access to information on beneficial ownership (European Parliament, 2023). Final decisions on these proposals and their implementation will depend on negotiations between the EU Council, the European Commission and the European Parliament.

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REVIEWS

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MARSHALL, TIM: PRISONERS OF GEOGRAPHY: TEN MAPS THAT TELL YOU EVERYTHING YOU NEED TO KNOW ABOUT GLOBAL POLITICS. ELLIOTT AND THOMPSON, 2015 / Klára Jelínková

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Tim Marshall's *Prisoners of Geography*, published in 2015, is an in-depth examination of the influence that geographic features exert on the geopolitical strategies, international law, historical trajectories, and socioeconomic events of nations. Marshall is an experienced foreign correspondent, drawing on his extensive experience and knowledge of world history and geopolitics.

In his volume, the author analyses the geographic location of countries and regions – using ten selected, geographically interesting areas that are significant for their importance in the terms of historic events and global politics – to discuss how the geographic conditions of those specific areas define and influence the international relevance of individual states.

The book finds arguments in favour of a theory advocating that the decisions the countries make, as well as the behaviour and aspirations of nations, are conditioned and determined by their geographical location. Marshall's work addresses the complex dynamics of global politics and international relations through the prism of geography, providing a comprehensive examination of key regions.

One of the book's strengths is undoubtedly the way it is written; despite dealing with complex geopolitical concepts, the author expresses his theses clearly, in an exciting way that holds the attention of the reader. He presents arguments while combining historical events, current world events, and personal anecdotes. Each chapter is a scholarly exposition, offering readers an understanding of the significance and interconnections between terrain, climate (and climate change), and national aspirations.

The author raises issues of national development and international status, considering advantages and obstacles of their geographic position.

Inter alia, he explores historical reasons of the UK's isolation leading to the creation of liberal democracy. How Russia's quest for access to a warm water port was a major reason for the annexation of Crimea. In the context of China, the author focuses on the strategic importance of Tibet, whose plateau is the source of both of China's major rivers. He discusses the United States territories that provide a competitive advantage in terms of access to oceans and its navigable inland rivers. Author also examines Cuba's proximity to the United States, as a possible gateway for Florida's enemies.

Publication further discusses the role of geography in ongoing conflicts, showing how geography has shaped their dynamics, and affected the complexity of their solutions. Book intuitively discusses national rivalries (such as India vs. Pakistan; Korea vs. Japan; etc.) and describes their origins, as well as the long-term strategic the states apply to deal with them.

Moreover, the geographical analysis gives us a view of the different continents and addresses distinguished issues. Western Europe is described as an area that has benefited from favourable weather, inland rivers, the transfer of knowledge across the Eurasian peninsula, and from the access to warm-water ports.

The territory of Africa is analysed within its isolation, that is the cause of its current economic position. The Sahara Desert, in the north, is the reason for just a few natural ports and a lack of unnavigable inland rivers creating only weak inland connections. Given geographical characteristics of the continent have contributed to its territorial isolation and hindered a key development of society: the mutual and cross-territorial exchange of ideas. Attention is paid to the colonisation by Europeans, who neglected the development of the inland territories, that resulted in a phenomenon causing that, after reaching their independence, the African nations have built the states out of flawed institutions and structures.

Following analyses of the Middle East, the book focuses on the disputes arising within society. The chapter also describes the advantages and disadvantages of the region in terms of its size, pointing out that the large part of it is made up of The Arabian Desert, that has displayed people to settle closer to the coastal areas. In addition to the country's unfavourable topography, its situation is exacerbated by differing religious views, conflicts, and the Israeli-Palestinian conflict.

Central and South America is also under analysis. Like Africa, its political crisis has mostly been the result of isolation and its origins. The coastal cities were populated by European settlers who, while contributing to better connecting the coastal regions, neglected to connect the inland regions with each other. European settlers controlled much of the land, created serfdom, and dominated the majority of indigenous population. The history of the continent, combined with its complicated geographical situation, has created the Latin America of today.

In his publication, Marshall not only describes the geographic constraints, but he also considers how peoples navigate and transcend these constraints. He illustrates how countries use the political, human, or natural resources at their disposal to break free from the geographical restrictions. This approach further deepens the scholarly analysis of the subject and goes beyond its own deterministic view of geography and geopolitics.

The academic significance of the book is enhanced by its serious outlook. Currently, the planet is suffering from global warming, desertification, deforestation (not only) of the Amazon region, increased flooding, and the melting of the Arctic. These factors might be possible future triggers for the global and regional conflicts, as well as the cause of possible mass migrations.

The author encourages readers to consider how nations might strategically adapt to changing global dynamics, offering a perspective based on historical precedents and geopolitical theory. He argues that geography will continue to play a central role in the decades to come.

The main weakness of the book is the huge scope of the issues it focuses on. The problematics would probably deserve a much deeper elaboration and therefore a more extensive treatment. Given its broad scope, its content may seem too brief.

Tim Marshall views geography mainly from the perspective of conflict potential, overlooking other factors that are crucial from the perspective of geopolitics and international relations, such as economic or social aspects. He also omits pressing security challenges concerning modern times, for example drones, disinformation, and cyber security.

In conclusion, the book is very enriching, offering a new more informed understanding of geography's role in shaping our contemporary world. Its content emerges as a slick scholarly contribution to the field of geopolitical analysis and complex international relations. Academic maturity coupled with appealing stylistics ensure that the book is accessible to a broad audience as well as a valuable resource for scholars seeking a sophisticated understanding of the complex interplay between geography, international relations, and global politics.

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QUO VADIS THE STATUS OF TRANSGENDER PEOPLE IN SLOVAKIA? (BRATISLAVA, 29 SEPTEMBER 2023) / Ľubomír Batka, Olexij M. Meteňkanyč

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On September 29, 2023, a scientific conference entitled "Quo Vadis the Status of Transgender People in Slovakia?" was held at Comenius University Bratislava. It was the second conference organised as part of the VEGA project No. 1-0350-21 "Trans-Identity of minors: Ethical and Legal Aspects related to Informed Consent" by the research team led by Prof. Ľubomír Batka and based at the Faculty of Law of the Comenius University in Bratislava.[1]

[1] For more details about the grant itself and the members' activities, see here: Trans-Identita pri maloletých. In: *COMENIUS výskum*. Available at: https://comeniusvyskum.flaw.uniba.sk/2022/07/20/trans-identita-pri-maloletych/ (accessed on 12. 12. 2023). Simultaneously see more in Meteňkanyč and Batka (2022) for the proceedings of the first conference.

The aim of the project is to create and cultivate an interdisciplinary approach to the topic, both on an academic level and on a practical level. For this reason, the organisers have invited a number of experts and practitioners working on the subject from different academic, professional and practitioner backgrounds (law, psychiatry, psychology, sociology, philosophy, ethics, NGOs). This was reflected in the diverse structure of the conference, which was divided into three sections: 1. Experiences from the lives of transgender people, 2. Medical aspects of the care of transgender adolescents, and 3. Legal and ethical aspects.

Welcoming speech with the introductory lecture was given by prof. Ľ. Batka. He opened the topic "Autonomy of transgender adolescents" basing on the principle of self-determination in gender identity of transgender people and sex of intersex people. The capacity to give informed consent is determined by the age of the person, but at the same time it is also conditioned by the individual rational and will capacities of the person. From the development of legal protections and the growth of ethical standards for intersex people, he pointed out the analogy to transgender adolescents (affirmation of sexual and gender identity, self-determination, and the question of age limit for giving informed consent). According to prof. Batka, as autonomy increases, so does responsibility, so irreversible surgical treatments should, in his view, be performed after reaching the age of majority.

The second opening lecture of the conference was "The Copernican Turns in Transgenderism?" by Dr. Lucia Berdisová from the Institute of State and Law of the Slovak Academy of Sciences. The 'Copernican Turns' refer to three phases: depatologising transgender and empowering self-determination. The third turn is the realisation that not only gender, but also sex is socially constructed and the binarity of the sexes is not an immutable structure. Following the ideas of L. Wittgenstein and using Fish's concept of interpretive communities as a foundation, Dr. Berdisová pointed out that even considerations of (binaries of) the sexes are the result of our usage of language, i. e. our construction of the world and ourselves through language and other social practices. In this perspective on law and culture, but also on medical discourse, some of the issues that burden the discourse on transgenderism (e. g. nature v. nurture) also cease to exist, and a wider space opens up for appreciating the contribution of the concepts of non-binarity and gender fluidity and how social institutions can be thought and lived differently once certain issues have "disappeared".

A number of transgender people were invited to the first section of the conference and were able to present their experiences in this way to the legal audience. Zara Kromková from the "Komunitné a poradenské centrum PRIZMA" [Community and Counselling Centre PRIZMA] delivered a lecture "The situation of transgender and non-binary people from the perspective of the counselling centre for LGBTI+ people." The lecture was particularly valuable due to the data on numbers of clinic clientele, as well as due to insight into the difficulties that transgender people face (e.g., refusal to register gender reassignment at registry offices).

A discussion followed, moderated by Assoc. Prof. Matej Horvat, together with Liberty Blake Simon, Charlotte Srnčíková, Alena Srnčíková (Charlotte´s mother) and Zara Kromková. The discussion focused on several aspects of transgender people's lives, with particular emphasis on personal problematic experiences in changing name and gender information in documents at some Slovak registries. The panellists highlighted the unclear and inconsistent application of the Slovak Ministry of Health's Expert Guideline on the unification of procedures for the provision of health care for gender reassignment prior to the issuance of a medical opinion on the gender reassignment of a person administratively registered in the registry office. The debate participants mentioned the

shortcomings in access to health care. Generally, they were critical towards the conditioning of transitions on the diagnosis of F 64 (according to the ICD-10), as the World Health Organization has already reclassified the original "disease" of transgender people from the mentioned transsexualism to gender incongruence in its 11th revision of the International Classification of Diseases (ICD) in 2019. During the discussion, the participants repeatedly emphasised that the human rights framework of the debate is not sufficiently respected in Slovakia, and they also stressed the need to show empathy to transgender people in the country.

The second session focused on the medical aspects of health care of transgender adolescents and children. MUDr. Dana Šedivá, vice-president of the Slovak Society of Sexology, discussed the topic "Transsexualism-diagnosis and management of health care" based on the still valid ICD-10 and DSM-5. In her contribution, MUDr. Šedivá presented a comprehensive approach to the diagnosis of transsexualism (based on the current situation in the Slovak Republic). She advocates for a non-moralising, non-pathologising and non-discriminatory approach to transgender people. Rates of persistence of gender dysphoria from childhood into adolescence or adulthood range from 2.2% to 30% for MtF, and 12-50% for FtM. She also pointed to Rapid Onset Gender Dysphoria (ROGD) with an abrupt onset in adolescence and underlined the importance of differential diagnosis here.

MUDr. Barbora Vašečková from the Psychiatric Clinic of University Hospital Bratislava in Ružinov (Slovakia) gave a lecture "Challenges of transgender healthcare in Slovakia." In her thesis "Transition is a journey where you stop where you feel good" she emphasised the importance of the self-determination principle. She compared possible surgical procedures, waiting periods, type of health care and health insurance reimbursement in Slovakia and in different EU countries. Based on the study *The State of Trans specific Healthcare in the EU* (https://tgeu.org), she also noted the long-term delay of Slovakia in the provision of comprehensive healthcare. The minimum age for the treatment with puberty blockers and for the administration of hormone therapy varies across the EU: from Tanner 2, Tanner 3, age 16, or age 18. In Slovakia, these therapies are unavailable for adolescents.

MUDr. Eva Katrlíková (Department of Paediatric Psychiatry, The National Institute of Children's Diseases) also drew attention to adolescents in her lecture "Transgender child and adolescent in the health care system". She pointed out that children can already distinguish their identity at preschool age. She mentioned various data on the likelihood of persistence of gender dysphoria from childhood to adulthood: from 2 to 27%, depending on the study. Using data from the Department of Paediatric Psychiatry (DPP), she documented an increase in the number of patients diagnosed with F 62.4/F62.0/F66.0 between the years 1993-2022: while in the period 1993-2011 there were 7 patients, from 2011-2022 there were 47 patients registered at the clinic. More than ¾ are girls in the last decade (FtM). More than ¾ in that period have comorbidities, and nearly half of the patients monitored at the DPP from 2011-2022 had suicidal ideation. She also pointed to studies on the topic of ROGD, and on the incidence of intersex persons in the Slovak Republic: about 10 new-borns per year may have ambiguous genitalia on the basis of DSD, and in puberty and adolescence, between 2-5 DSDs per year may be detected.

MUDr. Klára Dzúriková from OZ Psychiatrická klinika v Trenčíne (Psychiatric Clinic in Trenčín) presented her own study based on research among psychologists in Slovakia in her lecture "The role of psychotherapy in transgender adolescents". Although psychotherapy is not a prerequisite for diagnosis or an obligatory part of the medical management of transsexualism, it can provide support not only during the whole process

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of transition, but also before it starts and in follow-up care: e.g., in reducing minor stress, in processing traumatic experiences. Research among 40 psychotherapists and therapists and 88 other people who work with transgender people showed that: on the topic of access to psychotherapeutic care, a third of the respondents think that transgender people have more difficulty finding a therapist than other clients. The most frequent topics in therapy are psychological problems (anxiety) 92.5%, relationship problems 75%, minority stress 52.5%, discrimination 47%, suicidal thoughts 45%. MUDr. Dzúriková fundamentally rejected the use of conversion therapy; on the grounds that it is contrary to the recommendations of world health agencies and good therapeutic practice (*lege artis*).

Mgr. Viera Hincová from the A-Centre elaborated on the topic "Gender dysphoria and gender euphoria on the background of the culture of neurodiversity". Neurodiversity is about neurological variations that affect how people think and interact. According to a 2020 study (Dataro) there is a 3-6 higher likelihood that autistic people will develop transgenderism. Mgr. Hincová stated that depending on the response to culture (normativity as a cultural phenomenon), not only gender dysphoria but also gender euphoria emerges. A culture of neurodiversity implies an awareness of the differences of neurominority when interacting with the environment. Gender-sensitive language in communication contributes to the elimination of minority stress and leads to respect for a person's individual culture, identity, and uniqueness.

MUDr. Šedivá, MUDr. Vašečková, MUDr. Kartlíková and MUDr. Dzúriková participated in the panel discussion. The participation of endocrinologist MUDr. Z. Pribilincová, from Faculty of Medicine, Comenius University Bratislava was also beneficial. The discussion centred around the issues of the appropriateness/inappropriateness of blocking puberty at the Tanner 2 stage, the conditions for the possibility of giving informed consent of adolescents, and the incidence and prevalence of transgenderism/transsexualism among adolescents. MUDr. Pribilincová presented the possibilities of hormonal treatment for persons younger than 18 years of age in order to block puberty (Gonadotropin-Releasing Hormone Analogue (GnRH)). From the therapeutic point of view, the procedure would be possible at an earlier age, but after two years it should be followed by hormone therapy, which is not available for adolescents in the Slovak Republic. The consensus in the discussion consisted of an emphasis on building a functioning health system and on high-quality diagnostics. However, there was uncertainty about whether adolescents can give fully informed consent.

The third thematic section focused on human rights and ethical aspects was moderated by Olexij M. Meteňkanyč. The introductory speech was delivered by Assoc. Prof. Andrea Erdösová from the Faculty of Law at the Pan-European University in Bratislava, in which she focused on the case-law of the European Court of Human Rights and its evolutionary development in the context of transsexualism. She analysed in more detail selected fundamental decisions of the ECtHR (Rees v. UK, Ch. Goodwin v. UK, van Kück v. Germany, A. P., Garçon, Nicot v. France, X and Y v. Romania), while presenting the gradually formulated position of the Court in relation to transgender persons, where the ECtHR assumes that gender identity constitutes one of the most intimate spheres of private life, and therefore Member States have only a limited margin of discretion in this area. The case-law of the Court itself has developed in particular in relation to Article 3 (prohibition of torture), Article 8 (right to respect for private and family life), Article 12 (right to marry) and Article 14 (prohibition of discrimination) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Another legally tuned contribution was presented by Dr. Maroš Matiaško from the Forum for Human Rights in Prague, Czech Republic. He focused on the analysis of the case law of the Court of Justice of the European Union (CJEU). The creativity of his approach consisted in the fact that in his paper entitled "The perspective of the Court of Justice of the EU in cases of transgender and non-binary people: Current Situation and Possible Future Developments", he modelled a number of case studies that may affect transgender and non-binary people, particularly in the Czech Republic, in the context of the application of the Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. In the context of the model cases (relating to homeless transgender and non-binary people, access to mental health and reproductive health services), he analysed the pitfalls in complying with the principle of non-discrimination in the provision of services and goods to transgender and non-binary people, which arises from the Directive in question and the case law of the CJEU, as many EU Member States continue to recognise selected goods and services as "gender exclusive", which should be perceived as violating the principle of non-discrimination on the basis of gender/sex.

The perspective of the NGOs appeared in the presentation of Niko Nagy on the topic "Shortcomings of the Slovak legal regulation concerning the legal transition in relation to International Human Rights Law". Niko Nagy summarised the many problematic points of the Slovak legal system at the level of legal transition, the weak reflection and reception of globally recognised human rights standards in the field of protection of the rights of LGBTI+ people (especially transgender and non-binary people), as well as in comparison with international legal standards, Amnesty International Slovakia's position was also presented, which has for a long time advocated the principle of self-determination (also for transgender adolescents), depathologisation of transgender and non-binary people, as well as the need to promote and protect the human rights of all citizens of Slovakia, irrespective of their difference.

Dr. Nikolas Sabján discussed the topic of non-binarity: 'Law and gender (non-) binarity: an analysis of recent court decisions in the field of legal recognition of the third gender'. The presentation addressed the question, which rights do courts rely on when deciding on issues related to the legal recognition of the third gender. Dr. Sabján analysed the case-law of the highest judicial authorities in European and non-European countries and divided them into three categories: (1) there are issues with non-recognition/refusal of non-binarity, or the possibility of socio-legal transition (e.g., Czech Republic, UK), (2) partial recognition (e.g., Germany, Austria, India, Nepal, Pakistan), (3) full legal recognition of the third gender (Belgium, Colombia, Netherlands, Inter-American Court of Human Rights). Dr. Sabján concluded that the right to gender identity is generally recognised and stems from human dignity, the right to free development and/or the protection of private life. Its non-recognition is a violation of the right to protection against unwarranted interference with private life and contrary to the principle of non-discrimination. The existence of intersex and non-binary people obliges the search for legislative options for the legal recognition of the third gender and/or the removal of gender from some documents.

The final lecture touched on the topic of transgenderism from a philosophical-anthropological perspective on how the perception of transgender identity depends on cultural factors. Slovak philosopher Dr. Renáta Kišoňová talked about the topic "Prejudice in contemporary social reality". The phenomenon of prejudice in relation to gender non-conforming persons can be analysed in its etymological and semantic context. Prejudice as a preliminary decision carries the danger of a mistaken generalisation spreading further in society. In the context of gender non-conforming persons, it is a range of

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negative attitudes that lead to hostility in interpersonal relationships. The tolerant perception of transgender people by Two-Spirit People, Fakakeiti People, Hirja in India, or Virdžina, tobelija in Albania, Montenegro shows that prejudices in culture can be changed.

In the final discussion, the floor was opened for debate on the previous contributions. A number of topics and problematic issues were raised, and the perspectives of the conference participants on selected aspects of transgenderism and non-binarity in our society overlapped in some respects, but often diverged and varied as well. The legal, human rights and medical discourse appeared to move on different levels and needed to be mediated already at the level of language, where several disagreements among the conference participants present became apparent. However, the very fact that so many experts from the fields of medicine, law and ethics came together and demonstrated a sincere effort to argue their positions signals the adequacy and necessity of organising an event of this type. Problems related to the health care and quality of life of transgender and non-binary people can only be addressed comprehensively, which is why the conference had an interdisciplinary character. The organisers also valued the participation of transgender people at the conference, who shared their unique experiences with the academic community.

The importance of the organised scientific conference is underlined by the fact that in the near future a collection of papers will be published, in which a significant number of the presented papers will be included, as well as other research papers of the persons who chose to participate passively in the conference in question. We believe that this will result in scientifically valuable publications with recent content, which can become an useful source of reference for the academic community, as well as their topicality can be of interest to practitioners who are involved in the subject in their professional activities.

In conclusion, the conference fulfilled in many ways the expectations set by the conference organisers. Although the question posed in the title of the conference "Quo vadis status of transgender people in Slovakia?" remains open, yet the participants of the conference were able to listen to a number of erudite contributions that addressed the situation of transgender people in Slovakia as it was, is and should be. As the visions of what should be did not always coincide, as well as alongside the discussion there were raised other, still unanswered questions, the mentioned motivates the organisers to continue to host more events of this type.

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THE EFFICIENCY OF PRE-TRIAL PROCEEDINGS – CURRENT CHALLENGES OF CRIMINAL LAW (BRATISLAVA, 11 – 12 SEPTEMBER 2023) /Jozef Čentéš, Maximilián Kiko

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On September 11th and 12th, 2023, the international scientific conference "Bratislava Legal Forum 2023" was held under the auspices of the Alumni Club and Faculty of Law of the Comenius University in Bratislava (hereinafter as "conference"). The central theme of the plenary session was "Human at the center of the rule of law". One of the main goals of the conference was to connect the knowledge of legal practice and legal science through their representatives from the domestic and international

environment. In order to reach this goal, the conference was divided into plenary session and parallel discussions in thematically focused sections. The plenary session had two panel discussions. One of them was panel discussion called "Artificial intelligence as a challenge for law, legal education and the rule of law" and second one was panel discussion called "Criminal law and the rule of law" moderated by professor Tomáš Strémy (academic professor and attorney at law). Participants of this panel discussion were doc. JUDr. Eduard Burda, PhD. (Dean, Faculty of Law, Comenius University in Bratislava), JUDr. Petr Angyalossy, PhD. (President, Supreme Court of the Czech Republic), JUDr. Martin Puchalla, PhD. (Chairman, Slovak Bar Association), JUDr. Jozef Kandera (first deputy general prosecutor of the Slovak Republic, General Prosecutor's Office of the Slovak Republic).

Criminal law, criminology and criminalistics had their own section in the conference and the discussion took place in Slovak, Czech and English language. This section 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" (hereinafter as "project"). The given section was aptly titled: "Current challenges of criminal law" (hereinafter as "section"). The guarantors of the subject section of criminal law, criminology and criminalistics were important internationally recognised experts in the field of criminal law, Dr. h. c. prof. JUDr. Lucia Kurilovská, PhD. (State Secretary, Ministry of the Interior of the Slovak republic) 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 supports the importance and justification of this international scientific conference.

Over 45 contributions were represented by experts from academic circles and legal practice in this section during both days. This quantity and quality of contributions made the section of the conference one of the best and largest in terms of the number of participants. From these contributions, a rational and useful discussion raised, which had an impact on improvements of the efficiency of the pre-trial proceedings of its examination, evaluation, criteria, and the impact of legislative changes.

The first day of the section was opened by prof. JUDr. Jozef Čentéš, PhD. (responsible project researcher). He welcomed the participants and especially thanked important domestic and foreign guests who showed interest and contributed to the high quality of the section by their participation in this international scientific conference. In his speech, he emphasised the importance of this format also from the point of view of linking theoretical knowledge with application knowledge and pointed out the high participation of various legal application professions, among which judges, prosecutors and lawyers were represented. At the same time, he stated that the section is carried out within the framework of the APVV project 190102 "Effectiveness of preparatory proceedings – examination, evaluation, criteria and impact of legislative changes". In this context, prof. JUDr. Jozef Čentéš, PhD. had a contribution with paper "Virtual currencies – some legal and economic aspects and trends in the Slovak republic and the world" in co-authorship with doc. JUDr. Ján Šanta, PhD., LL.M., MBA (University in Trnava, Faculty of Law/Special Prosecutor's Office). Also, he gave the floor to prof. JUDr. Tomáš Strémy, PhD., which led the first day of the conference.

JUDr. Lukáš Turay, PhD. (Comenius University in Bratislava, Faculty of Law), who presented the conclusions of a joint paper with Dr. h. c. prof. JUDr. Lucia Kurilovská, PhD. (Comenius University in Bratislava, Faculty of Law) "Quo vadis criminal policy?", in which they dealt with questions of the current direction of Slovak criminal policy. They drew

attention to three problematic areas, namely recidivism, the absurdity of certain criminal facts and the problem of setting disproportionately harsh penalties. They stressed the need for an honest criminological basis when adopting new legislation and pointed to the problem of the high number of amendments to the Criminal Code, which were often made solely on the basis of feelings, and which added a number of new facts. At the same time, they expressed regret about the outcome of the legislative process of the forthcoming major amendment to the Criminal Code, which was supposed to solve the problems raised.

Assoc. Prof. Radovan Blažek, PhD. (Comenius University in Bratislava, Faculty of Law) in his paper entitled "The rights of the accused juvenile in the context of Directive 2016/800" analysed the scope of the rights of accused juvenile under Directive 2016/800 and compared them with the scope of rights of accused juvenile in the Code of Criminal Procedure. This Directive was transposed into the legal order of the Slovak Republic by an amendment to the Code of Criminal Procedure, Act No. 161/2018 Coll. Based on a detailed analysis, the author of the paper found that the content of the amendment contained only one provision, namely Section 121(5) of the Code of Criminal Procedure. In his speech, he pointed out the insufficient scope of the rights of accused juvenile in the Code of Criminal Procedure compared to the Directive, from which it can be inferred that all the provisions of the Directive have not been transposed into the Code of Criminal Procedure, since the provisions do not correspond to each other. In conclusion, he stated that in connection with the consequences that may result from this, proceedings could be initiated by the European Commission for incorrect transposition of the directive into the legal order of the Slovak Republic.

On the topic "Theoretical and methodological starting points for the legalization of proceeds from criminal activity" came forward with his contribution professor Tomáš Strémy, PhD. (Comenius University in Bratislava, Faculty of Law), in which he dealt with this issue from a global perspective and subsequently moved to the conditions of the Slovak Republic by discussing the facts themselves regulated in the Criminal Code. In the context of that offence, he also dealt with the mandatory penalty of forfeiture of property, which in his view is too severe.

Team of authors (JUDr. Ing. František Vojtuš, PhD., Mgr. Petra Dražová, PhD.) represented by doc. JUDr. Marek Kordík, PhD., LL.M. (Comenius University in Bratislava, Faculty of Law) in paper ""Follow the money" principle in the investigation", dealt with the principle of monitoring financial flows in connection with decision-making practice. This principle is enshrined in (European union) Directive no. 4 AML (beneficial owner), a different person who is kept in databases, and it is the "one who gets something out of it". It either holds 25% of the voting rights or is entitled to appoint a management, controlling or statutory body. In the presented paper, the authors believe that the condition of 25% share is unnecessary and should focus on the specific power rights of the potential beneficial owner. If this cannot be determined, the statutory body shall be considered the beneficial owner. It also pointed out specific application problems in investigating and finding the ultimate beneficial owner related, for example, to the issue of tax havens, but also to the use of trusts, funds, and family foundations, as well as overly complicated ownership structures, fragmented or circular ownership.

Another speaker was JUDr. Stanislav Mihálik, PhD. (Comenius University in Bratislava, Faculty of Law) with a paper entitled "How to continue with the sanctioning of driving under the influence of an addictive substance", in which he discussed the punishment of the crime of endangerment under the influence of an addictive substance from the perspective of the status quo, a qualitative analysis of legislative proposals and proposals *de lege ferenda* in relation to the prosecution of the said crime. In the paper,

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the author pointed to the legislative proposal for a short-term prison sentence, which leads to success in terms of radical change, because the increase in the penalty rate does not affect the psychological state of the potential offender.

The second day of the section was opened again by prof. JUDr. Jozef Čentéš, PhD. He welcomed the attendees and then gave the floor to Dr. h. c. Prof. JUDr. Lucia Kurilovská, PhD., who headed the section. Dr. h. c. prof. JUDr. Lucia Kurilovská, PhD (Comenius University in Bratislava, Faculty of Law) and JUDr. Patrícia Krásná, PhD., LL.M. (Academy of the Police Force in Bratislava) focused on "Peculiarities of child pornography investigation." In their speech, they outlined the most important specifics that need to be examined in order to make the investigation more effective from the point of view of de lege ferenda. As the Internet environment continues to flourish, it is necessary to adapt to these realities. First of all, it is necessary to unify the legislation relating to the storage and transfer of data on the Internet to law enforcement authorities. An important milestone is to connect the theoretical with the application level and to link the connections that will make the investigation of child pornography more effective (e.g., victims are neglected, a small number of publications are devoted to victims and their specific needs, etc.). Finally, they stated that it is necessary to improve and streamline expert examination, to increase cooperation and promptness in the investigation of child pornography, since cooperation between experts very often occurs.

Authors JUDr. Jakub Ľorko, PhD. and Mgr. Lenka Miklóssyová (Comenius University in Bratislava, Faculty of Law) in their paper entitled "Current penological knowledge from drug crime" focused on three areas with the aim of acquiring new criminological knowledge about convicted drug offenders. They devoted themselves to criminal analysis with an emphasis on the multiplicity of criminal activity, which was greatest between section 171 and section 172 of the Criminal Code. The authors also dealt with the length of imprisonment, for Section 171 of the Criminal Code it is most often 1-2 years and for Section 172 of the Criminal Code it is 6-10 years. Most of the convicts are in the minimum level of guarding. Another evaluation criterion was age analysis, or gender, when most of the perpetrators are men. Most drug crimes are committed in the Trnava region. The last criterion was educational analysis i.e., the highest educational attainment. Most drug offences were committed by offenders who had completed primary school. In conclusion, the authors dealt with the results.

Finally, Dr. h. c. prof. JUDr. Lucia Kurilovská, PhD. thanked all participants who, through their participation and subsequent discussion, contributed to the high quality of the section at this conference and expressed her conviction about the high contribution of this event in the context of current issues that criminal law is currently facing.

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ADMINISTRATIVE LAW WITHOUT BORDERS (VEĽKÁ TŔŇA, TOKAJ WINE REGION, 19 – 20 OCTOBER 2023) / Jakub Handrlica

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An international conference, entitled "Administrative Law without Borders" was organised by the Faculty of Law, University of Košice in the municipality Veľká Tŕňa, which is situated in the very heart of the Slovak area of the Tokaj wine region. The conference was organised under the research project "Extraterritorial effects of foreign administrative decisions in the European Union", which has been supported by the Scientific Agency VEGA. The Košice-based research team, under the leadership of Associate Professor Radomír Jakab, has been dealing with various problems arising from mutual recognition of foreign administrative decisions for several years, and the conference, as organised on 19th and 20th October 2023 in the Tokaj Wine Region, represents one of the major academic meetings organised under the umbrella of this academic endeavour.

Having said this, it must be noted that the topic of the conference is in line with the current trend in the science of administrative law in Europe. The topic has been quite intensively addressed by French, Spanish, and Italian scholars under the umbrella of the *Transnational Administrative Law Network/Réseau de droit administratif transnational* in the last decade. Therefore, the scientific effort of the Košice-based research team represents a valuable contribution of the Slovak Academy to this very recent discussion. At the same time, the reviewed event clearly demonstrates that the Slovak academy represents an integral part of European legal space.

The international conference was opened by the introductory speech by Professor Miroslav Štrkolec, Dean of the Faculty of Law in Košice, who warmly welcomed participants, who arrived from several universities in the Slovak Republic, as well as from the Czech Republic and Hungary. In the first panel of the conference, attention was paid

to selected theoretical problems arising from the concept of extraterritorial administrative act. In my speech, I addressed the question of recognition of those foreign administrative acts, which were issued on those territories, which are either military occupied or annexed in contradiction to international public law. Such foreign acts – for example, acts issued by Russian authorities on the territory of Ukraine – may circulate also in Central Europe, and consequently, they may represent a considerable challenge for the domestic decision making. The European dimension of the problem was also addressed in the next two presentations: Professor Fabián Adrián (University of Pécs) dealt with the principles that arise for the administrative proceedings from the EU law. In her speech, devoted to the competencies of professional corporations, Professor Soňa Košičiarová (University of Trnava) addressed the issues arising from the freedom of establishment of these corporations in the European Union. The overall message of all presentations, delivered in the first panel, was crystal clear: Taking into account the very deep interaction between the EU law and administrative law, one can only barely consider administrative law as being a pure domestic branch of law. In the subsequent discussion, the participants addressed the consequences of this shift of administrative law from a purely national branch of law to a concept which is European. These consequences do not only imply the need for different scientific methods to deal with the current challenges that arise, but also the need for change in the education process.

The second panel of the international conference was opened by Associate Professor Tibor Seman (University of Košice) by his speech, devoted to the historical context of recognition of both foreign judicial and administrative decisions. In his presentation, Associate Professor Seman outlined a very detailed and informative overview of the past legal frameworks, as applicable to the problem of recognition in the territory of the former Czechoslovakia and, subsequently, in the law of the Slovak Republic. Furthermore, Associate Professor Radomír Jakab (University of Košice) dealt with the current legal framework for recognition of foreign administrative decision under the procedural rules of the judicial review. In the next speech, Associate Professor Vladimíra Žofčinová and Associate Professor Peter Molitoris (University of Košice) addressed the problems, arising from mediation in administrative proceedings.

Furthermore, the third panel of the conference clearly demonstrated that the problem of recognition in administrative law represents a quite broad and topical issue in the current administrative law. In particular, this was demonstrated, for example, by the presentations, as delivered by Junior Lecturer Daniel Burda (Charles University), who dealt with selected topics of recognition of foreign university education, and by Assistant Professor Lukáš Jančát (University of Košice), who addressed the basic requirements for introducing a regime of mutual recognition of administrative decisions under the EU law. Further interesting presentations were given by Professor Zsuzsanna Árva (University of Debrecin), Associate Professor Jozef Tekeli, Assistant Professor Rastislav Král, Ph.D. candidates Diana Repiščáková, Miroslava Francová, Eva Berníková and Dominika Pisarčíková (all from the University of Košice),

The fruitful character of the discussions, which followed each presentation made at the international conference, was undeniably supported by the charming atmosphere of the venue, which was chosen by the organising committee. The arrival of autumn has naturally triggered the interest of the participants in spending the evening time in the Tokaj-House, where academic discussions of the participants also continued also beyond the official scientific programme.

In year 2023, the Faculty of Law in Košice celebrates the 50th anniversary since its foundation in 1973. The conference "Administrative Law without Borders" has undeniably represented a perfect and dignified contribution to these celebrations. At the

same time, the event clearly demonstrated the level of scientific excellence of the research team, based at the Department of Constitutional and Administrative Law in Košice.

On behalf of all the participants from the Charles University, I would like to thank the research team of Associate Professor Radomír Jakab for perfect organisation of the event and for the opportunity of a fruitful and interesting discussion in the Tokaj Wine Region. I am looking forward to read the written versions of all the presentations, which are to be published by the ŠafárikPress Publishing House in open access.

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CONSULTATION CONFERENCE ON LAND CONSOLIDATION (BRATISLAVA, 31 MAY 2023) / Ľudovít Máčaj

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On the 31st of May 2023, Comenius University Bratislava, Faculty of Law organised an international scientific conference entitled "Consultation conference on land consolidation". The conference was organised at the faculty with the participation of several Slovak, as well as foreign guests. The conference represented the outcome of the research team concerning the project No. APVV-19-0494 „Effective land consolidation", granted by Slovak Research and Development Agency (APVV).

The consultation conference represented a significant milestone in scientific research aimed at efficient land consolidation. In this phase of addressing the grant project, it is crucial to establish deeper collaboration with professional partners and, through the delivered research results, directly contribute to improving legal practices in this sector.

It was prepared as a means for consultation with professional partners who are also engaged in land consolidation in their practice. Primarily, the Chamber of Land Consolidation, as well as the Chamber of Geodesists and Cartographers. We also engaged other partners in the discussion who willingly accepted our invitation. These included representatives from the Ministry of Agriculture and Rural Development of the Slovak Republic, the Notarial Chamber of the Slovak Republic, Geodesy, Cartography and Cadastre Authority of the Slovak Republic, the Slovak Agriculture and Food Chamber (SPPK), the Association of Towns and Communities of Slovakia (ZMOS), the National Motorway Company of Slovakia, the Slovak Land Fund and others.

The conference had an international dimension as well, as it was attended by JUDr. Jakub Hanák, Ph.D., Head of the Department of Environmental Law and Land Law at Masaryk University in Brno, Czech Republic. However, other representatives from universities also participated in the conference, such as Slovak Agricultural University in Nitra, and Technical University in Zvolen. The conference was attended by additional guests and a broad professional audience.

The conference was not structured in the traditional format of scientific or professional contributions. On the contrary, it involved a moderated discussion and consultation between academics from universities and professional partners concerning pre-defined areas of land law issues, with a focus on land consolidation.

The discussion was divided into four fundamental thematic areas: Land Consolidation Act and new legal regulation, Land consolidation and public administration, Proceedings on land consolidation, and Special issues related to land consolidation proceedings.

The conference was organised under the auspices of prof. JUDr. Marián Vrabko, CSc., the head of the research team for the mentioned project and simultaneously the head of the Department of Administrative and Environmental Law at the Faculty of Law, Comenius University in Bratislava. He welcomed the conference participants, informed them about the achieved results in addressing the grant, and highlighted the current relevance and importance of land consolidation issues in today's society.

Subsequently, Mgr. Maroš Pavlovič, PhD., LL.M, the vice-dean of the Faculty of Law at Comenius University also welcomed the guests and, together with JUDr. Ľudovít Máčaj, PhD., moderated discussions on concrete thematic areas.

In the first part of the conference, focused on the Land Consolidation Act and the new legal regulation, conference participants discussed the current status, the need for new legislation, and implementing regulations. Representatives from the Chamber of Land Consolidation and the Chamber of Geodesists and Cartographers expressed that the current legal framework, primarily found in the Land Consolidation Act, is inadequate. They highlighted several practical issues, such as the implementation of landowners' agreements. They also mentioned that the current criteria for land consolidation reasons are restrictive, especially because it is not possible to combine these reasons in practice to address all deficiencies in land ownership in a given area. Therefore, they proposed new legislation, including an implementing decree. On the other hand, the representatives of the Ministry of Agriculture and Rural Development of the Slovak Republic pointed out that while the current legal framework is not perfect, introducing new laws may also create problems where none currently exist. Representatives from Slovak Agricultural University in Nitra and Technical University in Zvolen emphasised the importance of considering landscape planning aspects in the new Land Consolidation Act. This importance grew after a separate law on landscape planning, previously in the National Council of the Slovak Republic, was not approved. It is particularly crucial to take into account public interest in this context.

In the second part of the conference, focusing on land consolidation and public administration, participants discussed the organisation of state administration in the field of land consolidation. The discussion included topics such as creating specialised state administration or establishing a new state administration body with nationwide jurisdiction. Representatives from the Slovak Land Fund mentioned that the creation of a unified authority, serving as the central body for state administration in the field of land, and simultaneously managing state-owned land or land of unidentified owners, could lead to conflicts of interest in various proceedings. A representative from Masaryk University in Brno countered this by stating that this model works well and efficiently in

the Czech Republic and has not caused problems in practice. Representatives from the Chamber of Land Consolidation supported the idea of creating a unified state land office, which would also serve as the administrator of the mentioned lands. Simultaneously, they supported establishing specialised local state administration in the form of land offices. The majority of conference participants agreed with this perspective.

In the third part of the conference, focused on proceedings related to land consolidation, participants presented various opinions regarding the course of these proceedings. This included topics such as defining participation in the proceedings, agreements among landowners, rules of proportionality considering differences in value and size between original and new plots owned by the same individual, remedial measures, and the establishment of a land consolidation court. Although these topics may not be as socially and politically sensitive, they have significant practical implications, making the discussion about them highly valuable.

In the fourth part of the conference, which was focused on specific issues related to land consolidation, participants continued their discussion on current topics. This included matters such as the status of common properties, lands with unknown or unidentified owners, costs related to the construction of shared facilities and measures, and the termination of lease relationships due to the new arrangement of lands after land consolidation.

At the conclusion of the discussion, Mgr. Maroš Pavlovič, PhD., LL.M, expressed gratitude to the participants for the valuable discussion. He also pledged to continue scientific work on these issues and collaborate with the involved partners.

The consultation conference on land consolidation brought forth several interesting perspectives and an exchange of opinions on issues related to the implementation of land consolidation. It served as a solid foundation for further collaboration with partners in this field.

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LAW STUDENTS PROVIDING LEGAL SUPPORT IN AN INTERNATIONAL HATE SPEECH PROJECT (PART 2) / Sandra Žatková

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1. INTRODUCTION

The previous report from 2022[1] presented a newly started international anti-hate speech project with the participation of students from the Faculty of Law of Comenius University Bratislava. Despite the EU-funded project started in April 2022, in December of the same year, we were already able to present tangible results. At the end of 2023, the project can be described as fully established and set to reach its ambitious goals thanks to the synergy among students, volunteers and the client Forum for Human Rights ("FORUM").[2] This report is a follow-up to the first one and presents new interesting developments and challenges. It focuses on the role of students, aspiring young

[1] Žatková, S. (2022). Law Students Providing Legal Support in an International Hate Speech Project. Bratislava Law Review, 6(2),169-172, https://doi.org/10.46282/blr.2022.6.2.324
[2] For more information, see the webpage of FORUM: https://forumhr.eu/ (accessed on 04.12.2023)

professionals, in protecting the human rights of Roma people.

Both summer and winter semesters of 2023 brought new students wishing to participate in the legal clinic for the non-profit sector, a subject created and administered by the Institute of Clinical Legal Education at the Comenius University.[3] A legal clinic has repeatedly proven to be a modern and unique way to prepare students for their future legal careers. They are given an opportunity to work with a real client under the supervision of a legal practitioner and their effort is rewarded by learning new skills and credit (ECTS) points, too. One of the clients is FORUM, whose international project attracted motivated students willing to dedicate their time and expertise to protect a vulnerable group from attacks. Students' dedication and support are key in the legal part of the project.

Alexandra Dubová, the FORUM's chairperson, and her colleagues managed to create an agile environment providing new challenges and opportunities for anyone joining the project, even in its later stages. As the project has grown, the team welcomed new forces from the Law Faculty of the Pavol Jozef Šafárik University in Košice. To provide its students with credit points, the law faculty in Košice decided to join the law faculty in Bratislava and implement a similar legal clinic model towards FORUM. The project's team called "ROMAntici" now consists of: Alexandra Dubová, the head of the project, coordinators of volunteers Sandra Žatková, Adam Máčaj (Comenius University), Diana Repiščáková (Pavol Jozef Šafárik University), and Barbora Bešenejová (student and trainee at the European Roma Rights Centre - NGO coordinating the project at the international level), attorney Michal Zálešák and of course, students and activists. The project officially ends in April 2024, but hopefully, the initiative will continue. Anyone reading this report and wishing to join the common effort is thus encouraged to reach out.

2. LEGAL STRATEGY

Firstly, it is important to reiterate the project's goals. The project connects volunteers with lawyers who work to defend victims of discrimination and hate speech. It therefore has the potential to strengthen the Roma minority's trust in the rule of law and to mobilise people to take active action against discrimination and hate speech. The aim is to ensure that members of the Roma community see themselves as rights-holders and gain experience in defending their rights through reporting hate content. On the other hand, the project participants undertake to remind state authorities and other responsible institutions such as media platforms and social networks that they have a duty to protect the Roma from discrimination and hate speech. These goals and actions are central to the broader goal of ensuring that the rights of members of the Roma in Slovakia are recognised.

In Slovakia, the project leaders decided to focus on hate speech in the online environment, which is often encouraged by the perceived internet anonymity. The legal strategy, indicated already in the first report, focused on filing i.) complaints with the Council for Media Services ("Council") and ii.) criminal complaints with law enforcement bodies. The students and volunteers created a database with instances of hate speech found on social media. These data were then evaluated and used to develop our two main strategies: to create pressure on social media to remove harmful content and to remind

[3] For more information, see the webpage of the Institute of Clinical Legal Education: https://www.flaw.uniba.sk/en/departments/institutes/institute-of-clinical-legal-education/ (accessed on 04.12.2023).

the public of individual responsibility for one's illegal conduct on the internet. Moreover, FORUM also undertook advocacy activities as another strategy to improve the situation of the Roma in Slovakia.

2.1 Council for Media Services

Those hateful comments or posts, that were reported to the respective social platforms, but were not deleted,[4] were forwarded to the Council which is the national regulator. The Section 151 of the Act No. 264/2022 Coll. on Media Services specifies, which content is considered illegal and falls under the Council's authority. ROMAntici have been regularly and consistently reporting content inciting hate and violence against Roma. In a short time, they have been contacted by the Council and praised for filing complaints on a "very high level". The possibility to file a complaint against social platforms is open to anyone,[5] but as mentioned by the Council, citizens often report cases with no merits. The Council invited ROMAntici for a closer cooperation and added them among trusted partners, who can report cases directly to their database. The Council even agreed to organise a webinar for students and volunteers, providing them with a better insight into how the Council operates. A very interesting part concerned their interaction as a Slovak national regulator with social media companies, such as META.

ROMAntici have been quite successful in its effort towards the Council. The very first administrative procedure was initiated by the Council against Google on 25.01.2023. It was a comment that was reported by ROMAntici on the YouTube platform, the verbatim text of which was as follows: "*shoot it all down*". This comment was directed at the Roma minority and incited violence. Another example, ROMAntici reported to Facebook a comment: "*Burn down the whole settlement and there will be peace from them*". After these comments were submitted as a complaint to the Council which initiated proceedings, Google informed the Council on 31.01.2023 that it deleted the comment containing racism on YouTube.[6] After our many unsuccessful reports of individual comments that were not deleted by social media, we have finally seen the desired outcome, at least in these two cases.[7] Such a small number of cases might seem irrelevant at first sight, but they help the Council to pile up cases and strengthen its strategy to pressure social media not to close their eyes and act swiftly against hate.[8] We should mention that no decision has been issued in the administrative proceedings since the legislation creating the Council came into force. The illegal content has been always removed by social media either before the proceedings was initiated on the basis of escalation by the Council (dialogue between the Council and the social media) or after the proceedings was initiated. So far, FORUM reported 77 cases of hate speech to the Council and is planning to file further dozens by the end of December.

[4] The social platform either ignored the report (there was no answer) or it was deemed compatible with the social platform´s policy.

[5] The formular is available online: https://www.rpms.sk/formular-pre-podanie-podnetu-tykajuceho-sa-nelegalneho-obsahu (accessed on 04.12.2023).

[6] The proceedings gained attention of media - see a report by Denník N: https://dennikn.sk/minuta/3227529/?ref=ampm (accessed on 08.12.2023)

[7] See the blog of ROMAntici here: https://romantici9.webnode.sk/l/malymi-krokmi-k-velkemu-uspechu/ (accessed on 04.12.2023).

[8] The Council issues press releases on its webpage, which often inform about cases of hate speech submitted by ROMAntici. See e.g.,: https://rpms.sk/tlacove-spravy/tlacova-informacia-zo-zasadnutia-rady-pre-medialne-sluzby-dna-26-4-2023 (accessed on 04.12.2023).

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2.2 Criminal Complaints

As regards the strategy to use criminal law tools against individual perpetrators, there have been some results as well. The students searched the project's internal database, identified six most serious instances of hate speech and drafted criminal complaints. The problematic content concerned promoting genocide against the Roma, sympathising with Nazi ideology, and directly inciting hate and violence against Roma and people with disabilities. The criminal complaints including evidence were submitted to the National Criminal Agency. FORUM has received decisions for four of them so far.

The first complaint dealt with a comment published under a YouTube video where someone visited a Roma settlement in Eastern Slovakia and reported a slaughter of dogs. The comment read as follows: "*The only solution I see throughout this video is... burn the place to the ground with those creeps. These are not people for me*."[9] ROMAntici reasoned that the suspect's actions may have fulfilled the elements of the crime of defamation of nation, race and belief pursuant to Section 423, or the crime of incitement to national, racial and ethnic hatred pursuant to Section 424 of Act No. 300/2005 Coll., the Criminal Act. The case has been referred to another authority to deal with the conduct as a potential petty offence, as there was "no reason to start criminal proceedings". Unfortunately, the publisher of the comment was not identified by the authorities (the account was probably fake). As for the existence of a crime, the police investigator agreed that the comment can be considered as defaming and inciting violence but did not agree that it is defaming Roma and inciting violence towards Roma. This reasoning came as surprising because the video was recorded in a Roma settlement and even the word "settlement" (in Slovak "osada") from the title of the video is typically understood with the connection to secluded Roma areas. The students therefore prepared an interlocutory appeal ("sťažnosť") against the decision which was filed by attorney Michal Zálešák. The decision of the police investigator was, however, quashed due to its noncompliance with the law by a prosecutor acting pursuant to Section 230 (2) letter e) of the Act. No. 301/2005 Coll., the Criminal Procedure Code.[10] The reasons were twofold: the police investigator referred the case to a non-existent body and specified a wrong Section of the Act No. 372/1990 Coll. on Offences (not Section 47a dealing with extremism, but Section 49 (1) letter a) dealing with reputation which requires a concrete victim). The prosecutor did not address the issue of whether the comment was aimed at Roma or not, but the police investigator will have to issue a new decision, which could be (again) subject to an appeal.

The second and third complaint was filed against Facebook users, who posted hateful comments under an article titled "*A young man from the settlement was supposed to have committed the murder. Erika was still screaming for help, but no one heard her*." The problematic comments were these: "*That bastard from the settlement should be hanged or dissolved in acid, personally I'd start by gouging out his eyes, etc.*"[11] and "*Fu*king addict. Set the whole village on fire*".[12] The investigator did not proceed with the prosecution in either of the two. He took into account the material corrective and assessed the seriousness of the conduct as minor. Referring to the remedy of criminal law as the *ultima ratio*, both cases were referred to be dealt with as a potential petty

[9] In the original language (Czech): „Celou dobu toho videa vidim jediný řešení… spálit to tam na popel i těma hnusákama. Toto za mě nejsou lidi."

[10] The prosecutor shall supervise the observance of legality prior to the initiation of criminal prosecution and in the preparatory proceedings.

[11] In the original language (Slovak): „Toho bastarda z osady by mali obesiť, alebo rozpustiť v kyseline ja osobne by som mu na začiatok vypichol oči a podobne"

[12] In the original language (Slovak): „Sku*veny fetak. Celú osadu zapáliť."

offence pursuant to Section 47a (1) letter b) of the Act on Offences.[13] FORUM decided to appeal because the decisions lacked reasoning as to why the seriousness of the comments was deemed minor, except for the suspects regretting their actions. Moreover, in the latter case, the suspect posted another vulgar comment, where he explicitly mentioned Roma. The arguments contained in the appeal were supported by the relevant jurisprudence of the European Court of Human Rights.

The fourth complaint concerned a comment on the same article about a murder by a young man from a settlement as mentioned above. The suspect wrote: "*Into the gas chamber with that scum.*"[14] The police investigator refused the criminal complaint mainly on the grounds that the suspect does not explicitly mention any group of persons mentioned in Sections 423 and 424 of the Criminal Act. In the opinion of the police investigator, the suspect's comment is not objectively capable of causing the members of the Roma minority to fear for their lives and health, as this minority is not mentioned in the comment. He concluded that there is no object, objective and subjective aspect of the crime (with the word „*scum*", the suspect allegedly referred to all murderers, not Roma people). According to the decision, elements of crimes can be only fulfilled in cases where there is a manifest excess of freedom of expression - the suspect's comment, on the other hand, should be protected by human rights law. The police investigator did not even refer the case to be dealt with as a potential offence, as was done in the previous cases by a different police investigator. To the disappointment of the project team, the police investigator concluded by saying that the comment is only an angry, inappropriate reaction "*from behind the keyboard*". This approach only supports the idea that the behaviour on the internet should be taken less seriously and does not recognise the harm it can cause. Especially when there are tens, hundreds and thousands of comments on social media and elsewhere in the online environment not specifically mentioning "Roma" but published under content mentioning or showing Roma. During last year's terror attack at Zámocká street, we witnessed how hatred from the online world escalated into the real world. It is therefore not adequate to underestimate internet hatred. FORUM appealed in this case, too.

2.3 Advocacy

FORUM focuses not only on strategic litigation but also on advocacy. The hate speech project itself presupposes advocacy activities. Therefore, FORUM sent advocacy letters to improve specific human rights situations of Roma people. One of them was addressed to a Slovak city, which was asked to respect a human right to adequate housing and to provide accommodation to a Roma family with children, whose health and life might be endangered by living on the streets during winter.

Another strategy ROMAntici implemented was informing the public through blogging and posting on social media on various topics concerning Roma people. ROMAntici are active on major social platforms, namely Facebook, Instagram and

[13] The offence of extremism is committed by a person who uses in public a written, graphic, pictorial, visual, audio or audio-visual representation advocating, supporting or inciting hatred, violence or unjustifiably different treatment towards a group of persons or an individual because of their belonging to a race, nation, nationality, colour, ethnic group, origin of descent or because of their religion. This offence is punishable by a fine of up to EUR 500.

[14] In the original language (Slovak): „Do plynu s tou havedou".

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Linkedin.[15] They publish stories about successful Roma people, but also about ordinary men and women to break the stereotypes and spread a positive image because the media mostly show negative news that supports those stereotypes. Moreover, students and volunteers point out important dates and events, such as International Roma Day, or Roma Resistance Day. They furthermore explain international jurisprudence relating to hate speech, racism and extremism in simple words. One of the volunteers, Zdeno Farkaš, has been exceptionally proactive in advocating for more authentic representation of Roma voices through his engaging videos in which he shares mostly his personal stories. ROMAntici publish good and inspirational stories about Roma people in the hope of making them feel accepted, understood and to bring a little bit of light to all the negativity and harm being spread on the internet.

3. SPECIALISED TRAININGS

Students and volunteers participating in the project have been regularly provided with various trainings by experts or people with personal experience in the relevant topics. Those trainings are supposed to develop certain skills that may be helpful in the project activities, such as digital content creation, sociological aspects, knowledge of relevant law or understanding social media and their policies. One of the benefits of the project is that Roma and non-Roma volunteers and lawyers get to work together. Non-Roma colleagues may directly hear life stories and situations of Roma colleagues. This may be one of the most valuable lessons learned during the project period. However, the Roma volunteers come from safer environments than Roma who live in secluded areas and often lack basic needs, such as access to potable water. ROMAntici therefore gladly accepted the invitation by Klara Kohoutová, an expert on Roma history and culture, to visit one of the most known Roma "ghettos" - Luník IX. Mgr. Klara Kohoutová, PhD. is based at the Centre of Social and Psychological Sciences (Slovak Academy of Sciences) that has been FORUM's partner since the early stages of the project.

The volunteers started the rich program in the metropolis of Eastern Slovakia, where they were welcomed by scientists Jana Papcunová and Klara Kohoutová, who told them about the history of Luník IX, as well as their other projects focused on Roma and hate speech. Subsequently, the project participants moved to Luník IX – a secluded part of Košice inhabited exclusively by the Roma. The non-profit organisation ETP Slovensko guided the volunteers through Luník IX and the neighbouring village of Mašličkovo. Students and volunteers had an opportunity to ask questions and interact with the local population.

Luník IX generally has a bad reputation and local non-Roma people usually avoid visiting it or the neighbouring areas. Even the volunteers from Košice have never been there before. However, many people would be surprised about the current situation in Luník IX as well as by its cheerful and welcoming inhabitants. This "city in a city" is slowly on the rise, with various projects going on, including housing. Those interested in living in their own house have an opportunity to take a loan for material and start building their new home. Luník IX is an example that with a little bit of help and faith from the majority, the life conditions of Roma could be much improved. Unfortunately, the situation of many other secluded Roma ghettos is much worse, as the majority and the authorities turn a blind eye to their fates. As the colleagues from the Slovak Academy of Sciences and ETP

[15] ROMAntici on Facebook: https://www.facebook.com/p/ROMAntici-100085930808998/?paipv=0&eav=AfZc9.SUwzwU5ragKeOTXDqq-Gj7H5RcHos2FCtT4lE2iZVq8iNdtpnye8VN7QA8-Pkk&_rdr and Instagram: https://www.instagram.com/roma.ntici_/ (accessed on 04.12.2023).

Slovensko showed us, the change and acceptance can begin by firstly understanding Roma people a little bit more. Roma belongs to the biggest minorities in Slovakia and in Europe – but what do we really know (or learn at school) about their history and culture?

In the afternoon, the students and volunteers moved to the Constitutional Court of the Slovak Republic, where, in addition to a tour of the court, a discussion was prepared for them with judicial advisors Ján Štiavnický and Tomáš Majerník. They briefly introduced the decision-making of the Constitutional Court in the area of hate speech. At the end, a lecture combined with a discussion with doc. JUDr. Renáta Bačárová, PhD., LL.M was held at the premises of the Faculty of Law of the Pavol Jozef Šafárik University. The participants discussed the legislation of illegal content on platforms, the responsibility of online platforms and content filtering.[16]

In the second part of the year, FORUM organised another in-person training for students and volunteers. It was held in the beautiful premises of the Liszt Pavilion at the University Library in Bratislava. Ján Hurtík and Peter Wilfling from the Council for Media Services prepared a workshop for the students and volunteers, during which they introduced them to the procedure of preventing the dissemination of illegal content, in which the Council, as an independent and regulatory body, decides. Simona Šintalová and Rebecca Hulalová from digiQ, FORUM's partner, presented different tips for fighting hate speech on social networks, e. g. how to search for hate speech, how to identify it and how to report it. Another guest was Irena Biháryová, a politician and a lawyer specialising in crimes of extremism and the issues of misinformation and unlawful hate speech in the online environment with a focus on Roma. Finally, Tomáš Halász, the CEO of TrollWall, explained the way artificial intelligence helps to filter hateful comments on social networks.[17] After presentations, interactive exercises and teambuilding activities, the team of volunteers was ready to continue fighting against hatred. As a follow-up event, Diana Repiščáková and Barbora Bešenejová, both volunteer coordinators, prepared a workshop for volunteers on legal and non-legal options to challenge online hate. In the first part, Barbora emphasised to the volunteers the importance of using counter-narratives. In selected case studies from Slovakia, she explored how amplifying a wider diversity of Roma voices and experience can challenge the authoritative dominant discourses that use stereotypical portrayals of Roma and relegate their real stories and the social conditions surrounding them to the edges of the Internet. In the second part, Diana introduced the legal aspects of the administrative procedure to prevent the spread of illegal content - she presented the legislation, pointed out its shortcomings and summarised the FORUM's experience with this procedure.

Besides these bigger events, where students, volunteers and lawyers could get to know each other through different activities and teambuilding, FORUM also organised two webinars, one with the Council mentioned above and one focusing on legal aspects of hate speech with an academic guest JUDr. Laura Bachňáková Rózenfeldová, PhD. from the Law Faculty of the Pavol Jozef Šafárik University. The European Roma Rights Centre ("ERRC") has also provided students and volunteers from the project with opportunities to attend interesting events abroad, including a summer school. Barbora Bešenejová, a former active volunteer, who was promoted by FORUM to a coordinator of volunteers in the project, has been individually tutored by the ERRC. The assigned mentor helps improve her writing skills for a future career in the non-profit sector.

[16] See the original information here: https://forumhr.eu/meeting-of-volunteers-fighting-online-hate-speech/ (accessed on 06.12.2023).

[17] See a video report by Barbora Bešenejová: https://www.instagram.com/reel/CyOpeexrlzC/ (accessed on 06.12.2023).

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Another experience worth mentioning was an opportunity for students and volunteers from the project to participate in a roundtable with META representatives. Minority Rights Group International, an international NGO, organised for META (formerly as Facebook) a series of roundtables in selected countries to receive opinions from experts, activists, members of minorities and other stakeholders on their policies and activities concerning hate speech. FORUM was asked to identify relevant stakeholders for the Czech Republic and help organise a roundtable in March. The discussion was very dynamic and interesting due to the diversity of attendees. The project participants could contribute with their fresh experience with META platforms, give advice on improvements and ask for explanations. The discussion seemed to be fruitful, all concerns were duly heard. However, not many answers were provided by META representatives, especially on legal questions, as there was no one from the legal department. Hopefully, META will use the gained information to improve its approach to hate speech from the policy and technical point of view in general and when it comes to smaller markets, such as the Czech Republic or Slovakia. On the other hand, META has much more initiative and tools to tackle hate speech than many other platforms, such as Twitch or TikTok.

4. COOPERATION & VISIBILITY

Project participants use social media and blogging to reach a wider audience and share good and objective news, opposite of hate. Their effort has gained some attention,[18] but mostly among their partner organisations, the ERRC[19] or Bratislava and Košice law schools, who used their web pages or social media accounts to inform about the project activities. Klara Kohoutová from the Slovak Academy of Sciences even invited Sandra Žatková (the author) to be interviewed for the Slovak Radio and Television (RTVS).[20] Diana Repiščáková promoted the activities at the popular event called Night of Researchers (Noc výskumníkov)[21] and Barbora Bešenejová represented ROMAntici at a 3-day conference held in December of this year in Prešov. The conference is called "The current state of Roma studies IV" and is organised by the Centre of Social and Psychological Sciences of the Slovak Academy of Sciences, the State Scientific Library in Prešov and the Institute of Roma Studies of the University of Prešov.[22]

Fortunately, FORUM is not the only organisation fighting against hate speech and protecting hate victims. GLOBSEC, FORUM's partner, coordinated a common initiative called "Stop hate" ("Zastavme nenávisť") joined by various partners, including NGOs, attorneys or the Slovak National Centre for Human Rights. The common goal is to raise awareness that even freedom of speech has its limits, to stop the spread of hate speech and incitement to violence through legal action and to provide legal, media and social assistance and support to victims of hate speech. The webpage of the initiative[23] explains how to identify hate speech and what legal tools victims have at their disposal. Anyone can fill out a form reporting hate speech and members of the initiative will evaluate it and either take legal action to protect the victims or at least provide advice on possible further steps. The initiative also uses visually and audibly interesting content on social media to

[18] See e.g., a short report by SITA: https://sita.sk/dobrovolnici-a-pravnici-budu-bojovat-proti-nenavistnym-prejavom-zaroven-ohlasili-boj-proti-digitalnemu-anticiganizmu/ (accessed on 04.12.2023).
[19] See e.g., this press release: http://www.errc.org/press-releases/young-activists-take-legal-action-against-anti-roma-online-hate-in-slovakia (accessed on 04.12.2023).
[20] The interview can be found here: https://www.rtvs.sk/radio/archiv/1565 and https://www.rtvs.sk/radio/archiv/11406/2032863 (accessed on 04.12.2023).
[21] See more here: https://www.instagram.com/p/CxxmJuyIZIF/?img_index=3 (accessed on 06.12.2023)
[22] Some information is published here: https://svusav.sk/chystame (accessed on 04.12.2023).
[23] See the webpage of the initiative: https://zastavmenenavist.online/ (accessed on 04.12.2023).

share its message.[24]

Another initiative FORUM is a part of is called #nohate (#bezhejtu). The current number of members is 125 and includes many companies (e.g., ESET, Henkel, Allianz, Tatra Banka), public institutions (e.g., Bratislava city, Košice city, Police Corps, Office of the President), media, influencers, non-governmental organisations and others. All members undertake to support polite debate by actively monitoring comments on their profiles, identifying and removing hate content and fostering a culture of openness, respect and constructive feedback on its digital platforms.[25]

5. CONCLUSION

This report reiterates the importance of the engagement of young students and activists in topics such as hate speech against vulnerable groups. Every person participating in the project believes in the equality of all people and therefore invests time and expertise to protect those in need. The focus of this project are Roma. Despite the generally negative approaches towards Roma people in our society, the people involved in the project (mostly non-Roma) are working hard to make a change. Supported by their universities, mentors, NGO sector and their colleagues mutually, they could see that change (even if small) before they finish their studies and start their careers as embraced, motivated and skilled young professionals.

As regards the project plans, there is still a lot on the plate. The team will further monitor and document hate speech on social media, deal with criminal complaints, report hate speech to the Council and gain new skills. At the moment, FORUM is discussing a workshop with doc. Dr. Iur. Mgr. Martin Husovec, Assistant-Professor at the Law Faculty of the London School of Economics and Political Science and an expert on human rights in the digital environment. Moreover, there will be a conference organised by the ERRC in Bratislava at the end of the project, where ROMAntici will meet Bulgarian and Romanian teams participating in the project. At the end of the project, there will be a third report where we will inform about further achievements, the state of the initiated proceedings and the future fate of ROMAntici.

[24] See the Instagram account: https://www.instagram.com/zastavme.nenavist/ (accessed on 04.12.2023)
[25] See the webpage of the initiative: https://www.bezhejtu.sk/ (accessed on 04.12.2023).

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